IN THE SUPREME COURT OF FLORIDA

INQUIRY CONCERNING A JUDGE NO. 02-466

JUDGE JOHN RENKE, III Case No. SC03-1846

RESPONDENT'S INITIAL BRIEF

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SYMBOLS AND REFERENCES

J. Exh.	=	Judge Renke's Exhibit entered into record at the September 6, 2005 hearing
JQC Exh.	=	Judicial Qualifications Commission's Exhibit entered into record at the September 6, 2005 hearing
Findings	=	Findings, Conclusions and Recommendations by the Hearing Panel of the Judicial Qualifications Commission dated November 17, 2005
T.	=	Transcript of proceedings of the September 6, 2005 hearing before the Hearing Panel of the Judicial Qualifications Commission

STATEMENT OF THE FACTS

A. Judge Renke's Present Fitness to Serve as a Judge

The Hearing Panel (the "Panel") "unanimously rejected removal from office" and "strongly" held that Judge Renke "is not presently unfit to serve as a judge." (Findings at 31-32). To the contrary, the Panel determined that "Judge Renke has shown himself to be a very good circuit judge." (Findings at 32). In addition to submitting character affidavits from twenty attorneys, the Judge elicited testimony from three character witnesses. (J. Exh. 36). None of the character witnesses knew the Judge before he was elected and each testified that the Judge had done an excellent job despite being assigned to a family law docket that had responsibility for two divisions resulting in a higher than normal caseload. (Findings at 31-32). These witnesses, including an attorney who had served as his opponent's campaign treasurer, explained that Judge Renke was extraordinarily patient with the litigants, prepared, knowledgeable and extremely diligent and conscientious. (T. 661-76, 840-48, 769-78).

B. Judge Renke's employment at the Renke Law Firm

Prior to being elected as a circuit judge in 2002, the Judge worked as an attorney for his father's law firm. The Judge began working for his father in 1995, immediately after he graduated from law school. The law offices of John Renke was predominantly a family business. The Judge's mother, Margaret Renke,

worked for her husband at the firm since 1981 as a secretary and bookkeeper. (T. 594, 598). In addition, the Judge's wife, Michelle Renke, worked with the Judge for a few years, providing secretarial support. (T. 575). The only non-family members in the firm were Thomas Gurran, Esquire, who worked part-time due to health problems, and Ms. Helen Sandor, an elderly lady in her eighties who helped with clerical duties. (T. 463, 595, 607-08).

The Judge used his 2002 compensation from the law firm to fund his judicial campaign. The Panel considered the Judge's entitlement to his 2002 compensation and found that Judge Renke had a "valid and reasonable expectation of receiving the funds," but he was paid prematurely. (Findings at 32). Judge Renke performed substantial work for his father's law firm and was the only lawyer at the firm who consistently worked at least eight hours a day. (T. 607). While John Renke, II, insisted on reviewing and signing the work product leaving the firm, Mr. Renke was in the office infrequently and commonly worked as little as six to twelve hours a week. (T. 608). Often, the Judge's mother would take the work product home for her husband to review. Id. Mr. Gurran averaged approximately six hours a day. (T. 606). As such, Judge Renke was responsible for managing the majority of the firm's case load.

In addition to the firm's personal injury and property cases, Judge Renke devoted his time to a group of complex deed restriction cases which ultimately

involved the Renke firm's representation of over two-hundred (200) plaintiffs. (T. 109). The Panel refers to these cases as the "Driftwood litigation."[1] Judge Renke assisted in drafting discovery requests and pleadings in this case. (T. 108). Moreover, Judge Renke spearheaded the financial document discovery which consisted of inspecting the association's financial documents with members of the community. (T. 108). Judge Renke was also responsible for client communication. (T. 109-110, J. Exh. 25.) Three lawyers from three separate firms represented the defense and the defense acknowledged the complexity and difficulty of the case. (T. 124-125, JQC Exh. 111, p. 31).

Despite Judge Renke's efforts, the Judge was paid minimally. The Panel found the "evidence overwhelmingly indicated that [Judge Renke] was underpaid throughout his years at the firm and his family functioned very close to the financial line." (Findings at 12). Prior to passing the Bar, Judge Renke was paid nine dollars an hour, which was raised to eleven dollars an hour after he was admitted. (T. 572). Judge Renke and his wife Michelle worked hard to live within their means, including owning only one family car and living with the Judge's

[1] This litigation pertained to the appropriation and spending of home owners association dues in a seniors only residential community in Pasco County, which also permitted a smaller section for non-age restrictive family housing. The family housing residents challenged the association's use of their dues on amenities that were restricted to seniors only. The resulting litigation, including a records inspection case, spawned into claims involving the viability of covenants and requests for injunctive relief. (T. 104-109).

parents until they could finance a $57,000 home that they located in foreclosure proceedings. (T. 588, 803).

Judge Renke accepted the position at the firm out of a sense of responsibility and a desire to be close to his parents. The Judge and his wife had made an independent life in Tallahassee while the Judge attended law school but decided to move to New Port Richey and work for the Judge's father after his dad indicated that his health was poor. (T. 571). The Judge and his father entered into an incentive-based compensation agreement that included an hourly wage plus twenty percent of significant cases. (T. 100-01, 152-53, 172, 173). There were frequent disagreements during which the Judge appealed to his father to pay him what was fair. (T. 574-75, 587). The Panel recognized that Judge Renke "had no control over the way his father ran the law firm and the less than generous compensation system." (Findings at 32).

During his employment, the Judge received several additional checks associated with the settlement of significant cases, reflecting the firm's compliance with its oral compensation agreement with the Judge. (J. Exh 13, 22). The Judge and his father also agreed that the Judge would receive one hundred percent of the legal fees, after costs were deducted, on cases he originated. (T. 100). Accordingly, the Judge's wife began work at the firm to assist her husband in establishing his own practice. (T. 575). Unfortunately, the time required to

manage his father's cases prohibited him from developing his own client base. (T. 588). On the other hand, his father's unwillingness to delegate control to his son limited the Judge's ability to simply take over his father's cases. (T. 588).

Since the Judge's family was having difficulty making financial ends meet while he worked for his father, the Judge began looking for another job near the end of 1999. (T. 119, 120-21). When the Judge received an offer out of town in 2000, the Judge's father hoped to persuade him to stay. (T. 337, 582, 612). However, as demonstrated by the firm's gross receipts, the firm had very limited cash flow. (J. Exh. 20). Since the firm did not have the financial means to immediately pay the Judge a higher salary, the Judge's father told him that if he stayed, he would pay him the compensation to which he was entitled when the Driftwood litigation settled. (T. 208, 612-12). The additional compensation was for work he performed on the Driftwood case as well as "to make up for the years of low pay" the Judge received. (T. 583, 639, 644-45).

At this time, a portion of the Driftwood litigation had already generated a prevailing party fee award of $60,000 in 1997 and was continuing to grow due to statutory interest. (T. 110). Accordingly, even if the remaining litigation was unsuccessful, the case would still result in significant fees to the firm. The oral compensation contract entitled the Judge to receive an amount roughly equal to half of the total settlement. (T. 119, 619). The Judge communicated this

agreement to his wife, who began looking for a new home that they would be able to afford with the additional compensation. (T. 583). The Judge diligently pursued a resolution in the Driftwood litigation and in Spring 2001, the parties reached a settlement. (T. 236).

Pursuant to the settlement agreement dated March 23, 2001, the defendants agreed to immediately deliver $123,553 in attorney's fees to the Renke firm to stop the accrual of statutory interest on the prevailing party fee award, which had already grown from $60,000 to $97,000. (T. 110). The $123,553 was delivered to the Renke law firm in March 2001, with the understanding that the funds would be held intact until final approval of the settlement. (T. 236, 297, 613-14). At the time the funds were delivered, the settlement was uncertain because all of the parties, including the 200 plaintiffs, had to approve the settlement. (T. 236, 627). Over the next year, the settlement became more secure as the requisite consent was granted. (T. 236). When the defendants filed the Preliminary Court Approval of Settlement and Defendant's Motion to Confirm Class Status on May 1, 2002, the Judge's father believed there was little risk that the case would not settle. (T. 129, 237, 281, 334-35, JQC Exh. 104). Although the settlement still required approval by the Home Owner's Association, the Judge's father thought this contingency posed little risk since the association had already voted to approve the settlement at the time the insurance company issued the check for $123,553 that was delivered

to the firm on May 21, 2001. (T. 238). Once the Driftwood litigation defendants requested the court to approve the settlement on May 1, 2002, the Judge's father determined that the firm would have the cash reserve from the settlement necessary to absorb the payment of additional compensation that he owed to his son pursuant to their agreement. (T. 237, 334-35).

The filing deadline for the judicial election fell mere days after the defendants moved for approval on the Driftwood litigation settlement. Judge Renke learned that a local attorney, Declan Mansfield, was running unopposed for a vacant seat. Judge Renke had volunteered on the South West Florida Water Management District ("SWFWMD") as a hearing officer and excelled in this role. (T. 520). William Bilenky, general counsel to SWFWMD, testified concerning the Judge's promise in this regard by stating, "that his legal abilities . . . were akin, if not superior, to a lot of judges that [Mr. Bilenky] appeared before." Id.

Judge Renke and his wife had not planned on running a judicial campaign and had not pursued any campaign fundraising. Moreover, the Judge's wife had located a new home on which she wanted to make an offer when they had the funds to do so. (T. 583). The Judge and his wife knew that they would have to use their own money to finance the campaign since they were entering the campaign the week of the filing deadline and that they did not have enough money for the campaign and the new home. (T. 585). The Judge's wife encouraged him to

pursue this opportunity and they decided to use the additional compensation for the election. (T. 128-29, 584). Prior to any JQC investigation, Michelle Renke spoke to the press about this early dilemma and their ultimate decision to use the money for the campaign. (J. Exh. 1A).

Instead of the firm paying the Judge his $101,800 in additional compensation in one lump sum, the Judge's father preferred to dole out the payments as "slowly as he possibly could." (T. 282). The Panel recognized that this pattern of payment was consistent with the father's desire to continue to exert control. (T. 635-36). Accordingly, when the Judge needed to contribute more of his funds to his campaign, he so notified his father who paid him the funds owed to him. (T. 153, 621). John Renke, II, made his first payment to his son on May 11, 2002, approximately one week after the Driftwood defendants filed the motion to approve the settlement. (T. 281). His father did not pay the Judge out of the Driftwood litigation funds that were held separately pending the final approval in 2003. (T. 632-33). Instead, the Judge's father paid his son the promised compensation out of another source of funds, with the understanding that the firm would be able to recoup this expense after the settlement was final. (T. 647). Had the settlement fallen apart, the Judge was not expected to pay his compensation back to the firm. (T. 307-08, 647). The Judge properly reported all of his

contributions to his campaign on the Financial Reports and paid income tax on all of the compensation his father paid to him in 2002. (T. 132-33).

C. Judge Renke's Campaign Materials

Judge Renke's father assisted the Judge in his campaign as his "unofficial" campaign manager. (T. 282). The campaign also hired Mr. Jack Hebert, principal of the Mallard Group, to assist them in creating and sending direct mail pieces. (T. 681). Mr. Hebert had worked in political campaigns since 1979 and had run his own consulting firm for the past eleven years. (T. 677). While at least one Panel member characterized the Judge as "politically untested, politically green" and a "very novice client," Mr. Hebert had been involved in several hundred election campaigns, including ten to eleven judicial campaigns. (T. 741, 677-78). Judge Renke was the first client to receive a complaint based on his campaign mailers in Mr. Hebert's twenty-one years of acting as a political consultant. (T. 735).

Mr. Hebert not only created the layout for the mailers and drafted the content and captions, but also in formulated a campaign theme. For example, Mr. Hebert masterminded the slogan, "John Renke, a judge with our values," which is the subject of Count One. (T. 685). In a separate judicial election, Mr. Hebert created a similar slogan, "Bo Michaels, a judge for the people" for another non-incumbent judicial candidate. (T. 692-93). Mr. Hebert testified that he never intended to infer incumbency. (T. 689). To the contrary, Mr. Hebert believed that

incumbency could be considered detrimental based on the public's positive reaction to term limits. (T. 690). Mr. Hebert intended to convey that John Renke would be a judge with the community's values once he was elected. (T. 701). The full content of the flyer referred to his "general and family practice" at a law firm and his appointments in guardianship and incapacity proceedings. (JQC Exh. 1). Judge Renke testified that he believed the values he shared with the community were "hard work, ethical representation of the citizenry, [and the] ability to do a job" and that he never thought that the slogan would mislead the public into thinking he was an incumbent judge. (T. 50-57).

Mr. Hebert also drafted the caption corresponding to the picture of the Judge sitting underneath the SWFWMD sign with the name plate "chair" in front of him, which is the subject of Count Two. (T. 694). Mr. Hebert knew the Judge had served as a chair of two SWFWMD subcommittees and did not intend to convey that he was chair of SWFWMD. (T. 695). Judge Renke explained the picture was only meant to depict him "on the job," and that the picture accurately portrayed where he sat, along with the location of the nameplate and the SWFWMD sign when he chaired the two subcommittees. (T. 782-83). Judge Renke never contemplated the inference that he was the chair of SWFWMD. (T. 783).

Ms. Lou Kavouras, who was responsible for setting up the SWFWMD boardrooms prior to the hearings confirmed the picture accurately depicted Judge

Renke's position when he chaired the Governing Board Planning Committee meeting. (J. Exh. 10, pp. 14-15). Ms. Kavouras further explained the judge would also be positioned in that seat for Coastal River Basin Board meetings, with a nameplate indicating his title as "chair" and the district logo behind him. (J. Exh. 10, p. 16).

Count Three concerns the picture of the Judge with firefighter supporters. Mr. Hebert drafted the caption, "supported by our areas bravest: John with Kevin Bowler and the Clearwater Firefighters." (T. 696). Mr. Hebert knew the Judge had not received an endorsement and asserted that the caption was not misleading as it accurately depicted the picture accompanying the caption. (T. 697, 706). Judge Renke testified that he never intended to misrepresent he had an endorsement but was only trying to convey the support of the firefighters pictured with him. (T. 783). It was undisputed that Kevin Bowler and the pictured firefighters supported Judge Renke in the campaign. (J. Exh. 11).

Counts Six and Seven pertain to the debate between Judge Renke and his opponent, Declan Mansfield, regarding their respective experience and cited to representations the Judge made in a campaign mailer and a candidate response letter to the newspaper. Declan Mansfield began the debate in a newspaper interview, asserting that Judge Renke had not been a lawyer for a sufficient length

of time to be a judge. (J. Exh. 27). Judge Renke responded that Mr. Mansfield practiced in a "narrow" area of law, as follows:

> Renke said that he is not making any value judgments about the type of law Mansfield practices. But if Mansfield is going to make an issue out of experience, Renke said that it is only fair that voters know the truth about his opponent . . . "We need to look at the complete picture. His experience is in criminal law, a very narrow area. My experience is much broader."

(J. Exh. 27).

Similarly, the *St. Petersburg Times* noted in another article that Mr. Mansfield stated that the race for circuit court judge "boils down to experience . . . and in that category, Mansfield says he has a big advantage over his opponent." (J. Exh. 28). In reply, Judge Renke stated, "I don't disagree that experience is very important. But I think a broad range of experience is just as important." (J. Exh. 28).

In a September 5, 2002 article titled "Candidates Reply to Endorsements" in the *Tampa Tribune,* Judge Renke also commented on the range of his opponent's experience which was limited to mostly criminal law. (J. Exh. 35). In contrast, Judge Renke stated that he had experience in a wide variety of civil law subjects. Judge Renke explained his experience as follows:

> I received an academic scholarship at the University of Florida and obtained a juris doctorate with honors from Florida State University. I have almost eight years of experience handling complex civil litigation in many areas such as homeowner/condominium association and property law, Fair Housing Act cases, civil rights discrimination,

> personal injury, probate and foreclosures, defamation, contracts, life insurance, business and commercial law.

(J. Exh. 35) (*emphasis added*). Count Six refers to a similar candidate reply to the *St. Petersburg Times* in which the Judge stated as follows:

> I obtained a juris doctorate with honors by Florida State University. I have almost eight years of experience handling complex civil trials in many areas involving deed restrictions, property, fair housing act cases, civil rights discrimination, personal injury, probate, foreclosures, defamation, contracts, life insurance, business and commercial law.

(JQC Exh. 3) (*emphasis added*).

Count Seven pertains to a campaign mailer in which Judge Renke defends his position in the political debate with his opponent by asserting that his broad range of experience makes him a better candidate than Mr. Mansfield. (JQC Exh 4). Specifically, Count Seven references Judge Renke's statement that the public's interests "would be better served by an attorney who has many years of broad civil trial experience." (*emphasis added*). Judge Renke assisted John Renke, II, in several civil trials, including a federal civil jury trial that lasted for one week and a civil jury trial that lasted two days. (T. 785-86). In addition, Judge Renke assisted in four non-jury civil trials in which John Renke, II, was lead counsel and one non-jury civil trial in which Judge Renke was lead counsel. (T. 61-62, 734-92).

In contrast, Judge Renke's opponent had never participated in a civil jury trial, including sitting as "second chair" or "third chair." (T. 420, 422). Moreover, his only non-jury civil trial was a dog-bite case against a *pro se* litigant. (T. 422).

Judge Renke testified that he was attempting to make a qualitative distinction between his experience and Mr. Mansfield's experience. The Judge believed that he had more experience in complex civil litigation and explained that his office used the terms "litigation" and "trial" interchangeably. (T. 64-66). While the Judge acknowledged that "litigation" would have been the better word choice, he denied that he was intentionally trying to overstate his experience. (T. 66). Recognizing the JQC had misinterpreted his statements, the Judge testified as follows, "I would apologize to every individual if I have given any statement that could be interpreted as misleading or if someone thinks I was trying to misrepresent myself. . . I would apologize to every individual in Pasco and Pinellas County if that were possible, yes, sir, I would." (T. 99).

STANDARD OF REVIEW

The Court should examine the Panel's findings to determine whether they are supported by "clear and convincing evidence." In re Pando, 903 So. 2d 902, 904 (Fla. 2005). In addition, the Court must examine whether the recommended sanction is "consistent with governing precedent." Pando at 904.

SUMMARY OF THE ARGUMENT

The Panel found Judge Renke had a valid and reasonable expectation of receiving the money he used to fund his campaign and thus, recognized the Judge's substantial work for the firm. While the Panel determined the Judge accepted the compensation prematurely, the Judge's father was not required to wait to pay his associate until the firm's interest in the Driftwood settlement had fully vested. The executive director of The Florida Bar's Law Office Management Advisory Service ("LOMAS") explained that law firms commonly and appropriately pay associates a percentage of settlement funds out of the firm's operating account before the firm has access to the actual settlement. Even if the Court finds that the $101,800 was made prematurely, the LOMAS opinion confirms the reasonableness of the Judge's belief that he received legitimate compensation that he could loan to his campaign. The Judge's credible belief that his compensation was appropriate vitiates the Panel's finding that he intentionally accepted an illegal campaign contribution.

The Judge's statements referenced in Counts One, Two, Three, Six and Seven were not knowingly false and thus, should not subject the Judge to discipline. The Panel did not use the actual malice standard enunciated by the Eleventh Circuit Court of Appeals for judicial elections which is already utilized to consider slander and libel actions in Florida legislative elections. There is no compelling governmental interest to treat judicial candidates differently than any

other political candidate. Any restriction of political speech exceeding the prohibition against making knowingly false statements improperly chills free speech and thus, violates the First Amendment to the United States Constitution.

Even though it did not apply the actual malice standard, the Panel found that Judge Renke expressed genuine remorse for anything he said or did that may have misled the voters. The Panel's remarks regarding the Judge's sincerity were echoed by the character witnesses who each testified to the work ethic, compassion, intellect and sensitivity of this unique jurist. None of the Judge's live character witnesses knew him before he took the bench but all of them, including Mr. Parker, who was the campaign treasurer of Judge Renke's opponent, testified to his exceptional performance and appealed to the Panel to keep him on the bench. Even if the Court approves each of the Panel's findings, the Panel's recommended sanction of a public reprimand and fine has a basis in existing case law and should be approved.

ARGUMENT

I. The Hearing Panel erred in finding that a portion of Judge Renke's 2002 law firm compensation was an illegal campaign contribution.

The Panel rejected the JQC's contention that Judge Renke's work efforts did not justify the compensation paid to him in 2002. To the contrary, the Panel correctly found that the evidence "overwhelmingly indicated" that Judge Renke was "underpaid by his father" based on his meager compensation for the substantial work he performed for his father's firm for seven years. Moreover, the Panel determined that Judge Renke had a "valid and reasonable expectation to receive the compensation" paid to him in 2002, although they determined that the compensation was paid prematurely. The Panel reasoned that the premature payment transformed the legitimately earned compensation into an illegal campaign contribution. Judge Renke contests the Panel's finding that the 2002 compensation was paid prematurely and disputes the argument that the timing of the payment transformed his compensation into an illegal campaign contribution.

Assuming *arguendo* that the payment was premature, Judge Renke reasonably believed that he was legitimately entitled to the funds in 2002. Even The Florida Bar's executive director of LOMAS, who regularly advises law firms on appropriate compensation structures, opined that the compensation arrangement was proper. Judge Renke's credible belief that his compensation was appropriate shows the absence of specific intent to violate Florida election campaign laws.

A. The panel incorrectly reasoned that the Renke law firm was required to wait until the firm's interest in the Driftwood litigation settlement had completely vested before it was permitted to pay one of its attorneys for work already performed.

The Panel improperly imposed constraints on the firm's ability to evaluate when it could afford to pay the Judge compensation his father owed to him pursuant to their compensation agreement. The Panel analogized the compensation agreement between father and son to a contingency fee agreement entered into between a lawyer and client, reasoning that the firm was prohibited from paying one of its employees until the firm's interest was entirely vested, just as an attorney was not entitled to a contingent fee until a settlement was final. (See Findings at 20, citing Faro v. Romani, 641 So. 2d 69 (Fla. 1994)(addressing a lawyer's entitlement to a charging lien based on a contingency fee agreement with his client after the lawyer was discharged)). Although the Panel acknowledged that Faro v. Romani was "factually dissimilar," it is respectfully submitted that the Panel's apparent reliance on Faro demonstrates its failure to consider the rationale for the additional compensation.

When the Judge confronted his father in late 1999 or early 2000 with his decision to leave the firm in order to financially support his family, his father persuaded him to stay with the promise of paying him an amount equal to roughly fifty percent of the Driftwood litigation settlement. (T. 119, 619). Rather than immediately increase his son's salary to a competitive or even reasonable level,

Judge Renke's father promised to pay his son compensation for years of underpayment when the Driftwood litigation settled. (T. 583, 639, 644-45). While the Panel found that the evidence "overwhelmingly indicated" that Judge Renke was "underpaid" for his efforts at the firm, the law firm's gross receipts reflected limited cash flow to pay its employees. (J. Exh. 20). The Judge and his father's agreement was that the Judge would be compensated once the firm had the resources to pay him for all of his efforts during the previous seven years. (T. 583, 639, 644-45).

Judge Renke's father reasonably believed that it was purely a business decision as to when the firm should pay the Judge this additional compensation. (T. 236-37). In May 2001, the Renke law firm knew that the total attorney's fees from the Driftwood litigation would be $218,000. (T. 236, 297). Pursuant to the firm's contract with the Judge, the Judge was going to receive a little over $100,000. Although the Judge and his wife began making plans for the money, such as purchasing a new home, the Judge's father was not comfortable with paying his son when the funds were delivered in March 2001 because he believed the settlement was too tenuous. (T. 236-37). At that time, the Judge's father was concerned that the firm might be placed in too dire a financial position if the 200 plaintiffs did not consent to the settlement.

Between March 2001 and May 2002, the attorneys worked toward gathering the approval of all the parties. (T. 236). When the defendants filed their motion requesting the court to approve the final settlement on May 1, 2002, the Judge's father immediately felt secure that the settlement was solid. (T. 237, 334-35). The Panel found that the settlement was still tenuous in 2002 because the Homeowner's Association still had to approve the terms. (Findings at 16). However, the Judge's father explained that he was not concerned with that contingency because the association had already approved the settlement authorizing the insurance company to deliver the $123,552 check in March 2001. (T. 238).

The compensation contract between father and son did not require the Driftwood fees that were being held separately to be split. Rather, the total settlement figure was used to compute an amount of compensation that the firm would pay Judge Renke for services he had rendered in the Driftwood cases and others. (T. 583, 639, 644-45). Therefore, the Judge's father believed he could begin making payments to his son using a separate source of funds while holding the Driftwood fees separate and intact pending the final settlement. (T. 281-82, 325). The Judge testified, "I fully thought it was my own money and I fully believed at that point that I had earned every dollar and we did have to pay taxes on it." (T. 817-18). Further, the firm issued a 1099 to the Judge and the IRS for the total compensation paid in 2002. (T. 630).

There is no authority prohibiting this type of compensation arrangement. To the contrary, John Renke, II's decision to pay his son in 2002 is supported by compensation manuals published by the American Bar Association and considered by The Florida Bar's LOMAS office to be authoritative. (T. 856). In pertinent part, the American Bar Association states, "[s]pecial distributions or bonuses may be paid any time management determines that the firm has an adequate reserve of cash to meet its needs and provide for some contingencies." James D. Cotterman, ABA Law Practice Management Section, Compensation Plans for Law Firms, 68 (4th ed 2004).

Similarly, the executive director of LOMAS, Mr. J.R. Phelps, who was called as an expert witness on behalf of Judge Renke, averred that there was nothing improper about the manner in which John Renke, II, paid his son. (T. 867). Mr. Phelps has advised lawyers on law office practices, including compensation plans, for the past twenty-three (23) years. (T. 852). Mr. Phelps testified that the Judge was properly paid in 2002 pursuant to his agreement with his father, even though the money paid to Judge Renke was taken from a source other than the fees that were received from the Driftwood litigation and even though the firm was not able to access the settlement funds until the next year. (T. 865, 867, 877-78). Mr. Phelps explained that an employer law firm was not required to wait until the firm could access final settlement funds before the firm

was authorized to pay its associates an agreed percentage of the settlement as compensation so long as the firm used funds from its operating account or another source of funds to pay the compensation. (T. 877-78). Indeed, he explained that this payment structure is a common practice among law firms. (T. 881, 894, 902).

There is no Rule Regulating The Florida Bar barring the firm from paying the Judge when the Judge's father believed it was a sound business decision. In fact, even The Florida Bar's expert on law office practices opined that the timing of the payments was not improper. Accordingly, the Panel's finding that the payments were made prematurely is not supported by clear and convincing evidence or legal authority and should be rejected by this Court.

B. Timing does not transform legitimately earned compensation into illegal campaign contributions.

The Panel noted that the compensation payments from the firm coincided with the loans that the Judge made to his campaign. (Findings at 17). While the Judge's father chose to dole out portions of the total amount owed to his son as they were needed, the mere timing of the payments does not transform earnings for services rendered into illegal campaign contributions. The JQC cannot merely rely on the source and timing of those payments to meet its burden of proof, any more than the Board in the Pennsylvania case of In the Matter of Dalessandro, Judge of Court of Common Pleas, Luzerne County, 483 Pa. 431 (Pa. 1979), could meet its burden in that case.

In Dalessandro, the Supreme Court of Pennsylvania exonerated a judge of charges of soliciting and receiving a $35,000 illegal campaign contribution from a family owned corporation when he was a judicial candidate. Judge Dalessandro had requested that the corporation repay a loan he had made to the company so that he could meet certain expenses involving his candidacy for judge. Id. at 438. The Board was unable to prove that the money did not belong to Judge Dalessandro, even though it found the timing and source of the funds he contributed to his campaign suspicious.

In this case, Judge Renke did not invest money in the form of loans to his father's law firm, but he undeniably invested years of labor for which the Panel found he was underpaid. Judge Renke saw the financial sacrifices made during the first seven years of his career as an investment in the future, because he believed that he would one day take over his father's firm. The Panel found that Judge Renke performed services that created a "valid and reasonable expectation of receiving the funds" that were paid to him by his father's firm in 2002. (Findings at 32). The Judge reported his 2002 compensation on their income tax returns as earned income. (T. 132, 630). John Renke, II, relinquished his control over those funds when he disbursed them to his son, who was then at liberty to use them as he chose: to fund his judicial campaign.

C. Even if the Court finds that compensation was paid to the Judge prematurely, the Judge's acceptance of the compensation was merely a negligent violation and does not reflect adversely on his integrity.

Florida courts have required the prosecution to prove that a defendant willfully committed an election law violation. In Fulton v. Division of Elections, 689 So. 2d 1180 (Fla. 2d DCA 1997), the court determined a negligent violation was insufficient to support a violation of Chapter 106. Even if the Court accepts the Panel's finding that a premature payment amounts to a campaign contribution, there is no clear and convincing evidence that the Judge intentionally violated Florida Statutes, sections 106.08(1)(a), 106.08(5) and 106.19(a)(b).

The Panel's findings did not reveal an intentional scheme to disguise a loan from the Judge's father as bogus compensation. Rather, even before the JQC investigated the campaign financing, the Judge's wife spoke with the press regarding their expectation of receiving income from the law firm and their decision to fund the campaign rather than buy a new house, thus demonstrating their innocent belief that they were entitled to the compensation. (J. Exh. 1A). The Panel rejected the suggestion that Judge Renke did not work for his compensation and instead found that Judge Renke had a valid and reasonable expectation of receiving the funds and determined that he had been underpaid. While the Panel decided that he was paid prematurely, The Florida Bar's

representative who specializes in advising law firms regarding their office practices, including compensation plans, disagreed.

When The Florida Bar's own expert in law firm compensation structures fails to fault the firm's decision to pay the Judge before the settlement was final, one should not criticize the Judge for failing to consider whether his compensation payments were premature. The Judge's failure to anticipate this criticism, if it is deemed valid criticism, is merely negligent. Accordingly, there are insufficient findings and evidence to support the Panel's recommendation that the Judge willfully violated Florida's election laws.

Moreover, a merely negligent violation of the elections laws does not demonstrate a lack of integrity that would violate Canons 1, 2A or 7A(3)(a).[2] This Court has previously determined that negligently violating Florida Statutes, section 106.08 by making campaign contributions in excess of $500, "did not reflect adversely" on a Florida lawyer's "honesty, trustworthiness or fitness." Florida Bar v. Brown, 790 So. 2d 1081, 1085 (Fla. 2001). In Brown, the referee considered a unique set of circumstances and ultimately found that the respondent negligently

[2] Canons 1, 2A and Canon 7(A)(3)(a) essentially prohibit the same types of conduct. Since Canons 1 and 2A only apply to judges rather than judicial candidates, it is improperly included in the charging document and the Panel incorrectly found that Judge Renke violated these Canons. Dismissal of Canons 1 and 2A do not appear to substantially alter the formal charges because Canon 7A(3)(a) properly applies to judicial candidates. See In re Kinsey, 842 So. 2d 77, 85 (Fla. 2003). However, the Canon 1 and Canon 2A violations should be dismissed.

violated the election laws. Similarly, the unusual circumstances of the present case, at worst, demonstrate merely negligent conduct that does not reflect adversely on Judge Renke's integrity. Contra In re Pando, 903 So. 2d 902 (Fla. 2005)(imposing public reprimand and fine when the judge admitted to knowingly violating Florida election laws by accepting a $25,000 loan from her mother and then repeatedly misrepresenting the source of the funds); In re: Gooding, 905 So. 2d 721 (Fla. 2005)(imposing public reprimand when the judge admitted to knowingly violating prohibitions against contributing to election campaign after statutory deadline by making "substantial loans" to his campaign to cover outstanding obligations that would be returned for insufficient funds). Because the evidence does not support a finding that Judge Renke willfully circumvented the campaign contribution limits, we respectfully request the Court to reject the Panel's finding that the Judge violated Florida election laws or Canon 7A(3)(a).

II. The Hearing Panel erred in failing to apply the "actual malice" standard enunciated by the Eleventh Circuit in considering whether the Judge's election materials violated Canon 7.

The constitutionality of judicial regulations governing campaign statements and representations has been recently scrutinized by the Eleventh Circuit Court of Appeals. See Weaver v. Bonner, 309 F. 3d 1312, 1320 (11th Cir. 2002)(reviewing Ga. Code of Judicial Conduct Canon 7(B)(1)(d)). The Eleventh Circuit found a Georgia judicial canon facially violative of the First Amendment to the United

States Constitution because the Georgia Canon prohibited not only "false statements knowingly or recklessly made" but also "false statements negligently made and true statements that are misleading or deceptive or contain a material misrepresentation or omit a material fact or create an unjustified expectation about results." Id.

In contrast to the Georgia Canon considered by Weaver v. Bonner, Florida Canon 7 specifically imposes the element of specific intent by requiring any misrepresentation to be "knowing." However, in this case, the JQC has interpreted Canon 7 in an exceedingly broad manner, resulting in an unconstitutional application. Indeed, the JQC has utilized the "knowing" standard in the Florida Canon to embrace the theory behind the unconstitutional Georgia Canon by recommending guilty findings for statements that are, at worst, "false statements that are negligently made" or "true statements that are misleading or deceptive or contain a material misrepresentation or omit a material fact." Review of First Amendment issues is not limited to the establishment of constitutional guidelines, but also encompasses consideration of whether principles have been constitutionally applied. See Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 508 (1984) (citing Speiser v. Randall, 357 U.S. 513, 525 (1958)).

This Court has recognized that, A[t]he scope of the protection accorded to freedom of expression in Florida under Article I, section 4 is the same as is required under the First Amendment.@ Department of Education v. Lewis, 416 So. 2d 455, 461 (Fla. 1982). Florida courts should offer no less protection for freedom of speech than the bare minimum guaranteed under federal law. Although Weaver v. Bonner directly addresses the protections afforded to judicial election speech and sets forth the proper standard to evaluate judicial campaign statements to ensure constitutional application of judicial regulations, the Panel's Findings failed to consider whether the Judge's campaign materials demonstrated "actual malice." As a result, this inquiry did not protect Judge Renke's rights guaranteed by the First Amendment to the United States Constitution and Article I, section 4 of the Florida Constitution.

A. There is no meaningful distinction between judicial and legislative campaigns for the purpose of evaluating candidate statements.

The Weaver Court recognized the United States Supreme Court majority view that the "difference between judicial and legislative elections has been 'greatly exaggerated'" and did not find that any distinction between the two, "if there truly is one, justifies greater restrictions on speech during judicial campaigns than during other types of campaigns." Weaver at 1321 (quoting Republican Party of Minnesota v. White, 536 U.S. 765, 784 (2002)). The Eleventh Circuit acknowledged the inevitability of erroneous statements occurring during the free

exchange of ideas in a campaign and determined that the chilling effect caused by requiring judicial candidates to err on the side of silence was not narrowly tailored to promote any compelling governmental interest. Weaver at 1319. In so holding, the Eleventh Circuit evaluated the impact of erroneous statements in campaigns.

While accepting that false statements "may have serious adverse consequences for the public at large," the Eleventh Circuit noted "erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need. . .to survive.'" Weaver at 1321 (quoting Brown v. Hartlage, 456 U.S. 45 at 60-61 (quoting New York Times, Co. v. Sullivan, 376 U.S. 254 (1964)(quoting N.A.A.C.P. v. Button, 371 U.S. 415 (1963))).

At the heart of any campaign is the candidate's freedom to express his/her views without fear of reprisal for unintentional misrepresentations. See New York Times, Co. v. Sullivan at 270 (recognizing "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."); See also Dockery v. Florida Democratic Party, 799 So. 2d 291, 293 (Fla. 2d DCA 2001)("Free discussion on sensitive and divisive political issues [is] the cornerstone of our democracy. The ability of the public to weigh all of the information on the issues and candidates, as well as the method that information is disseminated is guaranteed by the Constitution.").

The United States Supreme Court has noted that the fear of litigation can result in "self-censorship" in order to "'steer far wider of the unlawful zone' thereby keeping protected discussion from public cognizance." Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)). So too does the threat of judicial discipline potentially suppress legitimate debate by judicial candidates, diminishing the public's information about the judges it is empowered to elect. To protect the public's role in judicial elections, the Weaver Court recognized the necessity for a very high standard to prove judicial campaign misrepresentations so as to permit sufficient freedom for a judicial candidate to vigorously communicate his/her qualifications.

B. The JQC must prove "actual malice" to establish a violation of Canon 7.

The Eleventh Circuit found that the Georgia Code did not permit sufficient "breathing space" because it prohibited "false statements negligently made and true statements that are misleading or deceptive or contain a material misrepresentation or omit a material fact or create an unjustified expectation about results." The Weaver Court held as follows:

> For fear of violating these broad prohibitions, candidates will too often remain silent even when they have a good faith belief that what they would otherwise say is truthful. This dramatic chilling effect cannot be justified by Georgia's interest in maintaining judicial impartiality and electoral integrity. Negligent misstatements must be protected in order to give protected speech the "breathing space" it requires. The ability of an opposing candidate to correct negligent

> misstatements with more speech more than offsets the danger of a misinformed electorate that might result from tolerating negligent misstatements.

Weaver at 1320 (*emphasis added*). To protect the "breathing space" in judicial campaigns, the Weaver Court adopted the actual malice standard originally set forth in Brown. Specifically, "to be narrowly tailored, restrictions on candidate speech during political campaigns must be limited to false statements that are made with knowledge of falsity or with reckless disregard as to whether the statement is false, i.e., an actual malice standard." Weaver at 1319. Moreover, Florida imposes even a higher standard because Canon 7 specifically mandates that any misrepresentation must be "knowing."

1. Negligent misstatements and true statements that are misleading do not meet the "actual malice" standard.

The Weaver Court clearly held that "false statements negligently made and true statements that are misleading or deceptive or contain a material misrepresentation or omit a material fact or create an unjustified expectation about results" do not meet the "actual malice" standard and thus do not constitute judicial misconduct. Weaver at 1319. Although Weaver does not otherwise define "reckless disregard as to whether the statement is false," several United States Supreme Court and Florida cases have addressed the standard. For example, in Garrison v. State of Louisiana, 379 U.S. 64, 74 (1964), the Court emphasized that the "reckless-disregard-of-truth standard" is not the same as examining whether the

declarant had a "reasonable belief" as to whether the statement was false or whether the "exercise of ordinary care would have revealed that the statement was false." Id. at 79. Rather, the Court explained that "mere negligence" is insufficient to meet the reckless disregard of the truth standard. Id.

In St. Amant v. Thompson, 390 U.S. 727, 731 (1968), the Court found that "reckless conduct is not measured by whether a reasonably prudent man would have published or would have investigated before publishing," but whether the declarant "entertained serious doubts as to the truth of the publication." St. Amant at 730; See also Demby v. English, 667 So. 2d 350 (Fla. 1st DCA 1995) (emphasizing that the plaintiff's burden in proving actual malice is not to establish what a "reasonably prudent person" would do, but to show that the defendant "*in fact* entertained serious doubts as to the truth of his publication.").

2. Florida cases applying the "actual malice" standard in legislative elections require consideration of the statement's context.

Since the Eleventh Circuit determined that there is no discernable distinction between judicial and other elections, cases applying the actual malice standard in Florida defamation actions brought by candidates in a public election are especially helpful. In Dockery v. Florida Democratic Party, 799 So. 2d 291, 293 (Fla. 2d DCA 2001), the Second District emphasized the dominance of First Amendment protections over a candidate's individual sensitivities. The Second District initially

noted, ". . . this Court is required to make rulings based upon principles of Constitutional Law, and not based upon its sense of political correctness, etiquette, or even fairness" and quoted Pullum v. Johnson, 647 So. 2d 254, 258 (Fla. 1st DCA 1994), by stating, "[t]he First Amendment requires neither politeness or fairness." Id. at 258.

In applying the actual malice standard to the political statements contained in the candidate's circular, the Dockery Court determined that, "it is necessary to read the entire publication in context, not simply the offending words." Id. at 295. (citing Colodny v. Ivernson, Yoakum, Papiano & Hatch, 936 F. Supp. 917 (M.D. Fla. 1996)). Consequently, a thorough examination of the entire political mailer is required to consider the meaning of any one statement in its full context as well as any reliable source supporting the assertions made in the mailer.

3. Even without the "actual malice" standard, the Court has required the absence of any reasonable hypothesis of innocence before finding an intent to deceive.

Given the recency of Weaver v. Bonner, this Court has not published opinions examining the application of the actual malice standard in JQC proceedings. However, this Court has set forth the burden of proof in Bar disciplinary proceedings alleging conduct involving "dishonesty, misrepresentation or deceit." R. Regulating Fla. Bar 4-8.4(c). While Rule 4-8.4(c) does not require the Bar to meet the actual malice standard to prove a violation, it does require

specific intent.[3] Even with a lesser standard in Bar cases, the Court has required the consideration of other reasonable hypotheses of innocence when the intent to make a misrepresentation is inferred from circumstantial evidence. See Florida Bar v. Marable, 645 So. 2d 438 (Fla. 1994); Florida Bar v. Fredericks, 731 So. 2d 1249, 1251-52 (Fla. 1999).[4] Similarly, the Panel should have determined whether any of the political statements referenced in the Formal Charges are subject to interpretations other than the meanings suggested by the JQC. If the statements are susceptible to more than one meaning, and one of the interpretations would not violate Canon 7, a reasonable hypothesis of innocence exists precluding a finding of guilt.

III. The record does not support the Hearing Panel's findings that the Judge's representations in his campaign materials violated Canon 7.

The Panel did not consider the actual malice standard or even the requirement that the alleged misrepresentation is "knowing" in evaluating the Judge's statements referenced in Counts One through Three and Six through Seven. In particular, the Panel failed to analyze whether the allegedly false statements could be subjected to other truthful interpretations, whether the

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[3] See Florida Bar v. Lanford, 691 So. 2d 480 (Fla. 1997) ("in order to find an attorney acted with dishonesty, misrepresentation, deceit or fraud, the Bar must show the necessary element of intent.").

[4] Marable pertains to consideration of underlying dishonest conduct that could be construed as criminal and Fredericks addresses potentially dishonest conduct that would not constitute a crime. In both cases, the Court indicates that a reasonable hypothesis of innocence should be considered.

statements were merely a negligent mistake or whether the full context of the representations would clarify any potentially inaccurate interpretations. Instead, the Panel implied misleading interpretations from accurate and truthful pictures and text and imposed a strict liability standard for any misstatement, regardless of the Judge's intent.

The Panel also erred in determining that the Judge's conduct constituted a cumulative pattern of misconduct in Count Nine. Even if the Court approves each guilty finding, the charged representations in Counts One, Two, Three and Seven were made in two brochures out of many campaign representations. (J. Exh. 27, 28, 31, 35). Moreover, although Count Six pertains to a candidate reply letter to the *St. Petersburg Times* in which the JQC alleges he overstated his "trial" experience, an almost identical candidate reply letter to the *Tampa Tribune* substituted the word "trial" for "litigation." (J. Exh. 35). Interchanging the words "trial" and "litigation" is inconsistent with the assertion that the Judge intended to engage in a pattern of misconduct.

A. The Panel incorrectly found that "A judge with our values" inappropriately suggested incumbency, but failed to address other reasonable interpretations of the slogan or Judge Renke's intent to misrepresent his status.

The Panel found that the phrase "John Renke, a judge with our values" "created the impression that he was or had been a judge" and thus, found him guilty of Count One. (Findings at 25). The Panel noted that Mr. Hebert created

the phrase. (Findings at 25). Indeed, Mr. Hebert created a similar slogan, "a judge for the people" for another non-incumbent judicial candidate. (T. 692-93). In order to meet the actual malice standard enunciated in Weaver, the Judge must have published this slogan "knowing it was false" or "seriously doubt[ing] the truth of the statement." Weaver at 1319; St. Amant at 731; Fla. St. Jury Instr. (Civ.) 4.1. The standard is not whether a reasonably prudent person would have believed the phrase suggests incumbency; rather, the Panel had to find that the Judge "in fact entertained serious doubts concerning the truth of the publication." St. Amant at 730.

Depending on the perception of the reader, the statement is susceptible to different interpretations. At least one member of the Panel believed that "semantics" was playing a "great role in this case" and repeatedly commented that the JQC was being "very, very picayune." (T. 752, 761). Judge Renke testified that he could not "quarrel" with the JQC and "say whether a person will or will not interpret" the phrase to suggest incumbency. (T. 805). The Judge stated, "if I thought it did and I was cognizant of it, you can be guaranteed one thing, it would not appear in my flyer."

In considering whether the Judge made the statement knowing it to be false, or seriously doubting the truth of the statement, the Panel should have considered other reasonable interpretations. Given the equal likelihood that the phrase is

merely a description of the type of Judge the candidate would become and not a suggestion that he is currently a sitting judge, there is a reasonable hypothesis of innocence precluding a guilty finding. See Florida Bar v. Marable, 645 So. 2d 438; Florida Bar v. Fredericks, 731 So. 2d 1249 (requiring the Bar to prove that no reasonable hypothesis of innocence existed in order to establish the specific intent element for a violation of a Bar rule involving dishonesty, misrepresentation or deceit). The conflicting interpretations preclude any finding that Judge Renke made a knowing misstatement.

The text of the entire political circular represented John Renke, III, as an attorney and not as a sitting judge. For example, the mailer refers to his general and family practice and his appointment as an attorney in guardianship and incapacity proceedings. If the actual malice standard is applied, it is improper to extract one phrase from the mailer and find that out of context it misrepresents his status. Dockery at 295; contra In re Kinsey, 842 So. 2d 77, 85 (Fla. 2003) (Court did not require a contextual analysis in considering whether a statement was a knowing misrepresentation and did not apply the actual malice standard to a judicial disciplinary proceeding).[5]

[5] Since the date of the In re Kinsey opinion is January 30, 2003 and the date of the Weaver opinion is October 18, 2002, it is unclear whether this Court considered Weaver in deciding Kinsey.

At worst, the statement is merely negligently misleading because the Judge did not consider that the phrase could suggest incumbency. However, "false statements negligently made" do not meet the "actual malice" standard necessary to impose judicial discipline. Weaver at 1319; Garrison at 79. Moreover, a negligent misstatement is inconsistent with the "knowing" requirement specifically required by Canon 7.

B. The Panel incorrectly found that the Judge's SWFWMD picture referenced in Count Two violated Canon 7 even though the picture accurately portrayed the Judge serving on SWFWMD and was accompanied by a truthful caption.

The Panel failed to consider the actual malice standard in evaluating the SWFWMD picture and text referenced in Count Two. The picture of Judge Renke in the SWFWMD boardroom accurately depicted what the public would see if he were chairing a subcommittee meeting and the caption correctly described his experience on SWFMWD. (J. Exh. 10, pp. 14-15, 16). Judge Renke simply included this picture to show him "on the job." Most respectfully, if a person reviewing the picture and the caption would be misled, any member of the public who attended a Coastal River Basin Board meeting or a Governing Board Planning Committee meeting would be similarly deceived because they would have observed Judge Renke underneath the SWFWMD sign with the designation "Chair" on his nameplate.

A truthful depiction of the Judge serving on the District should not be construed as a knowing and purposeful misrepresentation. The Panel failed to consider the Judge's perspective in examining whether the picture was misleading. When the Judge reviewed the picture, it just seemed to him like a "snapshot" of him serving on SWFWMD. (T. 782-83). Accordingly, Judge Renke did not contemplate whether someone unfamiliar with SWFWMD would think he was actually the "Chair" of the entire organization.

The Panel found a violation of Canon 7 by inferring a deceptive or misleading message into a truthful statement and an accurate picture. Such analysis falls well below the actual malice standard. Assuming, *arguendo*, that the accurate picture and caption are characterized as misleading and deceptive, the representations are protected political speech. In Weaver, 309 F.3d at 1320, the Eleventh Circuit struck down a Georgia judicial canon that prohibited "true statements that are misleading or deceptive or contain a material misrepresentation or omit a material fact." The Panel used this same theory embodied in the unconstitutional Georgia canon to find Judge Renke guilty on Count Two. However, the Weaver court clearly held that judicial regulation must permit significant "breathing space" to protect political expressions. Weaver at 1320. As a consequence, it is unconstitutional to sanction a judicial candidate for making

accurate statements even if the statements are found to be misleading, deceptive or omit a material fact.

C. The Panel erred in finding guilt in Count Three because the Judge did not intend to imply any official endorsement and, at worst, the caption of the picture with the Judge and firefighters merely contained a one-word mistake.

Count Three pertains to a picture and text that accurately reflect Clearwater firefighters who supported Judge Renke during his judicial campaign. The Panel found the picture misleading because the Judge was not endorsed by any group representing the firefighters. However, Judge Renke did not reference any endorsement but instead merely published a picture of himself surrounded by supporters, who are employed in a profession that he admires. (T. 783.). Neither Mr. Hebert nor Judge Renke intended to suggest that his campaign had an official endorsement. (T. 706).

In recommending a guilty finding, the Panel determined that the Judge should have used the modifier "some," instead of the article "the" before "Clearwater Firefighters" to avoid the potential suggestion that the Judge had an official endorsement. (Findings at 27). Even if the Panel's modifier is considered the better word choice, the Panel's finding still hinges on a one-word mistake.

As the Weaver court noted, mistakes happen in the midst of a vigorous political debate. Weaver at 1319 ("erroneous statement is inevitable in free debate."). For example, Mr. Hebert knew the Judge graduated from Florida State

law school; however, this same brochure that used "the" instead of "some," also mistakenly stated he graduated from the University of Florida School of Law. (T. 766-67). In addition, although the Judge gave Mr. Hebert the correct spelling of his daughter's name, her name was also misspelled on the same brochure. Id. No one caught these errors. Similarly, the JQC repeatedly misquoted language from one of the Judge's mailers in every one of its charging documents, materially altering the meaning of a statement attributed to the Judge.[6] These examples demonstrate the ease with which erroneous statements can innocently occur.

Post-campaign critiquing of word choice is precisely the problem Weaver addresses. If judicial candidates know that each word uttered will be scrutinized for every possible unintended meaning, candidates will be terrified to say anything. The self-censorship caused by the fear of judicial discipline is the antithesis of "uninhibited, robust and wide-open" public debate celebrated by the United States Supreme Court. New York Times at 270. In the end, the chilling effect caused by unconstitutional restrictions hinders the public's ability to thoughtfully choose the judiciary it is empowered to elect. As this Court stated in Sadowski v. Sheven, 345

[6] In Count Four, the JQC alleged that the judge overstated his experience as a "hearing officer in hearing appeals from the administrative law judge" when he had only acted as a hearing officer in one case and served on a panel in considering the remainder of the appeals. However, the Judge had actually stated he had experience as a "hearing officer **and** in hearing appeals from the administrative law judges," which was accurate. The Panel found the Judge not guilty on this count.

So. 2d 330, 333 (Fla. 1977), "[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among the candidates for office is essential, for the identities of those who are elected will inevitably shape the course we follow as a nation."

The Judge did not intend to mislead the public by implying he had been endorsed by any organization. If he mistakenly chose the wrong article, his mistake was merely negligent and does not constitute a violation of Canon 7A(3)(a) or 7A(3)(d)(iii).

D. The Panel incorrectly found that the Judge intended to overstate his experience in Counts Six and Seven when he interchanged the word "trial" for "litigation" and truthfully claimed that he had broader civil trial experience than his opponent.

Vigorous political debate is an essential part of the American elective process. See New York Times at 270 (debate on issues of public opinion should remain "uninhibited, robust and wide-open"). As the Second District has noted, complaints concerning political debate must be strictly evaluated based on "principles of constitutional law, not on a sense of political correctness, etiquette or even fairness." Dockery at 293. Indeed, "[t]he First Amendment requires neither politeness or fairness." Pullum at 258.

In order to encourage debate between candidates, the First Amendment protects incorrect statements made during the political discussion. Weaver at 1319 ("erroneous statement is inevitable in free debate, and it must be protected as a

freedom of expression or to have the breathing space they need to survive."). In Weaver, the Eleventh Circuit recognized a "candidate's factual blunder is unlikely to escape the notice of, and correction by, the erring candidate's political opponent." Id. at 1320. As Weaver emphasized, the "preferred First Amendment remedy [is] 'more speech, not enforced silence'." Weaver at 1320 (quoting Whitney v. California, 274 U.S. 357, 377 (1927)(Brandeis, J., concurring). If a political candidate feels constrained from freely discussing his/her background and qualifications due to a fear of mis-speaking or making a "factual blunder," the candidate will err on the side of silence. This chilling effect inhibits candidates from educating the electorate concerning their respective experiences.

In the full context of the political debate between Mr. Mansfield and John Renke, III, it is clear that Judge Renke did not intentionally misrepresent his experience. A comparison between both of his candidate replies to the *St. Petersburg Times* and to the *Tampa Tribune* shows that they are substantially the same, except that Judge Renke interchanges the words "trial experience" in the *St. Petersburg Times*, which is the subject of Count Six with "litigation experience" in the *Tampa Tribune.* (JQC Exh. 35, J. Exh. 3).

In the legal community, it is common for people who characterize their work as "litigation" to rarely participate in a trial. For example, in Declan Mansfield's literature, he repeatedly represented himself as a litigator in the courtroom. (J. Exh.

38). Although Mr. Mansfield handled six-hundred to eight-hundred personal injury cases in the past fourteen years, he had never participated in a civil jury trial and only tried one civil non-jury trial. (T. 420, 422). Similarly, even though Judge Renke's experience in a courtroom was limited, he worked on many files which were in litigation. Judge Renke drafted pleadings, drafted motions for summary judgment, helped develop trial strategy, participated in discovery, attended and assisted with substantive motion hearings and met with clients. (T. 108-110, J. Exh. 25). Although Mr. Mansfield and Judge Renke both had limited courtroom time, their practices could be accurately described as "litigation." (T. 61-62, 420, 422, 734-92, 785-86).

Since Judge Renke had intended to convey his experience in handling cases in which a complaint and answer had been filed and discovery had commenced, rather than his experience actually trying cases, he agreed that the more appropriate term was probably "litigation experience" rather than "trial experience." (T. 784). To overcome First Amendment protections, the JQC must show that Judge Renke's statement was false and made with actual malice at a minimum. Weaver at 1319. Judge Renke's reference to "trial experience" rather than "litigation experience" was, at worst, an erroneous statement negligently made and therefore did not reach the actual malice standard. See Weaver at 1320 ("[n]egligent misstatements must be protected in order to give protected speech the 'breathing

space' it requires."). Since interchanging the word litigation with trial was merely negligent, the Panel erred in recommending a guilty finding with regard to Count Six.

The Panel also erred in recommending that the judge was guilty of the allegations in Count Seven. Judge Renke's statement that he had broader "civil trial experience" than his opponent is accurate. (JQC Exh. 4). While the JQC asserted in the Formal Charges that Mr. Mansfield had "far more experience as a lawyer and in the courtroom," Judge Renke's statement in Count Seven specifically referenced "broad civil experience." (JQC Exh.4) (*emphasis added*). Mr. Mansfield and Judge Renke's debate regarding their relative qualifications was initiated by Mr. Mansfield. (J. Exh.28). Mr. Mansfield alleged that Judge Renke, a younger lawyer, did not have the requisite experience to be a qualified judge. (J. Exh. 28). Judge Renke responded that he did not "disagree that experience is very important" but that a "broad range of experience is just as important." (J. Exh. 28). Specifically, Judge Renke compared their experience and stated, "We need to look at the complete picture. His experience is in criminal law, a very narrow area. My experience is much broader." (J. Exh. 35).

Judge Renke's claim that he had broader civil trial experience is supported by the record. It is undisputed that Judge Renke assisted in two civil jury trials while Mr. Mansfield testified that he had never participated in or assisted in a civil

jury trial, even in a second or third chair capacity. Moreover, Judge Renke participated in or assisted with five civil non-jury trials while Mr. Mansfield's non-jury civil trial experience was limited to one dog-bite case against a *pro se* litigant. In addition, Judge Renke correctly referenced areas of law in which he had experience but his opponent did not. As such, Judge Renke's representation in his political mailer that he had broader civil trial experience was accurate. The Judge's true and correct representations as set forth in Count Seven do not violate Canons 7A(3)(a) or 7A(3)(d)(iii). Accordingly, the Panel's guilty finding should be rejected.

IV. Even if the Court accepts the Panel's findings, the Panel's recommended sanction is consistent with governing precedent.

The Panel strongly and unanimously rejected the sanction of removal. Instead, the Panel asserted that a public reprimand and fine were the appropriate sanctions. The Court has imposed a public reprimand, sometimes paired with a fine, in several cases involving campaign misrepresentations and cases in which the judicial candidate accepted what the court characterized as an illegal campaign contribution. See In re Kinsey, 842 So. 2d 77 (Fla. 2003); In re Pando, 903 So. 2d 902 (Fla. 2005); In re: Gooding, 905 So. 2d 721 (Fla. 2005).

Assuming *arguendo* that the Panel's factual findings are accepted, the present case is less egregious than other campaign contribution cases that impose a public reprimand. First, the Panel's findings distinguish the present case from

Pando and Gooding by determining that the judge had a reasonable and valid expectation in receiving the 2002 compensation that he used to fund his campaign. The Judge's reasonable belief that he could legitimately receive this compensation in 2002 for work he performed on the Driftwood case and for his underpayment for the entire time he was at the firm was corroborated by the opinion of the executive director of LOMAS. In contrast, the judges in Pando and Gooding simply took loans from family members, without any credible understanding that the payments were legitimate.

Second, the judges in Pando and Gooding each misrepresented the source of their loans. There is no showing in this case that the judge intended to deceive or misrepresent the source of his compensation or his personal loans to his own campaign. To the contrary, prior to any JQC investigation, his wife spoke to the press about the additional compensation and their dilemma as to whether they would loan the funds to the campaign or purchase a house. (J. Exh. 1A). In addition, the judge disclosed this compensation on his income tax returns as earned income and paid taxes on this money. The judge also properly reported his income in his Disclosure of Financial Interests and disclosed the loans to the campaign in the Treasurer's Report. As such, there is no circumstantial evidence of his intent to hide the source of his funds.

The Panel also determined that the Judge showed sincere and extreme remorse for even unintentionally misleading the public in his campaign brochures and found that the undisputed evidence established his reputation as a very good circuit court judge. Although the campaign between the Judge and Declan Mansfield was intense, the community has moved beyond the campaign and has embraced this diligent and competent judge. For example, attorney Harry James Parker, II, was Declan Mansfield's campaign treasurer in the 2002 election and yet he testified as a character witness on behalf of Judge Renke. (T. 665). Mr. Parker practices primarily in family law and has appeared at hundreds of hearings before the Judge and in twenty-five to thirty substantive hearings and trials. (T. 662, 668). Mr. Parker, who has also served on various grievance committees over the past thirty years, testified to the Judge's "intellectual honesty," promptness, work ethic, patience with litigants and his ability to take the "monster calendar" with a "tremendous backload" that he inherited and turn it into a functioning docket. (T. 663, 668-69). Similar live testimony was offered by attorneys Thomas Todd and Millicent Athanason and in character affidavits submitted by twenty other attorneys. (T. 769-77, 840-47; J. Exh. 36). Based on a totality of the circumstances, including the mitigating factors found by the Panel, a public reprimand is the appropriate sanction if the Panel's findings are approved.

CONCLUSION

The Judge respectfully requests this Court to reject the Panel's guilty findings and dismiss all charges against Judge Renke. If the Court accepts the Panel's recommendations regarding the Judge's guilt, the Panel's recommended sanction of a public reprimand and fine is supported by existing case law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of February, 2006, the original and seven (7) copies of the foregoing Respondent's Initial Brief has been filed via e-file@flcourts.org and furnished by FedEx overnight delivery to:

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Clerk
Supreme Court of Florida
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The undersigned counsel does hereby certify that this brief is submitted in 14 point proportionally spaced Times New Roman font.

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