ORIGINAL

IN THE SUPREME COURT OF OHIO

In re: Judicial Campaign Complaint Against Jeanette Moll,	:	**Case No. 2012-1186**
Respondent.	:	**PROCEEDINGS BEFORE THE FIVE JUDGE COMMISSION APPOINTED PURSUANT TO RULE II, SECTION 5(D)(1) OF THE SUPREME COURT RULES FOR THE GOVERNMENT OF THE JUDICIARY OF OHIO, AND SECTION 2701.11 OF THE OHIO REVISED CODE**

COMPLAINANT LYNN RIFE'S MEMORANDUM IN OPPOSITION TO RESPONDENT'S OBJECTIONS TO PANEL FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATIONS

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COMPLAINANT LYNN RIFE'S MEMORANDUM IN OPPOSITION TO RESPONDENT'S OBJECTIONS TO PANEL FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATIONS

Complainant Lynn Rife, by and through her undersigned counsel, respectfully submits this memorandum in opposition to Respondent's objections to the hearing panel's findings and recommendations. The gist of Respondent's objections is that she did not know of the requirement that she exercise care to ensure that her campaign literature was not misleading. In the course of making her argument, Respondent makes misleading statements, feigns ignorance, denigrates the importance of an applicable Advisory Opinion of the Board of Commissioners on Grievances and Discipline, and mischaracterizes both the panel findings and the record. For these reasons, Respondent's objections should be overruled.

a. Respondent has no excuse for her actual or feigned ignorance.

The subject brochure, Complainant's Exhibit 1, shows that she obtained a B.A. from the University of Notre Dame, attended Oxford University in England, and obtained a J.D. from The Ohio State University. More important, Respondent's testimony established that she is sophisticated, skilled and knowledgeable. For instance, she testified that she clerked for Judge David Ellwood while still in law school. Transcript of July 6, 2012 Formal Hearing ("Tr.") at 47, ln. 21-22. In 1996, she was trained as a mediator, and served simultaneously as law clerk and mediator. Tr. at 48, ln. 4-5. She was subsequently appointed as magistrate to hear domestic relations matters. Tr. at 48, ln. 13-16.

In 1997, Respondent received a separate appointment to serve as magistrate in the general division, where she presided over preliminary criminal proceedings,

such as bond hearings and arraignments. Tr. at 48, ln. 18-22. She was more than able to handle the responsibilities of magistrate, research assistant and mediator. Tr. at 52, ln. 2-6.

Respondent readily agreed that she was called upon to resolve complex disputes. *E.g., Tr.* at 49, ln. 6-8; Tr. at 50, ln. 2-5. She considers herself proficient in performing legal research. Tr. at 50, ln. 18-20. She also considers herself able to understand complicated judicial decisions, and to interpret statutes. Tr. at 50, ln. 21-24, and at 51, ln. 1.

Respondent often made written findings of both fact and law. Tr. at 50, ln. 1-8. Along those lines, she was once "certified in a class action." Tr. at 49, ln. 9-10. In these matters, Respondent had no research assistant, and performed her own research. Tr. at 50, ln. 9-14. In fact, she served as the common pleas judge's research assistant in addition to her other duties. Tr. at 50, ln. 14-16. Typically, she would simply draft judicial decisions that the judge would finalize. Tr. at 51, ln. 12-16. Respondent performed her legal research carefully because she knew it was important to get things right, including the details. Tr. at 50, ln. 17-24.

Respondent was so proficient at her job that of 2000 matters over which she presided, Judge Elwood struck finds of fact only two times, and ordered a new hearing only once. Tr. at 103, ln. 1-5. The normal routine was for Respondent to issue her decision, and for Judge Elwood simultaneously to file an entry adopting it. Tr. at 103, ln. 6-9. Additionally, Respondent was so proficient that the Court of Appeals affirmed every one of her decisions that was appealed. Tr. at 102, ln. 5-8.

Additionally, as the hearing panel noted, Respondent attended a mandatory Judicial Candidates Seminar on campaign practices, finances and ethics, presented by the Supreme Court Judicial College, on August 18, 2011. *See* Complainant's Exhibit 2 (course materials). Following the course, she certified "[her] completion of the course and [her] understanding of the requirements of the Code of Judicial Conduct and applicable provisions of the Revised Code. *See* Complainant's Hearing Exhibit 2.

Against this background, Respondent's claim of ignorance rings hollow. The standard by which her conduct is measured is "knowingly" or "recklessly". "If the result is probable, the person acts 'knowingly'; if it is not probable, but only possible, the person acts 'recklessly' if he chooses to ignore the risk." *In re Judicial Campaign Complaint Against Michael,* No. 2012-0876 (hereinafter "*Michael*"). Respondent's misconduct meets both tests.

Since Respondent certified her understanding of the Canons, she must have understood that "[c]ampaigns for judicial office must be conducted differently from campaigns for other offices so as to foster and enhance respect and confidence in the judiciary." *See* Canon 4, Rule 4.1, Comment [2]. She also must have understood her responsibility for reviewing and approving the content of all of her campaign. And, she must have been well aware of the prohibitions against her knowingly, or with reckless disregard: distributing information that was false, or if true, would be deceiving or misleading to a reasonable person (*see* Canon 4, Rule 4.3(A)); using the title of an office that she did not currently hold (*see* Rule 4.3(C)); and misrepresenting her qualifications, present position or other fact (*see* Rule 403(F)).

Respondent's achievements as magistrate also render silly her excuse that she was unaware of the contents of Board of Commissioners on Grievances and Discipline Advisory Opinion 2003-8, which deals with wearing judicial robes in campaign advertisements. Furthermore, contrary to Respondent's claim that information about that opinion was buried "at the back of the course material" for the Judicial Candidates Seminar, Respondent's Objections at 1, the information was near the *front* of the course materials (approximately 20% of the way in), right behind one of two tabs that protruded from the right hand side of the book, labeled "Ethics Opinions and Cases." There, Opinion 2003-08 is described as involving "[u]se of title and appearance in a robe by magistrates running for judicial office." She admits this entry "absolutely" would have caught her attention. Respondent's Objections at 2. This negates Respondent's claim that she could not have been "'put on notice' by a Seminar that never discussed the use of a picture by a magistrate in a robe." Respondent's Objections at 2. *See generally, Michael* at 4.

It is also preposterous for Respondent to claim that the Opinion has no application other than to its facts and precise holding, *see* Respondent's Objections at 1 – especially because she prides herself on being able to understand complicated judicial decisions and to interpret statutes." *See* Tr. at 50, ln. 21-24, and at 51, ln. 1.

In short, Respondent's claim of ignorance is no more believable than her procrustean interpretation of Opinion 2003-8. She knew the rules, and tried to skirt them. She admitted that Complainant's Exhibit 1 was used in the primary as "a fill-the-gap piece ... so that we had something to use until we could start fundraising and until we could get things in place ... [T]he point of it was to do something quick

and cheap and small that would give us something to immediately get out until we could raise money and get all the pieces in place that we did not have in place when I started." Tr. at 212, ln. 1-16. In other words, Respondent hadn't started fundraising but needed to get through the primary. But, there is not excuse for her having violated the rules to do so.

b. <u>The *O'Neill* case is inapplicable.</u>

Respondent invokes the Thirteen Judge Commission's opinion in *In Re: Judicial Campaign Grievance Against William M. O'Neill*, No. SCC 12-001 as showing that Canon 4.3 is overbroad on its face, overbroad as applied and unconstitutionally vauge. Respondent's Objections at 3. *O'Neill* does not go nearly so far.

First, the case dealt only with Canon 4, Rule 4.3(C) – not with Rules 4.3(A) and 4.3(F), which the hearing panel also found Respondent to have violated. Additionally, the *O'Neill* Commission held Rule 4.3 unconstitutional only "as it applies to respondent under the facts in this case." There, unlike in this case, the respondent accurately identified himself as a "former" judge once in the subject brochure. In that sense, the conduct in *O'Neill* resembled Complainant's Exhibits 5 and 6, where photographs of Respondent in a judicial robe were accompanied by her dates of service. Complainant's Exhibit 1, by contrast, nowhere identifies Respondent as a "former" magistrate.

c. <u>Respondent's claims regarding the testimony of Deborah Feitcher are unsupported and reckless.</u>

Deborah Feichther testified that, contrary to Respondent's claim that none of the offending brochures had been distributed to county Republican Headquarters, she had obtained a copy from Stark County Republican Headquarters the day before

the hearing. Tr. at 218, *et seq.* Respondent has submitted three affidavits which claim there were by then no copies of the brochure at Stark Headquarters. Respondent's Objections at 5.

Ms. Rife has separately moved to supplement the record with her affidavit. She attests that an individual who identified himself as Garrett faxed to her a copy of the back of Complainant's Exhibit 1 on July 5, 2012 – the same day that Ms. Feichter testified to having obtained one there. In contrast to the barren assertions by Respondent's affiants – whose affidavits appear all to have been prepared by the same person, presumably Respondent – Ms. Rife provides as an attachment a copy of the fax from "Garrett," showing that it came from Stark County Republican Headquarters.

The fax attached to Ms. Rife's affidavit shows the falsity of Respondent's claim that all copies of the brochure were removed or destroyed. This is consistent with the pattern established at the hearing, when Respondent testified to that effect – before being caught by Ms. Feichter's testimony. As Ms. Rife's affidavit shows, Respondent has made similar, reckless or knowingly false allegations to the Franklin County Prosecutor.

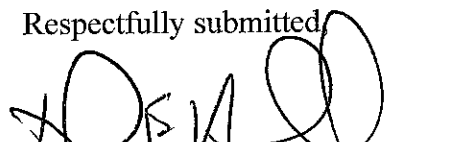
d. <u>Respondent's claim for attorney fees should be rejected.</u>

Respondent's claim to have expended countless dollars in attorney fees should be rejected for two reasons: first, she has submitted no supporting documentation. Additionally, and perhaps more important, the hearing panel's findings demonstrate that Respondent cannot meet the standard required by the

Supreme Court Rules for the Government of the Judiciary of Ohio, Section 7(B), *i.e.*, that it is frivolous or filed solely for the purpose of obtaining an advantage for a judicial candidate.

In short, Respondent's conduct is inexcusable given her experience and attendance at the Judicial Candidates Seminar. For all of the foregoing reasons, the Commission should adopt the hearing panel's findings and recommendations. The Commission should also immediately imposed the fine that was stayed by the Hearing Panel.

Respectfully submitted,



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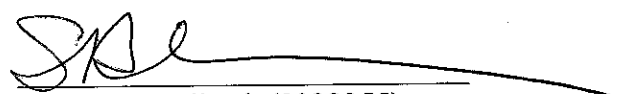

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Complainant Lynn Rife's Memorandum in Opposition to Respondent's Objections to Panel Findings of Fact, Conclusions of Law and Recommendations, has been served, this 10th day of August, 2012, by regular United States Mail, on the following:

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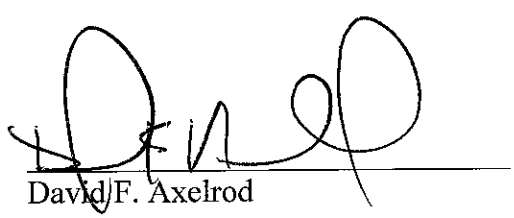
Additionally, true and accurate copies of the foregoing have also been served this 10th day of August, 2012, by facsimile on Respondent at 740.297.7782, and by email on Mr. Asbury at a.asbury@sc.ohio.gov.



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