IN THE SUPREME COURT OF FLORIDA

INQUIRY CONCERNING A JUDGE, NO. 01-244 **CASE NO.: SC01-2670**

_____/

RESPONDENT'S REPLY TO FLORIDA JUDICIAL QUALIFICATION COMMISSION'S RESPONSE TO MOTION TO STRIKE OR ALTERNATIVELY RESPONSE TO UNTIMELY MOTION FOR COSTS

COMES NOW the Respondent by and through undersigned counsel and files this reply to the Florida Judicial Qualification Commission's Response to Motion to Strike or Alternatively Response to Untimely Motion for Costs and in support thereof would state:

1. It is evident from the tenor of Special Counsel's pleading and the attachments thereto that he is seeking to court public opinion and thereby influence improperly the Supreme Court of Florida in causing it to reject the recommendation of the Hearing Panel.

2. Special Counsel alleges falsely that Judge Cope "attacks the character and integrity of the Investigative Panel, the Commission's attorneys, the alleged victim and her former boyfriend." Judge Cope leveled no such attacks. Rather Judge Cope's motion sets forth facts which are true and readily established.

3. Special Counsel falsely asserts that Judge Cope did not admit to the conduct prior to trial for which he was found guilty by the Hearing Panel.

4. In paragraph 4 of his motion, Special Counsel misrepresents what occurred before the Investigative Panel in an effort to support his false allegation that Judge Cope did not admit to the conduct prior to trial.

5. As was made clear to the Investigative Panel, and as is clear from the partial transcript Special Counsel appends to his motion, Judge Cope did specifically acknowledge, through his counsel, the misconduct. In advancing this false proposition, Special Counsel has neglected to produce as an exhibit the entirety of the transcript before the Investigative Panel, which it is submitted will corroborate the proposition that Judge Cope acknowledged the impropriety of the conduct for which he was ultimately found guilty.

6. In addition, on December 13, 2001, in an hour long telephone conference with Special Counsel, Judge Cope again acknowledged through his counsel both the facts and the impropriety of his conduct and offered to plead guilty to that conduct. In fact Special Counsel was advised in that conversation that the police

reports alleging a battery on the beach as reflected in the charges by the Investigative Panel, were predicated on false reports by the woman. Moreover, Special Counsel was advised that Judge Cope observed a physical anomaly on the woman in the privacy of his hotel room which he could not have known but for the fact that she was there consensually and disrobed. Special Counsel advised that the JQC was not concerned with the conduct in the hotel room; and if the facts were as represented he would recommend a reprimand and alcoholic aftercare.

7. In addition, Special Counsel has neglected to point out to this Court the fact that Judge Cope continued to acknowledge his misconduct in depositions taken by Special Counsel in March of 2002.

8. Special Counsel has also failed to acknowledge the fact that following his deposition of Judge Cope Special Counsel apologized to Judge Cope for doubting his veracity and acknowledged the JQC had insufficient evidence upon which to prosecute and convict Judge Cope on the criminal charges; the charges which Judge Cope was ultimately acquitted.

9. Special Counsel's reference in paragraph 6 of his motion to Judge Cope's answer and affirmative defenses were filed after the referenced conversation with Special Counsel. Moreover, it was explained to Special Counsel by the undersigned, who prepared the answer and affirmative defenses, that Judge Cope while fully acknowledging the scope of his conduct did not wish to waive a legal defense raised by infirmities in the charging document. Those infirmities were rife and served as a legitimate basis for the denials ultimately made by Judge Cope.

10. Special Counsel was clearly advised that the pleading as to the lack of jurisdiction was intended, and only concerned, any charge leveled by the JQC in connection with the consensual conduct in the privacy of the hotel room. Judge Cope, and the undersigned, had a good faith reason to question the jurisdiction over such conduct not only by previous case law in the State of Florida and elsewhere, but also through the acknowledgement of Special Counsel in the December 13th conversation that the JQC had no business or interest in going behind closed doors. Indeed that

defense was candidly presented and acknowledged as a legal defense only to the Hearing Panel. Thus there was no concealment as Special Counsel seeks to suggest in his motion.

11. Special Counsel in paragraph 6 goes on to suggest that Judge Cope made false and untrue denials in his answer and proceeds to cite particulars. Special Counsel's averments in this paragraph are misleading and convey a totally false impression. For example, paragraph a. states "In the early morning hours of April 4, 2001, while in Carmel-by-the-Sea, California for a judicial conference, you became intoxicated and wandered the public streets."

12. In fact, as Special Counsel knew or should have known, Judge Cope became intoxicated on April 3rd not April 4th. Nor did he at any time "wander" the public streets.

13. Subparagraph b. asserts "when the women discovered that the door to their hotel room was locked and they could not find their key, you suggested they come to your hotel room at the La Playa Hotel a few blocks away."

14. Special Counsel knows that this allegation was false as well and was properly denied by Judge Cope. It was denied because it was incomplete and misleading and as literally phrased could not be admitted. Carvell v. Kinsey, 87 So.2d 577 (Fla. 1956) (an admission in an Answer binds the party and no proof is required of the matter admitted.) As Judge Cope truthfully testified, the women had discovered they could not find their key before he even met them. Indeed the manager of the hotel testified at trial that the mother reported the key had been lost at the beach or while shopping hours before they ever met Judge Cope. Moreover when it came to Judge Cope's attention that they could not get into their room, he did not at that time suggest they come to his "hotel room a few blocks away." Rather he suggested that the daughter accompany him to the manager's office to retrieve an extra key.

15. Subparagraph c asserts "You and the two women began walking down the middle of the public street in an obviously intoxicated state and were picked up by a police officer, who drove the three of

you to your hotel." Here again, this allegation is fundamentally false and known by Special Counsel to be false. Judge Cope then and now truthfully believed he was not in an "obviously intoxicated state." Moreover, he was not "picked up" by a police officer as a consequence of such alleged "obviously intoxicated state" as the allegation implies. As noted even the police officer testified that he merely offered assistance, and that Judge Cope knew where he was, readily identified himself and knew where he was going.

16. Subparagraph d states "After the police officer returned the two women to their hotel room during the early morning hours of April 4, 2001, you returned to the women's room and asked the daughter to walk with you on the beach." Special Counsel claims this allegation was denied. In fact, it was admitted in both the Answer and Affirmative Defenses and Respondent's Response to Request to Admit.

In paragraph 8 Special Counsel asserts that Judge Cope firmly insisted he did nothing wrong under Count III during settlement negotiations. Nothing could be farther from the truth. Judge Cope had agreed to fully and publicly acknowledge all of the facts surrounding his conduct with the woman. The comments in the letter cited by Special Counsel by Judge

Cope's counsel were addressed to Special Counsel's insistence that Judge Cope acknowledge taking advantage of the woman in a predatory fashion.[1] Judge Cope could not agree to this; since it did not happen.

17.

Special Counsel asserts in paragraph 9 that "the predominant if not only issue in proceedings before the Commission is whether the judge violated the Code of Judicial Conduct." Special Counsel falsely asserts that Judge Cope denied that he did so before the Investigative Panel and it was thereby forced to file formal charges. The misleading character of this allegation is clearly exposed by the fact, readily apparent from the complete transcript of the appearance by Judge Cope's counsel before the Investigative Panel in October 2001, that Judge Cope voluntarily, through his counsel, acknowledged every aspect of his misbehavior. Judge Cope volunteered, through his counsel, the fact that he brought the woman into his hotel room. This fact was nowhere reflected in the police reports which the Investigative Panel had,

[1] Since the woman claimed that Judge Cope never even kissed her on the beach, was gentle at all times and denied going to Judge Cope's room where she was intimate, Special Counsel's insistence on this Count could only have been predicated on Judge Cope's own truthful testimony. Thus Special Counsel could not have believed the "victim" as he claimed in his affidavit.

because, as the Investigative Panel was told, the woman/victim had made false reports to the police. The Investigative Panel was not forced to do anything other than that which was required by law, which was to investigate the facts. It conducted no such investigation.

18. Special Counsel also attests in his affidavit that he always believed that Judge Cope was guilty of each of the crimes charged, that he always believed Judge Cope was a liar and lied to the police, and that he always believed that the evidence was sufficient to convict.

19. Notwithstanding such assertions, Special Counsel in fact volunteered to Judge Cope and both of his co-counsel his (Special Counsel) conclusion that the JQC had insufficient evidence to pursue the charges for which a directed verdict was ultimately entered in Judge Cope's favor. In addition, outside of the offices of Louis Kwall on the same day Special Counsel made such acknowledgement, Special Counsel advised the undersigned that his "view of Judge Cope" had "changed 180 degrees."

Once Special Counsel knew that Judge Cope's observations in his hotel room were indeed independently confirmed,[2] Special Counsel could not possibly have believed that the "victim" was telling the truth. For him to do so would have required Special Counsel to believe that the witness was being truthful in claiming that Judge Cope attempted to rape her on a public beach from which she fled in fear. It would have required him to believe she was telling the truth when she changed that story and admitted in deposition that Judge Cope made no aggressive sexual advance whatsoever and was always "gentle" yet still fled in fear. It would have required him to believe that Judge Cope could have possibly invented the observation of the physical anomaly in the privacy of his hotel room. Even the "victim" ultimately admitted that Judge Cope's observation was consistent with her physical appearance. At the final hearing when asked how she could explain that fact she snapped sarcastically "There is no way, unless he was peeping somehow through the room or he got in touch with an ex-boyfriend." The

[2] Notwithstanding his denial to the contrary in his latest pleading.

record of course is undisputed that the confirming evidence was not obtained from each of the boyfriends until March 2002 well after Special Counsel was advised of the fact.

20.

If as Special Counsel states, he always believed the "victim" was telling the truth[3] and always believed Judge Cope was a liar, then Special Counsel was prepared to deceive this Court and the public when he authored a stipulation in which he expressly asserted:

> "Due to the Daughter's drinking earlier on the evening of April 4 and some inconsistencies in her statements, the Special Counsel cannot prove by clear and convincing evidence that the Daughter is correct. Accordingly, it is stipulated for purposes of these proceedings that Judge Cope's version is correct (i.e., that he did not take the key and was not the man at the door).

21. In addition, in order to have always believed the "victim" was telling the truth, Special Counsel would necessarily have had to ignore her own admission at the hearing that she had committed perjury.

[3] Notably, Special Counsel makes this assertion notwithstanding the abundance of authority holding that it is improper for an attorney to express his personal belief as to the credibility of a witness. E.g., Smith v. State, 818 So.2d 707 (Fla. 5th DCA 2002)

22. Furthermore, Special Counsel's further assertion that despite his belief in the alleged victim that he perceived his case against Judge Cope as nothing more than a swearing contest is telling. Given that Special Counsel had the burden of proving the claims against Judge Cope by clear and convincing evidence, there is no way that Special Counsel, if he truly believed the allegations against Judge Cope amounted to a swearing contest, could have believed that the JQC had sufficient evidence to convict Judge Cope on such charges. See e.g., Inquiry Concerning Davey, 645 So.2d 398, 404 (Fla. 1994)("The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy. Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier

of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.)

23. Having now professed an abiding belief in the "victim's truthfulness" and an irrational belief in the sufficiency of the evidence, contrary to his earlier admission, Special Counsel can offer no explanation to this Court why, if such were true, he authored the stipulation acknowledging Judge Cope's truthfulness as opposed to the victim's. Special Counsel can offer no credible ethical or practical reason in the context of what he terms "settlement discussions" to make such a remarkable and, according to him, false concession. He can offer no credible or ethical or practical reason why he would be thus willing to deceive this Court by submitting to it a proposition he believed to be false for the purpose of inducing this Court to accept the proposed findings of fact and recommendation that he was then contemplating. He can offer no ethical reason arising by either convenience or necessity for being thus prepared to not only deceive this Court, but to subvert the fundamental processes of the Judicial Qualifications Commission by acknowledging a core

fact (that Judge Cope was telling the truth) when he believed supposedly that such a fact was false. Nor can he explain why his position on Count III (Inappropriate Conduct of an Intimate Nature) rested entirely on facts supplied by Judge Cope, which facts the woman denied ever occurred. In this light Special Counsel's asserted reason for negotiating a settlement in the first instance is similarly implausible. He states that he feared that the Hearing Panel might acquit and that the public would believe the "victim," thereby creating a crisis of confidence on the part of the public in the integrity of the judiciary and the JQC. This claim is patently bizarre and unbelievable. For Special Counsel to tender to this Court verbally assaultive editorials and letters to the editor for the St. Petersburg Times, which Special Counsel courted publicly throughout these proceedings, does not in fact evidence the believability of his contention. What it does clearly evidence is his desire to persuade this Court to lower its own high standards, accept the contemporaneous editorial proposition that the Hearing Panel basically "took a dive" in this case, and to attack the very proposition that the St. Petersburg

Times conveniently contemporaneously attacked with Special Counsel pleading (i.e. that the recommendation of the Hearing Panel was wrong, that Judge Cope was a liar, and that Judge Cope was unrepentant).

After the directed verdict of acquittal on all of the criminal counts Special Counsel in argument to the panel directly and expressly violated strict ethical norms by arguing facts to the jury not in evidence.[4] In addition, Special Counsel personally and passionately vouched for the credibility of the victim. See, Rule 4-3.4 of the Rules Regulating the Florida Bar (a lawyer shall not . . . in trial . . . assert personal knowledge of facts in issue except when testifying as a witness or state a personal opinion as to the credibility of a witness . . . or the guilt or innocence of the accused.)

24.

Now in the guise of challenging the Respondent's motion for fees and costs, Special Counsel has thrown at this Court false and irrelevant propositions regarding not only what happened, but his beliefs, and incredibly the supposed beliefs of the California prosecutor, who the record discloses was operating in league with Special Counsel from the outset. The Court will recall that that prosecutor filed the criminal charges of

[4] Special Counsel contended that Judge Cope was lying and represented to the jury a false version of what happened in rebuttal of Judge Cope's testimony that Mills had apologized to him for doubting his veracity and admitted there was insufficient evidence on the criminal charges.

battery, theft of key, and aggravated trespass months after the original charges were filed in California and without investigation. They were also filed months after the victim herself expressly repudiated in a statement to the California District Attorney's Investigator that any battery occurred.

25. The truth of the matter ultimately is that Special Counsel's acknowledgement on December 13th to the undersigned that this case required merely a reprimand and alcoholic

26. aftercare if Judge Cope's rendition of facts were correct was indeed the proper disposition. The Hearing Panel heard all of the testimony and determined the credibility of the witnesses. The Hearing Panel determined that Judge Cope was telling the truth. The evidence of that proposition was overwhelming, including the unambiguous testimony of Special Counsel's principal witness, the Honorable Susan Schaeffer.

27. Special Counsel now has the audacity to suggest, and in fact accuse, Judge Cope of intemperate and injudicious conduct for merely defending himself from malicious criminal charges. Special Counsel has the audacity to assert that Judge Cope is in fact guilty of criminal conduct after Judge Cope has been effectively acquitted in two forums of such conduct. Specific reference is made to the affidavit of California prosecutor Lisa Poll. She states that "one of the factors" leading to the dismissal was her sensibility for the feelings of the victim. Never mind that it was established conclusively that Judge Cope could not have stolen the key as charged. Never mind that it was established conclusively that the "victim" had made serial false reports to the police (which was testified to unequivocally by the investigating officer). The California prosecutor, like Special Counsel , would

have had to indulge in the willing suspension of disbelief to have believed this "victim." The real reason the charges were dismissed in California was because the prosecutor knew she could not prove her case. In addition, Judge Cope had filed a motion to dismiss in California after the California prosecutor reneged on her position that she would dismiss the charges upon an acquittal in Florida.

28. The averments in the affidavits of Special Counsel and the California Prosecutor professing belief in the "victim's" allegations are improper and irrelevant. The issue before the Court is not whether or not Special Counsel believed the "victim." In asserting to this Court his subjective "belief," Special Counsel characterizes the evidence as a "swearing contest" between Judge Cope and the woman. This is inaccurate and misleading. Overwhelming independent evidence conclusively established that the woman's story was fabricated, imagined, or otherwise unsustainable as a matter of law.

29. The woman denied under oath in her deposition filing initial specific false reports with the

police. The investigative police officer affirmed under oath at his deposition that the woman in fact filed such reports. Concerning the alleged theft of the key which the intruder used to attempt to enter the room, the woman initially told police she was not paying attention to the key and did not know what happened to it. She later changed her story and claimed she was paying attention to the key and its location immediately prior to Judge Cope's arrival outside of their room. Investigation by the Respondent confirmed that the key had in fact been reported lost while shopping or at the beach many hours before the Respondent came in contact with the woman. The woman alleged, and the JQC charged, that the Respondent was "eavesdropping" on the woman's conversation with her mother in which personal matters were being discussed. This false allegation was made to conceal the fact that the woman confided personal matters to the Respondent and affirmatively sought his company. The woman later admitted she only assumed the Respondent was eavesdropping; and her mother testified that the woman had admitted confiding personal matters to Judge Cope.

The woman's mother confirmed under oath that the woman falsely reported to police initially that the Respondent attempted to rape her on the beach. The investigating officer testified that the woman initially claimed that the Respondent made forceful sexual advances on the beach. The woman later recanted such false reports, before the charges were even filed in the case. She testified that the Respondent made no forceful or aggressive sexual advances, that the Respondent never even kissed her and that the Respondent was "gentle" at all times on the beach. The woman denied the physical anomaly the Respondent observed in his hotel room, then admitted to the physical anomaly at the final hearing and suggested Respondent learned of it by talking to her boyfriends.

30. The woman denied her mother was an abusive alcoholic, a fact confided to the Respondent. The woman's two boyfriends confirmed the mother was an alcoholic and abusive. The woman had made an earlier allegation of a multiple rape by three individuals while she was sleeping, which assault assertedly did not awaken her.

31. The woman falsely told police she had consumed no alcohol prior to identifying the Respondent at her hotel room door. She later admitted consuming five beers. She also admitted that she could not see Respondent's features through the "blurry" peephole of her door, but observing only the outlines of a "round face and big ears." She claimed to have identified Judge Cope at her door before the police were called. The transcript of the subsequent 911 call reflects she did not know who was at the door. After initially telling the police the door merely "pushed" against the chain lock, she testified that it was repeatedly and violently slammed against the chain. The investigating officer and the manager of the hotel both testified that could not have possibly occurred without damaging the door and chain. There was no damage whatsoever.

32. The above are a mere fraction of the inconsistencies and untruths established by independent evidence and the woman's own admissions. Irrespective of Special Counsel's professed belief in the woman's latest version of events, it is indisputable that

he must have known and in fact acknowledged that the woman's testimony was insufficient as a matter of law to establish the criminal charges under this Court's standard articulated in Davey.

33. A telling example documenting Special Counsel's determination to pursue criminal charges which were not substantiated and in fact disproven lies in the formal allegation that the Respondent "peered" into the woman's room. The woman herself denied that the Respondent did or even could have peered into the room. The configuration of the door and the location and actions of the individual outside the door as described by the woman rendered such act impossible. In response to an interrogatory requesting to be apprised of the evidence supporting that allegation, Special Counsel wrote:

> "The Special Counsel objects to this interrogatory as overly broad and an improper "contention interrogatory." Subject to this objection, the fact that Respondent repeatedly banged into the door after opening it as far as the chain lock would allow supports the inference that Respondent peered into the opening. Whether Respondent actually looked inside the room or not is irrelevant to the impropriety of his conduct."

34. Special Counsel asserts in his pleading that the issue in the case was whether the Respondent

violated the Code of Judicial Conduct. That allegation is obviously misleading. The issue of course was whether Respondent's conduct violated the judicial canons. Determination of the extent and the manner in which the canons were violated in turn was necessarily dependent on a determination of the Respondent's conduct. Special Counsel seems to be suggesting that he was free to assume the specific misconduct charged criminally occurred; and seeks to obliterate the necessary discrimination the law imposes between conduct which can and cannot be proven.

35. However notwithstanding the distinction Special Counsel seeks to overlook, his assertion nevertheless supports the Respondent's position. This is so since the Hearing Panel found in favor of the Respondent on each of the counts on which it directed a verdict of acquittal thereby determining that the Respondent did not violate the judicial canons. The Hearing Panel further found in favor of the Respondent on those specific false allegations in Counts I and III to which the Respondent had objected. Since these counts were the only charges Respondent contested, the

Respondent prevailed.

36. Finally, even were this Court to decline to question the credibility of Special Counsel's affidavit and the other affidavits tendered in support of his pleading, and even were the Court to presume such affidavits to be true, such presumption would not alter the elemental fact that Respondent was in fact the prevailing party on the only charges he contested.

37. One of the traps cleverly laid by Special Counsel and the California prosecutor throughout these proceedings has been to portray the "victim" as the ingénue prey of an unscrupulous judge. Evidence which refuted that central theme was falsely characterized by Special Counsel (and by the St. Petersburg Times) as the irrelevant product of a gross invasion of privacy. However, such evidence in fact documented the falsity of the charges. There was no invasion of her personal privacy whatsoever in the discovery and defense of this case. The evidence established that it was she who solicited Judge Cope's company and volunteered to Judge Cope the intimate details of her life, including her recent abortion, her

mother's alcoholism and verbal abuse, and her desire to get away from her mother. The evidence established that her allegations against Judge Cope were false, and she knew they were false. She was not put on trial. The falsity of her criminal allegations were put on trial; most appropriately.

38. In paragraph 11 Special Counsel lists various costs which he implicitly claims are fraudulent.

39. As the record reflects, Judge Cope timely filed with the JQC pursuant to its instructions his Motion for Costs and Attorneys Fees. The Hearing Panel thereafter issued a recommendation that the parties bear their own costs. Judge Cope respectfully disagrees with such recommendation. Judge Cope's Motion for Costs and Fees is now pending before this Court. Special Counsel now improperly suggests to this Court that it should punish Judge Cope for seeking reimbursement of the costs and attorneys fees that he was forced to incur as a result of Special Counsel's decision to pursue baseless charges for which Special Counsel knew insufficient evidence existed to obtain a

conviction and for which a directed verdict was ultimately entered in Judge Cope's favor.

40. As set forth in Judge Cope's Motion for Costs and Attorneys fees, Judge Cope's motion to have the costs that he was forced to incur reimbursed is based on precedent of this Court. E.g., Moritz v. Hoyt Enterprises, Inc., 604 So.2d 807 (Fla. 1992)(holding that "the party prevailing on the significant issues in the litigation is the party that should be considered the prevailing party . . . "). Given that Judge Cope prevailed on all matters that were at issue in the litigation, Judge Cope is the prevailing party in this action and as such has requested that this Court award him his costs pursuant to Rule 2.140 of the Judicial Administration Rules. Rule 2.140, Jud. Ad. R. ("The supreme court may award reasonable and necessary costs, including the costs of investigation and prosecution to the prevailing party."). Judge Cope has also moved for attorneys fees based on the fact that Special Counsel forced this matter to final hearing by pursuing charges of criminal and ethical misconduct that Special Counsel knew were unfounded and not

supported by substantial and competent, let alone clear and convincing, evidence. A directed verdict was ultimately entered by the Hearing Panel on all such charges. The Hearing Panel, consistent with Judge Cope's admissions and acceptance of responsibility from the outset of these proceedings, recommended a reprimand regarding his acts of public intoxication and inappropriate conduct on a public beach.

41. Special Counsel now amazingly asks this Court to punish Judge Cope for his reliance on prior state supreme court precedent, §57.105, Fla. Stat., inherent authority of this Court to sanction had faith conduct and precepts of fairness in requesting reimbursement for costs and attorneys that he was forced to incur in the prosecution of his defense of charges which Special Counsel knew were unfounded and not supported by clear and convincing evidence. Unfortunately, Special Counsel's position in this regard is consistent with the malicious and vindictive manner in which Special Counsel (a) pursued the knowingly baseless charges for which a directed verdict was ultimately entered and (b) threatened Judge Cope with

removal from the bench in express retaliation for Judge Cope refusing to admit to false predatory conduct. (discussed *supra*). Thus, once again only in Special Counsel's world does it appear appropriate to use Judicial Qualification Commission proceedings for the purpose of punishing sitting judges for exercising their rights under the law.

42. To bolster Special Counsel's suggestion to this Court that it should reject the Hearing Panel's recommendation to this Court of a reprimand because of Judge Cope's asserted lack of remorse, Special Counsel disingenuously argues that in addition to Judge Cope's claims for costs and attorneys fees being wholly unfounded, that Judge Cope has improperly claimed certain expenses as taxable costs. Special Counsel's position in both regards is contrary to established legal authority.

43. The authority of this Court to award costs to the prevailing party in JQC proceedings is governed by Rule 2.140 of the Florida Rules of Judicial Administration. Significantly, Special Counsel's representations to this Court that such Rule "limits

recoverable costs" to court reporter fees and witness expenses is both erroneous and contrary to the express provisions of the Rule. Rule 2.140(C) expressly states:

> (C) The supreme court may award reasonable and necessary costs, <u>including costs of investigation and prosecution</u>, to the prevailing party. Neither attorneys fees nor travel expenses of commission personnel shall be included in any award of costs. Taxable costs may include:
>
> (1) court reporters' fees, including per diem fees, deposition costs, and costs associated with preparation of the transcript and record; and
> (2) witness expenses, including travel and out of pocket expenses.

(emphasis added). Thus, Rule 2.140 by its own terms expressly repudiates the Special Prosecutor's representation to this Court that subparagraphs (1) and (2) constitute an exhaustive or limiting list of recoverable costs. As stated in <u>Amendments to Fla. Rules of Jud. Admin</u>, 780 So.2d 819 (Fla. 2000). Rule 2.140(C) "is modeled in part after Rule Regulating the Florida Bar 3-7.6(o)." Rule 3-7.6(o) of the Rules Regulating the Florida Bar lists the following as recoverable fees:

> (A) investigative costs, including travel and out-of-pocket expenses;
> (B) court reporters fees;
> (C) copy costs;
> (D) telephone charges;
> (E) fees for translation services;
> (F) witness expenses, including travel and out of pocket expenses;
> (G) travel and out of pocket expenses of the referee;
> (H) travel and out of pocket expenses of counsel in the proceedings, including of the respondent if acting as his own counsel; and
> (I) an administration fee in the amount of $750 when costs are assumed in favor of the bar.

3. Notably, the amendment to Rule 2.140, Fla. R. Jud. Admin., post dates and is consistent with this Court's decision in <u>In re Hapner</u>, 737 So.2d 1077

(Fla. 1999). Contrary to Special Counsel's representation to this Court that in In re Hapner "expressly held that travel costs are not recoverable costs," In re Hapner, in actuality holds, consistent with the recent amendment to Rule 2.140, that travel costs of "JQC personnel" are not recoverable. In re Hapner does not hold that all travel expenses are not recoverable as Special Counsel asserts. As explained by this Court in that decision:

> Florida Judicial Qualification Commission Rule 11 provides that, except in extraordinary circumstances, a JQC prosecution is to be held within the county of the judge's residence. The purpose of this rule is to minimize the costs of, and inconvenience to, the accused judge and witnesses. The benefit of this rule would be reversed (many times over) if the judge were required to foot the bill for the travel expenses of all JQC personnel.

737 So.2d at 1077. Accord Rule 2.140, Fl. R. Jud. Admin. ("Neither attorneys fees nor travel expenses of commission personnel shall be included in any award of costs."). See also, Moonlit Waters Apartments, Inc. v. Cauley, 666 So.2d 898, 900 (Fla. 1996)("Under the principle of statutory construction, *expressio unius est exclusio alterius*, the mention of one thing implies the exclusion of another.")

4. Furthermore, given that Rule 2.140(C) "is modeled in part after Rule Regulating the Florida Bar 3-7.6(o)," Special Counsels reliance on the Uniform Guidelines for Taxation of Costs In Civil Actions, as opposed to the express provisions of Rule 3-7.6(o), is misplaced.

5. Accordingly, travel and out of pocket expenses of Judge Cope's counsel is properly taxable as a cost in this matter, as are long distance telephone charges, photocopy charges, court reporter fees and investigation costs, which included weather information.

6. Notably, Special Counsel's assertion that Judge Cope is claiming as costs "travel time for his

attorneys and their families" is false. Judge Cope is claiming as costs only the travel expenses of his attorneys and their staff for matters necessarily related to this litigation. He is not claiming as a cost any travel time of such persons. Moreover, as Special Counsel well knows Angela Merkle, though the wife of Robert Merkle, is employed as a legal assistant by the law firm of Merkle & Magri, P.A. and has been for several years. That legal assistant was, *inter alia*, present at the final hearing and assisted Judge Cope's attorneys in organizing and retrieving all documents, pleadings and evidence in this cause. It appears unfortunately obvious that Special Counsel's false assertion to this court that Judge Cope is claiming as costs "travel time for his attorneys and their families" is intended to mislead, inflame and prejudice this court into rejecting the hearing panel's recommendation as so as to present Judge Cope in a false light to the public.

7. The expense relating to attorney J. Gregory Merkle is also taxable in that such expense was reasonably and necessarily incurred when taking the deposition of the alleged victim and her mother. Notably, Special Counsel caused Judge Cope to incur such additional expense as a result of his advice to the woman and her mother that they retain their own counsel so as to prevent or impede Judge Cope's ability to inquire into matters material to the charges against him. As a result, Judge Cope's counsel was forced to hire Maryland counsel to open a case before the Maryland courts and to attend the depositions in Maryland.

8. The claimed cost of $220 that was incurred due to having to cancel a flight that was originally booked to attend out of state depositions of the JQC's two main witnesses is also properly taxable given that such deposition dates and location were cleared with Special Counsel and the depositions duly noticed prior to the purchase of such airline ticket. It was only because Special Counsel filed a motion for protective order based on the false representation that Judge Cope had agreed to a quid pro quo requiring his deposition to precede that of his accusers, that Judge Jorgenson ultimately entered an order staying all discovery in the case until such time as the California

criminal proceedings had concluded. As a result of such order, Judge Cope reasonably and necessarily canceled the deposition of the woman and her mother and canceled his counsel's flight to same.

9. The polygraph examination expense is also recoverable in that it was incurred in the prosecution of Judge Cope's defense. The polygraph examination was presented to Special Counsel and the Investigative Panel in an effort to demonstrate that Judge Cope's version of events was entirely truthful and thus prosecution of the baseless criminal charges should be abandoned. See The Florida Bar v. Bosse, 609 So.2d 1320 (Fla. 1992)(holding that those cost items that are properly taxable against a party should be the same regardless of whether the party obtaining the award is the bar or the accused).

10. The document enlargements were also an expense incurred in prosecution of Judge Cope's defense. There were in excess of 20 enlargements that were made in preparation for closing argument. In fact, Special Counsel offered to assist Judge Cope's counsel in setting up the enlargements for the Hearing Panel's view. As it turned out the Hearing Panel, immediately prior to closing arguments, announced that it granted a directed verdict on all of the criminal charges and Judge Jorgensen instructed the parties to abbreviate and modify their closing arguments accordingly, which Judge Cope did. As a result, many of the enlargements that were made were not used in closing argument because they related to the criminal charges for which a directed verdict had been entered. Such expense was reasonable and necessary given that Judge Cope, despite the Special Prosecutor's lack of evidence, could not presume with certainty that the Hearing Panel would grant Judge Cope's motion for directed verdict on such charges.

11. With regard to the expert witness fee of Justice England, the dates stated in the affidavit of cost reflect the dates of the invoices. The charges contained on such invoices each relate to services rendered prior to the conclusion of the final hearing. The record will reflect that Justice England and a Professor of Ethics from Cumberland, Dr. William Ross, were both listed as expert witness to testify as to two issues material to

the charges against Judge Cope, i.e., that Judge Cope had no duty to report the California misdemeanor citizen's arrest to the JQC and that Judge Cope had no duty to disclose such misdemeanor arrest to litigants and/or recuse himself from presiding over the matters that came before him. Judge Cope reasonably believed that both experts were necessary to Judge Cope's case and that their expert opinion would be helpful to the Hearing Panel, particularly given the two witnesses' differing backgrounds and rationales for their opinions. Justice England's opinion was based on his experience as a sitting Florida Supreme Court Justice and Florida law, while Professor Ross' opinion was based on ethical standards throughout the country. During the final hearing, Judge Jorgensen required Judge Cope to select only one expert to testify on such issues. Judge Cope chose Justice England, who then rearranged his calendar to prepare and testify days earlier in the proceeding than originally anticipated. Ultimately, it was concluded just minutes before Justice England's scheduled testimony, that given the Special Counsel's failure to produce any evidence relating to a judge's duty to report a citizens arrest to the JQC or to litigants under like circumstances and the testimony of Special Prosecutor's witness, former Chief Judge Susan Schaeffer, as to her continued belief that no duty existed at the time to report the citizens arrest, it was unnecessary to incur the additional expense related to Justice England's hearing testimony on such issues. A directed verdict was ultimately entered in Judge Cope's favor on such issues. In summary, the Special Prosecutor decided to pursue such charges based on no evidence; and Judge Jorgenson refused to grant summary judgment on such issue prior to the final hearing, choosing instead to defer the issue for the Hearing Panel's consideration. It was only at trial, after the Special Prosecutor had failed to produce any evidence of an ethical violation with regard to such issues, that Judge Cope attempted to mitigate the expense of his defense and chose not to have an expert testify as to such issues.

12. Dr. Merin was retained and disclosed to the Special Prosecutor as an expert witness in the field of psychology who Judge Cope intended to call at the

final hearing in this cause. As in the case of Justice England, it was only in response to the lack of evidence presented by the Special Counsel and the virtual collapse of his case, that Judge Cope in an effort to mitigate the costs of the litigation elected not to call Dr. Merin in the final hearing. Under such circumstances, it is clear that such expert witness expenses were incurred in prosecuting Judge Cope's defense of the charges levied against him and that he should not be penalized for attempting to mitigate such costs when it became clear that Special Counsel had offered no evidence in the Final Hearing on the related charges of misconduct. See The Florida Bar v. Bosse, 609 So.2d 1320 (Fla. 1992)(awarding as taxable costs fee charged by witness of accused).

13. Notably, though Special Counsel refers to unspecified costs relating to unspecified depositions of persons allegedly not called to testify or costs related to transcripts not actually used at trial, such general objection, like others, fails to satisfy special counsel's burden of establishing which specific claimed costs are unjustified. Such general objection also prevents any meaningful response from Judge Cope other than to point out that absent a statute to the contrary courts have traditionally awarded costs of depositions if they served a useful purpose, even though not introduced into evidence. See e.g., Fatolitis v. Fatolitis, 271 So.2d 227 (Fla. 2d DCA 1973); Noel v. Broward General Medical Center, 725 So.2d 438, 439 (Fla. 4th DCA 1999)("the trial court was within its broad discretion to tax those items used neither at trial nor to support a motion for summary judgment if the court concluded that the taking of such depositions was "reasonably necessary."

14. With regard to the court reporter charge for the University of California Records Custodian, such charge was not for a deposition, as Special Counsel represents, rather such charge was reasonably and necessarily incurred as a result of being required to have the witness produce the requested records pursuant to a California subpoena to a court reporters office in California.

15. There is only one charge to which Special Counsel objects that has any merit and that is

the charge related to the purchase of a book that was to be utilized in cross-examination. Such charge was included erroneously and is hereby withdrawn.

With regard to Judge Cope's claim for attorneys fees pursuant to § 57.105, Fla. Stat., In re Hapner, is not dispositive. In re Hapner, merely states that attorneys fees are not to be considered as cost under Rule 2.140. It does not foreclose an award of attorneys fees when it is determined that the Special Prosecutor caused a matter to go to final hearing on charges which the Special Prosecutor knew were not supported by the evidence or the law and that as a result a directed verdict was ultimately entered on such charges. The other cases relied upon by the Special Prosecutor relating to criminal and administrative proceedings are also inapposite in that the present proceedings were neither administrative nor criminal. Given the facts of this case, and the express application of the Rules of Civil Procedure to these proceedings, an award of attorneys fees pursuant to § 57.105, Fla. Stat., and/or the inherent power of this court to sanction bad faith litigation, an award of attorneys fees is required in the interest of justice. Though generally, absent an authorizing statute attorney's fees may not be awarded as punishment, Florida courts have recognized an exception to this proscription in circumstances where the misconduct rises to the level of bad faith contributing to unnecessary legal expenses, costs, and delay. This power lies in the courts' limited "inherent authority to assess attorneys' fees for the misconduct of an attorney in the course of litigation." Moakley v. Smallwood, 826 So.2d 221, 227 (Fla. 2002). This sanction can be imposed also for bad faith conduct against a party. Id.; Bitterman v. Bitterman, 714 So.2d 356 (Fla. 1998); St. Pierre v. Greenberg, 697 So.2d 218, 219 (Fla. 4th DCA 1997) (recognizing that "[i]n assessing attorney's fees against a party, a trial court may consider that party's willful refusal to comply with an existing order if that conduct made further litigation necessary for enforcement."). In the instant case there is clearly sufficient evidence of bad faith in the prosecution of Judge Cope on charges which the Special Counsel knew (and admitted) were not supported by the evidence to warrant an award of fees pursuant to this Court's inherent power to sanction bad faith litigation.[5]

16.

With regard to Special Counsel's assertion that Judge Cope was required to produce additional supporting documents in addition to his affidavit of costs and attorneys fees, Judge Cope believes such position lacks merit. Notwithstanding, if this Court believes additional documents should be produced and/or an evidentiary hearing conducted then it should rule that Judge Cope is entitled to award of costs and attorneys

[5] While the Respondent has filed a claim for attorneys' fees in good faith, the Respondent has now been confronted with what amounts to a complete (and shockingly false) denial of the averments upon which the claim is based. While the Respondent respectfully submits that Special Counsel's tortured and false factual presentation to this Court in denying the bad faith of this prosecution is inherently unbelievable in the established circumstance, Respondent acknowledges that, beyond pleading and affidavits and the record below, no testimony has been adduced directly addressing the underlying facts, and this Court accordingly may determine it is not in a position to factually and legally assess the merits of Respondent's claim for attorney's fees.

fees and refer the matter to the hearing panel for a determination of the precise amount of reasonable and necessary costs and attorneys fees to be awarded. See e.g., In re McMillan, 797 So.2d 560 (Fla. 2001)(awarding costs and remanding case for a determination of the amount of costs).

Respectfully submitted,

ROBERT W. MERKLE, ESQ.
Florida Bar Number: 138183
MERKLE & MAGRI, P.A.
5510 West LaSalle Street
Tampa, Florida 33607
Telephone: (813) 281-9000
Facsimile: (813) 281-2223

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: **Judge James R. Jorgenson**, Chair of the Judicial Qualifications Commission Hearing Panel, 3rd District Court of Appeal, 2001 S.W. 117th Avenue, Miami, Florida 33175-1716; **John Beranek, Esq.,** Counsel to the Hearing Panel of the Judicial Qualifications Commission, P.O. Box 391, Tallahassee, Florida 32302; **John S. Mills, Esq.**, 200 Laura Street, Suite 1150, Jacksonville, Florida 32201; **Heather Ann Solanka, Esq**., Special Co-Counsel, Foley & Lardner, 200 Laura Street, Jacksonville, Florida 32201-0240; **Brooke S. Kennerly**, Executive Director of the Florida Judicial Qualifications Commission, 1110 Thomasville Road, Tallahassee, Florida 32303; **Thomas C. MacDonald, Jr., Esq.**, General Counsel to the Investigative Panel of the Judicial Qualifications Commission, 100 North Tampa Street, Suite 2100, Tampa, Florida 33602, this 2nd day of December, 2002.

ROBERT W. MERKLE, ESQ.