

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF SAN DIEGO

HALL OF JUSTICE

TENTATIVE RULINGS - April 05, 2012

EVENT DATE: 04/05/2012

EVENT TIME: 12:00:00 PM

DEPT.: C-66

JUDICIAL OFFICER: Joel M. Pressman

CASE NO.: 37-2012-00094121-CU-WM-CTL

CASE TITLE: AMADOR VS. DEBORAH SEILER SUED IN HER OFFICIAL CAPACITY AS REGISTRAR OF VOTERS FOR THE COUNTY OF SAN DIEGO [IMAGED]

CASE CATEGORY: Civil - Unlimited

CASE TYPE: Writ of Mandate

EVENT TYPE: Motion Hearing (Civil)

CAUSAL DOCUMENT/DATE FILED:

STATEMENT OF DECISION AND ORDER FOLLOWING WRIT OF MANDATE April 4, 2012

This matter came regularly before this court on April 4, 2012, at 2:00 p.m. for oral argument. The Court, having taken the above-entitled matter under submission on April 4, 2012, and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented now rules as follows:

A peremptory writ of mandate or an injunction shall issue only upon clear and convincing proof that the material in question is false, misleading, or inconsistent with the requirements of this chapter, and that issuance of the writ or injunction will not substantially interfere with the printing or distribution of official election materials as provided by law. (See Elections Code Section 13313(b)(2).)

"Clear and convincing" evidence requires a finding of high probability. This standard is not new. We described such a test, 80 years ago, as requiring that the evidence be " 'so clear as to leave no substantial doubt'; 'sufficiently strong to command the unhesitating assent of every reasonable mind.' " (See CACI 201: In Re Angelica P (1981) 28 Cal.3d 908, 919; *Sheehan v. Sullivan* (1899) 126 Cal. 189, 193, 58 P. 543.) It retains validity today. (*In re Terry D., supra*, 83 Cal.App.3d at p. 899.)

In the case at bar, Petitioner Robert O. Amador challenges two separate documents. Namely, the Proposed Ballot Designation Statement and the Candidate Statement submitted by Jim Miller.

Proposed Ballot Designation Statement:

Under the Election Code, Mr. Miller is limited to three words to describe his current employment. [Elections Code §13107(a)(3)] "No more than three words designating either the current principal professions, vocations, or occupations of the candidate, or the principal professions, vocations, or occupations of the candidate during the calendar year immediately preceding the filing of nomination documents. For purposes of this section, all California geographical names shall be considered to be one word. Hyphenated words that appear in any generally available standard reference dictionary, published in the United States at any time within the 10 calendar years immediately preceding the election for which the words are counted, shall be considered as one word. Each part of all other hyphenated words shall be counted as a separate word." (Elections Code §13107(a)(3).)

Initially Petitioner challenges the accuracy of the proposed Ballot Designation where Mr. Miller identified

his occupation as "Attorney/Arbitrator." Petitioner takes the position that is a false and misleading designation in so far as, under California law, a temporary, occasional position, specifically Mr. Miller's work as an Arbitrator for the Better Business Bureau, does not qualify as an occupation.

In opposition, Mr. Miller contends that being an arbitrator is one of the two things he does professionally. In that regard Mr. Miller has provided the Court with substantial evidence supporting his ballot occupational designation as "Attorney/Arbitrator." (See Miller Decl. ¶¶ 7-23; Exhs. 11-12, 15, 15.)

Consequently, based on the evidence provided, the Court finds that Mr. Miller's ballot occupational designation as Attorney/Arbitrator is neither false nor misleading according to the evidence presented and under the facts and circumstances of this case. Petitioner's request to strike Mr. Miller's ballot occupational designation as Attorney/Arbitrator is denied.

Candidate Statement:

Elections Code sections provides the standard for challenging statements in the Candidate's Statement. Specifically, Elections Code section 13313 (b)(1) provides: "During the 10-calendar-day public examination period provided by this section, any voter of the jurisdiction in which the election is being held, or the elections official, himself or herself, may seek a writ of mandate or an injunction requiring any or all of the material in the candidates statements to be amended or deleted. The writ of mandate or injunction request shall be filed no later than the end of the 10-calendar-day public examination period." (Elections Code section 13313 (b)(1).)

Petitioner next challenges statements made by Mr. Miller in his Candidate's Statement. Specifically, Petitioner contends that under occupation in the top portion of the Candidate Statement, Mr. Miller lists himself as "Attorney/Arbitrator." Petitioner asserts that Mr. Miller's designation of "Arbitrator" as his principal occupation on his Candidate's Statement is also false and misleading.

Contrary to Petitioner's contentions and similar to Mr. Miller's proposed Ballot Designation as Attorney/Arbitrator, the Court finds that Petitioner Amador has failed to demonstrate by clear and convincing evidence that the Mr. Millers work as an Arbitrator is false or misleading in light of the substantial evidence provided by Mr. Miller in support of his Candidate Statement designation as "Attorney/Arbitrator." (See Miller Decl. ¶¶ 7-23; Exhs. 11-12, 15, 15.)

Next, Petitioner challenges the first paragraph in Mr. Miller's Candidate Statement wherein Mr. Miller states he is the "only candidate experienced and qualified in every primary area of the law..." Petitioner argues that by stating that he is "the only candidate..." Mr. Miller draws a comparison to the other candidates, suggesting that the other candidates do not possess the qualifications for the voters to choose as San Diego Superior Court Judge. Petitioner states that under California Elections Code, a candidate's statement is restricted to a statement of one's own qualifications and any reference to an opponent is prohibited.

Mr. Miller opposes Petitioner's objection to his use of the term "only" because his statement is true. Mr. Miller submits that he has accurately identified his qualifications and experience stating that he is the only candidate that practices in all five primary areas of the law as designated by the San Diego Superior Court: Civil Division, Criminal Division, Family Law Division; Probate Division and Juvenile Division. (Miller Decl. ¶¶ 1-6, 43-43.)

The Court finds that Petitioner's use of the words "only" in conjunction with the statement "every primary area of the law" insinuates and/or implies that Mr. Miller is more experienced and has more expertise and qualifications than his opponents. The Court notes that Elections Code section 13308 expressly states in pertinent part: "In addition to the restrictions set forth in Section 13307, any candidate's statement submitted pursuant to Section 13307 shall be limited to a recitation of the candidate's own personal background and qualifications, and shall not in any way make reference to other candidates for that office or to another candidate's qualifications, character, or activities...." (**emphasis added.**)

Here, the Court finds that Mr. Miller's use of the statement "only candidate" draws attention to his opponents' lack of qualifications and/or personal failings. As such, the Court finds Mr. Amador's contentions Mr. Miller's use of the words "only candidate" improperly disparages his opponents in violation of Elections Code section 13308. The Court orders stricken from Mr. Miller's Candidate Statement: "the only candidate" in paragraph one."

Paragraph one will read as follows:

"JIM MILLER, experienced and qualified in EVERY primary area of Law. Jim has made the tough calls as a JUDGE PRO TEM and an ARBITRATOR. Jim will be professional, tough and honest."

Next, Petitioner takes exception to Mr. Miller's statement in his Proposed Candidate's Statement that he is, "...experienced and qualified in every primary area of the law..." on the grounds that the statement is vague and misleading to the public as it overstates his experience in light of all the different areas of legal practice there are in the legal field. Petitioner contends that there are numerous areas of legal practice and there is no legally or professionally established list which constitutes "every primary area of the law" to which Mr. Miller can reference.

In opposition, Mr. Miller submits that he has accurately identified his qualifications and experience stating that he is the only candidate that practices in all five primary areas of the law as designated by the San Diego Superior Court: Civil Division, Criminal Division, Family Law Division; Probate Division and Juvenile Division. (Miller Decl. ¶¶ 1-6, 43-43.)

The Court finds that Mr. Miller's use of the term "in EVERY primary area of the law" is neither false nor misleading according to the evidence presented and under the facts and circumstances of this case. Petitioner's request to strike this language is denied.

Next, Petitioner challenges Mr. Miller's use of the term "Judge pro Tem" in both the first and third paragraphs of his proposed Candidate's Statement as improper and misleading to the general public. Petitioner contends that the term "Temporary Judge" is how the position is defined by both the California State Bar and the San Diego Superior Court. Petitioner submits that at least one Court has previously opined that any use of the word "Judge" whether alone or in combination with another word is improper for inclusion into a Candidate's Statement when describing qualifications. (Citing *Luke v. Superior Court* (1988) 199 Cal.App.3d 1360.)

In opposition, Mr. Miller argues that the petitioner's points and authorities are misleading. First, petitioner cites the *Sallinger* and *Luke* cases (petitioner's brief at p. 12.) Mr. Miller points out that *Sallinger* is cited for the proposition that the ballot designation (not the Candidate Statement) should not be misleading; that case also makes reference to the "designation" which is, in fact, the designation of occupation on the ballot. Mr. Miller submits that he has not designated himself as a Judge Pro Tem on his ballot designation, rather, it is a reference to his experience within the 20 words of his Candidate Statement. Similarly, in *Luke v. Superior Court* the Court determined that a ballot designation of "Judge Pro Tem" was misleading as it was not the principal occupation of the candidate. Mr. Miller asserts that the distinction lies in describing oneself as a Judge Pro Tem for occupational purposes in the ballot designation as opposed to referencing that same work as experience in the 200 word Candidate Statement. Mr. Miller maintains that petitioner's cite to a local Superior Court Ruling by the Honorable Jay Bloom is also distinguishable. Mr. Miller contends that in Judge Bloom's ruling, he was determining whether a candidate could use the phrase "Judge Pro Tem" as his "occupation" at the top of his 20-0 word Candidate Statement. In that race, the judicial candidate was not merely citing his experience as Judge Pro Tem in his 200 words, but rather suggesting at the top of the 200 words that this was his occupation. Mr. Miller acknowledges that in his ruling, Judge Bloom offered as dicta in his ruling that he did not believe "Judge Pro Tem" was an appropriate term, referring to CRC Rule 2.810-2.834. However, Mr. Miller notes that notwithstanding the dicta in Judge Bloom's opinion and the CRC, the common reference to the position of these volunteer judges is "Judge Pro Tem," even on the Court's website and in materials promulgated by the California Judges Association Committee on Judicial Ethics

and the Registrar of Voters herself. (See Miller Decl. ¶¶ 27, 31, 33, 32, 34, 35, 36; Exhs. 17, 18, 19, 20, 21, 22, 25.)

The Court finds that Mr. Miller's use of the term "Judge Pro Tem" is appropriate for his Candidate Statement because it refers to services he has performed and does not refer to "Judge Pro Tem" as his occupation. Petitioner's writ is denied with regard to Mr. Miller's use of the term "Judge Pro Tem," on his Candidate Statement.

Next, Petitioner contends that the second paragraph of Mr. Miller's Candidate Statement is an unlawful attack on both of Mr. Miller's opponents in the election and does not pertain to Mr. Miller's own qualifications as he cannot be experienced in every area of legal practice. Petitioner takes the position that Mr. Miller is insinuating that his opponents are not experienced in the same areas of law as Mr. Miller, and therefore his opponents in the judicial campaign are not qualified to sit as judges.

In opposition, Mr. Miller argues that the second paragraph of his Candidate Statement does not attack his opponents and is not misleading. Mr. Miller submits he does not even reference his opponents. He takes the position that the second paragraph is his platform and constitutes political speech expressing his viewpoint. Mr. Miller contends he is expressing his own thoughts and impressions of the present Court system which constitutes his commentary on a deficiency in our local Courts and which has been his principal platform in now two campaigns for judicial office. (Miller Decl. ¶¶ 3-4, 40-41 and 44-46.) Moreover, Mr. Miller contends that he has lawfully expressed his view of the 2010 election, and he expresses his belief that over 440,000 voters supported his platform. Mr. Miller claims this characterization, is a political statement of the import of that vote constitutes his viewpoint, which taken in the context of the entire document, cannot be said to be false or misleading be clear and convincing evidence.

The Court finds that the second paragraph in Mr. Miller's Candidate Statement is misleading based on the evidence provided because it appears Mr. Miller is combining his votes from the Primary and General election in 2010 to arrive at the stated 440,000 vote figure. Mr. Miller's statement that "Over 440,000 voters in the 2010 Elections states that it is time for real change in our courts" is inaccurate and misleading both to this Court and to the general voting public. As set forth in Mr. Amador's reply brief at p. 8:13-p. 9:14 the 2010 San Diego Gubernatorial Election records for the Primary and General Election show that 138,274 people voted for Mr. Miller in the Primary Election, and 311,939 people voted for Mr. Miller in the General Election. (See Amador Decl.; Exh. A.) Consequently, based on clear and convincing evidence before it, the Court finds the following statement in Mr. Miller's Candidate Statement is misleading and is ordered stricken; "Over 440,000 voters"

The first sentence in paragraph 2 is amended to read as follows:

"Received over 440,000 votes in the 2010 Elections. It is time for a real change in our courts."

Moreover, the Court agrees with Petitioner Amador and finds, based on the evidence, that the remaining language in paragraph 2 is ambiguous and suggests that the voters made a decision or statement that they did not make. The remaining language in paragraph 2 is amended to read as follows:

"No more "establishment" judges. No more "single area" government attorneys riding on a title to the bench."

Paragraph two will read as follows:

Received over 440,000 votes in the 2010 Elections. It is time for a real change in our courts. No more "establishment" judges. No more "single area" government attorneys riding on a title to the bench.

Finally, Petitioner challenges the slogan used by Mr. Miller at the bottom of the Candidates Statement stating: "A Judge From San Diego for San Diego" implies that Mr. Miller is already a judge, Petitioner submits that this is an improper designation in violation of the Elections Code as Mr. Miller is not a Judge and this should be stricken in its entirety. The Court notes that in his opposition, Mr. Miller does not address the propriety of slogan he uses at the bottom of his Candidates Statement stating: "A Judge

From San Diego for San Diego." In any event, the Court agrees with Petitioner Amador that this statement constitutes an improper designation in violation of the Elections Code because Mr. Miller is not a Judge. Therefore, the Court orders this statement to be amended as follows:

Paragraph eight (the last sentence on the Candidate Statement) will read as follows:
"A Judicial Candidate From San Diego for San Diego."

The Court denies Petitioner's request for an award of attorney's fees and costs at time.

IT IS SO ORDERED.