

1 That in the event there is a fee for publication of the letter, the respondent shall pay the expense of
2 said publication.

3 DATED this 4th day of December, 2006.

4 **NEVADA COMMISSION ON JUDICIAL DISCIPLINE**

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6 STEVE CHAPPELL, Commissioner and Chairman

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8 GREG FERRARO, Commissioner

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10 ROBNEY WILLIS, Alternate Commissioner and
11 Presiding Officer

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13 BARBARA NETHERY, Alternate Commissioner

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15 C.W. HOFFMAN, Alternate Commissioner

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17 JAMES BEASLEY, Commissioner

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1 **DISSENT TO THE MAJORITY'S**
2 **FINDING OF GUILTY FOR VIOLATION OF CANON 5A(3)(d)(iii)**

3 I dissent from the majority's decision finding Judge Higgins guilty of violating Canon
4 5A(3)(d)(iii) of the Nevada Code of Judicial Conduct which states that a judicial candidate "shall
5 not knowingly misrepresent the identity, qualifications, present position or other fact concerning the
6 candidate or an opponent."

7 Judge Higgins was found guilty of violating this Canon for a statement he included in a
8 campaign brochure which stated, "The Washoe County Bar Association (WCBA) overwhelmingly
9 endorsed Judge Higgins by awarding him an 80% retention rating, the second highest rating of all
10 Washoe County Justices of the Peace." This statement was made based on a published survey
11 regarding evaluations of incumbent judges' performance and retention recommendations conducted
12 and presented by the Washoe County Bar Association that was released to judges on August 30,
13 2004 and to the media through a press release on August 31, 2004, during Nevada's primary election
14 campaign.

15 I dissent from the majority's guilty ruling based on my assessment of the lack of "clear and
16 convincing" evidence that Judge Higgins knowingly misused the word "endorsed" to intentionally
17 misrepresent the WCBA survey results. In my opinion, the WCBA survey results and their
18 accompanying explanations to the members of the Bench in the cover letter distributing the survey
19 results to judges and to the public through the media press release were misleading in themselves
20 as to their purpose, methodology and representation and were presented ambiguously and
21 erroneously. I agree with the Commission that the word "endorsed" was an unfortunate choice of
22 words regarding the statement made by Judge Higgins with regards to his retention rankings, but
23 there was not clear and convincing evidence that Judge Higgins used the word "endorsed" to
24 knowingly mislead the public.

25 In its cover letter to members of the Bench, August 30, 2004, the WCBA states:

26 "We are enclosing your advance copy of the Washoe County Bar Association
27 Judicial Survey for 2004. The purpose of this survey is to provide candid, objective
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1 data to judges in Washoe County from attorneys who appear before them... The
2 results are provided to the members of the Bench prior to public announcement of
3 the results as a courtesy. Washoe County Bar Association requests that these results
4 remain absolutely confidential until after the results are released to the public at a
5 news conference Tuesday, August 31, 10:30 a.m. Your cooperation and
6 professionalism are greatly appreciated in this regard.”

7 Nowhere in its cover letter to judges do they specifically state that the survey results should not be
8 construed to constitute an endorsement by the WCBA. Nor do they state that the purpose of the
9 survey was also to provide the public with the findings to serve as a “voter guide.” Nor do they
10 specifically instruct the judges if or how incumbent judges may utilize these survey results for their
11 individual campaign purposes. It does, however, imply that the results could have potential value
12 for retention campaign purposes because it specifically cautions the judges to keep the findings
13 confidential “until they are released to the public” the following day, August 31, 2004, at 10:30 a.m.

14 The WCBA’s press release is also misleading in its presentation of the survey results to the
15 public through its media press release:

16 “The Washoe County Bar Association (WCBA), today released statistical results of
17 the sixth performance evaluation of Washoe County judges, justices and Nevada
18 Supreme Court Justices. The confidential evaluation was completed by 224
19 practicing attorneys in Washoe County.

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21 Participation in the survey was open to all public and private attorneys, regardless
22 of membership in the WCBA. Only attorneys who regularly practice in Washoe
23 County and have professional courtroom experience with the judges being evaluated
24 were open to participate. Although approximately 1,300 survey invitations were sent
25 out, many lawyers do not practice in front of judges on a regular basis. Only those
26 who have appear[ed] in front of judges regularly can participate in this survey.”
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1 The press release further quotes Richard Horton, the judicial survey program chairperson:

2 “Not only does the survey provide valuable constructive criticism to the judges, it
3 also lets the public know what’s happening in our courts and gives them more
4 information when deciding who’s retained come election time.”

5 The introductory statement in the press release leads the reader to assume that because the
6 survey was conducted and published by the WCBA that it is representative of that organization.
7 Nowhere does it specifically state that the survey findings do not constitute an endorsement by the
8 WCBA. According to the WCBA’s survey chairman, “it also lets the public know what’s happening
9 in our courts and gives them more information when deciding who’s retained come election time.”

10 The press release erroneously implies that all 224 respondents responded to all evaluations
11 regarding every judge included in the survey. In an attempt at clarification, the press release does
12 attempt to explain the methodology and eligibility criteria of respondents for specific judges, but
13 it is unsuccessful or ambiguous at best.

14 The statements did not clearly and successfully explain that the respondents were only
15 allowed to evaluate those specific judges in front of whom they regularly appear but instead, used
16 the collective case. It ambiguously inferred that all 224 attorneys responded and evaluated every
17 judge if they “regularly practice in Washoe County and have professional courtroom experience
18 with the judges being evaluated. Furthermore, it did not present the number of respondents
19 evaluating each judge, which would have clarified its explanation.

20 The media release also states:

21 “The 27 judges from Washoe County’s District, Justice and Municipal Courts were
22 rated in 23 areas of performance, along with a question on retention.”

23 By default, it did not adequately explain that the recommendations regarding retention were also
24 only answered by those attorneys responding to a particular judge and yet, were presented as a point
25 of comparison using the positive percentages of responses for each judge and were presented as an
26 “equal playing field” to those interpreting the results. In fact, Judge Higgins utilized those
27 comparison results to promote his retention election by stating that his 80% rating was “the second
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1 highest rating of all Washoe County Justices of the Peace.”

2 It is obvious, though unfortunate, that Judge Higgins’ selection of the verb “endorsed” had
3 a different connotation for him in the preparation of the brochure statement regarding the survey
4 results on retention. As he asks in his formal statement to the Commission, “If an 80% retention
5 rating is not an endorsement of the judge’s retention, what is it?” The survey question 24, “Should
6 this Judge be retained?” was specifically directed towards an election result thus implying an
7 “endorsement”– at least by those who responded. He acknowledged that the Washoe County Bar
8 Association did not officially endorse his retention by omitting the Washoe County Bar Association
9 from his listing of professional associations which did officially endorse him in the same brochure.
10 In my opinion, Judge Higgins’ choice of the word “endorsed” for the statement regarding his
11 recommended retention is understandable and not knowingly misleading. He states in his
12 “Response to Complaint and Interrogatories”:

13 “If this proceeding is about the wording of this single sentence, let us examine it.
14 The WCBA conducted the survey. I received an 80% retention rating. It was the
15 second highest of all other Justices of the Peace in the County. All of which are
16 absolutely true. While my opponent complains that I claim 80% of the bar endorsed
17 me, that is not what the sentence says. It says by awarding me 80% retention rating,
18 the WCBA had in effect endorsed me.

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20 While I received formal endorsement letters from several other groups I certainly did
21 not from the WCBA. But in the context of an election campaign, I believed the
22 survey results meant that the survey conducted by the WCBA said I should be
23 retained, thus endorsing me. If you tell someone they should vote for someone else,
24 that is an endorsement of their candidacy. I never claimed that it was a formal
25 written endorsement, which if it had been I would have included in the other section
26 of my flier listing those endorsements. I used ‘endorse’ simply as a verb describing
27 the results of the survey.”
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1 Due to the confusing nature of the Washoe County Bar Association's presentation of its
2 survey results to the Bench and to the public as to the purpose of the survey results, its methodology
3 and its representation, I believe that the evidence does not establish by the clear and convincing
4 standard required that Judge Higgins knowingly misrepresented a fact concerning his candidacy for
5 election.

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7 DATED this 28th day of November, 2006.

8 **NEVADA COMMISSION ON JUDICIAL DISCIPLINE**

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12 DAVEEN NAVE, Commissioner and Vice-Chairperson

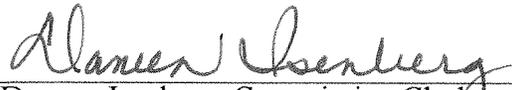
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1 **CERTIFICATE OF MAILING**

2 I hereby certify that I am an employee of the Nevada Commission on Judicial Discipline and
3 on the 4th day of December, 2006, I placed the above-referenced FINDINGS OF FACT,
4 CONCLUSIONS OF LAW, DECISION AND ORDER in the United States Mail, postage pre-paid,
5 addressed to the undersigned:

6 Frank J. Cremen, Esq.
7 715 South Fourth Street
8 Las Vegas, NV 89101
9 Special Counsel

10 David R. Grundy, Esq.
11 Lemons, Grundy & Eisenberg
12 6005 Plumas Street, Suite 300
13 Reno, NV 89509
14 Counsel for Respondent

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Daneen Isenberg, Commission Clerk

Kevin G. Higgins
4796 Crestside Drive
Sparks, Nevada 89436

DATE

Robert A. Dotson, President
Washoe County Bar Association
P.O. Box 1548
Reno, Nevada 89505

Dear Mr. Dotson:

In the fall of 2004 I was pleased and honored by the results of the Judicial Survey sponsored by the Washoe County Bar Association (WCBA). Eighty percent of those lawyers who responded to the poll for my particular race, recommended that I be retained in my position.

At the time, I was involved in a hotly contested campaign. I made a statement in a campaign flyer about those results that, in retrospect, was misleading and inappropriate. In that brochure that was distributed to the voters of the City of Sparks, I stated that, "The Washoe County Bar Association overwhelmingly endorsed Judge Higgins by awarding him an 80% retention rating, the second highest rating of all Washoe County Justices of the Peace."

After the election, your predecessor, President Gail Kern, wrote me a letter regarding my statement that the WCBA endorsed my retention as a justice court judge. I want all members of the Bar to know that the Washoe County Bar Association does not endorse candidates for judicial election. Rather, the retention rating of the Bar's survey constitutes only the opinion of the percentage of attorneys who actually participate in the survey for any particular race, which in my case constituted a fairly small number of attorneys who practice in the justice court. The Washoe County Bar Association does not endorse judicial candidates and I should not have utilized the poll to suggest that it did.

I would like to take this opportunity to sincerely apologize to the Washoe County Bar Association and to the voters in my election who may have been misled by my campaign flyer. The judicial poll provides meaningful, candid information to voters in judicial elections and should not have been mischaracterized by me or anyone else.

Sincerely,

Kevin Higgins
Justice of the Peace
Sparks Township