

THE SUPREME COURT OF OHIO

IN RE:

SUP. CT CASE NO. 2012-1186

Judicial Campaign Complaint against
Jeanette Moll (0066786)

BOARD OF COMMISSIONERS ON
GRIEVANCES & DISCIPLINE
CASE NO. 12-045

**RESPONDENT'S BRIEF AS TO HER OBJECTIONS
TO THE FIVE JUDGE COMMISSION'S ORDER**

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III. ASSIGNMENTS OF ERROR

A. ASSIGNMENT OF ERROR NUMBER ONE

THE FIVE JUDGE COMMISSION COMMITTED REVERSIBLE ERROR AS THERE IS NO PRECEDENT FOR THE SANCTIONS ISSUED BASED ON THE RECORD OF THE INSTANT CASE.

B. ASSIGNMENT OF ERROR NUMBER TWO

THE FIVE JUDGE COMMISSION COMMITTED REVERSIBLE ERROR AS THERE IS LEGAL ERROR IN THEIR ORDER AND THE RECOMENDATIONS OF THE HEARING PANEL.

- 1. RESPONDENT WAS NOT PUT ON NOTICE AS TO THE NEED TO EITHER USE DATES OF SERVICE OR THE TERM "FORMER" AS RELATED TO HER PAST SERVICE AS A MAGISTRATE.**
- 2. NO TESTIMONY OR EVIDENCE WERE PRESENTED THAT THE RESPONDENT 'KNOWINGLY' VIOLATED THE CANNONS.**
- 3. CANNON 4.3 IS AN UNCONSTITUTIONAL INFRINGEMENT ON THE RESPONDENT'S 1ST AMENDMENT RIGHT TO DISCUSS HER QUALIFICATIONS AS A JUDICIAL OFFICER.**
- 4. THIS ACTION WAS BROUGHT SOLEY FOR THE POLITICAL ADVANTAGE OF ANOTHER JUDICAL CANDIDATE.**

IV. ISSUES PRESENTED

A. WHETHER THE FIVE JUDGE COMMISSION ERRORED IN THEIR ORDER FOR SANCTIONS BY FAILING TO FOLLOW CANON 4 PRECEDENT? YES

B. WHETHER THE FIVE JUDGE COMMISSION AND THE HEARING PANEL ERRORED IN FINDING VIOLATIONS OF CANON 4.3 BASED ON THE RECORD PRESENTED HEREIN? YES

V. STATEMENT OF FACTS/STATEMENT OF THE CASE

Now comes Respondent, Jeanette Moll, *pro se*, and respectfully requests that the Supreme Court overrule the Commission of Five Judges' order filed on August 30, 2012 and the sanctions contained therein.

The undisputed facts of this case are that the Respondent was a Magistrate jointly appointed in the Guernsey County Court of Common Pleas General/Domestic Relations Division and Juvenile/Probate Divisions. Respondent served as a Magistrate for approximately 10 years (1997-2007). The Respondent, as part of a Bench and Bar Composite done by the Guernsey County Bar Association in 2005, had her picture taken in her Magistrate's robe (Respondent's Exhibit D). This picture of the Respondent has been publically on display on the wall of the Guernsey County Courthouse outside the Courtroom the Respondent primarily served in for the past 7 years.

Count 1 of this case, the only part which has proceeded forward, focused on three times that Respondent used the aforementioned photograph. The photograph was used on Respondent's Facebook page (Respondent's Exhibit G), which serves as her webpage, and in the Canton Repository Candidate profile for the Primary (Respondent's Exhibit F). In both of these, the picture appeared together with Respondent's prior title as Magistrate, the Courts she served in, and her dates of service. On one piece of campaign literature, Complainant's Exhibit 1, the Respondent identified herself as a Magistrate and the Court she served on. However, she inadvertently left off the dates of service although her

background was presented in chronological/resume format starting with her Bachelors of Art and ending with her current law practice.

I. THE FIVE JUDGE COMMISSION COMMITTED REVERSIBLE ERROR AS THERE IS NO PRECEDENT FOR THE SANCTIONS ISSUED BASED ON THE RECORD OF THE INSTANT CASE.

The Respondent respectfully submits that a review of the prior decisions relating to Canon 4 and its predecessor, reveal no precedent for the Five Judge Commission to impose: 1. a cease and desist order; 2. a fine of \$1,000.00; 3. attorney fees of \$2,500.00; 4. court costs of \$3,572.00; and 5. publication costs when the undisputed facts are that Respondent: 1. has no prior disciplinary record; 2. has no prior judicial campaigns such that there are no prior determinations relating to the same; 3. has complied with all orders in a timely manner and taken additional actions to ensure on-going compliance; 4. the violations at issue were inadvertent and all stem from one and only one flyer; and 5. there is a clear record that the grievance has been pursued for the political advantage of another judicial candidate.

A review of judicial canon cases reveals one case where the violation was unintentional. *In Re Judicial Campaign Complaint against Keys et al.* (1996), 80 Ohio Misc. 2d 1. In the *Keys* case, it was found that two Magistrates unintentionally violated the Judicial Canons by allowing their names to be used on another candidate's invitation. Although a violation was found, there were no sanctions issued beyond a cease and desist order.

A further review of Canon 4 precedent includes *In re Judicial Campaign Complaint against Lilly*, (April 18, 2008) 117 Ohio St. 3d 1467 (*Lilly I*) where due to no prior disciplinary record, a fine of \$300.00 with suspended costs was imposed despite a finding of four separate violations. The decision was based on the cumulative effect of campaign

statements such that even though some statements were individually accurate, the overall effect of the campaign was to mislead. It was only after the *Lilly 1* Respondent had a second action proceed relating to a campaign grievance four years later that the suspended court costs were imposed together with the new court costs and a \$1,000 fine. *In re Judicial Campaign Complaint against Lilly*, (April 12, 2012) 131 Ohio St.3d 1515, 2012-Ohio-1720 (*Lilly 2*). Thus, after violating the Canons in two separate campaigns and with a cumulative effect of trying to mislead, the *Lilly 1 and 2* Respondent received a total of \$1,300.00 in fines and \$3,633.00 in Court costs. No attorney fees were awarded either time nor were any publication costs.

As seen above in *Lilly 1*, Canon 4 precedent includes numerous instances where the totality or cumulative effects of campaign statements were considered. These cases do not focus on one campaign statement or piece of literature in isolation as has been done in the instant case. In fact, a review of the totality of the Respondent's campaign statements and materials clearly shows that in every other instance, the Respondent has clearly identified herself as a past Magistrate or included the dates of her service.

Moreover, a review of the Complainant's Exhibit 1 reveals that it states in large lettering "Jeanette Moll for Judge." A reasonable person would construe this to mean that Respondent is not an incumbent or sitting judge. Secondly, Exhibit 1 also includes reference to a website to get more information that would take the user to the Facebook page with all the relevant information including dates of service. Third, Complainant's Exhibit 1 listed the education and professional experience of the Respondent in

chronological/resume style format, starting with her Bachelor's degree and ending with her current employment. The reasonable man is familiar with this format and would understand that the Respondent is currently a practicing attorney.

Thus, the cumulative effect regarding the Respondent's campaign materials and public statements is not misleading. See *In Re Judicial Campaign Complaint against Hein*, 95 Ohio Misc. 2d 31, 36; *In Re Judicial Campaign Complaint against James O'Reilly*, Judicial Case No. 06-J-03; and *Lilly 1*, *Supra*.

Therefore, the sanctions as ordered by the Five Judge Commission are excessive and inconsistent with Canon 4 precedent such that they should be overruled. See also *In re Judicial Campaign Complaint against Emrich* (1996), 78 Ohio Misc. 2d 32 and *In re Judicial Campaign Complaint against Roberts* (1996), 82 Ohio Misc. 2d 59.

II. THE FIVE JUDGE COMMISSION COMMITTED REVERSIBLE ERROR AS THERE IS LEGAL ERROR IN THEIR ORDER AND THE RECOMENDATIONS OF THE HEARING PANEL.

A. RESPONDENT WAS NOT PUT ON NOTICE AS TO THE NEED TO EITHER USE DATES OF SERVICE OR THE TERM "FORMER" AS RELATED TO HER PAST SERVICE AS A MAGISTRATE.

The Hearing Panel findings state "Respondent was put on notice of Rule 4.3 and Opinion 2003-08 by her attendance at a Judicial Candidates Seminar on August 18, 2011."

The testimony in front of the Hearing Panel was clear that Opinion 2003-08 was included in a list of advisory opinions at the back of the course material for the Judicial Candidate's Seminar Respondent attended. The opinion itself was not included in such materials. Moreover, this is an advisory opinion that states "If a magistrate who is a judicial candidate accurately labels a photograph in a judicial campaign advertisement with a true statement identifying himself or herself as "magistrate" of a particular court, the public will not be misled as to the candidate's qualifications." In the instant case, it was undisputed that each time the picture in the robe was used, Respondent identified herself as a "magistrate" and identified the particular court in which she previously served.

Moreover, the only testimony offered regarding the Judicial Candidate Seminar was Respondent's. When asked "Do you remember the faculty discussing the issue of magistrates wearing robes during that training." (Transcript p.142, ln 13-15) Respondent answered "I do not. I kept notes from that, and it's nowhere in my notes." (Transcript p. 142, ln 16-17)

Respondent was then asked "Is that the kind of thing that would have caught your attention at that time?" (Transcript p. 142, ln 18-19) She responded "Absolutely." (Transcript p. 142, ln 20)

Thus, Respondent could not have been "put on notice" such that Respondent had "knowledge" that dates of service or the term "former" were required by the foregoing advisory opinion being listed in materials for the Judicial Candidates Seminar when such

opinion is silent as to any need to include dates of service or the term “former.” Neither could Respondent have been “put on notice” by a Seminar that never discussed the use of a picture by a magistrate in a robe. In fact, the Canons are vague in that there is no written requirement to set forth dates of service or use the term “former.”

Moreover, the Five Judge Commission does not rely upon the Candidate Seminar or the Advisory Opinion but rather on *Lilly 2*, Supra for the notion that a photograph “must be accompanied by a prominent statement that the candidate is a former judge.” Thus, the Five Judge Commission implies that all judicial candidates are somehow put on notice of the *Lilly 2* holding despite no testimony or evidence relating to the same having been presented in the instant case.

This Court has held the legislature to a higher standard in cases like *In Re J.A.S.* (2009), 126 Ohio St.3d 145 where this Court stated that if legal custodians were to be included in adoption exemptions provided to other classes, the legislature had the ability to specifically state the same such that it could not be implied therein. H.B. 212, which went into effect on May 22, 2012, did just that by adding legal custodians to the adoption exceptions. Thus, if this Court specifically wished to require campaign statements to include dates of service or the use of the term “former” as relates to past service, the Code of Judicial Conduct could specifically state the same but it does not. Instead, the instant case sets forth that a first time judicial candidate who attends a seminar, reads the advisory opinions which are referenced by a list in the course materials, complies with the requirements of such advisory opinions, must then look beyond the vague language contained within the

Canons to read all prior Canon 4 decisions so as to comprehend the need to include dates of service or the term “former” just in case a campaign statement is taken out of context. If the judicial candidate inadvertently fails to do the same, she will lose her constitutionally protected right to discuss her qualifications for judicial office and have her reputation in the present and future tarnished for the political advantage of her political opponent.

B. No testimony or evidence was presented that the Respondent “knowingly” violated the Canons.

The Hearing Panel’s decision, perhaps inadvertently, has the effect of changing the essential *mens rea* element of the Canons from the highest possible standard (knowingly) to the lowest possible standard (strict liability). This is beyond their purview as the Ohio Supreme Court, when it adopts the Code of Judicial Conduct, is the only entity that has the authority to change the legal standard to be used in these types of cases. Such a shift to strict liability is found in the Hearing Panel’s finding “that Respondent was put on notice of Rule 4.3 and Opinion 2003-08 by her attendance at a Judicial Candidates Seminar on August 18, 2011 and she is charged with knowledge of both.” Every judicial candidate is required to attend the Judicial Candidates Seminar. Thus, the Hearing Panel’s finding that this alone creates “knowledge” then creates a strict liability standard for every judicial candidate in Ohio such that there is no need for the presentation of testimony or evidence as to *mens rea*.

C. Canon 4.3 is an unconstitutional infringement on the Respondent's 1st Amendment right to discuss her qualifications as a judicial officer.

As just decided in *In Re: Judicial Campaign Grievance against William O'Neill*, 7/17/2012 Case Announcements, 2012-Ohio-3223, the very ability of the Hearing Panel and Five Judge Commission to make a finding based on the "misleading" language of the Canon may have been vitiated. In *O'Neill*, the 13-member panel of Court of Appeals Judges (sitting in place of the Ohio Supreme Court) ruled that the "doctrine against misleading" "is even a greater threat to free speech." The effect appears to be that the First Amendment to the United States Constitution is violated when the judiciary seeks to sanction a former judicial officer who used his or her prior title in campaign literature to identify his or her qualifications. The foregoing decision found that the required use of the term "former" "has a chilling effect on [the candidate's] First Amendment privileges and rights." Respondent's trial counsel advanced a similar First Amendment argument in his opening and closing statements yet the Hearing Panel appeared to have overlooked the point.

As in *O'Neill*, the application of Canon 4.3 is overbroad both on its face and as applied to the facts of the instant case and is, additionally, vague. This rule is an unlawful restraint of judicial campaign speech such that it violates the First and Fourteenth Amendments to the United States Constitution. "As recently as June 28, 2012, the United States Supreme Court reaffirmed the philosophy that 'content-based restrictions on free speech are presumed invalid.'" *Id.* at 2 citing *United States v. Alvarez*, ___ S.Ct. ___, 2012 WL

2427808, at *6. Moreover, “[t]he *Alvarez* court at *11 recognized that not only must the restriction meet the “compelling interest test,” but the restriction must be “actually necessary” to achieve the interest.” *Id.* at 3.

O’Neill states “Canon 4.3 in many sections prohibits making false statements which would place it within a very broad interpretation of the *Alvarez* decision.” *Id.* at 3.

The *O’Neill* court recognizes that the Respondent in that case was, in fact, a former judge making the disputed usage a true statement. Likewise, in the instant matter, the Hearing Panel and Five Judge Commission acknowledge that Respondent Moll was, in fact, a Magistrate for the Guernsey County Court of Common Pleas from 1997 to 2007 when they found both the Facebook post and the Canton Repository Primary Candidate Profile to not be in violation of Canon 4.3.

O’Neill further states, “Undeniably, speech about qualifications for judicial office are ““at the core of our First Amendment freedoms”” and therefore any restrictions are subject to strict scrutiny.” *Id.* at 4 (citations omitted). The decision then concludes that the requirement that the Respondent use the term “former” in every reference to his prior service is unconstitutional.

Likewise, here, the Hearing Panel and Five Judge Commission’s conclusion that the accidental omission of dates on Complainant’s Exhibit 1 or, in the alternative, required use of the term “former” is unconstitutional. Moreover, unlike the Respondent in *O’Neill*, the

Respondent in the instant case has never before campaigned for a judicial position such that she would possess less insight into the judicial canons and their applications to campaign statements than a former elected judge who is currently running for the Ohio Supreme Court.

Additionally, all interpretations of the Code of Judicial Conduct must be made with deference to the United States Supreme Court decision in *Republican Party of Minnesota vs. White* 536 U.S. 765, 782 (2002) where the majority declared: “We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election.”

E. This action was brought solely for the political advantage of another judicial candidate.

The Respondent served as a Magistrate for the Guernsey County Court of Common Pleas for approximately 10 years. She has been an attorney for more than 15 years. She has no prior disciplinary record. She has never before been a candidate for judicial office.

Despite the foregoing, the Hearing Panel relied upon the testimony of a witness, Deborah Feichter, that Respondent’s testimony that she had stopped using Complainant’s Exhibit 1 was not credible. Please see the previously filed affidavits and amended affidavits of both Elisabeth Leonard, the Executive Director of the Stark County Republican Party, and her intern, Garrett Goehring, which evidence the fact that Ms. Feichter falsely stated that there was “a stack” of “6 inches” of Complainant’s Exhibit 1 at the Stark County Republican

Headquarters on July 5, 2012. (Transcript p. 221, ln 13 and p. 226, ln 8-16 and Respondent's Notice of Filing of Affidavits filed on August 3, 2012 and Respondent's Memorandum Contra to Complainant's Motion to Supplement the Record, or Alternatively, to Remand filed August 14, 2012). In fact, there never was a 6 inch stack of Exhibit 1 at the headquarters. Further, of a printing of 10,000 total, a 6 inch stack would have represented at least 1,000 or 10% of the total available fliers. The purpose of campaign literature is to distribute it and Respondent testified that on the night of the March Primary Election, she believed that she had distributed all of the 10,000 and had none in her possession. It is not credible that months later, 10% of this literature would be sitting collecting dust somewhere.

Moreover, Ms. Feichter's testimony under oath was that she was testifying at the direction of Respondent's opponent Judge Patricia Delaney's staff assistant, Kitty Giacomelli. (Transcript p. 223, ln 14- p. 224, ln 19). Ms. Feichter further testified that Ms. Giacomelli is her family member. This further underscores the concerns of Ms. Feichter's credibility. The United States Supreme Court has noted that a lower court's determination of witness credibility is not impervious to review. *Zenith Radio Corp. v. Hazeline Research, Inc.*, (1969) 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129. Thus, this Court can review the credibility of the Respondent and Ms. Feichter in the context of this case.

It should be noted that the Petitioner, Lynn Rife, stipulated on the record that "she is a personal friend of Judge Delaney, the opponent to Ms. Moll; that she's a political supporter of Judge Delaney; that she's involved in her campaign as a volunteer; and that she

communicated with Judge Delaney about this grievance.” (Transcript p.288, ln 18-23) In fact, Ms. Rife identifies herself as the former Executive Political Director for the Ohio Democratic Party in her affidavit attached to Complainant Lynn Rife’s Motion to Supplement the Record, or Alternatively, to Remand filed August 10, 2012.

This Court has previously looked at the motivation of the complainant in *In re Judicial Campaign Complaint against Harper* (1996), 77 Ohio St.3d 211. In *Harper*, the Court found that a letter by Attorney Moore, who was not a campaign contributor of the Respondent’s political opponent, was based on his concern about the perception in the public of attorneys as unethical and dishonest.

As noted by the Hearing Panel Chairman’s opening statement, “If the panel dismisses the complaint, the panel may assess costs and attorney fees against complainant if the panel finds that the grievance was frivolous or that it was filed solely for the purpose of obtaining an advantage for that judicial candidate.” (Transcript p. 9, ln 7-12) Here, over half of the original grievance was dismissed by the Probable Cause Panel. Then, the Hearing Panel dismissed two of three counts prior to closing arguments. The Petitioner, in closing arguments, acknowledged that both the Facebook post and Canton Repository Primary Candidate Profile were not in violation (two-thirds of Count 1). Thus, of the original grievance, less than 10% remains pending. Respondent has expended countless hours and thousands of dollars in attorney fees in this process to have more than 90% of the allegations dismissed. Moreover, the stipulation of Lynn Rife and the testimony of

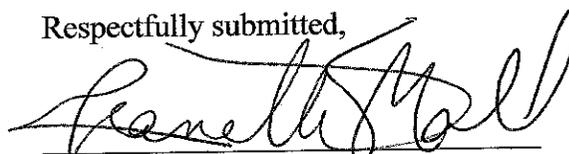
Deborah Feichter evidence the fact that this action was commenced “solely for the purpose of obtaining an advantage for [a] judicial candidate.”

This was confirmed by Attorney Axelrod’s closing statement where he stated: “It seems to me [Lynn Rife’s] motives are irrelevant; and frankly, in any case we don’t apologize. It should be no surprise that someone who takes it upon themselves to file a grievance against a candidate might support someone else. Normally one doesn’t file a grievance against a candidate one supports. None of that should be a surprise.” (Transcript p. 346, In 10-17)

III. Conclusion

Therefore, Respondent respectfully requests that this Court overrule the order of the Five Judge Commission and the Complaint against her be dismissed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was duly served upon Attorney David F. Axelrod, Esq. at 614-545-6356 and Steve Hollen, Esq. at 614-387-9379 by facsimile on September 24th, 2012.



Jeanette M. Moll (0066786)

APPENDIX 1

THE SUPREME COURT OF OHIO

IN RE:

SUP. CT CASE NO. 2012-1186

Judicial Campaign Complaint against

Jeanette Moll (0066786)

BOARD OF COMMISSIONERS ON
GRIEVANCES & DISCIPLINE
CASE NO. 12-045

RESPONDENT'S NOTICE OF APPEAL

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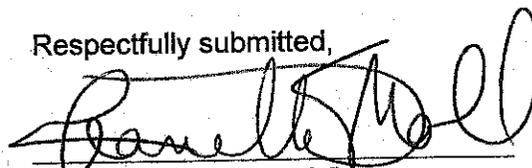
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Now comes the Respondent, Jeanette Moll, and respectfully gives notice pursuant to Rules for the Government of the Judiciary RII, Section 5(E)(3) of her appeal of the sanctions issues by the Five Judge Commission by Order filed August 30, 2012. A copy of said Entry is attached hereto.

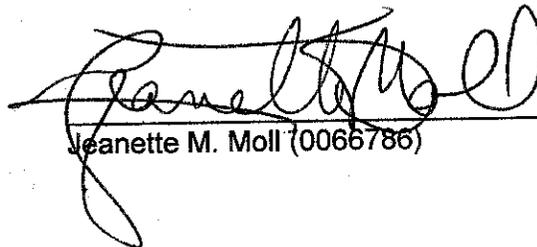
Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was duly served upon Attorney David F. Axelrod, Esq at 614-545-6356, Steven Hollon at 614-387-9379 and D. Allan Asbury at 614-387-9509 by facsimile on September 5th, 2012.



Jeanette M. Moll (0066786)

APPENDIX 2

BEFORE THE COMMISSION OF FIVE JUDGES
APPOINTED BY
THE SUPREME COURT OF OHIO

FILED

AUG 30 2012

CLERK OF COURT
SUPREME COURT OF OHIO

In re Judicial Campaign Complaint
Against Jeanette Moll

Case No. 2012-1186

ORDER

ORDER OF THE COMMISSION OF JUDGES.

This matter came to be reviewed by a commission of five judges appointed by the Supreme Court of Ohio pursuant to Gov.Jud.R. II(5)(D) and R.C. 2701.11. The commission members are Judge Lisa L. Sadler, chair, Judge Barbara P. Gorman, Judge Thomas A. Swift, Judge Mark K. Wiest, and Judge Peter M. Handwork.

The complainant, Lynne Rife, filed a complaint with the Board of Commissioners on Grievances and Discipline of the Supreme Court alleging that the respondent, Jeanette Moll, had violated various provisions of Canon 4 of the Code of Judicial Conduct. The respondent is a former magistrate who has never held judicial office. Following a review by a probable-cause panel of the board pursuant to Gov.Jud.R. II(5)(B), the secretary of the board filed a formal complaint alleging that the respondent, during the course of a judicial campaign, committed violations of Jud.Cond.R. 4.3(A) (a judicial candidate shall not knowingly or with reckless disregard distribute information concerning the judicial candidate that would be deceiving or misleading to a reasonable person), 4.3(C) (a judicial candidate shall not knowingly or with reckless disregard use the title of an office not currently held), and 4.3(F) (a judicial candidate shall not knowingly or with reckless disregard misrepresent their present position).

On July 6, 2012, a hearing panel appointed by the board conducted a hearing on the allegations contained in the formal complaint. On July 16, 2012, the hearing panel issued its findings of fact, conclusions of law, and recommendations in this matter. The hearing panel dismissed Counts II and III of the complaint, but found by clear and convincing evidence that the respondent violated Count I of the complaint by using campaign materials (a flyer, submitted to the panel as complainant's Exhibit 1) displaying a photograph of the respondent in a judicial robe that inaccurately gives the impression that she is a current judge or magistrate, in violation of Jud.Cond.R. 4.3(A), (C), and (F).

The hearing panel recommended that the respondent be ordered to immediately and permanently cease from using complainant's Exhibit 1 and to file an affidavit indicating the steps taken to remove the exhibit from circulation. The hearing panel also recommended the respondent be fined \$1,000, stayed on condition there were no further violations of the Code of Judicial Conduct related to campaign conduct, and that respondent be ordered to pay the costs of the proceedings.

On July 19, 2012, the Supreme Court of Ohio appointed this five-judge commission to review the hearing panel's report pursuant to Gov.Jud.R.II (5)(D). We were provided with the record certified by the board and a transcript of the July 6, 2012 proceedings before the hearing panel.

We issued a cease-and-desist order on July 31, 2012, ordering the respondent to immediately and permanently cease and desist from using complainant's Exhibit 1. In addition, we ordered the respondent to file an affidavit detailing her attempts to ensure that all undistributed copies of the exhibit were destroyed or returned to her. The respondent filed an affidavit on August 3, 2012, and a supplemental affidavit on August 6, 2012. The full commission met by telephone conference on August 15 and August 23, 2012. The respondent and the complainant each filed objections to the hearing panel's recommendation and answer briefs in response. A motion filed by the respondent on August 8, 2012, for sanctions and a motion filed by the complainant on August 10, 2012, to supplement the record were both denied on August 16, 2012.

Pursuant to Gov.Jud.R. II(5)(D)(1), we are charged with reviewing the record to determine whether it supports the findings of the hearing panel and that there has been no abuse of discretion. We unanimously hold that the record supports the findings of the hearing panel that the respondent violated Jud.Cond.R. 4.3 (A), (C), and (F) as alleged in Count I of the complaint.

Complainant's Exhibit 1, the flyer, creates an impression the respondent is currently serving in an elected or appointed judicial office. The front of the flyer depicts the respondent in a traditional judicial robe under the heading "Jeanette Moll For Judge." However, no text on the same side of the flyer indicates whether the respondent is a current or former magistrate or judge. Only the back of the flyer provides some indication as to the office the respondent may hold as one bullet point simply states "Magistrate, Guernsey County". There is no indication whether the office is currently or formerly held by the respondent, as no dates are provided as to the length of time she held the position. In addition, and contrary to the argument made by the respondent, the phrase "for judge" on the front of the flyer does not adequately clarify whether the respondent is a current or former magistrate.

In *In re Judicial Campaign Complaint Against Lilly*, we noted that the use of a photograph by a judicial candidate in a robe is not per se misleading, but held that the photograph must be accompanied by a prominent statement that the candidate is a former judge. 131 Ohio St.3d 1515, 2012-Ohio-1720, 965 N.E.2d 315. Our decision in *Lilly* persuades us to adopt a similar holding in this case. Here, the flyer did not contain an indication of the status of the respondent as a former magistrate. However, in comparison, the campaign materials submitted as complainant's Exhibits 5 and 6 also display the respondent in a robe, but the dates of the respondent's service as a magistrate are in close proximity to the photograph. Had the respondent placed the same text in close proximity to the photograph in complainant's Exhibit 1, there would be no violation of Canon 4.

We agree with the hearing panel that the respondent's use of Exhibit 1 was either knowingly false, or with reckless disregard for whether or not it was false, or if true, would be deceiving or misleading to a reasonable person. Jud.Cond.R. 4.3(A). We also agree that the campaign flyer brochure implies that the respondent is currently in an office that she does not hold, in violation of Jud.Cond.R. 4.3(C), and misrepresents the respondent's present position, in violation of Jud.Cond.R. 4.3(F).

In her objections, the respondent cites *In re Judicial Campaign Grievance Against O'Neill* for the proposition that Jud.Cond.R. 4.3 is vague and overbroad both on its face and as applied to the facts of this case. 132 Ohio St.3d 1472, 2012-Ohio-3223, 970 N.E.2d 973. The respondent's objections are not well taken. *O'Neill* held only that Jud.Cond.R. 4.3(C) was unconstitutional as applied to the facts in that particular case, and therefore it has limited precedential value to the case at hand.

We believe that a judicial candidate who violates Canon 4 should receive a sanction that is commensurate to the seriousness of the violations. Sanctions are imposed in order to punish the violator and deter similar violations by candidates in the future. *In re Judicial Campaign Complaint Against Morris*, 81 Ohio Misc.2d 64, 65, 675 N.E.2d 580 (Five-Judge Commission, 1997). The respondent violated three separate provisions of Canon 4 through her use of the flyer. She was also ordered by this commission to cease and desist from using the flyer. Affidavits filed by the respondent provide ample evidence that she has and will continue to abide by the order. However, we believe that the respondent's use of the flyer warrants the imposition of a sanction, despite the hearing panel's recommendation that a \$1,000 sanction should be imposed, but stayed. Consequently, we order the respondent to pay a \$1,000 fine. No non-monetary sanctions are imposed.

In addition, we order the respondent to pay the complainant \$2,500 in attorney fees and to pay the costs of all proceedings before the hearing panel and this commission. Payment of the fine and costs shall be made within 30 days of the date of this order. Payment of the attorney fees to the complainant's counsel shall be made within 45 days of the date of this order.

The secretary shall issue a statement of costs before this commission and instructions regarding the payment of the fine, costs, and attorney fees. It is further ordered that this opinion shall be published by the Supreme Court Reporter in the manner prescribed by Gov.Bar R. V(8)(D)(2) and that respondent bear the costs of publication.

SO ORDERED.

/s/ Lisa L. Sadler
Judge Lisa L. Sadler, Chair

/s/ Barbara P. Gorman
Judge Barbara P. Gorman

/s/ Thomas A. Swift
Judge Thomas A. Swift

/s/ Mark K. Wiest
Judge Mark K. Wiest

/s/ Peter M. Handwork
Judge Peter M. Handwork

BEFORE THE COMMISSION OF FIVE JUDGES
APPOINTED BY
THE SUPREME COURT OF OHIO

FILED

AUG 30 2012

In re Judicial Campaign Complaint
Against Jeanette Moll

Case No. 2012-1186

CLERK OF COURT
SUPREME COURT OF OHIO

ORDER

**STATEMENT OF COSTS;
INSTRUCTIONS REGARDING PAYMENT OF FINE, COSTS
AND ATTORNEY FEES**

The following is a statement of the costs incurred by the commission of five judges appointed pursuant to Rule II, Section 5 of the Supreme Court Rules for Government of the Judiciary of Ohio to review the report of the hearing panel of the Board of Commissioners on Grievances and Discipline in the above-captioned case. These costs are in addition to the \$3,544.34 in expenses certified by the secretary of the Board of Commissioners on Grievances and Discipline on August 15, 2012. This statement of costs is entered pursuant to order of the commission of five judges entered on August 30, 2012:

Total Costs (Fed Ex)

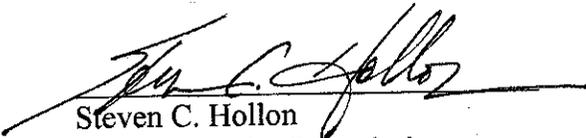
\$27.66

The August 30, 2012 commission order also directed the secretary of the commission to provide instructions to the respondent regarding the payment of the fine, costs and attorney fees.

Respondent is hereby instructed to pay a fine of \$1,000.00 and costs of \$3,572.00 to the Supreme Court of Ohio, Attorney Services Fund by cashier's check or money order on or before October 1, 2012. If the fine is not paid in full on or before October 1, 2012, interest at the rate of ten percent per annum shall accrue on the unpaid balance, respondent will be found in contempt, and the matter will be referred to the office of the Attorney General for collection.

Respondent is also instructed to pay attorney fees in the amount of \$2,500 by cashier's check or money order payable to David F. Axelrod, Axelrod, Todd, Laliberte, LLP, 137 East State Street, Columbus, OH 43215 on or before October 9, 2012, and provide proof of payment to the secretary of the commission.

BY ORDER OF THE COMMISSION.


Steven C. Hollon
Secretary to the Commission

Dated: August 30, 2012

APPENDIX 3

**BEFORE THE BOARD OF COMMISSIONERS
ON
GRIEVANCES AND DISCIPLINE
OF
THE SUPREME COURT OF OHIO**

In Re:	:	
Judicial Campaign Complaint against:	:	Case No. 12-045
Jeanette Moll (0066786)	:	
Respondent	:	PANEL FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS
Lynn Rife	:	
Complainant	:	

INTRODUCTION

{¶1} This matter came on for hearing in Columbus, Ohio, on July 6, 2012, pursuant to Section 5(C)(3) of Rule II of the Supreme Court Rules for the Government of the Judiciary of Ohio, before a panel consisting of Martha Butler Clark, a nonattorney member of the Board of Commissioners, the Honorable Harvey J. Bressler, and David E. Tschantz, panel chair, all of whom are duly qualified members or former members of the Board of Commissioners on Grievances and Discipline. None of the panel members resides in the appellate district from which the complaint originated. The Complainant Lynn Rife appeared at the hearing and was represented by David F. Axelrod and Michael W. Karam. The Respondent Jeanette Moll also appeared and was represented by Mark R. Weaver and George B. Limbert.

{¶2} The complaint in this matter contains three counts. Count I alleges that the Respondent is a candidate for the Fifth District Court of Appeals; that she is currently not a judge in the State of Ohio and has not been a magistrate in the State of Ohio since 2007; that campaign

materials distributed by her committee and her Facebook page contain a photograph of her in a judicial robe; that the photograph creates a false impression of being a current judge or magistrate; that the photograph was posted, published, circulated, or distributed by the Respondent and that she did so either knowing the information to be false or with a reckless disregard of whether or not it was false or, if true, that it would be deceiving or misleading to a reasonable person. Count II alleges that the Respondent's campaign materials state that the Respondent, in her capacity as a magistrate, "Heard Over 2000 Cases;" that this statement connotes to a reasonable person something more than working on an aspect of a case, such as an arraignment, a 30-minute child support contempt hearing, or a dissolution or mental illness confinement hearing that lasted 15 to 20 minutes; that this statement was posted, published, circulated, or distributed by the Respondent and that she did so either knowing the information to be false or with a reckless disregard of whether or not it was false or, if true, that it would be deceiving or misleading to a reasonable person. Count III alleges that the Respondent's campaign materials state that the Respondent, in her capacity as a magistrate, was "Never Reversed On Appeal;" that this statement is misleading to a reasonable person in that it conveys the impression that the Respondent was the judge of record regarding the matters that came before her when, in fact, the judge for whom she worked was required to either adopt, modify, or reject her recommended findings or conclusions, and it was the judge's decision that was subject to review on appeal; that this statement was posted, published, circulated, or distributed by the Respondent and that she did so either knowing the information to be false or with a reckless disregard of whether or not it was false or, if true, that it would be deceiving or misleading to a reasonable person.

{¶3} All three counts were fully heard at the hearing, but Counts II and III were dismissed at the close of the Respondent's case because the Complainant failed to prove by clear and convincing evidence the alleged misconduct set forth in those counts.

{¶4} The panel concludes that the Complainant proved Count I by clear and convincing evidence that the Respondent has violated these rules of the Ohio Code of Judicial Conduct: Jud. Cond. R. 4.3(A) [knowing or reckless use of false or misleading campaign literature]; Jud. Cond. R. 4.3(C) [use of the title "judge" in a manner that implies that she currently holds that office]; and Jud. Cond. R. 4.3(F) [misrepresentation of her identity, qualifications or present position].

FINDINGS OF FACT

{¶5} The Respondent is currently a judicial candidate for the Fifth District Court of Appeals in the November 6, 2012, general election and is not currently a judge in that court. She served as a magistrate in the Guernsey County Court of Common Pleas from January 1997 until January 2007. This is the first time she has ever sought an elected judicial office and she has no prior disciplinary record.

{¶6} The Respondent's campaign materials that were admitted as evidence at the hearing are as follows:

- **Complainant's Exhibit 1**—The brochure distributed by the Respondent in her primary campaign, which is a two-sided multi-color document the front side of which contains a photograph of the Respondent in a judicial robe and both sides of which contain the header "Jeanette Moll For Judge." The back side also lists her purported qualifications in resume format, the pertinent portion of which reads as follows:

Magistrate, Guernsey County

- Court of Common Pleas
- Heard Over 2,000 Cases
- Never Reversed on Appeal
- Strict Constructionist | Conservative

Neither side of this document lists the dates that she served as a magistrate nor states that she is not currently a magistrate or judge.

- **Complainant's Exhibit 5**—The portion of her Facebook page containing the same photograph as that shown in Complainant's Exhibit 1, but also containing this language directly above the photograph:

Public office experience: Magistrate, jointly appointed for general-domestic relations and probate-juvenile divisions, Guernsey County Court of Common Pleas, August 1997-April 2007, court mediator, April 1997-July 2007; law clerk, January 1....See More

- **Complainant's Exhibit 6**—The portion of a Candidate profile section pertaining to the Respondent published by the Canton Repository on its website using material provided by the Respondent containing the same photograph as that shown in Complainant's Exhibit 1 and containing substantially the same language next to the photograph as that shown in Complainant's Exhibit 5.
- **Respondent's Exhibit V**—A campaign flyer containing pictures of the Respondent in dress clothing as an attorney arguing a case before a court.

ANALYSIS AND CONCLUSIONS

Count I

{¶7} With regard to the three Complainant's exhibits listed above and admitted into evidence, the panel must determine which, if any, of said exhibits would be deceiving or misleading to a reasonable person because it contains a photograph of her in a judicial robe. The panel agrees with the conclusion of the panel in the case of *In re Judicial Campaign Complaint Against Lilly, 4/19/2012 Case Announcements, 2012-Ohio-1720*, that use of a photograph of a judicial candidate in a judicial robe is not a *per se* violation of Canon 4, but such a photograph

can be misleading if not accompanied by a prominent and accurate statement that the candidate is a former judge or magistrate rather than a sitting judge. *Cf.* Board of Commissioners on Grievances and Discipline Advisory Opinion No. 2003-8 (relating to a campaign photograph of a magistrate wearing a robe).

{¶8} In this case, Complainant's Exhibits 5 and 6—while they contain the photograph of the Respondent in her robe—also clearly state, in close proximity to each photo, information concerning the dates of the Respondent's service as a magistrate. The panel finds that this express notice would vitiate any belief on the part of a reasonable person created by the photo that the Respondent is a sitting judge or magistrate.

{¶9} However, the panel also finds that Complainant's Exhibit 1, the flyer, creates a false impression that she is a current judge or magistrate in two ways. First, although the Respondent appears in a judicial robe on the front side of the flyer, there is no accompanying verbiage or dates on that side of the flyer that advise the reader that she is a former magistrate. Secondly, the qualifications listed in bullet point form on the back side of the flyer describe her as "Magistrate, Guernsey County," again with no accompanying verbiage or dates that advise the reader that she is a former magistrate. The panel believes that this lack of express notice is not vitiated, as the Respondent argued at the hearing and in her prehearing brief, by the use of the words "For Judge" and the use of the past tense in the bullet points that describe her service as a magistrate; *i.e.*, "Heard Over 2,000 Cases" and "Never Reversed on Appeal." In the opinion of the panel, even if the reasonable person reading the flyer assumes from the words "For Judge" that the Respondent is not a sitting judge, the reader is still left with the impression that she is a sitting magistrate. With regard to the career and service bullet points, the panel finds that these

types of descriptions are commonly used, and used in the past tense, by sitting judges running for reelection and, therefore, do not adequately convey to the reader that she is a former magistrate.

{¶10} The panel further finds that the Respondent was put on notice of Rule 4.3 and Opinion 2003-08 by her attendance at a Judicial Candidates Seminar on August 18, 2011 and she is charged with the knowledge of both. Therefore, her use of Complainant's Exhibit 1 was either knowingly false or with a reckless disregard for whether or not it was false, or if true, would be deceiving or misleading to a reasonable person.

{¶11} The panel therefore finds that the Complainant has proven Count I by clear and convincing evidence that the Respondent violated Jud. Cond. R. 4.3(A), 4.3(C), and 4.3(F).

Count II

{¶12} Count II alleges that the statement in the Respondent's campaign materials that she, in her capacity as a magistrate, "Heard Over 2000 Cases" connotes to a reasonable person something more than working on an aspect of a case, such as an arraignment, a 30-minute child support contempt hearing, or a dissolution or mental illness confinement hearing that lasted 15 to 20 minutes; that this statement was posted, published, circulated, or distributed by the Respondent and that she did so either knowing the information to be false or with a reckless disregard of whether or not it was false or, if true, that it would be deceiving or misleading to a reasonable person. Based on the evidence presented in the Complainant's case, the panel unanimously concluded that the Complainant failed to prove by clear and convincing evidence the charged violation of Jud. Cond. R. 4.3(A) and dismissed this count on the record.

Count III

{¶13} Count III alleges that the statement in the Respondent's campaign materials that she, in her capacity as a magistrate, was "Never Reversed On Appeal"; is misleading to a

reasonable person in that it conveys the impression that the Respondent was the judge of record regarding the matters that came before her when, in fact, the judge for whom she worked was required to either adopt, modify or reject her recommended findings or conclusions, and it was the judge's decision that was subject to review on appeal; that this statement was posted, published, circulated, or distributed by the Respondent and that she did so either knowing the information to be false or with a reckless disregard of whether or not it was false or, if true, that it would be deceiving or misleading to a reasonable person. Based on the evidence presented in the Complainant's case, the panel unanimously concluded that the Complainant failed to prove by clear and convincing evidence the charged violation of Jud. Cond. R. 4.3(A) and the panel dismissed this count on the record.

RECOMMENDATION

{¶14} Evidence presented at the hearing indicates that the Respondent may still be violating Jud. Cond. R. 4.3(A), 4.3(C), and 4.3(F) and may continue to do so unless ordered to cease and desist. The Respondent testified that she has made efforts to remove Complainant's Exhibit 1 from circulation, however the panel is not satisfied that all reasonable efforts have been made to do so. The panel recommends that this matter be considered on an expedited basis and that the five-judge commission issue interim and permanent cease and desist orders that the Respondent immediately and permanently cease from using Complainant's Exhibit 1. The panel further recommends that Respondent be ordered to file an affidavit with the five-judge commission affirming that she has contacted every Republican Party county headquarters that exists within the Fifth Appellate District and an executive officer of every other organization to whom she or her committee distributed Complainant's Exhibit 1 and requested and received in return written or emailed assurance from each person contacted, or an agent or employee of that

person, that a search was made and no undistributed copies of Complainant's Exhibit 1 were found, or that those found were destroyed or have been returned to her, and that any that might be found in the future will be destroyed or returned to her. The panel further recommends that Respondent be instructed to visit the Stark County Republican Party Headquarters and personally inspect the available literature to ensure that no copies remain in that office.

{¶15} The panel also recommends that the Respondent be assessed a fine of \$1,000 and the costs of this proceeding, but that the fine be stayed on condition of no further violations of the Code of Judicial Conduct relating to judicial campaign conduct. The panel does not recommend an award of attorney fees in this case, as requested by the Complainant.


The Honorable Harvey J. Bressler


Martha Butler Clark


David E. Tschantz, Chair



APPENDIX 4



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AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

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AMENDMENT XIV

SECTION 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

SECTION 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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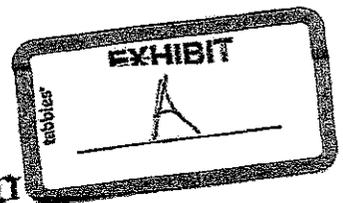
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APPENDIX 6

The Supreme Court of Ohio



CASE ANNOUNCEMENTS

July 17, 2012

[Cite as 07/17/2012 Case Announcements, 2012-Ohio-3223.]

MISCELLANEOUS ORDERS

BEFORE THE COMMISSION OF THIRTEEN JUDGES APPOINTED BY THE CHIEF JUSTICE OF THE COURTS OF APPEALS ASSOCIATION

In Re:	:	Supreme Court Case No. 2012-0418
Judicial Campaign Grievance Against:	:	On Appeal from a Decision of the
William M. O'Neill (0024031)	:	Commission of Five Judges
Respondent	:	Appointed by the Chief Justice of the
Carlos M. Crawford	:	Courts of Appeals Association
Complainant	:	Commission Case No. SCC 12-001
	:	OPINION

Pursuant to Rule II, Section 6(D)(2) of the Rules for the Government of the Judiciary, the Chief Justice of the Courts of Appeals convened an adjudicatory panel after the filing of a notice of appeal from the sanction imposed by the five-judge commission. Respondent filed a brief on April 23, 2012, and complainant did not file a brief. Respondent was heard at oral argument before the adjudicatory panel on May 21, 2012 and complainant did not appear.

Respondent advanced the following two propositions of law:

I
"THERE IS NOT CLEAR AND CONVINCING EVIDENCE TO SUPPORT THE CLAIM THAT THE RESPONDENT VIOLATED JUD. CONDUCT R. 4.3(C) BY DISTRIBUTING THE CAMPAIGN LITERATURE AT ISSUE."

II
"RULE 4.3(C) OF THE OHIO CODE OF JUDICIAL CONDUCT IS UNCONSTITUTIONAL UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION IN THAT IT IS OVERBROAD BOTH ON ITS FACE AND AS APPLIED TO THE FACTS OF THIS CASE, AND IN THAT IT IS UNCONSTITUTIONALLY VAGUE AS WELL."

II
We will discuss Proposition of Law II as we find it to be dispositive of this case.

Respondent claims Canon 4.3(C) of the Ohio Code of Judicial Conduct is unconstitutional as the rule is an unlawful restraint of judicial campaign speech and therefore violates the First and Fourteenth Amendments to the United States Constitution. Respondent claims the rule is overbroad, both on its face and as applied to his case, and is vague. Said rule states the following:

"During the course of any campaign for nomination or election to judicial office, a *judicial candidate*, by means of campaign materials, including sample ballots, advertisements on radio or television or in a newspaper or periodical, electronic communications, a public speech, press release, or otherwise, shall not *knowingly* or with reckless disregard do any of the following:

"(C) Use the title of an office not currently held by a *judicial candidate* in a manner that implies that the *judicial candidate* does currently hold that office."

As recently as June 28, 2012, the United States Supreme Court reaffirmed the philosophy that "content-based restrictions on free speech are presumed invalid":

" '[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.' *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573, 122 S.Ct. 1700, 152 L.Ed.2d 771 (2002) (internal quotation marks omitted). As a result, the Constitution 'demands that content-based restrictions on speech be presumed invalid ... and that the Government bear the burden of showing their constitutionality.' *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 660, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004)." *United States v. Alvarez*, ___ S.Ct. ___, 2012 WL 2427808, at *6.

The *Alvarez* court at *11 recognized that not only must the restriction meet the "compelling interest test," but the restriction must be "actually necessary" to achieve its interest:

"The First Amendment requires that the Government's chosen restriction on the speech at issue be 'actually necessary' to achieve its interest. *Entertainment Merchants Assn.*, 564 U.S., at —, 131 S.Ct., at 2738. There must be a direct causal link between the restriction imposed and the injury to be prevented. See *ibid.*"

Respondent's challenge centers on whether there exists a compelling interest of the judiciary in the enactment/enforcement of its rules and whether the restriction in Canon 4.3(C) is actually necessary to achieve that interest.

The Code of Judicial Conduct enacted by the Supreme Court of Ohio sets forth in its Preamble [1] and Scope [5] the government's interest and philosophy of the code, respectively:

"An independent, fair, and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the rules contained in this code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.

"The rules of the Ohio Code of Judicial Conduct are rules of reason that should be applied consistent with constitutional requirements, statutes, other court rules, and decisional law, and with due regard for all relevant circumstances. The rules should not be interpreted to impinge upon the essential independence of judges in making judicial decisions."

Canon 4.3 in many sections prohibits making false statements which would place it within a very broad interpretation of the *Alvarez* decision. As noted in *Alvarez* at *12, the "remedy for speech that is false is speech that is true." As respondent notes, the hearing panel's decision concedes that respondent is a judge, albeit a retired judge. Respondent argues with this accepted fact, the brochure is not false, but misleading. Although we might agree the brochure is not in toto false but misleading, the challenged rule does not address misleading speech, only the use of a judicial position that the candidate currently does not have.

As stated in Preamble [1] cited supra, the purpose of Canon 4.3 is to ensure judicial independence, fairness, and impartiality, and emphasizes that the United States' legal system is based upon the "integrity" of the participants. This is a clear expression of a compelling governmental interest. Therefore, we will now

review whether the restriction of Canon 4.3(C) as applied to respondent is necessary to achieve this interest.

Undeniably, speech about qualifications for judicial office are " 'at the core of our First Amendment freedoms' " and therefore any restrictions are subject to strict scrutiny. *Republican Party of Minnesota vs. White* (2002), 536 U.S. 765, 774, quoting *Republican Party of Minnesota vs. White* (2001), 247 F.3d. 861, 863. Therefore, the burden is upon the proponents of the rules to demonstrate the restrictions of Canon 4.3(C) do not "unnecessarily circumscrib[e] protected expression." *Brown vs. Hartlage* (1982), 456 U.S. 45, 54.

Canon 4.3(C), as it applies to respondent, places the burden upon respondent of declaring himself to be "a former Court of Appeals Judge" each and every time he uses the title "judge" during his campaign. In the brochure in question, respondent identifies himself as a "former" judge only once and states that he has served by invitation on the Supreme Court of Ohio. Both statements are true and do not violate Canon 4.3(C). Seven other times in the same brochure, respondent identifies himself as "Judge O'Neill."

Although it is arguable that respondent's brochure may mislead an observer, we find a "doctrine against misleading" is even a greater threat to free speech.

Undisputedly, in common conversation, a retired former judge is called "Judge." Furthermore, as a voluntarily retired judge not engaged in the practice of law, respondent remains eligible for assignment to active duty as a judge. Ohio Constitution, Article IV, Section 6(C). To prohibit respondent from speech wherein the disclaimer of "former judge" is prominent in the advertisement has a chilling effect on his First Amendment privileges and rights.

We conclude Canon 4.3(C) as it applies to respondent under the facts in this case is unconstitutional.

Proposition of Law II is granted as to "as applied" to the facts of this case and not "on its face." Proposition of Law I is moot.

The finding and order of the five-judge commission is reversed.

s/ Sheila G. Farmer
Hon. Sheila G. Farmer
Chief Justice of the Courts of Appeals

Judge Thomas J. Grady
Second District Court of Appeals

Judge Arlene Singer
Sixth District Court of Appeals

Judge Cheryl L. Waite
Seventh District Court of Appeals

Judge Patricia A. Blackmon
Eighth District Court of Appeals

Judge Susan Brown
Tenth District Court of Appeals

Judge Timothy P. Cannon
Eleventh District Court of Appeals

Powell, Abele, Preston, Delaney, Fischer, and Whitmore, JJ., dissenting,

We respectfully dissent from the majority's opinion that Canon 4.3(C) is unconstitutional as applied to respondent. Based upon the following facts, we would find respondent has not perfected his right to challenge the constitutionality of the canon in this thirteenth hour.

Upon reviewing the transcript from the hearing panel, we do not find a challenge to the constitutionality of Canon 4.3(C). There appears to have been a passing reference to the nature of the potential sanction, but when specifically questioned by Judge Elwood, respondent's counsel declined to argue the constitutionality of the canon:

"JUDGE ELLWOOD: You are not arguing or alleging that rule 4.3(C) is unconstitutional, are you?"

"MR. QUINN: I'm alleging that it could well be as applied in this case. That's the -

"JUDGE ELLWOOD: All right.

"MR. QUINN: That's the issue. And I don't want to dwell on this point a great deal, but I do think it's an important point that - -" February 22, 2012 T. at 54-55.

The possibility that a cease and desist order may be the sanction is referenced in Gov.Jud.R. II(6)(C)(2) as follows in pertinent part:

"If the commission concludes the record supports the hearing panel's finding that a violation of Canon 4 has occurred and there has been no abuse of discretion by the hearing panel, the commission may enter an order that includes one or more of the sanctions set forth in Section 5(D)(1) of this rule."

Gov.Jud.R. II(5)(D)(1)(b) specifically states the five-judge commission may enter an order "enforceable by contempt of court that the respondent cease and desist from engaging in the conduct that was found to be in violation of Canon 4."

The five-judge commission concluded there was no need for a hearing, and respondent made no attempt to challenge the constitutionality of any possible sanction.

In its determination and final order on review, the five-judge commission noted the following:

"Under Rule II Section 6(C)(2) of the Ohio Rules for Government of the Judiciary, this Commission may make its determination from the report of the

hearing panel, permit or require the filing of briefs, conduct oral argument, or order the hearing panel to take additional evidence.' There are no factual disputes in this matter, and the Commission, in its discretion, has determined that it will make its decision from the report of the Hearing Panel and the record of the hearing that took place before that panel."

The five-judge commission did not address the constitutionality of the Gov.Jud.R. II(5)(D)(1)(b) sanction or the recommendation of the hearing panel.

Respondent failed to challenge the constitutionality of the statute to the hearing panel and the five-judge commission. As stated by the Supreme Court of Ohio in *State v. Awan* (1986), 22 Ohio St.3d 120, syllabus:

" Failure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a waiver of such issue and a deviation from this state's orderly procedure, and therefore need not be heard for the first time on appeal.' "

Based upon these facts, we would find a constitutional challenge has not been perfected.

Gov.Jud.R. II(6) provides for a three-tiered examination regarding an alleged violation of the Code of Judicial Conduct (probable cause panel, hearing panel, and commission panel).

In its determination and final order on review, the five-judge commission noted the scope of its review as follows:

"Rule II section 6(C)(2) provides for this Commission to apply a two-part standard of review to the determination and recommendation of the Hearing Panel. First, it is to determine whether the Hearing Panel's finding of a violation is supported by the record, and, second, it is to determine whether the Hearing Panel abused its discretion."

Given the nature of the review before the five-judge commission and the language of Gov.Jud.R. II(6)(D), we would conclude our review is limited to the appropriateness of the sanction.

We note a cease and desist order was the minimum that could have been imposed. It is the only sanction that could reasonably be expected to curtail subsequent violations and stop further violations of Canon 4.3. A monetary sanction would not have insured that similar statements would not have occurred again during the course of the campaign.

We therefore would find no error in the issuance of a cease and desist order as the sanction in this case.

We would deny Propositions of Law I and II and affirm the finding and order of the five-judge commission.

Judge Peter B. Abele
Fourth District Court of Appeals

Judge Patricia A. Delaney
Fifth District Court of Appeals

Judge Beth Whitmore
Ninth District Court of Appeals

Judge Stephen W. Powell
Twelfth District Court of Appeals

Judge Vernon L. Preston
Third District Court of Appeals

Judge Patrick F. Fischer
First District Court of Appeals

APPENDIX 7

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 2003-8

Issued December 5, 2003

[Former CJC Opinion-provides advice under the former Ohio Code of Judicial Conduct which is superseded by the Ohio Code of Judicial Conduct, eff. 3/1/2009.]

SYLLABUS: A magistrate who is a judicial candidate may appear in a judicial robe in a photograph used in campaign advertising if the photograph has an accurate label identifying himself or herself as a magistrate of the court on which he or she serves. Opinion 96-8 (1996) is withdrawn.

A magistrate may use the title "magistrate" when listed as a contributor in a dinner program of a political party. The use of funds to attend social or fund-raising political events must comply with the following requirements of Canon 7(C) of the Ohio Code of Judicial Conduct.

A judge, magistrate, or judicial candidate may use *personal funds* to attend social or fund-raising political gatherings. [There is no restriction in Canon 7].

A judge, magistrate, or judicial candidate may use *campaign funds* to attend a social or fund-raising event held by or on behalf of another public official or candidate for public office. [Canon 7(C)(7)(b)].

A judge, magistrate, or judicial candidate *may not* use *campaign funds* in support of or opposition to a candidate for public office, other than the public office to which the judge, magistrate, or judicial candidate is seeking election. [Canon 7(C)(7)(b)].

A judge, magistrate, or judicial candidate may use *campaign funds* to contribute to a political party or to attend *events sponsored by a political party*, so long as the funds are used for the purposes identified in R.C. 3517.18(A) (to defray operating and maintenance costs of the political party headquarters; to organize voter registration programs and get-out-the vote campaigns; to administer party fund-raising drives; to pay for advertisements sponsored jointly by two or more qualified political parties to publicize the Ohio political party fund and to encourage support of the income tax checkoff program; to direct mail campaigns or other communications with registered voters of a party that are not related to any particular candidate or election; to prepare reports required by law). [Canon 7(C)(7)(c)].

A judge, magistrate, or judicial candidate *may not* use *campaign funds* to attend *events sponsored by a political party*, if the funds are used for the purposes identified in R.C. 3517.18(B) (to further the election or defeat of any particular candidate or to influence

directly the outcome of any candidate or issue election; to pay party debts incurred as the result of any election; to make a payment clearly in excess of the market value of that which is received for the payment). [Canon 7(C)(7)(c)].

A judge, magistrate, or judicial candidate *may not* participate in or use *campaign funds* for a judicial fund-raising event that categorizes or identifies participants by the amount of the contribution made to the event. [Canon 7(C)(3)].

OPINION: This opinion addresses whether a magistrate who is a judicial candidate may wear a judicial robe in campaign advertising and use the title “magistrate” when listed as contributor in the dinner program of a political party. The opinion discusses the requirements of Canon 7 as to the proper use of campaign and personal funds by judges, magistrates, and judicial candidates to attend social or fund-raising political events.

1. Is it proper for a judicial candidate who is an appointed magistrate to appear in a judicial robe in a photograph used in campaign advertising?
2. Is it proper for a judicial candidate who is an appointed magistrate to use the title “magistrate” when listed as a contributor in a dinner program of a political party?

Question One

Is it proper for a judicial candidate who is an appointed magistrate to appear in a judicial robe in a photograph used in campaign advertising?

The requester is one of two magistrates in a domestic relations court. According to the requester, both magistrates wear judicial robes in all hearings.

Magistrates perform judicial functions and are subject to the Ohio Code of Judicial Conduct. See Compliance Section, Ohio Code of Judicial Conduct.

In Opinion 96-8, this Board advised that it is improper for a judicial candidate who is a magistrate to wear a judicial robe in a judicial campaign advertisement. Ohio SupCt, Bd of Grievances and Discipline, Op. 96-8 (1996). The Board’s opinion was based on its interpretation of the requirements of Canon 7(B)(2)(f) that there not be a knowing misrepresentation of identity, qualifications, present position, or other fact.

Canon 7(B)(2)(f) of the Ohio Code of Judicial Conduct explicitly establishes that a judicial candidate should not “[k]nowingly misrepresent his or her identity, qualifications, present position, or other fact.” By allowing a magistrate, who is a judicial candidate, to wear a judicial robe in campaign advertisements a viewer may be led to a false impression that the candidate is an experienced incumbent judge. Such a campaign advertisement in which a magistrate appears in a judicial robe

misrepresents not only the present position of the magistrate, but also the qualifications of the candidate for the office of judge.

Ohio Sup Ct, Bd Comm'rs on Grievances and Discipline, Op. 96-8 (1996).

The Board now relinquishes that view. There is no requirement in the Code that a judge or a magistrate wear, or not wear, a judicial robe. By tradition, judges wear judicial robes in the courtroom. Now, some magistrates also choose to wear judicial robes in courtroom proceedings.

If a magistrate who is a judicial candidate accurately labels a photograph in a judicial campaign advertisement with a true statement identifying himself or herself as "magistrate" of a particular court, the public will not be misled as to the candidate's qualifications or present position.

Thus, the Board advises as follows. A magistrate who is a judicial candidate may appear in a judicial robe in a photograph used in campaign advertising if the photograph has an accurate label identifying himself or herself as a magistrate of the court on which he or she serves. Opinion 96-8 (1996) is withdrawn.

Question Two

Is it proper for a judicial candidate who is an appointed magistrate to use the title "magistrate" when listed as a contributor in a dinner program of a political party?

Magistrates, judges, and judicial candidates may attend political gatherings. See Canon 7(B)(3). Political gatherings include dinner parties of a political party. A dinner party of a political party might be a fund-raising event for the political party, a fund-raising event for judicial or political candidates, or a non-fund-raising social event for party members.

Nothing in the Ohio Code of Judicial Conduct prohibits the use of the title "magistrate" in the listing of contributors in a dinner program of a political party. But, whenever there is a "price" attached to attendance at a political gathering, Canon 7(C) restrictions on use of judicial campaign funds must be followed.

Thus, the Board advises as follows. A magistrate may use the title "magistrate" when listed as a contributor in a dinner program of a political party. The use of funds to attend social or fund-raising political events must comply with the following requirements of Canon 7(C) of the Ohio Code of Judicial Conduct.

A judge, magistrate, or judicial candidate may use *personal funds* to attend social or fund-raising political gatherings. [There is no restriction in Canon 7].

A judge, magistrate, or judicial candidate may use *campaign funds* to attend a social or fund-raising event held by or on behalf of another public official or candidate for public office. [Canon 7(C)(7)(b)].

A judge, magistrate, or judicial candidate *may not* use *campaign funds* in support of or opposition to a candidate for public office, other than the public office to which the judge, magistrate, or judicial candidate is seeking election. [Canon 7(C)(7)(b)].

A judge, magistrate, or judicial candidate may use *campaign funds* to contribute to a political party or to attend *events sponsored by a political party*, so long as the funds are used for the purposes identified in R.C. 3517.18(A) (to defray operating and maintenance costs of the political party headquarters; to organize voter registration programs and get-out-the vote campaigns; to administer party fund-raising drives; to pay for advertisements sponsored jointly by two or more qualified political parties to publicize the Ohio political party fund and to encourage support of the income tax checkoff program; to direct mail campaigns or other communications with registered voters of a party that are not related to any particular candidate or election; to prepare reports required by law). [Canon 7(C)(7)(c)].

A judge, magistrate, or judicial candidate *may not* use *campaign funds* to attend *events sponsored by a political party*, if the funds are used for the purposes identified in R.C. 3517.18(B) (to further the election or defeat of any particular candidate or to influence directly the outcome of any candidate or issue election; to pay party debts incurred as the result of any election; to make a payment clearly in excess of the market value of that which is received for the payment) [Canon 7(C)(7)(c)].

A judge, magistrate, or judicial candidate *may not* participate in or use *campaign funds* for a judicial fund-raising event that categorizes or identifies participants by the amount of the contribution made to the event [Canon 7(C)(3)].

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.