

Ohio Board of Professional Conduct

**JUDICIAL CANDIDATE SEMINAR
2024**


RICHARD A. DOVE, Esq.
DIRECTOR

D. ALLAN ASBURY, Esq.
SENIOR COUNSEL

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AGENDA


- **BPC: Code of Judicial Conduct**
 - Campaign speech and conduct
 - Campaign contributions
- **Secretary of State:**
 - Campaign finance law, reports, and disclaimers
- **Questions and answers**




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OVERVIEW OF MATERIALS

- Rules
- Contribution limit chart
- Advisory opinion summaries
- Breakdown of judicial campaign sanctions
- Case summaries
- Contact and website information




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**JUDICIAL CAMPAIGN
MISCONDUCT**



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OVERARCHING PRINCIPLES


Canon 4: A judge or judicial candidate shall not engage in political or campaign activity that is inconsistent with the *independence, integrity, or impartiality* of the judiciary.



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OVERARCHING PRINCIPLES

Rule 4.2(A)(1): A judicial candidate shall be responsible for . . . acting at all times in a manner consistent with the *independence, integrity, and impartiality* of the judiciary.



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OVERARCHING PRINCIPLES

Rule 4.3, Comment [1]: A judicial candidate must be scrupulously fair and accurate in all statements made by the candidate and his or her campaign committee.



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Losing Sight of the Overarching Principles



- “She will be a tough judge that supports the death penalty and isn’t afraid to use it...she favors the death penalty for convicted murderers.” (*Burick*)
- “My opponent is a liberal who is soft on criminals.” (*Hein*)
- “Endorsed by the Neighborhood Protection Council.” (a fictitious entity) (*Kaup*)
- “You need to step up to the plate and contribute to my campaign.” (*D. O’Neill*)



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Losing Sight of the Overarching Principles



- “[H]e felt teenage drinking wasn’t a serious crime.” (*Tamburrino*)
- “My opponent got appointed by the political bosses in Columbus.” (*Berry/Burick*)
- “Her opponent moved to Hamilton county three years ago to take a judicial appointment.” (*Falter*)
- To a defendant: “Tell all your family how you feel about me because I’m running this year for the common pleas court.” (*Michael II*)



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JUDICIAL CAMPAIGN BASICS

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CODE OF JUDICIAL CONDUCT

- Rule 4.1** – Political and campaign activities (judges and candidates)
- Rule 4.2** - Political and campaign activities (candidates)
- Rule 4.3** – Campaign standards and communications
- Rule 4.4** – Campaign solicitations and contributions
- Rule 4.5** – Judges who become candidates for nonjudicial office (resign-to-run rule)
- Rule 4.6** - Definitions



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WHAT’S DIFFERENT ABOUT A JUDICIAL CAMPAIGN?

Campaign prohibitions and limits:

- Pledges, promises, and commitments
- Endorsements of other candidates
- Appearance in joint campaign advertisements with nonjudicial candidates
- Fundraising with nonjudicial candidates
- Leadership positions in political parties




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WHAT'S DIFFERENT ABOUT A JUDICIAL CAMPAIGN?

- Fundraising prohibitions and limits:
 - Personal solicitations; with four exceptions
 - Limited time period to fundraise
 - No transfer of funds to other candidates
 - "No carry-in" rule
- KEY = the judicial candidate is responsible for the campaign – Rule 4.2(A)(2)

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POLITICAL AND CAMPAIGN ACTIVITIES

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Rule 4.1 and Comments [8]-[13]

Rule 4.2

- **NO** pledges, promises, statements that commit or appear to commit
- **NO** comments on cases pending or impending before any court in the United States or its territories
- **NO** statements affecting outcomes or impairing fairness
- **OK** to state personal beliefs on issues – add statement re: duty to apply the law fairly and impartially
- **OK** to make statements on court administration

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PERSONAL VIEWS

- **In re Disqualification of Cottrill (2022):**
- Judge's public comments during an unsuccessful 2004 race:
 - "I'm a conservative, no-nonsense, tough-on-crime judge. My opponent is not."
 - "I hold convicted defendants accountable and responsible for their actions. It takes work to do that."
- Comments were connected to sentence of a defendant in a factually similar case that was decided in 2004.
- Chief Justice found impartiality could be reasonably questioned.

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CAMPAIGNING WITH OTHER CANDIDATES

YES	NO
<ul style="list-style-type: none"> ➤ Raising funds w/ other judicial candidates ➤ Advertising w/ other judicial candidates ➤ Party-sponsored fundraising activities ➤ Slate cards, ballots, etc. that identify ALL party candidates 	<ul style="list-style-type: none"> ➤ Public endorsement or opposition ➤ Fundraising w/ nonjudicial candidates (except party-sponsored activities) ➤ Advertising w/ nonjudicial candidates

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"ON THE CAMPAIGN TRAIL"

YES	NO
<ul style="list-style-type: none"> ➤ Attending political gatherings and fundraisers of other candidates ➤ In general, speaking at political gatherings 	<ul style="list-style-type: none"> ➤ Speaking on behalf of political party or another candidate for public office ➤ Introducing candidates at political events (see Adv. Op. 92-11) = public endorsement

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PARTY AFFILIATION AND ENDORSEMENTS

- **OK** to advertise and speak about party nomination, endorsement, membership, or affiliation – at any time during the campaign
- **OK** to seek and advertise endorsements
- Statements cannot be false
 - Endorsement must be current
 - Endorsing entity must be clearly identified
 - Avoid short-hand terms to describe endorsement
 - No “made up” endorsing entities



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CAMPAIGN STANDARDS AND COMMUNICATIONS

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RULE 4.3(A)

Prohibited from:

- Posting, publishing, broadcasting, transmitting, circulating, or distributing:
 - Information about self or opponent
 - Either knowing the information to be false **OR**
 - With reckless disregard of whether or not it is false



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RULE 4.3(A)

In re O'Toole (2014)

- Respondent claimed to be a judge when she was not, a misrepresentation that was patently false.
- Respondent's conduct undermined public confidence in the judiciary as a whole and injured both the public and the judiciary.
- **Result:** Severance of “deceiving or misleading” language from rule.
- Rule now applies only to **false communications** that are made knowingly or with reckless disregard.



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RULE 4.3(A)

ODC v. Tamburrino (2016)

- Respondent's judicial campaign commercial contained patently false statements about the respondent's opponent and respondent acted knowingly or with reckless disregard about the false statements.
- Impugned incumbent opponent
- Endangered the independence of the judiciary
- Sanction: One-year suspension with six months stayed



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RULE 4.3(A)

In re Falter (2021)

- Candidate acted with reckless disregard by falsely stating that her opponent moved to Hamilton County to accept a judicial appointment from the Governor. Respondent-candidate relied on courthouse gossip and did not verify the accuracy of her statements.
- Sanction: public reprimand and fine.
- “Reckless disregard” = result is possible and candidate chooses to ignore the risk.



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RULE 4.3

- > **Rule 4.3(C):** may not use title of public office or position “immediately preceding or following” name when the candidate does not hold the office or position
- > **Rule 4.3(E):** may not use terms “former” or “retired” immediately preceding “judge” unless in prominent lettering and appears each time “judge” is used



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Definitions
Rule 4.6(N)

What is “prominent lettering?”

- > Certain terms (*elect, vote, for, retired, or former*) cannot be less than the physical size of the largest type used to display the title of office or the court to which the judicial candidate seeks election, irrespective of the point size or font of the largest type.



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RULE 4.3

Prohibited:

- > Use of title of an office preceding the candidate’s name when the office is not currently held. Rule 4.3(C).
- > Use of term “judge” if not a judge **UNLESS** “magic language” (*elect, vote, or for*). Rule 4.3(D).
- > Use of “re-elect” if never elected to office being sought or not the current occupant of the office for which a candidate. Rule 4.3(F).



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CHECKLIST

- INCLUDE “ELECT”, “VOTE”, OR “FOR”
- CANDIDATE NAME BEFORE OFFICE TITLE
- PROMINENT LETTERING – Defined in 4.6(N)



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Example of Use of Prominent Lettering

The graphic shows a blue rectangular box containing the text: "Vote", "W. John Smith", "for", "Judge", "Smallville Municipal Court", and a scale of justice icon. Three red arrows point from explanatory text to the words "Vote", "for", and "Judge".

“Vote” is not less than the physical size of the title of office to which the candidate seeks election.

“for” is not less than the physical size of the title of office to which the candidate seeks election.

Title of office to which the candidate seeks election.



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Example of Improper Use of Term “Judge” Before Candidate’s Name

The graphic shows a white rectangular box containing the text: "Frank and Shirley Thomas", "CORDIALLY INVITE YOU TO A FUNDRAISING RECEPTION AT THEIR HOME", "123 Mulberry Street, Smallville, Ohio 43081", "FOR SMALLVILLE MUNICIPAL COURT JUDGE", "W. John Smith", "Saturday, September 16 6:00 – 9:00 p.m.", "\$100 per person", "Make Checks Payable to Committee to Elect W. John Smith Judge", and "Paid for by Committee to Elect W. John Smith Judge". A red arrow points from explanatory text to the words "FOR SMALLVILLE MUNICIPAL COURT JUDGE".

The term “judge” is improper because it appears before the name of the candidate when he/she does not hold that office or position



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Example of Proper Use of Term "Judge" After Candidate's Name

Frank and Shirley Thomas
 CORDIALLY INVITE YOU TO A
 FUNDRAISING RECEPTION
 AT THEIR HOME
 123 Mulberry Street, Smallville, Ohio 43081

In support of
 W. JOHN SMITH

FOR
 SMALLVILLE MUNICIPAL COURT
 JUDGE

Saturday, September 16
 6:00 – 9:00 p.m.

\$100 per person
 Make Checks Payable to Committee to Elect W. John Smith Judge

Paid for by Committee to Elect W. John Smith Judge

The term "judge" correctly appears after the name of the judicial candidate

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RULE 4.3

Rule 4.3, Cmt. [2]: Use of title of public office or position

- Reserved for those who contemporaneously hold the office by election or appointment
- Use of title by one not entitled to the office that falsely states incumbency
- Misuse of a title violates the "3 I's"

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RULE 4.3

Additional prohibitions:

- Misrepresentation of identity, qualifications, position.
- False statements re: education, training, awards, licensure, employment
- False statements re: criminal background, mental illness, military discipline
- False endorsements
- Bias or prejudice toward opponent based on race, sex, religion, etc.

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Candidates Portraying Themselves Inaccurately



- During campaign, former judge wearing name badge stating she holds her prior judicial seat (*O'Toole*)
- Past or current photograph of candidate in judicial robe without explanatory language (*Lilly I, Lilly II, Moll, Williams*)

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Candidates Portraying Themselves Inaccurately




JUDICIAL ROBES

A judicial candidate may wear a judicial robe in a campaign photograph when:

- A past or current photograph is labeled with the dates of service and title of office if there is a gap in judicial service.
- If currently a magistrate and photograph is accurately labeled with the title of office held.

See Adv. Op. 2003-08

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DEFINITIONS

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Definitions
Rule 4.6(F)

When am I a “judicial candidate?”
(and thus subject to Canon 4)
Earliest occurring of:

- Public announcement of candidacy

OR

- Declared or filed with election authority

OR

- Authorized the solicitation or receipt of contributions or support for judicial office

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Definitions
Rule 4.6(J)

What is an “organization?”

- Any entity
- Any combination of two or more persons
- PACs
- Law firms
- Organizations affiliated w/ political parties
- Labor organizations
- Other campaign and caucus campaign committees

NOT “organizations” - political parties

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Definitions
Rule 4.6(C)

Who is my “immediate family?”

- Spouse / domestic partner
- Related by blood, law, or marriage:
 - Parent
 - Child
 - Brother or sister
 - Grandparent
 - Grandchild
 - Uncle or aunt
 - Nephew or niece
 - Great-grandparent
 - First cousin


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Definitions
Rule 4.6(D) and Terminology Section

Who is a “domestic partner?”

- Person with whom another person maintains a household AND an intimate relationship
- Other than a person to whom one is legally married
- See *Michael I*

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**CAMPAIGN SOLICITATIONS
AND CONTRIBUTIONS**

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RULE 4.4(A) – SOLICITATION OF CONTRIBUTIONS

Ban on most personal solicitations except:

- *General request* when speaking to an audience of 20 or more individuals
- *Letters from campaign* that direct contributions to the committee not candidate
- *General request* in text format via an electronic communication (no voice or video)
- *Immediate family members* (but not close friends): See *AFSCME v. Brunner*, 912 F.Supp. 556 (12/10/2012)

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RULE 4.4(A) – SOLICITATION OF CONTRIBUTIONS

Absolute ban on personal receipt of campaign contributions

- “Can I be deputy treasurer?” Yes, but only for purposes of writing/signing checks to pay bills. Cannot collect or deposit contributions.
- “May my spouse be treasurer?” Yes, but should not use home address for contributions.



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FUNDRAISING PERIOD – RULE 4.4

- Fundraising may begin 180 days before the date of the May primary, regardless of actual primary date—for 2024 candidates—September 14, 2023
- Fundraising ends 120 days after the general election except:
 - If defeated in primary – fundraising may continue until 120 days after the primary
- “Seeding” period (personal funds) – 90 days prior to 180-day fundraising period—for 2024 candidates—June 16, 2023



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CONTRIBUTION LIMITS

CANDIDATE FOR:	INDIVIDUAL		ORGANIZATION		POLITICAL PARTY	
	Primary*	General	Primary*	General	Primary*	General
Supreme Court Chief Justice and Justice	\$4,100	\$4,100	\$7,500	\$7,500	\$203,900	\$373,900
Court of Appeals	\$1,400	\$1,400	\$4,100	\$4,100	\$40,800	\$81,700
Common Pleas, Municipal, and County Court more than 750,000	\$650	\$650	\$4,100	\$4,100	\$40,800	\$81,700
750,000 or less	\$650	\$650	\$4,100	\$4,100	\$34,000	\$67,900



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CONTRIBUTION LIMITS

- **Contested primary:** primary limits apply; reset after primary
- **No contested primary:** general election limits apply throughout fundraising period
- **Unlimited contributions** from the candidate and the candidate’s immediate family
- Contributions from the **same source** are **aggregated** – however, lawyers and their law firms are separate contributing entities



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IMPERMISSIBLE CONTRIBUTIONS

- Court employees (current and prospective)
- Contractors and others doing business w/ the court (over \$250 in any of the last 6 years)
- For-profit and non-profit corporations (R.C. 3599.03)
- Incorporated labor organizations (R.C. 3599.03)



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PERMISSIBLE CONTRIBUTIONS

- Family members of court employees
- Lawyers who are not court employees or contractors
- Court appointees (but must be identified as such in campaign reporting)
- LPAs, LLCs, or partnerships
- Unincorporated labor organizations, union PACs, union PCEs (verify status with the Secretary of State’s Office)



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Ohio Elections Comm. Adv. Op. 96-03

- “Corporation” in R.C. 3599.03 is a for-profit corporation defined in R.C. 1701.02, or a non-profit corporation as defined in R.C. 1701.01;
- “Corporation” does not include an LPA, LLC, partnership.



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CAMPAIGN EXPENDITURES

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EXPENDITURE OF CAMPAIGN FUNDS

- Rules 4.1(A)(4), (B)(2) and (3)
 - **NO** political donations– EXCEPT:
 - ✦ A ticket to another candidate’s fundraiser or political party social event;
 - ✦ A contributions to political party for administrative and operational expenses.



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EXPENDITURE OF CAMPAIGN FUNDS

- Code of Judicial Conduct does **not** govern expenditure of campaign funds (either timing or use), other than donations of campaign funds to political parties or other candidates.
- Revised Code defines what are permissible expenditure of campaign funds (legitimate, verifiable, ordinary, and necessary) and the manner of reporting of campaign expenditures and contributions. See R.C. 3517.08 and 3517.13.



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USE OF NONJUDICIAL CAMPAIGN FUNDS

- Rule 4.2(B)(3) prohibits a judicial candidate from spending money received by the candidate in a campaign for nonjudicial office
- AKA— “no carry-in” rule
 - Must “zero-out” balance in nonjudicial campaign fund before beginning judicial campaign



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PUBLIC EMPLOYEES; MAGISTRATES

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CAMPAIGN ACTIVITY BY PUBLIC EMPLOYEES

Rule 4.4(B) – a judicial candidate **must** prohibit all **public** employees subject to his or her direction or control from soliciting or receiving contributions.

- Employees cannot serve as treasurer or member of committee
- Employees cannot sell tickets or collect money at a fundraiser

Private practice employees – no restrictions.



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CAMPAIGN ACTIVITY BY PUBLIC EMPLOYEES

- “Direct report” employees of public officials / employees cannot be involved in solicitation or receipt of funds
 - For judges: same court or division
- Restrictions apply only to public employees and officials
- Campaign volunteering OK if not compelled and not on court time or using court resources



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CAMPAIGN ACTIVITY BY PUBLIC EMPLOYEES

Disciplinary Counsel v. Horton, 2019-Ohio-4139

- Judge directed staff to perform campaign activities on court time (preparing prospective donor lists and campaign correspondence; attend political/campaign events; pick-up and deliver campaign checks, accept contributions)
- Judge blamed staff for not self-policing



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CAMPAIGN ACTIVITY BY PUBLIC EMPLOYEES

Disciplinary Counsel v. Horton, 2019-Ohio-4139

- **Supreme Court**—activity was not *de minimis*; judge is responsible for “imposing clear rules prohibiting campaign work on county time or using county resources and strictly enforcing those rules;” “merely encouraging * * * staff to attend a judicial-campaign seminar did not fulfill his obligation to ensure that his staff did not conduct campaign work on county time.”
- **Sanction**—indefinite suspension



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MAGISTRATES

- Magistrates are subject to the Code of Judicial Conduct
- Advisory Opinions on magistrate campaign activity
 - **2018-04**: Campaign activities by magistrates on behalf of judicial candidates
 - **2003-8**: Appearance in robe when running for office




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MAGISTRATES

- *In re Moll*, 2012-Ohio-5674 (former magistrate as candidate)
- *In re Williams*, 2023-Ohio-4116 (magistrate as a candidate)



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**CAMPAIGN GRIEVANCE
PROCESS**

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**Gov. Jud. R. II,
Section 5**
Campaign Grievance
Procedure

- Grievance filed with Board
- Considered on expedited basis by Director
- If facially valid, reviewed by probable cause panel
- Confidential until probable cause is found
- Board hearing if passes probable cause
- Grievant's burden is clear and convincing evidence
- If hearing panel finds violation, considered and decided by 5-judge commission

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**Gov. Jud. R. II,
Section 5**
Campaign Grievance
Potential Penalties

- Disciplinary sanction
- Interim cease and desist order
- Cease and desist order
- Fine
- Assessment of costs
- Assessment of attorney fees

Other options for filing grievance:
ODC, Elections Commission

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BREAKDOWN OF SANCTIONS

Indefinite suspension	Suspension (partially stayed):	Stayed Suspension
<i>Horton</i> (\$12,260)	<i>D. O'Neill</i> ** (\$4,600) <i>Tamburrino</i> (\$2,300)	<i>Hildebrandt</i> * (\$23,000) <i>Berry</i> (\$16,400) <i>Evans</i> ** (\$1,000) <i>Kemp</i> * (\$1,000)
Public Reprimand, Fine, and Attorney Fees: <i>Burick</i> * (\$13,900) <i>Hein</i> * (\$7,600) <i>Kienke</i> * (\$6,700) <i>Davis</i> *(\$15,700) <i>O'Toole</i> * (\$6,000)	Public Reprimand and Fine: <i>Lilly II</i> ** (\$3,300) <i>Michael II</i> * (\$6,300) <i>Fulfer</i> (\$2,600)	Public Reprimand and Attorney Fees: <i>PerDue II</i> (\$3,700)
Public Reprimand: <i>Harper</i> (\$1,300) <i>Morris</i> * (\$100) <i>Spicer</i> (\$1,800)	Fine and Attorney Fees: <i>Brigner</i> ** (\$2,200) <i>Michael I</i> * (\$6,100) <i>Mull</i> ** (\$7,100) <i>Williams</i> (\$13,110)	Fine Only: <i>Carr</i> (\$2,600) <i>Emrich</i> (\$1,450) <i>Roberts</i> (\$200) <i>PerDue I</i> (\$300) <i>O'Reilly</i> (\$6,600) <i>Lilly I</i> (\$1,600) <i>Sherren</i> (\$1,600) <i>Lombardi & McCarty</i> (\$1,200 each)
Other: <i>Keyes/Taitler</i> (cease and desist order)	Notes: - Figures in parentheses = total of all fines, costs, and attorney fees - Cases in italics were decided by the Supreme Court	Notes: * Indicates more severe sanction than initially recommended ** Indicates less severe sanction than initially recommended

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CAMPAIGN GRIEVANCE LESSONS

- If in doubt, ask for guidance because the candidate is responsible for all campaign activity
- Be wary of local party and outside consultants with little or no judicial campaign experience
- Accuracy is essential
- Be able to document campaign statements
- Avoid "absolutes"

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**CALL WITH
QUESTIONS**



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614.387.9370



Conservative / nonbinding advice
Avoid needless disciplinary violations and financial sanctions
Cannot preapprove campaign material

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