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STATE OF NEVADA
STANDING COMMITTEE ON
JUDICIAL ETHICS AND ELECTION PRACTICES

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

JOHN H. "JACK" HOWARD

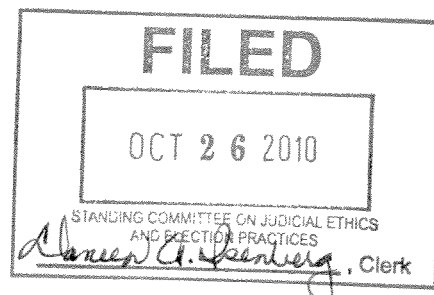
Complainant

vs.

RONALD J. ISRAEL

Respondent.

) PUBLISHED DECISION: 10-5
) 10-6
) (Consolidated)



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, Christine S. Munro, Esq., and Dan R. Reaser, Esq. The entire Panel was present and participated in the hearing.

The Complainant John H. "Jack" Howard, Esq. ("Howard") was present and appeared in *propria persona*. Howard was assisted by his campaign consultant Gary Gray. The Respondent Ronald J. Israel, Esq. ("Israel") was present and represented by legal counsel Dominic P. Gentile, Esq. ("Gentile") and Margaret Wightman Lambrose, Esq. of Gordon Silver. The Panel reviewed the pleadings and papers submitted by the parties and at the hearing accepted testimony of Howard and David V. Thomas, Esq. ("Thomas"), who is Respondent Israel's campaign committee manager, as well as argument from both Howard and Gentile on behalf of Israel. Respondent's Exhibit A was accepted into the record of the proceedings before the Panel. The Panel ordered the proceedings in Case No. 10-5 and Case No. 10-6 consolidated for the purpose of hearing

1 and decision. The administrative record in Case No. 10-5 is comprised of the Complaint
2 dated September 30, 2010, and filed by Howard on October 4, 2010; the Response filed
3 by Israel on October 15, 2010; the correspondence on file with the Standing Committee
4 designating the Panel and setting the hearing dated October 14, 2010; and, Exhibit A.
5 The administrative record in Case No. 10-6 is comprised of the Complaint dated
6 October 1, 2010, filed by Howard on October 4, 2010; the Response filed by Israel on
7 October 15, 2010; the correspondence on file with the Standing Committee designating
8 the Panel and setting the hearing dated October 14, 2010; and, Exhibit A. Neither
9 Howard nor Israel presented an objection to the composition of the Panel. The
10 jurisdiction and authority of the Panel is duly established pursuant to the Rules of the
11 Standing Committee on Judicial Ethics and Election Practices as adopted by the
12 Supreme Court of Nevada.

13 SUMMARY OF CLAIMS AND EVIDENCE

14 1. Howard and Israel are each duly declared candidates for the judicial office
15 of the Clark County District Court, Department 28. Neither of the candidates are
16 incumbent judicial officers.

17 Case No. 10-5

18 2. Howard alleges in the Complaint dated September 30, 2010, in Case No.
19 10-5, that Israel has violated Canon 4 and Rule 4.1(A)(6) of the Nevada Code of Judicial
20 Conduct (the "NCJC"). In support of the allegations, Howard asserts that Israel directly
21 or indirectly through his campaign committee staff publicly distributed a one-page
22 document entitled "Democratic Judicial Candidates for District Court" (hereinafter
23 "Democratic Judges Flyer") identifying seven candidates for judicial office, the District
24 Court Department for which the respective candidates were seeking election and a brief
25 professional profile of each candidate. Howard testified that he personally saw the
26 Democratic Judges Flyer at Democratic Party Organization meetings (the "Democratic
27 Party Meetings") beginning in January 2010.

28 3. Israel raises three defenses to Howard's claims in the Response filed

1 October 15, 2010 in Case No. 10-5.

2 4. First, Israel states that the distribution of the Democratic Judges Flyer was
3 permissible because of the time, place and manner of its use. In this regard, Israel
4 explains in his Response that the Democratic Judges Flyer was permissible under Rule
5 4.1 because it was used only at political party organization meetings to respond to the
6 anticipated inquiry as to whether Israel was a registered Democrat, a question if asked
7 he would be permitted to answer under the NCJC.

8 5. In support of his position, Israel presented the testimony of Thomas.
9 Thomas explained that the Democratic Judges Flyer was prepared and used to his
10 knowledge at only four Democratic Party Meetings, between approximately January
11 and April 2010. Thomas testified that for any judicial candidate to gain access, attend
12 and speak at Democratic Party Meetings the candidate must establish their credentials
13 as a registered democrat. Thomas further explained that three judicial candidates,
14 including Israel, identified on the Democratic Judges Flyer had just recently changed
15 their political party registration from Republican to Democrat. He stated that Clark
16 County's voter registration records at the time of the Democratic Party Meetings had
17 not been changed to reflect Israel's change in political party affiliation. For this reason,
18 Thomas anticipated that Israel's access to the Democratic Party Meetings would be
19 barred unless some documentation was provided to party credential staff. Thomas
20 decided, without consulting or informing Israel or any of the other six judicial
21 candidates, that the most effective means of presenting that documentation was to
22 create the Democratic Judges Flyer. The Panel asked Thomas why, given this
23 explanation, it was necessary to include on the Democratic Judges Flyer any but the
24 three candidates whose change in party affiliation was recent. Thomas indicated that
25 he prepared the Democratic Judges Flyer because he was the campaign manager for all
26 seven candidates and that the document would assist in promoting the candidacies of
27 all these judicial candidates in Democratic Party Meetings. The Panel further inquired
28 why Thomas did not present a copy of the proof of political party registration change

1 document issued by Clark County to Israel and the other two candidates to party
2 credential staff. Thomas readily acknowledged that he could have done that as an
3 alternative measure to preparing and distributing the Democratic Judges Flyer.

4 6. Second, Israel asserts Rule 4.1(C)(2) is unconstitutional pursuant to the
5 decision of the Supreme Court of the United States in *Republican Party of Minnesota v.*
6 *White*, 536 U.S. 765 (2002).

7 7. Third, Israel asserts that Howard brought his Complaint merely as an
8 election tactic. In this regard, Israel explains Howard's Complaint was filed more than
9 six months after the Democratic Judges Flyer was first published and on the eve of early
10 voting. Israel also notes that if Howard legitimately believed the claimed violation of
11 the NCJC, then the Complaint would have been lodged against all seven candidates
12 listed on the Democratic Judges Flyer. Israel asks that the Panel find that the delay in
13 filing the Complaint was improper.

14 8. Israel also submitted Exhibit A which is a supplemental response to the
15 Complaint dated October 19, 2010 (the "Supplemental Response").¹ The Supplemental
16 Response asserts that Howard has violated Canon 4 and Rule 4.1(A)(11) by
17 disseminating a press release about a complaint submitted to the Nevada Secretary of
18 State containing materially false and misleading information. Israel states that the
19 information in the Supplemental Response establishes a pattern and practice by
20 Howard of making vexatious complaints as an election campaign tactic.

21 **Case No. 10-6**

22 9. Howard alleges in the Complaint dated October 1, 2010, in Case No. 10-6,
23 that Israel has violated Canon 4 and Rule 4.1(A)(3) of the NCJC. The basis of this claim
24 is that Israel joined with ten other candidates for judicial office in preparing and
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26 ¹ The Supplemental Response is also styled in certain respects as a "cross-
27 complaint" asserting that Howard violated Canon 4 and NCJC Rule 4.1(A)(11). Israel, however,
28 did not comply with the Rules of the Standing Committee on Judicial Ethics and Election
Practices governing the filing of complaints. For that reason the Panel does not here address
Israel's allegations against Howard.

1 publishing fliers, brochures and other written campaign materials that in varying form
2 identified the candidates by name and court for which the respective candidates were
3 seeking election, as well as included their photographs and references to their
4 respective campaign websites, telephone numbers and e-mail addresses.

5 10. Howard introduced two specific examples of what he states is an
6 impermissible endorsement. The first was a group invitation to a campaign event
7 sponsored by a law firm (the "Invitation"). The Invitation depicts the photographs,
8 names and offices sought by each of the candidates. The Invitation announcing a
9 dinner, open bar, entertainment and silent auction also contains statements identifying
10 the candidates as "The Magnificent Eleven" "highly qualified," and "experienced." A
11 second example is a one-page flier entitled "Outstanding Judicial Candidates," that
12 depicts the photographs, names and offices sought by each of the candidates and lists
13 their respective campaign websites, telephone numbers and e-mail addresses (the
14 "Alliance Flyer").

15 11. Israel asks the Panel to dismiss Howard's allegation that he violated Rule
16 4.1(A)(3) in the Response filed October 15, 2010, based on Advisory Opinion JE10-012
17 issued by the Standing Committee on Judicial Ethics and Election Practices on October
18 8, 2010. Israel likewise cited the Supplemental Response as grounds to deny Howard's
19 Complaint in Case No. 10-6.

20 DISCUSSION AND ANALYSIS

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

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

2 **Case No. 10-5**

3 14. NCJC Rule 4.1(A)(6) provides that “a judge or a judicial candidate shall
4 not . . . publicly identify himself or herself as a candidate of a political organization;
5 . . .” See Nev. Code Jud. Conduct, Rule 4.1(A)(6).

6 15. Rule 4.1(B) of the NCJC states “[a] judge or judicial candidate shall take
7 reasonable measures to ensure that other persons do not undertake, on behalf of the
8 judge or judicial candidate, any activities prohibited under paragraph (A).” Nev. Code
9 Jud. Conduct, Rule 4.1(B).

10 16. Rule 4.1(C)(2) explains that “[e]xcept as prohibited by law, a judge or
11 judicial candidate subject to public election may at any time . . . *upon request*, identify
12 himself or herself as a member of a political party; . . .” Nev. Code Jud. Conduct, Rule
13 4.1(C)(2)(emphasis added).

14 17. The Nevada Supreme Court’s Comments to NCJC Rule 4.1 are instructive.
15 Comment 1 notes that:
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17 Even when subject to public election, a judge plays a role
18 different from that of a legislator or executive branch official.
19 Rather than making decisions based upon the expressed views
20 or preferences of the electorate, a judge makes decisions based
21 upon the law and the facts of every case. Therefore, in
22 furtherance of this interest, judges and judicial candidates
23 must, to the greatest extent possible, be free and appear to be
24 free from political influence and political pressure. This Canon
25 imposes narrowly tailored restrictions upon the political and
26 campaign activities of all judges and judicial candidates.

27 *See* Comment [1] to Nev. Code Jud. Conduct, Canon 4, Rule 4.1.

28 18. Comment 3 similarly admonishes, “[p]ublic confidence in the
independence and impartiality of the judiciary is eroded if judges or judicial candidates
are perceived to be subject to political influence.” *See* Comment [3] to Nev. Code Jud.

1 Conduct, Canon 4, Rule 4.1.

2 19. On the specific question in this case, the Court’s Comment 6A elaborates:

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4 Even though judges in Nevada are chosen by means of
5 nonpartisan elections, judges and candidates for judicial office
6 are occasionally asked at candidates’ forums to identify their
7 political party affiliations. Rule 4.1(C)(2) permits a judge or
8 candidate to identify his or her political party membership
9 upon request. *While judges and candidates may properly
10 respond to questions regarding their party affiliation, it is
11 impermissible in campaign materials for them to align
12 themselves with a political party or to affiliate themselves
13 with a political party.*

14 *See* Comment [6A] to Nev. Code Jud. Conduct, Canon 4, Rule 4.1(C)(2)(emphasis
15 added).

16 20. Rule 4.2(A) provides in relevant part:

17 A judicial candidate in a public election shall:

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19 (3) review and approve the content of all campaign
20 statements and materials produced by the candidate or his
21 or her campaign committee, as authorized by Rule 4.4,
22 before their dissemination; and

23 (4) take reasonable measures to ensure that other
24 persons do not undertake on behalf of the candidate
25 activities that the candidate is prohibited from doing by
26 Rule 4.1.

27 See Nev. Code Jud. Conduct, Rule 4.2(A)(3) & (4).

28 21. The Comments under Rule 4.2 provides further guidance, stating “[t]his
Rule permits a candidate to seek, accept, or use endorsements or publicly stated
support from any source *except partisan political organizations,*” *see* Comment [4] to
Nev. Code Jud. Conduct, Canon 4, Rule 4.2 (emphasis added), and “judicial candidates
in nonpartisan public elections are prohibited from running on a ticket or slate

1 associated with a political organization.” See Comment [7] to Nev. Code Jud. Conduct,
2 Canon 4, Rule 4.2.

3 22. Relatedly, Rule 4.4 states:

4 A judicial candidate subject to public election may establish a
5 campaign committee to manage and conduct a campaign for
6 the candidate, subject to the provisions of this Code. The
7 candidate is responsible *for ensuring* that his or her campaign
8 committee complies with applicable provisions of this Code
and other applicable law.

9 See Nev. Code Jud. Conduct, Rule 4.4 (emphasis added).

10 23. The reasons identified by Thomas as justification for using the Democratic
11 Judges Flyer do not excuse the very unambiguous violation of Rule 4.1(A)(6). The
12 “upon request” exception of Rule 4.1(C)(2) to this prohibition was not established by
13 the facts presented at the hearing. Thomas’ anticipation of credential challenges for
14 Israel and the other two candidates who had changed political affiliation could have
15 been easily addressed, as the witness agreed, by presenting a copy of the proof of
16 political party registration change document issued by Clark County. The Nevada
17 Supreme Court has included in the Canons very strong directions on avoiding
18 alignment or affiliation with political parties with the one very narrowly tailored “on
19 request” exception. A preponderance of the evidence demonstrates that the Democratic
20 Judges Flyer was not remotely within the proper ambit of the exception. The flyer
21 included a slate of judges affiliated with the Democratic Party not just the three that
22 were subject to the stated credentials concern. A much more narrowly tailored solution
23 was readily available that balances the candidate’s campaign objectives with the critical
public policy interests served by the NCJC.

24 24. Israel acknowledges that he is responsible under Rules 4.2(A)(3), 4.2(A)(4)
25 and 4.4 for Thomas’ decision to prepare and publish the Democratic Judges Flyer. The
26 uncontradicted evidence showed that Israel did not know of, review, direct or approve
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1 in advance Thomas' use of the Democratic Judges Flyer. Israel thus violated Rules
2 4.2(A)(3) and 4.4.

3 25. The Panel concludes that the constitutional arguments raised by Israel are
4 without merit for three reasons. First, the NCJC is entitled to a presumption of
5 constitutionality. Second, the specific Canon and Rules were recently adopted by the
6 Court consistent with the relevant jurisprudence, including the decision of the United
7 States Supreme Court in the *White* case, vetted in promulgation of the American Bar
8 Association's 2007 Model Code of Judicial Conduct. *See* ABA Center for Prof. Resp.,
9 2007 Edition Model Code of Judicial Conduct 142-161 (Am. Bar Assoc. 2007). Third, as
10 an administrative body created by the Court, the Standing Committee on Judicial Ethics
11 and Election Practices is limited in its jurisdiction to interpretation and enforcement of
12 the Canons. Our jurisdiction does not extend to setting aside a Canon or Rule duly
13 adopted by the Court.

14 26. Israel asks the Panel to decline to adjudicate Howard's Complaint because
15 of the six month or more delay between the publication of the Democratic Judges Flyer
16 and the date upon which the Complaint in Case No. 10-5 was filed. Israel asserts that
17 Howard manipulated the timing of the Complaint for political objectives. Israel has
18 failed to establish a legal basis for, or facts that would justify, the Panel's application of
19 the equitable doctrines of laches or estoppel. *See, e.g., State ex rel. Nev. Gaming Comm'n*
20 *v. Rosenthal*, 107 Nev. 772, 819 P.2d 1296 (1991)(laches elements); *Chequer, Inc. Painters &*
21 *Decorators*, 98 Nev. 609, 655 P.2d 996 (1982)(equitable estoppel elements). In the
22 ultimate analysis, the Nevada Supreme Court has not prescribed rules that impose any
23 time bar, limit or restriction on the filing of Complaints with the Standing Committee
24 on Judicial Ethics and Election Practices. In the absence of such a rule, we are not
25 inclined to entertain such a claim absent facts so egregious that the remedy would
26 appear consistent with and dictated by the jurisdiction and authority delegated by the
27 Court.

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1 Case No. 10-6

2 27. NCJC Rule 4.1(A)(3) mandates that “a judge or a judicial candidate shall
3 not . . . publicly endorse or oppose a candidate for any public office; . . .” See Nev.
4 Code Jud. Conduct, Rule 4.1(A)(3). The related Comment explains that this rule is
5 intended to “prohibit judges and judicial candidates from . . . endorsing . . . candidates
6 for public office, respectively, to prevent them from abusing the prestige of judicial
7 office *to advance the interests of others.*” *See* Comment [4] to Nev. Code Jud. Conduct,
8 Canon 4, Rule 4.2(A)(emphasis added and citation omitted).

9 28. Comments to Rule 4.2 indicate that even though judicial candidates may
10 not run “on a ticket or slate associated with a political organization, they may group
11 themselves into slates or *other alliances* to conduct their campaigns more effectively.”
12 *See* Comment [7] to Nev. Code Jud. Conduct, Canon 4, Rule 4.2(A)(emphasis added).

13 29. The Standing Committee on Judicial Ethics and Election Practices has
14 previously opined that a group of judges may issue joint invitations to a public event
15 promoting the re-election of the jurists to their current judicial offices. *See Advisory*
16 *Opinion JE07-013* (December 26, 2007)(majority opinion). That advisory opinion was
17 rendered prior to the adoption of the current version of the NCJC under the then
18 existing and more restrictive public endorsement rules that predated the decision of the
19 Supreme Court of the United States in *Minnesota v. White*, 536 U.S. 765 (2002). Comment
20 7 to Rule 4.2 is consistent with the conclusion of the majority in our 2007 advisory
21 opinion, which determined that judicial ethics standards are not undermined by
22 allowing candidates for judicial office to form groups that conduct joint campaign
23 functions provided the participating candidates do not explicitly endorse one another.

24 30. In the Advisory Opinion issued on October 8, 2010, the Standing
25 Committee on Judicial Ethics and Election Practices found that an invitation such as
26 that described here for our review does not contain an express endorsement by the
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1 candidates of one another. *See Advisory Opinion JE10-012* (October 8, 2010)(majority
2 opinion). That opinion explained:

3 The language of the invitation identifying the candidates as
4 “magnificent,” “highly qualified,” and “experienced” comes short of a
5 statement that the collective judicial candidates advocate the election
6 of the entire group. Although less hyperbole might be viewed by
7 some as more consistent with the decorum appropriate to persons
8 pursuing judicial office, the group invitation was no more an
9 endorsement than would have been outright campaign contributions
10 among the candidates which is permitted. *See* Comment [4] to Nev.
11 Code Jud. Conduct, Canon 4, Rule 4.1(A)(“A judge or judicial
12 candidate’s donation to a candidate or political organization that is
13 otherwise permitted by state or federal law is not considered a public
14 endorsement of a candidate for public office.”). Based on our 2007
15 opinion and given the guidance by the Nevada Supreme Court in
16 Comment 7, the Committee concludes that a group invitation to a
17 joint campaign event for judicial candidates is permissible under Rule
18 4.1(A)(3) provided the invitation does not contain a statement or
19 statements of explicit endorsement taken in the totality.

20 *See id.* The Invitation and the Alliance Flyer are campaign materials that appear in all
21 respects consistent with those we found permissible in Advisory Opinion JE10-012 and
22 thus Israel’s participation in distributing those materials did not violate the
23 endorsement clause of NCJC Rule 4.1(A)(3).

24 DECISION

25 Therefore, the Standing Committee determines:

- 26 (i) That Ronald J. Israel violated Canon 4, as well as Rule 4.1(B), Rule
27 4.2(A)(3) and Rule 4.2(A)(4) of the NCJC by failing to exercise
28 reasonable care pursuant to Rule 4.4 to ensure his campaign
committee complied with the mandates of NCJC Rule 4.1(A)(6)
prohibiting a judicial candidate from identifying himself as a
candidate of a political organization and to that extent he engaged
in an unfair election practice; and
- (ii) That pursuant to Rule 4(4)(a)(i) of the Standing Committee on
Judicial Ethics and Election Practices and based on the foregoing

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findings and conclusions, Ronald J. Israel is hereby **Publicly Censured** for violating Canon 4, as well as Rule 4.1(B), Rule 4.2(A)(3) and Rule 4.2(A)(4) of the NCJC by failing to exercise reasonable care pursuant to Rule 4.4 to ensure his campaign committee complied with the mandates of NCJC Rule 4.1(A)(6) which prohibited the publication of the Democratic Judges Flyer; and

(iii) That Howard's claim that Israel's participation in distributing the Invitation and Alliance Flyer violated the endorsement clause of NCJC Rule 4.1(A)(3) or Canon 4 is without merit as a matter of law and, therefore, Howard's Complaint in Case No. 10-6 is DENIED; and

(iv) That this decision shall be published in accordance with 4(4)(a)(i) and 4(5) of the Rules of the Standing Committee on Judicial Ethics and Election Practices.

DATED this 26th day of October, 2010.

NEVADA STANDING COMMITTEE ON
JUDICIAL ETHICS AND ELECTION PRACTICES

By: *Dan R. Reaser*
Dan R. Reaser, Chairman