

IN THE
UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET No. 03-7250
(CROSS-APPEAL DOCKET No. 03-7289)

THOMAS J. SPARGO, ET AL.,

PLAINTIFFS-APPELLEES-CROSS-APPELLANTS,

v.

NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT, ET AL.,

DEFENDANTS-APPELLANTS-CROSS-APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

**BRIEF FOR AMICI CURIAE
NEW YORK STATE BAR ASSOCIATION,
SUFFOLK COUNTY BAR ASSOCIATION AND
ASIAN AMERICAN BAR ASSOCIATION OF NEW YORK
IN SUPPORT OF DEFENDANTS-APPELLANTS-
CROSS-APPELLEES**

INTEREST OF AMICI CURIAE

The New York State Bar Association (“NYSBA”), founded in 1876, is the statewide association for lawyers in New York. With over 73,000 members, it is the largest voluntary state bar association in the nation.

The 3,500-member Suffolk County Bar Association represents the lawyers practicing in that eastern Long Island county. The association, in existence since 1908, has been active in the judicial selection process and has striven to enhance public trust and confidence in the judiciary.

The Asian American Bar Association of New York, founded in 1989, is an organization of Asian and Pacific American attorneys dedicated to the advancement of diversity in the legal profession.

The issues raised on this appeal concern the power of the State of New York to regulate certain extra-judicial activity on the part of state court judges. Specifically, the decision of the court below calls into question the constitutionality of rules governing political activity by judges in New York State's court system, whether they be elected or appointed jurists. These subjects have historically been of no less central importance to the organized bar than to the judicial branch.

The NYSBA has played a key role in the development and promulgation of ethical standards for judges. It studied, reviewed and promoted the adoption in New York of the Code of Judicial Conduct in 1973, following the initial approval of the Model Code by the House of Delegates of the American Bar Association ("ABA"), and again in 1993, after the ABA substantially revised the Model Code. In both instances, the views of the NYSBA and other bar associations throughout the state played a pivotal role in shaping the provisions of the judicial conduct

rules ultimately adopted by the Chief Administrator of the Courts of the State of New York. The NYSBA continues to play a major role in the interpretation of the New York Code of Judicial Conduct through its Committee on Professional Ethics, which has published dozens of such opinions in the past (*see* footnote 9 below) and stands ready to issue advisory opinions concerning the application of the Code to specific proposed future conduct.

The NYSBA has in other ways devoted substantial resources to the goal of promoting trust and confidence in the judiciary and the judicial discipline process, including through the following entities: (a) the Judicial Section, to which nearly 400 sitting judges belong; (b) the Committee on Judicial Campaign Conduct, which has fostered the creation of judicial campaign monitoring committees throughout New York State and has prepared a written guide for conducting judicial campaigns in New York; (c) the Special Committee to Review the Code of Judicial Conduct; (d) the Special Committee on Procedures for Judicial Discipline; (e) the Special Committee on Public Trust and Confidence in the Legal System; and (f) the Special Committee on Judicial Independence.

The district court in this case struck down important provisions of the Code of Judicial Conduct as adopted in New York State. Because of the NYSBA's substantial experience in reviewing and interpreting the Code, and because of the interest and dedication of all of the *amici curiae* in ensuring the integrity of the

judiciary, we believe that this brief will provide a point of view that may not be presented by the parties and will be of special interest and assistance to the Court.

All parties have consented to the filing of this brief in accordance with Fed. R. App. P. Rule 29(a).

ARGUMENT

POINT I

THE POLITICAL ACTIVITY PROVISIONS OF THE NEW YORK CODE OF JUDICIAL CONDUCT SERVE A COMPELLING STATE INTEREST

One of the fundamental underpinnings of American society is the principle of “equal justice under law.” To safeguard this precept, we have created a judicial branch of government that stands as a disinterested arbiter that owes its only allegiance to the rule of law. We expect that the members of the judiciary will provide us with unbiased and impartial decision-making in all matters that come before them, and that they will carry out their duty without regard to public or political pressure.

Respect for those who administer our justice system is therefore essential to the legitimacy of our democratic form of government. If those who should be using the legal system lack confidence in its fairness, voluntary obedience to the rule of law and the effective operation of the legal system are undermined.

Consequently, we must do everything possible to promote public trust and confidence in our legal system, and in our judicial officers in particular.

The Code of Judicial Conduct, as adopted in New York, is intended to serve this critical purpose. To maximize the public's respect for our judges, we must require them to adhere to the highest ethical standards. This principle is emphasized in the Preface to the New York Code of Judicial Conduct, which states:

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and highly visible symbol of government under the rule of law.

NYSBA Code of Judicial Conduct, Preface (as adopted effective April 13, 1996);¹

see also 22 N.Y.C.R.R.² § 100.1 (“An independent and honorable judiciary is

¹ The rules contained in 22 N.Y.C.R.R. Part 100 were adopted, in accordance with N.Y. Const. art. VI, §§ 20(b) and 20(c), by the Chief Administrator of the Courts in consultation with the Administrative Board of the Courts of the State of New York. The preamble and the many paragraphs of commentary to the New York Code of Judicial Conduct, in contrast, were adopted by the NYSBA's House of Delegates. While the commentary thus does not have the force of law, it is intended to provide “guidance, through explanation and example, as to the purpose and meaning of the Canons and the Sections, but is not intended to state additional rules.” M. Peter Moser, *The 1990 ABA Code of Judicial Conduct: A Model for the Future*, 4 Geo. J. Legal Ethics 731, 735 (1991).

indispensable to justice in our society. A judge should 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.”).

Indeed, to ensure that respect for the judiciary is maintained, it is essential that judges be held to *higher* standards of conduct than members of the general public. Thus, not only must actual bias and prejudice in the justice system be avoided, but also efforts must be made to dispel the perception of partiality. *See Matter of Watson*, ___ N.Y.2d ___, slip op. at 12-13 (N.Y. June 10, 2003). As the commentary to Canon 2 of the Code of Judicial Conduct counsels:

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge’s conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. . . . Actual improprieties under this standard include violations of law, court rules or other specific provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.

² The New York Code of Rules and Regulations (N.Y.C.R.R.) is the equivalent of the Code of Federal Regulations (C.F.R). All state administrative rules and regulations are codified therein. Title 22 of the N.Y.C.R.R. contains the rules and regulations of the judiciary.

NYSBA Code of Judicial Conduct, Comment ¶¶ 2.1, 2.2 (1996).

A judge's active involvement in partisan politics can create a public perception that the judge's decisions are being made for reasons other than the merits of the case. Even more significantly, political activity by judges creates a substantial risk of actual partiality and even improper influence or corruption in certain matters, thereby converting an unfortunate but reasonable perception into a dishonorable reality. *See Matter of Raab*, ___ N.Y.2d ___, slip op. at 12-13 (N.Y. June 10, 2003).

For these reasons, Canon 5 of the Code restricts the extent to which sitting judges may participate in the political process. Were a judge, for example, to act as a political party leader, or to campaign actively for or against or otherwise publicly endorse or oppose a particular candidate or party, or to participate in a candidate's fundraising activities, the public could justifiably believe that the judge may decide cases in favor of members of the judge's own party or treat members of the opposition party unfairly.³ This long-standing concern was expressed most cogently in the Canons of Judicial Ethics adopted by the ABA in 1924:

³ The district court's observation that recusal is an available remedy in cases where the judge is actually biased against a party, for political reasons or otherwise, *see Spargo v. New York State Comm'n on Judicial Conduct*, 244 F. Supp. 2d 72, 88-89 (N.D.N.Y. 2003), does not resolve the problem of public perception. Nor is it a practicable solution; under the district court's approach, a judge active in Democratic Party politics could be faced with an endless and unseemly string of

While entitled to entertain his personal view of political questions, and while not required to surrender his rights or opinions as a citizen, it is inevitable that suspicion of being warped by political bias will attach to a judge who becomes the active promoter of the interests of one political party as against another.

ABA, *Canons of Judicial Ethics*, Canon 28 (1924).⁴

A related concern is that a judge's involvement in partisan politics creates the possibility, or at least the appearance, that the independence of the judge may be compromised. An independent judiciary is central to our justice system. *See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 60 (1982) (the constitution "commands that the independence of the Judiciary be jealously guarded"). As one commentator explained:

[A]n independent judge gives every party a full and fair opportunity to be heard without regard to the party's identity or position in society. An independent judge presides impartially, free from extraneous influences and immune to outside pressure. An independent judge rules in good faith, determined to follow the law as she understands it, unmindful of possible personal, political or financial repercussions.

Steven Lubet, *Judicial Discipline and Judicial Independence*, 61 *Law & Contemp. Prob.* 59, 61 (1998). In short, an independent judge decides a case on its merits

recusal motions made by litigants who are members of the Republican Party, and *vice versa*.

⁴ The Code of Judicial Conduct does not prevent judges from participating in the political process by joining a political party, from voting, or from privately expressing views on candidates for public office, including candidates for the judiciary. *See* NYSBA Code of Judicial Conduct, Comment ¶¶ 5.2, 5.4 (1996). Only active, public involvement in partisan politics is restricted.

through the application of the rule of law, not because the government or a political leader wants the case decided in a certain way. *See Morial v. Judiciary Comm'n* 565 F.2d 295, 302 (5th Cir. 1977) (“The state’s interest in ensuring that judges be and appear to be neither antagonistic nor beholden to any interest, party or person is entitled to the greatest respect.”), *cert. denied*, 435 U.S. 1013 (1978).

The overarching precept that is protected through the prohibition of partisan political activity by members of the judicial branch of government is nothing less than due process of law. In *Matter of Raab*, ___ N.Y.2d ___, slip op. at 8-9, the New York Court of Appeals declared that “litigants have a right guaranteed under the Due Process clause to a fair and impartial magistrate and the State, as the steward of the judicial system, has the obligation to create such a forum and prevent corruption and the appearance of corruption, including political bias or favoritism.” Similarly, Justice Felix Frankfurter observed that:

judges are restrained in their freedom of expression by historic compulsions resting on no other officials of government. They are so circumscribed precisely because judges have in their keeping the enforcement of rights and the protection of liberties which, according to the wisdom of the ages, can only be enforced and protected by observing such methods and traditions.

Bridges v. California, 314 U.S. 252, 283 (1941) (Frankfurter, J., dissenting).

That most judges in the New York State court system are elected to office does not change this analysis:

Although the political elective process for the judiciary makes judicial candidates political party candidates, they are not as others. They may not indorse one another. They may not attack one another. They may not indorse or attack candidates, of their own or another party, for nonjudicial office. They may not contribute to the political war-chests of other candidates. They may appear at political meetings but must maintain political neutrality publicly, as to other candidates or issues not involving the courts. They are, in short, to be as non-partisan as the selection of Judges by election permits.

Rosenthal v. Harwood, 35 N.Y.2d 469, 473 (1974). The rules struck down by the district court, of course, apply equally to elected judges and the many judges who are appointed to their positions⁵ and thus have no intrinsic need to engage in partisan political activity.⁶

The provisions of the New York Code of Judicial Conduct struck down by the district court are prophylactic rules designed to preserve due process of law, in both appearance and actuality. When a judge actively engages in partisan activity, the judge is transformed in the eyes of the public from a fair and impartial arbiter into a politician. Involvement in the political process also creates a genuine risk of improper influence and actual partiality. It is the obligation of government to guard against these evils at all costs. Indeed, to paraphrase Justice Potter Stewart,

⁵ These include the judges of the Court of Appeals, the Court of Claims, the New York City Criminal Court, the New York City Family Court, certain judges of the New York City Civil Court and Housing Court, as well as judges appointed by the Governor or Mayor of the City of New York on an interim basis.

⁶ The same may be said for any justice of the Supreme Court, for example, who is at least 56 years of age when elected, and therefore will be ineligible (because of laws mandating retirement at age 70) to stand for re-election to judicial office.

writing in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 848 (1978) (Stewart, J., concurring), we can think of no governmental interest more compelling than a state’s interest in the quality and integrity of its judiciary.⁷

⁷ See also *Nicholson v. State Comm’n on Judicial Conduct*, 50 N.Y.2d 597, 607 (1980) (“the State has an overriding interest in the integrity and impartiality of the judiciary”); Stephanie Cotilla & Amanda Suzanne Veal, *Judicial Balancing Act: The Appearance of Impartiality and the First Amendment*, 15 Geo. J. Legal Ethics 741, 747 (2002) (“an impartial and independent judiciary is essential to the health of a well-ordered democracy[;] [l]imitations on what sitting judges may say and the political activities in which they may be involved have generally been accepted as necessary to ensure public confidence in the judicial system”).

POINT II

GUIDANCE REGARDING THE INTERPRETATION AND APPLICATION OF THE PROVISIONS OF THE CODE OF JUDICIAL CONDUCT IS AVAILABLE FROM A VARIETY OF SOURCES

The district court held that two provisions of the New York Code of Judicial Conduct are unconstitutionally vague, and proceeded to strike them down on that basis. While recognizing that 22 N.Y.C.R.R. §§ 100.1 and 100.2(A) are “affirmative directives to judges . . . designed to preserve an honorable, independent and impartial judiciary,” *Spargo v. New York State Comm’n on Judicial Conduct*, 244 F. Supp. 2d 72, 90 (N.D.N.Y. 2003), the court ruled that those provisions could not form the basis for judicial discipline in the State of New York. In so doing, the court failed to take into account the fact that the provisions in question do not stand alone, but must be interpreted and applied in the context of a variety of authorities that serve to inform their meaning.

Foremost among these authorities are the many decisions rendered in connection with the imposition of public discipline by the Commission on Judicial Conduct itself, and the opinions of the New York State Court of Appeals on review of those determinations. Additionally, because New York’s Code of Judicial Conduct is patterned on the ABA Model Code, and in many cases the New York Code contains the same language that is in effect in other states, a broad range of

judicial precedents from many states is available to New York judges seeking guidance on the parameters of any particular judicial conduct rule.

To the extent that these judicial authorities do not provide a direct and precise answer to a particular ethical question, any judge in the New York State court system may submit an inquiry to and receive guidance from the Advisory Committee on Judicial Ethics (“ACJE”). The ACJE was established in 1987 “to issue advisory opinions to judges and justices of the [New York] Unified Court System concerning issues related to ethical conduct, proper execution of judicial duties, and possible conflicts between private interests and official duties.” 22 N.Y.C.R.R. § 101.1; see also N.Y. Judiciary Law § 212(2)(l). While the written opinions rendered by the ACJE to individual members of the judiciary are confidential, the ACJE each year publishes scores of formal opinions (after deleting all names and identifying references) on a variety of topics. N.Y. Judiciary Law § 212(2)(l)(iii). Thus, not only is there a government-sanctioned entity available to answer judges’ questions as to the propriety of their conduct, but the ACJE has created a substantial and growing body of precedents – there are currently over 3,000 published ACJE opinions – to which New York judges can refer in dealing with ethical issues.

Significantly, if a judge seeks advice from the ACJE, receives an opinion, and acts in accordance with the findings or recommendations of the ACJE, those

actions are “presumed proper for the purposes of any subsequent investigation by the state commission on judicial conduct.” N.Y. Judiciary Law § 212(2)(l)(iv).

This mechanism provides New York State judges with the ability to obtain definitive advice on ethics issues on which they may rely in good faith without fear of disciplinary sanction. Thus, any judge with doubts as to the propriety under the Code of Judicial Conduct of certain proposed future conduct, whether it be political activity or otherwise, has recourse to a governmental system, the ACJE, that can provide the judge with conclusive guidance.⁸

In addition, many bar associations in New York State, including the NYSBA (through its Committee on Professional Ethics), the Association of the Bar of the City of New York (through its Committee on Professional and Judicial Ethics) and the New York County Lawyers’ Association (through its Committee on Professional Ethics) are available to issue written advisory opinions regarding the proposed future conduct of lawyers and judges. Often these opinions are published after all identifying references have been deleted.⁹

⁸ Informal telephonic advice from members of the ACJE is also available to judges seeking quick responses to questions of judicial ethics.

⁹ The NYSBA Committee on Professional Ethics, for example, has issued the following formal opinions addressing issues of judicial ethics (under the Code of Judicial Conduct or its predecessor, the Canons of Judicial Ethics): Formal Opinion Nos. 11 (1965), 19 (1965), 29 (1966), 29a (1967), 30 (1966), 39 (1966), 55 (1967), 57 (1967), 65 (1967), 65a (1970), 79 (1968), 91 (1968), 94 (1968), 118 (1969), 137 (1970), 137a (1971), 146 (1970), 146a (1970), 150 (1970), 164 (1970),

Lastly, as discussed above (in footnote 1), the Code of Judicial Conduct as adopted by the House of Delegates of the NYSBA contains many paragraphs of explanatory commentary. Patterned on the commentary in the ABA Model Code of Judicial Conduct, the New York commentary provides additional guidance to judges regarding the purpose and meaning of the provisions of the Code.

The provisions of the Code of Judicial Conduct that the court below struck down as unconstitutionally vague simply cannot be evaluated in a vacuum. Surrounding and amplifying the text of the rules are a broad range of authorities that provide guidance to judges as to what conduct is permitted and what is not. Any questions that might remain after study of the applicable body of nationwide precedents can be answered conclusively – at the cost of a postage stamp – through a written inquiry to the ACJE or, on an advisory basis, through telephonic advice from the ACJE or from opinions rendered by any one of a number of bar association ethics committees.

181 (1971), 186 (1971), 197 (1971), 210 (1971), 214 (1971), 216 (1971), 228 (1972), 232 (1972), 232 (1972), 240 (1972), 248 (1972), 250 (1972), 252 (1972), 263 (1972), 276 (1972), 280 (1973), 289 (1973), 301 (1973), 306 (1973), 308 (1973), 327 (1974), 342 (1974), 370 (1974), 384 (1975), 391 (1975), 491 (1978), 511 (1979), 520 (1980), 541 (1982), 548 (1983), 558 (1984), 568 (1987), 574 (1986), 581 (1987), 585 (1987), 586 (1987), 593 (1988), 594 (1988), 602 (1989), 612 (1990), 617 (1991), 632 (1992), 671 (1994), 673 (1995), 699 (1998), 701 (1998), 702 (1998), 703 (1998) and 706 (1998).

We note that a purely facial evaluation of the “vagueness” of disciplinary rules, such as those at issue here, could have widespread implications not only for the rules governing the conduct of judges, but for attorney discipline as well. Certain general provisions of the Disciplinary Rules of the New York Lawyers’ Code of Professional Responsibility (“Lawyers’ Code”) would arguably be susceptible to the same sort of attack if viewed in isolation, without the informing context of the body of precedents, commentary and other interpretations that has been developed over the past several decades.

For example, DR 1-102(A)(5) of the Lawyers’ Code broadly prohibits attorneys from engaging in “conduct that is prejudicial to the administration of justice.” 22 N.Y.C.R.R. § 1200.3(a)(5). The district court, if presented with a vagueness challenge to this rule, might well have found it infirm for the same reasons as the provisions of the Code of Judicial Conduct at issue here. Yet New York’s DR 1-102(A)(5) must be interpreted within the analytical framework created by the many judicial decisions and ethics committee opinions within New York¹⁰ that provide guidance to lawyers as to precisely what conduct violates the

¹⁰ The Model Rules of Professional Conduct have been adopted by 44 states and the District of Columbia. Model Rule 8.4(d) is identical to DR 1-102(A)(5). Consequently, much as judges may look to precedents from other states that have adopted the Code of Judicial Conduct with language identical or closely analogous to that adopted in New York, lawyers are able to seek guidance from a nationwide body of precedent on provisions such as this.

rule. *See, e.g., Matter of Chariff*, 221 A.D.2d 719 (3d Dep't 1995) (false notarization of pleading); *Matter of Sorid*, 189 A.D.2d 377 (2d Dep't 1993) (failure to cooperate with grievance committee); *Matter of Cohen*, 139 A.D.2d 221 (1st Dep't 1988) (evading a subpoena to testify in a criminal prosecution against former client); *Matter of Riccio*, 131 A.D.2d 973 (3d Dep't 1987) (failure to respond to numerous telephone and mail inquiries from clients regarding the status of their cases); *Matter of Higgins*, 105 A.D.2d 462 (3d Dep't 1984) (guilty plea to possession of marijuana *not* a violation); NYSBA Committee on Professional Ethics, Formal Opinion No. 749 (2001) (using computer technology to examine and trace e-mail and other electronic documents surreptitiously); NYSBA Committee on Professional Ethics, Formal Opinion No. 702 (1998) (lawyer-legislator practicing criminal law, even if the lawyer abstains from voting on the district attorney's budget); NYSBA Committee on Professional Ethics, Formal Opinion No. 683 (1996) (prosecutor exercising prosecutorial discretion to advance personal political interests); *see generally* Roy Simon, *Simon's New York Code of Professional Responsibility Annotated* 31-35 (2003).

If general provisions such as DR 1-102(A)(5) were subject to invalidation for vagueness, many ethical transgressions not specifically prohibited by other sections of the Code of Professional Responsibility could go unpunished. For example, while no lawyer should intentionally evade subpoenas or other legal

process -- the conduct at issue in *Matter of Cohen* -- no provision of the Code expressly states that lawyers may not do so. Because the drafters of attorney ethics rules cannot be expected to anticipate all permutations of unethical conduct, general prohibitions such as DR 1-102(A)(5), the boundaries of which are delineated jurisprudentially on a case by case basis, are necessary for the effective regulation of the bar as well as the bench.

In sum, judges can determine what conduct is, or is not, proscribed by the Code of Judicial Conduct by evaluating a nationwide body of precedents or by seeking advice from various sources. Importantly, they can obtain protection against disciplinary charges by seeking advice from the ACJE and complying with that advice. Accordingly, we respectfully submit that it is improper to analyze the “vagueness” of provisions of the Code of Judicial Conduct by viewing them, as did the court below, in isolation.

CONCLUSION

For the foregoing reasons, in the event this Court determines to intervene in the New York State judicial discipline process and reach the merits of this case, *amici curiae* respectfully request that the judgment of the district court be reversed.

Dated: June 17, 2003

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**CERTIFICATE OF COMPLIANCE
WITH FED. R. APP. P. 32(a)(7)(B)**

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the foregoing brief complies with Fed. R. App. P. 32(a)(7)(B)(i) with respect to the word type-volume limitation. The word processing equipment used to generate the foregoing brief indicates that the brief, excluding those portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), contains 4,664 words.

Dated: June 17, 2003

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