

unanimous, and was affirmed by an unpublished one-page decision of the New York Court of Appeals (Michelle Bolton, “Removed Judge’s Litigation Comes to a Close,” *Albany Times Union*, at B7, May 10, 2006), one of the commissioners deplored the fact that New York trial judges must run for elections, thus implying that the system, as much as the person, was to blame.



Justice is not, and cannot be, totally blind. When one is a judge, one’s background, experiences, and preferences cannot be, nor should be, ignored. It is the nature of a political system that background, experiences, and preferences matter in the selection of the judge even if the judicial office is not an elected position. However, we do not want a judge to remove the blindfold, which Spargo obviously did in soliciting money from attorneys appearing before him. Spargo’s impartiality could now be more than reasonably challenged. It is impossible to think the request for money was not an implied coercive threat to those appearing before him.

However, for the other judges, until there is some action or behavior that actually concerns the matter before the court, it is difficult for any party to the matter to use the judge’s past preferences or experiences as cause for removal. In those circumstances, the matter appears left to the discretion of each judge, and it appears that our system must trust that choice to each individual jurist. Thus, each judge must decide whether their preferences will impair impartiality. jsj

The Code of Judicial Conduct and Lawyers’ Ethics: A Little Case Study

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The usual, and indeed expected, focus of discussions of the Code of Judicial Conduct is on judges. (That is almost a “Du’oh” statement.) However, lawyers may be implicated in that discussion, not only when judges are thought to act improperly toward lawyers, including the demonstration of bias toward some over others, but also when lawyers create problems. While lawyers can, of course, be disciplined under their own code of ethics, standards of behavior for judges may play a role in evaluating lawyers’ behavior. In such situations, the two codes—that for lawyers and that for judges—may mesh or interlock.

A small case study illustrates this. In 1977 the U.S. Court of Appeals for the Ninth Circuit, interpreting the Truth in Lending Act (TILA) and the Federal Reserve Board Rule Z implementing the Act, held that the Rule’s prepayment disclosure requirement mandated the presence of an acceleration clause and specification of

whether, on prepayment, a rebate of unearned interest would be made and how it would be computed. *St. Germain v. Bank of Hawaii*, 573 F.2d 572 (9th Cir. 1977). A petition for rehearing and suggestion for rehearing en banc (PFR/SREB) was filed. While the petition was being considered, some interest groups sent letters to the three judges of the panel who had decided the case (Judges Shirley Hufstедler, the opinion's author, Walter Ely, and Eugene Wright) and to the court itself, through the chief judge, the clerk of court, or both; some of those letters were not "copied" to other parties.

The letters, which urged the court to reconsider the case en banc, were written by lawyers, some using law-firm stationery. They were not presented as, or with, motions to participate as amicus curiae. Almost all the letters pointed out how the lending industry would be affected by the court's interpretation of the statute. The authors of the letters made a number of claims. Among them were that the ruling "represents a startling, radical and unexpected departure from judicial precedent in this Circuit" (Richter letter) and was "a novel theory never before adopted by the many courts which have considered this issue" (Smith letter). The ruling was also said to "conflict[] with the decisions reached by every other federal Court of Appeals" on the matter (Richter letter) and not to be "consonant with the prior interpretations of the Federal Reserve Board" (Wiese letter).

The associations sending these communications were not intervenors, nor had they sought to file briefs amicus curiae. One could also surmise that at least some of the letters were not "independently invented" but resulted from a coordinated campaign stemming from communication among the various trade associations. In being sent directly to individual judges rather than through the clerk of court, the letters clearly violated the court's own rules. More significantly, they violated rules, directed at both judges and lawyers, on ex parte communication with judges.

The receipt of this material, sent in this irregular and untoward fashion, was unexpected and it led to considerable communication within the court—first, among the panel members and then among a larger number of judges—as to how to handle the matter. As the opinion author, Judge Hufstедler was the first to raise the matter with colleagues. In a memo to her judicial associates sent on May 15, 1978, she said that the letters, "some of which amount to briefs," had the "obvious intent . . . to influence the en banc voting." She said that she was "both surprised and shocked that lawyers would undertake this kind of information communication with any member of the court concerning a case which is under submission." She felt that the lawyers "would appropriately be subject to disciplinary action" for the letters and suggested having the court's chief judge order the letters stricken. Other, off-panel judges chimed in, with Judge Anthony Kennedy suggesting on May 22, 1978, that "direct communications to the court from persons deemed affected by this decision are most troublesome" such that the court's Council should consider them.

Then one of the court's senior members, Judge Ben Duniway, upped the ante. He said that "I just don't think we ought to tolerate ex parte communications of this kind from lawyers. Other people may not understand that it is improper, but lawyers

certainly should,” and suggested on June 6, 1978, that “we should give serious consideration to referring each such communication from a lawyer or law firm to the appropriate state bar for investigation and possible disciplinary action”; an alternative would be to have the court directly issue its own show-cause order. Agreeing that some discipline was appropriate, Judge Thomas Tang indicated on June 12 that he preferred referrals to state bars, which “may be a more cumbersome and long drawn out process but . . . will have more long range effect on our total bars.”

At this point and later, as the judges focused on correcting the lawyers’ behavior, they drew heavily on the judges’ Code of Conduct as a basis for doing so, but they also drew on rules for lawyer behavior. Judge Hufstедler moved toward action by drafting letters to be sent by the clerk of court. In a June 15 memo, she suggested that the letters be in three categories—to laymen; lawyers who had not “copied” opposing counsel; and lawyers “who did not violate the *ex parte* communication rule, because they did send copies of the letter to counsel in the case, but who apparently are oblivious to the judicial canons.” All versions of the proposed letter would have called attention to Canon 3A(4) of the Code of Conduct for the United States Judges and to the official commentary on the Canon. The Canon itself stated:

A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding.

And the commentary on the Canon observed, “The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding,” and called attention to amicus briefs as “[a]n appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues.”

The proposed letter to the first category of lawyers (those not “copying” other lawyers) would also have reminded its readers that the Ninth Circuit’s own rules required communications to be addressed to the clerk of court. However, it would have gone further to say, “*Ex parte* communications by a lawyer with any member of the court in respect of a pending or impending proceeding is a violation of the Canons of Professional Conduct for Lawyers and may subject the lawyer to disciplinary proceedings.” For the other category of lawyers—those who had “copied” other lawyers but who needed to be reminded on the Code of Conduct—the relevant rule of the California Rules of Professional Conduct of the State Bar was quoted, and the lawyer was told his letter was being forwarded to the state bar’s disciplinary enforcement department.

Suggestions for editing came from some members of the court, and Judge Walter Ely, a member of the panel, argued in a July 5 memo that the third letter should not be sent until the lawyer had been provided an opportunity to show cause to the court. He also opined that the state bar would do no more than reprimand. This point led

several judges to agree that of the two letters proposed for lawyers, only the former be used, so the third form of the letter was put aside.

With the judges having come into agreement on the letters to be sent, Judge Hufstedler prepared an order to be sent by clerk of court. Five individuals received the first letter and only two the second letter. With that, the court considered the matter closed. Although during the communication about possible discipline, some judges had supported en banc rehearing, no judge made an en banc call, and the panel denied rehearing and the suggestion of en banc rehearing.

Note: Despite the trade association's reactions to the *St. Germain* ruling, a certiorari petition was not filed. The reason may have been that, as one letter writer had noted, other cases were pending in the Ninth Circuit "which present the issue of whether the right to accelerate results in disclosure responsibilities under the Act or Regulation and, if so, whether those disclosure responsibilities have been satisfied by creditors" (Richter letter). When, shortly thereafter, the Ninth Circuit handed down a ruling on several of these issues, including a holding as to acceleration clauses based on *St. Germain*, the case went to the Supreme Court, which reversed the Ninth Circuit's position. *Milhollin v. Ford Motor Credit Co.*, 588 F.2d 753 (9th Cir. 1978), rev'd and remanded, *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980).

REFERENCES

- Richter letter. George R. Richter, Jr., Sheppard, Mullin, Richter & Hampton, Los Angeles, letter to Clerk of Court, U.S. Court of Appeals, Ninth Circuit, March 22, 1978.
- Smith letter. James L. Smith, President, Consumers Bankers Association, Washington, D.C., to Chief Judge James Browning, U.S. Court of Appeals, Ninth Circuit, May 11, 1978.
- Wiese letter. Alvin O. Wiese, Jr., Styskal, Wiese & Melchione, North Hollywood, California, letter to Clerk of Court, U.S. Court of Appeals, Ninth Circuit, March 28, 1978.