

ORIGINAL

IN THE SUPREME COURT OF OHIO

In Re: Judicial Campaign Complaint  
Against Colleen Mary O'Toole  
RESPONDENT

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CASE NO. 2012-1653

COMPLAINANT'S ANSWER BRIEF TO  
RESPONDENT'S MOTION TO STAY THE SANCTIONS IMPOSED AGAINST HER  
PENDING HER APPEAL TO THE SUPREME COURT OF OHIO

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## TABLE OF CONTENTS

	<u>Page</u>
<b>BRIEF CHRONOLOGY</b> .....	1
<b>ARGUMENT</b> .....	1
<b>PROOF OF SERVICE</b> .....	5

## **I BRIEF CHRONOLOGY**

A Hearing was held on September 18, 2012 before a duly appointed Board Hearing Panel. On October 1, 2012, the Panel's Findings, Conclusions and Recommendations ("Panel's Findings") were filed with the Clerk of the Supreme Court. The Panel's Findings: with respect to Count I, Complainant failed to prove, by clear and convincing evidence, the alleged violations of Jud. Cond. Rule 4.3(A) and 4.3(F); with respect to Counts II and III, Respondent violated Jud. Cond. Rule 4.3(A) and recommended that Respondent be assessed a fine of \$1,000, pay the costs of the proceedings, and pay Complainant \$2,500 as and for attorney fees.

On October 3, 2012 the Five-Judge Commission was appointed to consider the Panel's Findings. On October 5, 2012, the Five Judge Commission entered an Interim Order that Respondent immediately cease and desist from referring to herself as Judge O'Toole.

On October 10, 2012, Respondent filed Objections to the Panel's Findings, raising three objections and arguing, *inter alia*, that Jud. Cond. Rule 4.3(A) both on its face and as applied was unconstitutional under the First and Fourteenth Amendments to the United States Constitution. On October 15, 2012 Complaint James Davis filed Complainant's Answer Brief to Respondent's Objections.

On October 24, 2012, the Five Judge Commission issued its Order. Respondent now appeals from the October 24, 2012 Order and files for a stay of the October 24, 2012 Order.

## **II ARGUMENT**

Now comes Complainant, James Davis, by and through counsel, to respectfully request that Respondent's Motion to Stay the Sanctions Imposed Against Her Pending Her Appeal to the Supreme Court of Ohio ("Respondent's Motion to Stay") should be denied for two reasons.

First, Respondent's Motion is procedurally defective, in that it is addressed to the Five Judge Commission which, pursuant to Gov. Jud. Rule II, Section 5(D)(2) or (E), has no jurisdiction to grant the requested stay.

Second, Respondent does not assert any specific error or explain why she believes she will win on appeal. Respondent just continues to reiterate and reargue her position that Jud. Cond. Rule 4.3(A) violates the First Amendment.

Respondent's argument that Jud. Cond. Rule 4.3(A) violates the First Amendment ("First Amendment Argument") has been presented and rejected on four separate occasions. Respondent first presented her First Amendment Argument in her response to Complainant's grievance. The Probable Cause Panel of the Board rejected Respondent's argument and certified the Complaint to the full Board.

Next, Respondent filed Respondent's Motion to Dismiss with the Hearing Panel. The Hearing Panel overruled Respondent's Motion to Dismiss at the start of the September 18 hearing. Respondent's Motion to Dismiss was renewed in Respondent's closing arguments at the conclusion of the evidentiary hearing on September 18 hearing. The Hearing Panel also rejected the renewed Motion to Dismiss when it issued its Findings, Conclusions and Recommendations on October 1, 2012. The Hearing Panel's rejection of the renewed Motion to Dismiss was the third time Respondent's First Amendment Argument was considered and rejected.

The fourth time Respondent's First Amendment Argument was considered and rejected was by the Five Judge Commission. In its October 24, 2012 Order, the Five Judge Commission states:

respondent raised three separate objections to the hearing panel's report, including a facial and as-applied challenge to the constitutionality of Jud.Cond.R.4.3(A) based on the First and Fourteenth Amendments to the United States Constitution. The hearing panel dismissed a similar motion filed by the respondent before the hearing. The respondent relies on a recent decision of the 13-judge commission in *O'Neill v. Crawford*, 132 Ohio St.3d 1472, 2012-Ohio-3223, 970 N.E.2d 973, to support her objection. The *O'Neill* commission dismissed a complaint alleging a Jud.Cond.R. 4.3(C) violation based on a recent decision of the United States Supreme Court that invalidated the Stolen Valor Act. *United States v. Alvarez* \_\_\_ U.S. \_\_\_, 132 S.Ct.2536, 183 L.Ed2d 574 (2012). The respondent's objections are not well taken. *O'Neill* is factually distinguishable from the case at hand . . . *October 24, 2012 Order, pages 2 and 3.*

Since Respondent's First Amendment Argument have been considered and rejected four times and she has brought forth **no** reasons why she will prevail in her appeal, Respondent's Motion to Stay should be denied.

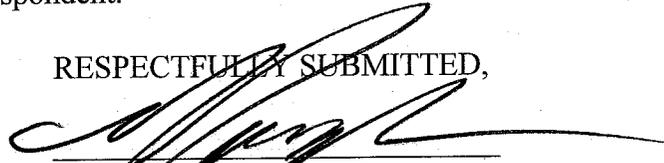
Additionally, Respondent claims that she "will have suffered a very real, and comparatively immediate punishment", if Respondent's Motion to Stay is not granted and the October 24, 2012 Order is later reversed or modified on appeal. However, it is Complainant, James Davis, who is suffering immediate harm as he now must incur further unreimbursed expenses and additional attorney fees (without any guarantee that the modest attorney fees previously ordered will ever be paid by Respondent), because Respondent has decided to further appeal the October 24, 2012 Order and to request a stay of the October 24, 2012 Order.

### **III CONCLUSION**

For the reasons set forth above, Complainant James Davis respectfully requests that Respondent's Motion to Stay be denied and that the Five Judge Commission's October 24, 2012

Order be upheld and enforced against Respondent.

RESPECTFULLY SUBMITTED,

A handwritten signature in black ink, appearing to read 'Mary L. Cibella', written over a horizontal line.

Mary L. Cibella, #0019011

**Counsel for Complainant, James Davis**

**PROOF OF SERVICE**

I Mary L. Cibella, Counsel for Complainant, James Davis, do hereby certify that on November 13, 2012, a copy of Respondent's Answer Brief to Respondent's Objections was served as follows:

**Original and 7 Copies Overnight Federal Express to:**

Kristina D. Frost, Esq., Clerk  
Supreme Court of Ohio  
65 South Front Street 8<sup>th</sup> Floor  
Columbus, Ohio 43215

**Copy via Regular U.S. Mail to:**

Steven C. Hollon, Esq., Administrative Director  
Secretary to Five-Judge Commission  
Supreme Court of Ohio  
65 South Front Street, 7<sup>th</sup> Floor  
Columbus, Ohio 43215

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