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January 16, 2001

VIA FACSIMILE

Scott K. Tozian, Esquire
SMITH and TOZIAN, P.A.
109 N. Brush Street, Suite 150
Tampa, Florida 33602-4152

Re: *Inquiry Concerning a Judge; No. 00-143; Cynthia A. Holloway*
Supreme Court Case No. SC00-2226

Dear Scott:

We write in response to your letter of January 3rd, 2001 wherein you requested copies of the investigative statements taken by the Judicial Qualifications Commission (JQC) investigator or, in the alternative, our reasons for failing to provide the statement in our 12 (b) response.

Please be advised that we hereby object to the production of said documents as they were obtained and prepared in anticipation of litigation and thus protected by the work product doctrine. The requested documents were obtained by a JQC investigator acting under the direction of Mr. Thomas C. MacDonald, Jr., General Counsel to the JQC in furtherance and in anticipation of the present matter. Specifically, the requested documents consist of typed summaries of the investigator's hand written notes taken during numerous witness interviews. In addition to being privileged work product, the requested documents also fail to meet the definition of "a statement" pursuant to Florida Rule of Civil Procedure 1.280 (b)(3) in that they are neither written, signed or otherwise adopted (statements) by persons interviewed.

Furthermore, Rule 1.280 (b) (3) specifically provides that a party may obtain discovery of an opposing party's "documents ... prepared in anticipation of litigation... only upon a showing that the party seeking discovery has need of the material in preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means."(emphasis added) According to the controlling case law regarding the production of investigative reports in the civil context, "The rationale supporting the work product doctrine is that 'one party is not entitled to prepare his case through the investigative work product of his

EXHIBIT
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adversary where the same or similar information is available through ordinary investigative techniques and discovery procedures.'" *DeBartolo-Aventura, Inc. v. Hernandez*, 638 So. 2d 988, 990 (Fla. 3rd DCA 1994); *Southern Bell Tel. & Tel. Co. v. Deason*, 632 So.2d 1377, 1385 (Fla. 1994).

Clearly, the "undue hardship" exception does not apply to you in this case. You and your client have the option of learning the "substantial equivalent" of the privileged information by means of deposition or by conducting an investigation of your own. In furtherance of same, we have provided the names and addresses for each person interviewed by the JQC investigator. Each and every witness listed lives or works in Tampa and can be easily be subpoenaed for deposition or contacted via telephone. Furthermore, the ease in which the privileged information can be obtained by you is evidenced in your letter of January 3rd, wherein you advised you have already spoken to at least three of the people interviewed by the JQC investigator.

Finally, we strongly disagree with your analogy that the JQC investigator's statements are equivalent to police reports which are discoverable under the Rules of Criminal Procedure. Respectfully, your analogy is deficient on at least a couple of grounds. First, in the criminal context, a person's liberty is at stake which arguably justifies the infringement on the (prosecutors) work product privilege and overall extensive discovery obligations in State court.[1] Conversely, the issue in the present case concerns your clients qualifications to hold judicial office which some may view as a privilege not at all equal to an accused's Sixth Amendment confrontation rights.

Secondly, Rule 12 (a) of The Florida Judicial Qualifications Commission Rules, specifically provides that "In all proceedings before the Hearing Panel, the Florida Rules of Civil Procedure shall be applicable..." This demonstrates the intent of the Commission to treat judicial investigations in a manner consistent with a civil lawsuit and not a criminal prosecution. Therefore, it is doubtful the Hearing Panel will be persuaded by your analogy to the discovery Rules of Criminal Procedure.

Once again we decline your request for the production of the JQC investigator's interview summaries and welcome the opportunity to discuss this matter with you further.

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The discovery rules are even more restrictive in federal court where pursuant to the Federal Rules of Criminal Procedure, "... no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

Very truly yours,

KAYE, ROSE & MALTZMAN, LLP

Beatrice A. Butchko
Special Counsel
Judicial Qualifications Commission

cc: Thomas C. MacDonald, Jr.
General Counsel