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IN THE SUPREME COURT OF FLORIDA

RE: INQUIRY CONCERNING A JUDGE NO. 16-496

RE: PHILIP JAMES YACUCCI, JR.

CASE NUMBER: SC16-2178

RECEIVED, 12/22/2016 03:13:26 PM, Clerk, Supreme Court

RESPONDENT, PHILIP JAMES YACUCCI'S RESPONSE TO FORMAL CHARGES

The Respondent, PHILIP JAMES YACUCCI, responds to formal charges and states:

Response to Para. 1. Admitted

Attorney Stephen Smith is employed by the Ticket Clinic. The Ticket Clinic appears to be an entrepreneurial legal services entity specializing in automobile traffic related offenses. Mr. Smith appeared before Judge Yacucci in the case of State v. Horatio Lewis in St. Lucie County case number 2013-972-CT.

Attorney Smith was held in direct criminal contempt for his material misrepresentation to the court regarding the existence of a evidential video tape, after Judge Yacucci had granted his pre-trial motions and fashioned a special jury instructed benefitting his client based on the misrepresentations of video evidence.

Attorney Smith was sentenced to five (5) days jail pursuant to FRC.P 3.220(n)(2).

Attorney Smith did file an appeal which was heard by an appellate panel at which time he was represented by Counsel.

Attorney Smith's appeal was denied and the sentence was upheld, PCA, by the appellate panel on June 24, 2015 in Circuit case 14-AP-1; County Court case 14-102-MM, rehearing denied on July 28, 2015.

Response to Para. 2. Admitted in Part; Denied in Part

Judge Yacucci did file a Florida Bar complaint regarding Attorney Stephen Smith's behavior. However, Counsel for the Florida Bar Ms. Carrie Constance Lee did call Judge Yacucci to inform him that Attorney Stephen Smith was made to complete an Ethics Course/class.

Response to Para. 3. Admitted in Part; Denied in Part

The facts as alleged in the Notice of Formal Charges are clarified below. The Ticket Clinic (and its employee Stephen Smith) have engaged in a course of conduct that has forced Judges to recuse themselves, resulting in what appears to be forum shopping.

In 2012, Attorney Stephen Smith was homesteaded as a resident of Palm Beach County and was employed by the Ticket Clinic when he choose to challenge incumbent County Judge Mike Carr in a Judicial campaign in Collier County.

Attorney Stephen Smith's Ticket Clinic employers established a ECO named Florida Judicial Watch, Inc. With an address of 2010 NW Miami Court, Miami, FL 33127.

The Chairperson, treasurer and registered agent for Florida Judicial Watch, Inc. was Caroline Zelman.

A total of $91,170.00 was contributed to Florida Judicial Watch, Inc. All by Ted Hollander and Associates (Ticket Clinic) to utilize against Judge Carr.

Attorney Stephen Smith lost the election in Collier County against Judge Carr 66% - 34%.

However, Judge Carr now was required to recuse himself from Ticket Clinic cases.

Attorney Stephen Smith two years later was still residing and homesteaded in Palm Beach County.

Attorney Stephen Smith then paid the filing fee to challenge incumbent County Judge Philip J. Yacucci, Jr. In St. Lucie County.

Attorney Stephen Smith's employers at the Ticket Clinic did again utilize the same formula used in Collier County by setting up an ECO, this time calling it Concerned Citizens for Judicial Fairness, Inc.

The ECO again utilized the same chair person, treasurer and registered agent, Caroline Zelman.

The ECO utilized the same address as the prior ECO in the Collier County challenge of Judge Carr, 2010 NW Miami Court, Miami, Fl 33127.

Attorney Stephen Smith's employer at the Ticket Clinic, Ted Hollander and Associates exclusively funded the ECO, this time with contributions totaling $144,300.00 and expenditures totaling $133,785.00.

The ECOs in both above named campaigns utilized the same mailing address which matched the address on Smith's own campaign literature making the connection obvious.

During the campaign against Judge Yacucci, the Ticket Clinic, through their thinly veiled ECO employed web sites, mailers, handouts, and television ads which made false claims. All of these false and inflammatory claims would clearly be prohibited if utilized by any incumbent Judge.

An action was filed, including moving for the issuance of an injunction, to force the Ticket Clinic to cease disseminating vile material, much of which dealt with unfounded and false statements made during a divorce/custody action 26 years prior.

A hearing was held before the Honorable George A. Shahood, acting Circuit Court Judge and retired 4th DCA Judge who did find sufficient reason to grant the preliminary injunction.

Judge Yacucci was required by Judge Shahood and did post a required $10,000.00 civil bond in case number 56-2014-CA-001711-A.

The 4th DCA did overturn Judge Shahood's decision and Judge Yacucci does agree that it was a correct ruling in that voters should be allowed to hear any allegations, no matter how false or vile, even in a judicial race (Florida Bar must ultimately be responsible for oversight and sanctions against non-incumbent candidates).

Judge Yacucci won re-election overwhelmingly, yet now, like Judge Carr, was required to recuse for a period of time the duration of which is unclear under the Court Rules, Canons of Conduct, Statutes and case law.

Additional post elections suits were filed but both sides entered into a joint stipulation for voluntary dismissal with prejudice in case no. 56-2014-CA-001711-A.

A joint stipulation for voluntary dismissal with prejudice was also entered in case 20147-CA-002139 and a General Release was signed by all parties clearly stating that is shall not be used or deemed to be an admission of liability on the part of any party.

Judge Yacucci did agree not to contest the $10,000.00 civil bond as appropriate attorney fees in the preliminary injunction matter that was overturned.

Response to Para. 4. <u>Admitted in Part</u>

Judge Yacucci did appear voluntarily and without counsel in early 2015 to explain and answer questions concerning the campaign.

Judge Yacucci did explain the nature and extent of the Smith/Ticket Clinic conduct including inappropriate remarks to Judge Yacucci's wife at a voting location.

Response to Para. 5. Admitted

After the election in August 2014, Judge Yacucci reached out to multiple sources as to appropriate time for recusal after a contested election.

Judge Yacucci reached out to several Judges for guidance including the Chief Judge, Administrative Judge, and other Judges who had been in contested races and ironically, contacted the JQC for guidance. Additionally, Judge Yacucci researched case law both in Florida and other States.

The conclusion was that there is no "set in stone" amount of time required for recusal and that one to two years was the usual.

As a result, Judge Yacucci did sign boilerplate motions for recusal for two full years after the August 2014 election and had already been recusing for a number of months prior to the election.

Response to Para. 6. Admitted in Part

Judge Yacucci did deny the motion to disqualify in September 2016 in State v. Clive Harracksingh.

Judge Yacucci felt that waiting close to a total of 2 ½ years to stop recusing was totally within the case law and guidance he had received.

Additionally, "Harracksingh" involved a VOP in which he had been represented by Assistant Public Defender Sasha Dadan when he initially entered his plea and received a sentence including probation.

The case law is clear that a Defendant who enters a plea before a Judge may not seek to have said Judge disqualified by retaining a subsequent counsel who has a possible conflict with the Judge. Pendelton v. State, 933 So. 2d 1291 (4DCA, 2006)

Response to Paras. 7-10. Admitted in Part, and Denied in Part

Stephen Smith did not petition for a Writ of Prohibition as alleged in the Notice of Formal Charges. .

A Writ was filed not by Smith but by petitioner Clive Harracksingh through Counsel Louis Arslanian, 5800 Sheridan Street, Hollywood, FL 33021.

Judge Yacucci did submit two responses to the Writ filed by Attorney Arslanian.

In both responses Judge Yacucci pointed out that the Writ and subsequent response filed by Ticket Clinic Attorney Arslanian were filled with inaccuracies and misrepresentations.

Judge Yacucci's response was detailed, accurate and verified.

Judge Yacucci's point in the response to the Writ of Prohibition are the same now as they were then.

It is improper for any law firm to intentionally create a conflict for the purpose of forcing a Judge to forever recuse/disqualify and in effect cherry-pick which Judge to appear before in selected counties.

It is even more improper to set up straw man ECOs which are solely funded by the firm, and whose sole purpose is to utilize large amounts of money to utilize multiple media outlets in an effort to smear a sitting Judge's reputation.

It is further noted that during the pendency of the Writ of Prohibition, Judge Yacucci again reached out to his Chief Judge and Administrative Judge, and again, even reached our to the JQC telephonically.

Judge Yacucci did deny other motions to recuse on Smith's cases during the pendency of the Writ as he awaited a ruling by the Appellate Court, which would then, of course, be followed whichever way the issue was decided by the higher authority.

At no time did Judge Yacucci force any matter to hearing prior to resolution of the pending Writ.

Finally, the statement as alleged in the Notice of Formal Charges as to lack of an apology by Smith was simply more of an afterthought at the end of a detailed response by Judge Yacucci and should have been received in that context.

Response to Paras. 11 and 12. Admitted in Part, Denied in Part

Judge Yacucci did receive a notice of investigation pursuant to Rule 6(b).

Judge Yacucci chose to attend and testify before the investigative panel and did appear without counsel, chose to be sworn, and did answer all questions.

Again, the statement in paragraph 11 of the Notice of Formal Charges alleging Judge Yacucci did not think disqualification was necessary because he did not hold any ill feelings toward Mr. Smith was only part of the more important larger issues detailed by Judge Yacucci before the panel.

This included history and actions of the Ticket Clinic, its behavior during the campaign, the real purpose of running against selected Judges and strategy of utilizing ECOs which clearly conduct improper activity in a judicial campaign pursuant to the Florida Bar rules as set forth in a memo of September 10, 2013, from John T. Berry, Director, Lawyer regulator, to John F. Harkness, Jr., Executive Director and also the Florida Bar v. Renke, 933 So 2d 482 (Fla. 2006).

Finally, as to the allegation in paragraph 12 of the Notice of Formal Charges, is is stated that Judge Yacucci acknowledged in [Mr. Leonard's] case he had reason to believe he could not be fair after the Writ was filed. Again, this must be viewed in context of the questions he was asked. Judge Yacucci simply agreed that reading the complaint, without more, could possibly create a doubt. That is the whole point. If a contrived/improper reason to have a Judge recuse is

allowed, the perpetrating lawfirm/lawyer can always use it to justify recusal even if a client may not have any idea about the situation.

CONCLUSION AND AFFIRMATIVE DEFENSES

The fair determination of the issues here requires the balancing of the risk that a sitting Judge, elected by his jurisdiction, with a negative history with a lawyer practicing in his jurisdiction will use that history to punish the lawyer's client against the risk that lawyers committing contemptuous acts (confirmed on appellate review), then participating in unethical political practices, may then use the inevitable responses to those acts as a basis for unlimited recusal, and therefore forum shopping. Judge Yacucci took no substantive action on the matters under review in the Writ of Prohibition while awaiting determination by the court of the recusal action. This JQC investigation and ultimate formal complaint changed the substance of the recusal issue and, in effect, decided the issue.

As explained to the investigatory panel, Judge Yacucci easily could have simply signed boilerplate motions to recuse/disqualify forever and thus decreased his own workload.

Judge Yacucci explained he felt an obligation to follow the law and to his obligation and oath as a Judge.

He explained he felt a duty to the next Judge in whatever county who will inevitably be targeted in a future election.

He reached out to multiple Judges and the JQC and he explained that at least one other Ticket Clinic Attorney appeared before him in the last year to handle a case giving the impression that there would no longer be a conflict, and he made every effort to follow the case law.

Judge Yacucci never claimed to the Investigative Panel that his decision to stop disqualifying after nearly 2 ½ years was absolutely correct, he merely awaited guidance from the Writ of Prohibition court which would have determined the issue without the interference and complications of this pending JQC investigation and action. What he did was inform them of his opinion that he acted well within his authority after researching the matter and going beyond the norm by reaching

out to other Judges for guidance. Like all trial judges, he well understands that he is subject to review.

He was more that willing to follow the eventual decision by the appropriate appellate Court, whatever that decision might be.

Inasmuch as no violation of the Canons of Ethics was committed by Judge Yacucci and he was more that willing to submit the recusal matter for judicial review, rather than presume it was a limitless condition, and this complaint should be dismissed or in the alternative resolved after fair hearing in his favor.

I hereby certify that a true and correct copy of the foregoing was delivered to Ashley N. Minton via E-Service this 19th day of December, 2016.

Respectfully Submitted,

s/Robert J. Watson
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