

Court Strikes Key Provisions Of NY Judicial Conduct Code

BY LAZAR EMANUEL

The decision of Federal District Judge David N. Hurd (Northern District, NY) in *Spargo v. New York State Commission on Judicial Conduct* (New York Law Journal, February 26, 2003) has received extensive news and editorial coverage. The decision requires careful study for its impact on New York's judicial system and on New York lawyers involved in political or election activity. In his decision, Judge Hurd struck down as unconstitutional Sections 100.1, 100.2(A), 100.5(A)(1)(c)-(g) and 100.5(A)(4)(a) of New York's Code of Judicial Conduct. (Judiciary Law; 22 NYCRR Part 100). Judge Hurd relied on the Supreme Court's decision in *Republican Party of Minnesota v. White, U.S.*, No. 01-521, June 27, 2002 (see, NYPRR, September 2002, page 6). In *White*, the Supreme Court had struck down as an unconstitutional restraint on free speech a provision of the Minnesota Code which prohibited judicial candidates from "announcing" their views on "disputed legal or political issues." The Minnesota provision was essentially similar to provisions in the ABA and New York codes on judicial conduct.

Plaintiff Thomas J. Spargo is a Supreme Court Justice for New York's Third Judicial District. Defendant Commission (Defendant Henry T. Berger, Chairman, and Defendant Gerald Stern, Administrator) is the body charged with responsibility "to receive, initiate, investigate and hear complaints regarding the conduct, qualifications, and performance of judges" in the New York court system. The Commission is made up of eleven members appointed in varying numbers by the Governor, the Chief Judge, and leaders of the state legislature (Judiciary Law § 41). The Commission is authorized to impose sanctions for judicial misconduct, including admonishment, censure and removal from office.

Commission's Allegations

The dispute between the Commission and Judge Spargo was triggered by the Commission's complaint concerning conduct of Judge Spargo which occurred prior to his election as Supreme Court judge. Specifically, the Commission alleged the following acts:

- (1) in his campaign for election as Berne Town Court Justice, Judge Spargo offered items of value to voters to induce them to vote for him;
- (2) in criminal cases tried before him as Town Justice in 2001-2, Judge Spargo failed to disclose to defense lawyers that he had represented the campaign of the District-Attorney-elect and that the campaign owed him \$10,000 for his legal services;
- (3) while attending sessions for the recount of presidential votes in Florida during the 2000 presidential campaign, Judge Spargo "participated in a loud and obstructive demonstration against the recount process outside the offices of the Miami-Dade County Board of Elections;"
- (4) Judge Spargo attended a Monroe County Conservative Party event in May 2001 and served as keynote speaker while he was serving as a Town Court justice and was campaigning for election as a Supreme Court judge; and
- (5) in his campaign for election as a Supreme Court judge, Judge Spargo's campaign committee

paid \$5,000 to Jane McNally (one of the other plaintiffs in the action), a volunteer who did not expect to be paid and did not request payment, and \$5,000 to a consulting firm headed by another supporter, although there was no legal obligation to make the payment.

Plaintiffs Allege Invalid Restraints

On Free Speech

In response to the Commission's complaint, Judge Spargo joined with Jane McNally and Peter Kermani, chairperson of the Albany County Republican Party, to challenge the constitutionality of the New York Code under which the Commission was acting. The plaintiffs alleged that the Code of Judicial Conduct infringes upon the rights to free speech and equal protection of the laws conferred by the First and Fourteenth Amendments and guaranteed by the New York State Constitution.

At the outset of his analysis of the issues involved, Judge Hurd made it clear that he was not deciding the facts:

Note that whether Spargo actually engaged in the conduct alleged to violate the Rules is irrelevant for the purpose of this decision. It is also irrelevant, if Spargo did engage in the conduct, whether such conduct constituted a violation of the Rules. No opinion is offered as to whether that alleged activity of Spargo, if true, would bring disrespect to the judiciary.

Judge Hurd proceeded to consider the relevant provisions of the New York Code of Judicial Conduct. These are:

§100.1. A judge shall uphold the integrity and independence of the judiciary. An independent and honorable judiciary is indispensable to justice in our society. A judge shall participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved...

§100.2(A) A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary...

§100.5 A judge or candidate for elective judicial office shall refrain from inappropriate political activity. (A) Incumbent judges and others running for public election to judicial office.

- (1) Neither a sitting judge nor a candidate for public election to a judicial office shall directly or indirectly engage in any political activity except (i) as otherwise authorized by this section or by law, (ii) to vote and to identify himself or herself as a member of a political party, and (iii) on behalf of measures to improve the law, the legal system, or the administration of justice. Prohibited activity shall include:

- (c) engaging in any partisan political activity, provided that nothing in this section shall prohibit a judge or candidate from participating in his or her own campaign for elective judicial office or shall restrict a non-judge holder of public office in the exercise of the functions of that office;

- (d) participating in any political campaign for any office or permitting his or her

- name to be used in connection with any activity of a political organization;
- (e) publicly endorsing or publicly opposing (other than by running against) another candidate for public office;
- (f) making speeches on behalf of a political organization or another candidate;
- (g) attending political gatherings.

(4) A judge or non-judge who is a candidate for public election to judicial office:

- (e) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary and shall encourage members of the candidate's family to the same standards of political conduct in support of the candidate as apply to the candidate;...

Judge Hurd Disposes of Other Issues

Before deciding the constitutional issues, Judge Hurd disposed of several other subsidiary issues. He considered first of all the right of a federal judge to intervene in a proceeding pending before a state agency or court. He acknowledged that "there is a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances." *Middlesex County Ethics Committee v. Garden State Bar Ass'n.*, 457 U.S. 423, 431. However, the following circumstances dictated that he should intervene in this case.

- (1) Plaintiffs McNally and Kermani are not judges or judicial candidates and, therefore, not subject to the Commission's jurisdiction. Their rights to free speech and association cannot be determined by the Commission;
- (2) The language creating the Commission's authority does not enable it to decide constitutional challenges to the Code;
- (3) The Commission's argument that a judge facing misconduct charges can raise unconstitutionality as a defense to the charges has no merit because (a) if the defense is rejected by the Commission, review by the Court of Appeals is probably not mandatory; (b) the procedure followed by the Commission does not ensure a full record enabling thorough review of constitutional issues; and (c) the Court of Appeals "has never undertaken a constitutional challenge to the rules on review of a Commission determination." In the one case cited by the Commission, the Court "did not consider a constitutional challenge to the Rules in the context of a disciplinary proceeding." *Nicholson v. State Comm'n. on Judicial Conduct*, 50 N.Y.2d 597 (1980).

Having decided to intervene, Judge Hurd proceeded to consider the issue of equal protection. Is it proper to place restrictions upon candidates for judicial office when similar restraints are not placed upon candidates for other public offices? Judge Hurd quoted the dissenting opinion of Justice Stevens in the *White* case, *supra*.

There is a critical difference between the work of a judge and the work of other public officials. In a democracy, issues of policy are properly decided by majority vote; it is the business of legislators and executives to be popular. But in litigation, issues of law or fact should not be determined by popular vote; it is the business of judges to be indifferent to popularity.

Judge Hurd concluded that it is constitutionally permissible to treat judicial candidates differently from candidates for non-judicial public offices. "The restrictions placed upon judges and judicial candidates do not deny them equal protection of the laws."

Deciding the Other Constitutional Issues

Judge Hurd turned next to the other constitutional issues raised by the parties. First of all, he rejected the Commission's argument of immunity against suit under 42 U.S.C. § 1983. [Editor's Note: This section imposes civil liability upon any person who subjects any citizen of the United States "to the deprivation of any rights, privileges or immunities secured by the Constitution and laws..."] Although suits against the states are generally barred under the Eleventh Amendment, declaratory and prospective injunctive relief are available (citing *Kostok v. Thomas*, 105 F.3d 65 (2d Cir. 1997).

On the principal issue of plaintiffs' First Amendments rights to free speech, Judge Hurd found:

- (1) The parties agree that the Code provisions constitute a prior restraint. The question is whether the restraint is constitutionally permissible. A prior restraint on protected speech is constitutionally permissible only if it is narrowly tailored to serve a compelling state interest. *White, supra*, at 54. Defendant Commission argues that the state interest being served is an independent judiciary.
- (2) If the court accepts that an independent judiciary is a compelling state interest, the court must then define "independent judiciary" and decide whether the New York Rules are narrowly tailored to achieve it. The Court finds that independence in this context is "the ability of judges to make their decisions free of the control or influence of other persons or entities."
- (3) The New York Rules for judicial candidates and their families essentially "prohibit judges and judicial candidates from any political activity except their own judicial campaign." The only conceivable connection between political activity and judicial independence is that the activity would create a bias in the candidate for or against an issue of law or a particular party. "Even if this attenuated connection was valid, it does not save the Rules."
- (4) The Supreme Court has determined that a rule prohibiting announcing views on disputed legal or political issues by judicial candidates is not narrowly tailored to serve the compelling interest of a judiciary free from bias. *White, supra*. No one becomes a candidate for judicial office without first having engaged in political activity. "There is no support for the proposition that one-time participation in political activity impedes the making of independent judgments any less than current participation in some political activity might."
- (5) When a judge is influenced or biased for or against a party for political reasons, the proper remedy is recusal.
- (6) It is misleading to argue that there is a long-standing tradition in favor of restraints on the speech of judicial candidates. The ABA Code of Judicial Conduct was not adopted until 1924. Even if the restraints were the product of a long tradition, they must fall before the core free-speech requirements of the First Amendment because the New York Rules are not narrowly tailored to serve an overriding state interest.
- (7) The general directives to judges in Sections 100.1 and 100.2(A) of the New York Code are vague and lack specificity. The language "uphold the integrity and independence of the

judiciary" provides "no reasonable opportunity for a person of any level of intelligence to know what conduct would be prohibited." Judge Hurd concluded by declaring Sections 100.5(A)(1)(c)- (g) and 100.5(A)(4) void as invalid prior restraints on the plaintiffs' First Amendment rights . He also declared Sections 100.1 and 100.2(A) void for vagueness in that they do not have specific standards for conduct and do not permit persons of reasonable intelligence to know what is prohibited. He enjoined the Commission from proceeding further under these sections of the Code. He allowed the Commission to continue its inquiry under other sections of the Code which were not "constitutionally challenged."

Attorney General Files Appeal

On Friday, March 7, the attorney general's office filed its appeal from Judge Hurd's decision. The notice of appeal raises two issues:

- (1) Should the District Court have abstained from exercising jurisdiction; and
- (2) Did the District Court err in finding the code provisions, tactically unconstitutional and in granting plaintiffs injunctive relief? The notice was filed by Assistant Attorney General Patrick F. MacRae.

In the meantime several other cases testing whether the provisions controlling judicial electioneering are constitutional under *White and Spargo*, are proceeding through the administrative and judicial machinery controlling judicial conduct. On February 19, 2003 Nassau County Supreme Court Judge Ira Raab was censured by the Commission on Judicial Conduct for violating the Code by participating in a political party's phone bank and by attending the same party's screening panel. Judge Raab has appealed the Commission's decision and the matter will be argued before the Court of Appeals on May 7. The appeal will turn on the constitutional issues raised by *White and Spargo*.

Lazar Emanuel is the publisher of NYPRR.