BEFORE THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION
STATE OF FLORIDA

INQUIRY CONCERNING
A JUDGE Supreme Court Case No.: SC00-2226
NO. 00-143

RESERVED [1] MOTION TO COMPEL
AND MOTION FOR SANCTIONS

The Respondent, the Honorable Cynthia A. Holloway, by and through her undersigned attorneys, moves for entry of an order compelling testimony from the deponent, Robert W. Butler, and for sanctions against the Judicial Qualifications Commission. This motion is made pursuant to Rule 12 of the Florida Judicial Qualification Commission Rules and Rules 1.280 and 1.380 of the Florida Rules of Civil Procedure. In support of this motion, the Respondent would show as follows:

1. Pursuant to notice, the Respondent attempted to take the deposition of Robert W. Butler on June 6, 2001. (The transcript of the adjourned deposition is appended to this motion; reference to same will be designated as RWB.)

2. By way of background, Butler is an investigator retained by the JQC to investigate complaints against judges. Butler is not given any protocol or criteria to guide him in conducting his investigations.

[1] This motion is identical to the one served on August 17, 2001. Same is resubmitted to reflect filing with the Florida Supreme Court.

3. In this instance, Mr. Butler interviewed a number of witnesses relative to a complaint made against the Respondent. These interviews are not recorded (RWB pg. 22, l. 22). Rather, Butler takes notes and prepares a typewritten report summarizing the interview from these notes (RWB pg. 23, l. 20-22).

4. Following the preparation of the summary, Mr. Butler discards his notes. He does not provide the person whom he has interviewed a copy of his summary (RWB pg 24, l. 16-22).

5. So that the position of Respondent can be fully appreciated, some background information about the usage of Butler's witness statements should be noted. These statements were provided to the investigative panel of the JQC for use in determining if probable cause existed for formal charges. Initially, the JQC objected to the production of these statements. It was only after a motion to compel was granted by the Florida Supreme Court that these statements were provided to Respondent and her counsel. As heretofore noted, the statements are not a recorded verbatim recapitulation of the witnesses' responses but Butler's summary of same. This summary is not given to the witness to check its accuracy or completeness.

6. Since these statements formed at least some component of the formal charges against the Respondent, the deposition of Mr. Butler was scheduled. Early on in the deposition, counsel for the JQC attempted to unilaterally establish ground rules for the

deposition and also indicated that she would be filing a motion for protective order as to her instructions to the witness not to answer questions (RWB pg. 10). No motion has been filed even though over 2 months have lapsed since Butler's deposition was adjourned.

7. Repeatedly, throughout the deposition of June 6, 2001, Butler was instructed not to answer questions by counsel for the JQC. By way of example, see pages 9, 26, 27, 28, 29, 33, 34, 35, 36, 37, 38, 39, 40, 41, 45, 48, 49, 51, 55, 58, 59, 60, 62, 63, 65, 66, 67, 68, 69, 71, 72, and 73 of RWB.

8. In view of the numerous inappropriate objections, which will be discussed hereinafter, Respondent's counsel adjourned Butler's deposition. In doing so, counsel indicated on the record it was unfair to the respondent and not in good faith to interpose the numerous objections heretofore identified. Some of these objections were speaking objections suggestive of an answer in violation of Rule 1.310(c).

9. Furthermore, counsel for the JQC indicated that an amended privilege log would be filed relative to the JQC's continued assertion of the work product and attorney client privileges. Counsel for the Respondent has not received an amended privilege log with regard to the investigative materials subpoenaed from Butler (RWB pg. 15). In regards to the privilege log that was filed (Exhibit 18 to RWB), it is clear that that privilege log is incomplete and inaccurate. Specifically, special counsel for the JQC

admitted omitting certain items from the list for fear that such a disclosure may "reveal my work product" (RWB pg. 16). Additionally, it is clear that other items were identified as being privileged that pre-dated Butler's involvement in this case. Based upon his understanding of the chronology of his involvement, Butler believes certain notations on the privilege log are incorrect (RWB pg. 17, l. 19-21).

10. Further, Butler identifies other correspondence that is not identified on the privilege log (RWB pg. 19). Once again, there has been no amended privilege log filed identifying these additional documents that should have been produced at the deposition of Butler.

11. More troubling is the limitations counsel for the JQC imposed upon the inquiry by Respondent's counsel. In general, the JQC counsel took the position that any area or subject of inquiry not explicitly covered in the witness summary was privileged and not subject to inquiry. See the objections at pg. 35, 37, 38, 39, 49, 50, 55, 56, 58, and 59 of RWB.

12. It is important to note that Butler perceives the purpose of his investigation to give the JQC a "complete and total picture". Whether that has been done in this case is in dispute. Respondent respectfully submits that she should be entitled to inquire as to not only what is written in the summaries prepared by Butler but what may have

been omitted or reflected incorrectly[2]. Just as important are the absence of statements from certain witnesses. Specifically, Butler did not obtain or attempt to obtain statements from Respondent's husband (Todd Alley), Respondent's brother (James Holloway) or Ray Brooks.

13. By asserting privilege repeatedly throughout this deposition, counsel for the JQC prevented Respondent's counsel from inquiring as to the totality of the interviews conducted by Mr. Butler, what was said in these interviews, why certain material was included in the written summary and why other material was left out.

14. In fact, counsel for the JQC takes inconsistent positions, at times allowing responses (RWB pgs. 12 and 33) while at other times prohibiting same.

15. A party asserting a privilege must demonstrate that the privilege applies. Wal Mart Stores v. Weeks, 696 So.2d 855 (2nd DCA 1997). Blanket assertions of privilege are insufficient to support this burden. Burns v. Image Films Entertainment,

[2] By way of example, there is a glaring mistake in the written summary of Mr. Johnson in that Mr. Butler testified that these summaries are typically prepared within a day or two of the interview. If that were the case, Mr. Johnson's summary would have been prepared within a day or two of June 13, 2000. Giving Mr. Butler the benefit of the doubt, let's assume that the summary was prepared on June 16, 2000. How then does the summary contain a reference to a facsimile sent to Mr. Butler by Mr. Johnson on June 29, 2000? As reflected on the dialogue on pages 42 and 43 of his deposition, Mr. Butler's earlier testimony about how these summaries were prepared was incorrect in this instance.

Inc., 164 FRD 589 (W.D. N.Y. 1996). In this instance, this burden cannot be met in regards to the discovery sought; the JQC's position is without support in the law.

16. As is reflected in the numerous objections and the conflicting grounds therefore, the purpose behind same was to frustrate the taking of the deposition and prevent meaningful discovery from being taken on behalf of the Respondent. Respondent would suggest that there is no justification for the limiting of discovery from a witness who's investigation formed a substantial basis of the charges against the Respondent. This conduct is in violation of the Florida Rules of Civil Procedure.

17. Nowhere in either the Florida Judicial Qualifications Committee Rules or Florida Rules of Civil Procedure is there a provision allowing an attorney to instruct a witness not to answer. See Smith v. Grady, 569 So. 2d. 504 (4th DCA 1990). The obfuscation of Butler's testimony was the goal of the JQC's counsel; if not, why wasn't a motion for protective order filed beforehand so that guidelines could be established? As noted, over two months have passed without benefit of a motion in this regard.

18. Respondent would suggest that the JQC's position crossed the line insofar as improper interference in the discovery process. See Quantachrome Corp. v. Micromeritics Instrument Corp., 189 FRD 697 (S.D. Fla. 1999).

WHEREFORE, the Respondent, Cynthia A. Holloway, would respectfully request entry of an order in the following respects:

1. Requiring the witness, Robert W. Butler, to respond to the inquiry of Respondent's counsel relative to circumstances of the statements he obtained and his investigation with regard to this matter;

2. Admonishing counsel for the JQC that any objections during the deposition shall be stated concisely in a non-argumentative and non-suggestive manner;

3. If the JQC's investigator fails to fully and completely respond to questions asked by Respondent's counsel, Respondent's counsel would respectfully request that an order be entered striking any charges against Respondent based upon witness statements obtained by Butler;

4. The JQC pay the Respondent's attorney fees and costs associated with this motion and the futile deposition of Butler taken on June 6, 2001.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to:

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this _____ day of August, 2001.

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