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IN THE SUPREME COURT
OF THE STATE OF FLORIDA

INQUIRY CONCERNING A JUDGE, SC16-2178
HON. PHILIP JAMES YACUCCI,
JQC No. 16-496
_____/

REPLY OF THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION TO JUDGE YACUCCI'S RESPONSE TO THIS COURT'S ORDER TO SHOW CAUSE

The Florida Judicial Qualifications Commission ("JQC" or "Commission") submits this Reply to Judge Yacucci's Response to this Court's Order to Show Cause, issued June 29, 2017.[1]

Introduction

Judge Yacucci accepts the Hearing Panel's findings of fact, conclusions of law, and recommendations, except for the recommendation that he be suspended from office for 30 days without pay. Judge Yacucci was charged with violating Canons 1, 2A, 3B(3), 3B(8), 3B(9), and E(1). The Hearing Panel found that Judge Yacucci "clearly violated" each of those Canons by his conduct. The Panel recommended a public reprimand, a 30-day suspension from office without pay, a refresher course in judicial ethics, and that he be ordered to pay the costs of the proceedings. Judge Yacucci argues that the suspension is excessive in this case,

[1] References to the Hearing Transcript are reflected as, (T.__), the parties' exhibits admitted by stipulation are described as, (FJQC Ex.__;Resp. Ex.__), and the Findings and Recommendations of the Hearing Panel as, (Findings __).

and that his good conduct as an attorney and as a judge suggests that suspension is not appropriate. A review of Judge Yacucci's behavior that necessitated this judicial disciplinary action, and, indeed, his response to the process, only serve to justify the imposition of at least a 30-day suspension from office.

Findings, Conclusions, & Recommendations

"[A] judge has an absolute obligation to 'act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.' Fla. Code of Jud. Conduct, Canon 2A. This provision is not an aspirational goal but a clear and unequivocal mandate." *In re Maxwell*, 944 So. 2d 974 (Fla. 2008). It requires only a cursory review of the facts in this inquiry to determine that Judge Yacucci's behavior denigrated the integrity of the judiciary and called his impartiality into question.

At the core of this matter is the contentious and adversarial relationship between Judge Yacucci and attorney Stephen Smith. Judge Yacucci has held Mr. Smith in contempt on two occasions in 2009 and in 2014. (T. 29-33). After the last episode, Mr. Smith qualified to run against Judge Yacucci in the 2014 general election. (T. 35; 96). Judge Yacucci and Mr. Smith agreed that the election was acrimonious, describing it as "contentious," and "combative," respectively. (T. 104; 35).

During the election Judge Yacucci sued Mr. Smith, and an Electioneering Communication Organization supporting Smith alleging defamation, perjury and intentional infliction of emotional distress, and seeking injunctive relief. (T. 37-38; 96-98; 264-65; 271-72). Although a preliminary temporary injunction was issued by the Circuit Court, the Fourth District reversed, and Judge Yacucci ultimately had to forfeit a $10,000.00 injunction bond as a result. (Findings at 5-6).

Also during the election there was an altercation between Judge Yacucci and Smith at a polling place. (T. 38-39; 98-99). Mr. Smith claimed that Judge Yacucci physically and verbally assaulted him. Judge Yacucci claimed that Mr. Smith made a sexual innuendo about Judge Yacucci's wife, and he responded angrily and with profanity. Law enforcement responded, but no criminal charges were made; however, Mr. Smith filed a civil suit for assault, battery, and defamation. (T. 37; 265-66). The competing lawsuits between Judge Yacucci and Mr. Smith were not settled until January of 2016. (Resp. Ex. 9-11).

After the altercation, Judge Yacucci gave a televised interview in his courtroom. In that interview he stated, "[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). During the trial before the JQC Hearing Panel, Judge Yaucci would deny that those comments were

disparaging, and disrespectful, referring, instead, to his televised statements as, "[T]ruthful." (T. 102-04).

Thereafter, and for a period of approximately two years, Judge Yacucci routinely granted Motions to Disqualify filed by Mr. Smith and his employer, the Ticket Clinic. (T. 127-28; 193-94; 205-06). Judge Yacucci decided that 2 1⁄2 years of disqualification was enough, and he determined to no longer sign off on Smith's recusal motions. (T.126-28; 178). Upon the denial, Mr. Smith and his firm filed a petition for a writ of prohibition to the Circuit Court. (FJQC Exs.5&6).

In response, Judge Yacucci filed an unsolicited "Court's Response to Petitioner's Petition for Writ of Prohibition" that set forth, in great detail, the conflicts between Judge Yacucci and Mr. Smith. (FJQC Ex.5). As more petitions were filed contesting Judge Yacucci's refusal to grant motions to disqualify, Judge Yacucci filed a second unsolicited pleading with the circuit court appellate division handling the prohibition petition. (T.129-33; FJQC Exs.5 & 7, 9 paras.19, 20 & 22). This pleading was seeking sanctions against appellate counsel, so that the attorney could "be held accountable for his actions by this Court, as Stephen Smith was held accountable by the undersigned…." The pleading continued advocating for the Florida Bar to hold opponents to incumbent judges accountable. (FJQC Ex.5).

Despite the foregoing, when Judge Yacucci appeared before the FJQC Investigative Panel in 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). His justification was that he was trying to stop the Ticket Clinic from intimidating judges and running against judges. (Id. at pp. 37-38, 42).

During the trial before the Hearing Panel, Judge Yacucci justified his unsolicited filings in response to the petition for writ of prohibition, as fulfilling his obligation to inform the fact finder. (FJQC Ex.7, p.12; T.160; 162).

The Hearing Panel found by clear and convincing evidence that Judge Yacucci improperly failed to recuse himself in cases involving Mr. Smith and the Ticket Clinic. "This was not a close case." (Findings at 20). The Hearing Panel further found that Judge Yacucci's filings "were riddled with character assassination, and sought personal vindication by having the petitioner's appellate counsel sanctioned and held in contempt." (Id.).

The Hearing Panel concluded, "[t]he 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." (Id. at 21) (e.s.). This is especially important given Judge Yacucci's Response to the Order to Show Cause.

> Judge Yacucci appreciates and respects Judge Morris's conclusion, but hopes that this Court will conclude that Judge Yacucci was motivated by more than personal objections to Mr. Smith and was at least concurrently and legitimately concerned about the independence of the judiciary which is challenged when political PACs are used to eliminate judges by use of unethical campaign tactics or blanket recusals.
>
> Judge Yacucci hopes that The Florida Bar and other Judicial oversight committees examine the facts of this case and in the future commit to enforcement of the already existing rules holding non-incumbent judicial candidates fully accountable for their campaign conduct, including those attorneys and firms who seek to clandestinely hide behind the shield of thinly-veiled ECOs.
>
> -Judge Yacucci's Response, page 4.

Argument

"[T]he object of disciplinary proceedings is not for the purpose of inflicting punishment, but rather to gauge a judge's fitness to serve as an impartial judicial officer." *In re McMillan*, 797 So.2d 560 (Fla. 571 (Fla. 2001) (citing *In re Kelly*, 238 So.2d 565, 569 (Fla. 1970)).

This Court has had many occasions to evaluate the actions of judges who justify their actions as serving the betterment of the judiciary. "Neither honest motives nor well-intentioned conduct, however, excuse less than strict compliance with the Code of Judicial Conduct. *In re Glickstein*, 620 So. 2d 1000 (Fla. 1993).

Nor does the alleged misconduct of others justify a departure from the Code of Conduct. *In re Graham*, 620 So.2d 1273 (Fla. 1993).

The use of a personal rationalization and justification for improper conduct has been reviewed and rejected in several cases. Judge McMillan sought to justify improper campaign tactics as a response to a conspiracy to prevent his election. *In re McMillan*, 797 So. 2d 560 (Fla. 2001).

The *McMillan* case most closely resembles Judge Yacucci's assertion that his actions were justified because he was seeking to engender "enforcement of the already existing rules holding non-incumbent judicial candidates fully accountable for their campaign conduct, including those attorneys and firms who seek to clandestinely hide behind the shield of thinly-veiled ECOs." (Judge Yacucci's Response at page 4).

Judge Graham's justification for his improper behavior as attempting to "rid the county of what the judge perceived as political favoritism and corruption," was similarly rejected. *In re Graham*, 620 So.2d 1273 (Fla. 1993).

Judge Shea justified his actions "as an attempt to improve the administration of justice in the Upper Keys and to improve access to mental health resources in the community. *In re Shea*, 759 So. 2d 631 (Fla. 2000).

Judge Barnes justified his filing of a Petition for a Writ of Mandamus by arguing that he was trying to force the public defender, the state Attorney, and his

fellow judges to compel compliance with his understanding of pretrial procedures. *In re Barnes*, 2 So. 3d 166 (Fla. 2009). This, too, was rejected.

In recommending discipline, the Hearing Panel compared the present case to that of Judge Contini. *In re Contini*, 205 So. 3d 1281 (Fla. 2016). In *Contini* there were mitigating factors cited by the Hearing Panel, and this Court including his relative lack of judicial experience. The Court also noted, "Judge Contini accepted full responsibility for his actions at every stage of these proceedings and, according to the JQC, he expressed sincere remorse." *Id.* This Court opined that "[w]ere it not for the mitigating factors, and Judge Contini's full and complete cooperation with the JQC, this Court could have considered more severe sanctions." *Id.*

In contrast, the Hearing Panel in the present case observed that, "[t]his case is more serious than *Contini* … because of Judge Yacucci's experience, prior appearance before the FJQC Investigative Panel, and the *absence of mitigation*." (emphasis supplied). (Findings at 24).

Judge Yacucci's Response to the Disciplinary Process

In judicial disciplinary cases, a review of the Respondent's approach to the disciplinary process can be constructive in determining the appropriate discipline. And since Judge Yacucci accepts the Hearing Panel's "findings, conclusions of law, and recommendations" (save for the unpaid suspension), he is not deprived of the opportunity to advance a legitimate defense.

As was demonstrated by Judge Yacucci's Response, he is unable or unwilling to recognize that his actions have eroded the public's confidence in the judiciary, and still fails to understand that when a judge maintains an animus toward an attorney or a law firm, that animus undermines the appearance of impartiality.

This inability to be aware of one's improper behavior has been a common theme in judicial disciplinary cases. See *In re Damron*, 487 So. 2d 1 (Fla. 1986) ("…he generally failed to acknowledge the seriousness and gravity of his admitted conduct; and with limited exceptions, demonstrated no contrition for his abuses."); *In re Graham*, 620 So. 2d 1273 (Fla. 1993) ("A judge who refuses to recognize his own transgressions does not deserve the authority or command the respect necessary to judge the transgressions of others. We are troubled by the fact that Graham shows no remorse and we can only presume that if this Court reprimanded him, he would continue to violate the precepts of the Code of Judicial Conduct."); *In re Turner*, 76 So. 3d 898 (Fla. 2011) ("Judge Turner evinced a failure to appreciate the impropriety of his actions at the time and even in retrospect failed to see that his advances were unwelcome."

Conclusion

Even after appearing before the Investigative Panel of the Commission regarding his televised remarks, he undertook to advance his agenda by attempting

to intervene in the petition process. Even after the final hearing, Judge Yacucci is still fomenting for action against "non-incumbent judicial candidates." The recommendation of discipline was made without the benefit of Judge Yacucci's Response, and given the tone and tenor of that Response, the recommended suspension is all the more appropriate, reasonable, and necessary.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply of the Florida Judicial Qualification's Commission is being furnished by electronic service this 8th day of August, 2017 to:

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