

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

12-1653

In re:	:	
Judicial Campaign Complaint Against	:	Case No.: 12-066
Colleen Mary O'Toole (0053652)	:	
Respondent,	:	
James Davis (0007850)	:	PANEL FINDINGS, CONCLUSIONS AND RECOMMENDATIONS
Complainant.	:	

INTRODUCTION

{¶1} This matter came on for hearing in Columbus, Ohio on September 18, 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 Patrick L. Sink, a nonattorney member of the Board of Commissioners, McKenzie Davis, Esq. and Judge Otho Eyster, panel chair, all 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, James Davis, was present and represented by David F. Axelrod and Mary L. Cibella. The Respondent, Colleen Mary O'Toole, was also present and represented by J. Michael Murray.

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CLERK OF COURT SUPREME COURT OF OHIO

{¶2} The complaint in this matter contains three counts. Count I alleges that Respondent is a candidate for the Eleventh District Court of Appeals and that she is not now nor has she been a judge in the State of Ohio since 2011; that the biography or resume distributed by Respondent to the Ashtabula County Republican Party contains a photograph of her in what appears to be a judicial robe (Exhibit 1); that this photograph creates the false impression of being a current judge; and, this photograph was posted, published, circulated, or distributed concerning 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 would be deceiving or misleading to a reasonable person. Count II alleges Respondent's web site ootooleforjudge.com (Exhibit 2) contains a statement that she "was elected to the Eleventh District Court of Appeals in 2004" and that "Judge O'Toole testified on the positions of the Ohio Judicial Conference Committee and participated in many legislative conferences advocating the position of the conference be[fore] legislators"; and these statements were posted, published, circulated, or distributed concerning the Respondent, either knowing the information to be false or with a reckless disregard of whether or not it was false or, if true, that would be deceiving or misleading to a reasonable person. Count III alleges Respondent wore a gold and black name badge which reads "Colleen Mary O'Toole Judge 11th District Court of Appeals (Exhibits 3 & 17); that this statement is misleading to a reasonable person in that it conveys the impression that the Respondent is

currently a judge of the 11th District Court of Appeals; and this statement was posted, published, circulated, or distributed concerning the Respondent, either knowing the information to be false or with a reckless disregard of whether or not it was false or, if true, that would be deceiving or misleading to a reasonable person.

{¶13} The panel, having considered the testimony, exhibits, arguments and all relevant matters, finds the Complainant did not prove by clear and convincing evidence the alleged violations of Rules 4.3(A) and 4.3(F) of the Ohio Code of Judicial Conduct contained in Count I of the complaint, and recommends Count I be dismissed. The panel further finds the Complainant did prove by clear and convincing evidence a violation of Rule 4.3(A) [statements posted, published, circulated, or distributed concerning the Respondent, either knowing the information to be false or with a reckless disregard of whether or not it was false or, if true, that would be deceiving or misleading to a reasonable person] as alleged in Counts II & III.

FINDING OF FACT

{¶14} The Respondent is currently a judicial candidate for the Eleventh District Court of Appeals in November 6, 2012 general election. The Respondent served a full term on this Court from 2006 through 2011, and was defeated in the 2010 primary in her bid for re-election. The Respondent has not served as a judge in the State of Ohio since 2011.

ANALYSIS AND CONCLUSIONS

COUNT I

{15} The allegation in this count is that Respondent distributed a biography or resume to the Ashtabula County Republican Party containing a photograph of her in what appears to be a judicial robe (Exhibit 1). The Respondent testified that she never provided a resume or picture to the Ashtabula County Republican Party and had never been on their web site prior to the filing of this grievance. Charles Frye, Chairman of the Ashtabula County Republican Party, testified the photo shown in Exhibit 1 came from the 2010 election, and was posted by the party in January or February of this year. He said the wordage accompanying the photo came from Respondent within the past couple of months. The Respondent later testified that she had, in fact, provided the text contained in Exhibit 1, but not the photograph captioned "Judge Colleen Mary O'Toole". The panel finds the photograph does create the false impression that the Respondent is a current judge, but the Complainant has failed to prove by clear and convincing evidence that Respondent posted, published, circulated or distributed the photograph, and the panel finding no violation of Rule 4.3(A) or 4.3(F) of the Ohio Code of Judicial Conduct recommends Count I be dismissed.

COUNT II

{16} The allegation in this count is that Exhibit 2 (Respondent's campaign web site) contains statements posted by Respondent either knowing

the information to be false or with reckless disregard of whether or not it was false or, if true, that would be deceiving or misleading to a reasonable person. The posting entitled, "About", begins with the statement, "Colleen O'Toole was elected to the Eleventh District Court of Appeals in 2004", followed by the sentence, "During her term, she has decided over 1500 cases and has authored over 500 opinions". The panel finds the failure to state her term ended in 2010 gives the impression she is still on the court. The second sentence is worded in such a manner as to reinforce the impression that she is still a sitting judge. On line 9 of the page, she refers to herself as "Judge O'Toole", again giving the impression that she is currently serving as a judge. It is Respondent's contention the last sentence, the last line on the page, "She is presently CEO of On Demand Interpretation Services, LLC", indicates her term has ended. The panel finds a reasonable person would be deceived or misled into believing Respondent is currently serving on the Eleventh District Court of Appeals. Respondent acknowledges writing the page, and the panel finds her conduct has violated Rule 4.3(A) of the Code of Judicial Conduct.

COUNT III

{17} The allegations in this count are that the badge worn by Respondent which reads, "Colleen Mary O'Toole Judge 11th District Court of Appeals", is misleading to a reasonable person in that it gives the impression the Respondent is currently a judge on that court. The badge is depicted in Exhibit 3 and further identified as Exhibit 17 is the badge Respondent wore to the hearing.

The Respondent did not deny that it was the same badge depicted in Exhibit 3, but testified she always wears it in conjunction with another name tag reading "O'Toole for Judge" with a disclaimer. Respondent testified the badge was made for her by her secretary when she was sitting as a judge, but was not designed to communicate that she was a judge. She says the badge is the description of the position, and not a description of a title and wearing it in conjunction with the other name tag indicates she is now running for judge. The panel finds Respondent's explanation somewhat confusing and not at all persuasive. The panel finds the gold and black name badge depicted in Exhibits 3 & 17 reading, "Colleen Mary O'Toole Judge 11th District Court of Appeals," would deceive or mislead a reasonable person into believing Respondent is currently serving on the court of appeals. The panel finds Respondent's conduct has violated Rule 4.3(A) of the Ohio Code of Judicial Conduct.

{18} Respondent has attended five judicial candidate seminars and professes to desire to comply with the rules. The panel has serious concerns as to how the Respondent views herself. When asked, "Do you contend that it is a true statement to describe yourself as a judge right now," Respondent replied, "Yes, I am a judge, not a sitting judge. I believe I will always hold the title if I choose to." Hearing Tr. 54, l. 10-15. Referring to the web site that is the subject of Count II, Respondent was asked, "Okay. When you put it up, did you believe the First Amendment permitted you to call yourself a judge?" Her response, "I believe it was accurate and not misleading when I put it up; and I

mean if you read the case, yes, I think the First Amendment also supports the position. I'm not waiving any of those First Amendment rights; but more importantly, I don't think it was misleading and I don't think it was inaccurate." *Id.* at 117, l. 10-19. Respondent was asked, "So you believe that's appropriate for you to describe yourself as a judge?". Respondent's reply, "In non-campaign material absolutely. I'm not misleading anyone". *Id.* at 142, l. 24 to 243, l. 3. One panel member asked Respondent, "Now, are you a judge?". The response, "I am a judge, but I am not a sitting judge" *Id.* at 255, l. 19-21. When asked by another panel member, "Where do you get the idea that you're a judge," Respondent answered, "Because I served for six years as a judge and so people commonly call you by that name" *Id.* at 278, l. 3-7. A panel member stated, "But you have testified that you think you're a judge". To which the Respondent answered, "I think I can use the title because of my former service". *Id.* at 283, l. 21-24.

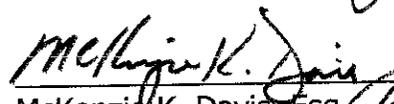
RECOMMENDATION

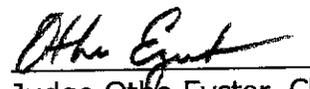
{19} BCGD Advisory Opinion 89-15 states "an advertisement that is unclear as to whether the candidate is currently a judge is, in our opinion, a misrepresentation of the candidate's identity." Respondent acknowledges she wrote the text of the web site addressed in Count II. It has her elected judge but doesn't state her term has ended. It speaks in the present tense and refers to the Respondent as "Judge O'Toole." The badge worn by Respondent (Exhibits 3 & 17) identifies her as "Colleen Mary O'Toole Judge 11th District Court of

Appeals" and gives the distinct impression that Respondent is presently serving as a judge on the appellate court. The panel can only conclude that Respondent's web site and badge are part of an effort to portray herself as an incumbent judge.

{¶10} While the two Jud. Cond. R. 4.3(A) violations found by the panel may not appear egregious standing alone, the Respondent's insistence that she is a judge in view of overwhelming evidence to the contrary is of great concern. The panel recommends the Respondent be ordered to include the date her service as judge ended and to remove any reference to herself as "Judge O'Toole" from the web site addressed in Count II. The panel also recommends that the Respondent be ordered to cease and desist from wearing the name badge (Exhibits 3 & 17) that identifies her as a judge. The panel further recommends that the Respondent be assessed a fine of \$1,000.00 and to pay the costs of these proceedings. The panel further recommends the Respondent pay Complainant \$2,500.00 as and for attorney fees.


Patrick L. Sink *By per author*


McKenzie K. Davis, Esq. *By per author*


Judge Otis Eyster, Chair *By per author*