

State of Arizona
COMMISSION ON JUDICIAL CONDUCT

Disposition of Complaints 14-039 and 14-045

Judge: Susan M. Brnovich
Complainant: Commission on Judicial Conduct (14-039)
Teresa Ottesen Binder (14-045)

ORDER

The commission learned of public allegations that Superior Court Judge Susan Brnovich improperly appeared in a video for her husband's campaign in which he is seeking a party nomination for the position of Arizona Attorney General. Subsequent to opening an investigation into that allegation, the commission received a complaint raising the same issue and an additional complaint file was opened. The two cases have been consolidated for the purposes of this order.

With regard to the campaign video at issue, the judge did not appear in the campaign video in her capacity as a judge and did not identify herself as a judge. The video, similarly, did not identify the judge's office or position in any way. Further, Judge Brnovich did not state or imply that her position as a judge should persuade voters to support her husband.

The responsibility of the Commission on Judicial Conduct is to impartially determine if the judge engaged in conduct that violated the provisions of Article 6.1 of the Arizona Constitution or the Code of Judicial Conduct and, if so, to take appropriate disciplinary action. The purpose and authority of the commission is limited to this mission. The commission particularly notes that the Code explicitly states that its rules are "rules of reason" and that members are directed to consider a variety of factors and circumstances in determining whether a judge's conduct violates the Code in a particular situation.

After review of all relevant materials, facts, and circumstances, the commission found no evidence of ethical misconduct and concluded that Judge Brnovich did not violate the Code in this case.

While Rule 4.1(A)(3) prohibits a judicial officer from publicly endorsing another candidate for public office, and there is no "family exception" to this rule, the extension of the prohibition to a circumstance where the judge does not identify

This order may not be used as a basis for disqualification of a judge.

herself as a judge or even imply she is a judge is not consistent with the directive that the rules be applied as rules of reason. Based on the facts and circumstances specific to this case, the commission finds the judge did not violate Rule 4.1(A)(3).

Accordingly, the complaint is dismissed in its entirety, pursuant to Rules 16(a) and 23. Given the already public nature of these allegations, the commission also voted pursuant to Commission Rule 9(c) that these cases be public such that the order and complaint will not be redacted, and Judge Brnovich's response will be made public as well.

Dated: May 19, 2014

FOR THE COMMISSION

/s/ Louis Frank Dominguez

Louis Frank Dominguez
Commission Chair

Copies of this order were mailed to the complainant and the judge on May 19, 2014.

This order may not be used as a basis for disqualification of a judge.

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State of Arizona
Commission on Judicial Conduct
1501 W. Washington Street, Suite 229
Phoenix, Arizona 85007

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COMPLAINT AGAINST A JUDGE

Name: Teresa Ottesen Binder Judge's Name: Susan M. Skibba Brnovich

Instructions: Use this form or plain paper of the same size to file a complaint. Describe in your own words what you believe the judge did that you believe constitutes judicial misconduct. Be specific and list all of the names, dates, times, and places that will help the commission understand your concerns. Additional pages may be attached along with copies (not originals) of relevant court documents. Please complete one side of the paper only, and keep a copy of the complaint for your records.

Violation of Canon Rules: 4.1
(A) (3) (5)

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Original video is posted on YouTube under his political ad for attorney general.

On 2.4.2014 the Phoenix New Times also ran an article about the candidate and clearly identified the wife as a judge.

The information in regards to March Brnovich's campaigning was stated on 2.5.2014 on Seeing Red AZ that the judge appeared physically in her husband's political commercials. Within the article it was clearly stated that she had violated the Cannon Rules.

FEB 07 2014



Mark Brnovich's Wife, Judge Susan Brnovich: Did She Pull a Lester Pearce?

By Stephen Lemons

Published Wed., Feb. 5 2014 at 6:58 PM



In a [blog item last week](#), I discussed a [YouTube video](#) sent out by Arizona Attorney General Tom Horne's GOP primary rival, former Arizona Gaming Director [Mark Brnovich](#). The video talked about his family life and included some heartfelt comments from his wife, Maricopa County Superior Court Judge [Susan Brnovich](#).

The video did not identify Susan Brnovich by name or profession, other than hubby Mark noting that they met while they were working at the Maricopa County Attorney's Office. It was embedded in an e-mail from the campaign.

Basically, Susan talks about what attracted her to Mark and praises him as a good father. Titled "Live Your Values, Do the Right Thing," the video is a not-so-veiled jab at Horne's lack of family values, at least in the sense that Horne hired his alleged mistress to a state job at a salary of \$108,000.

The note from Mark in the e-mail included an appeal for campaign contributions and a direct swipe at Horne.

"As you know, I am running against an incumbent Attorney General that has been plagued with scandal after scandal," reads the text. "It will take help from Arizonans like you to help me win in August and be afforded the opportunity to run in the General Election in November.

"Arizona's Attorney General should be able to work with law enforcement, not have their personal lawyer on speed dial."

Pretty standard stuff for what promises to be a rough-and-tumble primary. Save for one issue: In being a part of the video, did Judge Brnovich violate [Arizona's Code of Judicial Conduct](#), which prohibits judges from campaigning on behalf of anyone other than themselves?

The rule occurs in Canon 4, specifically Rule 4.1., which states that a judge shall not, "publicly endorse

or oppose another candidate for any public office," or "actively take part in any political campaign other than his or her own campaign for election, reelection or retention in office."

Comments accompanying the rule make clear that this includes campaigns for family members as well.

It reads:

Although members of the families of judges and judicial candidates are free to engage in their own political activity, including running for public office, there is no "family exception" to the prohibition in paragraph (A)(3) against a judge or candidate publicly endorsing candidates for public office.

A judge or judicial candidate must not become involved in, or publicly associated with, a family member's political activity or campaign for public office. To avoid public misunderstanding, judges and judicial candidates should take and should urge members of their families to take reasonable steps to avoid any implication that the judge or judicial candidate endorses any family member's candidacy or other political activity.

Regular readers of this blog may recall that ex-Justice of the Peace Lester Pearce, brother of recalled, disgraced former state Senate President Russell Pearce, was censured and fined by Arizona's Commission on Judicial Conduct in 2012 for the campaigning he did for his brother back in 2011.

By the time the commission got around to dinging Pearce, he already had left office to run unsuccessfully for county supervisor.

Still, the commission's reproach will dog the ex-JP for the remainder of his days.

In the rarefied world of judges and lawyers, such rules are taken pretty seriously. And for good reason. The idea is to remove judges from politics as much as possible, so that justice will be blind, or as blind as we can make it.

Elections law expert Tom Ryan was one of the first persons to raise the issue with me. Ryan is the Irish wolfhound who pursued the Pearces throughout Russell's recall election, and he has been a fierce critic of Tom Horne's many ethical lapses.

He told me that he believed Susan Brnovich stepped over the line. He did not think the fact that she was not identified in the video let her off the hook. So I asked him, if he were advising the Brnoviches, would he tell them to jerk the video?

"If the Brnoviches were to call me, it would be an unqualified, 'Hell yeah you yank it,'" he told me.

"The Canons of Judicial Conduct make it especially bad for judges to campaign for family members," he said, adding that, "This is very serious stuff."

Former Superior Court Judge Colin Campbell's firm Osborn Maledon did the investigation into Lester Pearce for the Commission on Judicial Conduct.

Campbell, who has given advice to Judge Brnovich on this issue, cited what he referred to as the "leading paper" on the subject, entitled, "Political Activity by Members of a Judge's Family," which can be found on the American Bar Association's Web site.

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Read the paper Campbell references surveying ethics codes for judges.

The paper offers a survey of state rules restricting campaigning by judges. Campbell says he believes there is an exception under which Judge Brnovich would fall.

"Many state ethics opinions have held that that a candidate's campaign ads or flyers can identify a candidate's spouse by name and relationship as long as the material does not identify the spouse as a judge," he told me in a lengthy e-mail.

"Taking these authorities into account," he continued, "in my opinion, Judge Brnovich can participate in an interview with her husband, provided that she does not identify herself as a judge and limits her remarks to her marriage and family.

"In this situation, her role as a wife and mother is 'solely to the legitimate need of the candidate to present a full biography of himself.' The interview you note is well within these limitations. I suspect that 99.9% of the people who view the interview will not even know or recognize the wife as a judge."

Problem is, now that the genie has fled the oil can, a lot of people are going to know that Susan Brnovich is the wife of Mark and is on the bench.

Campbell also suggested that there could be, "a question whether a prohibition of speech under these circumstances, confined to statements as to her role as a wife to the candidate, is constitutional under the Arizona and United States Constitutions."

I asked him, since he was citing state rules, wouldn't Arizona's rules be paramount in this matter?

"The rules are remarkably consistent on this across the States," he replied. "The issue is what does the rule mean. Other states have address these issues in similar factual circumstances, but Arizona has not."

As I suspected, Ryan, who is a purist when it comes to such matters, was not convinced by Campbell's argument, which I sent to him in full, along with a link to the legal study Campbell cited.

"Doing an interview that is content neutral is not the problem," he told me. "The problem is when you take the image of the judge - whether a still or video - and attach it to campaign literature or a campaign website as they do here.

"It is not a defense under current Arizona canons to say 'Well, I didn't say I was a judge,' or '99.9% of the people who look at this won't know she's a judge.'"

He added, "if a judge cannot drive around with her husband's campaign stick on her bumper, how can she appear in a video affixed to his campaign website? What is the functional difference? Spoiler alert: NONE!"

What about other states having more less stringent rules?

"Yes, other states may well have more lenient rules regarding campaigns and judges," conceded Ryan, "but that ain't Arizona."

He continued:



"Wyoming may have an 85 mph speed limit on its freeways, but it is not a defense to a speeding charge in Arizona where the speed limit is 75 mph. Same rule applies here. By the way, there are examples listed in that article that are even more strict than Arizona's rules. Should the Brnovichs be ignoring those?"

"If Judge Brnovich is...saying these Judicial canons affect my First Amendment Rights and I am taking a stand, then more power to her. But that is not what she is saying."

He also pointed out that Brnovich has an obligation as a judge to order her husband to cease using her image and to self-report the possible ethical violation.

How do Judge Brnovich's actions compare with Lester Pearce's? I'm sure this will depend on whom you ask, but Pearce was a presence throughout the 2011 recall of his brother.

Read the Commission on Judicial Conduct's 2012 censure of ex-JP Lester Pearce.

In the minutes of a controversial Republican Legislative District 19 meeting at the time, he is identified as a Justice of the Peace, and it is recorded that he spoke in favor of his brother and against the recall.

<p>VI. Legislators' Reports</p> <ol style="list-style-type: none"> 1. Don Stapley, Maricopa County Supervisor 2. Justin Olson, AZ House, LD 19 – Justin spoke in support of Senator Russell Pearce and against the recall. 3. Lester Pearce, North Mesa Justice Court – Lester Pearce spoke in support of Senator Russell Pearce and against the recall. <p>VII. Treasurer's Report – Wayne Gardner (Drex Davis excused)</p> <p>From the original minutes of the 2011 LD 19 meeting ...</p>
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Pearce also admitted riding in a car with his niece as she solicited petition signatures for the sham candidate in that race, Olivia Cortes.

In a blog item back then, I also noted that:

"I confronted [Lester Pearce] about an account of him going to someone's door and arguing that the individual should remove a Jerry Lewis sign from that person's front yard.

"The judge explained that he had approached a neighbor about a Lewis sign, but that this had only been a joke."

Lewis was the Republican candidate who defeated Pearce in the recall election.

Lester Pearce also got physical briefly with videographer Dennis Gilman as we asked him questions before a debate in Mesa between Lewis and Pearce, though this issue and the other issue involving the yard sign were not addressed in the complaint against Lester.

In my personal opinion, Lester Pearce's actions were far more egregious than anything Judge Brnovich has done.

That said, it is unfortunate that Horne, from whose every pore oozes corruption, now has a weapon to use against Mark Brnovich.

Indeed, some of the wingnut blogs are already in attack mode, though why they want to hitch their cabooses to Tom "Hit-and-Run" Horne, a guy who is facing a much-delayed hearing on Monday into alleged campaign finance violations, is beyond me.

Speaking for the Brnovich campaign, spokesman Ryan Anderson shot back at the Horne partisans taking advantage of the issue online.

Anderson issued the following statement:

"It's pathetic that Tom Horne's minions and allies want to make this campaign about attacking wives and families. They have nothing to attack Mark on, so this is the best they've got?"

"We're talking about a sitting AG who has been convicted of a hit and run, who has been found to have violated campaign finance laws not by one, but by two county attorney's, who has a lifetime trading ban from the Securities Exchange Commission, has questions revolving around his personal life, and Tom Horne's supporters want to talk about ethics? We feel confident that we will win that battle any day.

"Susan is one of the highest rated judges sitting on the bench today in Arizona. To call into question her ethics is beyond the pale. With the exception of Mark's mother, there is no one more qualified to speak to the values of Mark as a husband and a family man than Susan.

"Obviously the content of this video has hit a little too close to home for some in the Horne camp."

He also told me that the campaign sought and received legal advice before releasing the video, and they are confident that it adheres to any and all ethical rules.

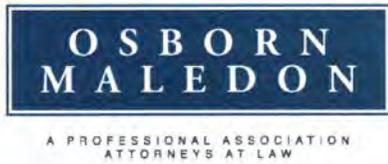
Even if Judge Brnovich's participation in the video is found to be in error, it's tiny taters compared with the colossal transgressions of Horne.

Sure, Horne loyalists will attempt to muddy the waters with it. Hell, what else have they got to work with?

For them, this is like trying to paddle the Titanic out of the way of that iceberg. No matter how hard they try, their ship's still going down.

Got a tip for The Bastard? Send it to: Stephen Lemons.





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March 6, 2014

Via U.S. Mail and Email

Jennifer Perkins
Commission on Judicial Conduct
1501 West Washington Street, Ste. 229
Phoenix, Arizona 85007

Re: Judge Susan Brnovich

Dear Ms. Perkins,

On behalf of Judge Susan Brnovich, we respond to your letter of February 20, 2014.

Judge Brnovich is married to Mark Brnovich. Her husband is running for Attorney General in the November 2014 elections.

Judge Brnovich appeared in a brief video with her husband. In the video she is not identified in any way as a judge. The video portrays her marriage, family and children, and her remarks are limited to those subjects.

Judicial Ethics Rule 4.1(A)(3) states that a judge shall not *endorse or oppose* another candidate for political office. The application of this rule to situations where a judge's spouse is running for political office rests upon whether an action by the Judge is a public "endorsement." What is a public "endorsement" is not otherwise defined by the rule.

The leading paper on such ethical issues is a paper prepared by Cynthia Gray and published by the State Justice Institute: "Political Activity by Members of a Judge's Family." It was last updated in August 2010. Her paper was cited with approval in Arizona Advisory Opinion 03-05.

As noted in the paper, many state ethics opinions have held that that a candidate's campaign ads or flyers can identify a candidate's spouse by name and relationship as long as the material does not identify the spouse as a judge. *See* Florida Advisory Opinion 07-13; Florida Advisory Opinion 90-7; Maine Advisory Opinion 94-3; Kansas Advisory Opinion JE-3 (1984); New Mexico Advisory Opinion 96-2; New York Advisory Opinion 06-94; New York Advisory Opinion 96-7; South Carolina Advisory Opinion 14-2003; Texas Advisory Opinion 295 (2009); Vermont Advisory Opinion 2728-10 (2004); Washington Advisory Opinion 02-2 (June 19, 1991); West Virginia Advisory Opinion (December 30, 2002). Materials that depict a spouse judge as a member of the candidate's family, and not as a judge, is not an "endorsement."

Ohio allows that a spouse judge can be identified as a judge in a family picture, reasoning that “family member pictures, names and occupations are biographical information about a candidate and the candidate’s family, not a prohibited ‘public endorsement.’” Ohio Advisory Committee 2001-1.

Massachusetts allowed a spouse judge to be interviewed, to appear in a commercial, or provide a quote to be used in campaign commercials. Massachusetts Advisory Opinion 99-16. The Committee noted that the “public’s expectation that it will learn certain basic biographical information about a candidate negates, or at least minimizes to an acceptable degree, any perception that a reference to a judicial spouse in such literature or commercial implies a judicial endorsement.” A spouse judge should “limit . . . remarks to personal matters about your marriage and family,” and not allow the interview to focus on judicial duties or political debates.

Taking these authorities into account, Judge Brnovich’s participation in an interview with her husband, where she does not identify herself as a judge and limits her remarks to her marriage and family, is permissible under the rule. In this situation, her role as a wife and mother is solely limited to basic biographical information and is not and does not create a perception that it is a judicial endorsement. *Id.* The interview noted in the Complaint is well within these limitations. We suspect that 99.9% of the people who view the interview will not even know or recognize the wife as a Judge of Maricopa County Superior Court, a County that has nearly one hundred judges and many other judicial officer commissioners. Urban counties in Arizona adopted merit selection in part because of the impossibility of the voting population knowing as a practical matter the many judges.

The Complaint appears to rely upon a comment to the rule, rather than the rule itself. A judge can only be disciplined for a violation of a rule. *See* Rules of the Supreme Court, Rule 81, Preamble and Scope. The comments themselves provide guidance and aspirational goals: *See also* Supreme Court Rule 42, Scope (“[regarding the rules of professional responsibility for lawyers] comments do not add obligations to the Rules but provide guidance for practicing in compliance with the rules.”)

The Complaint refers to the comment to Rule 81(a)(3) that states that there is “no ‘family exception’ to the prohibition in paragraph (A)(3) against a judge or candidate *publicly endorsing* candidates for public office.” (emphasis added) While the comment may be explanatory that Judge Brnovich cannot publically endorse her husband, it does not change the rule requirement that there must be a public “endorsement”, or otherwise clarify what an “endorsement” is. As noted above, the relevant judicial advisory opinions do not find the type of conduct engaged in by Judge Brnovich to be a prohibited “endorsement.”

The Complaint, if it goes any further, also raises a question of whether the state rule, as applied to the particular and unique circumstances of this case, where a judge’s statements in an interview with a spousal candidate are confined to statements as to her role as a wife and her role as a mother, is constitutional under the Arizona and United States Constitutions. We contend the rule should not be read or applied this broadly. “The legal maxim is well established that a provision should be construed, if possible, to avoid an interpretation that would render it

unconstitutional.” See, e.g., *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring). To interpret the ethical rule as broadly as would be necessary to apply it to Judge Brnovich and cover the particular conduct in this case creates a conflict with First Amendment rights.

In *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), the Supreme Court held that a Minnesota statute prohibiting a candidate for judicial office from announcing his or her views on disputed legal or political issues violated the First Amendment. In *White*, the Court applied strict scrutiny to determine the constitutionality of a judicial ethical rule limiting a judicial candidate’s freedom of speech.

The purpose of Rule 4.1, as set forth in the general consideration comments for the rule states that “a judge makes decisions based upon the law and the facts of each case. Therefore, in the furtherance of this interest, judges . . . must, to the greatest extent possible, be free and appear to be free from political influence and political pressure.” The purpose of the rule is to assure that a judge will rule based on the facts and the law of each case, not from “political influence and political pressure.”

Given the purpose of the rule, the rule is not narrowly tailored to accomplish its purpose and infringes on free speech rights as applied to Judge Brnovich’s conduct.

Judge Brnovich, of course, can privately express her views on candidates for public office even under the current ethics rules. And the Massachusetts opinion expressly allows interviews of the type complained of here, saying they are not public endorsements. We doubt that any serious argument can be made that a viewer of the video, assuming that they would know that she is a Judge, would believe that Judge Brnovich’s comments on her marriage and family would translate into any concern that her decisions on cases are influenced by politics.

The purpose of the rule, to assure that a judge will rule based on the facts and law of each case, is already accomplished by the recusal rules in the case of a husband and wife. By reason of the marital relationship, Judge Brnovich would have to recuse herself from cases arising from the Attorney General’s office if her husband is elected, so the broad application of the rule to these facts are not necessary and the rule is certainly not narrowly tailored to the evils it is meant to proscribe.

The First Amendment considerations in this case also involve a marital relationship, and the rule as applied here interferes both with the marital relationship and Mark Brnovich’s and Judge Brnovich’s First Amendment rights to publicly speak about her marriage and family.

Mark Brnovich, who is the one actually running for a state office, has the full protection of the First Amendment. The First Amendment “has its fullest and most urgent application to speech uttered during a campaign for political office.” *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989). Candidate Mark Brnovich is certainly entitled to make comments about his family life and marriage. Does he have to do so with a cardboard cut-out of his wife next to him?

Under these circumstances, the ethics advisory decisions above recognize that it is pointless to interpret the rule to mean that the candidate has to picture himself differently than any other candidate would; that is, the candidate can picture himself as a married man with a wife, and be interviewed with his wife as to their marriage and family values. To require otherwise is to disadvantage any candidate for public office who is married to a judge. It also certainly chills Mr. Brnovich's free speech rights if his words and actions, or video appearances with his wife as in the video here, will cause his wife to face punishment; and expressly punishes Judge Brnovich's free speech rights to discuss her marriage and family.

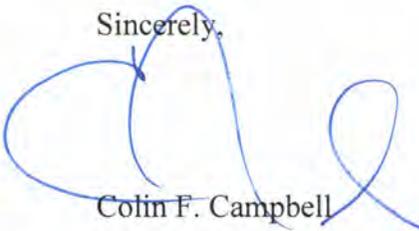
The Arizona Constitution's protection of free speech is even broader than the First Amendment. *See, e.g., Mtn. States Tel. & Tel. Co. v. Ariz. Corp. Comm'n*, 160 Ariz. 350, 354 (1989). Article 2, sec. 6 provides: "Every person may freely speak, write and publish on all subjects being responsible for the abuse of that right." The Arizona constitution forbids the type of prior restraint that an overly broad interpretation of this rule would create.

Given the conflicting authorities and the constitutional issues raised by application of the rule in this context, the Complaint should be dismissed.

The Commission should also be aware of Judge Brnovich's record. She has served on the Maricopa County Superior Court as a judge and a commissioner for ten years. She has no record of prior discipline. She has been retained as a Judge on the unanimous recommendation of the Judicial Merit Selection Committee.

Moreover, prior to appearing in the video, Judge Brnovich asked for our legal opinion on the propriety of appearing in a video of this nature, and based upon our review of the applicable law and ethics advisory opinions, we advised her in our view it was permissible. In reaching this conclusion, which was concurred with by my partner Mark Harrison, we personally consulted Cynthia Gray as to the applicable legal authorities to make sure no further precedents were overlooked. Judge Brnovich had no intention to violate the rule.

Sincerely,



Colin F. Campbell

CFC/ml