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STATE OF NEVADA
STANDING COMMITTEE ON
JUDICIAL ETHICS AND ELECTION PRACTICES

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IN RE UNFAIR ELECTION PRACTICE
COMPLAINT PURSUANT TO NCJC
CANON 1 AND 4 AND NCJC RULES
1.3 AND 4.1:

PHILIP J. DABNEY

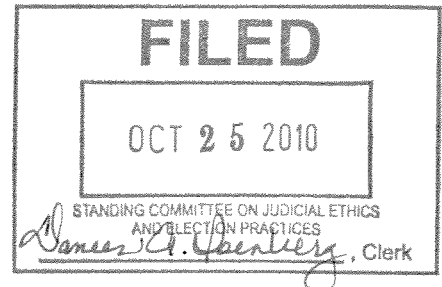
Complainant

vs.

JOANNA S. KISHNER

Respondent.

PUBLISHED DECISION: 10-7



DECISION

This matter came before a Panel of the Standing Committee on Judicial Ethics and Election Practices for hearing on October 19, 2010. The Panel selected in accordance with Rule 4(1) of the Rules of the Standing Committee on Judicial Ethics and Election Practices was comprised of the Honorable Dan L. Papez, William E. Dougan, M.D., Susan Miller, Eric Dobberstein, Esq., and Dan R. Reaser, Esq. The entire Panel was present and participated in the hearing.

The Complainant Philip J. Dabney ("Dabney") was present and represented by legal counsel David V. Thomas, Esq. The Respondent Joanna S. Kishner ("Kishner") was present and represented by legal counsel, Dennis L. Kennedy, Esq. and Elena B. Roberts of the firm of Bailey Kennedy. The Panel reviewed the pleadings and papers submitted by the parties and at the hearing accepted testimony and argument from both Dabney and Kishner. Respondent's Exhibit A was accepted into the record of the proceedings before the Panel. The administrative record in this matter is comprised of the Complaint filed by Dabney on October 7, 2010; the Response filed by Kishner on October 14, 2010; the correspondence dated October 14, 2010, on file with the Standing

1 Committee designating the Panel and setting the hearing; and, Exhibit A. Neither
2 Dabney nor Kushner presented an objection to the composition of the Panel. The
3 jurisdiction and authority of the Panel is duly established pursuant to the Rules of the
4 Standing Committee on Judicial Ethics and Election Practices as adopted by the
5 Supreme Court of Nevada.

6 SUMMARY OF CLAIMS AND EVIDENCE

7 1. Dabney and Kushner are each duly declared candidates for the judicial
8 office of the Clark County District Court, Department 31. Neither of the candidates are
9 incumbent judicial officers.

10 2. Dabney alleges in the Complaint filed October 7, 2010, that Kushner has
11 violated Canon 4 and Rule 4.1(A)(11) of the Nevada Code of Judicial Conduct (the
12 "NCJC"). In support of the allegations, Dabney asserts that Kushner made public
13 statements that are false or misleading, or that omit facts necessary to make the
14 communication considered as a whole not materially misleading. The statements were
15 made by Kushner on September 13, 2010, during a televised joint interview of Dabney
16 and Kushner on the *Face-to Face* program (the "Television Interview"), hosted by pundit
17 Jon Ralston ("Ralston"). The specific statements of Kushner cited by Dabney as violative
18 of the NCJC were in the following conversation between Kushner and Ralston:

19 Kushner: "An elderly client had his [Dabney's] firm change her estate plan
20 and he personally benefited about a quarter of a million dollars."

21 Ralston: "Wow, that is a serious allegation you are making right here, you
22 are saying that he used his position to get a quarter of a million
23 dollars?"

24 Kushner: "I am not saying he used his position. I am saying the facts speak
25 for themselves that the Nevada Supreme Court said the actions
26 were in violation of former Supreme Court Rules 158 and 160."

27 Ralston: "Did he get disciplined for it, do you know?"

28 Kushner: "Ah, you will have to ask him, I do not believe he was disciplined

1 for it, because of the resulting litigation that incurred.”

2 3. Dabney alleges that Kishner violated the NCJC by failing to state during
3 the Television Interview that both the Clark County District Court and the Supreme
4 Court of Nevada concluded that clear and convincing evidence established Dabney did
5 not exercise undue influence over his client. *See In Re Jane Tiffany Living Trust 2001*,
6 Case No. P52199, Order Granting Petition to Construe Terms of Trust and Declare Trust
7 Valid (Nev. 8th Jud. Dist. Ct. filed Apr. 7, 2005), *affirmed*, 124 Nev. ---, Nev. Adv. Op. No.
8 8, 177 P3d 1060 (2008) (the “Tiffany Trust Case”). Dabney avers that Kishner made the
9 statements during the Television Interview in a manner that created an implication that
10 Dabney had engaged in misconduct to receive an inheritance. Dabney testified that the
11 impact of Kishner’s accusation not only prejudiced his judicial campaign, but also
12 would irreparably damage his reputation as a practicing attorney in the community.

13 4. The Panel viewed the entirety of the Television Interview and relies in this
14 matter on the totality of Kishner’s relevant communications during the Television
15 Interview.

16 5. Kishner defends against Dabney’s claims in the Response filed October 14,
17 2010, that she cannot have violated Canon 4 and Rule 4.1(A)(11) because each of her
18 statements when parsed is either factually true or a mere expression of opinion.
19 Kishner further defends that Rule 4.1(A)(11) must be strictly construed and is only
20 violated if Dabney establishes by a preponderance of the evidence that she made a false
21 statement of fact – not opinion – knowing that the statement was false and with actual
22 malice. Kishner further asserts that the statements were not “materially misleading”
23 because the facts stated were all true and “speak for themselves,” thus inviting the
24 voters to review the record themselves. She further avers that because Ralston
25 provided Dabney the opportunity to explain his interpretation of the events, Dabney
26 had a contemporaneous opportunity to correct any adverse impression.

27 6. Kishner testified that she had carefully reviewed the NCJC and the
28 decisions of the Clark County District Court and the Supreme Court of Nevada in the

1 Tiffany Trust Case. She further testified that she had determined that Dabney was
2 entitled to receive over \$250,000.00 as a beneficiary of the trust by reviewing transcripts
3 of Dabney's deposition taken in the Tiffany Trust case. Kishner indicated to the Panel
4 that the Dabney deposition had been obtained from a confidential source and was not
5 public information.

6 7. Kishner explained that informing the voters that the Nevada Supreme
7 Court found Dabney violated former Rules 158 and 160 was important information the
8 public should have in assessing his fitness for judicial office and that disclosure of this
9 type of information is considered important in assessing judicial appointment
10 candidates. *See* Exhibit A.

11 8. Kishner also asserted that Dabney brought his Complaint merely as an
12 election tactic. In this regard, Kishner notes Dabney's Complaint was filed twenty-four
13 days after the Television Interview after absentee ballots were mailed and just before
14 early voting commenced. She states that given the Complaint's lack of merit, Dabney is
15 manipulating the ethical rules to gain political advantage. Kishner asks that the Panel
16 find that the delay in filing the Complaint was improper.

17 9. Dabney testified that he did not file the Complaint immediately because
18 he wanted to give thoughtful consideration to the implications of such action, he
19 needed time to collect the evidence and consult with legal counsel and he was also
20 engaged in campaigning and the responsibilities of his private law practice.

21 DISCUSSION AND ANALYSIS

22 10. Canon 4 of the NCJC states, "[a] judge or candidate for judicial office shall
23 not engage in political or campaign activity that is inconsistent with the independence,
24 integrity, or impartiality of the judiciary." See Nev. Code Jud. Conduct, Canon 4.

25 11. Paragraph 11 of Rule 4.1(A) provides in relevant part that "a judge or
26 judicial candidate shall not . . . knowingly, or with reckless disregard for the truth,
27 make any false or misleading statement." See Nev. Code Jud. Conduct, Rule 4.1(A)(11).
28 The NCJC defines the term "knowingly," to "mean actual knowledge of the fact in

1 question and states that a person’s knowledge may be inferred from circumstances.

2 12. The commentary to Rule 4.1(A)(11) explains that:

3 Judicial candidates must be scrupulously fair and accurate in all
4 statements made by them and by their campaign committees.
5 Paragraph (A)(11) obligates candidates and their committees to
6 refrain from making statements that are false or misleading, or
7 that omit facts necessary *to make the communication considered
as a whole not materially misleading.*

8 See Comment 7 to Rule 4.1(11)(emphasis added).

9 13. NCJC Rule 4.1(A)(11) and the related comments were adopted by the
10 Nevada Supreme Court based on the language of the American Bar Association’s 2007
11 Model Code of Judicial Conduct. *Compare* Nev. Code Jud. Conduct, Rule 4.1(A)(11) &
12 Comment 7 to Rule 4.1(11), *with* ABA Center for Prof. Resp., 2007 Edition Model Code
13 of Judicial Conduct 49-52 (Am. Bar Assoc. 2007)(the “Model Rules”). The Model Rules
14 explain that the new language used in the Code relative to Rule 4.1(A)(11) “is
15 established in the law of libel and slander.” *Id.* at 147. Given these facts, the Panel
16 concludes that the constitutional arguments raised by Kishner are without merit for
17 three reasons. First, the NCJC is entitled to a presumption of constitutionality. Second,
18 the specific Canon and Rule were recently adopted by the Court consistent with the
19 relevant jurisprudence vetted in promulgation of the Model Rules. Third, as an
20 administrative body created by the Court, the Standing Committee on Judicial Ethics
21 and Election Practices is limited in its jurisdiction to interpretation and enforcement of
22 the Canons. Our jurisdiction does not extend to setting aside a Canon or Rule duly
23 adopted by the Court.

24 14. An unfair election practice must be established with evidence proving by
25 preponderance a violation of the NCJC. The term “preponderance of the evidence”
26 means such evidence that leads the fact finder to conclude that the existence of the
27 contested fact is more probable than its nonexistence. See *Brown v. State*, 107 Nev. 164,
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1 166, 807 P.2d 1397 (1991).

2 15. Under the NCJC, our obligation pursuant to Rule 4.1(A)(11) is to
3 determine if a preponderance of the evidence establishes a judicial candidate made a
4 false or materially misleading statement, considering that candidate's campaign
5 communication as a whole, and if so whether the false or misleading statement was
6 made by the judicial candidate with knowledge of its falsity or with reckless disregard
7 of the truth. In Comment 7, the Supreme Court of Nevada has indicated that a
8 campaign statement will be considered "misleading" if the statement omits facts
9 necessary to make the communication considered as a whole not materially misleading.

10 16. In this case, the Panel is not faced with statements by Kushner that are
11 false. Kushner is correct that based on the evidence before the Panel there is ample
12 proof that carefully parsed and skillfully delivered the individual statements were
13 either factual or Kushner's opinions or a combination of both fact and opinion. Kushner
14 is also correct that the fact of a judicial candidate's violation of the Rules of Professional
15 Conduct as a practicing attorney is a relevant fact of which voters should be informed.

16 17. The legal question before the Panel is whether all of Kushner's relevant
17 statements during the Television Interview were made knowingly or recklessly and
18 omit facts necessary to make the communication considered as a whole not materially
19 misleading.

20 18. The Panel concludes that a preponderance of the evidence presented at
21 the hearing and in the administrative record establishes Kushner's statements omitted
22 facts necessary to make the communication as a whole not materially misleading and
23 that Kushner either had actual knowledge that the statements omitted facts needed to
24 avoid misleading the public or Kushner was simply reckless in making the statements
25 without including important facts required to avoid misleading the public.

26 19. Kushner's conversation with Ralston taken as a whole communicated to
27 the public that Dabney had acted improperly and unlawfully to obtain from an elderly
28 client's estate an inheritance of approximately \$250,000.00.

1 20. Any reasonable person with Kushner’s education, experience and training
2 would understand that such an allegation would be highly inflammatory when heard
3 by the general public and would call into serious question whether Dabney was a
4 person of good character and fitness for judicial office. Ralston’s reaction was strongly
5 indicative that Kushner had achieved this result. Kushner knew she was making this
6 charge on a political talk show and as she acknowledged in her own testimony this was
7 an environment that could not be controlled.

8 21. Kushner’s statements were not “scrupulously” – meaning conscientious
9 and exact; painstaking¹ – fair and accurate and she omitted facts necessary to avoid
10 creating a false implication about Dabney that could mislead voters. Kushner needed to
11 inform the public in this context that Dabney had not improperly or unlawfully
12 influenced the client to gift Dabney. Additionally, Kushner needed to explain that the
13 violation of the Rules of Professional Conduct was committed by Dabney’s law partner,
14 but that those Rules extends the violation to every member of the same firm. If Kushner
15 was attempting to be painstakingly fair and accurate, she also would have made an
16 effort to include in her statement the numerous and detailed facts the Nevada Supreme
17 Court identified as important in judging the character and nature of Dabney’s conduct
18 in the Tiffany Trust case. See *In Re Jane Tiffany Living Trust 2001*, 124 Nev. ---, Nev. Adv.
19 Op. No. 8, at slip op. at 8, n. 13, 177 P3d 1060 (2008). Of course, such accuracy would
20 have blunted Kushner’s claim about Dabney’s unfitness for judicial office and been
21 difficult and tedious in the forum of the Television Interview – the forum Kushner
22 selected. The Panel’s mandate is to enforce the NCJC and that code required that
23 Kushner’s statements err to accuracy and not the political sound-bite.

24 22. As we have observed, Kushner knew and admitted in her testimony that
25 the Television Interview was an unpredictable and uncontrollable forum and she noted
26 she was “cut-off” by Ralston. Kushner selected this forum to make her charge of
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28 ¹ See The American Heritage College Dictionary 1248 (4th ed. 2002).

1 unfitness against Dabney with actual knowledge or reckless disregard that once the
2 charge was made she might not be given the opportunity to fully explain or that
3 Dabney would be given insufficient time to explain the nuances Kishner failed to
4 include in her initial summary of the Tiffany Trust case.

5 23. Kishner's suggests that because Ralston afforded Dabney a
6 contemporaneous opportunity to explain during the Television Interview, she is either
7 relieved of responsibility for the omission of material fact or is entitled to be judged by
8 some less rigorous standard. This argument is unavailing to the Panel because
9 Kishner's compliance with the NCJC is judged by her "communication considered as a
10 whole" and not whether the opposing candidate was successful in responding to the
11 misleading statements.

12 24. Kishner further suggests that she complied with the mandates of Rule
13 4.1(A)(11) "since she invited viewers to make their own assessment by saying 'the facts
14 speak for themselves.'" Response at 5. She knew when she made this statement,
15 however, that the public could not determine the truth or falsity of the claim that
16 Dabney would inherit approximately \$250,000.00. Kishner knew that information was
17 only available from a deposition she obtained from a confidential source.

18 25. Kishner asks the Panel to decline to adjudicate Dabney's Complaint
19 because of the twenty-four day delay between the Television Interview and the date
20 upon which the Complaint was filed. Kishner asserts that Dabney manipulated the
21 timing of the Complaint for political objectives. Kishner's reliance by analogy on
22 *DiMartino v. Eighth Jud. Dist Ct.*, 119 Nev. 119, 122-123, 66 P.3d 945 (2003), is unjustified
23 given Dabney's Complaint was filed to vindicate an actual violation of the NCJC and
24 not as a mere "tactical ploy." Moreover, Kishner has failed to establish legal bases for,
25 or facts that would justify, the Panel's application of the equitable doctrines of laches or
26 estoppel. See, e.g., *State ex rel. Nev. Gaming Comm'n v. Rosenthal*, 107 Nev. 772, 819 P.2d
27 1296 (1991)(laches elements); *Cheqer, Inc. Painters & Decorators*, 98 Nev. 609, 655 P.2d
28 996 (1982)(equitable estoppel elements). In the ultimate analysis, the Nevada Supreme

1 Court has not prescribed rules that impose any time bar, limit or restriction on the filing
2 of Complaints with the Standing Committee on Judicial Ethics and Election Practices.
3 In the absence of such a rule, we are not inclined to entertain such a claim absent facts
4 so egregious that the remedy would appear consistent with and dictated by the
5 jurisdiction and authority delegated by the Court.

6 DECISION

7 Therefore, the Standing Committee determines:

- 8
- 9 (i) That Joanna S. Kishner violated Canon 4 and Rule 4.1(A)(11) of the
10 NCJC; and
- 11 (ii) That pursuant to Rule 4(4)(a)(i) of the Standing Committee on
12 Judicial Ethics and Election Practices and based on the foregoing
13 findings and conclusions, Joanna S. Kishner is hereby **Publicly**
14 **Censured** for violating Canon 4 and Rule 4.1(A)(11) of the NCJC by
15 making statements on September 13, 2010, during a televised
16 interview on the *Face-to Face* program that were made knowingly or
17 recklessly and omit facts necessary to make the communication
18 considered as a whole not materially misleading.
- 19 (iii) That this decision shall be published in accordance with Rules
20 4(4)(a)(i) and 4(5) of the Rules of the Standing Committee on
21 Judicial Ethics and Election Practices.

22 DATED this 25th day of October, 2010.

23 NEVADA STANDING COMMITTEE ON
24 JUDICIAL ETHICS AND ELECTION PRACTICES

25 By: Dan R. Reaser

26 Dan R. Reaser, Chairman
27
28