(No. 77 CC 1.—Complaint dismissed.)

In re CIRCUIT JUDGE PAUL F. ELWARD of the Circuit Court of Cook County, Respondent.

Order entered June 23, 1977.—Motion for reconsideration denied August 31, 1977.

SYLLABUS

On March 17, 1977, the Judicial Inquiry Board filed a multi-paragraph complaint with the Courts Commission, charging the respondent with conduct that brings the judicial office into disrepute. In summary form, the allegations were: that pursuant to the Illinois Constitution, the respondent filed a declaration of candidacy to succeed himself, that is, to be retained in judicial office at the November, 1976 general election; that the Chicago Council of Lawyers, a local bar association, determined that the respondent should not be retained in office and issued a report to that effect; that prior to the general election, with the respondent's approval, a committee known as "Citizens Committee to Retain Judge Paul Elward" caused advertisements to appear in Chicago area newspapers; that said advertisements "created the false impression" that the Council supported the retention of the respondent, by materially misrepresenting the evaluation of the respondent by the Council; and that by engaging in said conduct, the respondent violated Supreme Court Rule 61(c)(4) (Ill. Rev. Stat., 1976 Supp., ch. 110A, par. 61(c)(4)) and Canon 7B(1)(c) of the Code of Judicial Conduct of the American Bar Association.

Held: Complaint dismissed.

Devoe, Shadur & Krupp, of Chicago, for Judicial Inquiry Board.

Don H. Reuben and Leonard M. Ring, both of Chicago (Samuel Fifer, Richard L. Wattling and Karla Wright, of counsel), for respondent.

Before the COURTS COMMISSION: GOLDENHERSH, J., chairman, and EBERSPACHER, STAMOS, HUNT and MURRAY, JJ., commissioners. ALL CONCUR.

ORDER

Pursuant to article VI, section 12(d) of the Illinois Constitution, the respondent, Paul F. Elward, a judge of the circuit court of Cook County, filed a timely declaration of candidacy to succeed himself and thus became subject to a "retention election" at the general election on November 2, 1976. The Chicago Council of Lawyers, stipulated by the parties to be an association of lawyers with a membership in excess of 1,000 and with representation as a bar association in the House of Delegates of the American Bar Association, issued a report setting forth its evaluation of all judges of the circuit court of Cook County seeking retention in the November 1976 general election. Its evaluation of the respondent, with the portions relevant to the instant Complaint italicized, was as follows:

> "Judge Elward has been in the Law Division (except for a brief interval in the Criminal Division in 1974-75) since 1971. During that time he has had several assignments, including at one time a highly controversial new call specifically designed to try to move cases along more quickly to trial. He is *a person of substantial intellectual ability who works hard*, but reports from many lawyers also indicate clearly that he has a terrible judicial temperament characterized by extreme rigidity, unreasonable demands and positions, and closed-mindedness. His efforts *to achieve worthy objectives—such as avoiding delays in the court process* attributable to dilatory lawyers—have in several cases been vitiated by the rigidity and excessive zeal with which he has attempted to pursue them. Because of his clear lack of judicial temperament, the Council concludes that he should not be retained as a judge."

Copies of the reports were sent to each judge so evaluated, including the respondent.

Prior to October 28, 1976, the Committee on Candidates of The Chicago Bar Association, and the membership of the association, had voted to recommend that the respondent not be retained in office.

With the respondent's approval, a committee known as "Citizens Committee to Retain Judge Paul Elward" caused an advertisement to appear, on October 28, 1976, in certain suburban newspapers and on November 1, 1976, in the Chicago Sun Times. *Inter alia*, the advertisements contained a quotation from an editorial which appeared in the Chicago Tribune on December 17, 1974, a statement by a former president of The Chicago Bar Association, and the following:

"* * * a person of substantial intellectual ability who works hard * * * to achieve worthy objectives—such as avoiding delays in the court process.

CHICAGO COUNCIL OF LAWYERS"

The Complaint charges that:

"5. In the form in which they were published, the advertisements * * * were materially misleading as to, and materially misrepresented, the evaluation of Respondent by the Council. By causing the advertisement to appear containing only the truncated version of the Council's evaluation * * *, Respondent created the false impression that the Council had recommended Respondent for retention, when the opposite was true. By said conduct Respondent also created the false impression that he had some significant bar association support for retention, when the opposite was true. Prior to the appearance of said advertisements, the Chicago Bar Association Committee on Candidates and the membership of the Chicago Bar Association had also voted to recommend that Respondent not be retained in office.

6. By engaging in the aforesaid conduct, Respondent violated Rule 61(c)(4) of the Illinois Supreme Court, which provides:

'*Avoidance of Impropriety.* A judge's official conduct should be free from impropriety and the appearance of impropriety; he should avoid infractions of law; and his personal behavior, not only upon the bench and in the performance of judicial duties, but also in his everyday life, should be beyond reproach.'

and Canon 7B(1)(c) of the American Bar Association Code of Judicial Conduct, which provides in relevant part:

'(1) *A candidate, including an incumbent judge, for a judicial office* that is filled either by public election between competing candidates or on the basis of a merit system election:

* * *

(c) *should not* make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or *misrepresent his* identity, *qualifications*, present position or other facts. [Emphasis added]'

Without limitation to the foregoing, Respondent's aforesaid conduct brought the judicial office into disrepute in violation of Section 15(c) of Article VI of the Illinois Constitution."

Relying upon *Vanasco v. Schwartz*, 401 F. Supp. 87 (*aff'd* without opinion, 423 U.S. 1041), the respondent argues that he was engaged in a campaign for retention, that "campaign speech" is protected under the first amendment, and short of calculated falsehood may not be controlled or curtailed. He argues that the dissemination of the matters excerpted from the Council's statement does not constitute "calculated falsehood," that his advertisement was permissible campaign speech protected by the first amendment, that this Commission is without jurisdiction to adjudicate the charges made in

the Complaint and that the proceeding must be dismissed.

We do not agree that this Commission is without jurisdiction in this proceeding. Assuming, *arguendo*, that campaign speech short of calculated falsehood enjoys the protection of the first amendment, this Commission is the tribunal which must make the determination whether the respondent's advertisement was a calculated falsehood. The ultimate issue presented here is whether the respondent engaged in conduct which was "prejudicial to the administration of justice" or which brought "the judicial office into disrepute" and we are not persuaded that even when campaign speech is involved, nothing short of the dissemination of calculated falsehoods would constitute such proscribed conduct.

Having concluded that this Commission has jurisdiction in this matter, we turn to the consideration of the merits. The respondent has filed two motions for judgment and argues that there is no evidence to support the charge of misconduct. We do not agree. Although the facts are stipulated and not in dispute, they are reasonably subject to conflicting interpretations. The motions for judgment are therefore denied.

In support of its position that the respondent's advertisement was materially misleading and misrepresented the evaluation of the respondent by the Council, and that it created the false impression that the Council had recommended the respondent for retention when the opposite was true, the Judicial Inquiry Board cites *P. Lorillard Co. v. F. T. C.*, 186 F.2d 52; *F.T.C. v. National Commission on Egg Nutrition*, 517 F.2d 485; and *E. F. Drew & Company v. F.T.C.*, 235 F.2d 735. All of these cases are distinguishable on their facts. In *Lorillard* the respondent cigarette company had stated in conclusional form the purported result of laboratory tests as reviewed in an article in the Reader's Digest. An examination of the opinion leaves little doubt that the

advertisements were clearly misleading. In *F.T.C. v. National Commission on Egg Nutrition*, the advertisements contained statements to the effect that there was no scientific evidence that increased intake of cholesterol resulting from eating eggs increased the risk of heart disease or related conditions when, in fact, such scientific evidence did exist. *Drew & Company* involved advertising which represented that oleomargarine was a dairy product. *In re Inquiry Relating to Judge Baker*, 218 Kan. 209, 542 P.2d 701; *Inquiry Relating to Judge Rome*, 218 Kan. 198, 542 P.2d 676; and *Halleck v. Berliner*, 427 F. Supp. 1225, cited by the Judicial Inquiry Board, are so clearly distinguishable on their facts that no further discussion of them is required. The Judicial Inquiry Board has not cited, and we have not found, a case which involved only the excerpting, without alteration, of the favorable portions of a statement, which, on the whole, was unfavorable. The determination whether the effect of the advertising was to create the false impressions charged in the Complaint must be made in the light of what could reasonably be implied or concluded under all of the surrounding circumstances.

We find analogous the test which has been applied in determining whether in the light of the circumstances under which they were made, omissions to state a material fact in a registration statement, filed with the Securities and Exchange Commission, were misleading. The rule applied is that "the adequacy of disclosure of material information must be evaluated by a consideration of the 'total mix' of all information conveyed or available to the investors [voters]." See *Spielman v. General Host Corp.*, 402 F. Supp. 190, and cases there cited, *aff'd*, 538 F.2d 39.

The "total mix" shown by this record consists of an article which appeared in the Chicago Tribune on July 30, 1976, stating that the Independent Voters of Illinois had recommended against the respondent's retention; an

article which appeared in the Lerner newspapers on August 15, 1976, stating that the Independent Voters of Illinois had voted to oppose the respondent; an article which appeared in the Chicago Daily News on September 22, 1976, stating that 12 Cook County circuit judges, including the respondent, were found to be unqualified for retention by the Chicago Council of Lawyers; articles in the Chicago Tribune on September 22, 1976 and September 23, 1976, purporting to quote from the report of the Council to the effect that the respondent has a "terrible judicial temperament" and should not be retained in office; an article in the Chicago Sun Times on September 23, 1976, again reviewing the Council's criticism of the respondent; an article in the Chicago Daily Law Bulletin on Thursday, September 30, 1976, stating that The Chicago Bar Association's candidates committee had recommended against the respondent's retention; an article that appeared in the Chicago Daily News on September 30, 1976, also reporting the action of The Chicago Bar Association committee; a similar article which appeared in the Chicago Sun Times on October 1, 1976; an article which appeared in the Chicago Tribune on October 1, 1976, again reviewing the actions of The Chicago Bar Association and the Chicago Council of Lawyers; a similar article on the same date which appeared in a different section of the Tribune; an article which appeared in the Sun Times on October 23, 1976, reviewing the action of the Independent Voters of Illinois; an article which appeared on October 22, 1976 in the Chicago Daily Law Bulletin, reviewing the actions taken by The Chicago Bar Association; a similar article which appeared in the Chicago Sun Times on October 22, 1976; a similar article on the same date in the Chicago Daily News; and a similar article on October 22, 1976 in the Chicago Tribune. In addition to the foregoing, two articles appeared in the Sun Times on October 23, 1976;

on October 25th, editorials urging that the respondent not be retained appeared in the Sun Times and Daily News; and on October 29, 1976 articles unfavorable to the respondent appeared in the Chicago Tribune. The Chicago Bar Association, in paid newspaper advertisements, announced a list of candidates whom it endorsed and a list of those whom it opposed for retention. On November 1, 1976, the Daily News, the Sun Times, the Tribune and the Chicago Daily Defender, in their respective lists of endorsements, urged a "no" vote on the respondent's retention. Measured against this "total mix", we conclude that the respondent, in the use of excerpts from the Council's statements, did not create the false impression that the Council had recommended him for retention or that he had significant bar association support.

Section 12(d) of article VI of the Constitution provides that to be retained in office a judge must receive the affirmative vote of 3/5 of the electors voting on the question and both Supreme Court Rule 70 (Ill. Rev. Stat., 1976 Supp., ch. 110A, par. 70), and Canon 7 of the Code of Judicial Conduct adopted by the American Bar Association, recognize that a judge seeking retention may find himself confronted with the necessity of mounting a campaign. On this record, we hold that the use of the advertisements in the manner alleged in the Complaint did not constitute conduct that was prejudicial to the administration of justice or that brought the judicial office into disrepute. The Complaint is, accordingly, dismissed.

Complaint dismissed.