IN THE SUPREME COURT OF FLORIDA

INQUIRY CONCERNING A JUDGE NO. 02-466

JUDGE JOHN RENKE, III Case No. SC03-1846

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# RESPONDENT'S REPLY BRIEF

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## SYMBOLS AND REFERENCES

| | | |
|---|---|---|
| I.B. | = | Respondent's Initial Brief, dated February 20, 2006 |
| A.B. | = | JQC's Answer Brief, dated March 2, 2006 |
| 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 |

## ARGUMENT

### I. THE ANSWER BRIEF MISQUOTES JUDGE RENKE'S CAMPAIGN MAILER AND THUS, OVERLOOKS THE POSSIBILITY OF INNOCENT INTERPRETATIONS WHICH WOULD PRECLUDE A FINDING OF GUILT AS TO COUNT ONE.

The Answer Brief erroneously quotes Judge Renke's mailer as stating, "John Renke **is** a judge with our values." (A.B. 11) (*emphasis added*). The Answer Brief then argues these "words. . . flatly asserted incumbency, which was obviously knowingly false." (A.B. 11). However, the slogan created by the Judge's campaign consultant and published on one mailer in reality stated, "John Renke, a judge with our values." (JQC Exh. 2). While the Answer Brief's altered quotation "flatly asserted incumbency," the slogan Judge Renke actually used did not.

The Panel found that the mailer referenced in Count One was created by Judge Renke's campaign consultant, Jack Hebert, and that "the words 'a judge with our values' were Mr. Hebert's." (Findings 25). Mr. Hebert created a similar slogan for another non-incumbent judge ("Bo Michaels, a judge for the people"). (T. 685). Mr. Hebert intended both phrases to be a catchy way of stating what types of judges they would be if elected. (T. 692-93).

The Panel found the phrase only "implied" incumbency, which does not meet the standard for a purposeful misrepresentation. (Findings 25). At the very least, the phrase is susceptible to different interpretations. As this Court has

recognized, intent is often inferred from circumstantial evidence. Florida Bar v. Fredericks, 731 So. 2d 1249, 1251-52 (Fla. 1999). In cases of circumstantial evidence, a reasonable hypothesis of innocence precludes a guilty finding, even when the burden of proof is clear and convincing evidence. Id.; Florida Bar v. Marable, 645 So. 2d 438 (Fla. 1994). The non-misleading interpretation of the slogan, as intended by Mr. Hebert and Judge Renke, demonstrates a "reasonable hypothesis of innocence" precluding a guilty finding in Count One.

## II. JUDGE RENKE'S PICTURE ACCURATELY DEPICTING HIM CHAIRING A SWFWMD SUBCOMMITTEE DOES NOT SHOW HE INTENDED TO MISRPRESENT HIMSELF AS "CHAIRMAN" OF SWFWMD, A NON-EXISTENT POSITION.

Judge Renke chaired the SWFWMD Governing Board's Planning Committee and the Coastal River Basin Board. Count Two references the Judge's publication of a picture accurately portraying him in the SWFWMD boardroom set up as though he were chairing a meeting. A SWFWMD employee confirmed the published picture correctly represented Judge Renke's position chairing a Governing Board Planning Committee meeting. (J. Exh. 10 at 14-15). In addition, the Panel acknowledged the accurate representation in the flyer that the "Governor had appointed John K. Renke III only to the governing board of the District." (Findings 26). While the picture and text were correct, the Answer Brief argues the picture could mislead the public, who may be unfamiliar with SWFWMD, to believe he was the chair of the entire District.

Potential misunderstandings derived from truthful representations are not clear and convincing evidence of a knowing misrepresentation. The Answer Brief acknowledges there is no official position as chairman of SWFWMD. (A.B. 12). Misrepresenting oneself to be in a non-existent position would not likely occur to someone who was knowledgeable about the SWFWMD organizational structure.

While the Answer Brief cites to In re Kinsey, 842 So. 2d 77, 90 (Fla. 2003), there is no indication that Judge Kinsey's literature published accurate pictures and text that was later interpreted to be misleading. (A.B. 13-14). Rather, the referenced portion of Kinsey pertains to Judge Kinsey's incorrect statement that her incumbent opponent had not revoked the bond of "an abusive punk" when, in fact, the bond was revoked. (A.B. at 13-14 (citing Kinsey at 90)). Judge Kinsey defended the representation by pointing to accurate newspaper articles contained in the text of the flyer. Kinsey at 90. The Court determined that merely including small print articles where much of the print was obscured did not cure overt misrepresentations in the mailer. Id. In contrast, the guilty findings in the present case were based on the possibility that a misleading message could be inferred from a truthful depiction and text. It is an unconstitutional application of Canon 7 to punish a judicial candidate for publishing an accurate photograph with truthful text merely because the public could potentially interpret it in a misleading manner. See Weaver v. Bonner, 309 F. 3d 1312, 1320 (11th Cir. 2002) (finding a

Georgia canon prohibiting "true statements that are misleading or deceptive or omit a material fact" to be unconstitutional).

## III. EVEN IF JUDGE RENKE INCORRECTLY USED THE WORD "THE" WHEN HE SHOULD HAVE USED THE WORD "SOME," THERE IS NO CLEAR AND CONVINCING EVIDENCE OF AN INTENT TO DECEIVE.

The Answer Brief references testimony in which Judge Renke and Mr. Hebert acknowledge that the modifier "some" might have been a better word choice than the article "the." (A.B. 15). Judge Renke testified that he did not intend to suggest he had an endorsement and believed that the caption accurately described the picture of him surrounded by Clearwater Firefighters. (T. 783). Assuming he chose the wrong word, a negligent misstatement is not a knowing misrepresentation.

For example, the Answer Brief misquotes the Judge's campaign literature in Count One to state, "John Renke <u>is</u> a judge with our values" instead of using the correct slogan "John Renke, a judge with our values." (A.B. 11). The Answer Brief's alteration of the Judge's mailer to create a misrepresentation, while careless or even reckless, does not show a deceptive intent. Indeed, another statement excerpted from the Judge's mailer was misquoted in Count Four of the Formal Charges and again in the Amended Formal Charges even after the mistake was discovered. (I.B. 42). The previous mistakes in Count Four converted a true statement into a misrepresentation. (I.B. 42, fn 6). The Answer Brief also

misquotes the caption referenced in Count Three as stating "John and Kevin Bowler" when the caption really stated "John with Kevin Bowler." (A.B. 14; JQC Exh. 2). However, it should not be suggested that the JQC's repeated mistakes show a pattern of deceitful intent. Rather, these errors show how easily unintentional slips occur even when the parties try to be careful. As the Eleventh Circuit noted, "erroneous statement is inevitable in free debate" and punishing negligent misstatements unconstitutionally chills freedom of expression. Weaver at 1321.

## IV. JUDGE RENKE DID NOT INTEND TO MISREPRESENT HIS EXPERIENCE IN HIS CAMPAIGN LITERATURE.

Judge Renke acknowledged that, in retrospect, the word "litigation" was better than the word "trial" to describe his experience. (T. 784). His firm regularly interchanged the words to describe their practice and in fact, the Judge interchanged the words in his candidate response letters to the newspapers. (T. 64-66; JQC Exh. 3; J. Exh. 35). However, his use of the word "trial" in the single response letter to the *St. Petersburg Times* does not establish, by clear and convincing evidence his intent to misrepresent his qualifications. Moreover, Judge Renke's statement referenced in Count 7 that he had more civil trial experience than his opponent was truthful and supported by evidence. (I.B. 46-47).

## V. THERE WAS NO PATTERN OF AN INTENT TO DECEIVE.

The Answer Brief incorrectly argues that a pattern exists because "the Renke campaign only distributed three brochures and two were filled with deliberate misrepresentations." (A.B. 19-20). While the Mallard Group assisted the campaign on three brochures, there were many other campaign representations. (J. Exh. 27, 28, 31, 35). Moreover, there is no basis for the Answer Brief's gratuitous assertion that the Judge's response letter to the *Tribune* contained misrepresentations. (A.B. at 20; J. Exh. 35). Rather, the Judge was charged with making an alleged misstatement to the *St. Petersburg Times* by using the word "trial" instead of "litigation" to describe his practice in his candidate response letter to the Editorial Board. And even then, as acknowledged by the Answer Brief, the Judge told the *Times* Editorial Board he had not handled any first chair trials himself. (A.B. 18, JQC Exh. 3). There is no clear and convincing evidence of a pattern of misrepresentations.

## VI. JUDGE RENKE DID NOT INTEND TO RECEIVE AN ILLEGAL CAMPAIGN CONTRIBUTION.

The Answer Brief's subjective critique of the Renke law firm compensation agreements demonstrates the fundamental error in its analysis. Each law firm is different and decisions regarding the sufficiency and timing of compensation are unique to each firm. As the American Bar Association has noted:

> If there is a universal rule regarding compensation, it is this: every compensation system works, and every compensation system fails. Systems can run the spectrum from objective to subjective, participative to dictatorial. What works in a particular law firm is a system that fits the culture and strategy of the organization. That means that a good compensation system should be flexible; it should be able to survive evolving needs of the firm and produce decisions respected by those affected.

James D. Cotterman, ABA Law Practice Management Section, Compensation Plans for Law Firms, 5 (4th ed 2004).

The Renkes agreed that the Judge would be compensated when the firm felt it would have capital to cover the expenditure. John Renke, II felt the firm could pay the Judge in May 2002 after the Defendants filed the Motion to Approve Settlement. (T. 334-35). The Motion was filed near the time of the election filing deadline and the Judge and his wife made the last-minute decision to use their own money to finance a judicial campaign. (T. 128, 584).

### A. There are no meaningful or substantive contradictions between the testimony of the Judge or his father.

The Answer Brief argues that Judge Renke's testimony recognizing his father's discretion to offer him a large or small compensation package to be somehow inconsistent with his father's testimony that he and his son had reached a valid compensation agreement. (A.B. 23). In any law firm, a partner has the discretion to make an offer of compensation to an associate attorney and the associate has the option of accepting the offer or working elsewhere. However, the

owner's discretion regarding the offer of compensation does not invalidate any subsequent compensation agreement entered into between the owner and the associate. In 2000, after being paid minimally for years, the Judge exercised his remedy and decided to leave if his father did not increase his offer. (T. 337, 582, 612; Findings at 14). The Judge's father offered to increase the Judge's compensation and he stayed. (T. 208, 612-30; Findings at 14).

The Answer Brief attacks the Panel's finding that Judge Renke had a "reasonable and valid expectation" of receiving the funds by suggesting the parties gave inconsistent testimony regarding the exact amount of compensation the Judge would receive. (Findings 32; A.B. at 23). The Answer Brief notes that Judge Renke stated he would receive "roughly half" of the amount of the Driftwood funds, the Judge's father indicated he would receive 45%, and Margaret Renke testified that she believed the amount would be split 50-50. (A.B. 25). However, everyone understood that the Judge would receive an amount equal to approximately half of the Driftwood funds even though the exact percentages slightly differed.

B. Judge Renke was not paid his compensation prematurely.

Although the Answer Brief characterizes the Judge's additional compensation alternately as "contingent fees" or "fee-splitting," the firm was not required to pay the Judge out of the settlement funds. Assuming *arguendo* that the

Court finds that the payments were directly linked to the settlement of cases, there is no authority prohibiting payments to associates prior to the firm's ability to access the settlement funds.

The Answer Brief does not refute Mr. Phelps' testimony that it is common and appropriate for many law firms using an incentive-based compensation system to pay its associate out of another account prior to the firm's vested right in the settlement funds. (T. 877-78; 881, 894, 902). Contrary to the Answer Brief's representations, Mr. Phelps did not "unequivocally testif[y] that the fees had not been earned when they were paid to Judge Renke in 2002. . . ." (A.B. 29, T. 875-76). Instead, Mr. Phelps merely acknowledged his understanding that the Driftwood litigation settlement was not final in 2002 and that Judge Renke was paid out of a separate source of funds. (T. 875-76). Mr. Phelps' acknowledgment clarified his understanding of the relevant facts supporting his opinion that the compensation arrangement was proper. Moreover, the Answer Brief misquotes Mr. Phelps' testimony that he "had never seen compensation like Judge Renke's in a law firm in his 23 years with the Florida Bar" to suggest Mr. Phelps criticized the increase in or the basis for the additional compensation paid to Judge Renke in 2002. (A.B. 24; T. 884-85). To the contrary, far from faulting the additional payments, Mr. Phelps really testified as follows:

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|---|---|
| Special Counsel: | . . . What do you think about his total compensation between ’95 and 2001? Have you seen compensation like that in law firms? |
| Mr. Phelps: | No, sir, not in my 23 years with the bar. |
| Special Counsel: | Right. |
| Mr. Phelps: | In terms of such a small amount. |

(T. 885) (*emphasis added*).

The law firm assumes the risk it will not recover the expense of paying its associate promised compensation if the ultimate settlement is unsuccessful. Despite the arguments in the Answer Brief that some of the witnesses believed the Driftwood litigation settlement was “precarious,” the American Bar Association in addressing law firm compensation structures, explains that it is the firm’s business decision regarding timing of payments to its employees. Compensation Plans for Law Firms at 68. (T. 313-14). As such, the Judge’s father needed to assess the risk as to when he believed his firm would have adequate cash reserves to pay the promised compensation. The Judge’s father felt there was little risk after the Defendants filed the Motion to Approve Settlement and he believed that the Defendant Home Owner’s Association would ultimately approve the settlement since they had previously authorized the delivery of the settlement check to the firm the year before. (T. 238). John Renke, II’s risk assessment was reasonable and ultimately, the case settled as he expected.

C. The Judge's work efforts justified his compensation.

The Panel found the evidence "overwhelmingly indicated that Judge Renke was underpaid" throughout his years at the firm. (Findings 12). The Panel only considered Judge Renke's 2002 compensation to be "unearned" because the Driftwood litigation settlement was not final. The Panel concluded, "Judge Renke would have been entitled to these same funds after the settlement in the Driftwood litigation was finally approved in the calendar year 2003." (Findings 32).

Special Counsel objects to the Panel's finding and maintains that Judge Renke's work efforts did not justify his payments. (A.B. 30-32). In support, it cites the testimony of attorneys Matthew D. Ellrod and Steven H. Mezer, who represented separate defendants in the Driftwood litigation and who did not deal directly with Judge Renke. (A.B. 30). The Answer Brief fails to reference the testimony of Mr. Pierce Kelly, who represented another defendant in the Driftwood litigation and who explained that the plaintiffs were represented by three attorneys at the Renke firm and acknowledged the substantial work that occurred behind the scenes. (JQC Exh. 111 at 31). In addition to research and writing, the Judge handled the financial discovery and coordinated the two hundred plaintiffs. (T. 108-110; J. Exh. 25).

The Answer Brief compares the thirty thousand dollars in additional compensation that Mr. Gurran received due to the Driftwood litigation with the

$101,800 received by Judge Renke but fails to note that Mr. Gurran worked part-time at the firm due to health problems and that he was paid twenty dollars an hour, almost twice the hourly wage as Judge Renke. (T. 462). The Judge was the only full-time lawyer in the firm since his father worked as little as six to twelve hours a week. (T. 608). John Renke II, Margaret Renke and the Judge all explained that the Judge's compensation was not based solely on his efforts in Driftwood, but were also meant to compensate him for the years of minimal pay. (T. 583, 639, 644-45; JQC Exh. 52, March 1, 2005 deposition of John K. Renke, II, at 122). While the Judge used his money to fund the campaign, the purpose of the payments was not to fund the campaign.

D. There is no clear and convincing evidence of any intent to accept an illegal campaign contribution.

Contrary to the Answer Brief's assertion that the Judge's compensation agreement was not explained prior to trial, the Judge described his agreement in Answers to Interrogatories and in his Motion for Summary Judgment as to Count Eight. Further, even before the JQC began its investigation, the Judge's wife referenced their eleventh-hour decision to use their additional compensation from the law firm to finance the campaign rather than buy a house. (J. Exh. 1A). While the Answer Brief erroneously states that John Renke, II, never explained the basis for the compensation at deposition, John Renke, II, did in fact testify to the complete agreement, including the higher percentage pertaining to the Driftwood

fees. (JQC Exh. 52, March 1, 2005 deposition of John K. Renke, II, at 122). The Answer Brief's assertion that the explanation of the Judge's compensation was a "moving target," demonstrates the single-minded approach to the investigation, focusing solely on whether the Judge's work efforts justified his compensation.

The Answer Brief incorrectly asserts that the payments were a gift because the Judge was not expected to repay his compensation if the Driftwood litigation settlement was not ultimately finalized. (A.B. 32). However, John Renke, II, did not offer to "share" the fees with the Judge. Rather, he structured an incentive based compensation plan whereby additional payments, calculated as a percentage of the settlement fees, were paid to his son. Just as any associate is not expected to "pay back" compensation, the Judge was reasonably entitled to keep compensation that he received and on which he paid taxes. (T. 132-33).

John Renke, II, as the employer, determined when payments were made in light of his available capital. Normally, more capital was available when personal injury settlements were received. However, the Driftwood litigation was not the typical personal injury case. For example, the litigation spanned seven years, involved over two-hundred plaintiffs, several separate causes of actions, complex financial discovery, and defense representation by three separate law firms. Moreover, in contrast to the usual personal injury case that is resolved shortly after the parties agree to a settlement award, the settlement procedures in the Driftwood

litigation were protracted, even though the parties had agreed to a sum certain for the attorneys' fees. All of these factors reasonably affected the firm's decision to pay the Judge prior to accessing the funds.

## VII. FIRST AMENDMENT PROTECTIONS REQUIRE APPLICATION OF THE ACTUAL MALICE STANDARD.

The Answer Brief argues the actual malice standard enunciated in Weaver v. Bonner, 309 F. 3d 1312, 1320 (11th Cir. 2002), is inapplicable to Florida judicial elections. As the Answer Brief asserts, Weaver found unconstitutional an "idiosyncratic" Georgia Canon that prohibited, in pertinent part, "false statements negligently made and true statements that are misleading or deceptive or contain a material misrepresentation or omit a material fact. . . ." (A.B. 34); Weaver at 1320. The Eleventh Circuit found that these restrictions chilled free speech and were not narrowly tailored to meet any compelling governmental interest. Id. While Florida's Canon 7 simply prohibits "knowing misrepresentations," the JQC has defined "knowing misrepresentations" to encompass the "idiosyncratic" and unconstitutional prohibitions against "negligent misstatements" or "true statements that are misleading or deceptive or contain a material misrepresentation or omit a material fact." While the Court has recently found Canon 7 to be facially constitutional, the JQC's interpretation of "misrepresentations" raises issues of overbreadth and vagueness. See Vanasco v. Swartz, 401 F. Supp. 87, 94-95 (E.D. NY 1976). We respectfully request the Court to clarify whether the First

Amendment to the United States Constitution and Article I, Section 4 of the Florida Constitution require application of the actual malice standard to evaluate judicial campaign speech or whether this Court's analysis is in conflict with the Eleventh Circuit Court of Appeals.

## VIII. A PUBLIC REPRIMAND AND FINE ARE THE MAXIMUM APPROPRIATE SANCTIONS IF THE COURT UPHOLDS THE PANEL'S GUILTY FINDINGS.

The Answer Brief's tone is more hostile than the Panel's Findings and implicitly attacks mitigating factors, such as the Judge's reasonable expectation of receiving his compensation from the law firm. (A.B. 30-32). In addition, the Answer Brief inserts aggravating factors into the Findings. For example, it states that the Panel "expressed some doubt that he would have been elected in view of the misrepresentations" when the Panel never commented on the effect on the election. (A.B. 47). Nonetheless, even with the more egregious picture painted by Answer Brief, it still asserts that a Public Reprimand and a fine are the appropriate sanctions. No evidence is referenced to counter the Panel's finding that Judge Renke is currently fit to hold office, nor does it distinguish the cases relied upon by Judge Renke or the Panel in arguing that the Panel's recommended sanction is the maximum supported by controlling authority.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of March, 2006, the original and seven (7) copies of the foregoing Respondent's Reply Brief has been filed via e-file@flcourts.org and furnished by FedEx overnight delivery to:

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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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