

IN THE SUPREME COURT OF FLORIDA

CASE NO. 07-774

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

**ANSWER BRIEF OF THE FLORIDA
JUDICIAL QUALIFICATIONS COMMISSION**

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INTRODUCTION

Judge Michael Allen wrote a gratuitous concurring opinion that was completely unnecessary to the decision of the matter before the court. It is seriously flawed on its face. It charges corruption without facts; it requires recusal where no party requested it and where there was no duty to recuse; and it was written months after the recusal issue was moot. And there is another serious flaw in the opinion that does not appear on its face: it was motivated by Judge Allen's years-long intense hostility and dislike of his colleague, Judge Charles Kahn.

STATEMENT OF THE CASE AND FACTS

The JQC agrees that the Findings, Conclusions and Recommendations of the Hearing Panel accurately sets forth the chronology of the case. The JQC agrees that the bullet pointed facts on pages 3 and 4 of Judge Allen's brief are accurate as far as they go, and it also agrees that there is no dispute about the "fact" of Judge Allen's concurring opinion, which speaks for itself.

But the parties are in sharp dispute about Judge Allen's motive in publishing the opinion, about Judge Allen's use of innuendo and supposition in his opinion to work a character assassination on his colleague, Charles Kahn, and whether the opinion on its face suggests that Judge Kahn is corrupt.

SUMMARY OF THE ARGUMENT

I. THE FACTUAL FINDINGS ARE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

There is a sharp conflict in evidence about Judge Allen's motive. We summarize the clear and convincing evidence the Hearing Panel believed in determining Judge Allen's motive. Judge Allen asks this Court to reject the clear and convincing evidence that the Hearing Panel accepted, and to accept his contrary evidence, which the Hearing Panel rejected. This Court has held that it gives great deference to the factual findings of the JQC. There is ample clear and convincing evidence to support the Hearing Panel's finding that Judge Allen was motivated by "an extraordinary level of antipathy to Judge Kahn," and that his opinion violates the Judicial Canons.

II. BOTH THE FACTS AND THE LAW SUPPORT THE HEARING PANEL'S CONCLUSIONS OF LAW.

This entire section of Judge Allen's brief is based on the faulty claim that his opinion does not suggest that Judge Kahn is corrupt. At least six of Judge Allen's colleagues disagree with him on this point, as do both the Investigative and Hearing Panels of the JQC. A line by line analysis of the opinion shows how, through innuendo and supposition, it suggests that Judge Kahn is corrupt, without any evidence to back up such a claim. The opinion, coupled with Judge Allen's improper motive, violates the "method

and motive" standard, the "actual malice" standard and the "objectively reasonable factual basis" standard. The Hearing Panel properly concluded that the opinion violates the Judicial Canons.

III. THE DOCTRINE OF JUDICIAL INDEPENDENCE AFFORDS NO PROTECTION TO JUDGE ALLEN'S CONCURRING OPINION.

There is no such thing as absolute judicial immunity or independence. Judges are held to exceptionally high standards, and are not free to lash out at others, including other judges. Dressing up a character assassination as a concurring opinion does not shield a judge from discipline.

STANDARD OF REVIEW

The Hearing Panel makes its findings based upon "clear and convincing" evidence. This Court reviews the JQC's findings to determine that they are supported by "clear and convincing" evidence and also gives the findings of the JQC "great weight." *In re Robert F. Diaz*, 908 So.2d 334, 336-37 (Fla. 2005). This is particularly true where the Hearing Panel determines a judge's intent or motive. *In re LaMotte*, 341 So.2d 513, 518 (Fla. 1977) (*See* Justice England's concurring opinion in which a majority joined).

We agree that the standard of review for the purely legal issues involved in this appeal is *de novo*.

ARGUMENT

I. THE FACTUAL FINDINGS ARE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

A. INTRODUCTION.

The Hearing Panel was faced with conflicting evidence regarding Judge Allen's motive. In his brief, Judge Allen sets forth all of the evidence the Hearing Panel **rejected**, and none of the evidence the Hearing Panel **accepted**. We therefore present the clear and convincing evidence that the Hearing Panel **accepted and found as fact**.

B. SUMMARY OF THE CLEAR AND CONVINCING EVIDENCE.

1. Testimony of Chief Judge Edwin Browning:

- In November, 2004, before the Childers case became an issue on the court in early 2005, Judge Allen asked Judge Browning to run against Judge Kahn for Chief Judge. (TR 37, 1 8-19)
- Judge Allen told Judge Browning that Judge Allen:

didn't think that Judge Kahn was fit to hold the job and he was duplicitous and just didn't have the people skills or the character traits that we ideally want as Chief Judge and he would like for me to run against him and hopefully defeat him. (TR 37, 1 22; TR 38, 1 1)

- At the time Judge Allen asked Judge Browning to run against Judge Kahn, Judge Browning had concluded "[t]hey did not like each other and especially Judge Allen didn't like Judge Kahn." (TR 38, 1 5-19)
- Judge Browning first became aware of Judge Allen's dislike of Judge Kahn in 2002 or 2003, long before the Childers case became an issue in the court. (TR 38, 1 20-24)
- After Judge Browning declined to run against Judge Kahn, Judge Allen's attitude changed toward Judge Browning, and "he didn't have much to do with me after that." (TR 39, 1 22-25)
- During the Childers case debate within the Court, Judge Browning knew there was "bad blood" between Judges Allen and Kahn and that there was "very, very high animus there," and Judge Allen told Judge Browning that he "would like to kick his [Kahn's] ass off the court." (TR 40, 1 3-13)
- Asked to describe how Judge Allen's attitude toward Judge Kahn compared to other hostile relationships, Judge Browning had encountered over the years, he testified that:

in my professional career I don't think I have ever observed the hostility and hatred that I saw that existed in this relationship. (TR 42, 1 2-15)

Judge Allen had a very, very strong view that Judge Kahn was not what a judge should be, was corrupt in the way he did things, dishonest, and just a character of very low quality. (TR 42, 1 20-23)

- When asked to describe how Judge Allen would convey his views on Judge Kahn to Judge Browning, Judge Browning testified:

Well, Judge Allen is a very forceful man. He would get red, he would start trembling and actually, sometimes, his complexion would turn ashen. I mean, it was extremely uncomfortable, really, to see that kind of hatred between two fellow colleagues. (TR 42, 1 25; TR 43, 1 4)

- Judge Browning did not join Judge Allen's concurring opinion because he did not think it was appropriate and did not want his name on it. (TR 44, 1 2-7)
- Asked whether Judge Browning agreed that a reasonable person reading Judge Allen's opinion could conclude that Judge Kahn is corrupt, Judge Browning testified:

In my opinion, I think if you read the opinion you would have to say that Judge Kahn was corrupt. (TR 44, 1 12-14)

- Judge Browning knows of no factual basis for any claim that Judge Kahn cast his vote in Childers as a payoff for past favors. (TR 44, 1 16-19)

- When Judge Browning realized that Judge Allen's opinion might go out, he tried to get some mediation going through Judge Van Nortwick because Judge Browning "felt like it [the Allen opinion] would be detrimental and shouldn't [go out]." (TR 68, 1 24-25; TR 69, 1 1)
- The concurring opinion about Judge Kahn was beyond the pale of what is normal in a dissent or what is typically done in a dissent. (TR 69, 1 4-10)

2. Testimony of Judge Peter Webster:

- Judge Webster considered Judge Allen to be his "best friend on the court," and the two of them "became very close over the years." (TR 214, 1 15-20)
- A month or six weeks before the March, 2005, chief judge election, Judges Allen and Padovano approached Judge Webster about running against Judge Kahn. (TR 215, 1 2-11)
- Judge Allen told Judge Webster that "he didn't believe Judge Kahn ought to be Chief Judge because he was generally perceived as arrogant and had a hard time getting along with other people" (TR 215, 1 14-16), but Judge Webster told Judge Allen that his experience had been just the opposite and that Judge Webster thought Judge

Kahn "was fairly popular among the Bar and the judiciary around the State." (TR 215, 1 17-24) Judge Webster refused to run in a contested election. (TR 216, 1 2-13)

- As a result of Judge Webster's refusal, his friendship with Judge Allen "cooled significantly for a while" and has never returned to its earlier level. (TR 216, 1 14-18)
- Judge Webster never approved of Judge Allen publishing his concurring opinion, and never communicated approval to him. (TR 218, 1 19-23)
- On June 9, 2006, Judge Webster sent an e-mail to his judicial colleagues calling for a return to "maturity, civility, and sanity," and requesting that the majority simply initial a per curiam denial as to all of appellant's motions, and that any dissents be noted without opinions. (TR 217, 1 21; TR 218 1 1-12; Tab 3 in Evidence Notebook in record; Tab 1 in the Appendix to this brief.) In response, Judge Allen sent a sarcastic e-mail message to Judge Webster:

I sincerely apologize to you for 'further wallowing in mud in this case' and acting contrary to 'the good of this court and institution.' After all, this is all my fault, right? Peter, you're lumping me in with the people who are solely responsible for this mess is an insult to me, and I am deeply disappointed that you know so little about my integrity and judgment after serving with me for these many years. (TR 219, 1 2-12)

- Judge Allen "likes to feel like he's in control." (TR 220, 1 14)
- Asked to describe Judge Allen's attitude toward Judge Kahn, Judge Webster testified:

I don't think there's any question but that it was a visceral dislike." (TR 220, 1 20-24)
- Judge Webster agreed that Judge Allen's attitude toward Judge Kahn was "an intense animosity and hostility." (TR 221, 1 5-7)
- Asked to describe Judge Allen's conversations with Judge Webster when he referred to Judge Kahn, Judge Webster testified:

Well, they changed over time, but certainly from at least 2002-2003 on, whenever he would bring up the subject of Judge Kahn, it would be in a derogatory manner and not infrequently accompanied by profanity. (TR 221, 1 22-25, TR 222, 1 1-2)
- Judge Allen has displayed such a level of hostility toward Judge Kahn since at least 2002-2003, predating the Childers opinion. (TR 222, 1 3-8)
- When asked whether Judge Webster believed that a reasonable person reading the Allen opinion could get the impression, whether true or not, that Judge Kahn is corrupt, Judge Webster testified: "I think it's hard to draw any other impression." Judge Webster knows of no

factual basis for any claim that Judge Kahn is corrupt. (TR 224, 1 4-10)

- Asked whether Judge Allen's opinion "enforced the high standards of conduct required of the judiciary," Judge Webster testified:

Well, it certainly had no impact on any decision by Judge Kahn to recuse himself because he had never been asked to recuse himself prior to that point by anybody. In my opinion the only thing it did was bring disrepute onto our court and onto the judiciary of Florida as a whole.

Furthermore, Judge Webster testified that he did not believe that the concurring opinion:

promoted public confidence in the integrity and impartiality in the judiciary. (TR 243, 1 21-24, TR 244, 1 1-7)

- Regarding the initial and en banc opinions, "none of it was outside of the traditional accepted boundaries in opinion writing, appellate opinion writing." (TR 244, 1 21-25)
- "Judge Allen's opinion, on the other hand, it seems to me, could not have helped but create the impression in the minds of many that Judge Kahn was on the take and that his - - that someone had attempted to purchase his vote on the panel. And this is coming from somebody who has read a lot of opinions in my career. And I just think that was the logical implication." (TR 245, 1 1-7)
- When asked by Panel Chairman Backman to identify the two judges who caused the third judge to change his vote on the initial opinion

reversing the Childers conviction, Judge Webster testified: "Judge Allen and Judge Thomas." (TR 245, 1 21-24)

3. Testimony of Judge Bradford Thomas:

- Q: Judge Webster just testified in here a few minutes ago that after the 3-0 opinion was on prerelease that you and Judge Allen went to Judge Van Nortwick and persuaded him to change his vote. Is that accurate?

A. That's true. Judge Allen spoke to him about viewing it from a slightly different perspective, a 90.403 analysis. My focus was on harmless error, but, yes, he spoke to Judge Van Nortwick and persuaded him, and I'm sure I was there and spoke to him, too." (TR 256, 1 8-16)

- Between June 9 and June 28, between pre-release and ultimate release of the concurring opinion, Judges Robert Benton and Thomas visited Judge Allen, and Judge Benton told Judge Allen that:

he should not release the opinion because it would function like a boomerang and hit Judge Allen and hurt him more than it would hurt Judge Kahn." (TR 258, 1 3-19)

- Three or four days before Judge Allen released the concurring opinion, Judge Thomas went to him again, alone, and presented to him a one sentence denial that he could sign:

Q: And what did he say to you.

A: Well, he said no, he wasn't going to sign it, in so many words, and he said *it's time for them to get theirs*. [emphasis added].

- Judge Thomas understood the persons who were going to "get theirs" were Judges Kahn and Wolf. (TR 258, 1 23-25; TR 259, 1 1-20)
- From the time Judge Thomas became a member of the Court in early 2005 to June 28, 2006, Judge Thomas observed the relationship between Judges Allen and Kahn:

During that year-and-a-half period I saw more and more examples of Judge Allen disapproving of Judge Kahn's behavior, disapproving of his actions, evidencing a general, at times intense, disapproval or dislike of Judge Kahn. (TR 260, 1 10-15)

On Cross Examination of Judge Thomas:

Q: One of the questions that has been posed by the JQC is whether or not Judge Allen's concurring opinion that's the subject of this issue was animated by personal dislike for Judge Kahn. Do you think that Judge Allen's opinion was motivated solely by personal dislike for Judge Kahn.

A: Solely?

Q: That's my question.

A: I do not think that it was motivated solely by dislike of Judge Kahn.

Q: It's clear that Judge Allen dislikes Judge Kahn, correct?

A: It is to me. (TR 267, 1 11-22)

On Redirect:

- Although as a general matter Judge Thomas believes Judge Allen exercises good judgment, Judge Thomas responded as follows to the question whether Judge Thomas thought that Judge Allen exercised good judgment in publishing the concurring opinion in question: "No, sir, I do not." (TR 282, l 11-17)
- Asked whether Judge Allen was partly motivated by animus in writing the concurring opinion, Judge Thomas testified:

I cannot know a person's motivation other than what I read and what they've written, but being that I've been allowed to answer the question, I think animus was a factor. (TR 283, l 15-20)

4. Testimony of Judge Robert T. Benton, II:

- The relationship between Judge Allen and Judge Kahn was "a mutual antipathy" and "a genuine dislike." (TR 373, l 6-14)
- Asked whether Judge Benton had ever heard Judge Allen say anything "nice about Judge Kahn," Judge Benton answered: "Nothing comes to mind." (TR 373, l 15-17)
- Q: Has Judge Allen ever told you any reason why he has this antipathy for Judge Kahn?

A: Well, I believe - - you asked me this question before in deposition, and what came to mind is I believe that Judge Allen told me that Judge Kahn had called him a control freak.

* * *

Q: What was Judge Allen's reaction to that?

A: He was upset about that. (TR 373; 1 18-25; TR 374, 1 1-3)

- Before the concurring opinion was released, Judges Benton and Thomas had a conversation with Judge Allen, which Judge Benton described as follows:

Well, I don't remember every detail, I have to say. But I then, I believe, advised Judge Allen against letting the opinion go out and told him that if it did go out it would come back and bite him on the ass. (TR 376, 1 7-15)

- On September 27, 2006, Judge Allen sent a letter to the JQC (Tab 10 in exhibit book; Tab 10 in the appendix to this brief). On page 9 of the letter, Judge Allen represented to the JQC: "The consensus was that my opinion was a fair and evenhanded explanation of very reasonable views." Judge Benton did not share that belief. His current view of the opinion is:

"I feel like this was an abuse of power. I feel like the Court's power to have these opinions published - - and each of us can do that - - was used to settle a score." (TR 374, 1 4-25; TR 375, 1 1-3; TR 376, 1 19-24; TR 377, 1 24-25; TR 378, 1 4-7)

- There is a history of animosity between Judge Allen and Judge Kahn on the Court, which existed "well before" the Childers case. (TR 378, 1 12-20)

- Asked whether a reasonable person reading the opinion could conclude that Judge Kahn was corrupt, Judge Benton testified: "Yes, I believe that is implied." (TR 378, 1 21-23; TR 379, 1 1) Judge Benton knows of no factual basis for a claim that Judge Kahn is corrupt. (TR 379, 1 3-5)

When Cross-Examined, Judge Benton Testified:

- "My advice to Judge Allen was don't send this out." (TR 386, 1 2) "I wasn't asked for a treatise on the canons." (TR 386, 1 6-7)
- Asked whether Judge Benton understood Judge Allen's concern about how it would look to have the Childers opinion written by Fred Levin's former law partner, Judge Benton answered:

A: I understood it.

Q: What did you understand about that concern?

A: Well, it had - - the whole thing was moot. It was not - - the opinion was not being written by anyone's law partner involved. The case was decided by the full court the way it is supposed to work.

It's time to quit and not use the power that you have as a judge to hit somebody over the head and just be *completely hateful* and raise questions in the public's mind about the - - whether people are corrupt or not in a position to defend themselves who are not before the court. [emphasis added]

Q: Did you say that to him?

A: No, I didn't. I should have.

Q: Wait. Can I ask - -

A: I told him not to send it out. That's what I told him.
(TR 388, 1 6-24)

- Q: Did you understand why Judge Allen thought it was inappropriate for Judge Kahn to have sat on the Childers case?

A: Mr. Rogow, the rule is in an appeals court it is for each appellate judge to decide on the question of whether or not he should sit. It's not for me to decide whether Judge Allen sits on a case. It's not for him to decide whether Judge Kahn sits on a case. (TR 389, 1 13-20)

- Judge Benton ultimately came to the conclusion that Judge Allen had an ulterior motive in publishing the opinion. (TR 393, 1 16-19)

Redirect of Judge Benton:

- Q: You were asked whether you understood Judge Allen's concerns about Judge Kahn sitting on the case. You said you understood his concerns, correct?

A: That's correct.

Q: Now understanding his concerns doesn't mean you approve of the course of action he took to deal with his concerns, does it?

* * *

[A]: That's correct. And it had been resolved. The panel was not deciding the case.

Q: That was my next question. The en banc decided the matter on the merits on February 2, 2006, correct?

A: I believe that date is correct.

Q: So, four and a half months later when this opinion came out from Judge Allen, there was no issue about Judge Kahn sitting on the case, correct?

A: That was water over the dam. (TR 401, 1 20-25; TR 402, 1 1-14)

- Q: Now, you distinguish . . . between a disagreement over legal principles and a personal attack on somebody?

A: Yes, I do.

Q: You find that Judge Allen's opinion was a personal attack on Judge Kahn?

A: I think that is a fair characterization. (TR 402, 1 22-25, TR 403, 1 1-3)

Judge Benton's Response to Questions from the Panel:

- Q: You believe that this opinion violated Canon 2A, correct?

* * *

A:It seems to me if you believe that what you are supposed to do is uphold the public confidence in the integrity and impartiality of the courts, and it is all much more delicate than I think people realize. If we don't have public trust in the process, we don't have anything.

So if, as we sadly know, there have been corruption problems; if there is such a thing and you have evidence, you have to tell the JQC. They have to look into it and hopefully ferret it out and take appropriate action.

Otherwise you should not be publicly raising the question about whether your colleagues are corrupt. (TR 405, 1 11-25, TR 406, 1 1)

On Further Cross-examination by Mr. Rogow:

- Q: As a colleague do you have a special responsibility to in your work on the court [sic] to give your honest and best advice?

A: My best advice was don't send it out. (TR 413, 1 19-22)

- A:This is something Judge Allen wanted to do and something I advised him not to do. (TR 415, 1 4-5)

On Further Direct Examination:

- Q: Have you ever seen such a personal attack as is contained in Judge Allen's concurring opinion?

A: No. (TR 419, 1 16-18)

5. Testimony of Judge Phillip J. Padovano (on Direct by Mr. Rogow):

- Q: Did there come a time when you saw Judge Allen's proposed opinion?

A: Yes.

Q: What was your reaction to it?

A: Well, I told him that I didn't think he should release the opinion.

Q: Why was that?

A: I thought it was an unwise thing to do.

Judge Padovano thought the opinion was "unusual," and "remarkable," and that it would "pique the attention of news writers," and that "some people would react negatively to it, not so much because of what was said but just the unusualness of the whole thing, one judge sort of calling to task another judge." (TR 470, 1 9-25; TR 471, 1 1-3)

- A:I didn't think it was a good thing for him. I didn't think it was a good thing for the court. I told him that. (TR 472, 1 5-7)

Judge Padovano's Testimony on Cross-Examination:

- Judge Padovano identified his e-mail to Judge Kahn of June 26, 2006, two days before the opinion was released. Judge Padovano confirmed that Judge Allen "was upset with [Judge Padovano] this morning for continuing the work for a solution," and that Judge Allen thought Judge Kahn was "stalling for time and that I am playing into [Judge Kahn's] hand." (TR 489, 1 15-25; TR 490, 1 1-23, Tab 9 in evidence book; Tab 2 in Appendix to this brief)
- Asked whether Judge Allen ever told Judge Padovano that Judge Allen would like to see Judge Kahn off the Court, Judge Padovano testified:

I don't know if he said that in so many words, but I think that would be a fair assumption, that he was not, you know - - didn't think that he was someone who necessarily belonged there. (TR 491, 1 25; TR 492, 1 1-6)
- Judge Padovano agrees that from the facts set forth in the opinion, one could conclude that Judge Kahn cast a corrupted vote in the Childers case. He testified that corruption is "a horrible implication." But Judge Padovano denies that Judge Allen was "marshaling the facts to make - - to allow a member of the public to draw the conclusion that Judge Kahn is corrupt." (TR 494, 1 18-25; TR 495-496-497, 1 1)

* * *

Q. As you sit here today, and I think maybe you answered this question. Is it your view that the "snooker the bastards" sentence is, 'a fair and even-handed explanation of very reasonable views'?

A. Yes, it is." (TR 498, 1 14-18)

- Regarding whether Judge Allen's concurring opinion is the proper exercise of the power of an appellate judge, Judge Padovano testified:

It's within his authority. I have already said that was not a wise thing to do. I wouldn't have done it. I didn't sign it. It was within his authority. It was not ethically improper. That is my answer. (TR 499, 1 14-20)

- Pressed on whether the opinion was the proper exercise of an appellate judge's power: "It's legally proper. I wouldn't have done it, but it is legally proper." (TR 499, 1 21-25)
- Judge Padovano read the concurring opinion; he saw that there was an effort to link Judge Kahn to events that happened long after he came on the bench; he noted that at the time of the tobacco litigation Judge Kahn had been on the bench for a number of years; he noted there was nothing in any of the articles to connect Judge Kahn to the tobacco litigation; he noted there was nothing in any of the articles to connect Judge Kahn to Mr. Childers; he noted that Judge Kahn's name is not mentioned in any of the articles; and he noted there is nothing in any of the articles to establish what role, if any, Mr. Childers and Mr.

Levin had in Judge Kahn's appointment to the bench. (TR 501, 1 3-25; TR 502, 1 1-8)

- Q: Did it occur to you that the concurring opinion itself could cause the public to question the impartiality of the court's decisions?

A. Yes.

Q: Okay. In fact, that is one of its consequences, is it not?

A. It is. I think it is, yes. (TR 502, 1 18-24)

Question by Panel Member Nachwalter:

- Judge Padovano believes that it is "a fair assessment" that Judge Allen's concurring opinion did not promote collegiality, and Judge Padovano understands why one would think there is a collegiality problem on the Court. (TR 514, 1 18-25; TR 515, 1 1-11)

6. Testimony of Judge William A. Van Nortwick, Jr. (on Cross Examination):

- When asked whether Judge Allen's opinion was "a fair and even-handed explanation of very reasonable views,"¹ Judge Van Nortwick testified: "I'm not sure I ever used those words in describing that opinion." (TR 577, 1 1-6)

¹ In his letter of September 27, 2006, to the JQC, Judge Allen represented to the JQC that "the consensus [among the judges he consulted] was that my opinion was a fair and evenhanded explanation of very reasonable views." (TR 576, Tab 10, p. 9 in Evidence Book). What Judge Allen failed to mention to the JQC was that of all the judges he consulted, all but one told him in clear terms not to publish it.

- Judge Van Nortwick agreed that if a judge voted in a certain way to pay back a past favor, that would be a corrupt act. (TR 579, 1 21-25)
- Pressed on whether there were consequences to the reputation of Judge Kahn as to honesty and integrity, Judge Van Nortwick testified: "Well, certainly the facts that are laid out in the concurring opinion are relevant to Judge Kahn's integrity." (TR 581, 1 22-25; TR 582, 1 1-5)
- Asked whether he was aware of any history of animosity on the court between Judge Allen and Judge Kahn: "I am not sure I would use the word animosity. I don't believe that Judge Allen respected Judge Kahn, and he believed that Judge Kahn was volatile and not trustworthy." (TR 583, 1 13-22)

Questioning by Panel Member Nachwalter:

- Judge Van Nortwick admits that the Allen opinion was "directed at one of his fellow judges." (TR 584, 1 17-19)
- Judge Van Nortwick agreed that it was "fair" to state that there is no "way of getting around saying his concurring opinion was a semicontroversial criticism of Judge Kahn." (TR 585, 1 16-19)

- Judge Van Nortwick agreed that even though Judge Wolf was part of the controversy involving the en banc dissents, "no one went after Judge Wolf." (TR 586, 1 13-18)

Questioning by Panel Member McGrane:

- Q: This concurring opinion didn't help the reputation of your court one iota, did it?
A. Didn't help, no. (TR 591, 1 20-22)

7. Testimony of Judge James Wolf

- Judge Wolf had a close relationship with Judge Allen, but it became strained in the last past two to three years because Judge Wolf opposed Allen on "several issues." (TR 298, 1 14-25; TR 299, 1 1-6)
- On June 22, 2006, Judge Wolf sent an e-mail to the First District judges complaining that Judge Allen's opinion attacked the integrity of Judge Kahn. (TR 299, 1 7-20; Exhibit 5 in Exhibit Book; Tab 3 in Appendix to this brief.) The opinion suggests that Judge Kahn is corrupt. (TR 305, 1 6-23)
- Judge Allen had a very hostile attitude toward Judge Kahn that predated the Kahn/Padovano election. (TR 304, 1 9-18)

On Cross-Examination by Mr. Burnette:

- If counsel doesn't think the claim of payback for past favors is an attempt to defame or defile a fellow judge, he is sadly mistaken. (TR 319, 1 10-13)

8. Testimony of Judge Paul Hawkes:

- Judge Hawkes sent an e-mail to Judge Allen (Exhibit 18 in Exhibit Notebook; Tab 4 in Appendix to this brief) because Judge Allen was discouraged that no one had joined his opinion. Judge Hawkes was trying to "buck him up or encourage him." (TR 339, 1 16-21)
- Judge Hawkes thought the opinion would harm Judge Kahn's reputation for integrity. (TR 340, 1 17-21)
- Judge Hawkes believed the opinion would be "devastating" to Judge Kahn because it would prevent Judge Kahn from pursuing a federal judgeship or appointment to the Florida Supreme Court or any other judicial opportunities. (TR 340, 1 22-25; TR 341, 1 1-7)
- Judge Allen thought Judge Kahn lacked integrity, and Judge Allen "clearly did not like Judge Kahn." (TR 341, 1 8-25)
- Judge Hawkes agrees that giving a vote to someone as a payback for a past favor is corrupt. (TR 342, 1 4-11)

Questioning by Panel Member Nachwalter:

- Admits again that the opinion would harm Judge Kahn and would create the impression of corruption. (TR 363, 1 9-20)
- Admits that the opinion was detrimental to the Court as a whole. (TR 363, 1 21-25; TR 365, 1 1-11)

9. Testimony of Judge Michael E. Allen:

Called as an adverse witness by the JQC, Judge Allen made the following admissions:

- Judge Kahn's vote could not have affected the outcome of the *en banc* decision. (TR 99, 1 16-18)
- He has no personal knowledge of any of the "facts" stated in the three newspaper articles quoted in his opinion. (TR 99, 1 23-25; TR 100, 1 1)
- Judge Kahn's name does not appear anywhere in any of those newspaper articles he quotes in his concurring opinion. (TR 100, 1 9-12)
- At the time of the publication of the 1998 article, Judge Kahn had been on the bench for seven years, and by the time of the publication of the 2003 article, he had been on the bench for 12 years. (TR 100, 1 13-22)

- All the tobacco litigation related events occurred after Judge Kahn took the bench, and Judge Allen did not point this out in his opinion. (TR 100, 1 23-25; TR 101, 1 1-6)
- Judge Allen admits he wrote about matters as to which he had no personal knowledge. (TR 101, 1 7-11)
- For a judge to cast his vote on a matter to pay back someone for an earlier favor would be an act of judicial corruption. (TR 104, 1 6-11)
- Casting a vote to pay back a favor would subject the judge to removal and possible criminal prosecution. (TR 104, 1 18-22)
- Judge Allen conceded a lack of knowledge whether the newspaper articles were true. (TR 107, 1 10-21)
- Admits that it did not occur to Judge Allen that his opinion itself would cause the public to question the impartiality of the court's decision. (TR 108, 1 9-15)
- Admits that using a concurring or dissenting opinion to attack the honesty and integrity of a judge, if the practice should catch on, would have a chilling affect on collegial decision making and decision writing, but denies that he had done so. (TR 110, 1 16-23)

- Admits that in Florida the governing law of recusal of an appellate judge is that the decision rests entirely with the conscience of the individual appellate judge. (TR 112, l 22-25; TR 113, l 1)
- Admits that in the initial Childers appeal no party to the case asked Judge Kahn to recuse himself. (TR 114, l. 13-16)
- Judge Allen was not sure whether Fred Levin or any member of his law firm was counsel to Mr. Childers in the appeal, but was not suggesting that some member of the Levin firm was counsel of record in the appeal. (TR 114, l 17-25; TR 115, l 1-8)
- A judge is not disqualified just because he was once in practice with a lawyer who appears before him. (TR 115, l 13-16)
- A judge is not disqualified because the lawyer or party who appears before him helped him get appointed to the bench. (TR 115, l 17-20)
- Judge Allen has no evidence of any kind of direct relationship between Judge Kahn and Mr. Childers and was not familiar with the actual relationship between Judge Kahn and Mr. Childers. (TR 115, l 21-25)
- The court's docketing statement shows that there is no appearance by anybody connected with the Levin firm in the Childers cases. (TR 193, l 22-25; TR 194, l 1-2)

C. ARGUMENT REGARDING THE SUFFICIENCY OF THE EVIDENCE.

Clear and convincing evidence must produce "in the mind of the trier of fact" a "firm belief or conviction, without hesitancy" that the allegations are true. *In re: Davey*, 645 So.2d 398, 404 (Fla. 1994). The evidence above, together with all other evidence in the record, generated in the Hearing Panel, (the trier of fact), an unhesitating belief and conviction resulting in these findings of fact (quoted verbatim from the Panel's findings):

(1) Judge Allen evinced a strong, intense dislike for Judge Kahn which predated the Childers case. . . . Judge Allen had nothing nice to say about Judge Kahn, and when he discussed Judge Kahn with colleagues, it was in a derogatory manner, not infrequently accompanied by profanity, and reflected by a physical change in his appearance.

* * *

Judge Allen then actively solicited other judges to contest Judge Kahn's election, voicing objections to his fitness. . . . (Page 4 of the Hearing Panel's Findings, Conclusions and Recommendations)

(2) Childers' appeal . . . was blindly assigned to a three judge panel comprised of Chief Judge Kahn, Richard W. Ervin, and William Van Nortwick, Jr. . . . No party to the appeal sought Judge Kahn's recusal. (p. 5) [Ironically, Judge Allen quotes his character witness, State Attorney Willie Meggs, about how "proud" Mr. Meggs was of Judge Allen's opinion (Br. at 39), yet it was Mr. Meggs' daughter who handled the appeal by the State in Childers and who did not ask for Judge Kahn's recusal].

(3) Judge Allen learned that Judge Kahn was assigned to the *Childers* panel on approximately November 5th, 2004, the day after oral argument in Childers. He took no action until January 2005, when he saw the proposed panel opinion. (p. 6)

(4) Days after the proposed unanimous opinion was circulated, Judges Allen and Thomas convinced one of the original panel members to change his vote. . . . In fact, Judge Allen was instrumental in changing the panel's original unanimous decision to a two to one decision. (pp 7-8)

(5) On February 2, 2006, the Court issued an *en banc* decision Four Judges dissented, and voted to reverse (Chief Judge Kahn and Judges Ervin, Browning and Polston) [Judge Wolf voted to affirm].

(6) [J]udge Allen's concurrence clearly suggested that Judge Kahn cast a corrupt vote as a payback to friends. (p 12)

* * *

The Hearing Panel agrees with the assessment that "Judge Allen's opinion . . . could not have helped but create the impression in the minds of many that Judge Kahn was on the take and that . . . someone had attempted to purchase his vote on the panel," and "it's hard to draw any other impression" from the opinion. . . . (p. 12)

(7) Judge Allen's opinion was not only counter-productive, it was unnecessary. By the time of its release, the entire court has already affirmed Childers' conviction by a vote of 10-4. . . . This raised the specter that Judge Allen was abusing his opinion writing power to settle a personal score. . . . Judge Allen's concurrence was no less a personal attack on a colleague because he phrased in the third person, invoking 'suspicious readers,' . . . (p 12)

(8) There is a clear distinction between criticizing the state of the law (i.e., application of the *en banc* rule) and attacks upon the integrity of an individual judge (footnote and citation omitted; emphasis in original) (p 13)

(9) The Hearing Panel is convinced that Judge Allen acted from dual motives: (1) a perceived threat to the integrity of the Court by criticism; and (2) an extraordinary level of antipathy to Judge Kahn. . . . He succumbed to his dislike of Judge Kahn, which clouded his perspective and his judgment. Judge Allen knew that his concurrence would be 'devastating,' would harm Judge Kahn, and would impede future endeavors, including judicial opportunities. (p. 18)

(10) [J]udge Allen's concurrence brought the court and the judiciary into disrepute. . . .It did not promote public confidence in the integrity and impartiality of the judiciary. . . .

* * *

Judge Allen agreed that there are lines which should not be crossed in appellate opinions, . . . and that appellate opinions should not make personal attacks on the character and integrity of other judges. . . . Judge Allen, in the opinion of the Hearing Panel, crossed the line here. He caused the public to question the Court's integrity and impartiality. Such a taint, once created, is not soon dissipated. (p. 19)

The Hearing Panel is charged with receiving and considering the evidence, weighing the credibility of each witness, and deciding which evidence to believe or disbelieve. This Court has ruled that it gives great deference to the JQC's factual findings that are supported by clear and convincing evidence, particularly findings about intent or motive. *In re*

Stuart F. LaMotte, Jr., 341 So.2d 513, 518 (Fla. 1977) (Justice England's concurring opinion joined by a majority of the Court).

Judge Allen's concurring opinion was not a mere explanation of his *en banc* vote as he contends (Br. at 39), but crossed the line to become a vicious character assassination laced with suggestions of corruption. The contention that the concurring opinion is a simple explanation of why Judge Allen voted the way he did on the *en banc* issue is fanciful.

Judge Allen argues it is anomalous that the Hearing Panel found him "not guilty" of making a false statement to the hearing panel when he denied animus for Judge Kahn, but finding him "guilty" of having "extraordinary antipathy" toward Judge Kahn (Br. at 8). But Judge Allen argued to the Hearing Panel that a stricter "perjury" standard applied to the "false statement" charge (TR 668-670), and the Hearing Panel cleared Judge Allen of that charge.

In his testimony before the Hearing Panel, Judge Allen showed no contrition and refused to admit that he made a mistake by publishing his opinion (TR 116, l 1-25; TR 117, l 1-23). In this appeal Judge Allen continues to maintain that position, and he also continues his relentless attack on Judge Kahn. On pages 8,9,10,11,12,14,15,21, 23,28 and 29 of his brief, Judge Allen lays forth his now-familiar litany of grievances against

Judge Kahn: he maligned the court; he refused to withdraw his opinion; he lacks integrity and honesty; he told Judge Thomas "to get the fuck out of his office;" he used ugly language with court employees over a parking space; he threatened a public records suit; he is duplicitous; he lacks people skills; he is not what a judge should be; he is corrupt in the way he does things.

And in the middle of this parade of horrors, this appears (Br. at 22):

Thus, Judge Allen's dislike or disrespect for Judge Kahn was not irrational, ..."

Through the double negative, we are told that Judge Allen's hatred of Judge Kahn is "rational." While there may be specific reasons that lead one person to hate another, the hatred, itself, is not rational. Courts are supposed to be the ultimate bastions of reason in our society where humans dispassionately apply reason to facts to resolve disputes. Courts are not supposed to be temples of raw, untamed emotions. The Hearing Panel properly concluded, based on clear and convincing evidence, that Judge Allen's opinion is a classic example of what happens when emotion trumps reason.

II. BOTH THE FACTS AND THE LAW SUPPORT THE HEARING PANEL'S CONCLUSIONS OF LAW.

This entire section of Judge Allen's brief (pp. 29-33) is based on this faulty premise: "Judge Allen voiced no opinion of corruption." (BR. at 29)

The Investigative Panel of the JQC disagreed with Judge Allen on this point and filed the present charges. Six of Judge Allen's judicial colleagues (Browning, Webster, Benton, Wolf, Hawkes and Padovano) testified that the concurring opinion suggested or implied corruption. The Hearing Panel of the JQC found that the concurring opinion suggests corruption. A person "off the street" who reads the opinion can hardly come to any other conclusion.

The following analysis of Judge Allen's concurring opinion captures the essence and "logic" of the opinion, and establishes why a reasonable person reading that opinion could conclude that Judge Kahn is corrupt:

- “My vote ... was based upon my concern that participation by a particular judge of this court [Judge Charles Kahn] in the panel decision would have led to public perceptions of partiality by this court.” *Childers v. State*, 936 So.2d 619, 623 (Fla. 1st DCA 2006)
- Quoting three separate newspaper articles from 1998 and 2002, the accuracy of which Judge Allen admits is unknown to him, he uses the newspaper articles to make these points: (*Id.* at 624-627)
 - Fred Levin and W.D. Childers were cronies of Lawton Chiles.

- The tobacco legislation and the Governor's handling of it was "the good ole boy network run amuck."
- W.D. Childers was a redneck politician who displayed a contempt for open government.
- Describing the passage of the tobacco legislation, Childers was quoted as saying: "All we did was snooker the bastards."
- The tobacco settlement made a handful of trial lawyers wealthy, including Fred Levin.
- Fred Levin plotted with Childers to pass the tobacco law and now represents Childers on the Sunshine Law charges against Childers.
- Upon being elected County Commissioner, Childers continued all of the bad-government habits he had when he was in the legislature.
- Childers and Levin have faced serious "jams" and experienced "success together" for more than two decades.
- Levin represented Childers in a grand jury investigation.
- Childers testified on Levin's behalf when the Florida Bar accused him of illegal gambling.

- In 1980, Levin represented Childers during a grand jury investigation.
- After reading those [newspaper articles], most members of the public would believe that Mr. Childers and Mr. Levin are extremely close personal and political allies, that they both had a close personal and political relationship with Governor Chiles, that their close relationship with one another and with Governor Chiles ultimately resulted in Mr. Levin's firm receiving hundreds of millions of dollars in litigation made possible by a law adapted as a result of a legislative 'scam' orchestrated by the three of them, that Mr. Levin was Mr. Childers' long-time personal attorney, and that Mr. Levin was personally representing Mr. Childers on various criminal charges growing out of his actions as an Escambia County Commissioner when – and for some period of time after – the indictment was handed down in the present case. (*Id.* at 627)
- Governor Chiles appointed nine judges to the 1st DCA, and the very first went to Fred Levin's 39-year old law partner, Charles Kahn. (*Id.* at 627) [But what Judge Allen completely omits from the opinion is the date of Judge Kahn's appointment – 1991 – years before the 1998 and 2002 newspaper articles. The state tobacco litigation and

settlement occurred years after Judge Kahn was appointed to the bench. The omission of Judge Kahn's appointment date from Judge Allen's opinion was a sleight of hand designed to associate Judge Kahn with events that occurred long after he was appointed to the bench.]

- A member of the public familiar with the reported relationships among Chiles, Levin and Childers described above would doubt that Charles Kahn was appointed to this court without the considerable influence of Levin and Childers. (*Id.* at 627)
- A reversal of the Childers' conviction might result in Mr. Childers not being required to further answer for the crimes for which he had been convicted because news reports reveal that the witness, Willie Junior, was dead. (*Id.* at 628)
- The deciding vote on the reversal would have been cast by Fred Levin's former law partner, Charles Kahn. (*Id.* at 628)²
- More suspicious members of the public “would have assumed that Judge Kahn had simply returned past favors provided to him by Mr.

² Judge Allen fails to mention that it was he who persuaded Judge Van Nortwick to change his vote, which put Judge Kahn into the position of being a deciding vote on the three judge panel. (TR 256, 1 8-16)

Levin and Mr. Childers, thus allowing them, once again, to ‘snooker the bastards.’” (*Id.* at 628)

- The First District has been respected by the public for its integrity, honor and impartiality and has a record unblemished by public suspicion. (*Id.* at 629) [The strong implication is that Judge Kahn’s activities have blemished the court.]
- The court should never perform our responsibilities in a manner that would cause the public to question the impartiality of our decisions, but that is what Judge Kahn did by failing to recuse himself from consideration of the case. (*Id.* at 629)
- “I cast my vote for consideration of this case by the full court, not to affect the outcome of the ultimate decision but to see that the ultimate decision of this court is made by judges unblemished by public suspicion.” (*Id.* at 629) [Thus suggesting that Judge Kahn is blemished by public suspicion.]

Based on the foregoing non-record newspaper articles, innuendo and supposition that portray Messrs. Childers and Levin, and even the late Governor, as wicked bogymen, and the crucial omission of the date of Judge Kahn's appointment to the bench, Judge Allen's opinion constructed this tortured and 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.

The essence of the Hearing Panel's conclusion is found on page 18 of its opinion:

The Hearing Panel does not, by this report, determine which of these legal standards apply (i.e., 'motive and method,' 'actual malice,' or the lack of an 'objectively reasonable factual basis'. It concludes that Judge Allen violated all of these standards. He acted, at least in part, from a personal motive. He did not pursue proper methods by bringing claims to the appropriate authority (the JQC or law enforcement). Instead, he abused the power of his office by accusing Judge Kahn of trading his vote as payback for past favors when he admittedly had no evidence to support it. This conduct was reckless and had no objectively reasonable factual basis.

The facial flaws of Judge Allen's opinion are clear: it charges corruption without facts; it requires recusal where no party requested it and there was no duty to recuse; and it was written months after recusal was moot. When one adds the proven animus to the mix, the opinion becomes, in the words of Judge Benton, "completely hateful." (TR 388, 1 17) It is not

an opinion that "decides" anything. It is a gratuitous defamation of a colleague on a purportedly collegial court.

Judge Allen reminds us (Br. at 29) that ours "is a profession where words count, . . ." We couldn't agree more, as the "completely hateful" words of Judge Allen's opinion clearly demonstrate. Judge Allen concedes (Br. at 33) "that a false accusation of judicial corruption harms public confidence in the integrity and impartiality of the judiciary," but he doggedly refuses to see that his opinion does just that. His violation of the Canons is palpable, and it is based on two independent grounds: (1) the opinion on its face decides nothing and accuses a colleague on a collegial court of corruption; and (2) the opinion was motivated in substantial part by Judge Allen's personal hatred of Judge Kahn. Either one of those grounds, alone, supports the Hearing Panel's findings.

III. THE DOCTRINE OF JUDICIAL INDEPENDENCE AFFORDS NO PROTECTION TO JUDGE ALLEN'S CONCURRING OPINION.

Judge Allen notes that "[t]here is no precedent in Florida or elsewhere in the United States for seeking sanctions against an appellate judge based on his or her reasons for writing a published opinion in a case before his or her court, or based upon the content of the opinion." We have not been able to find a situation in Florida or elsewhere in the United States where an

appellate judge has abused his or her opinion-writing privilege to falsely accuse a judicial colleague of the crime of corruption. The reason there are no such cases is that no judge has abused that privilege to the extent that Judge Allen abused it in this case.

Judge Allen quotes Tennessee Justice Birch's observation that judicial independence "is a promise that judicial decisions will not be subject to sanctions" (Br. at 36) But Judge Allen wrote a gratuitous concurring opinion that decides nothing. It was a malicious potshot at a colleague – not a judicial decision.

There is no such thing as absolute immunity in our society. The doctrine of "judicial immunity" protects judges against suits for *money damages* for actions taken in a judicial capacity, as long as the actions were not taken "in a complete absence of all jurisdiction." *Mireles v. Waco*, 502 U.S. 9, 9-12 (1991). But "judicial immunity" does not shield a judge from criminal liability, suits for injunctive relief, suits for attorneys' fees authorized by statute or disciplinary proceedings. *See Cameron v. Seitz*, 38 F.3d 264, 276 (6th Cir. 1994) (when immunity bars a suit for money damages against a judge, there are other remedies for addressing alleged judicial misconduct, such as disciplinary proceedings); *People v. Proffitt*, 865 P.2d 929, 932 (Colo. Ct. App. 1993) (although a judge's actions are

insulated to some degree by judicial immunity, a judge's actions are subject to review by judicial oversight committees).

This Court has made it clear that a judge is simply not free to lash out critically at other people, including other judges. In *In Re Richard A. Kelly*, 238 So. 2d 565, 569-70 (Fla. 1970), this Court specifically dealt with a judge's criticism of other judges:

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 raised 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.

* * *

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).

In *In re McMillan*, 797 So.2d 560, 572 (Fla. 2001), this Court held:

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 Graham*, 620 So. 2d 1273 (Fla. 1993), this Court pointed out, among other things, that the alleged misconduct of others does not justify a judge's repeated departure from the guidelines established in the Code of Judicial Conduct; that a judge may not abuse judicial power to the detriment of individuals; that judges are required to make some sacrifices that other individuals are not called to make; and that a judge who refuses to recognize his own transgressions does not deserve the authority or command the respect necessary to judge the transgressions of others.

In *In Re Diaz*, 908 So. 2d 334, 337 (Fla. 2005), this Court noted that Canons 1 and 2 of the Code of Judicial Conduct may be construed to prohibit judges from making threatening or disparaging remarks about other judges. In *In Re Glickstein*, 620 So. 2d 1000 (Fla. 1993), this Court noted that "[n]either honest motives nor well-intentioned conduct . . . excuse less than strict compliance with the Code of Judicial Conduct." (*Id.* at 1002). This Court also reasoned that a judge's neutrality in everything he or she does is necessary to sustain the public's confidence in individual judges and

in the judicial system as a whole. In *In Re Code of Judicial Conduct*, 603 So. 2d 494 (Fla. 1992), this Court ruled that judges should be held to even stricter ethical standards than attorneys; that judges must adhere to standards of probity and propriety higher than those deemed acceptable for others; and that the Canons impose high standards and a heavy burden on those persons who accept judicial office. (*Id.* at 498-499).

In *In Re Schwartz*, 755 So. 2d 110 (Fla. 2000), Judge Alan Schwartz of the Third District Court of Appeal, notwithstanding numerous prior warnings to refrain from rude, impatient and discourteous remarks on the bench, orally abused a law professor and her intern students who were attempting to argue several criminal cases before the Third District. This Court administered a public reprimand. Applying Judge Allen's argument, if Judge Schwartz had delivered his abuse in a written concurring opinion instead of orally, he would have been immune from discipline. So all a judge has to do to escape the Judicial Canons is dress up the defamation in a concurring opinion.

The following cases from other jurisdictions include cases disciplining judges who criticize other judges. *E.g.*, *In Re Rome*, 542 P.2d 676, 685-686 (Kan. 1975); *In Re Mathesius*, 910 A.2d 594, 610-611 (N.J. 2006); *In Re Inquiry of Broadbelt*, 683 A.2d 543, 552 (N.J. 1996); *Broadman v.*

Commission on Judicial Performance, 959 P.2d 715, 729 (Cal. 1998); *In Re Hill*, 8 S.W.3d 578, 583 (Mo. 2000); *In Re Barr*, 13 S.W.3d 525, 565 (Tex. Rev. Trib. 1998); and *Halleck v. Berliner*, 427 F.Supp. 1225, 1240-1241 (D.C.D.C. 1977).

Judge Allen improperly relies in part on *In the Matter of XYP*, 523 Pa. 411, 567 A.2d 1036 (1989). There, the Pennsylvania Judicial Inquiry and Review Board (JIRB) – the equivalent of Florida's JQC – declined to take any *formal* action against a judge who wrote a 62 page opinion and a supplemental 12 page opinion denying a motion for recusal and lambasting defense counsel's conduct as insidious, malicious, unworthy, unprofessional, dishonest, unethical and the like. Although the JIRB declined to take *formal* action against the judge, it issued a letter of admonishment to the judge. The Supreme Court of Pennsylvania vacated the admonishment because that court, rather than the JIRB, had the *exclusive* constitutional power to impose any sort of sanction on a judge. But the court, while paying homage to the concept of judicial immunity, made the following clear (567 A.2d at 1039):

Immunity is, of course, a solemn and sacred trust that should not be abused, and it is not to be regarded as a license for the judiciary to engage in improprieties. *This Court will, in cases of flagrant and egregious abuse of this trust, initiate appropriate disciplinary proceedings.* [emphasis added]

Judge Allen argues that the Montana Supreme Court in *State ex rel. Shea v. Judicial Standards Commission*, 198 Mont. 15, 643 P.2d 210 (1982) "rejected the only reported effort to sanction an appellate judge for his opinion" (Br. at 34). Judge Allen's analysis of *Shea* misses the mark.

The Montana Judicial Standards Commission (JSC) instituted proceedings regarding a claim of "conduct prejudicial to the administration of justice that brings the judicial office into disrespect." One charge was the "intemperate language" in a dissenting opinion. We quote here the "intemperate language" in its entirety (643 P.2d at 213):

- "This court no more granted a fair review to defendant than the citizens of Pondera County could have given him a fair trial. The people of Montana can be well advised that there is no law in the State of Montana."
- "It is intellectual dishonesty for the majority not to recognize that the combination thereof is a radical departure from existing interpretations of constitutional law in this state * * * "
- "And this is not the only manner in which the opinion is rather slippery with the facts."
- "The dishonesty of the majority opinion is manifest * * * "

It is important to note what Justice Shea's "intemperate language" does not do. It does not accuse the majority of his colleagues of casting their votes to pay someone back for a favor. It does not accuse the majority of corruption or other form of venality. Instead, Justice Shea accused the

majority of "intellectual dishonesty" when it radically departed from "existing interpretations of constitutional law in this state" Charging someone with "intellectual dishonesty" by taking a view of the law different from Justice Shea is a far cry from charging someone with voting to decide a case with the corrupt motive of paying back for a past favor. Justice Shea disagreed in strong and "intemperate" language with the majority's application of the law to the facts of that case. But Justice Shea did not cross the line and accuse his colleagues of corruption. That is a key distinction between the *Shea* case and the present case.

The devil is always in the details. *Shea's* actual holding was twofold:

- The Montana JSC proceeded against Justice Shea based on the JSC's Rule 9 which prohibits "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" (643 P.2d at 215). The Court concluded that Rule 9 exceeded the constitutional power of the JSC because the Montana Constitution and statutes do not expressly give the Montana Supreme Court or the JSC power to discipline a justice for "conduct prejudicial to the administration of the justice that brings the judicial office into disrepute." The Montana Court held that the only express constitutional basis for proceeding against Justice Shea was the constitutional prohibition of "willful

misconduct in office." (*Id.* at 220-221). The Montana Supreme Court narrowly construed "willful misconduct in office" to exclude "intemperate language."

- The second reason why the Court found in favor of Justice Shea is that the complaint against him was not verified, which violated an existing statute and the JSC's own rule. Therefore, the Court held the proceeding was barred by that technicality. (643 P.2d at 223).

Shea is far from a sweeping pronouncement that Judge Allen can escape the strictures of the Code of Judicial Conduct by dressing up his character assassination in the form of a concurring opinion – a concurring opinion in an *en banc* proceeding that no other judge on the First District Court of Appeal was willing to join. Judicial immunity and independence are not absolute. All but one of the colleagues Judge Allen consulted told him not to publish the opinion, but he refused to listen to them, and he crossed the line.

CONCLUSION

Throughout these entire proceedings, including his brief in this Court, Judge Allen has cast upon others the blame for "this mess," as he so aptly put it in his sarcastic email to his friend, Judge Webster. Judges Kahn and Wolf insulted him with their dissents on the *en banc* question; Judge Kahn is

a complete reprobate who should not be a judge on the court, which, of course, required Judge Allen to take action to save the court from Judge Kahn; Judges Kahn and Wolf refused to withdraw their dissents in a manner satisfactory to Judge Allen; and the other judges with whom he consulted failed to tell him that his opinion violated the Judicial Canons (although all but one told him in no uncertain terms not to publish it, and he was asked to join in a simple one word denial of the certification request, which he refused). And so, full of indignation, rectitude, righteousness and personal loathing for Judge Kahn, he wreaked havoc not only upon Judge Kahn, personally, but also upon the First District Court of Appeal and the judiciary of Florida as a whole.

For the foregoing reasons this Court should approve the JQC's conclusions and recommendations.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief 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 September, 2008.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Florida Rules of Appellate Procedure 9.100(1) and 9.210(a)(2). This brief is in 14 point, Times New Roman.

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F. Wallace Pope, Jr.