Matter of Spargo v. New York State Commission on Judicial Conduct

Supreme Court

Justice Colabella

This matter was assigned to the undersigned pursuant to Order of Hon. Jan H. Plumadore, Deputy Chief Administrative Judge, by Order dated September 10, 2004.

This petition is brought pursuant to CPLR Article 78 for a Writ of Prohibition (CPLR 7803[2]) to enjoin respondents from enforcing certain sections of the Code of Judicial Conduct, and to enjoin respondents from proceeding with or conducting any hearings with respect to petitioner, based on alleged violations of the First, Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article I, §§8, 9 and 11 of the New York State Constitution.

The Court has considered the Order to Show Cause and Verified Petition dated August 3, 2004; Affidavit of Thomas J. Spargo, sworn August 31, 2004; Respondents' Verified Answer and Return dated August 16, 2004, together with the Return; Respondents' Memorandum of Law dated September 17, 2004; Affidavit of Hon. Jonathan Lippman, sworn on September 14, 2004; Affirmation of Robert H. Tembeckjian, Esq., dated September 16, 2004 with 2 Exhibits; Petitioner's Memorandum of Law dated September 24, 2004; and Respondents' Reply Memorandum of Law dated September 29, 2004.

Petitioner (hereinafter "Spargo") is charged with six counts of misconduct in violation of the Rules of the Chief Administrator of the Courts Governing Judicial Conduct (22 NYCRR Part 100) and the Code of Judicial Conduct as specified in a Formal Written Complaint dated January 25, 2002, Supplemental Formal Written Complaint dated May 13, 2002, and Second Supplemental Formal Written Complaint dated March 23, 2004. Petitioner alleges that Sections 100.5(A)(1)(c), (d), (e), (f) and (g) of the Rules are facially unconstitutional and that the respondents' interpretation and application of Sections 100.1, 100.2(A), and 100.5(A)(4)(a) are unconstitutional as applied to petitioner.

Petitioner was elected Town Justice of the Town of Berne, Albany County, a part-time judicial position, in November 1999 and served in that position from January 1, 2000 through December 31, 2001. At the same time petitioner continued to work as an attorney during 2000 and 2001 while serving as part-time Town Justice. Thereafter, in November 2001, petitioner was elected a Supreme Court Justice for the Third Judicial District and has served in that position from January 1, 2002 to the present.

Petitioner is charged in the three Complaints with six counts of judicial misconduct.

In Charge I it is alleged that Spargo violated Sections 100.1, 100.2(A) and 100.5(A)(4)(a), in that, while campaigning for the election of Berne Town Court Justice in 1999, he offered items of value totaling approximately $2,000 to induce voters to vote for him, i.e., he distributed coupons redeemable for free gasoline, donuts and coffee, distributed free cider and donuts, purchased drinks for bar patrons, and purchased and delivered pizzas to a local school, and to other Town personnel.

In Charge II, it is alleged that Spargo accepted Albany County District Attorney-Elect Paul

Clyne as a law client in connection with a vote recount in a contested election for District Attorney, and that, while serving as Town Court Justice, Spargo presided over criminal cases prosecuted by the Albany County District Attorney's Office without disclosing to the defense that he had rendered services to Mr. Clyne or his committee, and that the District Attorney's campaign committee still owed Spargo $10,000 in legal fees. He is charged with conveying the impression that the District Attorney was in a special position to influence the judge in violation of Section 100.2(C), failing to disqualify himself in proceedings in which the judge's impartiality might reasonably be questioned in violation of Section 100.3(E)(1), and engaging in financial and business dealings that may reasonablely be perceived to exploit the judge's judicial position and involve the judge in a continuing business relationship with an attorney likely to come before the court in violation of Section 100.4(D)(1)(a), (b), and (c) and in violation of Sections 100.1 and 100.2(A).

In Charge III, it is alleged that Spargo engaged in prohibited partisan political activity, in violation of Section 100.5(A)(1)(c), participated in a campaign for political office other than his own in violation of 100.5(A)(l)(d), publicly endorsed another candidate for political office in violation of Section 100.5(A)(1)(e), and violated Sections 100.1 and 100.2(A) in that, in November 2000, he attended governmental sessions for the recount of presidential votes in Florida as an observer for the Republican Party and the George Bush/Richard Cheney presidential campaign, and in that capacity, on or about November 22, 2000, participated in a demonstration against the recount process outside the office of the Miami-Dade County Board of Elections with the aim of disrupting the recount process.

In Charge IV, it is alleged that on or about May 18, 2001, Spargo was the keynote speaker at the 39th Annual Monroe County Conservative Party Dinner, a fundraising event for the Conservative Party, thereby engaging in prohibited partisan political activity in violation of Section 100.5(A)(1)(c), permitting his name to be used in connection with the activities of a political organization in violation of 100.5(A)(1)(d), making a speech on behalf of a political organization in violation of 100.5(A)(1)(f), and attending a political gathering in violation of 100.5(A)(1)(g), as well as violating Sections 100.1 and 100.2(A).

In a Supplemental Complaint dated May 13, 2002, it is alleged that in December 2001, Spargo authorized his judicial campaign committee to pay $5,000 to Jane McNally, a delegate to the Democratic Judicial Nominating convention, after she nominated Spargo as its candidate for Supreme Court Justice; and that on or about January 4, 2002 he authorized his campaign committee to pay $5,000 to Empire Strategy Consultants, the principal of which is Thomas Connolly, the Rensallaer County Independence Party Chairman and a delegate to the Independence Party Judicial Nominating Convention, after Mr. Connolly supported and worked for Spargo's nomination as the Independence Party candidate. Spargo is charged with failure to maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary in violation of Sections 100.5(A)(4)(a), 100.1 and 100.2(A), by conveying the appearance that he paid Ms. McNally and Mr. Connolly for their efforts to obtain his nomination for public office in violation of the Election Law.

In the Second Supplemental Formal Written Complaint, it is alleged that Spargo solicited funds from attorneys who had cases before him or who regularly appeared in the courts to defray legal

expenses of his litigation against the Commission, and thereby lent the prestige of judicial office to advance his own private interest in violation of Section 100.2(C), and engaged in financial and business dealings that could reasonably be perceived to exploit the judge's judicial position in violation of Section 100.4(D)(1)(a), and in violation of Sections 100.1 and 100.2(A).

In this Article 78 proceeding, petitioner seeks a writ of prohibition.

> Invocation of the extraordinary remedy of prohibition is appropriate 'only when there is a clear legal right' (cite omitted) and only when the body or officer 'acts or threatens to act without jurisdiction in a matter over which it has no power over the subject matter or where it exceeds its authorized powers in a proceeding over which it has jurisdiction'(cite omitted).

Matter of Nicoholson v. State Commission on Judicial Conduct, 50 NY2d 597, 605-606(1980).

Petitioner's Constitutional Challenges to the Rules

Petitioner raises several constitutional challenges to the political activity rules with which he has been charged, specifically Sections 100.5(A)(1)(c), (d), (e), (f) and (g), 100.5(A)(4), and Sections 100.1 and 100.2(A). These sections provide in relevant part as follows:

> Section 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 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 political 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.

> 100.5(A)(4)(a) A judge or a non-judge who is a candidate for public election to judicial office: (a) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary . . .

Section 100.1 provides that

> An independent and honorable judiciary is 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.

Section 100.2(A) provides that

> [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.

Petitioner alleges that Sections 100.5(A)(1)(c), (d), (e), (f) and (g) are facially unconstitutional and unconstitutional as applied as they violate the First Amendment to the United States Constitution and Article I, §§8, 9, and 11 of the New York State Constitution in restricting his rights of free speech and association, specifically his political speech and activity, in restricting the ability of incumbent judges and candidates for judicial office from fully participating in the political process, speaking out and expressing his or her political views, and in restricting free association with individuals with whom said judge or judicial candidate would otherwise associate. Petitioner alleges that these rules are not narrowly tailored to serve a compelling state interest, that the rules constitute a prior restraint on constitutionally protected political speech and activity, and that they are overbroad as they sweep within their ambit activities protected by the First and Fourteenth Amendment without furthering any compelling state interest.

Petitioner also alleges that the Code violates his rights of equal protection as there is no rational basis for the disparate treatment given to judicial candidates and other similarly situated elected officials who engage in the types of conduct with which petitioner is charged.

The Court of Appeals has specifically addressed these issues in Matter of Raab v. Commission on Judicial Conduct, 100 NY2d 305 (2003). The petitioner in that case challenged Sections 100.5(A)(1)(c), (d), (e), (f) and (g) (as well as subdivision [h]) on the identical constitutional grounds asserted by petitioner in this proceeding. The Court of Appeals in that case applied a strict scrutiny analysis and examined whether the challenged rules were narrowly tailored to serve a compelling state interest (id. at 312), and found that these rules are constitutionally permissible. The Court held that these rules are narrowly tailored to further a number of compelling state interests, including the state's interest in preventing political bias or corruption or the appearance of political bias or corruption in its judiciary, and in preserving the impartiality and independence of the judiciary and maintaining public confidence in the New York State court system (id. at 312 and 316).

While recognizing that judicial candidates to be elected "have certain free speech and association rights that are protected under the First Amendment" and that "the right of judicial candidates to communicate to voters is linked to the right of the electorate to make informed choices about how to cast their votes," the Court also recognized that litigants have a guaranteed constitutional due process right to a fair and impartial magistrate, "and that 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" (id. at 313; see also Matter of Watson v. State Commission of Judicial Conduct, 100 NY2d 290, 301 [2003]). "The state has an overriding interest in the integrity and impartiality of the judiciary" (Matter of Raab, 100 NY2d at 313); see also Matter of Nicoholson, 50 NY2d at 607-608).

The Raab Court held that there is a rational basis for distinguishing judges and judicial candidates from other elected officials and that Sections 100.5A(1)(c)(d)(e)(f)(g) and (h) survive constitutional challenge because they are narrowly constructed to address the interests at stake of preventing political corruption, or the appearance thereof, in its judiciary:

> The provision allowing judicial candidates to engage in significant political activity in support of their own campaigns provide candidates a meaningful and realistic opportunity to fulfill their assigned role in the electoral process. Unlike other elected officials, however, judges do not serve particular constituencies, but are sworn to apply the law impartially to any litigant appearing before the court. Once elected to the bench, a judge's role is significantly different from others who take part in the political process, and, for this reason, conduct that would be appropriate in other types of campaigns is inappropriate in judicial elections. Precisely because the State has chosen election as one means of selecting judges, there is a heightened risk that the public, including litigants and the bar, might perceive judges as beholden to a particular political leader or party after they assume judicial duties. The political activity rules are carefully designed to alleviate this concern by limiting the degree of involvement of judicial candidates in political activities during the critical time frame when the public's attention is focused on their activities, without unduly burdening the candidates' ability to participate in their own campaigns."

(Matter of Raab, 100 NY2d at 316).

Petitioner relies heavily on the case of Republican Party of Minnesota v. White, 536 US 765 (2002). In that case, the United States Supreme Court invalidated the "announce" clause of the Minnesota Code of Judicial Conduct which prohibited a candidate from announcing his or her views on disputed legal or political issues, holding that the "announce" clause was not narrowly drawn to meet the alleged compelling state interest of the independence and impartiality of the judiciary.

Spargo contends that, like the "announce clause" in White, the political activity rules which he challenges in this proceeding are not narrowly drawn to meet a compelling state interest, and are overbroad and bear no reasonable relationship to the State's admitted interest in an impartial judiciary.

The Raab Court held that the political activity rules are not underinclusive or overinclusive given the number of competing interest at stake, almost all of which are of constitutional magnitude (Matter of Raab, 100 NY2d at 315). The political activity rules "distinguish between conduct integral to a judicial candidate's own campaign and activity in support of other candidates, or party objectives" (id. at 314-315), establish permitted and prohibited conduct in a judicial campaign and permit "judicial candidates to engage in significant political activity in support of their own campaign" (id at 316); however, "ancillary political activity such as participating in other candidates' campaigns . . . publicly endorsing other candidates . . . .making speeches on behalf of political organizations . . . are restricted" (id.).

Further, the Raab court has addressed the White case and distinguished it, stating that White is "significantly distinguishable" from the Raab case, as "White did not involve review of political activity restrictions analogous to those at issue here" (Matter of Raab, 100 NY2d at 313) and that the White Court "did not declare . . . that judicial candidates must be treated the same as nonjudicial candidates or that their political activity or speech may not legitimately be circumscribed. To the contrary the [White] Court distinguished Minnesota's announce clause from other rules restricting the speech of judicial candidates, taking no position on the validity of other judicial conduct provisions (cite omitted)" (Matter of Raab, 100 NY2d at 312-313).

Petitioner acknowledges that the cases of Matter of Raab and Matter of Watson (100 NY2d 290 [2003]) have addressed the issues raised herein, but contends that these cases do not meaningfully address those issues and did not consider or acknowledge the District Court's analysis in Spargo v. New York State Commission on Judicial Conduct (244 FSupp2d 72 [2003], vacated by 351 F3d 65 [2d Cir., 2003], cert den.124 S.Ct 2812 [2004]). In that case brought by Spargo in federal court, he raised the constitutional issues also raised in this petition, and the Court invalidated several of the Rules at issue herein, although it was later held that the District Court should have abstained from exercising jurisdiction over plaintiff's action pursuant to the doctrine of Younger v. Harris (401 US 37) (Spargo v. New York State Commission on Judicial Conduct, 351 F3d 65 [2d Cir., 2003]). The Court of Appeals has previously stated that it is not bound by the District Court's decision in the Spargo matter (Matter of Mason v. State Commission on Judicial Conduct, 100 NY2d 56, 58[2003]); and in any event, this Court is bound by the determinations and analysis of the Court of Appeals as set forth in Raab and Watson.

With respect to Sections 100.1, 100.2(A), 100.5(A)(4)(a) and 100.5(A)(1)(c) and (g), petitioner contends that these sections are unconstitutionally vague. Petitioner contends that Section 100.1 requires that a judge should maintain, enforce and personally observe "high standards of conduct" to preserve the integrity and independence of the judiciary but fails to define "high standards of conduct," and fails to offer any guidance with respect to how those goals are to be accomplished; that Section 100.2(A) fails to define or otherwise provide guidance with respect to what is meant by the term "impropriety" or what is meant by promoting "public confidence in the integrity and impartiality of the judiciary;" that Section 100.5(A)(4)(a) provides no guidance as to what is deemed "inappropriate political activity" or what is meant by the phrase "dignity appropriate to the judicial office;" that Section 100.5(A)(1)(c)fails to define "partisan political activity;" and that 100.5(A)(1((g) which prohibits "attendance at political gatherings" is also impermissibly vague.

A statute or regulation "is 'unconstitutionally vague if it fails to provide a person of ordinary intelligence with a reasonable opportunity to know what is prohibited, and it is written in a manner that permits or encourages arbitrary or discriminatory enforcement'(cites omitted)" (Ulster Home Care, Inc. v. Vacco, 96 NY2d 505, 509 [2001], cert. den. 534 US 1065[2001]).

However, the Constitution does not require "meticulous specificity" (Matter of Children of Bedford v. Petromelis, 77 NY2d 713, 730 [1991], vac on other grounds, 502 US 1025[1992]).

"[T]he quest for definiteness does not preclude the Legislature from using ordinary terms to express ideas that find adequate interpretation in everyday usage and understanding (cites omitted). For, 'Condemned to the use of words, we can never expect mathematical certainty from our language' (cite omitted). Recognizing reality, the Constitution therefore does not require impossible standards; it is enough that the language used 'conveys sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practices (cites omitted),'" although it is also clear that "where First Amendment rights are involved, to forestall the possibility of inhibiting free speech, a statute's imprecision may not be lightly overlooked (cite omitted)" People v. Illardo, 48 N.Y.2d 408, 414 (1979).

"Guidelines may be found . . . in the general moral and ethical standards expected of judicial officers by the community" Sarisohn v. Appellate Div., Second Dept., Supreme Court, 265 F. Supp. 455, 458 [E.D.N.Y. 1967]) "Standards of conduct on a plane much higher than for those of society as a whole, must be observed by judicial officers . . . A Judge must conduct his everyday affairs in a manner beyond reproach . . . " (Matter of Kuehnel v. State Commission on Judicial Conduct, 49 NY2d 465, 469 [1980]). "[R]elatively slight improprieties subject the judiciary as a whole to public criticism and rebuke (cites omitted)." (Matter of Aldrich v. State Commission on Judicial Conduct, 58 N.Y.2d 279, 283 [1983]). "Members of the judiciary should be acutely aware that any action they take, whether on or off the bench, must be measured against exacting standards of scrutiny to the end that public perception of the integrity of the judiciary will be preserved (cite omitted)" (Matter of Lonschein v. State Commission on Judicial Conduct, 50 N.Y.2d 569, 572 [1980]).

It has previously been held that an ethical mandate which proscribes the "appearance of impropriety" is not unconstitutionally vague (Sims v. State Commission on Judicial Conduct, 61 NY2d 349, 358 [1984]). The Court of Appeals stated in the Sims case that "[W]e have repeatedly upheld the appearance of impropriety rules and stated that Judges may be held to this admittedly high standard of conduct in performing their duties or even when performing nonjudicial duties (cites omitted)" (id).

"[I]mpartiality" has been traditionally defined as a matter of common usage as lack of party bias (see Republican Party of Minnesota v. White, 536 US at 775 - "One meaning of 'impartiality' in the judicial context . . . is the lack of bias for or against either party to the proceeding. Impartiality in this sense assures equal application of the law. That is, it guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party. This is the traditional sense in which the term is used . . . " "Impartiality can also mean, although not in common usage, "open-mindedness" and "lack of preconception in favor of or

against a particular legal view" Republican Party of Minnesota v. White, 536 US at 777-778; see also (Matter of Watson v.State Commission on Judicial Conduct, 100 NY2d at 302 [2003]).

Terms such as "inappropriate political activity," "partisan political activity," and "attendance at political gatherings" can be commonly understood to be related in meaning to the definition of a "political organization" which is defined in the Rules as "a political party, political club or other group, the principal purpose of which is to further the election or appointment of candidates to political office" (Preamble to the Rules of Judicial Conduct).

Although Sections, 100.1, 100.2(A), 100.5(A)(4)(a) and 100.5(A)(c) and (g) do not specify in detail every possible ground of misconduct to which they could apply, nevertheless the language challenged by petitioner has a common understanding, particularly in light of the generally known high standards of conduct expected of the judiciary (see e.g. Matter of Kuehnel, 49 NY2d at 469, Matter of Aldrich, 58 NY2d at 283, Matter of Lonschein, 50 NY2d at 572 and is not so vague that it could not be understood by a person of ordinary intelligence or could be arbitrarily enforced (see e.g. Ulster Home Care, 96 NY2d at 509; see also Matter of Addei v. State Bd. for Professional Medical. Conduct, 278 AD2d 551 [3rd Dept., 2000], in which it was held that Education Law §6530 (20) is not unconstitutionally vague for failure to give specific and sufficient notice of the type of activity which would constitute "moral unfitness to practice medicine." "Although this section does not describe the behavior which constitutes a violation in minute detail, it does provide sufficient warning concerning the manner in which the profession must be practiced (cite omitted)" (id at 552); Mason v. Florida. Bar, 208 F3d 952, 959[11th Cir., 2000] in which the Court held that, although capable of multiple meanings and potentially very broad application, the term "self-laudatory" contained in the Rule which prohibits statements made by lawyers in advertisements or written communications that are "self laudatory" is not unconstitutionally vague);and Arnett v. Kennedy, 416 US 134, 161-162[1974]) - "The most conscientious of codes that define prohibited conduct of employees include 'catchall' clauses prohibiting employee 'misconduct,' 'immorality,' or 'conduct unbecoming . . . Because of the infinite variety of factual situations in which public statements by Government employees might reasonably justify dismissal for "cause," we conclude that the Act describes, as explicitly as is required, the employee conduct which is ground for removal . . . ").

Further, it is also relevant to petitioner's challenges on vagueness grounds that advisory opinions are published and that formal advisory opinions may be obtained from the Committee on Judicial Ethics upon request of a judge or justice concerning issues of ethical conduct (Judiciary Law Section 212(1). (See e.g. Arnett v. Kennedy, 416 US 134, 160[1974]); Mason, 208 F3d at 959, n.4 - "In addition, the availability of advisory opinions to gauge the application of Rule 4-7.2(j) to specific situations bolsters its validity"). An action taken in accordance with such advisory opinion is "presumed proper for the purposes of any subsequent investigation by the state commission on judicial conduct" (Judiciary Law Section 212[2][l][iv]).

Petitioner also alleges that the Code is unconstitutional as applied to him, but has provided only general conclusory allegations in support of this contention, which is insufficient.

Petitioner's Claim of Unconstitutionality of the Commission as a Whole

Petitioner alleges that the Commission as a whole is unconstitutional as the Commission functions as investigator, prosecutor and judge (22 NYCRR 7000.2, 7000.3 and Judiciary Law §44[2]), thus denying true procedural due process as guaranteed by the First And Fourteenth Amendments, and contradicting the Commission's impartiality and independence.

Additionally, petitioner alleges that although the rules permit an independent referee to preside over hearings (Section 7000.1[o] and Judiciary Law Section 43[2]), the referee is designated by respondents; that the rules deny petitioner the opportunity for full pre-hearing discovery as the 10 day period prior to the hearing provided in the rules (Section 7000.6[h][1]) is an insufficient amount of time for adequate preparation; that internal reports and memoranda of the Commission are not discoverable, thus depriving petitioner of access to fundamental tools for cross-examination and denying petitioner the opportunity to meaningfully confront and cross-examine the witnesses against him; and that the unilateral control exercised over the process by the Commission denies petitioner any opportunity for a fair hearing.

The practice of combining investigative, prosecutorial and adjudicative functions in a single administrative agency or board is not improper . . . statutes doing so are common (cites omitted). Such arrangements do not, without more, violate due process by creating an unconstitutional risk of bias (cites omitted). The petitioners must demonstrate that because of the practice the Board has been prejudiced by its investigation or for some reason is disabled from hearing and deciding the matter on the basis of the evidence (cite omitted).

(Matter of Children of Bedford v. Petromelis, 77 NY2d 713, 723-724 [1991]), vacated on other grounds 502 US 1025 (1992); see also Sarisohn, 265 F.Supp at 458). Petitioner has not demonstrated such prejudice or inability to hear and decide the matter on the basis of the evidence.

Petitioner's argument that Section 7000.1(o) denies him an impartial referee as it requires that the referee shall be designated by the Commission is equally unavailing. The referee cannot be a judge or member of the Commission or its staff (Judiciary Law §43[1]). Standing alone, the mere fact that the referee is appointed by the Commission does not result in a denial of due process. See e.g. Nat Kagan Meat & Poultry, Inc. v. Gerace, 118 AD2d 1043, 1044 [3d Dept. 1986]; Alhmeyer v. New York State Policemen's & Firemen's Retirement System, 82 AD2d 954, 955 [3d Dept. 1981]. Further, there is no general constitutional right to discovery in administrative proceedings (Miller v. Schwartz, 72 NY2d 869 [1988], reconsideration denied 72 NY2d 953 [1988]).

Petitioner's Claim of Abridgement of his Right to Counsel

Section 7000.6(n) provides that, following the appearance of counsel, counsel may not withdraw without permission of the Commission. Petitioner alleges that the rules therefore delegate to the Commission complete control over the appearance of counsel and representation of judges in derogation of the Sixth Amendment right to choice of counsel.

"The Sixth Amendment right to counsel includes a right to retain counsel of choice by one who is financially able to do so (cites omitted) However, the right to counsel of choice is qualified and can be outweighed by countervailing governmental interests (cite omitted), or 'when required by the fair and proper administration of justice' (cite omitted)" (Kuriansky v. Bed-Stuy Health Care Corp., 135 AD2d 160, 174 [2d Dept. 1988], aff'd 73 NY2d 875).

> Trial courts possess inherent authority 'to impose reasonable rules to control the conduct of the trial' (cites omitted). However, in exercising that authority, a court should be 'hesitant to interfere in an established attorney-client relationship' (cites omitted), and may not do so arbitrarily (cites omitted) . . . Accordingly, judicial interference with an established attorney-client relationship in the name of trial management may be tolerable only where the court first determines that counsel's participation presents a conflict of interest or where defense tactics may compromise the orderly management of the trial or the fair administration of justice (cites omitted).

(People v. Knowles, 88 NY2d 763, 766-767 [1996]).

As there may therefore be constitutionally permissible reasons for the Commission to withhold permission for counsel to withdraw, it cannot be said that Section 7000.6(n) on its face unconstitutionally deprives a judge of the right to counsel.

In this case, petitioner has notified the Commission that E. Stewart Jones, Esq., will be substituted as counsel. Respondents contend that Mr. Jones will be called as a witness to testify against Spargo on the solicitation charge alleged in the Second Supplemental Formal Written Complaint, which would therefore create a conflict of interest and also contend that the substitution was intended to interfere with the orderly management of the commission proceedings or fair administration of justice. According to respondents' memorandum of law (see page 46 and affirmation of Mr. Tembeckjian, para 18), that application for substitution is pending; and the propriety of respondents' contentions is not before this Court for consideration.

Petitioner has not established that the rules which he challenges are unconstitutional and has not, therefore, demonstrated a "clear legal right" to the relief requested in this proceeding (Matter of Nicoholson, 50 NY2d at 610). Accordingly, this proceeding is dismissed.

The foregoing constitutes the Order and Judgment of the Court.

Nicholas Colabella, JSC
Dec. 9, 2004

ORDER AND JUDGMENT
Index No. 5336-04