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BEFORE THE JUDICIAL QUALIFICATIONS COMMISSION
STATE OF FLORIDA

INQUIRY CONCERNING JUDGE

PHILIP JAMES YACUCCI, NO. 16-496 SC 16-2178
_____/

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS OF THE HEARING PANEL, FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

Pursuant to the Florida Constitution Art. v, §12(a)(1), (b) and (c), and the Florida Judicial Qualifications Commission ("FJQC") Rules, the FJQC Hearing Panel hereby certifies these Findings of Fact, Conclusions of Law and Recommendations of Discipline to the Florida Supreme Court.

THE COURSE OF THE PROCEEDINGS

On December 8, 2016, the FJQC Investigative Panel filed a notice of formal charges against the Honorable Phillip Yacucci, a county judge for the 19th Judicial Circuit, St. Lucie County, Florida, alleging the following history of conflict between the judge and attorney Stephen Smith:

1. Judge Yacucci jailed Mr. Smith for 5 days in 2014, after finding him in contempt of court for misconduct during representation of a client in State v. Horatio Lewis;

2. Judge Yacucci filed a Florida Bar complaint against Mr. Smith for his conduct in the Lewis case;

3. A contentious election between the two, when Smith qualified to run for a county court seat against Judge Yacucci, including (a) an altercation between them outside a polling location; and (b) a

televised interview wherein Judge Yacucci made negative comments against Smith; and

4. Dueling civil suits between these parties (and others) which were ultimately settled.

The notice of formal charges alleged that, after recusing himself from handling cases in which Mr. Smith was attorney of record for approximately 2 ½ years, Judge Yacucci began denying such motions in September 2016. Then, without request from the circuit court (which was sitting as an appellate tribunal on a petition for prohibition), Judge Yacucci filed "Responses" which documented, in detail, his numerous conflicts, and personal frustration with Mr. Smith. The notice asserted violations of Canons 1, 2A, 3B(8), 3B(9), and 3E(1), Code of Judicial Conduct.

Judge Yacucci answered, admitting most of the underlying facts, but denying Canon violations, urging that his actions were part of "more important larger issues" involving Mr. Smith and his employer the Ticket Clinic. (Yacucci Response to Formal Charges, p.7). Judge Yacucci alleged that the Ticket Clinic and Mr. Smith were "engaged in a course of conduct that has forced Judges to recuse themselves resulting in what appears to be forum shopping," that he "reached out to multiple Judges and the JQC" for guidance, and "felt that waiting close to a total of 2 ½ years to stop recusing was totally within the case law and guidance he received." Id. at pp.2,5,8). The judge raised three affirmative defenses: (1) there was no "case or

controversy" when he denied one of the motions to recuse; (2) the effect of his denials was "de minimis" since his orders were only "temporary" and he took no action in those cases pending the outcome of a prohibition petition; and (3) his temporary denials were "consistent with the requirement of supporting the independent judiciary" from undue influence under Canon 1. (Respondent's Affirmative Defenses).

Judge Robert Morris chaired the FJQC Hearing Panel, which conducted a final hearing on May 1, 2017. Six commissioners were present during the hearing and deliberations. In addition to the Chair, the Hearing Panel included Alan Bookman, Esq., Eugene Pettis, Esq., Judge James Wolf (ad hoc), Nancy Mahon (lay member)(ad hoc) and Harry Duncanson (lay member).

Alexander Williams, Esq. represented the FJQC Investigative Panel. Robert J. Watson, Esq. and Jordan Shore, Esq. represented Judge Yacucci. Lauri Waldman Ross, Esq. served as counsel to the FJQC Hearing Panel.

FINDINGS OF FACT[1]

Phillip James Yacucci, Jr. was admitted to the Florida Bar in 1980. (T.90). He was elected to a county court judgeship for the 19th judicial circuit in 2002, following service as a prosecutor and the county's elected Public Defender, and private

[1] References are to the Hearing Transcript (T.), and the parties' exhibits admitted by stipulation (FJQC Ex.__; Resp. Ex.__), which include a timeline (FJQC Ex.6).

practice as an attorney specializing in criminal defense. (T.146-47).

Attorney Stephen Smith was admitted to the Florida Bar in 2002. (T.23). Mr. Smith served as a police office, a prosecutor and a private lawyer before joining his current employer "The Ticket Clinic" in 2009. Mr. Smith handled all of the Ticket Clinic's cases in the Treasure Coast (covering Martin, St. Lucie, Indian River and Okeechobee counties). (T.26-27).

In approximately November 2009, Mr. Smith showed up late to a hearing, and was held in contempt by Judge Yacucci (a ruling the judge subsequently vacated). (T.29-32; 65-66).

In January 2014, Judge Yacucci jailed Mr. Smith for five days after finding him in direct criminal contempt in State v. Horatio Lewis, St. Lucie County Case No: 2013 CT00972 ("Lewis"). (T.32-33; 92-94).[2] Judge Yacucci also announced, during sentencing, that he had "lost confidence" in Smith as an attorney. (T.33-34; 93). Mr. Smith served the entire five days in jail for hotly disputed reasons, relevant only to the animosity between these parties. According to Mr. Smith, an attorney sought his release by Judge Yacucci the next day, was told that it was "not scheduled" and directed to the judge's judicial assistant to obtain a hearing, only to learn that the judge's judicial assistant was on vacation. (T.32-33). According to Judge Yacucci, the attorney tried to appear before him without the requisite

[2] This conviction was affirmed on appeal. (T.66-67).

paperwork at a time when they weren't in court; his judicial assistant was present and available. (T.93-95). Whatever the reason, Mr. Smith remained in jail and his arguments for release on bond went unheard. (T.33).

Judge Yacucci also filed a Bar complaint against attorney Smith over the Lewis case. This complaint was resolved through pretrial diversion without the imposition of discipline. (T.25-26).

Beginning in early 2014, Attorney Smith filed motions to disqualify Judge Yacucci based, in part, on Judge Yacucci's comments about him in his contempt finding, and conviction in Lewis. Judge Yacucci granted those motions. (T.95-96).

In May 2014, attorney Smith qualified to run against Judge Yacucci for a county court seat **via** election. (T.35; 96). By all accounts, this judicial election was highly contentious and adversarial. (T.36-37; 98-99; 149-52; 213-14; FJQC Ex.9; Resp. Exs.2&3). Judge Yacucci sued Smith and an electioneering communication organization ("ECO") alleging defamation, invasion of privacy and intentional infliction of emotional distress, obtained a preliminary injunction against the ECO, and posted a $10,000 bond with personal funds to secure the injunction. (T.37-38; 96-98; 264-65; 271-72). The Fourth District subsequently reversed the temporary injunction finding that (1) "Yacucci offered no evidence to support [it];" (2) the injunction lacked factual findings or the necessary precision regarding what was restrained; (3) Yacucci had an adequate remedy at law; and (4) the injunction was

issued in the last three weeks of a political campaign and was a "classic example of a prior restraint on freedom of speech triggering First Amendment concerns." Concerned Citizens for Judicial Fairness, Inc. v. Yacucci, 162 So.3d 68, 72-73 (Fla. 4th DCA 2014). Judge Yacucci forfeited the $10,000.00 injunction bond as a result. (T. 96-98; 271-73).

The night before the election, the parties were also involved in an altercation outside a polling place where voting was ongoing. (T.38-39; 98-99). Smith claimed the Judge verbally and physically assaulted him; Judge Yacucci claimed that Smith made a sexual innuendo to his wife, and he responded with heated words (including profanity) but there was no physical assault. (T.98-100; FJQC Ex.9). This altercation led to a separate suit by Smith against Judge Yacucci for assault, battery and defamation. (T. 37; 265-66).

During a televised interview in his courtroom a few hours after the altercation, Judge Yacucci stated that:

> [Mr. Smith] should not be a lawyer. He should not be in a courtroom. Mr. Smith is truly a disgrace as a judicial candidate and really as a human being. (T.101-03; FJQC Ex.9).

In December 2014, after Judge Yacucci won re-election, the FJQC Investigative Panel required his appearance (on January 30, 2015) to discuss his behavior during the 2014 election, involvement in the polling place altercation and the disparaging remarks made about his opponent during the televised interview.

(FJQC Ex.3). While there is no transcript of this hearing (T. 183), Judge Yacucci apparently informed the Investigative Panel that he would be recusing himself on Mr. Smith's cases. (T.106; FJQC Ex.7, pp.16-17; 20-21, 46-47).

From 2014 on (a period of approximately 2 ½ years), Judge Yacucci granted all motions to disqualify filed by Mr. Smith. (T.106-07).

In September 2016, Mr. Smith filed a notice of appearance and motion to disqualify Judge Yacucci in two separate cases involving the same client. In State v. Harracksingh, 2016-CT-1762, Judge Yacucci granted the motion. In State v. Harracksingh, 2015-CT-2111, Judge Yacucci denied the identical motion. (T.40-43, FJQC Ex.6, paras.104). The reason offered by the Judge, initially, was that Case No. 2015-CT-2111 involved violation of an existing term of probation, and the motion was premature because the defendant had yet to be arrested (a point on which the parties agreed). (T.41; 56-57; 71; 81; 107). However, there was a great deal more. (T.126).

St. Lucie County had four existing county court judges, only two to three of whom were hearing criminal cases at any given time. (T.58-64). Judge Yacucci blamed Smith's employer, the Ticket Clinic, for funding the ECO which supported Smith's judicial campaign, believing the Ticket Clinic orchestrated the campaign in an ongoing effort to "cherry pick" judges. (T.64-65; 102-03; 109-10). He invoked Canon 1 of the Code of Judicial Conduct, requiring a judge to uphold judicial

integrity and independence, researched the limited legal issue of whether recusal for cases involving an election opponent expired after a finite period of time, and consulted colleagues on the same legal issue. (T. 127-28; 193-94; 205-06). Judge Yacucci decided that Mr. Smith "was simply a conduit of the Ticket Clinic," (T.172) that 2 ½ years of disqualification was enough, and he was no longer going to sign off on Smith's recusal motions. (T.126-28; 178).

On October 5, 2016, Mr. Smith and his law firm petitioned for a writ or prohibition disqualifying Judge Yacucci from presiding over the Harracksingh violation of probation. Harracksingh v. State, St. Lucie County Case No. 2016-CA1783. (FJQC Exs.5&6).

On October 14, 2016, Judge Yacucci, unsolicited, filed a pleading in the circuit court appellate division styled as the "Court's Response to Petitioner's Petition for Writ of Prohibition." Judge Yacucci's "response" documented, in great detail, the conflicts between Judge Yacucci and Mr. Smith, including: (1) the Lewis contempt proceedings; (2) the Florida Bar complaint; (3) the judicial campaign; (4) the litigation between them; and (5) the Judge's accusation that the Ticket Clinic was engaged in "blatant forum (Judge) shopping" by funding other judicial campaigns. (FJQC Ex.5).

Judge Yacucci thereafter, denied additional motions to disqualify filed by attorney Smith; the parties in these cases joined the prohibition petition. (FJQC

Exs.5&6). State v. Gallo, 2016-CT-1191 (October 14, 2016 order); State v. Megnruth, 2016-CT-1827 (October 14, 2016 order); State v. Leonard, 2016-CT-1901 (November 1, 2016 order); State v. Inicio, 2016-CT-1904 (November 4, 2016 order). Some of these motions were denied despite their legal sufficiency because Judge Yacucci wanted an appellate ruling and was "not going to recuse anymore" until he secured it. (T.127-28; 132-33).

On October 26, 2016, Judge Yacucci reached out to the FJQC for guidance and spoke to assistant general counsel Alexander Williams. (FJQC Ex.6, ¶15). Judge Yacucci told Mr. Williams that attorney Smith hadn't apologized for his conduct after affirmance of his contempt conviction. They discussed the absence of a *per se* deadline for recusal, and Judge Yacucci's concern that other judges would have to handle these cases. Judge Yacucci acknowledged "I should probably recuse." At no time did Williams suggest that the judge remain on Smith's cases; he responded only that recusal was the safer course, and that a permanent conflict list might be appropriate. (T. 130-32).

After this discussion, Judge Yacucci denied recusal motions in Leonard and Inicio. He explained his action on the basis that he had still not reached a "final decision" regarding recusal when he spoke to Williams. (T. 132-33, 188). In addition, Judge Yacucci filed a second unsolicited pleading with the circuit court appellate division handling the prohibition petition. (T.129-33; FJQC Exs.5 & 7,

paras.19, 20 & 22). This pleading was styled "Judge Yacucci's Response to Petitioner's Reply and Judge Yacucci's Request for Sanctions and Rule to Show Cause Against counsel Louis Arslanian," took issue with the facts set forth in a reply (filed by appellate counsel on October 18, 2016) and sought sanctions against such counsel. (T. 188; FJQC Ex.5).

Judge Yacucci's second response attached exhibits and punctuated earlier points regarding Smith's contempt conviction, Bar complaint, and the funding of judicial campaigns by the Ticket Clinic. Judge Yacucci further accused appellate counsel of "intentionally seeking to mislead the court," and specifically requested that "Mr. Arslanian be held accountable for his actions by this Court, as Stephen Smith was held accountable by the undersigned for his false representation in State v. Horatio Lewis, 13-972-CT." (FJQC Ex.5). Judge Yacucci's second response urged:

> It is important, I believe, to remember how we have arrived at this place.
>
> Attorney Smith intentionally lied to the undersigned Judge Yacucci in pre-trial and trial matters even as the undersigned was going beyond the usual to protect Smith's client.
>
> Smith was caught, held in Direct Criminal Contempt, and sentenced to 5 days jail.
>
> Smiths' appeal was denied by an Appellate Panel and his conviction and sentence affirmed PCA.

Had Smith simply apologized for his actions and accepted responsibility, his apology would have been accepted and we would not be here today.

There is certainly none among us who has not made a mistake.

But Smith did not do that.

Instead, just as Smith's had challenged incumbent County Judge Mike Carr two years prior in Collier County (thought Smith resided and was homesteaded in Palm Beach County), he now challenged the undersigned Judge Yacucci in St. Lucie County (again Smith resided and was homesteaded in Palm Beach County).

In Collier County Smith was defeated by the voters nearly 66%-34%.

In Saint Lucie County, Smith was defeated by the voters nearly 59%-41%.

The Ticket Clinic, through their thinly veiled ECO's funneled nearly a quarter of a million dollars combined in these campaigns of Smith's.

Mailers, web sites, handouts, t.v. ads, all of which would clearly be prohibited and lead to removal if tied to any incumbent Judge in a Judicial Campaign by the JQC, were utilized by Smith's Ticket Clinic employers.

The ECO's were even so sloppy they utilized the same mailing addresses whish matched the address on Smith's own campaign literature.

It is clear to the undersigned that the Ticket Clinic, utilizing their employee Smith, has embarked in behavior seeking to force Judges to recuse/disqualify themselves and also to attempt to intimidate Judges with veiled threats

> of future Judicial challenge against a well-funded, reckless opponent.
>
> The undersigned realizes that the JQC has no jurisdiction over candidates who act improperly, but who are defeated. It must be the Florida Bar who in the future accepts the required responsibility to enforce the same rules and cannons on candidates as are imposed by the JQC on incumbent Judges as is mandated in the memorandum of the Florida Bar of September 10, 2013.[copy attached]

* * *

This pleading was signed and submitted by "County Judge Phillip J. Yacucci, Jr." (FJQC Ex. 5).

On November 9, 2016, the FJQC Investigative Panel served Judge Yacucci with a notice it was investigating the matters which led to the formal charges. (FJQC Ex. 1). When he received this notice, Judge Yacucci was finally convinced of the need to recuse himself in Mr. Smith's cases. (T.159-60).

On November 16, 2016, the Circuit Court granted the Writ of Prohibition, disqualifying Judge Yacucci from hearing the subject cases. The Circuit Court added that "At no time after the filing of the Petition for Writ of Prohibition had the Circuit Court requested any reply or response from any party" and it was "not giving consideration for any of the factual assertions in any of the unrequested responses/replies." It denied requests for judicial action in any responses "if any party believes they were legally submitted motions…" (FJQC Ex. 5). The Writ was emailed to Judge Yacucci at 9:11 a.m. (FJQC Ex.6, ¶27).

Judge Yacucci was in the process of preparing, and issued a *sua sponte* order of recusal in all of the pending cases hand-dated November 15, 2016, but it was docketed November 16, 2016, at 11:19 a.m. after the Writ issued. (FJQC Ex. 6, ¶26-28).

At his appearance before the FJQC Investigative Panel on December 2016, Judge Yacucci maintained that he had acted appropriately during the polling place altercation, and in responding to the prohibition petition. (FJQC Ex. 7, pp. 10-11, 31-32). He denied "holding any hard feelings against attorney Smith," (FJQC Ex. 7, pp. 10, 42) or "throwing mud" on Mr. Smith by filing pleadings in the appellate court, stating "That wasn't the intent. The intent was so that an appellate judge would understand the whole situation that had started a long time ago," i.e. stopping the Ticket Clinic from intimidating judges and running against judges. (Id. at pp. 37-38, 42).

During the final hearing Judge Yacucci was questioned about all of his actions. With respect to his televised statements about Mr. Smith, Judge Yacucci testified:

> Q. You would agree that those comments meet the definition of disparaging, disrespectful?
> A. Truthful.
> Q. Okay. Your opinion. But certainly those comments about Mr. Smith being a disgrace as a human being and a disgrace as a judicial candidate, those are your opinion that you're sharing.

> A. It was based on a sexual innuendo to my wife. It was based on all that I had dealt with through months of that campaign and him hiding behind the ECO when they were doing just vile and despicable things through their mailers, through their television ads, through every media, TV and radio. So, yes.
> Q. "Yes," what?
> A. Yes, that's how I felt about Mr. Smith, because he was certainly aware of and participating in those actions that ECO was acting on his behalf funded solely and entirely by the Ticket Clinic. (T.102-03).

Judge Yacucci acknowledged he still held those feelings about Mr. Smith, who "will never be held in high regard by me based on what he did**…**," but blamed Smith's actions on "the culture of the Ticket Clinic," and the persons funding Smith's judicial campaign. (T.103-04).

Judge Yacucci also read the petition for prohibition and filed two responses, directly rebutting allegations made against him. (T.119-25; 134-37). His rationale was that "there was an impropriety being done when counsel was filing this nonsense," i.e. the petition for prohibition, which needed to be brought to the appellate judge's attention. (FJQC Ex.7, p.12; T.160). He cited his broader obligations as an attorney to inform the "fact finder" of false statements about which he was personally knowledgeable. (T.162).

All of Judge Yacucci's research, discussion and analysis focused on a finite time when he would no longer be required to recuse himself in cases involving Mr. Smith, rather than the reasonable perception of Mr. Smith's clients that he could

never be fair in cases involving the two because of their extensive personal history, contentious, adversarial relationship, and the judge's firmly-held, publicly expressed opinions. (T.170-77; 193-94). Judge Yacucci ignored legal authority, the advice he received, and omitted critical information when he consulted others. (T.187, 189, 194-95). The following reflects his thought process regarding recusal:

> [Hearing Panel Member] Pettis: I just want to ask this from a common sensical layperson standpoint.
>
> If the facts that you thought warranted a recusal in the first instance remained in existence for an extended period of time, three years, four years, five years, these facts still remain in existence, don't you think fairness would warrant [you] to remain in the recusal mode since the facts that got you there are still there?
>
> [The judge]: What I came to believe is that Mr. Smith was simply a conduit of the Ticket Clinic**…**
>
> Mr. Pettis: The fact that you have the opinion, don't you think that in and of itself justifies your recusal?
>
> [The judge]: No, sir, because it's the same thing with anyone that tries to influence the system. At some point, we wouldn't do any cases. And I have never had a problem with Mr. Smith's clients in – in – or with his – the way he represented his client other than the time that he was held in contempt, and so if Mr. Gold came up at that point or Mr. Ted Hollander, then yeah, I think that would be a continuing problem.
>
> Mr. Smith – yeah, I understand your point. But, like I said, I really think it was the Ticket Clinic's decision to go after judges that what is – what that was all about. (T.173-74).

At no point did Judge Yacucci consider recusal from the vantage point of Mr. Smith's clients. (T.177-79; FJQC Ex.7, pp.12-21).

Judge Yacucci called several witnesses in his defense, including character witnesses. Judge Mike Carr, a Collier County judge, beat back a challenge from the same attorney in a hotly contested election financially staked by the Ticket Clinic.

Judge Yacucci reached out to Judge Carr for his experience with motions to recuse filed by Ticket Clinic lawyers. (T.200-06). Judge Carr informed Judge Yacucci that he waited at least two years before handling such cases. (T.206; 208-09). Judge Carr was unaware of or did not discuss the details of Judge Yacucci's election with him, deeming this "insensitive." (T.213). He watched Judge Yacucci's televised interview, and agreed that "[I]f you say that you've got to be disqualified for a while, because it gives somebody grounds**…**" (T.215).

Garrison Dundas, the attorney who represented Yacucci in the civil suits involving Smith and the EOC, offered support for Judge Yacucci's claim that false, misleading or inaccurate statements may have been made in the prohibition pleadings. (T.267-68; 272-74).

Judge Yacucci also offered a plethora of exhibits about the nature and funding of Smith's judicial campaigns, and the litigation between the parties (including the ECO). (Resp. Exs.2-11).

Bruce Colton, the State Attorney for the 19th judicial circuit, was the chief assistant when attorney Yacucci began working at the state attorney's office straight out of law school. Colton described Yacucci as a quick learner, with a good

reputation, who rose quickly through the ranks. They maintained a collegial, respectful relationship throughout Yacucci's term as Public Defender, and private practice. (T.219-22). Colton testified that Yacucci had a good reputation as a lawyer, and subsequently, as a judge, for efficiency, work ethic and integrity. (T.222-23).

Stephen Levin, a circuit court judge for the 19th judicial circuit, served as the circuit's chief judge from 2009 through 2015. (T.230-31). He attested to Judge Yacucci's reputation for diligence and efficiency. (T.233). Judge Yacucci sought his advice and they generally discussed a two year period for recusal (found in no rule) which seemed standard. (T.239; 242, 245-46, 250). He was not shown the responses filed by Judge Yacucci in the prohibition proceedings, and knew little about the underlying facts, but stated he would not deny or respond to a legally sufficient recusal motion. (T.240-42; 252-53).

Ken Mascara, the St. Lucie County Sheriff, a good friend of Judge Yacucci's, described him as the hardest working judge in St. Lucie County, with the highest ethical standards. (T.257-60).

CONCLUSIONS OF LAW

Judge Yacucci was charged with violating Florida's Code of Judicial Conduct, Canons 1, 2A, 3B(3), 3B(8), 3B(9), and 3E(1).

Canon 1 of the Code of Judicial Conduct provides:

> **A Judge Shall Uphold the Integrity and Independence of the Judiciary**

> 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 to 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.

Canon 2 of the Code of Judicial Conduct provides, in pertinent part:

> **A Judge Shall Avoid Impropriety and the Appearance of Impropriety in all of the Judge's Activities**
>
> * * *
>
> B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others**…**

Canon 3 of the Code of Judicial Conduct provides, in pertinent part:

> **A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently**
>
> * * *
>
> **B. Adjudicative Responsibilities**
>
> * * *
>
> (8) A judge shall dispose of all judicial matters promptly, efficiently, and fairly.
>
> (9) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or

> impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing**…**
>
> *** * ***
>
> **E. Disqualification**
>
> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) the judge has personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceedings.

Judge Yacucci clearly violated all of these provisions of the Code by his conduct.

> "Every litigant, including the state in criminal cases, is entitled to nothing less than the cold neutrality of an impartial judge." It is the duty of courts to scrupulously guard this right of the litigant and to refrain from attempting to exercise jurisdiction in any matter where his qualification to do so is seriously brought into question. The exercise of any other policy tends to discredit and place the judiciary in a compromising attitude which is bad for the administration of justice.

State ex re. Mickle v. Rowe, 100 Fla. 1382, 131 So. 331, 332 (Fla. 1930); Dickenson v. Parks, 104 Fla. 577, 140 So. 459, 462 (Fla. 1932). "[T]he question of disqualification focuses on those matters from which a litigant might reasonably question the judge's impartiality**…**" MacKenzie v. Super Kids Bargain Store, Inc., 565 So.2d 1332, 1334 (Fla. 1990). "It is not a question of how the judge feels; it is

a question of what feeling resides in the affiant's mind and the basis for such feeling." Livingston v. State, 441 So.2d 1083, 1086 (Fla. 1984).

This was not a close case. Judge Yacucci jailed Mr. Smith for contempt, and publicly announced he'd "lost confidence" in him as a lawyer even before their contentious election. The election spawned a highly publicized altercation, dueling lawsuits, and the loss of the judge's personal funds. It is hard to conceive a situation more likely to create a reasonable fear of partiality and bias on the part of a litigant than the long-standing, personal and professional disputes between these parties. Id. at 1087.

In "responses" filed in the prohibition proceeding, the judge attempted to dispute the charges and assumed the position of an adversary to Mr. Smith's clients. See e.g. Ellis v. Henning, 678 So.2d 825, 827 (Fla 4th DCA 1996); Fabber v. Wessel, 604 So.2d 533, 534 (Fla. 4th DCA 1992), disapproved on other grounds, Enterprise Leasing Co. v. Jones, 789 So.2d 964 (Fla. 2001); see also Valltos v. State, 707 So.2d 343, 344-45 (Fla. 2nd DCA 1997). State ex rel. Allen v. Testa, 414 So.2d 38 (Fla. 3d DCA 1982). The responses were riddled with character assassination, and sought personal vindication by having the petitioner's appellate counsel sanctioned and held in contempt.

Judge Yacucci testified that the polling place altercation was provoked when Mr. Smith directed sexual innuendo towards his wife. "It is only natural for a

husband to rise to the defense of his wife," but here Judge Yacucci was "not merely a husband but a judge." See e.g. Inquiry Concerning Dale C. Cohen, 99 So.3d 926, 934 (Fla. 2012). Given the opinions held by Judge Yacucci about Smith and his employer, and the long-standing documented history of animosity between them, his recusal in their cases was mandated. See Livingston v. State, 441 So.2d at 1086; Holt v. Sheehan, 122 So.3d 970, 973 (Fla. 2nd DCA 2013)(Canon 3E(1)(a) compels recusal in cases of personal prejudice). Judge Yacucci also improperly used the prestige of his office to disparage Smith in a televised interview, and in unsolicited responses, which attempted to taint the appellate court's perception of Mr. Smith and his employer to the detriment of their clients.

The responses filed in the prohibition proceedings, Judge Yacucci's testimony before two separate panels of the FJQC (Investigative and Hearing Panels) and his responses to questions, reveal a litany of grievances held against Mr. Smith and his employer, which consume the judge to this day. These include Smith's failure to apologize after he was held in contempt, Smith's elusion of discipline by the Florida Bar, the well-funded judicial campaign run against the judge by Smith and his employer, "reckless" statements made against him during the campaign, and the judge's dissatisfaction with the Florida Bar's treatment of the issues.

Judge Yacucci's televised comments that Mr. Smith was "a disgrace as a judicial candidate**…** and as a human being," who "should not be a lawyer" or "in a

courtroom" were highly inappropriate, warranting discipline if this were just a stand alone charge. See Inquiry Concerning Contini, 205 So.3d 1281, 1283 (Fla. 2016); Edwards-Freeman v. State, 138 So.3d 507 (Fla. 4th DCA 2014)("A judge's gratuitous remarks about counsel or his character undermines respect for the judiciary**…** and leaves an impression that the judge is not fair and impartial."). They were not pled that way, but just as part of the overall facts mandating the judge's recusal in all of Smith's cases.

Judge Yacucci attempted to justify his conduct by resort to the "larger issues" of judicial independence, and its ostensible subversion by the Ticket Clinic. (T.103-04); 107-110; 149-52; 172-73). Canon 1 requires **both** judicial integrity and judicial independence. The latter "does not offer judges the power to do as they please." Inquiry Concerning Eriksson, 36 So.3d 580, 588 (Fla. 2010).

The Florida Bar has jurisdiction to investigate and discipline lawyers for their conduct in court and during judicial campaigns. Judge Yacucci's dissatisfaction with the Florida Bar, and perceived disparity between judges and judicial candidates during a contentious election, did not justify personal efforts to punish Mr. Smith and his employer by other means, including improper comments about their character on television or in the appellate court.

A judge is "not a knight-errant, roaming at will in pursuit of his own ideal[s]**…**," Benjamin N. Cardozo, The Nature of the Judicial Process (1921), cited

in Inquiry Concerning Perry, 641 So.2d 366, 368-69 (Fla. 1994). Neither the alleged misconduct of others (Smith and the Ticket Clinic) nor the good motives of the judge (in preventing perceived forum shopping) excuse departure from the Canons. See Inquiry Concerning Barnes, 2 So.3d 166, 171-72 (Fla.2009)(discipline warranted where judge filed petition for writ of mandamus on behalf of defendants, who were likely to appear before him); In re Shea, 759 So.2d 631, 638-39 (Fla. 2000) (discipline warranted where judge abused his power, and attempted to justify his conduct as an action to improve the administration of justice in the Florida Keys and to improve access to mental health resources); In re Graham, 620 So.2d 1273, 1274-76 (Fla. 1993)(discipline warranted where judge abused his power, but attempted to justify his conduct as an effort to rid the county of perceived political favoritism and corruption).

RECOMMENDED DISCIPLINE

Judge Yacucci is an experienced lawyer and judge, who made what he perceived to be a valiant effort to rid St. Lucie County of attempts "to intimidate judges with veiled threats" of future judicial challenges. "His zealous pursuit of a pure society apparently clouded his ability to impartially adjudicate the matters before him. His motives are acceptable, but his methods are not." Inquiry Concerning Graham, 620 So.2d at 1275. In several cases involving disqualification motions and derogatory comments about counsel, the Florida Supreme Court has

approved a public reprimand, or a public reprimand plus conditions. See Inquiry Concerning Contini, 205 So.3d at 1281 (*ex parte* communications with public defender's office, failure to recuse in cases which effectively froze his division, and unwarranted derogatory comments about attorneys made in open court); Inquiry Concerning Cohen, 99 So.3d at 926 (*ex parte* communications and judge's use of disqualification proceedings as a forum to vindicate his spouse by challenging the credibility of a lawyer supporting her opponent for judicial office); Inquiry Concerning Aleman, 995 So.2d 395, 399-400 (Fla. 2008)(mistreating public defenders by forcing them to handwrite disqualification motions in short time period, and then threatening them with contempt); Inquiry Concerning Wood, 720 So.2d 506 (Fla. 1998)(rude and improper comments in multiple cases, refusal to recuse in cases based on his comments, and going beyond the legal sufficiency of a recusal motion to make derogatory comments about counsel who filed the motion).

This case is more serious than Contini and Cohen because of Judge Yacucci's experience, prior appearance before the FJQC Investigative Panel, and the absence of mitigation. Contini, 205 So.3d at 1286 ("Were it not for the mitigating circumstances and Judge Contini's full and complete cooperation with the JQC, the Court could have considered more severe sanctions."). Judge Yacucci appears to be a hard-working, conscientious judge in other respects, but had blinders on when it came to Mr. Smith and his employer.

Without minimizing the judge's conduct, the FJQC Hearing Panel recommends the following discipline:

(1) a public reprimand;

(2) a 30 day suspension without pay;

(3) a refresher course in judicial ethics to be completed within one year; and

(4) the cost of these proceedings.

All of the Hearing Panel's findings are supported by clear and convincing evidence. The vote of the Hearing Panel on guilt as well as the recommended discipline has been determined by an affirmative vote of at least two thirds of the six Hearing Panel Members, in compliance with Fla. Const. Art. v, §12(b); FJQC Rule 19.

Done and Ordered this 29th day of June, 2017.

By: /s/ Robert Morris

Honorable Robert Morris
FJQC HEARING PANEL CHAIR
Second District Court of Appeal
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I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using the Florida Courts E-Filing Portal and served via e-mail on this 29th day of June, 2017 to:

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