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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 4 AND NCJC RULE 4.1:

ELLEN STOEBLING

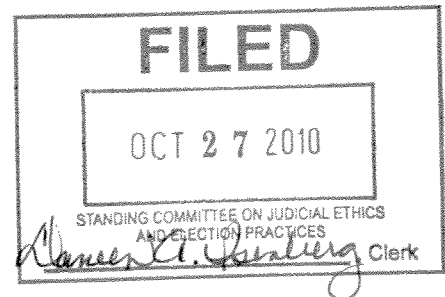
Complainant

vs.

ROB BARE

Respondent.

PUBLISHED DECISION: 10-9



DECISION

This matter came before a Panel of the Standing Committee on Judicial Ethics and Election Practices for hearing on October 20, 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., Robert B. Sulliman, Jr., Christine S. Munro, Esq. and Dan R. Reaser, Esq. The entire Panel was present and participated in the hearing.

The Complainant Ellen Stoebling ("Stoebling") was present and appeared in *propria persona*. The Respondent Rob Bare ("Bare") was present and represented by legal counsel, Laura Wightman FitzSimmons, Esq. ("FitzSimmons"). The Panel reviewed the pleadings and papers submitted by the parties and at the hearing accepted testimony of Stoebling, Bare and David V. Thomas, Esq. ("Thomas"), who is Respondent Bare's campaign committee manager, as well as argument from both Stoebling and FitzSimmons on behalf of Bare. Respondent's Exhibits A through C were accepted into the record of the proceedings before the Panel. The administrative record in this matter is comprised of the Complaint filed by Stoebling on October 14, 2010; the

1 Response filed by Bare on October 18, 2010; the correspondence dated October 18, 2010,
2 on file with the Standing Committee designating the Panel and setting the hearing; the
3 Reply filed by Stoebling on October 19, 2010; and, Exhibits A through C. Neither
4 Stoebling nor Bare presented an objection to the composition of the Panel. The
5 jurisdiction and authority of the Panel is duly established pursuant to the Rules of the
6 Standing Committee on Judicial Ethics and Election Practices as adopted by the
7 Supreme Court of Nevada.

8 SUMMARY OF CLAIMS AND EVIDENCE

9 1. Stoebling and Bare are each duly declared candidates for the judicial office
10 of the Clark County District Court, Department 32. Neither of the candidates are
11 incumbent judicial officers.

12 2. Bare served as a duly appointed and invested full-time judge of the Las
13 Vegas Township Municipal Court, from January 2007 to June 2007 (the "Municipal
14 Court Judgeship").

15 3. Stoebling alleges in the Complaint filed October 14, 2010, that Bare has
16 violated Canon 4 and Rule 4.1(A)(11) of the Nevada Code of Judicial Conduct (the
17 "NCJC"). In support of the allegation, Stoebling asserts that Bare has widely broadcast
18 on television a thirty second campaign commercial (the "Television Commercial") and
19 produced the "Home Page" of a campaign website (the "Website") that presents the
20 implication of incumbency when Bare actually is currently employed as Bar Counsel to
21 the State Bar of Nevada (the "Office of Bar Counsel").

22 4. Stoebling specifically objects to approximately six to eight seconds of the
23 Television Commercial which includes (i) a segment of approximately three to four
24 seconds depicting an actual photograph of Bare being robed at his January 2007
25 investiture for the Municipal Court Judgeship; and (ii) a segment of approximately
26 three to four seconds depicting actual videotape of Bare presiding in court during his
27 Municipal Court Judgeship with a screen statement above of "'Outstanding Judge' -
28 Steve Wolfson, Las Vegas Council" and a screen statement below of "Paid for by the

1 Committee to Elect Rob Bare District Court Judge.” Stoebling explains that the
2 combination of these images, coupled with narrative statements of “unanimously
3 selected to serve as a municipal court judge” and “praised for his service as a judge” is a
4 communication that misleads the public to believe Bare is an incumbent jurist.
5 Stoebling does not claim that the statements were attributed to third parties are
6 inaccurate. Stoebling cites similar photographs, video and statements on the “Home
7 Page” of the Website that she asserts is similarly misleading.

8 5. The Panel viewed the entirety of the Television Commercial and relies in
9 this matter on the totality of Bare’s communications during the Television Commercial.
10 Bare submitted a transcript of the narrative of the Television Commercial. *See* Exhibit
11 A. Stoebling did not provide a viewable version of the website at the hearing.
12 Stoebling and Bare each provided documents that are copies of the content of the
13 “Home Page” and other pages of the Website.

14 6. Bare defends against Stoebling’s claims in the Response filed October 18,
15 2010, that he did not violate Canon 4 and Rule 4.1(A)(11) because the Television
16 Commercial considered as a whole is a factually accurate “retrospective of his legal
17 career” and as to the Municipal Court Judgeship the photographs and videotape
18 footage were actual pictures or footage taken in 2007 and not subsequently posed.

19 7. Bare also introduced a copy of a complaint filed by Stoebling with the
20 Nevada Secretary of State in which Stoebling asserts that Bare violated Section 294A.340
21 and which attaches a copy of the Complaint filed with Standing Committee on Judicial
22 Ethics and Election Practices (the “Standing Committee”), asserting that Stoebling has
23 violated the Rules of the Standing Committee. *See* Exhibit B.

24 8. Bare further asserts that the “Home Page” of the Website cannot be
25 considered in isolation. Instead, under Rule 4.1(A)(11) Bare states the Website must be
26 evaluated as a whole given the links and tabs that provide other information such as his
27 biography, *curriculum vitae* and photographic albums with individual captions to
28 images. As a comparison, Bare presented a copy of the “Home Page” of Stoebling’s

1 campaign website to demonstrate that such campaign websites generally have such
2 links and tabs. *See* Exhibit C.

3 9. Bare testified that before using the challenged pictures, videotape and
4 statements in his Website and for the Television Commercial, he had carefully reviewed
5 the NCJC as well as the advisory opinions and published decisions of the Standing
6 Committee. He stated he specifically examined the issue of whether and under what
7 circumstances a judicial candidate may be depicted in a judge's robe in campaign
8 materials.

9 10. Bare further testified that he sought advice from David F. Sarnowski, the
10 Executive Director to the Standing Committee on Judicial Ethics and Election Practices
11 and based on that consultation he limited his use of graphics depicting himself in a
12 judge's robe to the Website and Television Commercial.

13 11. Additionally, Thomas and Bare testified that within four days following
14 the filing of Stoebling's Complaint, a modification to the Television Commercial was
15 produced and could replace the current commercial within another day. Thomas
16 displayed the modified commercial and explained the change made from the original
17 Television Commercial.

18 12. Stoebling stated that she was not claiming that Bare was making any false
19 statements. She indicated that given her understanding of the advisory opinions and
20 published decisions of the Standing Committee on Judicial Ethics and Election Practices
21 Bare, as has she, could communicate to voters the fact and nature of his prior judicial
22 experience which is important information the public should have in assessing a
23 candidate's fitness for judicial office. Stoebling testified that in her opinion, however,
24 Bare could not use historic images depicting himself in a judge's robe in communicating
25 these facts.

26 DISCUSSION AND ANALYSIS

27 13. Canon 4 of the NCJC states, "[a] judge or candidate for judicial office shall
28 not engage in political or campaign activity that is inconsistent with the independence,

1 integrity, or impartiality of the judiciary.” See Nev. Code Jud. Conduct, Canon 4.

2 14. Paragraph 11 of Rule 4.1(A) provides in relevant part that “a judge or
3 judicial candidate shall not . . . knowingly, or with reckless disregard for the truth,
4 make any false or misleading statement.” See Nev. Code Jud. Conduct, Rule 4.1(A)(11).
5 The NCJC defines the term “knowingly,” to “mean actual knowledge of the fact in
6 question and states that a person’s knowledge may be inferred from circumstances.

7 15. The commentary to Rule 4.1(A)(11) explains that:

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

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

14 16. An unfair election practice must be established with evidence proving by
15 preponderance a violation of the NCJC. The term “preponderance of the evidence”
16 means such evidence that leads the fact finder to conclude that the existence of the
17 contested fact is more probable than its nonexistence. See Brown v. State, 107 Nev. 164,
18 166, 807 P.2d 1397 (1991).

19 17. Under the NCJC, our obligation pursuant to Rule 4.1(A)(11) is to
20 determine if a preponderance of the evidence establishes a judicial candidate made a
21 false or materially misleading statement, considering that candidate’s campaign
22 communication as a whole, and if so whether the false or misleading statement was
23 made by the judicial candidate with knowledge of its falsity or with reckless disregard
24 of the truth. In Comment 7, the Supreme Court of Nevada has indicated that a
25 campaign statement will be considered “misleading” if the statement omits facts
26 necessary to make the communication considered as a whole not materially misleading.

1 18. In this case, the legal question before the Panel is whether the Television
2 Commercial and the "Home Page" of the Website impermissibly create an implication
3 of incumbency made by Bare knowingly or recklessly and omit facts necessary to make
4 the communication considered as a whole not materially misleading.

5 19. The Panel concludes that Stoebling failed to prove by a preponderance of
6 the evidence presented at the hearing and in the administrative record that the
7 Television Commercial and the "Home Page" of the Website mislead the public to
8 conclude that Bare is an incumbent judge.

9 20. In Advisory Opinion JE02-004, the Standing Committee stated that under
10 a previous version of the NCJC, a judicial candidate serving as an unpaid part-time
11 short trial program judge was not permitted to appear in a judge's robe in campaign
12 advertising. The Standing Committee reasoned that a practicing attorney so robed
13 would "create the appearance and impression in the minds of the public that the
14 candidate is a full-time judge." *See Nev. Standing Comm. Jud. Ethics & Campaign*
15 *Prac., Advisory Op. No. JE02-004 (May 6, 2002).* The following year the Standing
16 Committee opined, again under a previous version of the NCJC, that a District Court
17 master likewise may not appear in a judicial robe in campaign advertising. Although
18 employed full-time in that capacity, the Standing Committee concluded the court
19 master is not a judge and if robed the candidate would communicate a powerful albeit
20 misleading message to the electorate. *See Nev. Standing Comm. Jud. Ethics &*
21 *Campaign Prac., Advisory Op. No. JE03-004 (Dec. 12, 2003).*

22 21. Advisory Opinion JE06-014 dealt with the same question but in that
23 instance the judicial candidate was an elected continuing part-time judge. The version
24 of the NCJC at the time defined a continuing part-time judge as a "judge who serves
25 repeatedly on a part-time basis by election or under continuing appointment" *See*
26 *The Standing Committee found that because a judge was "an elected judge", albeit a*
27 *"continuing part-time judge," his or her appearance in a robe in campaign advertising*
28 *was not misleading. See Nev. Standing Comm. Jud. Ethics & Campaign Prac., Advisory*

1 Op. No. JE06-014 (Sept. 15, 2006). Two years later the Standing Committee issued an
2 opinion that stated that a practicing attorney serving as an appointed periodic part-time
3 alternate municipal court judge cannot wear a judicial robe in a District Court campaign
4 advertisement. See Nev. Standing Comm. Jud. Ethics & Campaign Prac., Advisory Op.
5 No. JE08-006 (Jun. 17, 2008).

6 22. In Published Decision 98-5, the Standing Committee found that an
7 incumbent lower court judge seeking election to Department 19 of the Clark County
8 District Court appeared in a judicial robe in a television advertisement in a manner that
9 knowingly misrepresented his present office by implying he was the incumbent judge
10 in Department 19. See In Re Delanoy v. Redmon, Pub. Dec. No. 98-5 (Nev. Standing
11 Comm. Jud. Ethics & Campaign Prac. Oct. 30, 1998).

12 23. The Standing Committee's Published Decision 02-3 held that a *pro-tempore*
13 judge serving in the short trial program improperly depicted himself in judicial robes in
14 campaign advertising. The Standing Committee noted that the candidate was not a
15 full-time judge and instead maintained a full-time private law practice. That decision
16 noted that the campaign materials as a whole gave the impression that the candidate
17 was a full-time incumbent judge. See In Re Adair v. Israel, Pub. Dec. 02-3 (Nev.
18 Standing Comm. Jud. Ethics & Campaign Prac. Oct. 15, 2002).

19 24. Just recently the Standing Committee ruled that a judicial candidate
20 seeking election to a justice court judgeship engaged in an unfair election practice in
21 violation of Rule 4.1 by appearing in a television advertisement depicting the candidate
22 on the bench in a judicial robe presiding as a *pro-tempore* judge. There the Standing
23 Committee explained that "it is not appropriate for a part-time judge to wear a judicial
24 robe in campaign advertising" even where images used were actual historic
25 photographs or videotape of a court proceeding. The Standing Committee there
26 importantly concluded that considering the candidate campaign advertisement as a
27 whole, the communication gave a "powerful impression of incumbency" or the false
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1 impression the candidate is a full-time judge. See In Re Pearson v. Taitel, Pub. Dec. 10-8
2 (Nev. Standing Comm. Jud. Ethics & Campaign Prac. Oct. 18, 2010).

3 25. Stoebling argues that these advisory opinions and published decisions of
4 the Standing Committee indicate that the distinction is between elected or appointed
5 judicial office, wherein the former may be robed in campaign advertisements while the
6 latter may not. This interpretation misapprehends the Standing Committee's prior
7 guidance and rulings, over emphasizing a single factual distinction and ignores the
8 touchstone of the past determinations by the Standing Committee which is whether the
9 public will be misled about the candidate's prior judicial experience.

10 26. To synthesize the Standing Committee's previous advisory opinions and
11 published decisions, the standard applied in the "Robe Cases" is that a non-incumbent
12 judicial candidate may not use images in campaign communications depicting the
13 candidate in a judicial robe unless (i) the candidate served in a full-time elected or
14 appointive judicial office; and (ii) while serving in such judicial office the candidate may
15 not have been engaged whatsoever in the practice of law; and (iii) the images must be
16 actual and accurate photographs or videotape depicting an historic event; and (iv) the
17 images must themselves indicate the historic quality of the image portrayed or be
18 accompanied by narration or clearly legible written statements that make
19 understandable to a reasonable viewer that the image is an historical event; and (v) the
20 campaign communication in all other respects must be scrupulously fair and accurate;
21 and (vi) refrain from communicating information that is false or misleading, or that
22 omit facts necessary to make the communication considered as a whole not materially
23 misleading.

24 27. In this case, Bare is using actual photographs and videotape footage that
25 depicts him being invested and serving in 2007 when he was a full-time municipal court
26 judge. At the time Bare served as a judge he was not a part-time jurist, *pro-tempore*
27 judge, alternative short-trial judge or other judicial officer who also maintained a
28 private law practice. The Committee's prior advisory opinions and published decisions

1 consistently have expressed the view that a practicing attorney serving in part-time
2 judicial positions cannot employ images in campaign materials where they are depicted
3 in a judge's robe. The images used by Bare, the accompanying narration and written
4 statements accompanying the historic pictures on the screen in which he is robed and
5 the totality of the facts and information communicated by Bare in the Television
6 Commercial do not present an impression of incumbency. After viewing the Television
7 Commercial on more than six occasions during the hearing, the Panel concluded, as
8 Bare argued, that this advertisement was a fair and accurate "retrospective of his legal
9 career."

10 28. Similarly, the Panel concludes that the evidence presented on the content
11 of the Website -- evaluated as a whole and given the links and tabs that provide other
12 information such as his biography, *curriculum vitae* and photographic albums with
13 individual captions to images -- is fair and accurate and does not present statements or
14 information that violates Canon 4 or NCJC Rule 4.1(A)(11).

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DECISION

Therefore, the Standing Committee determines:

- (i) That Stoebling has failed to prove by a preponderance of the evidence that Bare's Television Commercial and the "Home Page" of the Website were made knowingly or recklessly and omit facts necessary to make the communication considered as a whole not materially misleading by impermissibly creating an implication of incumbency in violation of Canon 4 and NCJC Rule 4.1(A)(11) and, therefore, Stoebling's Complaint is DENIED; and
- (ii) That this decision shall be published in accordance with Rules 4(4)(a)(i) and 4(5) of the Rules of the Standing Committee on Judicial Ethics and Election Practices.

DATED this 27th day of October, 2010.

NEVADA STANDING COMMITTEE ON
JUDICIAL ETHICS AND ELECTION PRACTICES

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