BEFORE THE BOARD OF PROFESSIONAL CONDUCT
OF THE SUPREME COURT OF OHIO

In re:

Judicial Campaign Complaint Against	**Case No. 2020-012**
Karen Kopich Falter **Attorney Reg. No. 0066770**	**Findings of Fact, Conclusions of Law and Recommendation of the Hearing Panel**
Respondent	
Curt C. Hartman	
Complainant	

OVERVIEW

{¶1} Complainant Curt C. Hartman ("Complainant"), filed a judicial campaign grievance against Respondent Karen Kopich Falter ("Respondent") with the Board of Professional Conduct ("the Board"). A probable cause panel of the Board was appointed to review this matter pursuant to Gov. Jud. R. II, Section 5(B) and found probable cause that Respondent had committed two violations of the Code of Judicial Conduct. The Director of the Board of Professional Conduct, acting in accordance with instructions from that panel, prepared and certified a two-count formal complaint on March 9, 2020 alleging that Respondent, a judicial candidate as defined in Jud. Cond. R. 4.6(F), during the course of a judicial campaign, violated Jud. Cond. R. 4.3(A).

{¶2} The complaint alleges that during the course of Respondent's campaign, Respondent disseminated a campaign flyer (also referred to in testimony and herein as "the letter") under the logo "Karen Falter for Judge" and carrying the disclaimer "Paid for by Karen Falter for Judge" in which she stated "Her opponent moved to Hamilton County 3 years ago to take a judicial appointment from Governor John Kasich in March 2017".

{¶3} Count I of the complaint alleged that the communication violated Jud. Con. R. 4.3(A) in stating that the Complainant moved to Hamilton County in 2017. Count II alleges that

the communication also violated Jud. Cond. R. 4.3(A) in stating that he moved to Hamilton County to accept a judicial appointment in 2017 from Governor John Kasich.

{¶4} On March 10, 2020, in accordance with the provisions of Section 5(C) of Rule II of the Supreme Court Rules for the Government of the Judiciary of Ohio, Lori Herf, a nonattorney-member of the Board, David W. Hardymon, Esq., (an attorney-member of the Board) and the Honorable Rocky A. Coss (a judge-member of the Board), none of whom resides in the district from which the complaint arose, were appointed as members of the panel to hear his matter. Commissioner Coss was designated as chair of the panel.

{¶5} The case was heard on March 16, 2020 in Columbus, Ohio by the panel, none of whom served on the probable cause panel in this case.

{¶6} Complainant was present represented at the hearing by Brian Shrive. Respondent was present at the hearing and represented by Donald C. Brey.

{¶7} The complaint involves a judicial campaign for a seat in the Hamilton County Court of Common Pleas.

FINDINGS OF FACT

{¶8} Based on the evidence adduced at the hearing, the panel finds that the following facts have been established by clear and convincing evidence.

{¶9} Respondent is a candidate for the position of Common Pleas Court Judge in Hamilton County, Ohio in the primary election that was scheduled for March 17, 2020, but was not held due to an order from the Director of the Ohio Department of Health closing all polling places in Ohio. As such, she is subject to Canon 4 of the Code of Judicial Conduct.

{¶10} Complainant is Respondent's opponent in the Republican party primary election. Both were interviewed by the screening committee of the Hamilton County Republican Party and Respondent received the endorsement of the party.

{¶11} Respondent employed the political consulting firm of "Red House Strategies LLC" ("RHS") to assist her in her campaign as reflected in Respondent's Exhibit A. Joshua Burton and Justin Hucke are the owners of the company. The firm had previously been involved in five judicial campaigns.

{¶12} Respondent is a longtime resident of Hamilton County and has worked in that county for her entire professional career, which includes ten years as an assistant prosecuting attorney and over 13 years as a magistrate in the juvenile and domestic relations courts.

{¶13} Complainant previously resided and practiced law in Clermont County but before moving had expanded his practice into Hamilton County in both state and federal courts. His current law office is located in Cincinnati, Ohio.

{¶14} Respondent testified that it was "common knowledge" that the reason that the Complainant had moved to Hamilton County was to accept an appointment for a vacancy in a judgeship of the Hamilton County Court of Common Pleas by then Governor John Kasich in 2017. Complainant served in that position until he was defeated by a Democrat in the general election in 2018. Respondent indicated that her consultants had advised her that she needed to let the voters know that her opponent was a "carpet bagger" but not in those exact words.

{¶15} During the holiday season in December 2019, Respondent's mother who was a long-time resident of Hamilton County but now lives in Massachusetts, visited with Respondent. During that time, her mother discussed how she could help Respondent with the election. After

her mother returned to visit in January of 2020, they continued those discussions which resulted in the Respondent and her mother drafting a letter that would be sent to the early absentee voters.

{¶16} On January 26, 2020, Respondent texted a draft to Joshua Burton and Justin Hucke. She later revised it and sent it to them. Additional texts and emails were exchanged (Resp. Ex. B).

{¶17} The final version of the letter was mailed on or about February 13, 2020 to 202 persons who had requested Republican Primary absentee ballots (Resp. Ex. D and Comp. Ex. 4). In the third paragraph of that letter, Respondent included the following language:

> **Her opponent moved to Hamilton County 3 years ago to take a judicial appointment from Governor John Kasich in March, 2017 and lost in his first election to a Democrat.** (emphasis in original).

{¶18} After Respondent's campaign learned of the letter, Complainant's treasurer and counsel contacted Joshua Burton to advise him that the letter contained incorrect information in that Complainant had moved to Hamilton County in May 2014 and voted in Hamilton County since then.

{¶19} Mr. Burton agreed to check into the matter and did so immediately. He informed Respondent that Complainant's campaign had advised him that Complainant had lived and voted in Hamilton County since 2014.

{¶20} Respondent's campaign then sent a correction letter (Resp. Ex. E) to the absentee voters who had received her first letter in which she stated, "We were informed by my opponent's campaign committee that my opponent moved to Hamilton County in 2014." The correction made no mention of public records indicating that Complainant moved to Hamilton County in 2014.

{¶21} At the hearing, Complainant testified that he had held the elected office of Trustee for Pierce Township in Clermont County from 1997-2005. He ran for a House seat in the General Assembly in 2004, but was defeated in the Republican primary.

{¶22} Complainant testified that he decided to move into Hamilton County with the goal of running for the General Assembly in a different House district that was more suburban, as he felt his personality would be more suited to that type of district. On May 6, 2014, he purchased a condominium in Anderson Township in the eastern part of Hamilton County that was just a few minutes from his Clermont County home (Comp. Ex. 3). He filed a notice of change of address with the Hamilton County Board of Elections on the same date and cast a provisional ballot in the Republican primary election (Comp. Ex. 1).

{¶23} Complainant voted in Hamilton County in every election after that as reflected in the Hamilton County Board of Elections records (Comp. Ex. 2).

{¶24} Because a friend of his had defeated the incumbent in the House district in which Complainant resides in the Republican primary in 2014 and was later elected to the position, Complainant has not run for the General Assembly. Complainant testified that in 2015 he was approached by the chairman of the Hamilton County Republican Party about running against incumbent Common Pleas Judge Jody Luebbers who is a Democrat. He took out and circulated petitions but decided against filing to be a candidate for the position.

{¶25} Complainant stated that part of the reason that he did not run for that position was that he wanted to serve as a delegate to the Republican National Convention in 2016 pledged to Governor John Kasich who was a candidate for President at that time.

{¶26} After the general election in November of 2016, there were five vacancies for judgeships in Hamilton due to the election of two appellate judges to the Ohio Supreme Court, the election of incumbent judges to other judicial positions, and a resignation. Complainant was interviewed by the judicial screening committee of the Hamilton County Republican Party that

made recommendations of up to five persons to Governor Kasich for appointment to each vacancy. Complainant was not recommended for appointment to any of the five vacancies.

{¶27} Complainant testified that because of his connections with the Governor's staff, he was able to obtain an interview and was later appointed to fill a vacancy as judge of the Hamilton County Common Pleas Court. He ran to retain that seat in November of 2018 but was defeated by the Democratic candidate.

{¶28} Complainant testified that he retained ownership of his house in Clermont County until 2019. He testified that after he moved to Hamilton County, he allowed a friend to live there and later rented it until he sold it. His law office was also located in the house while he lived there.

{¶29} Respondent testified repeatedly that she believed that Complainant had moved to Hamilton County in 2017 to accept the judicial appointment from the Governor because she had been told that numerous times by her consultants and others in the legal community and had read about it. One of her exhibits was a news article about his appointment (Resp. Ex. J). That article made no claim that Complainant had moved into Hamilton County in 2017.

{¶30} Respondent testified that she would not have included the claim about Complainant in her letter had she known it was not correct. She testified that she was upset that her letter included something that was not accurate and that she was also upset that her consultants had not checked the accuracy of the claim.

{¶31} However, Joshua Burton testified that the letter was "her project" and that he did nothing other than make some grammatical changes to the letter. Respondent's contract with RHS did not contain any provision that it would do "opposition research" or "fact checking". Nonetheless, Respondent felt that Burton and/or Hucke should have done something to prevent her from sending out a letter with inaccurate information.

{¶32} Respondent testified that she did not know if Complainant had in fact moved into Hamilton County but was taking him at his word. Since Respondent presented no evidence to rebut the Complainant's evidence that he moved into Hamilton County in May of 2014, the panel finds that he has established that was in fact the case and that the statement in Resp. Ex. 4 that Complainant had moved into Hamilton County in 2017 to accept the appointment by Governor Kasich is not true.

{¶33} The panel further finds that Complainant's motive in moving into Hamilton County in 2014 was not for the purpose of accepting a judicial appointment in 2017, as that was in the future and was unknown to Complainant or anyone else. Complainant testified without contravention that his motivation was for political purposes of running for a House seat in the General Assembly.

{¶34} The panel further finds that a check of public records available on line from the Hamilton County Board of Elections in 2019 would have shown that Complainant had voted in every election in Hamilton County since May 2014 and that the online records of the Hamilton County Auditor's would have shown that he had purchased a condominium in Hamilton County in May 2014.

{¶35} The panel further finds that Respondent chose to believe what was essentially courthouse and party-insider gossip or rumors without making any effort to check the truthfulness of the allegation that Complainant had moved into Hamilton County in 2017 to accept an appointment as a Hamilton County Common Pleas Judge. She also chose to rely upon similar statements about Complainant made to her by her consultants.

{¶36} For example, when asked how she came to include the language regarding Complainant when she was typing the letter, she testified: "That information came from Justin

and Josh" (Tr. page 32, lines 24-25). Complainant's counsel asked her during her panel testimony: "Specifically, who has told you, as you—as you previously testified, that Mr. Hartman moved into Hamilton County three years ago for the purpose of accepting a judicial appointment?" She answered: "That specific questions, Josh and Justin." (Tr. Page 42, lines 3-9). When she was asked how they knew that to be true she responded: "I assumed they knew it was true." (Tr. Pages 146-147).

{¶37} Respondent testified that based upon the "common knowledge" in the Hamilton County legal community, she believed that Complainant had moved into the county in 2017 to obtain the appointment to the vacant judicial seat. She was asked during her testimony before the panel, "Did you do anything to verify when—why he moved into Hamilton County", she answered: "That was common knowledge within the legal system that he came to Hamilton County." (Tr., page 35, lines 9-15). At page 39, lines 14-17 she testified: "That—no. That common knowledge has been for years. That wasn't just—that's just what people have talked about for many years, because that appointment was in 2017".

{¶38} However, Respondent did acknowledge in her testimony before the panel that the language in the letter alleging that Complainant had moved to Hamilton County in 2017 to take a judicial appointment by Governor John Kasich was not true. (Tr. Page143, lines 13-16).

{¶39} The panel finds by clear and convincing evidence that the statement in Resp. Ex. D that **"Her opponent moved to Hamilton County 3 years ago to take a judicial appointment from Governor John Kasich in March, 2017…"** was false.

CONCLUSIONS OF LAW

{¶40} Jud. Cond. R. 4.3 reads in relevant part as follows:

> 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:
>
> > (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 a reckless disregard of whether or not it was false, or if true, that would be deceiving or misleading to a reasonable person.

{¶41} Jud. Cond. R. 4.2(A)(2) requires a judicial candidate to review and approve the content of all campaign statements and materials by the judicial candidate or his or her campaign committee before their dissemination. Respondent acknowledged that she had typed the letter for her mother, had downloaded the list of persons requesting absentee ballots for the Republican primary, and prepared them for mailing. Therefore, the panel concludes that she reviewed and approved the content of the letter before it was disseminated to those persons, but without making any effort to confirm that it was true.

{¶42} Respondent argues that she relied upon reputable campaign consultants to make the determination if information in the letter was accurate which relieves her of any responsibility to determine the accuracy of the information herself. If that is the case, then Jud. Cond. R. 4.2(A)(2) would be eviscerated from the Code because any judicial candidate could make any false statement about an election opponent in a judicial race so long as they were not told the statement was false, or they relied upon the statements of others without confirming the accuracy of that statement.

{¶43} The panel concludes that is not what was intended by the rule and that in fact, it is inherent in the words "review and approve the content" in Jud. Cond. R. 4.2(A) that a judicial candidate must make a bona fide good faith effort to confirm the accuracy of a statement about their opponent.

{¶44} Respondent's defense to the two counts of the certified complaint alleging violations of Jud. Con. R. 4.3(A) is that she relied upon statements to her by her campaign

consultants and the general knowledge in the legal community that the allegation against Complainant that she included in the letter was true. She argues that because of this, she did not post, publish, transmit, circulate or distribute information knowing that it is false or with a reckless disregard of whether or not it was false and therefore has not violated the rule.

{¶45} Jud. Cond. R. 4.6(G) defines "knowingly for purpose of Canon 4 as follows: "'Knowingly' means actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." However, the term "reckless disregard" is defined in Jud. Cond 4.6 or elsewhere in the Code.

{¶46} In her hearing memorandum, Respondent argues that the definition of "reckless disregard" to be applied to Jud. Con. R. 4.3(A) is as set forth in *Varanese v. Gall*, 35 Ohio St.3d 78, 518 N. E.2d 1177. That decision cited the definition as determined by the United State Supreme Court in *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L.Ed 2d 686 (1964).

{¶47} The *Sullivan* case involved a state claim for libel by a public official in which punitive damages were awarded against the New York Times and four individual defendants in a state court of Alabama for publication of a paid advertisement. In that context, the United States Supreme Court held that a state cannot, under the First and Fourteenth Amendments, award damages to a public official for defamatory falsehood relating to his official conduct unless he proves "actual malice" -- that the statement was made with knowledge of its falsity or with reckless disregard of whether it was true or false. *Id.* at 265-292.

{¶48} In the *Varanese* case, a county commissioner sued a local newspaper for libel based upon a paid political ad by her opponent during the election campaign. In syllabus paragraph two, the Ohio Supreme Court held: "In defamation cases, a newspaper's liability for failure to check the accuracy of advertisements, including political advertisements, is limited to those cases where

the defendant actually knew the ad was false before publication, or where the ad is so inherently improbable on its face that the defendant must have realized the ad was probably false." The defendant was the newspaper, not the opponent. Syllabus two specifically noted that it was applicable to defamation cases involving a newspaper publishing advertisements.

{¶49} In *Varanese*, the Ohio Supreme Court noted at page 79: "In the common law, actual malice connotes ill will, hatred, a spirit of revenge or a conscious disregard for the rights and safety of other persons which has a great probability of causing substantial harm." This indicates that this is still the law of Ohio with regard to other types of cases.

{¶50} Since both the *Sullivan* and the *Varanese* cases involved defamation against a newspaper that published advertisements without checking their accuracy, the panel concludes that they are not applicable to the interpretation of "reckless disregard" under Jud. Con. R. 4.3(A) because judicial campaigns are very different. Therefore, the panel must look to other case precedents for guidance on the definition to be used for that rule.

{¶51} In the case of *In re Judicial Complaint against O'Toole*, 141 Ohio St 3d. 355, 24 N.E.2d 1114, 2014-Ohio-4046, the Ohio Supreme Court stated at ¶41:

> We therefore look at the breadth of Jud.Cond.R. 4.3(A) to determine whether it is tailored to serve Ohio's compelling interests. We recognize that " 'erroneous statement[s] [are] inevitable in free debate, and * * * must be protected if the freedoms of expression are to have the " breathing space" they " need * * * to survive." '" *Brown v. Hartlage* at 60, quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-272, *84 S.Ct. 710*, 11 L.Ed.2d 686 (1964), quoting *Natl. Assn. for Advancement of Colored People v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). But this general admonition does not apply to *intentional* or *reckless* erroneous statements because intentional lying is *not* inevitable in free debate. Lies do not contribute to a robust political atmosphere, and " demonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements." *Brown v. Hartlage* at 60. The portion of Jud. Cond. R. 4.3(A) that limits a judicial candidate's *false* speech made during a specific time period (the campaign), conveyed by specific means (ads, sample ballots, etc.), disseminated with a specific mental state (knowingly or with reckless disregard) and with a specific mental state as to the information's accuracy (with knowledge of its falsity

> or with reckless disregard as to its truth or falsity) is constitutional. That portion of the rule applies to specific communications made by judicial candidates under narrowly defined circumstances.

{¶52} "Reckless disregard" has been defined as the "failure to do a required act when the actor knows or has reason to know of facts that would lead a reasonable person to realize that the actor's conduct both creates a reasonable risk of harm to someone and involves a high degree of probability that substantial harm will result." Black's Law Dictionary (10th Ed. 2014) 573.

{¶53} In the case of *In re Judicial Campaign Complaint against Moll*, 135 Ohio St.3d 156, 2012-Ohio-5674, the Ohio Supreme Court stated at ¶11:

> The commission did not err in determining that the record supports the hearing panel's determination that Moll's campaign flyer violated Jud. Cond. R. 4.3(A), (C), and (F). In this context, a judicial candidate acts "knowingly" if the result is probable, and the candidate acts "recklessly" if the result is possible and the candidate chooses to ignore the risk.

{¶54} The panel concludes that the Respondent's failure to take any action whatsoever to confirm the truthfulness of the statement in her letter (Resp. Ex. D) that **"Her opponent moved to Hamilton County 3 years ago to take a judicial appointment from Governor John Kasich in March, 2017..."** was done in conscious disregard of whether it was false. As an experienced attorney and magistrate, she should have recognized that this type of statement is one that must be verified prior to sending the letter. Clearly, she chose to ignore the risk that claim was false. This constitutes "reckless disregard" of whether the statement about her opponent was false under Jud. Cond. R. 4.3(A)(2).

Violations Found

{¶55} Accordingly, the panel finds by clear and convincing evidence that Respondent violated Jud. Cond. R. 4.3(A) as alleged in both Counts One and Two of the certified complaint by including the statement **"Her opponent moved to Hamilton County 3 years ago to take a**

judicial appointment from Governor John Kasich in March, 2017…" in the letter (Resp. Ex. D) that she mailed to persons who requested absentee ballots for the Republican Primary Election. Specifically, she acted with reckless disregard of whether or not that statement was false.

AGGRAVATION, MITIGATION, AND SANCTION

{¶56} The panel finds that there are no aggravating factors present under Gov. Bar R. V, Section 13(B).

{¶57} In mitigation, Respondent has no prior disciplinary record and no prior violations of Canon 4.

{¶58} A judicial candidate who violates Canon 4 should receive sanctions in proportion to the seriousness of the violations. *In re Judicial Campaign Against Moll, supra* at ¶18. Sanctions in such cases should suffice to punish the violator and deter similar violations by judicial candidates in future elections. *In re judicial Campaign Complaint Against Morris,* 81 Ohio Misc. 2d 64, 65 (1997).

{¶59} The sanctions available under Gov. Jud. R. II, Section 5(D) include disciplinary sanctions, a cease and desist order, a fine, assessment of costs and assessment of attorney fees.

{¶60} Respondent has ceased using the claim that Complainant moved into Hamilton County in 2017 and now acknowledges in campaign communications that he moved in 2014. Therefore, there is no need for a cease and desist order at this time.

{¶61} In two cases involving violations of Jud.Cond. R. 4.3(D), a fine of $1,200 was imposed against two judicial candidates who used campaign signs that did not have the required prominent lettering required under Jud.Cond. R. 4.3(N), *In re Judicial Campaign Complaint Against Lombardi*, 154 Ohio St.3d 1458, 2018-Ohio-5173 and *In re Judicial Complaint Against McCarty,* 154 Ohio St.3d 1419, 2018-Ohio-5173. Each respondent used signs from campaigns in

which they had been judicial candidates prior to the change in the rule to require prominent lettering. They failed to check the lettering on their signs to insure they complied with the new rule and then used them in their respective campaigns.

{¶62} In the *Moll* case, the Respondent was found to have violated Jud. Cond. R. 4.3 by distributing a campaign flyer that had a photo that depicted her wearing a judicial robe and had the words "Magistrate, Guernsey County". At the time of the campaign, she was not serving as a magistrate although she had served for ten years but had not done so for about five years prior to thereto. She was fined $1,000, ordered to pay costs and $2500 in attorney fees.

{¶63} The panel finds that the conduct of the Respondent in this case is more serious than that of the candidates in those cases. The panel is mindful of the fact that Respondent mailed only 202 letters containing the statement and once she was made aware of the inaccuracy, she sent out a letter to the 202 persons that received the first letter that while not an apology did inform the voters that Complainant had moved into Hamilton County in 2014. However, the fact that the Respondent, a magistrate and an attorney with almost 24 years of experience in public service took absolutely no action to determine whether the statement about Complainant in the letter was true or false requires more than a fine to not only sanction the Respondent for the violations but to deter other future judicial candidates from choosing to act in a similar manner. If a judicial candidate can recklessly distribute material that contains information that is false and the only sanction is a fine, that could simply be considered an acceptable financial risk to pay if that candidate is successful.

{¶64} Therefore, the panel recommends that the Respondent be given a public reprimand, fined $1,000 and that she be assessed the costs of this proceeding. The panel recommends that the

matter be considered on an expedited basis since the polls were closed on the primary election day and the issue of when primary voting will take place has not yet been determined.

Judge Rocky A. Coss
Panel Chair

per authorization
Lori A. Herf

per authorization
David W. Hardymon

per authorization