

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

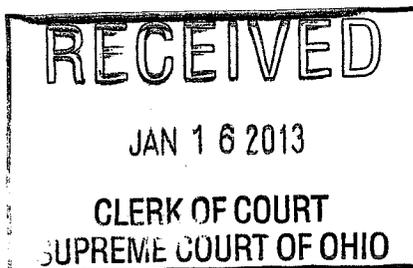
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**CASE NO. 2012-1653**

**COMPLAINANT'S ANSWER BRIEF TO  
OBJECTIONS OF RESPONDENT COLLEEN MARY O'TOOLE**

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## **I BRIEF CHRONOLOGY**

Complainant, James Davis, filed allegations with the Board of Commissions on Grievances and Discipline (“the Board”) alleging that judicial candidate Colleen Mary O’Toole, the Respondent herein, violated various provisions of Canon 4 of the Code of Judicial Conduct. Respondent had previously served one-term on the Eleventh District Court of Appeals, was defeated in the 2010 Republican Primary, and was **not** serving as a judge on any court while conducting her 2012 judicial campaign.

Mr. Davis alleged that during the course of Respondent’s judicial campaign, she engaged in a pattern of violations of the Code of Judicial Conduct through her misuse of the title “judge” and that her actions were designed to lead the voters to believe she was a judge and/or that she was still serving on the Eleventh District Court of Appeals. *Complainant’s Exhibit 9*.

Mr. Davis further alleged that despite receiving a cease and desist letter from the Trapp campaign which provided a safe harbor (*See Complainant’s Exhibit 4*), and despite having received a letter from the Board’s Senior Staff Counsel on the issue of the appropriate use of the title “judge”, Respondent persisted in her misuse of the title “judge”.

A Probable Cause Panel of the Board reviewed Complainant’s allegations and the Secretary of the Board filed a Formal Complaint alleging violations of Jud. Cond. R 4.3(A), which prohibits a judicial candidate from knowingly or with reckless disregard distributing information concerning the judicial candidate that would be deceiving or misleading to a reasonable person and also alleging a violation of Jud. Cond. R. 4.3(F), which prohibits a judicial candidate from misrepresenting his or her identity, qualifications, present position, or other fact.

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, that Complainant failed to prove, by clear and convincing evidence, the alleged violations of Jud. Cond. Rule 4.3(A) and 4.3(F); and with respect to Counts II and III, that Respondent violated Jud. Cond. Rule 4.3(A). The Board's Hearing Panel 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, and that a Five-Judge Commission to be appointed to issue a cease and desist order.

On October 3, 2012 the Five-Judge Commission ("Commission") was appointed to consider the Panel's Findings. On October 5, 2012, the 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 her Affidavit of Compliance with the Commission's Interim Order and also filed her Objections to the Panel's Findings, again alleging that Jud. Cond. R. 4.3(A) and 4.3(F) were unconstitutional both facially and as applied.

On October 15, 2012, Complainant filed Complainant's Answer Brief asserting that Jud. Cond. Rule 4.3(A) is constitutional on its face and as applied to Respondent. Since the Hearing Panel dismissed the allegations concerning Jud. Cond. Rule 4.3(F), and Complainant was not objecting to the dismissal of Jud. Cond. Rule 4.3(F), that issue was moot.

On October 8, 2012, Complainant filed a Motion to Amend the Interim Order based upon Respondent's submission to The League of Women Voters of Geauga County Voters Guide listing her "Occupation" as "Judge, 11 District Court of Appeals." (*Complainant's Motion Requesting the Five-Judge Commission Amend its October 5, 2012 Order, Exhibit A, 7<sup>th</sup> page*),

Respondent's comments to a Reporter from the Record Courier Newspaper that the Board's Hearing Panel Findings were "Basically, they found me guilty of a wardrobe violation."

*(Complainant's Motion Requesting the Five-Judge Commission Amend its October 5, 2012 Order, Exhibit B)* and Respondent's comments to a Reporter from the News-Herald Newspaper that the Board's Hearing Panel were "the wardrobe police". *(Complainant's Motion Requesting the Five-Judge Commission Amend its October 5, 2012 Order, Exhibit C)*.

On October 17, 2012, Respondent filed a Response in Opposition to Complainant's Motion.

On October 22, 2012, the Commission denied Complainant's Motion because, "The jurisdiction of the five-judge commission to issue a cease and desist order is limited to matters contained in the report and recommendation of the hearing panel and the record. Gov. Jud.III(5)(D)(2)." *Five-Judge Commission October 22, 2012 Order, last paragraph.*

On October 24, 2012, the Commission issued its unanimous Order, in which it found Respondent's Objections **not** well taken. The Commission rejected Respondent's arguments, finding her reliance on *In Re Judicial Complaint Against William M. O'Neill*, 132 Ohio St.3d 1472, 2012-Ohio-3223 misplaced. The Commission also found that the record supported the Hearing Panel's Findings and recommendations and that there was no abuse of discretion. The Commission also agreed with the Hearing Panel that a reasonable person would be deceived or misled into believing that Respondent was currently a sitting judge.

As to Respondent's intent, they found her own "testimony, together with her wearing the name badge in question to the hearing in this matter, leave little doubt that she intended the

public to believe that she is a sitting judge, when she is not.” *In Re Judicial Campaign Complaint Colleen Mary O’Toole*, 2012-Ohio-4920, p. 3.

In addition, the Commission affirmed the Panel’s Findings that Respondent violated Jud. Cond. R. 4.3(A) and also affirmed the Board Hearing Panel’s recommendation that a cease and desist order be issued, and that Respondent pay the costs of the proceedings, pay a fine of \$1,000 and pay \$2,500 towards Complainant’s attorney fees.

Citing two recent campaign disciplinary cases, *In Re Judicial Campaign Complaint Against Moll*, 132 Ohio St.3d 1505, 2012-Ohio-3952 and *In Re Judicial Campaign Complaint Against Lilly*, 131 Ohio St.3d 1515, 2012-Ohio-1720, they found that “[u]nlike Moll and Lilly, we believe that the respondent’s conduct here is more than simply the omission of key facts in her campaign materials or ignorance of our prior holdings. Instead her conduct demonstrates that she is deliberately flouting the very rules that govern judges and candidates alike. *Id at p.3.*

The Commission unanimously concluded that Respondent be “publicly reprimanded for her violations of Jud.Cond.R. 4.3(A) of the Code of Judicial Conduct.” *Five-Judge Commission October 24, 2012 Order, page three, second full paragraph.*

On November 9, 2012 Respondent filed a Request for Stay of Sanctions. On November 15, this Honorable Court granted a stay of the financial sanctions pending the disposition of Respondent’s appeal, but did **not** stay the imposition of a public reprimand upon Respondent.

Per stipulated extension of time, on December 14, 2012, Respondent filed Objections of Respondent Colleen Mary O’Toole.

The instant Answer Brief is being filed on behalf of James Davis, Complainant.

## II ARGUMENT

### **Proposition of Law No. 1** **Jud. Cond. Rule 4.3(A) Is Constitutional Both** **on Its Face and As Applied in this Case**

#### **A Prevailing Law On Constitutionality**

In *In Re Judicial Campaign Grievances Against William M. O'Neill*, 132 Ohio St.3d 1472, 2012-Ohio-3223, the Thirteen-Judge Panel found that the American system of jurisprudence is based upon the integrity of the participants, accordingly, Jud. Cond. Rule 4.3 serves a compelling state interest because it addresses fairness and accuracy – the integrity – of judicial campaigns. Diligent enforcement of Jud. Cond. Rule 4.3 maintains the integrity and quality of the judiciary and achieves a compelling state interest.

The same compelling state interest in preserving integrity is found in the very cases cited in Respondent's Objections. In *Butler v. Alabama Judicial Inquiry Comm.*, 111 F.Supp.2d (M.D. Ala 2000), that court found that preserving the integrity of the judiciary is a compelling state interest. The *Butler* court cited with approval to *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S.Ct.1535, 56 L.Ed. 1 (1978) which held, "[t]here could hardly be a higher governmental interest than a State's interest in the quality of its judiciary." *Landmark at 848*; and to *In Re Chmura*, 461 Mich. 517, 608 N.W.31 (2000), which held, "The state ... has a compelling interest in preserving the integrity of the judiciary." *Chmura at 40*.

In *Weaver v. Bonner*, 309 F.3d 1312 (11<sup>th</sup> Cir. 2002), the court adopted the standard set forth in *Republican Party of Minnesota v. White*, 536 U.S. 765, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002) at 346, that a candidate's speech during an election campaign is core political speech

subject to strict scrutiny analysis for constitutionality. The *Weaver* court went on to hold that strict scrutiny analysis requires that the restriction be narrowly tailored and serve a compelling state interest. In order to be narrowly tailored, “restrictions on candidate speech during political campaigns must be limited to false statements that are made with knowledge of falsity or with reckless disregard as to whether the statement is false – i.e., an actual malice standard.” *Weaver*, at 1320.

In *United States v. Alvarez*, \_\_ U.S. \_\_\_\_, 132 S.Ct. 2537 (2012), the narrowness of the restriction was demonstrated when the United States Supreme Court struck down the Stolen Valor Act (“Act”), because it banned and criminalized false statements at any time, in any place, to any person, and without regard as to whether the false statements were made for the purpose of material gain. *Id* at 2547.

**B. Proper Application of Prevailing Law on Constitutionality to the Instant Case**

The real issue in the instant case is whether Jud. Cond. Rule 4.3(A) on its face and as applied to Respondent is constitutional. For the reasons that follow, Jud. Cond. Rule 4.3(A) is both constitutional on its face and as applied to Respondent. Since this Honorable Court recently adopted amendments to the Ohio Code of Judicial Conduct effective January 1, 2013, and did **not** amend Jud. Cond. Rule 4.3(A), the presumption is that Jud. Cond. Rule 4.3(A) is constitutional on its face and would be constitutional as applied. An analysis of the prevailing law on constitutionality supports this presumption.

With respect to the facial challenge to Jud. Cond.R. 4.3(A) by Respondent, in order for Respondent’s assertion to prevail, this Honorable Court must find that under **no** set of

circumstances would Jud. Cond. R. 4.3(A) be valid. *United States v. Stevens*, 130 S.Ct. 1577 (2010). Based upon the discussion below, Respondent's arguments fail to meet this stringent test.

The first factor to be considered when determining whether Jud. Cond. Rule 4.3(A) is constitutional is whether the state (The Court) has a compelling state interest. Preserving the integrity of the judiciary in Ohio is a compelling state interest which can be enforced by The Court. *See O'Neill, supra, Butler, supra* and *Chmura, supra*.

The second factor to be considered when determining whether Jud. Cond. Rule 4.3(A) is constitutional is whether Jud. Cond. Rule 4.3(A) is narrowly tailored to serve that compelling state interest. Since Jud. Cond. Rule 4.3(A) restricts false statements made with knowledge of the falsity or with reckless disregard as to whether the statement is false, Jud. Cond. Rule 4.3(A) withstands constitutional scrutiny under the tests set forth in *Weaver, supra*.

Respondent cites several federal cases to support her claim that Jud. Cond. Rule 4.3(A) violates the First Amendment alleging that it is not narrowly tailored to serve the compelling state interest. Respondent's reliance on these cases is misplaced.

*White, supra*, has no bearing in this case other than to set a strict scrutiny standard. The Minnesota canon addressed in *White* prohibited a judicial candidate from expressing his or her views on disputed legal or political issues, whereas Ohio's Jud. Cond. Rule 4.3(A), at issue in this case, prohibits judicial candidates from knowingly or with reckless disregard posting or transmitting *false* information that purports to be fact.

In *White, supra*, the Court speaks to content-based restrictions upon views or issues, not the facts relating to a candidate's identity that is at issue in the instant case. *White, supra*, stands

only for the proposition that broad limitations on “campaign speech” or “political speech” of judicial candidates, *i.e.*, the judicial candidate’s **views** and **opinions** on legal or political issues run afoul of the First Amendment. Simply put, *White* focused on a discussion of a candidate’s point of view, not a false statement about a candidate’s present office or employment. At issue in the instant case is Respondent’s false statement during her campaign about her present office and employment, *ie.*, is she a judge?

Respondent’s arguments attempt to cloak her false statements of **fact** – whether she was a sitting 11<sup>th</sup> District Court of Appeals Judge at the time her campaign materials were published - under the rubric of **views** and **opinions** which are protected campaign speech or political speech under the First Amendment. This argument is disingenuous and not supported by the objective evidence. The exchange between Hearing Panel Member Sink, the public member of the Hearing Panel and Respondent, is instructive in this regard.

COMMISSIONER SINK: Now, are you a judge?

O’TOOLE: I am a judge, but I’m not a sitting judge.

COMMISSIONER SINK: What do you judge?

O’TOOLE: I judge nothing presently because I’m not sitting.

COMMISSIONER SINK: Are you retired?

O’TOOLE: I like to think I’m retired. I quit using the word ‘retired’ and deleted it because of the – you know, that original thing [March 8, 2012 letter from Attorney Michelle Hall, Board of Commissioners]. I took it out of everything, so.

COMMISSIONER SINK: Didn’t you cash in your PERS?

O’TOOLE: Yes, I did.

COMMISSIONER SINK: So you’re not eligible to retire from public service; is that correct, at this point?

O’TOOLE: Well, no, because I took my money out. I retired and left the judiciary and then I left.

COMMISSIONER SINK: You lost the election is what you did?

O’TOOLE: Correct. Correct. *Trans. p 255, line 19 through p. 256, line 19.*

The above dialogue encompasses Respondent’s admission of the false statement of fact.

Respondent continued to hold herself out as a judge at the September 18, 2012 Hearing, despite the fact that she lost the election in 2010 and is **not** entitled to legally call herself a judge.

Respondent continues, through motion practice, to argue that she was/is entitled to falsely state during her campaign that she was a judge.

The next exchange between Hearing Panel Member Sink, the public member of the Hearing Panel, relates to the public's perception of whether Respondent is a sitting judge.

COMMISSIONER SINK: Okay, then we go to No.2, Exhibit 2 [Respondent's website biographical section]. There's some of these things that have been kind of sticking here. There again, the public doesn't know the rules. So the public is not aware that you can't hold some of these offices and also be a judge. Because isn't it true that some of the positions that's in the bio of yours, you can't earlier you said that the assumption is you can't be a judge and also do those things.

O'TOOLE: Correct.

COMMISSIONER SINK: Okay. The public is not aware of that.

O'TOOLE: Those are also in the rules. I don't know exactly what the public is aware of in regard to – you know, the rules are you can't practice law and be a judge. Those are all in the same group of rules.

COMMISSIONER SINK: Anywhere in here where it says that you lost the election in 2010?

O'TOOLE: No, it does not say that in here.

COMMISSIONER SINK: Does it anywhere say you're not a judge?

O'TOOLE: This is a multiple page Web site. So on the first page its says–

COMMISSIONER SINK: In Exhibit 2.

O'TOOLE: I understand that. This is on the 'About' page. On several other places on the Web site, it has that I'm not a sitting judge.

COMMISSIONER SINK: But I'm talking about Exhibit 2 here.

O'TOOLE: Correct.

COMMISSIONER SINK; It says, 'During her term she has decided over 1500 cases.' and she's – not that she – it doesn't say that don't sit there anymore, does it?

O'TOOLE: No. It does not say that. It says that on the first page of the Web site.

COMMISSIONER SINK: I'm trying to see how the public looks at this. So earlier the testimony was, well, everybody knows that you can't do these things and not be a judge, but the public doesn't have that assumption.

O'TOOLE: The public would have to click – they would click onto the front page of the Web site. The public would look it and have various other things –

COMMISSIONER SINK: They see you in a robe.

O'TOOLE: No, no. The robe is on a completely different Ashtabula County Web site.

COMMISSIONER SINK: You can link it.

O'TOOLE: If it would link to my Web site, it would have the first page, my home page. I've not done that lately. I've been on the Ashtabula County Web site, but traditionally a link would take you to the home page.

COMMISSIONER SINK: That's okay. But you can still see one place you in a robe and the other place you're not a judge, so there's not a consistent perception. *Trans. p. 259, line 9 through p. 261, line 21.*

It is precisely Respondent's lack of consistency in the way in which Respondent held herself out to the public in her materials, her name badge, and her Web site, that created the false impression of fact during her judicial campaign, that Respondent was then a sitting judge on the 11<sup>th</sup> District Court of Appeals.

Prof. Cond. Rule 8.4(c) prohibits lawyers from engaging in "conduct involving dishonesty, *fraud*, deceit or misrepresentation." *Prof. Cond. R. 8.4(c)*. This Honorable Court has disciplined many lawyers for violations of this Rule. *See, Disciplinary Counsel v. Fowerbaugh*, 74 Ohio St.3d 187, 658 N.E.2d 237 (1995); *Disciplinary Counsel v. Kraemer*, 126 Ohio St.3d 163, 2010-Ohio-3300, 931 N.E.2d 571; *Disciplinary Counsel v. Karris*, 129 Ohio St.3d 499, 2011-Ohio-4243, 954 N.E.2d 118; and *Disciplinary Counsel v. Dockry*, 133 Ohio St.3d 527, 2012-Ohio-5014.

Likewise, This Honorable Court has disciplined lawyers for making a statement that "the lawyer *knows* to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judicial officer, or candidate for election or appointment for judicial office". *Prof. Cond. R. 8.2(a)*. *See, Disciplinary Counsel v. Gardner*, 99 Ohio St.3d 416, 2003-Ohio-4048; *Disciplinary Counsel v. Gallo*, 131 Ohio St.3d, 309, 2012-Ohio-758; *Disciplinary Counsel v. Proctor*, 121 Ohio St.3d 215, 2012-Ohio-684; *Akron Bar Assn. v. DiCato*, 130 Ohio St.3d 394, 2011-Ohio-5796.

Respondent argues that because she is a judicial candidate she is somehow cloaked under the First Amendment with the right to make false statements of fact concerning herself with impunity. Taking Respondent's arguments to their logical conclusions, once a lawyer becomes a judicial candidate, then that lawyer as judicial candidate is free to engage in dishonesty, fraud, deceit or misrepresentation, or make statements that lawyer as judicial candidate knows to be false or with reckless disregard to their truth or falsity and be immune from any disciplinary liability.

Jud. Cond. R. 4.3(A), as it existed during the September 18, 2012 Hearing, provides:

During the course of any campaign for nomination or election to judicial offices, 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: (A) Post, publish, broadcast, transmit, circulate, or distribute information concerning the *judicial candidate* or an opponent, 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.

We respectfully submit that Jud. Cond. R. 4.3(A) incorporates both Prof. Cond. Rule 8.4(c) and 8.2(a) into the requirements/prohibitions for lawyers who become judicial candidates. If Respondent's arguments are accepted, then lawyers as judicial candidates are permitted to engage in conduct that would be prohibited if that person were just a lawyer. Such a conclusion is an anathema to the entire Ohio disciplinary system.

Respondent cites to judicial campaign conduct cases in other jurisdictions to support her arguments. Respondent's reliance is misplaced.

In *Weaver, supra*, the Georgia court struck its judicial canon because it prohibited statements *negligently* made. The Georgia court reasoned that false statements negligently made

were inevitable in a free debate therefore the restriction did not afford sufficient “breathing space” for protected speech. However, the Georgia court went on to state that restrictions on judicial campaign speech must be limited to statements knowingly or recklessly made. *Id at 1319*. That is exactly what the instant case is about: the knowing utterance of reckless false statements by Respondent. Accordingly, *Weaver* supports the proposition that Jud. Cond. Rule 4.3(A) is constitutional.

In *Butler, supra*, the Alabama Supreme Court narrowed its canon to provide that a judicial candidate shall not disseminate false information concerning a judicial candidate or an opponent with knowledge that it is false or with reckless disregard whether or not it is false. Once again, that is exactly what Respondent did in this case, she distributed false information about her status as a judge, knowing that it was false or with reckless disregard as to whether or not it was false.

The *Chmura* court narrowed its rule to prohibit only public communications that the candidate for judicial office know were false or were used by the candidate with reckless disregard for their truth or falsity. This is exactly what Respondent did: disseminated false facts with reckless disregard for their truth or falsity during her 2012 judicial campaign.

Respondent, Colleen Mary O’Toole was **not** a judge. As the Hearing Panel found, “Respondent’s insistence that she is a judge in view of overwhelming evidence to the contrary is of great concern.” *Panel’s Findings, paragraph 10*. Thus, Respondent’s posting, publishing, broadcasting, transmitting, circulating or distributing information that she is a judge was done with knowledge of the falsity or with reckless disregard as to whether the statement is false.

Respondent’s reliance on *O’Neill* to support her claims is equally misplaced. First, the

*O'Neill* decision addressed only the constitutionality of Jud. Cond. Rule 4.3(C). Second, the Appellate Panel in the *O'Neill* decision found Jud. Cond. Rule 4.3(C) unconstitutional as applied to the facts in *O'Neill, supra*. The Appellate Panel did **not** find Jud. Cond. Rule 4.3(C) facially unconstitutional. In *In Re Judicial Campaign Complaint Against Moll*, 2012-Ohio-5674, this Honorable Court held that “The decision in *O'Neill* is limited to Jud.Cond.R 4.3(C) and is further restricted to the rule’s application to that respondent under the facts of that case.” *Moll, supra* ¶ 15. Thus, this Honorable Court’s own recent precedent supports Complainant’s arguments that Respondent’s reliance on *O'Neill* is misplaced.

In the instant case, the overwhelming evidence shows that Respondent was **not** a judge, retired or otherwise — she was defeated in the 2010 primary election. Accordingly, Respondent’s posting, publishing, broadcasting, transmitting, circulating or distributing information that she is a judge during her judicial campaign was done with knowledge of the falsity or with reckless disregard as to whether the statement was false.

Respondent also argues that the Sixth Circuit’s decision in *Briggs v. Ohio Election Commission*, 61 F.3d 287 (6<sup>th</sup> Cir. 1994), supports her position. However, Respondent acknowledges and admits that *Briggs* **only** applies in non-judicial elections. The instant case arises out of a judicial election and is therefore distinguishable from *Briggs*.

Respondent also relies heavily on *Alvarez, supra* to support her unconstitutionality claims. Respondent argues that *Alvarez, supra*, gives her the right to mislead or falsely state that she is a judge during her judicial campaign. Once again, Respondent’s reliance is misplaced. It is critical to note that in *Alvarez*, the Act was found unconstitutional because it prohibited and criminalized false statements made at any time, in any place, to any person, without regard to

whether the false statement was made for the purpose of material gain. The Act would make criminal “personal, whispered conversations within a home”*Id at*

In the instant case, Respondent published and distributed false statements with a purpose of material gain. As set forth in the Panel’s Findings, “The panel can only conclude that Respondent’s web site and badge are part of an effort to portray herself as an incumbent judge.” *Panel’s Findings, paragraph 9.* Respondent’s false use of the title “judge” is for the purpose of material gain. By deceiving the public into thinking that she is the incumbent judge, she gains a material advantage in the election.

Two examples of Respondent’s material advantage were attached to Complainant’s Motion to Amend Interim Order (“Complainant’s Motion to Amend”). The last paragraph of the article published in *The Star Beacon* reads: “Candidates for the 11<sup>th</sup> District Court of Appeals, incumbent judge Colleen Mary O’Toole and challenger Mary Jane Trapp, both discussed their judicial experience and said they would ashew [sic] political and personal agendas in rendering decisions.” *Exhibit A, The Star Beacon, October 4, 2012 attached to Complainant’s Motion to Amend.* By falsely portraying herself as a judge, Respondent gained a material advantage by having herself referred to as the “incumbent judge”. In elections, there is a distinct advantage to being an known as the incumbent. Respondent’s false portrayal of herself as a judge gave her a material advantage in the 2012 election.

In a letter to the Editor published in the Chagrin Solon *Sun Newspapers* on October 11, 2012 *Exhibit B to Complainant’s Motion to Amend*), the writer of the letter refers to Respondent as “Judge O’Toole”. The newspaper headline over the letter reads: “O’Toole experienced judge who will work for the people of Geauga”. Both the headline and the letter are yet another

example of the material advantage gained by Respondent through her false use of the title judge.

The material advantage of incumbency is borne out in academic research. In a study of the effect of incumbency in local elections, Princeton University Professor Jessica Trounstone noted that it is “a well-established fact that incumbents win reelection at high rates” and “it is virtually always better to be an incumbent than a challenger.” Professor Trounstone’s research established that in low information races (judicial races, especially at the appellate level are a prime example of such “low information races”), the candidate identified to the voter as the incumbent has an advantage of between 6 to 9%. *See Table 3, Trounstone, Turnout and Incumbency in Local Elections, Urban Affairs Review* (November 6, 2012).

Since Jud. Cond. Rule 4.3(A), prohibits the posting, publishing, broadcasting, transmitting, circulating or distributing either with knowledge that the information is false or with reckless disregard as to whether the information is false, this Rule meets the constitutionality standards set forth in the above cases. Jud. Cond. Rule 4.3(A) is constitutional both on its face and as applied to Respondent.

Other cases cited by Respondent are either inapplicable or readily distinguishable. In *Eu v. San Francisco County Dem. Cent. Comm.*, 489 U.S. 214 (1989), the speech in question was true speech. The true fact was that a political party had endorsed the candidate. Thus, true speech was wrongfully prohibited. In the instant case, what is being prohibited are false facts.

In *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307 (6<sup>th</sup> Cir. 1998), the speech at issue was ‘compelled speech’, in that the union was required to make certain disclosures regarding whether political contributions were voluntary. Again, in the instant case, what is being prohibited are false facts.

In *Mills v. Alabama*, 384 U.S. 214 (1966), the case concerned a newspaper editorial. In the instant case, the issue is false facts disseminated by Respondent.

Respondent also cites to *Brown v. Hartlage*, 456 U.S. 45 (1982) to support her arguments. This case concerned a statute whereby a candidate would forfeit office for promising to take a decreased salary if elected. Later, the candidate repudiated a **true** statement made as a campaign promise, and was still facing the harsh penalty of forfeiture of office.

The *Brown* court wanted to allow for the unfettered opportunity for candidates to make their views and opinions known to voters so the voters could intelligently evaluate a candidates' personal qualities and opinions. Respondent's false use of the title "judge" does nothing to make her views known to voters or advance her opinions.

Respondent also argues that *Getz v. Robert Welch*, 418 U.S. 323, a defamation case, which stood for the proposition that there is no constitutional value in false statements of facts, was repudiated by *Alvarez*. However, the false statement of facts in *Alvarez* would have been upheld if there was a showing of a material gain attributed to the false statements. In the instant case, Respondent achieved material gain when, through her use of the false factual statement that she was a judge on the 11<sup>th</sup> District Court of Appeals, she was able to gain an advantage in her election and defect the actual incumbent judge. This material gain is best illustrated by Hearing Panel Member Sink when he stated:

And I understand these rules; and I may be a bit unorthodox according to some of the rules of the court, but most of the rules in this that we're talking about today is to keep the citizens like myself from being duped. *Trans. p 254, lines 6-11*

For the reasons set forth above, Respondent's arguments that Jud. Cond. R.4.3(A) is

unconstitutional on its face and as applied to Respondent are without merit.

**Proposition of Law No. 2**  
**Complainant Proved by Clear and Convincing Evidence**  
**that Respondent's Statements Were False and Knowing or Reckless**

The Hearing Panel found the statement on Respondent's Web site that she was elected to the Eleventh District Court of Appeals in 2004, without giving the date her term ended, ". . . gives the impression that 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." *Panel's Findings* ¶ 6. This false, deceptive and misleading impression is further reinforced when Respondent refers to herself as "Judge O'Toole" in that same biographical sketch. *Panel's Findings* ¶ 6. Even the Ashtabula County Republican Party Chairman, a non-lawyer, agreed that Respondent's present tense description that she "serves as an intermediate court judge", "could be misleading." *Trans. p. 160, line 23.*

Respondent admitted writing the copy for her Web site. *Trans. p. 95, line 5* and *Panel's Findings* ¶ 8. Respondent also admitted that she failed to disclose in the text of her Web site that her term on the court had ended. *Trans. page 95, line 13.* Based upon Respondent's own admissions, she knowingly and recklessly made statements that were false, deceptive and misleading.

The Hearing Panel also found that the gold and black name badge reading "Colleen Mary O'Toole Judge 11<sup>th</sup> District Court of Appeals" (Complainant's Ex.17), and made for Respondent when she was actually serving as a sitting judge, would deceive or mislead a reasonable person into believing the Respondent is currently serving on the court of appeals." *Panel's Findings* ¶ 7.

Respondent testified that she wears a paper badge that reads “O’Toole for judge 11<sup>th</sup> District Court of Appeals” with the gold and black name badge (Exhibit 17) to “make sure there’s no ambiguity.” *Trans. page 236, line 6*. If the gold and black name badge was not false, it would be unnecessary to wear a paper badge.

The Hearing Panel found Respondent’s explanation about the gold and black name badge “somewhat confusing and not at all persuasive”. In her testimony, Respondent attempted to portray the gold and black name badge as a device to communicate that she was *running* for judge as opposed to communicating that she is a sitting judge (*Trans. p. 234, line 3*), despite the fact that the gold and black name badge was made for Respondent while she was a sitting judge on the Eleventh District Court of Appeals, and was not made during the current campaign. *Trans. p. 247, line 10*.

Evidence was adduced at the Hearing that Respondent appeared at the Portage County TEA Party event wearing only the gold and black name badge and **no** paper badge. *Trans. p. 207, line 24*. Additional evidence was adduced at the Hearing that the TEA Party Event Agenda (p 25 Complainant’s Ex 9) listed Respondent as “Judge O’Tool” [sic]. Further evidence was adduced at the Hearing that Ms. O’Toole failed to indicate in her remarks that she was **not** a sitting Eleventh District Court of Appeals Judge. *Trans. p. 208, line 18*.

When confronted with Exhibit 16, her campaign committee’s fund-raiser invitation, Respondent testified that she did not know what part of it she would change, and that she was “stick[ing] by the fact that it’s not misleading, that it’s not - I don’t think it describes me as a judge” (*Trans. p. 245, lines 16-20*), despite the language of the flyer, “You Are Cordially Invited

to Attend A Fundraising Event for Colleen M. O'Toole Judge 11<sup>th</sup> District Court of Appeals”  
(*Complainant's Exhibit 16*).

Respondent admitted in her testimony, “[i]n the common person’s mind, they think I’m still a judge; and return, reelect, running, most of them-most of them don’t know the difference one way or another.” *Trans. p. 266, line 21*. Thus, Respondent knows the public is already misinformed about or misunderstands her status, and Respondent’s continuing misuse of the title “judge” actively and intentionally misleads voters into believing that Respondent is the incumbent judge as evidenced by the Star Beacon and Chagrin Solon Sun articles (Exhibits A and B Complainant’s Motion to Amend).

Despite Respondent’s assertions to the contrary in her Objections, there is clear and convincing evidence in the record that Respondent’s statements were false and provided a material gain to her in her recent judicial election. Such false statements for material gain are **not** protected speech.

**Proposition of Law No. 3**  
**Hearing Panel’s Recommended Award of Attorney**  
**Fees Is Supported by the Record and Precedent**

James Davis, Complainant, also testified that he ‘signed the retainer letter. I’m involved. I’m responsible’ and that he hoped he would be reimbursed for attorney fees.” *Trans. p 191, line 17*. Respondent argues that if someone other than Complainant pays the attorney fees, such as the Trapp campaign, then an award of attorney fees would be a windfall. Although the Trapp campaign may ultimately pay attorney fees, the current recommended award of \$2,500 -- 18% of Cibella fees to October 11, 2012 – is in no way a “windfall” for Complainant Jim Davis or for the Trapp campaign.

Respondent's argument misses the important facts: 1) based upon the judicial campaign disciplinary procedure as set forth by this Honorable Court, the Complainant is required to prosecute the judicial campaign disciplinary case; 2) attorney fees and expenses have already been expended to prosecute Respondent's judicial campaign discipline case; 3) due to Respondent's unwillingness to enter into **any** Stipulations, the hearing lasted all day; 4) due to Respondent's motion practice, starting with a Motion to Dismiss filed prior to the September 18, 2012 hearing, the multiple Objections, including the recently filed Objections of Respondent Colleen Mary O'Toole, Complainant's attorney has spent hours in additional research and writing; and 5) Complainant's attorney fees are due and owing, despite who pays.

From the inception of her representation of Complainant until October 11, 2012, Cibella's fees for prosecuting the Formal Complaint on behalf of Complainant Davis total \$13,472.50. *See Exhibit C ¶ 12 to October 15, 2012 Answer Brief of Complainant.* In addition to fees, expenses have been incurred in prosecuting this case in excess of \$600. *Exhibit C ¶ 13 to October 15, 2012 Answer Brief of Complainant.* In addition to Cibella's fees, Attorney Axelrod, former counsel for Complainant Davis, also earned fees. *Exhibit C ¶ 15 to October 15, 2012 Answer Brief of Complainant.* It was and is Cibella's opinion based upon over 28 years experience in Ohio's attorney discipline system (10 years prosecuting cases and over 18 years defending disciplinary cases), that the time expended in representation of Complainant Davis is reasonable, necessary and comparable to other disciplinary cases Cibella has handled during her 18 years of private practice concentrating in professional responsibility. *Exhibit C ¶ 16 to October 15, 2012 Answer Brief of Complainant.* These numbers do **not** take into account the

time, effort and expenses by Cibella on the instant case since October 12, 2012.

This Honorable Court has previously held that sanctions in judicial campaign disciplinary cases serve multiple purposes, including: a) to punish behavior that is contrary to the Code of Judicial Conduct; b) inform the legal and judicial communities of the appropriate standards for judicial campaign conduct; c) deter future such violations, d) inform the public of the self-regulating nature of the legal profession; and e) enhance the public's confidence in the integrity of the proceedings. See, *In Re Judicial Campaign Complaint Against Berry*, 2009-Ohio-113; *In Re Judicial Campaign Complaint Against Morris* (1997), 81 Ohio Misc.2d 64; *In Re Judicial Campaign Against Burick* (1999), 95 Ohio Misc.2d 1 and *In Re Judicial Campaign Complaint Against Brigner* (2000), 89 Ohio St.3d 1460.

In *In Re Judicial Campaign Complaint Against Per Due*, 98 Ohio St.3d 1548, 2003-Ohio-2032, (Five Judge Commission, 2003), the stated purpose of a sanction was to inform other judicial candidates of the seriousness of the violations of the Code of Judicial Conduct and to deter future similar misconduct. In a recent case, *In Re Judicial Campaign Complaint Against Elinor Marsh Stormer*, 1/10/2013 Case Announcement #2, 2012-Ohio-34; the Five-Judge Commission cited to *Per Due*, and in addition to the fine of \$1,000 and the payment of the costs of the proceedings, Respondent was ordered to pay \$6,000 of the \$12,000 of Complainant's legal fees.

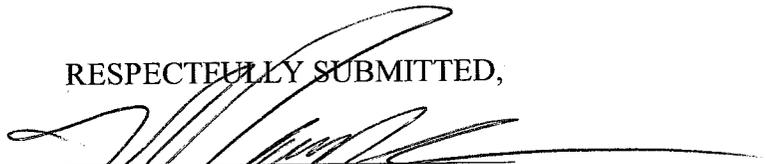
Respondent admitted in her testimony that she had attended 5 judicial candidate seminars in: 1998, 2000, 2004, 2010 and 2012. *Trans. p. 128, lines 19-22*. Respondent also admitted that the subjects taught at the seminars included campaign standards and communications and the importance of adhering to the Code of Judicial Conduct. *Trans. p. 130, lines 13-18*. Despite

attending 5 judicial candidate seminars, Respondent was **not** deterred in her false use of the title “judge” leading to her violation of Jud. Cond. R. 4.3(A). In order to deter future judicial candidates from engaging in like misconduct, an additional award of fees should be ordered to be paid by Respondent to Attorney Cibella, up to and including the \$13,472.50 owed as of October 11, 2012.

### **III CONCLUSION**

For the reasons set forth above, Complainant James Davis respectfully requests that Jud. Cond. Rule 4.3(A) be found to be constitutional both on its face and as applied to Respondent; that the Panel’s Findings and Five-Judge Commission’s Findings be adopted, with the exception that the award of attorneys fees to be paid by Respondent to Cibella be increased from the \$2,500 to \$13,472.50.

RESPECTFULLY SUBMITTED,



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 January 15, 2013, a copy of Respondent's Answer Brief to Objections of Colleen Mary

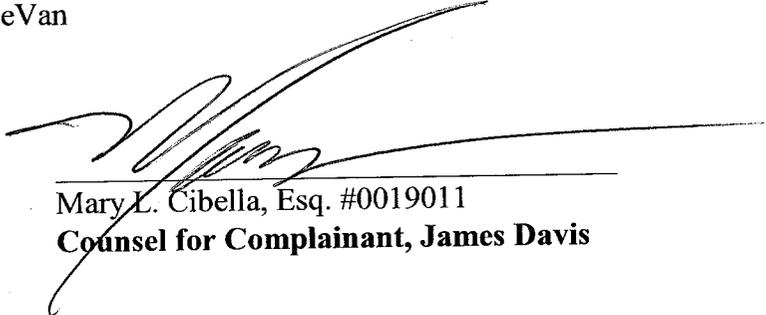
O'Toole was served as follows:

**Original and 16 Copies Via 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

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**Counsel for Complainant, James Davis**