IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

SEAN WILLIAM CONWAY,

Respondent
_____/

Supreme Court Case No. SC08-326

Lower Tribunal No.: 2007-51,308(17B)

RESPONDENT SEAN WILLIAM CONWAY'S RESPONSE TO THIS COURT'S RULE TO SHOW CAUSE ORDER

Pursuant to the order of this court dated June 23, 2008 the Respondent, Sean William Conway, files this response to the order of the Court requesting that he show cause whether any of his comments which form the basis of the Florida Bar's complaint against him "should be considered protected speech under the First Amendment" of the United States Constitution.

STATEMENT OF FACTS

Prior to October 18, 2006, Broward Circuit Judge Cheryl Aleman appointed the respondent, Conway, a Florida lawyer, to represent a defendant in her court room for a pending felony.[1] Through a written plea the defendant was arraigned *in absentia*

[1]All of the facts contained within this Statement of Facts have been acquired from the material which was posted by the respondent on the JAAB Blog.

on October 18, 2006. Six days later on October 24th the clerk of the court sent a Notice of Trial to the respondent. On October 25th the Notice of Trial was received by the Respondent advising him that his client's trial was scheduled to begin three business days later on October 30, 2006. Of equal importance, this date was only eight business days after his client's arraignment.

On October 30th Conway and his client appeared before Judge Aleman. When the case was initially called Judge Aleman asked counsel, "[t]rial or continuance?" If counsel and client wanted time to serve witnesses with subpoenas or to engage in reasonable discovery, Judge Aleman insisted that defendants, including Conway's client, waive their right to a speedy trial as a condition of granting their request for a continuance.

When the case was recalled approximately two hours later Conway directed Judge Aleman's attention to Fla. R. Crim. P. 3.160(d) which specifies that, "[a]fter a plea of not guilty has been entered **the defendant is entitled to a reasonable time in which to prepare for trial.**" (Emphasis added). The trial judge did not directly respond to counsel's suggestion that the language of the rule should guide the court in the matter. As a consequence, counsel reluctantly advised the Court that he was moving for a continuance, as it was the only prudent option available. Judge Aleman then directed her attention to Conway's client and had him affirmatively waive his

rights to a speedy trial. The next day, Halloween 2006, Conway posted on the JAAB blog[2] his views concerning what had transpired in Judge Aleman's courtroom with respect to his client's case, as well as all other cases which had been arraigned on October 18, 2006 and were thereafter set for trial on October 30, 2006. *See* Exhibit -A- *Respondent's JAAB posting dated October 31, 2006.* Conway acknowledges the following remarks: (1) "I along with several other attorneys, had to endure her ugly, condescending attitude as one-by-one we all went up to the podium and noted that our respective clients had just been arraigned on Oct. 18th as she forced us to decide between saying ready for trial - or need a continuance"; (2) "Every atty tried their best to bring reason to that ctroom, but, as anyone who has been in there knows, she is clearly unfit for her position and knows not what it means to be a neutral arbiter"; (3) "Evil, Unfair Witch ("hereinafter "Witch")"; (4) "As my case was on recall for 2 hours, I watched this seemingly mentally ill judge condescend each previous attorney"; and (5) "Judge (not your honor b/c there's nothing honorable about that malcontent) . . . there seems to be a mistake in this case." (Hereinafter the "*five remarks*").

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[2] JAABlog stands for Justice Advocacy Association of Broward blog. It is a forum about the justice system in the 17th Judicial Circuit.

STANDARD OF REVIEW

The typical standard of review for findings of fact in bar disciplinary proceedings is set forth in Fla. Bar Reg. R. 3-7.6(m)(1)(A):

> The referee's report shall include: (A) a finding of fact as to each item of misconduct of which the respondent is charged, **which findings of fact shall enjoy the same presumption of correctness as the judgment of the trier of fact in a civil proceeding . . .**

(Emphasis added).

However, in cases involving the First Amendment, the standard of review is *de novo*:

> [O]ur review of petitioners' claim that their activity is indeed in the nature of protected speech carries with it a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court. See *Bose Corp. v. Consumers Union of United States*, Inc., 466 U.S. 485, 499, 104 S.Ct. 1949, 1958, 80 L.Ed.2d 502 (1984). The "requirement of independent appellate review ... is a rule of federal constitutional law," *id.*, at 510, 104 S.Ct., at 1965, which does not limit our deference to a trial court on matters of witness credibility . . .

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 567, 115 S.Ct. 2344, 132 L.Ed.2d 487 (1995). The standard of review is no different in bar disciplinary cases involving expression. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 111 S.Ct. 2720, 2726, 115 L.Ed.2d 888 (1991)("[A]n appellate court has an obligation to 'make an independent examination of the whole record' in order to

make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.' ") (quoting *Bose Corp., supra.*)).

In *Gentile,* the Bar's case, like this case, rested solely on the lawyer's own statements:

> Neither the disciplinary board nor the reviewing court explains any sense in which petitioner's statements had a substantial likelihood of causing material prejudice. The only evidence against Gentile was the videotape of his statements and his own testimony at the disciplinary hearing. The Bar's whole case rests on the fact of the statements, the time they were made, and petitioner's own justifications. Full deference to these factual findings **does not justify abdication of our responsibility to determine whether petitioner's statements can be punished consistent with First Amendment standards.**
>
> **Rather this Court is,**
>
> > **'compelled to examine for [itself] the statements in issue and the circumstances under which they were made** to see whether or not they do carry a threat of clear and present danger to the impartiality and good order of the courts **or whether they are of a character which the principles of the First Amendment... protect**.

Id. at 1038. (Citation omitted, emphasis added).

III. LEGAL ARGUMENT

The only facts before the referee were those that Conway admitted posting on the JAABlog. The referee conducted no evidentiary hearing, made no credibility determinations, and received no evidence that what Conway posted was false. The

five remarks found by the referee to have been "false or to have been posted with reckless disregard as to their truth or falsity" are without any support in the record as to their falsity. They were opinion or rhetorical hyperbole protected by the First Amendment of the United States Constitution.[3]

A. Free Speech Is Often Provocative And Challenging

The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Connick v. Myers*, 461 U.S. 138, 145 (1983). "Speech is often provocative and challenging ... [But it] is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far

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[3] See ¶ 10 of Report of Referee. *Compare Ray v. Florida Bar*, 797 So. 2d 566 (2001), where there was an evidentiary hearing, credibility determinations, and evidence that what Ray said was false. Further, Ray asserted facts (i.e., the Immigration Judge lied and tampered with evidence) that were capable of determination as to their true or falsity.

Ray was ultimately reprimanded for writing letters about an immigration judge. Further, and unlike this case, the referee in Ray made specific findings that the accusations were false and reckless:

> The letters contained accusations which are utterly false and they were made in my way of thinking at a minimum-at a minimum-with reckless disregard for the truth.
> Indeed, if there is one word that characterizes these letters, it is reckless.
> ... I have read that transcript and I have listened to the tape and there was nothing-nothing-that transpired in that hearing that would justify such outrageously false accusations. And I am utterly appalled that this kind of language would be used against anybody on evidence that barely qualifies as sketchy.

Id. at 557, n. 1. Here there were no such findings beyond a very general boiler-plate finding. Even were there specific findings here like those in *Ray*, this Court can and should review those findings *de novo*. The factual record here shows no falsity in Conway's blog postings.

above public inconvenience, annoyance, or unrest." *Terminello v. City of Chicago*, 377 U.S. 1, 4 (1949).

B. Attorney Criticism of Judges– Especially Truthful Criticism or Opinion -- is Protected by the First Amendment

Judges are public figures. *Garrison v. Louisiana*, 379 U.S. 64, 85 S.Ct. 209, 215, 13 L.Ed.2d 125 (1964); *Republican Party v. White*, 536 US 765, 781, 122 S. Ct. 2528, 2538; 153 L. Ed. 694 (2002)("[d]ebate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms, not at the edges.") (internal quotation marks omitted).

Attorneys are in a unique position to understand, and criticize, the functioning of our judicial system and its judges. Attorney criticism of judges is protected for the same reason that criticism of other public officials is protected. *In Re Green*, 11 P. 3d 1078, 1085 (2000)(the " reason that the protection of attorney criticism of judges is similar to the protection of criticism of other public officials...[is to] safeguard [] public discussion of governmental affairs.")(citations omitted). See also *Standing Committee on Discipline v. Yagman*, 55 F.3d 1430, 1438 (9th Cir. 1995); *Fieger v. Michigan Supreme Court*, 2007 WL 2571975 (E.D. Mich.); *Oklahoma Bar Association, v .Porter*, 766 P.2d 958, 1988 OK 114 (1988); and *State Bar v. Semaan*, 508 S.W.2d 429 (Tex. Ct. App. 1974).

C. Truth is an Absolute Defense to Factual Statements

For First Amendment purposes, the line between fact and opinion is not always obvious. Statements criticizing a judge may not be punished unless they are capable of being proved true or false; statements of opinion are protected by the First Amendment unless they "imply a false assertion of fact." *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19, 110 S.Ct. 2695, 2706, 111 L.Ed.2d 1 (1990). Even statements that at first blush appear to be factual are protected by the First Amendment if they cannot reasonably be interpreted as stating actual facts about their target. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50, 108 S.Ct. 876, 879, 99 L.Ed.2d 41 (1988).

While Conway submits that his postings which led to these disciplinary proceedings were pure opinion or, in some cases, opinion in the form of rhetorical hyperbole, the facts underlying those opinions were truthful. There is no dispute as to what transpired in Judge Aleman's courtroom regarding Conway's client or the other defendants who were arraigned on October 18, 2006. Nor are there factual disputes about Judge Aleman forcing defendants to trial without adequate time to prepare, or the fact that she ignored Fla. R. Crim. P. 3.160(d) which entitles the defendant "to a reasonable time in which to prepare for trial."

Notably, the referee made no findings that the underlying statements posted on the blog were false or that Conway's account of the trial judge's conduct during the period of October 2006 implied a false assertion of fact. There simply has been no showing or attempt by the Bar to show that those facts were anything but truthful.

Attorneys may be sanctioned for impugning the integrity of a judge or the court only if their statements are false; truth is an absolute defense. See *Garrison v. Louisiana*, 379 U.S. at 74. Moreover, the Bar bears the burden of proving falsity. See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-77, 106 S.Ct. 1558, 1563-64, 89 L.Ed.2d 783 (1986).[4]

D. Opinions and Rhetorical Hyperbole are Entitled to First Amendment Protection

Statements of "rhetorical hyperbole" aren't sanctionable, nor are statements that use language in a "loose, figurative sense." See *National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 284, 94 S.Ct. 2770, 2781, 41 L.Ed.2d 745 (1974) (use of word "traitor" could not be construed as representation of fact); (use of word "blackmail"

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[4] The respondent notes that in footnote 3 of *Ray* this Court stated that "Ray also argues that the burden of proof was improperly shifted to him to substantiate his statements. However, there is no debate that the statements at issue concerned 'the qualifications or integrity of a judge,' R. Regulating Fla. Bar 4-8.2(a), and we see no error in the burden then shifting to Ray to provide a factual basis in support of the statements." Respondent respectfully submits that the burden shifting specified in *Ray* is inconsistent with *Hepps* and its progeny.

could not have been interpreted as charging plaintiff with commission of criminal offense). *Bresler*, 398 U.S. at 14. See also, *Justices of Appellate Division, First Department v. Erdmann*, 33 N.Y.2d 559, 560 347 N.Y.S.2d 441, 301 N.E.2d 426(1973)(Where lawyer was quoted in magazine article to effect that there were few trial judges in certain judicial departments who left guilt or innocence to jury, that appellate judges in same department were "whores who became madams," and that only way to become a judge was "to be in politics or buy it," lawyer was improperly censured; isolated instances of disrespect for law and courts expressed by vulgar and insulting words or other incivility, uttered, written, or committed outside precincts of court, without more, are not subject to professional discipline.).

1. All of Conway's Postings were Opinions or Rhetorical Hyperbole

All of Conway's postings were opinions, some in the form of rhetorical hyperbole. Those opinions were: "Evil, Unfair Witch"; "seemingly mentally ill"; "ugly, condescending attitude"; "unfit for her position and knows not what it means to be a neutral arbiter," and "there's nothing honorable about that malcontent."

The statement "Evil, Unfair Witch" is an opinion in the form of a rhetorical hyperbole. "Hyperbole" is defined as meaning "*Rhet.* An extravagant statement or figure of speech not intended to be taken literally, as in 'to wait an eternity.'"

Random House Dictionary of the English Language 698 (1st Printing 1966). On Halloween, 2006, the respondent referred to Judge Aleman as a mean spirited witch. His comment that Judge Aleman was a "witch" is an example of figurative speech. Conway's use of the words "evil" and "unfair" are also protected by the First Amendment. As noted in *Austin,*

> **to use loose language** or undefined slogans that are part of the conventional give-and-take in our economic and political controversies -- like **'unfair'** or 'fascist' -- **is not to falsify facts**. Such words were obviously **used here in a loose, figurative sense...**

Austin, 418 U.S. at 284 (Emphasis added).

The statement "seemingly mentally ill" is an opinion because it too is in the form of rhetorical hyperbole. In *Tech Plus, Inc. v. Ansel*, 59 Mass. App. Ct. 12, 16-17; 793 N.E.2d 1256, 1267(2003) the plaintiff sought compensation after one of his superiors told a third party that he was "sick" and "mentally ill." In reviewing the matter the court found that, "[v]iewed in the context in which they were made, these statements could not reasonably have been understood as assertions of actual fact ... as distinct from 'rhetorical hyperbole.'" *Id.* at 1267. Further, in *Keller v. Miami Herald Publishing Co.*, 778 F.2d 711, 717 (11th Cir. 1985) the court noted that "Florida courts have adopted the rule...[that] [t]he court must... accord weight to cautionary terms used by the person publishing the statement." (Internal quotation

marks omitted). The word "seemingly" falls squarely into the category of cautionary terms which should be weighted towards a finding of First Amendment protection.

The statements "ugly, condescending attitude," "unfit for her position and knows not what it means to be a neutral arbiter," and "there's nothing honorable about that malcontent" express opinions because none of the phrases can reasonably be understood to be an assertion of actual fact. *Falwell*, 485 U.S. at 50. Additionally, all three statements employ "loose language" which are part of the "give-and-take in our... controversies." *Austin,* 418 U.S. at 284. Given the context in which these statements were made, each of them express opinions protected by the First Amendment, as long as they had an objective reasonable basis in fact for their issuance.

2. Conway had an Objectively Reasonable Basis in Fact for his Opinions

Conway's postings reflected that Judge Aleman was setting trials eight business days after arraignments and with only three business days notice. Reasonable people can disagree on what constitutes a reasonable amount of time to prepare for trial, but it is occasionally next to impossible to find reasonableness in some positions. For instance, the Sixth Amendment of the United States Constitution provides in relevant part that "[i]n all criminal prosecutions, **the accused shall enjoy**

the right... to have compulsory process for obtaining witnesses in his favor..." (Emphasis added).

At a minimum, proper trial preparation includes insuring that compulsory process is obtained over witnesses having testimony favorable to an accused facing imprisonment. Defendants often need to subpoena for trial law enforcement officers involved in the investigation of their cases. However, the October 30th defendants were precluded from obtaining compulsory process over law enforcement officers because of the operation of Fla. Stat. § 48.031(4)(a)3, which provides that designated employees are to accept service with respect to "[s]ervice of a criminal witness subpoena upon a law enforcement officer,**[but that] no such designated employee is required to accept service [i]f the appearance date is less than 5 days from the date of service.**" (Emphasis added).

Additionally, if the defendants wanted to engage in reasonable discovery, Judge Aleman's accelerated trial dates left them with no other option but to forfeit their speedy trial rights.[5]

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[5] There is no suggestion here that the facts underlying the posted statements were in any way twisted or distorted. "If the [posted underlying facts] had been truncated or distorted in such a way as to extract the [*five remarks*] from the context in which [they were] used" in the posting, Conway's opinions might not be protected by the First Amendment. *Bresler*, 398 U.S. at 13. "But the [underlying facts] were accurate and full." *Id.* at 13. In short, Judge Aleman's rulings provided the respondent with an objectively reasonable basis in fact to express the opinions which he posted the following day on the JAABlog.

E. There is no Factual or Legal Support for the Bar's Allegations or the Referee's Conclusions that Conway's Statements were False and Therefore, None of Conway's Statements were Made with Knowing Falsity or Reckless Disregard for the Truth

Neither The Florida Bar nor the referee have brought forth any proof of any kind suggesting that any of the factual representations made by Conway and discussed herein above were false. Additionally, when all of the statements of fact are reviewed individually it is apparent that no evidence has been presented to substantiate the existence of a false statement of fact. In *Austin* the Court noted a fundamental rule of law in cases with First Amendment implications containing statements which need to be examined for potential liability of monetary or professional sanction. Therein, the Court declared that "**[b]efore the test of reckless or knowing falsity can be met, there must be a false statement of fact.**" *Austin,* 418 U.S. at 284. (Emphasis added). Accordingly, since the record before this Court is void of any false statements of fact there is no justifiable reason to explore whether any of the factual statements were made with knowing falsity or with reckless disregard for the truth.

F. Attorneys Play an Important Role in Exposing Problems within the Judicial System

In its show cause order this Court has requested that the respondent be mindful of the policy identified in *Fla. Bar v. Ray*, 797 So. 2d 556 (Fla. 2001) "that attorney's comments 'play an important role in exposing valid problems within the judicial system.'" Courts have recognized that attorneys who work within the system should not be inhibited from discussing what transpires within criminal courtrooms. As noted in *Gentile*,

> Because attorneys participate in the criminal justice system and are trained in its complexities, they hold unique qualifications as a source of information about pending cases. Since lawyers are considered credible in regard to pending litigation in which they are engaged and are in one of the most knowledgeable positions, they are a crucial source of information and opinion... If the dangers of their speech arise from its persuasiveness, from their ability to explain judicial proceedings, or from the likelihood the speech will be believed, these are not the sort of dangers that can validate restrictions. The *First Amendment* does not permit suppression of speech because of its power to command assent. (Internal quotation marks omitted)

Gentile, 501 U.S. at 1056, 1057.

In *Green* the Colorado Bar attempted to discipline a lawyer who had published his opinion that a local judge was a racist. After finding that the lawyer had an objectively reasonable basis in fact for his opinion the court stated:

> Restrictions on attorney speech burden not only the attorney's right to criticize judges, but also hinder the public's access to the class of people in the best position to comment on the functioning of the judicial system. Interest about judges is important in Colorado, where the

> public periodically votes whether to retain judges. The right of a lawyer as a citizen to publicly criticize adjudicatory officials .... is particularly meaningful where... the adjudicatory officials are selected through the elective system. (Internal quotation marks omitted).

Green, at 1085. As noted above in *White* "[d]ebate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms, not at the edges." (*internal quotation marks omitted*). *White*, 536 US at 781. Accordingly, Conway was performing the legitimate function of discussing the qualifications of a judicial official when he posted his comments pertaining to the matters occurring within Judge Aleman's court room.

In *Buckley v. Valeo*, 424 U.S. 1; 96 S. Ct. 612; 46 L. Ed. 2d 659 (1976) the Court reviewed its prior opinions which explained that,

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States, 354 U.S. 476, 484 (1957)*...'[T]here is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs,... of course includ[ing] discussions of candidates....' *Mills v. Alabama, 384 U.S. 214, 218 (1966)*. This no more than reflects our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,' *New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)*. In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, **for the**

> **identities of those who are elected will inevitably shape the course that we follow as a nation.**

(Emphasis added). Lastly, although CONWAY's words were initially published on a blog and not by the press, the teachings of *Sheppard v. Maxwell*, 384 U.S. 333, 350; 86 S. Ct. 1507, 1515, 1516; 16 L. Ed. 2d 600, 613 (1966) are appropriate.

> A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials **but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism**. This Court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media **for what transpires in the court room is public property**. (Internal quotation marks omitted).

(Emphasis added).

The respondent during October of 2006 was of the opinion that numerous defendants' procedural rights were being trampled upon by Judge Aleman. He observed Judge Aleman implement a first trial date setting policy which stripped defendants of their *Sixth Amendment* right to compulsory process and rendered virtually meaningless their right to a speedy trial as provided for in Fla. R. Crim. P. 3.191. Accordingly, he perceived Judge Aleman to be engaged in a course of conduct intentionally designed to force defendants to waive their speedy trial right

as promulgated for cogent reasons by this Supreme Court. He further viewed these actions to be in violation of Fla. Code Jud. Conduct, Canon 2A which provides that, "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary" and Canon 3B(2) which provides that, "A judge shall be faithful to the law and maintain professional competence in it." It follows that by posting his comments -- often in the form of rhetorical hyperbole -- on the JAABlog about Judge Aleman's court room behavior, Conway was exercising what James Madison had declared to be his First Amendment "**right of freely examining public characters and measures**..." 4 Elliot's Debates in the Federal Constitution (1876) p. 575. (Emphasis added). Accordingly, Conway's *five remarks* are protected by the First Amendment of the constitution and this Court should reject his tendered conditional plea of guilty to professional misconduct and order that the Florida Bar's complaint against him be dismissed.

CERTIFICATE OF FONT COMPLIANCE

I hereby certify that the font requirements of Fla. R. App. P.9.210(a)(2) have been complied with.

By: _____
Michael Wrubel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed on this the 12th day of July, 2008 to Anthony Alan Pascal, The Florida Bar, 5900 North Andrews Avenue, Suite 900, Fort Lauderdale, FL 33309; Kenneth Lawrence Marvin, The Florida Bar, 651 East Jefferson Street, Tallahassee, FL 32399; Fred Haddad, 1 Financial Plaza, Suite 2612, Fort Lauderdale, FL 33394; Maria Kayanan, 7455 SW 82 Court, Miami, Florida 33143 and Randall C. Marshall, American Civil Liberties Union, 4500 Biscayne Boulevard, Suite 340, Miami, FL 33137.

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