

**BEFORE THE COMMISSION OF FIVE JUDGES
APPOINTED BY
THE SUPREME COURT OF OHIO**

In re Judicial Campaign Complaint
Against Michael Brigner

Case No. 00-0975

OPINION

This matter came to be reviewed by a commission of five judges appointed by the Supreme Court of Ohio pursuant to Rule II, Section 5(E)(1) of the Rules for the Government of the Judiciary of Ohio and R.C. 2701.11. The commission members are: Judges John J. Donnelly, chairman; James R. Sherck; David A. Basinski; Lisa L. Sadler; and Sara E. Lioi.

Complainant, Denise Martin-Cross, is a candidate in the November 2000 election for the domestic relations division of the Montgomery County Court of Common Pleas. Respondent, Michael Brigner, is complainant's opponent in the November 2000 election and currently serves in the domestic relations division of the Montgomery County Court of Common Pleas.

On April 11, 2000, complainant filed a judicial campaign grievance with the Secretary of the Board of Commissioners on Grievances and Discipline (the Board). Attached to the grievance was a letter and enclosure soliciting contributions to the respondent's campaign committee. The letter was signed by respondent's campaign treasurer and included statements that the complainant "*** has never handled a divorce case" and is "*** a novice who lacks even one day of domestic relations experience ***." The enclosure contained a chart contrasting the experience of respondent and complainant and asserting that complainant had no experience in divorce and custody cases, dissolution cases, domestic violence cases, and reopened domestic relations cases. Complainant contended that the statements contained in the letter and enclosure were false and misleading since she had practiced law for more than 22 years, had served as a magistrate in the juvenile division of the Montgomery County Court of Common Pleas for ten years, and had opened and handled more than 70 domestic relations actions as a legal aid attorney during a five-month period in 1987 and 1988. She alleged that the statements made by respondent violated Canon 7(B) and 7(E)(1) of the Code of Judicial Conduct.

A probable cause panel of the Board was appointed to review the grievance, and on April 14, 2000 the panel ordered the Secretary of the Board to prepare and file a formal complaint based on the complainant's grievance. On April 19, 2000, the Secretary filed a formal complaint consisting of two counts. Both counts of the formal complaint alleged that respondent, in circulating the letter and enclosure attached to complainant's grievance, violated Canon 7(B)(2)(f) of the Code of Judicial Conduct by knowingly misrepresenting his opponent's

qualifications and/or Canon 7(E)(1) by communicating false information regarding his opponent, either knowing the information to be false or with a reckless disregard of whether or not it was false.

The Board convened a three-member hearing panel, which conducted a hearing on the formal complaint on May 15, 2000. On May 23, 2000, the hearing panel issued its findings of fact, conclusions of law, and recommendations, which are appended to this opinion. The hearing panel found that complainant did not, by clear and convincing evidence, establish a violation of Canon 7(B)(2)(f). However, the panel did conclude that respondent violated Canon 7(E)(1) in that he distributed information concerning complainant that was false and misleading and deceiving to a reasonable person and did so with reckless disregard. The hearing panel further concluded that the violation was egregious in view of respondent's participation in the preparation and distribution of the documents in question, his disregard for the accuracy of the documents, and his failure to demonstrate remorse for his actions. As a sanction for this violation, the hearing panel recommended that respondent be publicly reprimanded and required to pay the costs of this proceeding and the reasonable attorney fees of complainant. The panel also recommended that respondent's campaign committee be required to return any campaign contributions received through May 19, 2000 from persons who received the letter and enclosure upon which the complaint was based.

On June 6, 2000, the Supreme Court of Ohio appointed this five-judge commission to review the report of the hearing panel pursuant to Gov. Jud. R. II, Section 5(E)(1). The commission was provided with the record certified by the Board, a transcript of the May 15, 2000 proceeding before the hearing panel, and exhibits presented at the hearing.

The commission met by telephone conference on June 15 and July 18, 2000. Following the initial telephone conference, the commission issued an order allowing the parties to file written briefs and reply briefs. The commission considered these briefs in reviewing the record and the report of the hearing panel.

Respondent has requested the opportunity to present oral arguments to this commission. Gov. Jud. R. II, Section 5(E)(1) gives the commission discretion in choosing the manner it wishes to proceed in reviewing the report of the hearing panel. The briefs submitted by the parties fully and adequately address the legal and factual issues presented in this case, and the commission concludes that oral argument is unnecessary to more fully address the facts and legal issues presented in this matter. Accordingly, respondent's request for oral argument is denied. In addition, respondent's motion to strike complainant's reply brief is overruled.

Pursuant to Gov. Jud. R. II, Section 5(E)(1), the commission is required to review independently the report of the hearing panel and ascertain whether clear and convincing evidence exists to support a determination that respondent violated Canon 7 of the Code of Judicial Conduct. Having reviewed the record made before the Board hearing panel, the report of the hearing panel, and the briefs filed by the parties, the commission affirms and adopts the findings of fact and conclusions of law made by the hearing panel with regard to the violation of Canon 7(E)(1). Canon 7(E)(1) prohibits a judicial candidate from distributing information regarding an opponent with a reckless disregard of whether the information was false or, if true,

would be deceiving or misleading to a reasonable person. The evidence submitted to the hearing panel clearly establishes that the statements regarding the qualifications and experience of complainant, contained in the exhibits attached to the formal complaint, were false and deceiving or misleading to a reasonable person, and that respondent acted recklessly in distributing that information without ensuring its accuracy.

Sanctions

While the commission concurs with the finding of the hearing panel that respondent violated Canon 7(E)(1), we find it necessary to modify the sanction recommended by the panel. A judicial candidate who violates Canon 7 should receive a sanction commensurate to the seriousness of the violation. The sanction should be sufficient to punish the violator and serve as a deterrent to similar violations by judicial candidates in future elections. *In re Judicial Campaign Complaint Against Morris* (1997), 81 Ohio Misc.2d 64, 65. In comparing respondent's violation with those committed by other judicial candidates, we find the recommended sanction of a public reprimand to be excessive and inappropriate. Prior judicial campaign cases have addressed multiple violations of Canon 7 [*In re Judicial Campaign Complaint Against Burick* (1999), 95 Ohio Misc.2d 1], the wide distribution of false and misleading statements regarding an opponent [*Morris, supra* and *In re Judicial Campaign Complaint Against Kienzle* (1999), 96 Ohio Misc.2d 31], or improper communications made shortly before the election [*In re Judicial Campaign Complaint Against Hildebrandt* (1997), 82 Ohio Misc.2d 1]. By contrast, respondent's violation represents a single instance of misconduct involving a document that was distributed to a limited number of individuals well in advance of the November election.

The hearing panel also recommended that respondent's campaign committee be required to return all contributions made by persons who received the fundraising letter. This recommendation appears to be an attempt by the hearing panel to deprive respondent of any financial benefit that his campaign may have received as a result of the improper characterization of complainant's experience. While well intentioned, the commission is concerned with the difficulty associated with monitoring compliance with this sanction and the fact that this sanction is not expressly authorized by Gov. Jud. R. II, Section 5(E)(1).

In consideration of these factors, the violation before this commission, and the precedents established by prior commissions, it is the unanimous conclusion of this commission that respondent be fined \$1,000 and ordered to pay complainant's reasonable attorney's fees and the costs of the proceedings before the hearing panel and this commission. Respondent also shall provide complainant with the names and addresses of all persons known to have received a copy of the communication that was the subject of this complaint so that she may accurately communicate her qualifications to those persons.

After considering evidence related to attorney fees and expenses submitted by counsel for the complainant and the factors contained in DR 2-106(B), we find that the claimed fees are not reasonable relative to the uncomplicated nature of the issues presented in this matter and severity of the violation. Accordingly, we order the respondent to pay complainant \$4,115.00 (41.15 hours @ \$100.00 per hour) in attorney fees.

The Secretary shall issue a statement of costs before this commission and instructions regarding the payment of monetary sanctions. Payment of all monetary sanctions shall be made by October 27, 2000. The sanction shall be published by the Supreme Court Reporter in the manner prescribed by Rule V, Section 8(D)(2) of the Rules for the Government of the Bar of Ohio.

So Ordered.

Judge John J. Donnelly

Judge James R. Sherck

Judge David A. Basinski

Judge Lisa L. Sadler

Judge Sara E. Lioi

Dated: July 31, 2000