Decisional Independence in Opinion Writing: What a Judge May Not Do

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Judicial independence is paramount to the functioning of our judiciary. The freedom of judges to decide the issues presented before them establishes a judiciary free from political, societal, and even historical constraints. However, with this great freedom comes great responsibility. Judicial independence is not absolute. The doctrine of stare decisis compels the judiciary to follow the precedent that has been set before it. However, even in extraordinary cases, precedent may be overturned giving our judiciary the power to change the law of the land. This power should be used sparingly and only when a case cannot be distinguished from the existing precedent.

Judicial independence exists in two forms: institutional and decisional. Institutional independence refers to the governmental structure where the separation of powers between the three branches of government is successful at keeping the executive and legislative branch out of the affairs of the courts. Decisional independence refers to the ideal that judicial decision-making is able to exist free of undue influence from outside agents who are acting upon partisan or special-interest motivations, rather than being motivated by the demands and ideals of justice.

[1] Quite simply, judicial independence means that judges can decide cases before them without fear or favor, based on the law and the facts of that particular case. However, judicial independence does not mean that judges are free to decide cases according to their own whims or prejudices. [2]

The Florida Supreme Court recently addressed the issue of judicial independence when it reprimanded a First District judge for a concurring opinion that the Court deemed was intentionally written to personally attack another judge. While issuing a public reprimand to the
offending judge, the Court was careful not to restrict judicial independence in judges’ decision writing and narrowed their holding to reflect the circumstances of the instant case. The Court’s respect for decisional judicial independence reflects its understanding that “judges must necessarily have a great deal of independence in executing [their] powers.” [3] But the Court was careful to curb this power by emphasizing that it is not absolute and “should never be autocratic or abrasive.” [4]

I. Case Background

In this case of first impression, the Florida Supreme Court recently addressed the issue of judicial independence in decision writing by appellate judges. [5] The opinion stemmed from the W.D. Childers bribery case in which Childers, a former state legislator, was convicted of bribery and unlawful compensation or reward for official behavior. Childers appealed his conviction to the First District Court of Appeal. In 2005, his case was blindly assigned to a three-judge panel: Chief Judge Kahn, Judge Richard Ervin (who has since retired), and Judge William VanNortwick. After hearing oral arguments, the panel voted unanimously to reverse Childers’ conviction. Judge Kahn wrote the opinion as he was the primary judge one the case. After the proposed unanimous opinion was circulated to all of the First District judges, Judge Michael Allen persuaded another judge to talk to Judge Kahn about recusing himself, but Kahn said that he saw no reason to do so. After further discussion within the Court, a revised two-to-one Childers opinion was circulated to all the judges.

Before the new two-to-one opinion was released, one of the judges prepared an extensive memorandum, urging en banc review, which was then circulated to all judges. Subsequently, on February 2, 2006, the First District issued an en banc decision, affirming Childers’ conviction by
a ten-to-four vote. [6] A resulting legal dispute among the judges over the district court’s decision to proceed en banc prompted nine different opinions within the decision. [7] Judge Kahn authored one of the opinions in which he expressed his disagreement with the Court’s decision to proceed en banc. [8]

After the release of the en banc decision, Childers’ attorney moved to certify the certain questions to the Florida Supreme Court. It was in the decision denying Childers’ motion for certification that Judge Allen filed a concurring opinion that contained many inflammatory statements directed toward Judge Kahn. After Judge Allen circulated his proposed concurrence to the other judge, some of the judges warned Judge Allen not to release the opinion because “it was unwise and it would be problematic for him.” [9] These statements were at issue when the case was presented before the Florida Supreme Court. [10]

II. **Florida Judicial Qualifications Commission Hearing Panel**

The Florida Judicial Qualifications Commission ("JQC") brought charges against Judge Allen arising from the comments that he made about a fellow appellate judge in the concurring opinion. [11] At the evidentiary hearing, the JQC heard testimony from several judges from the First District. It was determined that a majority of the judges believed that the opinion was “inappropriate and that it suggested that [Judge] Kahn was corrupt.” [12] Testimony also revealed that Judge Allen refused to sign a one sentence per curium denial of Childers’ motion for certification stating that “It’s time for them to get theirs.” [13] The testifying judge understood “them” to mean Judge Kahn and Judge Wolf. Another judge believed that the opinion was an abuse of power and that Judge Allen wrote the opinion to “settle a score”. [14]
Judge Allen testified at the JQC hearing as well. He stated that if Judge Kahn had recused himself and had not written his dissent on the en banc issue accusing the majority of the court of ignoring the requirements of the law, then he would not have published his opinion. He also testified that he did not believe that he was attacking Judge Kahn’s integrity. With regard to his concurring opinion, Judge Allen admitted that although he quoted extensively from three newspaper articles, he had no personal knowledge of the facts contained within them and he admitted that Judge Kahn was not named in any of the articles. He conceded that he was not personally familiar with the relationship between Judge Kahn and Childers. [15]

The JQC’s factual findings following the hearing were extensive. The Hearing Panel made numerous conclusions and found that Judge Allen’s concurring opinion clearly implied that Judge Kahn “cast a corrupt vote as a payback to friends.” Additionally, the JQC found that the concurring opinion was counter-productive and unnecessary because it was a personal attack on Judge Kahn (even though it was phrased in the third person). Judge Allen did not pursue the proper methods of bringing claims of impropriety to the appropriate authority, such as the JQC or law enforcement. The JQC further found that Judge Allen acted from a dual motive: (1) a perceived threat to the integrity of the court by criticism, and (2) an extraordinary level of antipathy to Judge Kahn. Further findings show that Judge Allen knew that his opinion would harm Judge Kahn and would impede further endeavors by the Judge, including other judicial opportunities. Judge Allen’s opinion brought the court and the judiciary into disrepute and the opinion did not promote public confidence in the integrity and impartiality of the judiciary. As a result of these findings, the JQC Hearing Panel found that Judge Allen violated Canons 1, 2A, and 3B(5) of the Code of Judicial Conduct and recommended that Judge Allen be publicly reprimanded. [16]
III. **Code of Judicial Conduct**

The JQC found that Judge Allen violated the following Canons from the Code of Judicial Conduct:

**Canon 1 states:**
An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

**Cannon 2 states:**
A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

**Cannon 3B(5) states:**
A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, and shall not permit staff, court officials, and others subject to the judge's direction and control to do so. This section does not preclude the consideration of race, sex, religion, national origin, disability, age, sexual orientation, socioeconomic status, or other similar factors when they are issues in the proceeding.
IV. Florida Supreme Court Opinion

Judge Allen argued that the doctrine of judicial independence precluded the JQC from filing charges against him for his concurring opinion. Additionally, he also argued that to question by threat of sanction the reason for, the wisdom of, or the motive behind a decision constitutes a gross intrusion into judicial independence and will have a chilling effect on judges carrying out their duties.

The Florida Supreme Court countered this argument by stating that “while judicial independence is critical to the functioning of the judiciary, it is not unlimited.” [17] The Court referenced a prior judicial opinion where it placed a judge’s independence into context:

The duties, responsibilities, and powers entrusted to judges are awesome. Judges must necessarily have a great deal of independence in executing [their] powers, but such authority should never be autocratic or abusive. We judges must always be mindful that it is our responsibility to serve the public interest by promoting justice and to avoid, in official conduct, any impropriety or appearance of impropriety. We must administer our offices with due regard to the system of law itself, remembering that we are not depositories of arbitrary power, but judges under the sanction of law. Judges are expected to be temperate, attentive, patient and impartial, diligent in ascertaining facts, and prompt in the performance of a judge’s duties (emphasis added). [18]

The Court explained that “generally appellate judges are free to write almost anything in their opinions regarding the decision of the case or the facts and law involved in the case.” The Court emphasized that the judge’s writing must be relevant to the case at bar and the facts contained in record. In Judge Allen’s concurring opinion, he did not confine his discussion to the facts that were within the record of the Childers case. Rather, he went outside the record and utilized materials to personally attack Judge Kahn’s decision to not recuse himself from the case and to accuse him of corruption. The Court also found that Judge Allen failed to include vital facts that could have put in doubt
his assertion that Judge Kahn’s vote was corrupt. The Court placed a stern warning on this type of action stating that it could not be condoned, nor protected by the doctrine of judicial independence.

It its holding, the Court proclaimed that “an appellate judge cannot use his opinion-writing power to inappropriately personally attack another appellate judge by accusing him of a crime.” The Court explained that the doctrine of judicial independence did not preclude the JQC from filing charges against Judge Allen for writing his concurring opinion in the case. However, the Court guarded the doctrine of judicial independence by cautioning that the opinion was not to be construed as a license for the JQC to judge and evaluate judicial opinions. By issuing this warning, the Court is protecting the doctrine of judicial independence and appellate judges from undue influence by the JQC. While the Court struck down Judge Allen’s argument that the JQC’s inquiry was an improper violation of decisional judicial independence, the Court makes it very clear that this is not the norm. This opinion does not give the JQC the power to investigate or evaluate judicial opinions.

Finally, the Court attempts to further warn against increased scrutiny of appellate judges’ opinions by conceding that sometimes judges use “intemperate or colorful language in their evaluation of a fellow judge’s opinion of reasoning.” Approvingly, the Court states that this choice of language may not be the subject to scrutiny. In contrast, the Court strongly rejects Judge Allen’s opinion as one being exempt from scrutiny. Quite simply, it “crossed the line”. Judge Allen’s opinion did not merely use strong or colorful language, rather is falsely accused Judge Kahn of corruption using unverified statements from outside the record of the case. The Court draws a distinction between
Judge Allen’s concurring opinion and a strong and colorfully written opinion. The distinguishing factors from Judge Allen’s concurring opinion are that he went outside the record and used materials, mainly newspaper articles, to falsely accuse a fellow judge of corruption. The Court had no reservations in approving the JQC’s findings, even though they were investigating an appellate judge’s written opinion.

The Court agreed with the JQC’s findings that it issue a public reprimand to Judge Allen. The Court recognized that this case was one of first impression, but it acknowledged that it had imposed public reprimands for “judges who have criticized or made improper statements towards other judges, attorneys, and other person who came before the court.” The examples public reprimands issued by the Court involved a judge who made rude and discourteous remarks during oral argument [19], a judge who made improper and inappropriate remakes during a dissolution of marriage hearing [20], and a judge who made rude and improper remarks regarding ethnicity during a court hearing [21]. Accordingly, the Court accepted the JQC’s recommendation of a public reprimand.

V. Conclusion

Decisional judicial independence, while essential to the functioning of our judiciary, is not absolute. Judicial independence means that judges can decide cases before them without fear or favor, based on the law and the facts of that particular case. In the instant case, Judge Allen’s concurring opinion clearly fell outside the protection of judicial independence because it was not based on the law or the facts of the particular case. Rather, as the Court declared, his opinion was based on outside materials that were not part of the record and his own antipathy toward Judge Kahn. This clearly falls
outside the protection of judicial independence. While judicial independence will stretch
far to protect an appellate judge’s opinion writing, it cannot stretch so far as to allow a
judge to cloud his opinion with ill will and material outside the record.

**Endnotes**

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http://www.abanet.org/publiced/lawday/talking/judind_whatis.html

http://judgepedia.org/index.php/Judicial_Independence_and_Accountability


[4] Id.

[5] Inquiry Concerning a Judge, No. 06-249 re: Michael E. Allen, ___ So.2d ___ (Fla., No.
SC07-774, 12/18/2008).


[7] Id.

[8] Judge Ervin, Webster, and Wolf also wrote separate opinions dissenting to an en banc
review of the case.


[10] Id. at 4-5.


[13] Id. at 5.

[14] Id.

[15] Id.

[16] Id. at 6.

[17] Id. at 14.
[18] See, supra, note 1 at 1081.

