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PANEL DISCUSSION

DISQUALIFICATION OF JUDGES (THE SAROKIN MATTER): IS IT A THREAT TO JUDICIAL INDEPENDENCE?*

INTRODUCTION

*Dean John D. Feerick:***

This program is sponsored by the Association of the Bar's Committee on Professional Responsibility. It concerns judicial disqualification and was spurred by the Third Circuit's opinion in *Haines v. Liggett Group, Inc.*,¹ which resulted in the disqualification of District Judge H. Lee Sarokin. *Haines* was presided over by Judge Sarokin.

That case involved a lawsuit commenced by Susan Haines, administratrix of an estate of the deceased Peter Rossi. The complaint in the case alleged product liability, tort and conspir-

* This panel discussion, which constitutes Parts I & II of this Article, was sponsored by the Committee on Professional Responsibility of the Association of the Bar of the City of New York on December 8, 1992. The *Review* is grateful to the Committee and the panelists for their help and participation.

** Dean of the Fordham University School of Law; President of the Association of the Bar of the City of New York.

¹ 975 F.2d 81, 97-98 (3d Cir. 1992); see 28 U.S.C. § 144 (1988) (disqualification of judges for bias or prejudice).

acy claims against the defendants. The parties to the litigation had a dispute as to whether the tobacco defendants should be required to produce certain documents in discovery.

In *Haines*, the plaintiff contended that the documents sought showed purposeful concealment by the tobacco industry about the dangers of smoking. The defendants maintained that the documents were protected under either the attorney-client or work-product privileges. In response the Haines argued that the documents were not privileged and, even if they were, the crime-fraud exception applied, thereby annulling the privilege. A magistrate judge determined that the crime-fraud exception did not apply. Judge Sarokin, however, found that there was *prima facie* evidence that the defendants were engaged in an ongoing fraud and that the crime-fraud exception did apply. Accordingly, he reversed the magistrate's order and found that the crime-fraud exception applied to at least some of the documents. The defendants responded with a petition for a writ of mandamus to the Third Circuit to vacate Judge Sarokin's order.

One of the primary issues presented by the writ was whether the district court properly exercised its reconsideration function under the Federal Magistrate's Act.² Aside from the substantive issues of the *Haines* litigation, an important issue surfaced when the Third Circuit disqualified Judge Sarokin as a result of that mandamus petition. The basis for the disqualification arose because of a statement contained in his opinion, finding the exception to the attorney-client and work-product privileges. In his opinion Judge Sarokin used the following language, which the tobacco industry argued indicated his bias against it:

In light of the current controversy surrounding breast implants, one wonders when all industries will recognize their obligation to voluntarily disclose risk from the use of their products. All too often in the choice between the physical health of consumers and the financial well-being of business, concealment is chosen over disclosure, sales over safety, and money over morality. Who are these persons who knowingly and secretly decide to put the buying public at risk solely for the purpose of making profits and who believe that the illness and death of consumers is an appropriate cost of their own prosperity. As the following facts disclose, despite rising pretenders, the tobacco industry may be the king of concealment and disinformation.³

² 975 F.2d at 97; 28 U.S.C. § 636(b)(1)(A) (1992).

³ *Haines v. Liggett Group, Inc.*, 140 F.R.D. 681, 683 (D.N.J. 1992).

In disqualifying Judge Sarokin, the Third Circuit applied the test of whether in the context of what he said in the case, he appeared essentially to be impartial. The court held that the standard with respect to impartiality and the appearance of impartiality was not satisfied, particularly that part of the standard regarding the appearance of impartiality based on essentially the above-quoted part of the opinion.

The disqualification of Judge Sarokin raises a number of issues. How far can a judge go in his or her comments without appearing biased? Should judicial expression be restrained or limited? Will judicial independence and authority be unduly limited if judicial expression is curtailed? What is the distinction between impartiality and the appearance of impartiality? What are the First Amendment considerations surrounding this controversy? What repercussions will the increased litigation costs resulting from judicial disqualification have on already limited judicial resources and the outcome of the cases in which it occurs? These kinds of issues will be discussed by our very distinguished panel.

I. PANEL DISCUSSION

*Jack B. Weinstein**

I would be remiss if I did not first publicly express my own and my colleagues' deep appreciation to the City Bar Association for its long and consistent support for an independent bench. Without a strong judiciary, willing to speak and act in favor of freedom and other rights, our liberties and well-being would be in serious jeopardy. Without a strong, vigilant and supportive bar, judges could not be effective.

This meeting was called by the Association to discuss "The Sarokin Matter." I may be disqualified because I have long admired H. Lee Sarokin as one of our ablest judges and most delightful companions. Nor am I in a position to criticize any decision of the Third—or any other—Circuit. I merely note the facts to put the discussion in some historical setting.

For more than a decade, United States District Judge H. Lee Sarokin has presided over product liability lawsuits against several cigarette companies in the District Court of New Jersey.

* United States District Judge for the Eastern District of New York.

On September 4, 1992 the United States Court of Appeals for the Third Circuit ended his tenure in one of those cases, *Haines v. Liggett Group, Inc.*⁴ Acknowledging Judge Sarokin's fifteen years of "distinguished service" and his "magnificent abilities," the court took issue with Judge Sarokin's statement that "the tobacco industry may be the king of concealment and disinformation."⁵ It held that this statement suggested a sufficient appearance of bias to merit removal.⁶ Judge Sarokin, taking the hint, subsequently removed himself from the related suit brought by Antonio Cipollone against the same defendants.⁷

This appellate decision is an important lesson in style for district judges. Judge Sarokin would not have received the court of appeals' approbation had he noted his disquiet at what he had learned in presiding over the litigation by writing something like, "There are suggestions in the record that might lead some to conclude that there are elements in the tobacco industry who have concealed information and misled the public." Not quite as punchy, but more in keeping with the usually circumspect, "judgy-wudgy" style that we all use.⁸

Recusal normally can be expected to impose a burden on courts, requiring the judge or judges to whom a complex case is reassigned to learn the many details of a huge file and to acquire abstruse scientific and legal expertise. The fiscal burdens on litigants are formidable, greatly advantaging the parties with the most money—here the tobacco industry.⁹ In this instance Judge

⁴ 975 F.2d 81 (3d Cir. 1992).

⁵ *Haines v. Liggett Group, Inc.*, 140 F.R.D. 681, 683 (D.N.J. 1992).

⁶ 975 F.2d at 98; see 28 U.S.C. § 144 (1988) (disqualification of judges for bias or prejudice).

⁷ *Cipollone v. Liggett Group, Inc.*, 799 F. Supp. 466 (D.N.J. 1992).

⁸ The Third Circuit's ruling was not without its supporters. See *Judge Forced Off Tobacco Suit*, A.B.A. J., Nov. 1992, at 16 (quoting Professor Stephen Gillers's characterization of Judge Sarokin's comments as "sound[ing] more like Ralph Nader than Oliver Wendell Holmes").

⁹ *Plaintiffs' Lawyers Undaunted by Tobacco Defeats*, LEGAL TIMES, Jan. 27, 1986, at 2 (describing how plaintiffs' lawyers face unlimited funds in litigating against tobacco companies). The tactics of the tobacco industry to spare no expense in these cases are epitomized by the statement of J. Michael Jordan, counsel for RJR:

[T]he aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of [RJR]'s money, but by making that other son-of-a-bitch spend all of his.

Brief for Defendant at 13-14, *Haines v. Liggett Group, Inc.*, 814 F. Supp. 414

Sarokin's removal may avoid the need for another judge to undertake the task if plaintiff's attorney is permitted to abandon the case.¹⁰

Recusal or forced transfer of cases from one judge to another is not appropriate unless it is clearly authorized by statute¹¹ or when there are most unusual conditions. Except in the most egregious circumstances, the issue of case assignment of district judges is a matter best left to district courts.

Circuit courts should recognize that micro-management of federal trial courts is neither appropriate nor wise. The history of the creation of the appellate courts reveals that they have limited authority to control assignment of cases.¹² How the dis-

(D.N.J. 1993) (No. 84-678), *quoting* Brief for Plaintiff at 8.

¹⁰ The Cipollone family and its attorneys were permitted to voluntarily drop their suit because the litigation was "too expensive." See *Cigarette Suit Dropped*, A.B.A. J., Feb. 1993, at 30; *Cipollone Family Drops Landmark Cigarette Suit: Decision is Major Victory for Tobacco Firms*, WASH. POST, Nov. 6, 1992, at B1.

The attorneys in the *Haines* case, Budd, Lerner, Gross, Rosenbaum, Greenberg & Sade ("Budd Lerner"), attempted to withdraw because the litigation "ha[d] become an unreasonable financial burden." See Brief for Plaintiff, *supra* note 9, at 7. After nearly nine years of litigating eight cases, sometimes in conjunction with two other law firms, Budd Lerner had expended more than \$500,000 in out-of-pocket costs and close to \$4 million in lawyer and paralegal time. *Id.* at 8. To gauge its expenses in *Haines*, the firm relied heavily on its experience in *Cipollone*, which cost more than \$500,000 in out-of-pocket expenses and \$2 million to try. *Id.* Budd Lerner urged the court to allow it to withdraw because "it [had] become apparent that the amount of recovery against the tobacco industry [was] not likely to exceed these costs." *Id.* at 9. The firm also argued that from a public policy standpoint the benefits derived from its considerable work on the cigarette cases, such as the revelations about the tobacco industry's practices, would remain unaffected if they were permitted to withdraw. *Id.* at 9-10.

The court denied Budd Lerner's motion. It rejected any argument that the firm's expenses in other litigations should affect its position as representatives of this particular plaintiff or that the firm's experience in *Cipollone* should serve as a financial barometer for *Haines*. To the contrary, the court reasoned that Budd Lerner's work in *Cipollone* had provided much of the groundwork for *Haines* and might result in more focused discovery, narrower issues and fewer expenses. *Id.* at 18-20.

Also influential in the court's decision was that withdrawal would impair the plaintiffs' ability to find substitute counsel or remain in the action. *Id.* at 20-25. Even if they could find substitute counsel, the complexity of the case and the firm's wealth of experience in tobacco litigation raised serious questions about whether substitution would prejudice the plaintiff. *Id.* at 23. The firm was ethically obligated to protect its client's interests. *Id.*

Despite Budd Lerner's contention that the public interest is not served by continuing lawsuits that are not viable, the court recognized the high public interest in the case, apart from its profitability, most notably the unresolved question as to whether the tobacco companies can be held liable for their products. *Id.* at 44 n.29.

¹¹ See 28 U.S.C. §§ 144, 455 (1988).

¹² For a discussion of this history, see Jack B. Weinstein, *The Limited Power of the*

trict court should divide its business is generally not a matter for appellate intervention.

This philosophy of leaving management of district business to district courts is reflected in the present Guidelines for Division of Judicial Business, adopted by the Board of Judges of the United States District Court for the Eastern District of New York in the Fall of 1988. As Chief Judge, I chaired the District's Criminal Procedure Committee, under the chairmanship of Edwin Wesely, Esq., with conducting a study of the manner in which cases were assigned to judges in light of an increasing number of large cases in the district. As part of its study, the Committee considered problems associated with assignment on remand and related choices. In revising the guideline governing assignment on reversal or remand, we developed a system where, in criminal cases, the clerk would randomly select a different judge to preside over the case, reserving to the chief judge of the district the power to order the case assigned to the original presiding judge to avoid placing excessive burdens on another judge. In civil cases, the previously assigned judge would remain, unless the chief judge of the district ordered otherwise. This decision was prompted in part by a disturbing number of decisions in our circuit where the appellate court ordered reassignment to another district judge upon reversal or for sentencing. We sought to avoid peremptory reassignments by the court of appeals where claims of the partiality of the trial judge were made for the first time in the appellate court.¹³

When judges are removed after proceedings have begun, the judicial system bears a heavy burden. Other judges must make room on their calendars and educate themselves about a matter that may be well advanced and sometimes quite technical. Even a case in its early stages may have gone through extensive motion practice, which gives a presiding judge a good opportunity to become familiar with the facts and legal issues. By hearing competing versions of the facts and competing arguments on the controlling law, a trial judge gains an intangible feel for a case that is not available from reading a cold file. Lost are both time and subtle impressions of lawyers and tactics that may provide

Federal Courts of Appeals to Order a Case Reassigned to Another District Judge, 120 F.R.D. 267 (1988).

¹³ See *id.* at 267.

the basis for more sensitive and productive management of the case.

Toxic tort and other complex litigation require that a judge learn more than the underlying facts and procedural history. A judge must also become familiar with developing legal doctrines and scientific disciplines. In mass torts particularly, the traditional system is sometimes ill-equipped to deal with problems involving subtle issues of jurisdiction, conflicts of law, scientific uncertainty, case administration and ethics. These problems often require innovative *ad hoc* remedies borne of an intimate understanding of the case. In addition to the burden on the judiciary, such re-education may cause a significant delay, increasing the costs to the parties. Conservatism in recusal is particularly required today when federal dockets are overloaded with cases brought under an ever growing federal criminal code.¹⁴

It is doubtful that the Third Circuit's decision alone could have any significant effect on strong judicial case management. The ruling that prompted Judge Sarokin's removal involved a magistrate judge's determination that certain cigarette company documents did not fall within the crime-fraud exception to the lawyer-client privilege and were not discoverable by plaintiffs. Judge Sarokin was asked to rule on the viability of plaintiffs' fraud theory, namely that defendants knew about, but concealed and, in fact, distorted the hazards of smoking cigarettes. He was required to examine the facts presented by both sides to determine whether it was reasonable to conclude that the cigarette industry had in fact attempted to mislead the public. Finding "sufficient prima facie evidence of fraud in connection with the public assurances made by defendants to declare that the crime-fraud exception shall apply in this matter"¹⁵ was an appropriate exercise of judicial power.¹⁶

A judge's finding on the facts does not reflect an improper bias.¹⁷ An unambiguous statement from an objective onlooker

¹⁴ See, e.g., The Anti-Car Theft Act of 1992, Pub. L. 102-519.

¹⁵ Haines v. Liggett Group, Inc., 140 F.R.D. 681, 689 (D.N.J. 1992).

¹⁶ *Id.* at 683-84.

¹⁷ See, e.g., United States v. Barry, 961 F.2d 260, 263 (D.C. Cir. 1992) (recusal not warranted after judge gave speech describing defendant unfavorably, as views were based on judge's observations made during performance of judicial duties); Johnson v. Trueblood, 629 F.2d 287, 291 (3d Cir. 1990) (recusal not warranted after judge referred to defendants as "honest men of high character" during settlement conference because

lets the parties know where they stand and it sends a message to others who might engage in similar conduct.

No one should discourage clear statements by judges in either a civil or criminal context. When a judge admonishes a defendant at sentencing or criticizes attorneys for misconduct, the parties and the system are well served. It should be no different when private parties are involved. Of course, the basis for any decision must come from the record; extrajudicial bias is inappropriate.¹⁸

Earlier in *Cipollone v. Liggett Group, Inc.*,¹⁹ the Third Circuit refused to order Judge Sarokin's recusal after he made several findings against the tobacco defendants, rulings that were ultimately reversed. The basis of this earlier decision was that "bias or prejudice which can be urged against a judge must be based upon something other than rulings in the case."²⁰ The distinction between facts discerned from the record and extrajudicial bias—a point not considered by the Third Circuit in *Haines*—is well recognized by other circuits and the Supreme Court.²¹

I do not mean to suggest that recusal is never appropriate. The disqualification of judges is governed by statute²² and that

remarks were based on judge's perception of case).

¹⁸ Congress has specified particular instances when recusal is required, such as when the judge has previously acted in private practice on the pending case, or when the judge has a financial nexus with the litigation. See 29 U.S.C. § 455(b)(2) & (4) (1988). In addition (and although one would hope this is no longer true today), a judge might hold a bias against a party due to that person's race, religion or the like. See generally LESLIE W. ABRAMSON, JUDICIAL DISQUALIFICATION UNDER CANON 3 OF THE CODE OF JUDICIAL CONDUCT (2d ed. 1992).

¹⁹ 822 F.2d 335 (3d Cir.), cert. denied, 484 U.S. 976 (1987).

²⁰ *Id.* at 347, quoting *Berger v. United States*, 255 U.S. 22, 31 (1921).

²¹ See, e.g., *United States v. Grinnell*, 384 U.S. 563, 583 (1966) (A judge's comment on evidence does not require disqualification because "[t]he alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."); *United States v. Serrano*, 607 F.2d 1145, 1150 (5th Cir. 1979), cert. denied, 445 U.S. 965 (1980) (A judge's expressed frustration with failure of light sentences to deter narcotics trafficking does not require recusal because "the alleged bias was judicial rather than personal and . . . stemmed from his observations in a strictly judicial capacity."); *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1316 (2d Cir. 1988), cert. denied, 490 U.S. 1102 (1989) (A judge's strong criticism of attorneys' behavior "does not demonstrate bias, but . . . [was] directly addressed to the conduct of the attorneys before him; [the criticism] did not extend to extrajudicial matters beyond that conduct.").

²² See 28 U.S.C. § 455 (1988). An additional statute, 28 U.S.C. § 144 (1988), also governs disqualification in certain circumstances. Under both statutes the standard gov-

statute should be followed. Recusal is required when a judge's "impartiality might reasonably be questioned"²³ or where he or she "has a personal bias or prejudice concerning a party."²⁴ The statute was enacted to "promote public confidence in the integrity of the judicial process."²⁵ Thus, if a judge's impartiality might be reasonably questioned, recusal is warranted even if the judge in fact holds no bias.²⁶

If misapplied, however, this statute can be used as a powerful tool by parties who wish to judge-shop. For this reason and for those already discussed, the test must be strictly applied. The Second Circuit, for example, has carefully limited the statute's application to those instances where "an objective, disinterested observer fully informed of the underlying facts [would] entertain significant doubt that justice would be done absent recusal."²⁷ Subject only to this limitation, when a judge acts on knowledge derived from his or her capacity as judge, disqualification is inappropriate.²⁸

Although there may be the occasional egregious situation in which a judge is biased or inadvertently shows extrajudicial bias, the disqualification statute is usually utilized in circumstances where facts outside the record might raise a question of a judge's impartiality. For example, the Supreme Court has required recusal when the district judge was a trustee of an entity that was closely related to the litigation.²⁹

There may even be circumstances not explicitly contemplated by the statute that also warrant recusal. For example, I recently stepped down from a criminal case in which the government was seeking the death penalty under the Drug Kingpin

erning disqualification is the reasonable person test. See *United States v. Pugliese*, 805 F.2d 1117, 1125 (2d Cir. 1986).

²³ 28 U.S.C. § 455(a) (1988).

²⁴ 28 U.S.C. § 455(b)(1) (1988); see *supra* note 18.

²⁵ *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 858 (1988).

²⁶ *Id.* at 859.

²⁷ *United States v. Lovaglia*, 954 F.2d 811, 815 (2d Cir. 1992); see also *DeLuca v. Long Island Lighting Co.*, 862 F.2d 427, 428-29 (2d Cir. 1988).

²⁸ *United States v. Colon*, 961 F.2d 41, 44 (2d Cir. 1992); see also *United States v. Pugliese*, 805 F.2d 1117, 1125 (2d Cir. 1986), *cert. denied*, 489 U.S. 1067 (1989).

²⁹ *Liljeberg*, 486 U.S. at 847. In this case the district judge had forgotten that he was a trustee. The Supreme Court held, however, that his presiding over the case gave rise to an appearance of partiality and that he was required to recuse himself as soon as he became aware of his connection with the litigation. *Id.* at 859-61.

Act.³⁰ After a different trial of the same defendant, I had granted the government's motion for an upward departure from the sentencing guidelines. The defendant, an alleged high ranking participant in the Medellin Drug Cartel, moved for my recusal from the death penalty case, fearing that I was biased against him. Although there is no statutory basis for recusal under such circumstances, I treated the motion as a peremptory challenge.

Some states allow defendants to challenge automatically the first judge assigned to the case.³¹ A committee of this Association and our court considered such a plan of peremptory challenges of a judge and rejected it.³² Defendants in death penalty cases are, however, afforded particular due process protection. For example, additional peremptory challenges of jurors are granted to both sides³³ and rules of evidence are more stringently applied. Given the unique nature of a capital trial that these rules reflect, it seemed appropriate to permit the defendant to strike the first judge assigned to his case.

Shortly after its removal of Judge Sarokin, the Third Circuit removed another district court judge, this time relieving Judge James McGirr Kelly of the Eastern District of Pennsylvania from an enormous asbestos class action.³⁴ Judge Kelly, whom I also admire, had attended a conference where experts discussed the latest scientific discoveries about asbestos. He had apparently forgotten that plaintiffs funded this conference and that he had granted plaintiffs' *ex parte* request to use \$50,000 from the settlement fund specifically for this conference.

The Kelly ruling presents problems quite different from the Sarokin matter. It is possible for a reasonable person to question the impartiality of a judge who attended a conference funded by a party to the litigation, particularly when the judge himself authorized the use of the funds. It may not be unreasonable for a

³⁰ 21 U.S.C. § 848(e)(1)(A) (1988); see *United States v. Escobar*, 803 F. Supp. 611 (E.D.N.Y. 1992).

³¹ For a list of such statutes, see *id.* at 614.

³² See *Committee Report: A Proposal for Peremptory Challenges of Federal Judges in Civil and Criminal Cases*, 36 REC. 231 (1981); *Report of the Criminal Procedure Committee*, 111 F.R.D. 303 (1986). Both are discussed in *Escobar*, 803 F. Supp. at 615-16.

³³ See, e.g., FED. R. CRIM. P. 24 (affording both the government and the defendant twenty peremptory challenges in a capital case as contrasted with ten or fewer when a less severe punishment is at stake).

³⁴ *In re School Asbestos Litig.*, 977 F.2d 764 (3d Cir. 1992).

person "who [has] not served on the bench . . . to indulge suspicions and doubts concerning the integrity"³⁵ of a judge who attends a conference sponsored by one party. Mindful of the potential appearance of bias, Judge Kelly barred anyone who appeared at the conference from giving expert testimony. But the Third Circuit decided that this solution did not go far enough and it ordered Judge Kelly removed. I had been invited to the same conference attended by defense and plaintiff counsel to hear some of the preeminent experts in the asbestos-medical field. I could not attend because of lack of time—I was trying asbestos cases.

Judge Kelly had spent nine years presiding over the school asbestos litigation, during which time he issued hundreds of orders relating to discovery and other pretrial matters.³⁶ In its removal decision, the Third Circuit recognized that the newly assigned judge "will face a gargantuan task in becoming familiar with the case."³⁷ As with the tobacco litigation, it is not only the new judge who will be burdened. The parties will face a lengthy delay and will bear the costs of educating a new judge.

A less radical solution in the Kelly case would have been to remedy the situation by inviting defendants to present evidence or experts to counter the facts and conclusions presented at the conference the judge attended. There were no secrets and the papers presented were available. A reasonable person knowing that Judge Kelly's attendance at the plaintiffs' conference was inadvertent and that he had sought to remedy the error by giving the defendants essentially the same opportunity would not have a legitimate concern about Judge Kelly's impartiality.

In the Agent Orange case, I tried to read—and still do—all I could find on Agent Orange and dioxin. All that material is filed and docketed so anyone examining the public record can know what I have been exposed to.

It is, however, impossible to record all that we learn at conferences. Recently, I attended and spoke at the Rand Institute in New York on toxic torts. What I heard there may influence how I handle future cases. I also spoke at the Law Journal Toxic

³⁵ *Id.* at 782, quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864-65 (1988).

³⁶ *Id.* at 771.

³⁷ *Id.* at 784.

Torts Seminar. In both cases, my written remarks were substantially modified by extemporaneous changes. Moreover, I taught a recent session of my joint Brooklyn-Columbia Law School course in Mass Torts with a plaintiffs' lawyer in attendance to discuss ethical problems of the plaintiffs' bar in mass torts cases. All this, plus my attendance at meetings of the Carnegie Commission on Science, Technology and the Law and at the discussions about DNA and statistics during meetings of committees of the American Academy of Science that I served on, have had an impact on my thinking. Is this experience any more a basis for disqualification than the plays a judge sees or the books or articles he or she reads on jurisprudence, all of which may have an impact on decisions? Perhaps, as my children suggest, I should go fishing more.

The Third Circuit was careful to hold that the problem was that Judge Kelly attended a conference organized and funded by the plaintiff, not that he had sought to educate himself about the scientific aspects of asbestos litigation. The court acknowledged that a judge should seek to educate himself or herself to improve judicial management.³⁸ This is an important allowance.

The Third Circuit's decisions raise another difficult question I have already mentioned. When should the recusal decision rest with the district and when with the circuit court? The Sarokin and Kelly orders did not result from direct appeals after final judgment, but from petitions for mandamus before entry of an appealable order.³⁹ Mandamus provides extremely limited relief.⁴⁰ The Supreme Court has held that there must be a "judicial usurpation of power";⁴¹ that is, the district court must have "clear[ly] and indisputabl[y]" abused its discretion.⁴² Even in cases of abuse, an appellate court may decline to issue the writ

³⁸ *Id.* at 778-79.

³⁹ A petition for mandamus may be brought under the All-Writs Act, which provides that "The Supreme Court and all courts established by an Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (1988).

⁴⁰ See, e.g., *In re United States Dep't of Defense*, 848 F.2d 232, 234 (D.C. Cir. 1988), quoting *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988) ("[T]he writ of mandamus is an extraordinary remedy, to be reserved for extraordinary situations.").

⁴¹ *Kerr v. United States Dist. Court for the Northern Dist. of California*, 426 U.S. 394, 402 (1976).

⁴² *Id.* at 403.

of mandamus and wait until direct appeal to correct any errors.⁴³ These principles operate to further Congress's strong policy decision of avoiding piecemeal litigation.⁴⁴

Regardless of the procedure through which recusal is sought, the particular nature of recusal should give appellate courts reason for pause. Whether recusal is appropriate, that is, whether a judge's impartiality is reasonably in question ultimately is a judgment call; a careful examination of the particular facts and circumstances is required.⁴⁵ The district judge is best suited to make this determination in the first instance. The Second Circuit regards the determination as discretionary and will not reverse a district judge's decision to remain on or leave a case unless the decision was a clear abuse of discretion.⁴⁶ This is the appropriate standard. If a judge shows a clear extrajudicial bias or has a financial or other connection with a party, it would be inappropriate for that judge to continue to preside over the case; the circuit court must intervene. In the more common case where the facts are fuzzy and a party is attempting to judge-shop, the district judge's decision should stand. Moreover, the decision must be made in context. What would the cost of recusal be? Was the judge provoked? Was the statement out of character? Were other rulings balanced and fair?

After determining that Judge Kelly's conduct was so extraordinary that mandamus was an appropriate remedy to force him off the case, the Third Circuit concluded that it might not be necessary to vacate any of his post-conference rulings.⁴⁷ The Third Circuit rested its decision to leave Judge Kelly's rulings undisturbed on the desirability of avoiding the costs of relitigation. By doing so, it suggested that it did not itself doubt the judge's impartiality, but relied on what some members of the public might think.

So much of what jurors or judges do depends on their general life experiences that are not the basis for challenge. I am

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1309 (2d Cir. 1989), *cert. denied*, 490 U.S. 1102 (1989).

⁴⁶ *United States v. Lovaglia*, 954 F.2d 811, 815 (2d Cir. 1992); *Drexel*, 861 F.2d at 1312 (where circuit court asks "whether the district judge's decision is a rational one finding support in the record").

⁴⁷ *In re School Asbestos Litig.*, 977 F.2d 764, 786-88 (3d Cir. 1992).

reminded of a story told by the eminent District Judge Marvin Shoob from Atlanta. In the winter of 1944, he was a twenty-year-old army sergeant. When five teenage German soldiers surrendered to him, he disarmed them and waited for reinforcements. When his lieutenant arrived and asked Shoob what he planned to do with them, the young soldier said he did not know what to do. The lieutenant ordered the enemy soldiers to lie face down and sprayed them with bullets. He then announced to the young Shoob, "That solves your problem." Judge Shoob found the killing untenable. He vowed from that day on that, regardless of the consequences, he was going to do the right thing.⁴⁸

Nearly fifty years later, because Judge Shoob was "not the slightest bit intimidated by the federal government,"⁴⁹ he raised questions about whether he was getting a sanitized version of the evidence in a highly publicized case and whether the Bush Administration had interfered with the prosecution. As a result of his activist position, an investigator was appointed to report on any government wrongdoing. Judge Shoob recused himself.⁵⁰ Recusal was appropriate if the judge thought it was. But had it not been for Judge Shoob's courageous actions, the case probably would have quietly gone away.

Another outspoken judge, Miles Lord of Minnesota, was removed from a case after the circuit court said he was biased for shutting down a plant that was allegedly dumping waste into Lake Superior, creating a health hazard to the drinking water.⁵¹ Later his actions again became controversial when he ordered the makers of the Dalkon Shield intra-uterine device to produce minutes of meetings when officers said they could not remember anything about the controversy. The judge flew to the company's headquarters to examine its operation. His actions resulted in complaints from the corporation. Yet these actions changed the entire nature of the litigation, leading Professor Laurence Tribe to remark, "He has pierced the veil of corporate anonymity. He knew from the documents and record what had gone on. I wish the Supreme Court justices had some of his conviction and even

⁴⁸ Mark Curriden, *How Shoob Derailed a Plea*, A.B.A. J., Dec. 1992, at 12. I had an analogous experience during World War II that strengthened my own resolve to try to do what I thought was right.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Settlement Ends Mine Dumping Suit*, N.Y. TIMES, Apr. 28, 1982, at A31.

his passion.”⁵²

In the early 1950s, another well known district judge, Charles E. Wyzanski, in the context of an antitrust case, virtually restructured the deposition testimony planned by the defendant corporation when it appeared that a planned customer survey would be inadequate. Judge Wyzanski himself called to the stand officers of the principal competitor and in the summons listed topics appropriate for their questioning. The testimony resulted in a much clearer understanding of the industries that were to be affected by the ultimate decision in the case.⁵³

In his eloquent discussion of the freedom and responsibility of the trial judge, presented to this Association forty years ago, Judge Wyzanski reflected that to establish norms of judicial behavior for himself, the trial judge has the difficult task of being “critical of his own shortcomings, attentive to the reaction of the bar, informed of the unrecorded practices of his colleagues and, above all, reflective of the subtle differences in the tasks assigned to him.”⁵⁴

Judge John Sirica became the hero of the Watergate trials by continuously voicing the feeling that he was being lied to and by putting pressure on defendants either by taking over the questioning himself at times or even by using sentences as a means of extracting the truth. While he was criticized for his lack of judicial detachment, the country thought justice had been served.⁵⁵

Judges Sarokin and Kelly, much like Judges Shoob, Sirica, Lord and Wyzanski, are among the most distinguished and valuable of our trial judges. They were willing to say what they believed based upon what they saw in court. Of course tact and style are important. When a judge goes too far, the press, the bar, academics and appellate courts need to speak out. But, particularly in the delicate relationship between appellate and trial courts, caution by appellate judges is required to prevent neu-

⁵² Mary McGrory, *Sirica Set the Precedent for Morality Outweighing Manners*, WASH. POST, July 10, 1984, at A2.

⁵³ Charles E. Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1294 (1952) (discussing *United States v. United Shoe Machinery Corp.*, Civ. No. 7198, D. Mass, complaint filed Dec. 15, 1947).

⁵⁴ *Id.* at 1282.

⁵⁵ See Lawrence Meyer, *Watergate Judge at Peace with Self*, WASH. POST, Apr. 9, 1979, at B1.

tralizing judicial initiative and independence.

The independence of the federal judiciary and the necessity of maintaining that independence are a critical resource for our American democracy. The very first canon of the ABA Code of Judicial Conduct reminds us that "[a]n independent and honorable judiciary is indispensable to justice in our society."⁵⁶ Commentary to another canon describes a judge as a person in a unique position to contribute to the improvement of the law. Judges are encouraged to participate in efforts that promote both the fair administration of justice and the independence of the judiciary. This commentary is especially important for district judges who are in direct contact with people who need help. Their independence is crucial. Without it our system cannot work.

In his opinion recusing himself from the *Cipollone* case, Judge Sarokin wrote with his usual clear style:

It is difficult for me to understand how a finding based upon the evidence can have the appearance of partiality merely because it is expressed in strong terms. . . . I fear for the independence of the judiciary if a powerful litigant can cause the removal of a judge for speaking the truth based upon the evidence, in forceful language that addresses the precise issues presented for determination. If the standard established here had been applied to the late Judge John Sirica, Richard Nixon might have continued as President of the United States.⁵⁷

It is evident that Judge H. Lee Sarokin will not in the future be unduly inhibited from exercising the independence that Article III of our Constitution requires.

As for me, I shall continue to tell my law clerks: "Keep me out of as much trouble as possible by suggesting blue-pencilling what I write. But, don't inhibit me too much. Don't take all the fun out of being a federal district judge."

*Professor Monroe H. Freedman**

I find myself in a very awkward position criticizing Judge H. Lee Sarokin, whom I respect and admire, and disagreeing with Judge Jack Weinstein, whom I respect and admire even more. If

⁵⁶ ABA CODE OF JUDICIAL CONDUCT canon 1(A) (1989).

⁵⁷ *Cipollone v. Liggett Group, Inc.*, 799 F. Supp. 466 (D.N.J. 1992).

* Howard Lichtenstein Distinguished Professor of Legal Ethics, Hofstra University School of Law; author, MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS (Matthew Bender 1990).

you will forgive me, though, I would like to talk about some law on this subject, because it is easy for each of us to decide what we think ought to happen in particular cases in the abstract. Perhaps we would have written the relevant statutes and judicial decisions differently, but let us try to consider the Sarokin matter in the context of relevant legislation and Supreme Court decisions.

The section that is applicable in these cases is 28 U.S.C. section 455.⁵⁸ It is very different from the predecessor statute. Before 1974, the judicial disqualification statute, section 455, was expressly subjective.⁵⁹ The judge recused him or herself if, in the judge's opinion, it was appropriate to do so. In addition, the early section effectively established that the duty to sit was to be given overriding importance. This early version of the statute was weaker in terms of effecting judicial disqualification than the Due Process Clause as it was being interpreted by the Supreme Court. The Supreme Court in 1984 reiterated that in order to do justice, justice must satisfy the appearance of justice. And so, during the pre-1974 section 455, ironically, it was easier to disqualify a judge in criminal or civil cases under constitutional due process than under the judicial recusal statute. Section 455 was amended in 1974, replacing the subjective standard ("in his opinion" in the old statute) with an objective standard, eliminating the duty to sit and broadening the applicable language relating to disqualification. The key portion of section 455 now reads: "any judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."⁶⁰ "[M]ight reasonably be questioned" is the standard and it is mandatory ("shall").

In 1988 the Supreme Court decided *Liljeberg v. Health Services Acquisition Corp.*⁶¹ This was a case in which the presiding federal district judge was also a trustee of the University of Loyola in Louisiana. Loyola was not a party to the particular case before the judge. But Loyola had a significant interest in the outcome. The judge forgot any discussion that he might have had about this significant interest. He did not relate, in his own

⁵⁸ 28 U.S.C. § 455 (1988).

⁵⁹ 28 U.S.C. § 455 (1970).

⁶⁰ 28 U.S.C. § 455(a) (1988).

⁶¹ 486 U.S. 847 (1988).

mind, his discussions as a trustee with the case that was before him. The names were different, the interest of Loyola never appeared in the proceedings and he just never made the connection. This conclusion was accepted all the way up to the Supreme Court. Almost a year after the case was over, the losing party found out that the judge was a trustee of Loyola. You all know how difficult it is to overturn a case that has been decided, particularly one that was decided almost a year earlier. Nevertheless, the Supreme Court vacated the judgment in the case and ordered it to be retried.⁶² The language of the Supreme Court is significant. Interpreting the statute, the Supreme Court said, "The problem is that people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges."⁶³ Suspicions and doubts, the Court said, is what motivated this very broad disqualification provision in section 455. And so, the Court explained, to discourage these "suspicions and doubts . . . the very purpose of section 455 is to promote confidence in the judiciary by avoiding even the appearance of impropriety wherever possible."⁶⁴ This is exactly the reverse of the duty to sit where the judge was to recuse him- or herself only in the extreme case that might override the duty. In the language of the Supreme Court disqualification is to take place "wherever possible."

And so, in the school asbestos case involving Judge Kelley, the Third Circuit accurately reflected the Supreme Court's language when it stated the disqualification test as being whether reasonable but suspicious minds might question the judge's impartiality.⁶⁵ Indeed, the phrase "might question" tracks the statute.⁶⁶ That is to be distinguished from the rewriting of the statute in the Second Circuit where "might" becomes "would,"⁶⁷ an enormously different word in context, and "suspicion" becomes "significant doubt."⁶⁸ The Supreme Court never said "significant doubt." It said "suspicions and doubt." You might agree with

⁶² *Id.*

⁶³ *Id.* at 864-65.

⁶⁴ *Id.* at 865.

⁶⁵ *In re School Asbestos Litig.*, 977 F.2d 764, 782 (3d Cir. 1992); see *supra* notes 34-37 & 47 and accompanying text.

⁶⁶ *Id.*

⁶⁷ *United States v. Lovaglia*, 954 F.2d 811, 815 (2d Cir. 1992).

⁶⁸ *Id.*

the Second Circuit, but I submit to you that if you do, you are disagreeing with the Congress in its 1974 rewriting of section 455.

Now, the issue before Judge Sarokin was not whether the tobacco companies had fraudulently misled people into thinking that cigarettes were safe. The issue related to the tobacco industry research committee that had been set up with a view to litigation and was coordinated with lawyers for the tobacco industry who were preparing for litigation. At least this is what was said. And so, on its face there is a lawyer-client privilege and there is a work-product privilege that protects the documents of the tobacco research committee or counsel. The allegation was that because of the crime-fraud exception, documents could be discovered from this research committee that otherwise would be protected. What was before Judge Sarokin was not, again, whether there was fraud or criminal conduct or covering up in fact. The issue, as originally stated by the Supreme Court in an opinion by Justice Cardozo, is whether there is *prima facie* evidence that the allegation of criminal or fraudulent conduct has some foundation in fact.⁶⁹ All the judge had to find was "something to give color to the charge" that there was a fraud involved in the communications between the lawyers and the research committee.⁷⁰

You have heard the quote from Judge Sarokin's opinion.⁷¹ Now I would like you to hear it in context of what was before him—that is whether there was something to give color to the charge—not the ultimate fact, which the jury was yet to be empaneled to decide at some future date. This is how far Judge Sarokin went in the opening paragraph of his opinion: "In light of the current controversy surrounding breast implants . . ."⁷² Why does this opinion begin with something as inflammatory as the controversy involving breast implants? Judge Sarokin continues:

[O]ne wonders when all industries will recognize their obligation to voluntarily disclose risks from the use of their products. All too often in the choice between the physical health of consumers and the finan-

⁶⁹ *Clark v. United States*, 289 U.S. 1 (1933) (Cardozo, J.).

⁷⁰ *Id.* at 15, quoting *O'Rourke v. Darbishire*, A.C. 581, 604 (1920).

⁷¹ See *supra* note 3 and accompanying text.

⁷² *Haines v. Liggett Group, Inc.*, 140 F.R.D. 681, 683 (D.N.J. 1992).

cial well-being of business, concealment is chosen over disclosure, sales over safety, and money over morality. Who are these persons who knowingly and secretly decide to put the buying public at risk solely for the purpose of making profits and who believe that illness and death of consumers is an appropriate cost of their own prosperity?⁷³

The next paragraph in full is: "As the following facts disclose despite some rising pretenders, the tobacco industry may be the king of concealment and disinformation."⁷⁴ This passage speaks to the ultimate issue in the case to be decided by the jury; it goes far beyond what the judge at pretrial was called upon to decide.

You will never guess what happened with that opinion and its language. It made the headlines in the newspaper of the community from which the jury was to be drawn: "Judge Says Tobacco Firms Concealed Smoking Risk."⁷⁵ This is the ultimate issue in the case. The story was picked up, with similar headlines, which seems to me perfectly reasonable, fair, and I think intended by Judge Sarokin, in *The New York Times*,⁷⁶ *The Wall Street Journal*,⁷⁷ *The Washington Post*,⁷⁸ *The Chicago Tribune*,⁷⁹ and *The Los Angeles Times*.⁸⁰

In my view, Judge Sarokin was injudicious. Judge Weinstein says that Judge Sarokin sent a message to the public. He sure did. It is my position that this is not the judicial function, certainly not pretrial. I defended Miles Lord for something that he said after a case was over, and the case was in the process of being settled for there could be no prejudice to a jury or to any other aspect of the case.⁸¹ It was at the end of the case, based on

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Haines v. Liggett Group Inc.*, 975 F.2d 81, 97 (3d Cir. 1992), quoting *NEW JERSEY STAR LEDGER*, Feb. 7, 1992, at 1.

⁷⁶ Charles Strum, *Judge Cites Possible Fraud in Tobacco Research*, *N.Y. TIMES*, Feb. 8, 1992, at A1.

⁷⁷ Jonathon M. Moses & Junda Woo, *Law*, *WALL ST. J.*, Feb. 10, 1992, at B6.

⁷⁸ *Judge Orders Files Opened on Cigarettes*, *WASH. POST*, Feb. 8, 1992, at C1.

⁷⁹ *Judge Rules Industry Hid Smoking Threat*, *CHI. TRIB.*, Feb. 9, 1992, at C4.

⁸⁰ *Tobacco Industry Concealed Smoking Dangers*, *Judge Rules*, *CHI. TRIB.*, Feb. 7, 1992, at C7.

⁸¹ On July 9, 1984 I testified in St. Paul, Minnesota before a five-judge investigative panel appointed by the Chief Judge of the Eighth Circuit to hear A.H. Robins's complaints about Judge Lords's criticism of the company's actions with respect to the Dalkon Shield.

what had gone before in the proceedings. In *Haines*, however, the statement came early in the case.

There is an additional point, not relied upon by the Third Circuit, that I find important. Judge Sarokin is one of our best judges. Judge Sarokin knows that after he decided that the crime-fraud exception applies (remember that was the only issue before him), there is a right of appeal. Indeed, in this very case on this very issue, there was an order that no information from these documents be revealed until the case was appealed. Yet Judge Sarokin quoted from the documents in his opinion. That for me is so highly injudicious, coming from a judge who I know knows better, that it bespeaks more than the words in the opening two paragraphs. He never, I think, in any other situation would have reached the way he did in quoting from material when the Third Circuit had yet to decide whether that material was protected under the lawyer-client privilege and the work-product doctrine.

Another issue that persuades me that the Third Circuit was correct (and this it did not rely on because Judge Sarokin had not said it at that point): Judge Sarokin compared what he was doing with Judge Sirica's conduct in Watergate. Now I do not share Judge Weinstein's doubts—which I think may be tongue and cheek—about whether the impeachment was a good thing. I was, for example, the lead-off speaker in an impeachment rally at Westbury Music Fair. But I also wrote an op-ed piece in the *New York Times* at the time,⁸² and recently wrote a column in *The Legal Times*, criticizing Judge Sirica.⁸³ He may be a folk hero, but he is one that no American judge should emulate, as Judge Sarokin in effect has acknowledged he was doing. What Judge Sirica did in the Watergate prosecutions was to spell out for the jury, literally spell out, that T-R-U-T-H was more important in that case than the due process rights of the defendants. In open court, before the jury, he said that "the court of appeals can not tell me how to run my case."⁸⁴ Judge Sirica often re-

⁸² Monroe Freedman, *Arrogance of Power*, N.Y. TIMES, Dec. 14, 1974, at A29 (editorial).

⁸³ Monroe Freedman, *Evaluating Sirica's Watergate Legacy*, LEGAL TIMES, Sept. 7, 1992, at 26 (editorial).

⁸⁴ *United States v. Barker*, 514 F.2d 203 (D.C. Cir.), cert. denied, 421 U.S. 1013 (1975).

ferred to himself as a "natural-born prosecutor."⁸⁵ Indeed, he became the prosecutor in the case. *Time* magazine made him "Man of the Year" for his success in breaking the case.⁸⁶ He thereby violated the traditional role of the judge in an adversary system where the role of zealous advocacy is given to the lawyers on either side of the case and the judge is required to be impartial and relatively passive.

There are remedies for situations where the judge believes that because of a conflict of interest the case is not being litigated properly (as Judge Sirica had very good reason to believe in the Watergate case). I remember one case where Judge Pratt decided as trial judge that a case was not being litigated properly and that a party was not receiving due process of law; he declared a mistrial.⁸⁷ There is also authority that in criminal cases, where the prosecutor has a conflict of interest and is not prosecuting effectively, a judge has the inherent power to appoint—but not become—a special prosecutor.⁸⁸

Because of what Judge Sarokin said in that dramatic language that he had every reason to know would receive wide publicity in the community and way beyond, because of his own analogizing of his act to that of Judge Sirica, and because of his egregious act of quoting from the documents the privileged nature of which had not ultimately been passed upon, Judge Sarokin's impartiality might reasonably be questioned under the disqualification statute.

*Professor Stephen Gillers**

I want to try to agree with both Judge Weinstein and Professor Freedman, which will not be easy. In *United States v. Archibald Newbald*⁸⁹ the Fifth Circuit considered whether a judge should be disqualified because at the last of three trials, the judge described a particular group of individuals as "a large scale conspiracy composed of the most vicious individuals that

⁸⁵ Robert L. Jackson, *John J. Sirica, Watergate Case Judge Dies At 88*, L.A. TIMES, Aug. 15, 1992 at A1.

⁸⁶ TIME, 1973.

⁸⁷ *United States v. Narciso*, 446 F. Supp. 252 (D.C. Mich. 1977).

⁸⁸ For a full examination of this issue, see *In the Matter of An Application for Appointment of Independent Counsel*, 596 F. Supp. 1465 (E.D.N.Y. 1985).

* Professor, New York University School of Law.

⁸⁹ 554 F.2d 665 (5th Cir. 1977).

this court has ever seen.”⁹⁰ The Fifth Circuit held that this statement was not grounds for recusal because the judge had acquired that information in his judicial capacity, not in his extra-judicial capacity. Even there, recusal might be appropriate if the statement reflected “pervasive bias and prejudice.”⁹¹ But the circuit court concluded that it did not.⁹²

In *United States v. Antonelli*⁹³ a judge in the Northern District of Illinois responded to a motion to recuse another judge. The judge who wrote the opinion said that the other judge called Antonelli “the most viciously anti-social person who has ever come before me.”⁹⁴ The ruling judge held that this was not a reason to recuse the first judge. “Vicious” seems to be a popular word.

Hale v. Firestone Tire,⁹⁵ an Eighth Circuit products liability case, involved a man who was injured when a tire rim blew off the tire and hit him. The trial judge said repeatedly that he believed the rim was defective. The Eighth Circuit found that the trial judge made this view known unequivocally.⁹⁶ Nevertheless, it did not require his recusal because this case was going to be a jury case; the judge had given his opinion mostly outside the presence of the jury based on judicial sources, not extra-judicial sources.⁹⁷ There was one statement that the judge made in the presence of the jury for which he was chastised, but it was an insufficient basis to recuse him.

Finally, consider *Alberti v. General Motors Corp.*⁹⁸ The District of Columbia district court judge in that case had previously sat in *United States v. General Motors*.⁹⁹ The judge said that he would unavoidably be affected to some extent by the knowledge

⁹⁰ *Id.* at 681.

⁹¹ *Id.* at 682.

⁹² *Id.*

⁹³ 582 F. Supp. 880 (N.D. Ill. 1984).

⁹⁴ *Id.* at 881.

⁹⁵ 756 F.2d 1322 (8th Cir. 1985).

⁹⁶ *Id.* at 1330.

⁹⁷ *Id.* The court reversed on other grounds and noted “the district court’s comments which reflected its view that the rim was defective and that appellees should prevail were unnecessary to the proceedings. We further note that judicial restraint and decorum would be better served and advanced if district judges would refrain from making such comments.” *Id.* at 1331.

⁹⁸ 600 F. Supp. 1024 (D.D.C. 1984).

⁹⁹ 99 F.R.D. 610 (D.D.C. 1983).

he had acquired in presiding over the former case. Nevertheless, the judge concluded that he did not have to recuse himself because his knowledge was judicially acquired.

These decisions demonstrate the great variety of approaches to the issue presented in the Sarokin matter. I do not think that you can use the language of section 455(a) quite as freely as Professor Freedman does.¹⁰⁰ I understand what he is doing. The word "might" is a very powerful word. It is a wonderful word for people making recusal motions because frankly all you have to do is think of a logical progression of thought that a reasonable person might have and you may win. I think that we have to put more teeth into the word "might" than one would based on the reading of the statute alone.

The Supreme Court's decision in *Liljeberg v. Heath Services Acquisition Corp.*¹⁰¹ has to be read against the astonishing facts of that case. While it is true that Justice Stevens purported to assume that the trial judge was unaware of the Loyola interest in the litigation, that is about as far as you can go. His opinion is dripping with sarcasm. I do not believe for a second that Justice Stevens believed what he assumed. Furthermore, the facts are rather egregious even if you assume what Justice Stevens assumed. So while there is very broad language in *Liljeberg*, it has not been treated as broadly as its language would tolerate. In my view, the reason the Sarokin controversy is important is precisely because it is not like *Liljeberg*; this is not a financial interest case. In *Liljeberg* the judge was fiduciary to an organization that had a financial interest in the outcome of the litigation, which was tantamount to the judge having a financial interest.

*Haines v. Liggett Group, Inc.*¹⁰² wakes us up because all Judge Sarokin seemed to do was exercise his craft. He wrote something. I imagine it can become monotonous writing judicial opinions in the same style month after month. And the temptation is surely there to be frisky and to invoke metaphor and imagery. Some people do it better than others. Others do not have the time to do it. But all of us who write for a living or speak for a living, in one way or another, understand the temptation.

¹⁰⁰ See *supra* notes 57-86 and accompanying text.

¹⁰¹ 486 U.S. 847 (1988).

¹⁰² 975 F.2d 81 (3d Cir. 1992).

Judge Sarokin wrote, as judges often do, based on information he acquired as a judge. His information was not extrajudicial under what I take to be the dominant governing principal, including the one prevailing in the Third Circuit. His conclusions, based on judicially-acquired information, though perhaps evincing bias, could not be the basis for disqualification.

Bias, after all, is what we want judges to have after they gather information; it is inherent in their job. Another way of saying "bias" is saying "point of view," "position" or "belief." We are supposed to be affected by our beliefs, as Judge Weinstein said, whether we get them by going to the theater or by sitting in court listening to evidence. Instructions to juries to keep an open mind are nice, but we do not really expect that people who hear evidence day after day over weeks and months will not begin to fashion an opinion until the day they walk into the jury room to deliberate. So other things being equal, it strikes us as odd to remove a judge from a case for forming an opinion based on evidence heard in that case, where the opinion was formed in order to issue a ruling that the judge was duty-bound to issue in response to a motion rejecting the claimed privilege.

If that were all, we would stop right now. But it is not all. Since it is not all, I ultimately have to conclude that the Third Circuit's ruling was plausible, perhaps inevitable, although these things are a matter of judgment. I say the Third Circuit's "ruling" because I find its opinion impoverished.

I have no problem at all with the second of the two paragraphs of Judge Sarokin's opinion. It reads: "As the following facts disclose, despite some rising pretenders, the tobacco industry may be the king of concealment and disinformation."¹⁰³ If the opinion had begun with that sentence alone, no recusal could have been justified. At best it is colorful. Colorfully, it reaches a conclusion the judge is authorized to reach. The use of the word "king" to suggest that the industry is the greatest concealer and disinformant among others, including pretenders, is of no great moment. I do not think that even under the very broad definition of section 455(a) that Professor Freedman advocates we would disqualify Judge Sarokin for that passage. But that is

¹⁰³ *Haines v. Liggett Group, Inc.*, 140 F.R.D. 681, 683 (D.N.J. 1992).

not how the opinion began. It began with the passage: "In light of the current controversy surrounding breast implants"¹⁰⁴

The Third Circuit's opinion quoted those two paragraphs and then went to quote the headline from the New Jersey Star Ledger: "Judge Says Tobacco Firm Concealed Smoking Risks."¹⁰⁵ It then pointed out that national press had picked up this story.¹⁰⁶ I do not care about the national press. I think that is irrelevant; we do not count column inches to decide whether judges have to be disqualified. I think a judge can be disqualified for something he or she says from the bench whether or not there is a reporter in the courtroom. I think a judge may not be disqualified for something he or she says from the bench even though it makes the world press.

How the press constructs or describes something should not be the judge's problem. If Judge Sarokin had used what Judge Weinstein quoted as "judgy-wudgy" talk,¹⁰⁷ the national or world press might have written exactly the same thing. Again, it would have been irrelevant if Judge Sarokin said, in the language of the Second Circuit, that "a reasonable person could find" or "there is *prima facie* evidence to believe" or "there is probable cause to believe."¹⁰⁸ The news story on television might have been the same. We should not let judicial recusal motions turn on the happenstance of press attention.

The Third Circuit opinion also discussed other cases, using general language and emphasizing its own trust of Judge Sarokin.¹⁰⁹ But there is very little in the opinion that captures the essence, as a matter of judicial craft, of why Judge Sarokin should not have continued to sit and what we are alerting other trial judges to avoid doing.

As I say, the problem lies in Judge Sarokin's first paragraph. I have read it maybe two dozen times. It reads like Judge Sarokin has joined a group of crusaders concerned not with the evidentiary issue in this case, but with corporate culture and with disinformation by the Fortune 100. That is the problem. How do we explain that paragraph unless we hypothesize, quite

¹⁰⁴ *Id.* at 681.

¹⁰⁵ *Haines*, 975 F.2d at 97.

¹⁰⁶ *Id.*

¹⁰⁷ See *supra* note 8 and accompanying text.

¹⁰⁸ *United States v. Lovaglia*, 954 F.2d 811, 815 (2d Cir. 1992).

¹⁰⁹ *Haines*, 975 F.2d at 98.

reasonably, that Judge Sarokin had in some way been carried away and was no longer in the place he needed to be as a trial judge. I think that is quite a plausible inference and it surmounts the word "might" as used in section 455, even if defined with teeth. That is why I concluded after reading the Sarokin opinion that there was the appearance of danger there. The Third Circuit's opinion confirmed my view.

But I am distressed that the Third Circuit was so casual and brief, spending only a couple of pages in its treatment of this very important issue. The Sarokin matter needed more attention because it is not simply a matter of a judge's financial interests. Everyone understands financial interests. We have nearly a bright-line test for them. The Sarokin matter needed more attention because it treats so nebulous an area. Trial judges in the Third Circuit need more guidance.

I do not know if my conclusions make me agree with both speakers. I suppose I agree with Professor Freedman that the Third Circuit's decision was right. I also think that a lot of what Judge Weinstein said is absolutely right. You can agree with virtually all of it and yet come away disagreeing with his conclusion. Ultimately, my agreement with the Third Circuit's ruling rests on Judge Sarokin's decision to begin his opinion the way he did.

*Joseph T. McLaughlin**

No lawyer who represents or thinks that he or she might ever represent an unpopular plaintiff or defendant before a court can overlook the importance of the judiciary's independence. At the same time, with that great freedom the Constitution gives our federal judges comes a very heavy burden. That burden, that price for their freedom, is the duty to be impartial. It is not only the duty to be impartial, but as Congress and the Supreme Court have interpreted that duty on more than one occasion, the judge must be disqualified if his or her impartiality might reasonably be questioned. The question we are all asking is if we value the independence of the judiciary and the impartiality required so that we continue to have the respect we have as lawyers and as citizens for the decisions reached by the judiciary, then how do we make sense out of this Third Circuit *Haines*

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case?

I come from Massachusetts and after attending law school in New York, I returned to Massachusetts to serve as a law clerk. One of the first things that my fellow clerks and I were required to read before we began our duties was an account of the Salem Witchcraft trials that took place in the late seventeenth century in Salem, Massachusetts. Ultimately, some twenty-four individuals were sentenced and put to death for the crime of witchcraft. Judge Samuel Sewall, who presided over those trials, had the misfortune to outlive most of his supporters and consequently had to deal with his critics some thirty years later. When Judge Sewall tried to explain what he had done, because there was a transcript even then, he ultimately recanted and apologized to the good people of the Commonwealth of Massachusetts. He said he had been carried away by the passions of the times. Indeed, when you read about that time, it certainly was a time of passion and fear among the people.

In trying to make some sense of the *Haines* decision, I reviewed some of the earlier decisions of various courts—decisions where an appellate court was confronted with the heavy and difficult burden of reviewing the actions of a distinguished member of the federal judiciary who had tried his or her best to do justice in a particular case. There were several cases that I thought might help put *Haines* in perspective.

The first one is *Berger v. United States*.¹¹⁰ It was decided by the United States Supreme Court in 1921. There was a well-known district judge who went on to fame in other fields; his name was Kenesaw Mountain Landis. He was presiding at a trial in 1918, where six individuals were indicted for espionage. Each and every one of them had a last name that, according to the Supreme Court, had a German sound to it. The Supreme Court quoted some remarks that Judge Landis had made in another case sentencing an individual with a German-sounding name in the same courthouse within weeks of his refusing to disqualify himself from the *Berger* trial. Judge Landis said, according to the Supreme Court:

If anybody has said anything worse about the Germans than I have I would like to know it so I can use it. . . . I know a safe blower, he is a

¹¹⁰ 255 U.S. 22 (1921).

friend of mine who is making a good soldier in France. He was a bank robber for nine years, that was his business in peacetime, and now he is a good soldier, and as between him and this defendant, I prefer the safe blower.¹¹¹

The Court, after paying tribute to Judge Landis's reputation, said that neither the convictions nor his decision to deny the recusal motion could stand because a judge could not give the appearance of bias or prejudice. If he did, it would undermine the confidence that the citizens of the United States had in the impartiality of the judiciary.

Some fifty years later, in 1973, the Third Circuit, interestingly enough, had several cases involving the consideration of disqualification of a number of district judges. All these cases involved individuals who had declared themselves to be conscientious objectors in the heyday of a war about which many of us have read and seen movies of late and about which there are many opinions.¹¹² But we know that, like in Salem, Massachusetts, those opinions were passionate. In these cases the Third Circuit had to review remarks made by various district judges in that circuit when they were sentencing conscientious objectors who had refused to step forward for induction and who were then convicted for the crime of wrongfully refusing induction. A number of the judges whose remarks were analyzed in these Third Circuit opinions said they felt a duty to pressure conscientious objectors into submitting to induction and that sentencing them all to a uniform thirty months was the best way to effectuate the draft policy of the United States. The Third Circuit said, "We think the personal bias alleged was of such a nature and intensity to prevent the defendant, when convicted, from obtaining a sentence uninfluenced by the court's prejudgment concerning Selective Service violators generally."¹¹³ Such an allegation against a class is sufficient under the statute to require recusal.

In this same circuit in 1992 the acts of a very worthy and distinguished district judge were analyzed. One of the things to consider when analyzing Judge Sarokin's action in *Haines* is a fact to which not a great deal of attention has been paid, but it

¹¹¹ *Id.* at 28-29.

¹¹² See *United States v. Townsend*, 478 F.2d 1072 (3d Cir. 1973).

¹¹³ *United States v. Thompson*, 483 F.2d 527, 529 (3d Cir. 1973).

is a fact you should weigh with all the other facts you have heard. When the magistrate or special master ultimately made the report on the famous documents and found that the attorney-client privilege or the work-product protection applied to all of them, with the exception of eight out of some 1500 documents, Judge Sarokin did not simply review the magistrate's or the special master's reports. He called for exhibits, transcripts, briefs, and documents that had been produced in a related but not consolidated, case *Cipollone v. Liggett Group, Inc.*¹¹⁴ over which he also had been presiding for a number of years. Now the difference, of course, is that the *Cipollone* case was tried to a verdict. A jury ultimately rejected most of the claims of the plaintiff, the husband of Rose Cipollone, who had died years before the case went to verdict. However, the jury did find on one claim for the plaintiff and awarded him \$400,000. That award was ultimately vacated by the Third Circuit in another unrelated proceeding. But it was *Cipollone*, in which a jury had weighed the evidence and that had been pending for six years, to which the district judge in *Haines* turned because, after all, he was the judge in both cases. The difference is, of course, that although *Haines* had been pending for four years, there had been virtually no activity in the case; it had been stayed pending a decision by the Supreme Court of New Jersey on a state statutory interpretation question involving the parameters of tort liability. Unlike in *Cipollone*, in *Haines* there had been no decision on the merits, indeed not even a summary judgment decision. But the court reached out for documents, briefs, arguments and transcripts from *Cipollone*, where there had been a jury verdict, which had been up and down to the Third Circuit on two prior occasions, to vacate the findings of the special master and magistrate, to declare that the crime-fraud exception applied, and then to remit the documents to determine how the crime-fraud exception applied individually to specific documents.¹¹⁵ But as Professor Freedman noted, Judge Sarokin saved out of that pile some five documents that were subject to the order holding that the privilege would apply through an appeal. Yet he quoted them extensively in his opinion.

Now it is certainly true, whether one looks at the Dalkon

¹¹⁴ 683 F. Supp. 1487 (D.N.J. 1988).

¹¹⁵ *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 93 (3d Cir. 1992).

Shield or asbestos cases, or statistics that are offered by the American Heart Association that some 400,000 smoking-related deaths per year are due principally to smoking, that the tort field is in a time of national turmoil. Maybe it is a stretch to compare the language of Judge Sarokin discussing members of the tobacco industry as the "kings of concealment and disinformation," with the language of Judge Landis, who said he preferred the company of safe blowers to the company of the German defendants. But I am not so sure. When you look at how the disqualification doctrine has been applied to protect ultimately the confidence of citizens in the judiciary and in the impartiality of the judiciary, perhaps we can conclude, as the Supreme Court has on more than one occasion, that it is the task of the judiciary, in effect, to insulate itself from the passion of the times, and not to respond to the cries of justice either in Salem, in Judge Landis's court during World War I, or in the district courts of the Third Circuit in the middle of the Vietnam War. Perhaps a judge, although he or she should read and think and understand these kinds of problems, should not express himself or herself quite so colorfully and prejudge or appear to prejudge the merits before the summary judgment motion has not even been decided.

The language of Judge Sarokin's introductory passage is at best gratuitous. It forces us to go back to *Liljeberg v. Heath Services Acquisition Corp.*¹¹⁶ and ask ourselves what the Supreme Court concluded in its review of the legislative history, notwithstanding Chief Justice Rehnquist's dissent.¹¹⁷ The Court concluded that Congress intended to broaden the grounds for disqualification in 1974 to protect the impartiality of the judiciary so as to maintain the confidence expected by lawyers and as citizens—confidence not only in our independent judiciary, which we champion, but in our impartial judiciary, without which we could not have confidence in the outcomes of cases.

The most recent disqualification case in the Third Circuit, to which several of the speakers have previously alluded, is the case involving school asbestos litigation.¹¹⁸ The Third Circuit described what the trial judge did in that case in the following lan-

¹¹⁶ 486 U.S. 847 (1988).

¹¹⁷ *Id.* at 870 (Rehnquist, C.J., dissenting).

¹¹⁸ *In re School Asbestos Litig.*, 977 F.2d 764 (3d Cir. 1992).

guage: "In high profile cases such as this one the outcome of which will in some way affect millions of people, such suspicions [as to the integrity of judges] are especially likely and untoward."¹¹⁹ A reasonable person might suspect that the district judge's plaintiff-subsidized attendance at the preview of the plaintiffs' case would have predisposed him toward the plaintiffs' position. Alternatively, others might reasonably believe that because Judge Kelly now knows that the plaintiffs had indirectly paid his way he might have been angry at them for compromising him and might have overreacted to the prejudice whichever way, as the Third Circuit concluded. Removing the judge was necessary to protect the reputation of the judiciary and not the reputation of a single judge. Perhaps, thirty years from now, if a district judge looks back on this kind of experience, he or she will mellow as Judge Sewall did and think of it as a life experience. It undoubtedly must be difficult for any judge who puts the time and effort that Judge Sarokin has into attempting to adjudicate very complex cases. In the end, however, it is the judiciary we are trying to protect and not an individual judge.

Judge Weinstein:

I am generally in agreement with what has been said. I should like to just touch on a few points. I am somewhat amused by the chastisement of the judges in the Vietnam War cases.¹²⁰ The decisions were designed of course in part to prevent the extreme penalties that were imposed by some courts. Their only problem was that they were twenty or thirty years ahead of the times. Now they would have to follow the Sentencing Guidelines exactly. So they were premature guidelinists. There are also a few technical problems that have been adverted to apart from the style.

First, it is appropriate as a matter of judicial notice for a judge to rely on what is in the courthouse and what that judge has seen in court.¹²¹ It has been traditional to go to other files

¹¹⁹ *Id.* at 782.

¹²⁰ See, e.g., *United States v. Townsend*, 478 F.2d 1072 (3d Cir. 1972); *United States v. Thompson*, 483 F.2d 527 (3d Cir. 1972); see *supra* notes 110-11 and accompanying text. I suppose I, too, must be chastised. See *United States v. St. Clair*, 293 F. Supp. 337 (E.D.N.Y. 1968); *United States v. Lybrand*, 279 F. Supp. 74 (E.D.N.Y. 1967).

¹²¹ See JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN'S EVIDENCE*

within the court to determine generally what has been done. I do not see anything wrong with a judge looking at what is in the courthouse files. That is appropriate.

Second, putting the style problem aside, it is also appropriate to consult courthouse files in considering what the law should be, that is, what the proper standard should be with respect to the crime-fraud exception to the attorney-client privilege. Assume the judge had, in the course of his analysis of the standard, written something like the following: "In considering this standard, we must take into account that in massive toxic tort cases the possibility of secrecy can affect many people other than the litigants, and we must therefore consider that secrecy orders are more and more being ignored and cut down as a matter of public policy in this country. We ought to consider a lower standard in a mass product case with respect to this kind of issue."¹²² At that point it is appropriate, I believe, with regard to the privilege issue, to repeat what Judge Learned Hand said in connection with another privilege, that against self-incrimina-

§§ 200[01] *et seq.* (1990).

¹²² Currently a national campaign is underway in the name of public safety, spearheaded by the Association of Trial Lawyers of America ("ATLA"), to create a presumption of public access to all information produced in litigation. ATLA claims that protective orders are being used to hide product defects and public hazards and it has been pressing for legislation aimed at restricting the courts' discretion to issue protective and sealing orders. These plaintiffs' attorneys have an interest in opening up the files for other litigations. Yet, much can be said in favor of the public's right to know.

While legislation to limit protective orders has been defeated in most jurisdictions, two states, Florida and Texas, have introduced sweeping reforms to restrict the courts' ability to seal documents. Both provisions are facing constitutional challenges. The Florida statute prohibits a court from issuing a protective order that conceals "information concerning a public hazard." FLA. STAT. ANN. § 69.081(3) (West 1993). A public hazard is broadly defined and includes a product that has or is likely to cause injury. *Id.*

The Texas rule establishes a presumption that civil records be open. To obtain a protective order, a party has the heavy burden of showing a "specific, serious and substantial interest which clearly outweighs a presumption of openness to the general public." TEXAS R. CIV. P. 76(a) (West 1992). A court can seal the records only after deciding that the interest at stake outweighs the broad public interest in access. The order, however, can always be contested after it is granted. The Texas rule is being challenged in product liability cases involving the sleep-inducing drug Halcion, the antidepressant Prozac and the Ford Bronco II. *See, e.g., Upjohn Co. v. Freeman*, 847 S.W.2d 589 (Tx. Ct. App. 1992); *Eli Lilly & Co. v. Marshall*, 829 S.W.2d 157 (Tx. 1992).

In 1993 at least 15 states are likely to consider proposals to change the rules about protective orders. Action is sought at the federal level as well. For a complete survey of the status of legislation governing protective orders, see *Product Safety and Liability Reporter* (BNA), Vol. 2D, No. 47, Part II Nov. 27, 1992.

tion: you have to open the door slightly.¹²³ It has to be ajar to see whether there is a basis to conclude that there may be fraud because our original assumption is that there is no fraud.

In opening that door slightly and in analyzing the case to determine whether there is enough to open it further, we have to analyze the facts revealed by that peek. How much of it do you want to reveal? That is a matter of judgment. But there are public policy aspects and technical aspects that lead me to believe that it is improper to criticize Judge Sarokin for quoting some of the documents. Increasingly, any time there is a secrecy order that comes before me, particularly in a case with a public interest, I write after approving it, "subject to public policy and to re-opening by the court." The evidentiary points, the public policy points and these other points that are discussed all would allow judges to consider the heart valve cases,¹²⁴ the asbestos cases,¹²⁵ the Agent Orange cases¹²⁶ and the Dalkon Shield cases¹²⁷ in determining the proper secrecy standard. There is nothing wrong with considering the nature of our current society and the needs and protections that are desirable in ruling on a secrecy application.

Professor Gillers:

I just want to put one additional frame around this discussion. When we talk about disqualification it is easy to think that we are talking about fitness or unfitness. And it is easy to become defensive if you are the focus of the effort. That is certainly true in lawyer disqualification motions as well as judicial ones. But disqualification really is a way of asking very important questions, whether it is lawyers or judges who are being disqualified. Those questions are: "What does it mean to be a lawyer? What are the limits on who can be a lawyer in a particular situation for a particular client? What does it mean to be a judge? Who can and cannot sit in a particular matter under particular circumstances?" Disqualification is a method for asking

¹²³ See *United States v. Weisman*, 111 F.2d 260, 262 (2d Cir. 1940).

¹²⁴ See, e.g., *Khan v. Shiley, Inc.*, 266 Cal. Rptr. 106 (Cal. Ct. App. 1990).

¹²⁵ See, e.g., *In re Joint E. and S. Dist. Asbestos Litig. (In re Johns-Manville Corp.)*, 129 B.R. 710 (E. & S.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992).

¹²⁶ See, e.g., *Ryan v. Dow Chemical Co.*, 618 F. Supp. 623 (E.D.N.Y. 1985).

¹²⁷ See, e.g., *In re A.H. Robins Co., Inc.*, 88 B.R. 742 (E.D. Va. 1988), *aff'd*, 880 F.2d 694 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989).

these questions over time and getting different answers over time.

So it is a testing procedure rather than a challenging procedure, although it can be used and abused. Now, unfortunately, but perhaps inevitably, the Supreme Court has ruled that motions to disqualify—granted or not—are not appealable as of right, but only as an interlocutory matter.¹²⁸ So we are going to be answering this question largely, certainly in civil cases almost exclusively, at the district court level. We are not going to get the kind of appellate review for those questions in the federal system that we once had. Indeed, as casebook editors like me know, if you are looking for recent cases on attorney disqualification, you mostly, although not exclusively, have to look at district court cases. The circuit cases are extreme ones, mandamus cases, that do not really serve the pedagogical function. In large measure we are losing a voice—the appellate voice—in the dialogue about what a conflict is and who may and may not be a lawyer in a particular case. I think that is quite unfortunate. Even *Liljeberg v. Health Services Acquisition Corp.*¹²⁹ arose as a rare post-trial attack on a judgment.¹³⁰ So I think we have first to identify the questions we are asking. They are legitimate questions for society to ask. Second, we might reconsider whether we have hurt ourselves in the interest of other policy and efficiency considerations in largely excluding appellate participation in the solution to those evolving questions.

II. QUESTIONS FROM THE AUDIENCE

Dean Feerick:

Thank you very much. I would like to throw the discussion open to members of the audience.

Judge James L. Oakes:

I have a question, a double barrel question for Professor Freedman. First, Professor, were you not opposed to old Model Code Canon 9 relating to lawyers, on the basis that appearance of impropriety is a test subjective to the observer? And second,

¹²⁸ *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 432-33 (1985).

¹²⁹ 486 U.S. 847 (1988).

¹³⁰ *Id.* at 850.

if so, how does that square with your rather broad view, I may say, of section 455 as to judges, a view that emphasizes the word "might" and does not emphasize the word "reason?"

Professor Freedman:

Judge, I am sorry to say that you are misinformed about my position. I have written at some length in my book about the importance of the appearance of impropriety, and I have explained the essentially political reasons that the concept was disapproved by influential major firms, resulting in the virtual extirpation of the idea of appearance of impropriety from the new Model Rules.¹³¹ But it is my view that the appearance of impropriety is extremely important for the very reason that I quoted from the Supreme Court; to do justice, we must maintain the appearance of justice. What I have insisted upon is that it not be an appearance of impropriety in the abstract, but that we be prepared to identify the kinds of improprieties that we are talking about. I see the appearance of impropriety as one of the important metaphors, justifications and explanations of what we mean by a conflict of interest, particularly in an area where it is so important that the public have confidence in the processes upon which it relies.

Unidentified Questioner:

It seems to me that much of what has been discussed represents an unrealistic view of the way cases are litigated. Cases are litigated from the start to create an impression as to the merits of the parties' particular cause. In this case you are talking about a very, very dangerous precedent. A litigant who finds that the case is going poorly will make a motion to disqualify the judge, citing *Haines*. Think about the impact on the other party. I think it is wrong, frankly, and that has got to be addressed. There are two parties here. What is the impact going to be on the other party following a disqualification decision?

Professor Freedman:

One of the things that amuses me in cases involving lawyer and judicial disqualification is the frequent line that this motion is brought for tactical reasons. Well I would certainly hope so.

¹³¹ MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 205-11 (1990).

To bring it for reasons that are not tactically desirable from the point of view of your client would be a violation of ethical responsibilities. Why do we never hear judges saying "I am not sure I am going to exclude this hearsay testimony, because the only reason that the lawyer is objecting is for tactical reasons"? Yes, let us accept that lawyers are advocates. They are partisans for one side. They do not make motions unless there is a sound tactical basis for them, unless they are incompetent. Then, having gotten over that, we should move to the merits of the particular motion. I think that the arguments that have been made here and in Congress on section 455, and in the Supreme Court in interpreting section 455, are very weighty reasons for maintaining the appearance of impartiality: to ensure that people can have respect for and confidence in the administration of justice.

Unidentified Questioner:

I recently tried a case that was pretrial for years and we had a six-week bench trial. Four weeks into the trial, with the case going badly, my opponent moved to disqualify the judge based on comments that the judge had made about the credibility of the witnesses. The motion was denied, but think about the consequences to everyone involved. This decision by the Third Circuit may be cited for the proposition that appearance alone may be the basis for a disqualification motion. The question becomes, what might a reasonable person believe under certain circumstances? What are the consequences of such a standard, not simply for the judiciary but the parties involved? The parties have spent maybe a couple million dollars in pretrial and trial. All of a sudden they have to go back and retry a case because the judge has made certain comments.

Professor Freedman:

Right, it is called mistrial. It has been known to happen.

Mr. McLaughlin:

Clearly any tool that somebody perceives as useful may be misused. For many, many years until we had a series of appellate decisions, I think most practitioners would agree that from time to time motions to disqualify lawyers were abused. But judges not only deal with these things on the merits, I think fairly promptly, but we have all of the sanction power available

if we think someone has made a frivolous motion. Whether we look at it as vexatious litigation under the old statutes or we look at it as something that is a violation under Rule 11, if we happen to like Rule 11, we certainly have remedies if somebody makes an abusive motion.

Professor Daniel J. Capra:

I would like to say that I see the judicial system suffering from a case like *Haines*. The *Cipollone* litigation has been going on for years and years. Now, Judge Sarokin's disqualification, based on an intemperate comment in a written opinion, effectively results in a ruling on the merits. The *Cipollone* litigation has been terminated because it is too costly at this point, after all the money down the hole, to educate the newly assigned judge. It seems to me that the judicial system suffers when there is a disqualification under these circumstances.

I would like to ask a question of the panelists. I ran across an opinion by Judge Bowman of the Eighth Circuit.¹³² He criticized the exclusionary rule as being unfounded in the law, as being basically a material reason why we have such a high crime rate today, and as being a terrible rule generally. I am just wondering if a criminal defendant can move to have Judge Bowman disqualified in a future criminal case involving the exclusionary rule? I would also like to know if Judge Edwards, who has written against the sentencing guidelines, must be disqualified now in any case in which a criminal defendant is sentenced?¹³³

Professor Gillers:

Again, I do not think either one of the cases described is the same as *Haines*. We want judges to participate in the intellectual policy debate. The fact that they disagree with a statute, via a footnote added at the end, or with a court-made rule, really is different from saying "who are these persons who knowingly and secretly decide . . ." So it seems to me the *Haines* decision is of a different caliber.

Second, surely there are certain things a judge, even in a

¹³² *United States v. Jefferson*, 906 F.2d 346 (8th Cir. 1990) (Bowman, J., concurring); see *infra* notes 147-49 and accompanying text.

¹³³ *United States v. Harrington*, 947 F.2d 956 (D.C. Cir. 1991) (Edwards, J., concurring); see *infra* notes 150-52 and accompanying text.

case as complex and prolonged as *Haines*, might say that would require recusal even if it meant the *de facto* end of the case. If that is so, and sometimes it will be then our battle is with the judge for doing it and the lapse of judiciousness that resulted in the end of the case.

Third, this was not an intemperate remark by Judge Sarokin. It was a lead paragraph in a well-written, obviously carefully considered opinion, which as Professor Freedman has suggested, echoes in its intimations in other parts of the opinion.

I wanted to mention a Second Circuit case that to me seems questionable and, in its two paragraphs, insufficiently clear. That is a criminal case in which Judge Keenan was disqualified called *United States v. Diaz*.¹³⁴ After sentencing the defendant on three counts and giving him a longer term on one count, Judge Keenan was reversed on the ground that the latter count did not statutorily permit a longer term.¹³⁵ He then resentenced the man. Before he did, he wrote a letter to his senator, saying the defendant was running a "drug store" and urging the senator to file a bill to change the statute. Ultimately, Judge Keenan's resentence was vacated because writing that letter was deemed to create a doubt about his impartiality.¹³⁶ The opinion was about as long as what I have just said. I am not sure why the use of the term "drug store" in the letter required disqualification. Of course, there was no press coverage. We needed a longer opinion in *Diaz* as well.

Donald J. Cohn, Esq.:

My name is Donald Cohn and I tried the *Cipollone* case for Liggett, so I have a different view than Professor Capra. He said that he was disturbed that Judge Sarokin's disqualification was the result of an isolated incident. But if you look at the record before the Third Circuit, the motion to disqualify was based on a whole series of decisions starting in 1983 or 1984 when Judge Sarokin found that there was no preemption, a ruling ultimately reversed by the Supreme Court. But Judge Sarokin is one of the most courteous, charming, delightful people in front of whom to try a case. He was always a gentleman. I could not believe that

¹³⁴ 797 F.2d 99 (2d Cir. 1986).

¹³⁵ *Id.* at 100.

¹³⁶ *Id.*

this Dr. Jeckel would go in his chambers and turn into Mr. Hyde, writing the most excoriating opinions about our clients. But it happened regularly. This was not an isolated instance.

I would also like to point out that at the end of the plaintiffs' case in *Cipollone* we made a motion for directed verdict, which was denied in language equally as scathing, stating that a jury could reasonably conclude that we were the worst people in the world, had defrauded people, had concealed things. This opinion was given to the press before we got it and was in all the papers. The motion for a mistrial was denied. But as Mr. McLaughlin pointed out, the jury found there was no fraud. There was no concealment. And the allegations were the same as in *Haines*, because it was the same plaintiffs' lawyer. The cases were filed at the same time. The plaintiffs went with *Cipollone* because they thought it was a stronger case. Of course, once *Cipollone* went to Judge Sarokin, all the other cases went to him as associated cases. If we want to talk a little bit about judge shopping, the plaintiffs were very careful to file one case, see to whom it was assigned, and only then file all the others. I do not think that the dismissal of the case was the result of the Third Circuit's insensitivity, but the fact that the plaintiffs thought that they had no chance at all with any other judge.

My question, however, is to Professor Gillers. You talked of pervasive bias. Here it was based on something in the record. But where you have a judge basing opinions on the record over and over again, which seems to show pervasive bias, is it really necessary to have to go outside the record for the Third Circuit to disqualify the judge?

Professor Gillers:

As I understand the doctrine in every circuit that has ruled on the issue, excluding only the First Circuit, statements revealing bias based on judicial sources are not a basis for disqualification. Another way of describing that activity is to call it judging. We want judges to form opinions based on evidence even as the case moves along, so long as they do not irrevocably form an opinion before the end of it. Some of the circuits that take this view do create an exception for appearance of pervasive bias, which I read to be a policy decision to create an escape hatch in the event that what the judge says is indefensible. I think Judge Sarokin's first paragraph falls within the escape

hatch. Perhaps that is especially true in light of other things in the record that you have alluded to. In 1992 the Supreme Court rejected a *certiorari* petition that would have resolved the circuit split.¹³⁷ Even within the circuits that do not generally permit disqualification based on bias from judicially received information, there are divisions. So there are more divisions than just two. But the Court rejected *certiorari* with two dissenting votes—Justices O'Connor and White—and it may be that eventually the issue will be resolved.

Unidentified Questioner:

I wonder if there is not a difference that is more than semantic between injudicious conduct on the part of a judge, the term Professor Freedman applied to Judge Sarokin, and bias, prejudgment, the proper remedy for which is recusal. To a certain extent it sounds to me like Judge Sarokin made mistakes rather than demonstrated a personal bias, either out of animus or financial interest.

Professor Freedman:

Well, I may have, without frankly thinking of it, used a softer word than I might have in saying injudicious. What I was trying to suggest is that Judge Sarokin acted in a way that was uncharacteristic of a judge of his caliber, which seemed to me to betray a bias in the case. As I said, I cannot imagine that Judge Sarokin in another context, knowing that the issue of whether these documents are privileged is appealable, would moot the issue by exposing them in his opinion, thereby effectively preventing the court of appeals from performing its role in appellate review. I did not mean to say, for example, that his reference to Judge Sirica constituted bias. What I was suggesting was that his comment provides circumstantial evidence of the bias that Judge Sarokin had already demonstrated in his opening words. But I would add that I do not find it necessary to go so far as to say it was a calculated effort to publicize Judge Sarokin's strong views about the villains of the tobacco industry. Rather, at best it was reckless. Any reasonable person would have known that those remarks were going to be publicized in the very commu-

¹³⁷ *United States v. Waller*, 951 F.2d 364 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 2321 (1992).

nity from which the jury was to be drawn. That injudicious conduct seemed to me to provide substantial circumstantial evidence of a mindset that was significantly less than impartial.

Unidentified Questioner:

Given everything that I heard said about the *Haines* case, it is indeed a mystery why Judge Sarokin did what he did. It is not realistic to think that he could not have foreseen this result. Could each of the panelists respond to what might have driven him, a man of this caliber and wisdom? Could it have been something in the record, some conduct by the tobacco company that would have provoked even a saint?

Professor Gillers:

I could say it is spending your days in Newark. I have met Judge Sarokin several times. We have been on panels together. Let us assume that he watched the tobacco companies, no offense to Mr. Cohn, litigate to the hilt—you know, demand that every “t” be crossed and not give an inch—and watched the plaintiffs’ lawyers working on contingencies suffer mightily. Perhaps he felt that the process was taking over the goal of justice and was drowning it. Let us also assume that Judge Sarokin felt strongly about the product and its danger, of which we get repeated warning. It may be that he concluded that this was the way he was going to make a statement within the case about the bigger picture. Obviously it meant a great deal to him to see that justice was done here. But what I walk away with is the abiding view that he stepped out of role. We all do that all the time. Thank God I have tenure. Article III protects him as well.¹³⁸ But he stepped out of role and he did it not on the spur of the moment, not in the heat of passion and not from the bench in response to provocation from a lawyer. Judge Sarokin did it in a studied and contemplative way.

Every lawyer and every writer knows that the first sentence of the first paragraph of what he or she writes is the most important. Judge Sarokin had time to catch himself, and he did not. Ultimately, that is what required the result, although it could

¹³⁸ U.S. CONST., art. III.

have been better explained by the Third Circuit.

Professor Freedman:

I am not going to psychoanalyze the judge, but I can tell you my own reactions, having written a column in the *Legal Times*¹³⁹ this week in which I say some things about the tobacco industry that are considerably harsher than what Judge Sarokin said. I have accused them of killing over 1000 people every day of the week, every week of the year, and being determined to keep on doing it.¹⁴⁰ I said also that poor Dr. Kovorkian is simply using the wrong technology in the half a dozen or so people that he has helped to commit suicide. But the important difference between me and Judge Sarokin is not our sense of outrage over the peddling of a lethal and addictive product, but that I am a law professor writing a column and he is a judge who was at the beginning of a case in which the jury had not yet been selected. Again, there were references to his simply deciding the issue that was before him. But as I tried to make clear, his opinion went significantly beyond what was necessary to decide the issue before him. That is not always a fault. But when it is done so dramatically, in a way that any reasonable person would have foreseen was going to garner the publicity that it did, that is, I was going to say inexcusable, and decided to say injudicious.

Unidentified Questioner:

To the extent that we talk about bias or other kinds of misbehavior, I am not troubled. But a standard such as appearance of impropriety brings back echoes of "I know it when I see it." If a legislative body made it a misdemeanor to act in public with an appearance of impropriety, it is as likely as not that such a norm would be struck down as void for vagueness. When you couple it with an actual bias claim, we understand it. If a judge took a bribe and we coupled the accusation of bribery with the appearance of impropriety, the bribery accusation would be illuminated. But to the extent that it is an independent rationale, I do not profess to have no sense of what appearance of impropriety means, but I do not think it provides a standard of conduct.

¹³⁹ Monroe Freedman, *Gov. Clinton's Ethics in Transition*, *LEGAL TIMES*, Dec. 7, 1992, at 23.

¹⁴⁰ *Id.*

I think it is a cliché. I think it has introduced a good deal of confusion into the whole area of judicial and lawyer ethics.

Professor Freedman:

Well, that was the point that I tried to make in responding to Judge Oakes; it cannot be impropriety at large. It has to be related to a specific impropriety. For a lawyer that may be a lack of zeal, a violation of confidentiality, or a failure to communicate information to the client that is material to the client's case. With a judge, an appearance of impropriety means an appearance that the judge is less than impartial. I agree with you completely. But I do not see the inconsistency because I insist on relating the concept to specific wrongdoing. The point, however, is when you are talking about an appearance of impropriety, you do not have to show that a judge is in fact partial, as the Supreme Court, as well as the reporter to the Code of Judicial Conduct and the Congress have expressed it, the standard is if a reasonable person could suspect that a judge is partisan.

Professor Gillers:

First, the "appearance of impropriety" language for lawyers only appeared in the Code of Professional Responsibility.¹⁴¹ The ABA rejected it even when the Code was extant.¹⁴² Of course in this circuit, we have Judge Feinberg's wonderful opinion in *Board of Education v. Nyquist*,¹⁴³ in which he said the "appearance" test was "too slender a reed" on which to base disqualification. I bless the Second Circuit's departure. However, because New York State retains the Code, we still have the "appearance" language, and some judges have used it here.¹⁴⁴ It is important to recognize that the language is neither the language of section 455(a)¹⁴⁵ nor is it the language of Canon 3 of the Code of Judicial Conduct, whose subject is disqualification.¹⁴⁶ "Impartiality

¹⁴¹ MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980).

¹⁴² ABA, Formal Op. 342 (1975).

¹⁴³ 590 F.2d 1241, 1247 (2d Cir. 1979).

¹⁴⁴ See, e.g., *Rosman v. Shapiro*, 653 F. Supp. 1441 (S.D.N.Y. 1987).

¹⁴⁵ "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a) (1988).

¹⁴⁶ "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned." ABA CODE OF JUDICIAL CONDUCT § 3C(1).

might reasonably be questioned" is the language. That is the right standard, although it is broader than the standard for lawyer disqualification. Judges and lawyers are different in one critical way. Judges exercise public power. Lawyers exercise private power, unless they are public officials, in which case a broader standard is also appropriate for them. We demand something by way of appearances from people in positions of public trust that we generally have not demanded from people who exercise private power. That is the correct response. Ordinarily, all that happens to the person in a position of public trust is that he or she is denied the opportunity to participate in a particular decision because of how it will reasonably look to others. That is not a legitimate standard for denying a private lawyer the right to participate in private representation.

Dean Feerick:

I would just make the observation that in other areas the concept of appearance as a standard, as unclear as it might be, is grounded in a sense of need for public confidence in our system. There is conduct that raises issues that go to confidence in the system that falls within the appearance of the impropriety rubric we have heard discussed here tonight.

I would like to ask Judge Weinstein a final question. This is not an area that I have spent a great deal of time thinking about. I have read the *Haines* case. I came here believing that this was a situation of monumental importance to the Bar and the judiciary. Obviously there has been a great deal of discussion about this subject recently. But I have heard comments from Professor Freedman, Professor Gillers, Mr. McLaughlin and others that lead me to wonder if we have made more of this case in terms of a threat to the independence of the judiciary than should be made based on what was said by Judge Sarokin and its context. Is this really a result that will chill the free speech of federal judges and really compromise the judicial function in any significant way?

Judge Weinstein:

The answer is no. It is not going to chill anybody I know. We Article III judges will be here when the next president is gone, and the president after that. Nobody is going to chill us. But power does corrupt judges and everybody else. It is appro-

priate, therefore, to remind individual judges and the judiciary as a whole when either style or substance oversteps reasonable bounds. It is appropriate for appellate courts to do so, but with a minimum of resort to recusal, which is so costly. It is appropriate for the bar to criticize judges because individual litigants cannot. It is particularly appropriate for law reviews and academia to do so. So I congratulate this audience and the bar once again for this very instructive program.

III. FURTHER REFLECTIONS ON THE DISQUALIFICATION OF JUDGES AND LIMITATIONS ON JUDICIAL DISCOURSE

*Daniel J. Capra**

Federal judges in written opinions often contribute to legal dialogue in a manner that goes well beyond the interests and concerns of the parties before them. Two recent examples are illustrative.

Example 1: Judge Bowman of the Eighth Circuit, in *United States v. Jefferson*,¹⁴⁷ wrote a concurring opinion in a case in which the entire court agreed that evidence obtained in a stop made without reasonable suspicion was properly excluded from the defendant's trial. Judge Bowman wrote specially to state that the case "vividly illustrates the perversity of the exclusionary rule."¹⁴⁸ He went on to excoriate the exclusionary rule as partly responsible for the increase of crime in America and as a blank check for defendants who "exit unpunished, free to continue dealing illegal drugs to the pathetic addicts and contemptible scofflaws who comprise the national market for these substances."¹⁴⁹

Example 2: Many judges in written opinions have taken pot-shots at the Federal Sentencing Guidelines. For example, Judge Edwards, concurring in *United States v. Harrington*,¹⁵⁰ wrote that "[l]ike the Emperor's new clothes, the Sentencing Guidelines are a bit of a farce."¹⁵¹ He expressed "profound con-

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¹⁴⁷ 906 F.2d 346 (8th Cir. 1990) (Bowman, J., concurring).

¹⁴⁸ *Id.* at 352.

¹⁴⁹ *Id.*

¹⁵⁰ 947 F.2d 956 (D.C. Cir. 1991) (Edwards, J., concurring).

¹⁵¹ *Id.* at 964 (Edwards, J., concurring).

cerns about the efficacy of the Guideline system" and concluded that the Guidelines do not meet their stated goal of promoting uniformity and fairness in sentencing.¹⁵²

The above examples concern judicial discourse in the context of a written opinion. Similar contributions to legal dialogue from the federal judiciary may occur in the form of law review articles and published speeches. For example, Judge Grady has often written and spoken against contingent fees.¹⁵³ Before Justice Rehnquist was appointed to the Supreme Court, he took a written position on a ripeness question that was later before him on the Court.¹⁵⁴ And of course Justice Thomas, before his appointment to the Supreme Court, expressed in writing some affinity for a Natural Law theory of the Constitution.¹⁵⁵

Consider, in this brew of judicial activity, the language used by Judge H. Lee Sarokin in a written opinion in *Haines v. Liggett Group, Inc.*¹⁵⁶ *Haines* was a personal injury action brought against the tobacco industry under diversity jurisdiction. Haines had served a discovery request, seeking documents relating to the Council for Tobacco Research, which was formed by several cigarette manufacturing companies to conduct scientific research

¹⁵² *Id.* Judicial criticism of the Sentencing Guidelines has reached the level of a chorus. See, e.g., *United States v. Hill*, 943 F.2d 873 (8th Cir. 1991) (Heaney, J., concurring in part and dissenting in part); *United States v. Pimentel*, 932 F.2d 1029 (2d Cir. 1991) (Oakes, C.J.); *United States v. Andruska*, 964 F.2d 640 (7th Cir. 1992) (Will, J., concurring) ("I am compelled to write separately to emphasize that the irrationality and draconian nature of the Guidelines sentencing process is again unhappily reflected in this case . . ."); *United States v. Baker*, 961 F.2d 1390 (8th Cir. 1992) (Bright, J., concurring) ("This case is another example of rigid guidelines producing inequity and injustice in sentencing, and demonstrates a need for the reformation, if not the abolishment, of Guideline sentencing."). Federal judges have also taken to law reviews to criticize the Guidelines. See, e.g., Ellsworth A. Van Graafeiland, *Some Thoughts on the Sentencing Reform Act of 1984*, 31 VILL. L. REV. 1291 (1986); Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161 (1991).

¹⁵³ See John F. Grady, *Some Ethical Questions About Percentage Fees*, 2 LITIGATION 20 (1976); *Rosquist v. Soo Line R.R.*, 692 F.2d 1107 (7th Cir. 1982) (refusing to disqualify Judge Grady from a case challenging a contingent fee).

¹⁵⁴ See *Laird v. Tatum*, 409 U.S. 824, 839 (1972) (Rehnquist, J., memorandum) (stating that "it is not a ground for disqualification that a judge has prior to his nomination expressed his then understanding of the meaning of some particular provision of the Constitution").

¹⁵⁵ See, e.g., Clarence Thomas, *The Higher Law Background of the Privileges and Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 63 (1939); Clarence Thomas, *Toward a "Plain Reading" of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 HOW. L.J. 983 (1987).

¹⁵⁶ 140 F.R.D. 681 (D.N.J.), *rev'd*, 975 F.2d 81 (3d Cir. 1992).

on health hazards from smoking. The tobacco defendants refused to produce approximately 1500 documents, asserting the attorney-client and work-product privileges. Eventually, Judge Sarokin issued an opinion concluding that many of the documents were subject to disclosure under the crime-fraud exception to the privilege. He stated that he would appoint a special master to review the remaining documents to determine whether they were also subject to the crime-fraud exception. In the prologue to his opinion on the discovery issue, Judge Sarokin, in language that is carefully parsed by the panelists, excoriated the tobacco industry for its hardball litigation tactics in the discovery process. Judge Sarokin began his opinion as follows:

In light of the current controversy surrounding breast implants, one wonders when all industries will recognize their obligation to voluntarily disclose risks from the use of their products. All too often in the choice between the physical health of consumers and the financial well-being of business, concealment is chosen over disclosure, sales over safety, and money over morality. Who are these persons who knowingly and secretly decide to put the buying public at risk solely for the purpose of making profits and who believe that illness and death of consumers is an appropriate cost of their own prosperity! As the following facts disclose, despite some rising pretenders, the tobacco industry may be the king of concealment and disinformation.¹⁵⁷

On the basis of this language, the tobacco industry requested that the Third Circuit exercise its supervisory power to disqualify Judge Sarokin from further proceedings in the case. The court of appeals held that Judge Sarokin was in fact capable of handling the case free from bias or prejudice. Nonetheless, the court disqualified Judge Sarokin because the above two paragraphs gave an "appearance" of bias against the tobacco industry.¹⁵⁸ The court concluded that "it is impossible for us to vindicate the requirement of appearance of impartiality in view of the statements made in the district court's prologue to its opinion."¹⁵⁹ The upshot was that Judge Sarokin was disqualified not only from *Haines*, but also from any related tobacco litigation to which he had been assigned, including the famous *Cipollone v. Liggett Group, Inc.*¹⁶⁰ litigation. While the *Haines* case

¹⁵⁷ 140 F.R.D. at 683.

¹⁵⁸ 975 F.2d at 98.

¹⁵⁹ *Id.*

¹⁶⁰ 799 F. Supp. 466 (D.N.J. 1992) (recusal in light of the disqualification in *Haines*).

was at a preliminary stage, the *Cipollone* litigation had already reached judgment, a decision by the Supreme Court and a remand to the district court for a new trial. Shortly after Judge Sarokin's disqualification, counsel for Cipollone obtained dismissal of the case. Speculation for the true reason for counsel's throwing in the towel comes from both sides. Those sympathetic to the plaintiffs reason that it would have been too costly to educate another judge on the sophisticated scientific issues involved in tobacco litigation. Those sympathetic to the defendants claim that counsel succumbed because it would have been impossible to find a judge as biased against the tobacco industry as Judge Sarokin was. Whichever point of view is correct, it is clear that the disqualification of Judge Sarokin in *Haines* has had the identical practical effect as a dismissal on the merits in *Cipollone*—a consequence of which the Third Circuit took no account.¹⁶¹

In none of the above examples has a judge been disqualified for contributing to the legal dialogue or for staking out a position on a legal question that may be contrary to the position of a party in a particular case before the judge. As noted, Justice Rehnquist refused to disqualify himself from a ripeness case even though he wrote a memorandum on that point of law in-

¹⁶¹ The law firm of Budd Lerner was counsel for the plaintiffs in both *Cipollone* and *Haines*. It had taken the cases on a contingent fee basis. After the disqualification order in *Haines*, Budd Lerner made a judgment that the proceedings had become an unreasonable financial burden on the firm, and that the amount of recovery from the tobacco industry was unlikely to exceed the costs. See Henry J. Reske, *Cigarette Suit Dropped*, A.B.A. J., Feb. 1993, at 30.

While Budd Lerner was able to terminate the *Cipollone* litigation with the plaintiff's consent, the plaintiff in *Haines* wishes to pursue the litigation before another judge. Recently it was reported that Judge Lechner denied Budd Lerner's motion to withdraw from the *Haines* litigation. Judge Lechner stated that Budd Lerner could not withdraw merely because it was "ill at ease because the contract it made may not be lucrative." *Law Firm Ordered to Continue in Cigarettes Suit*, N.Y. TIMES, Jan. 29, 1993, at B5.

That the Third Circuit is rather unsympathetic to the costs imposed by judicial disqualification is also shown in the recent case of *In re School Asbestos Litig.*, 977 F.2d 764 (3d Cir. 1992), where the court disqualified Judge Kelly for attending a seminar sponsored by the plaintiffs, even though it acknowledged that "the newly assigned district judge will face a gargantuan task in becoming familiar with the case" and that "the delay may disadvantage the plaintiffs." *Id.* at 784. The court ordered disqualification even though Judge Kelly proposed less onerous alternatives such as disqualifying plaintiff's experts who appeared at the seminar, and even though Judge Kelly had presided over this nationwide litigation for nine years. See *supra* notes 34-38 and accompanying text.

volved in the case while working for the Solicitor General. Justice Rehnquist reasoned that no law or rule guarantees a litigant "that each judge will start off from dead center in his willingness or ability to reconcile the opposing arguments of counsel with his understanding of the Constitution and the law."¹⁶² Likewise, the Seventh Circuit refused to disqualify Judge Grady from a case challenging a contingent fee, reasoning that he was not required to recuse himself "merely because he holds and had expressed certain views on that general subject."¹⁶³ Nobody has contended that Judge Bowman should be disqualified from deciding Fourth Amendment cases or that Judge Edwards should be disqualified from Sentencing Guidelines cases.¹⁶⁴ In each of these situations, the courts presume that a judge can put aside his or her views about how the law should be and apply the law as it is to the facts presented. In each case the judge's written opinion is considered by most to be a positive contribution to legal dialogue and even legal reform.

What was so different about the opinion of Judge Sarokin that the radical remedy of disqualification was required? It cannot simply be, as Professor Freedman seems to imply in his contribution to this Panel, that Judge Sarokin went well beyond the facts of the case to discuss issues like breast implants and mass tort defendants in general. A judge cannot be disqualified simply for relating one social problem to another presented by the facts of the case before him or her. Certainly, Judge Bowman's vitriolic comments about the exclusionary rule were far afield from the particulars of the case, in which all the judges agreed that the law required the exclusion of the illegally obtained evidence.

It could be argued, however, that Judge Sarokin crossed the line by appearing to pre-decide the merits of the case, and by criticizing the tobacco industry at a case-specific level, rather than merely advocating legal reform or criticizing some general

¹⁶² *Laird v. Tatum*, 409 U.S. 824, 839 (1972). Former Chief Judge Wald of the District of Columbia Circuit Court of Appeals agrees with this position. See Patricia M. Wald, *Some Thoughts on Judging as Gleaned From One Hundred Years of the Harvard Law Review and Other Great Books*, 100 HARV. L. REV. 887, 891 (1987) (contending that it is unrealistic to expect that judges "will repudiate the basic philosophical views for which they were chosen" and concluding that "judges with strong political backgrounds have a way of expressing their views through their work on the bench").

¹⁶³ *Rosquist v. Soo Line R.R.*, 692 F.2d 1107, 1112 (7th Cir. 1982).

¹⁶⁴ See *supra* notes 131-33 and accompanying text.

point of legal doctrine.¹⁶⁵ There is something to the distinction between general legal criticism and expressions of case-specific bias. The Seventh Circuit employed this distinction when it refused to disqualify Judge Grady from the contingent fee case. The court stated that Judge Grady's "general tenets are not so case-specific that they would predetermine his position in this particular case."¹⁶⁶

There are at least three reasons, however, why this specific-general distinction, even if controlling, should not have led to the disqualification of Judge Sarokin in *Haines*. First, as Judge Weinstein points out in his contribution to this Panel, disqualification would not have been considered had Judge Sarokin toned down his language in even a minor way. It is common for judges in a written opinion to criticize or even ridicule a position taken by a litigant or conduct by a litigant at or before trial.¹⁶⁷ It is difficult to see how the costs of disqualification, including what could be a *de facto* dismissal on the merits, are justified by semantics and stylistic distinctions. It is also disturbing to think that an appellate court can, through the threat of disqualification, monitor the style as well as the substance of a district judge's written opinions.

Second, assuming pre-decision on the merits is a concern, Judge Sarokin's language can be fairly construed as a reference to the issues presented by the discovery motion, rather than a reference to the merits.¹⁶⁸ Judge Sarokin accused the tobacco industry of being perhaps the king of "concealment and disinformation."¹⁶⁹ Since the question before the court was one of

¹⁶⁵ This argument is made forcefully by Professor Freedman, *supra* notes 58-83 and accompanying text, and by Joseph McLaughlin, *supra* notes 110-19 and accompanying text, in their contributions to this Panel.

¹⁶⁶ *Rosquist v. Soo Line R.R.*, 692 F.2d 1107 (7th Cir. 1982).

¹⁶⁷ See, e.g., *United States v. Wolf*, 787 F.2d 1094 (7th Cir. 1986) (criticizing a lawyer's tactics in a case as "forensic suicide").

¹⁶⁸ Judge Sarokin was clearly of the view that the language he employed in *Haines* was pertinent to the discovery issue before him. See *Cipollone v. Liggett Group, Inc.*, 799 F. Supp. 466 (D.N.J. 1992) ("I fear for the independence of the judiciary if a powerful litigant can cause the removal of a judge for speaking the truth based upon the evidence, in forceful language that presents the precise issue for determination."). Certainly Judge Sarokin's language must be considered a reference to the discovery motion if judges are to be given the benefit of a presumption of impartiality. Professor Freedman argues, however, that under the judicial disqualification statute, the presumption runs the other way. See *infra* notes 182-83 and accompanying text.

¹⁶⁹ *Haines v. Liggett Group, Inc.*, 140 F.R.D. 681, 683 (D.N.J. 1992).

discovery, it is not out of line to describe the defendant's position as one of concealment. Regardless of the merits of the privilege argument, concealment of the documents under the cloak of privilege was precisely what the tobacco industry sought to accomplish. More importantly, Haines sought disclosure under the crime-fraud exception to the privilege. Haines claimed that the documents were not protected by the privilege precisely because they were used to perpetrate a crime or fraud of concealment and disinformation as to the perils of cigarettes.¹⁷⁰ The application of the crime-fraud exception will often mirror the substantive questions of crime, fraud or concealment that are to be adjudicated at trial.¹⁷¹ But that is hardly a reason to disqualify a judge who expresses a view in the context of a discovery motion that crime, fraud and concealment are afoot. If that were true, every judge who decided that otherwise privileged documents were subject to the crime-fraud exception would be disqualified from the trial on the merits.¹⁷² The alternative, requiring judges to repeat a mantra, such as "in finding the crime-fraud exception to the lawyer-client privilege applies, a court is careful to reserve judgment on the ultimate issue of whether the defendants have perpetuated a fraud," is no less absurd.

Third, even if Judge Sarokin's language indicates some disposition to decide against the tobacco industry on the merits, it is hardly a universal result that a judge is disqualified for so expressing himself or herself. As Professor Gillers points out in his contribution, "bias, after all, is what we want judges to have after they gather information" through the litigation process.¹⁷³ Indeed, the Supreme Court made this point forcefully in *United States v. Grinnell Corp.*¹⁷⁴ The defendants in *Grinnell*, a com-

¹⁷⁰ *The New York Times* has reported that federal prosecutors in Brooklyn are conducting a criminal investigation of possible conspiracy and fraud by tobacco companies in concealing information, and are seeking to obtain the documents that were held under seal in Judge Sarokin's court. See Ralph Blumenthal, *Stalled Tobacco Suit is Revived By Ruling*, N.Y. TIMES, Feb. 1, 1993, at B5.

¹⁷¹ See generally *United States v. Zolin*, 491 U.S. 554 (1989).

¹⁷² Likewise, every judge in an antitrust case who decided that a defendant was subject to the jurisdiction of the forum on the grounds of conspiracy would have to be disqualified from the trial on the merits. See Daniel J. Capra, *Selecting an Appropriate Federal Court in an International Antitrust Case: Personal Jurisdiction and Venue*, 9 FORDHAM INT'L L.J. 401, 422-25 (1986).

¹⁷³ See *supra* p. 1087.

¹⁷⁴ 384 U.S. 563 (1965).

plex antitrust case, argued that Judge Wyzanski, the trial judge, was biased against them. They based their argument on the fact that, at a pretrial motion to limit the issues to be tried, Judge Wyzanski stated that his views on the merits were "more extreme than those of the government."¹⁷⁵ The Supreme Court unanimously rejected the argument that Judge Wyzanski's comment reflected impermissible bias in favor of the government and against the defendants. The Court stated that for the alleged bias to be disqualifying, it "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."¹⁷⁶ The Court concluded that "any adverse attitudes that Judge Wyzanski evinced toward the defendants were based on his study of the depositions and briefs which the parties had requested him to make."¹⁷⁷ If a judge can be disqualified merely on the basis of judicially-obtained information, it will, as the District of Columbia Circuit has recognized, have a "drastic" effect on the judicial process.¹⁷⁸

Of course it may be true that, in the words of one commentator, "events in the courtroom so incite [the judge] to personal hostility as to render him incapable of fair judgment on remaining issues."¹⁷⁹ But surely it must be the rare case in which it can be confidently concluded that a judge has become (or even appears to be) so personally biased by events in the courtroom as to warrant disqualification. Most courts have operated under the fair presumption that a judge can overcome personal rancor, frustration or favoritism and render an impartial judgment.¹⁸⁰

¹⁷⁵ *Id.* at 582.

¹⁷⁶ Joseph McLaughlin, in his contribution to this Panel, relies heavily on the disqualification upheld by the Supreme Court in *Berger v. United States*, 255 U.S. 22 (1921); see *supra* notes 110-11 and accompanying text. Yet *Berger* is distinguishable from the situation in *Haines* because the judge in *Berger* explicitly relied on extrajudicial information. The *Grinnell* Court distinguished *Berger* on this point.

¹⁷⁷ Some courts have held, consistently with the Third Circuit but inconsistently with *Grinnell*, that a judge can be disqualified on the basis of access to information gained through the judicial process. See Note, *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. CHI. L. REV. 236 (1978) [hereinafter *Disqualification*].

¹⁷⁸ *United States v. Haldeman*, 559 F.2d 131, 132 n.297 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977).

¹⁷⁹ See *Disqualification*, *supra* note 177, at 254.

¹⁸⁰ See *Hagens v. Andrus*, 651 F.2d 622 (9th Cir.), cert. denied, 454 U.S. 859 (1981) (judge cannot be disqualified from a sex discrimination case for his comment that the plaintiff "went a long way as a woman" before being denied a promotion).

The fundamental question posed by this Panel discussion is whether judges should be entitled to a presumption of impartiality. If Judge Sarokin is to be given the benefit of the doubt, it is hard to argue that his opinion in *Haines* is anything more than, as he put it, "forceful language that addresses the precise issues presented for determination."¹⁸¹

Professor Freedman argues on the basis of the judicial disqualification statute¹⁸² that there should be a presumption in favor of disqualification. He notes, correctly, that the statute was amended by Congress to broaden the grounds of disqualification and to indicate that a federal judge has no "duty to sit."¹⁸³ He relies heavily on the statutory language that disqualification is necessary when the judge's impartiality "might reasonably" be questioned, and emphasizes the "might" rather than the "reasonably." Professor Gillers argues for a more moderate construction of the statutory language, but nonetheless appears to apply at least a mild presumption of partiality to the language employed by Judge Sarokin in *Haines*.¹⁸⁴

It is interesting to note that this statutory exegesis is misplaced in the context of *Haines*. The Third Circuit did not rely upon and never even cited the judicial disqualification statute and its purportedly permissive language. Rather, the court relied in a conclusory fashion on its supervisory power. If a statute mandates a presumption of partiality, so be it. But it is simply wrong for a circuit court, in the exercise of its supervisory pow-

An oft-cited case, relied on by the Third Circuit in *Haines*, in which the trial judge was held to have gone beyond the pale is *Nicodemus v. Chrysler Corp.*, 596 F.2d 152 (6th Cir. 1979). In ruling on the plaintiff's preliminary injunction motion, the trial judge in *Nicodemus* referred to the defendants as "villains . . . interested only in feathering their own nest at the expense of anybody they can." *Id.* at 155. I have doubts that the trial judge should have been disqualified in *Nicodemus*. The reviewing court should think twice about imposing the substantial costs of disqualification where the judge has merely given a strongly-worded view of the merits on the basis of the evidence and where the very question before the judge was whether the plaintiffs were likely to prevail on the merits. Even assuming that disqualification was warranted in *Nicodemus*, it seems apparent that the language used by Judge Sarokin in *Haines* was far more even-tempered than the language employed by the *Nicodemus* trial judge.

¹⁸¹ *Cipollone v. Liggett Group, Inc.*, 799 F. Supp. at 466 (D.N.J. 1992).

¹⁸² 28 U.S.C. § 455(a) (1988).

¹⁸³ See also *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 870 (1988) (Rehnquist, J., dissenting) ("The amended statute also had the effect of removing the so called "duty to sit," which had become an accepted gloss on the existing statute.").

¹⁸⁴ See *supra* notes 102-03 and accompanying text.

ers, to employ a presumption of bias against its district judges.¹⁸⁵

More importantly, and contrary to Professor Freedman's argument, the judicial disqualification statute, fairly read, does not impose a presumption of bias. Professor Freedman emphasizes the term "might" in the statute, but the word that follows "might" is the word "reasonably." It is only where bias might "reasonably" be found that the presumption is warranted. Otherwise, disqualification would be a remedy in any case where a litigant could spin a scenario in which the judge might be partial. The *Liljeberg v. Health Services Acquisition Corp.*¹⁸⁶ case, relied on by Professor Freedman, does not stand for the broad proposition that partiality is presumed. It merely held that the trial judge's "temporary lapse of memory" as to a disqualifying circumstance was no defense.¹⁸⁷ Moreover, in the course of its opinion, the Court in *Liljeberg* made clear that "there need not be a draconian remedy for every violation of §455(a)."¹⁸⁸ If there is any presumption of disqualification that can be taken from *Liljeberg*, it must fairly be limited to cases in which the judge has a direct or indirect financial interest at stake. Indeed, the Supreme Court has, in its few cases on judicial disqualification, clearly employed a presumption that federal judges will remain impartial arbiters of the facts and law before them. The Court has stated that judges are "assumed to be men of conscience and intellectual discipline, capable of judging a particular contro-

¹⁸⁵ In the subsequent case of *In re School Asbestos Litig.*, 977 F.2d 764 (3d Cir. 1992), the Third Circuit, while probably wrong on the merits as Judge Weinstein points out, at least relied explicitly on the judicial disqualification statute. See *supra* notes 34-38 and accompanying text.

Notably, in *Baylson v. Disciplinary Board*, 975 F.2d 102 (3d Cir. 1992), the Third Circuit took a considerably less aggressive view of the extent of a federal court's supervisory power. In *Baylson* the court held that the supervisory power could not be used to prohibit federal prosecutors from using a grand jury subpoena to obtain fee-related information from a criminal defense counsel.

¹⁸⁶ 486 U.S. 847 (1988).

¹⁸⁷ It bears noting that the five-person majority in *Liljeberg* (two of whom are no longer on the Court) appeared to believe that the trial judge was in fact aware of the financial interest in the litigation on the part of the University, of which the judge was a fiduciary. See 486 U.S. at 866-69. The Court also noted that the trial judge erred when he failed to recuse himself even after he admittedly became aware of the financial interest of the University. *Id.* at 862 & 866-69.

¹⁸⁸ *Id.* at 862.

versy fairly on the basis of its own circumstances."¹⁸⁹ No judicial system can guarantee that a judge will be a *tabula rasa*. Nor would it be a good thing if judges were made that way.

Employing a presumption of judicial partiality, in order to maintain the appearance of impartiality, is misguided for another reason: it runs contrary to other lines of authority where impartiality and fairness are presumed. For example, the Supreme Court has established a heavy presumption in favor of the impartiality of jurors. Even where jurors are exposed to inflammatory pretrial publicity, it is generally presumed that they can exclude these influences and render a verdict based on the evidence. The Court has applied this presumption even in capital cases.¹⁹⁰ Would it not be anomalous to presume that jurors in capital cases are impartial even when carrying preconceived notions into the courtroom, but that judges are biased when commenting on the basis of evidence before them?

In most situations, we presume that trial judges can put aside preconceived notions and that their impartiality will not be affected by even the most inflammatory circumstances. So for example, if two criminal defendants are tried in a jury trial, the prosecution is generally not allowed to proffer the confession of one of the defendants if it is not admissible against the other; the risk is too great that the jury will use the confession against both.¹⁹¹ But there is no such prohibition in a bench trial, since it is presumed that the judge can fairly segregate the evidence admissible against one defendant from that admissible against the other.¹⁹² Similarly, Rule 403 of the Federal Rules of Evidence requires exclusion of evidence where its probative value is substantially outweighed by its prejudicial effect.¹⁹³ But the prejudicial, inflammatory effect of evidence is not considered in a bench

¹⁸⁹ See *United States v. Morgan*, 313 U.S. 409, 421 (1941) (sending a letter to *The New York Times* criticizing a Supreme Court decision does not mandate disqualification from subsequent proceedings in the same case).

¹⁹⁰ See *Mu'Min v. Virginia*, 111 S. Ct. 1899 (1991) (exposure to extensive pretrial publicity as to prior crimes and the details of a charged crime did not affect juror impartiality); *Lockhart v. McCree*, 476 U.S. 162 (1986) (Court refuses to find that a jury is biased when it is "death-qualified," since an impartial jury is one that will conscientiously apply the law and find the facts, and there was no indication that the presumption of impartiality was overcome).

¹⁹¹ See, e.g., *Bruton v. United States*, 391 U.S. 123 (1968).

¹⁹² See *Rogers v. McMackin*, 884 F.2d 252 (6th Cir. 1989).

¹⁹³ FED. R. EVID. 403.

trial, since Rule 403 is concerned with evidence that might inflame the jury and cause it to decide the case on an impermissible basis. It is presumed that a judge will overcome the inflammatory nature of the evidence and render an impartial verdict.¹⁹⁴

It could be argued on policy grounds that a rule of liberal disqualification is needed to preserve the public's confidence in our court system. As Professor Arthur Miller has stated, "public confidence in American courts involves a belief in the fairness and impartiality of the tribunal."¹⁹⁵ This may be true, but it does not follow that disqualification should be liberally granted. Initially, it is anomalous that the public's belief in impartiality would be effectuated by a presumption—dispositive in close cases like *Haines*—that the judge is in fact biased. Also, while the importance of the public's perception of impartiality cannot be denied, the costs imposed by liberal disqualification must be considered. Those costs are so profound as to require courts to employ a strong presumption of impartiality and to refuse disqualification except in the most egregious cases.

The substantial costs of disqualification in a particular litigation, in terms of educating a new judge, have already been referred to, and are ably addressed by Judge Weinstein in this Panel. But there are other costs as well. Excessive concern over the appearance of impartiality is simply an invitation to gamesmanship, judge-shopping and satellite litigation, especially by parties who use hardball litigation tactics as a *modus operandi*.¹⁹⁶ We have had recent experience with satellite litigation

¹⁹⁴ See 1 JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN'S EVIDENCE* ¶ 403 [03] (1990) (referring to the influence of prejudicial evidence on the jury). Recently, the Third Circuit distinguished *Haines* and refused to disqualify a district judge from a case on remand, even though the judge had clearly sought to circumvent the Third Circuit's mandate in a previous ruling in the case. See *Blasband v. Rales*, 979 F.2d 324 (3d Cir. 1992). The court viewed the district court's failure to abide by a previous mandate as merely the district court's "frustration" with what it viewed as an incorrect determination of the law by the court of appeals. *Id.* at 329. In other words, the Third Circuit assumed that a court's "frustration" with the rule of law was less serious than a court's "frustration" with a party—even though the former "frustration" led to a decision that was completely incorrect on the merits. *Id.* at 328-29. This prioritization by the court of appeals is not self-evident.

¹⁹⁵ Arthur Miller, *Public Confidence in the Judiciary: Some Notes and Reflections*, 35 *LAW & CONTEMP. PROBS.* 69, 74 (1970).

¹⁹⁶ An R.J. Reynolds lawyer has been quoted as stating that the tobacco industries' courtroom victories have been based on a strategy of making the lawsuits "extremely

under Rule 11 of the Federal Rules of Civil Procedure, and it has not been pretty. The Rule 11 litigation explosion has led to proposed limitations on the Rule which are likely to be implemented.¹⁹⁷ The Third Circuit should learn from our experience with Rule 11 and refuse to disqualify a judge except in the most compelling circumstances.

Another cost of liberal disqualification is its chilling effect on judicial writing and decisionmaking.¹⁹⁸ Federal judges should not have to edit their opinions to assure that some sentence or phrase may be misconstrued as bias against a party by a second-guessing appellate court. In *Haines* Judge Sarokin wrote a sixteen-page opinion (as well as a dozen or so opinions in other tobacco cases); he was disqualified for two paragraphs of that opinion.¹⁹⁹

Judicial writing is an art. Anyone who reads a good deal of it cannot help but appreciate those who combine judicial decisionmaking with good and interesting writing.²⁰⁰ It is disconcerting to think that a judge can be disqualified for the use of an

burdensome and expensive" for plaintiffs. The attorney elaborated as follows: "To paraphrase General Patton, the way we won these cases was not by spending money, but by making that other son of a bitch spend all of his." Blumenthal, *supra* note 170, at B5.

¹⁹⁷ See Committee on Professional Responsibility, *Proposed Amendments to Federal Rule of Civil Procedure 11*, 47 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 65 (1992). On the Rule 11 litigation explosion, see generally GREGORY P. JOSEPH, *SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE* (1989); GEORGENE VAIRO, *RULE 11 SANCTIONS: CASE LAW PERSPECTIVES AND PREVENTIVE MEASURES* (Prentice Hall, 2d ed. 1992). The Supreme Court has recently sent a revised Rule 11 to Congress. Many of the revisions are designed specifically as a response to Rule 11 satellite litigation. See generally Advisory Committee Comment to Rule 11, as amended (1993).

¹⁹⁸ On the First Amendment aspects of this controversy, see Kenneth Baynes, *Judicial Speech, a First Amendment Analysis*, 6 GEO. J. LEG. ETH. 81 (1992).

¹⁹⁹ The Third Circuit seemed to rely on the fact that the two suspect paragraphs received wide press coverage. As Professor Gillers points out, however, it is difficult to see the relevance of this fact to the disqualification question. See *supra* notes 103-06 and accompanying text. It cannot seriously be contended that Judge Sarokin was attempting to taint the jury pool against the defendants, since the *Haines* trial would not have begun for months or even years. In *Patton v. Yount*, 467 U.S. 1025 (1984), the Supreme Court recognized that the effect of even the most inflammatory pretrial publicity will fade over time. Perhaps the *Haines* court reasoned that press coverage would create an impression of partiality in the public. But even under the judicial disqualification statute, the question is not whether the public heard about the judge's conduct, but rather whether a reasonable person who knew about the conduct might reasonably think that the judge was biased.

²⁰⁰ Justice Scalia and Judges Posner, Easterbrook, Kozinski, Selya, Higginbotham and Weinstein come immediately to mind as the best of the current crop of opinion-writers.

aggressive writing style.

Supporters of liberal disqualification point to the need to preserve the integrity of the justice system. But disqualification can harm the integrity of the justice system as easily as it can preserve it. It poorly serves the justice system when the tobacco industry wins protracted litigation not on the merits, but because it succeeded in having a well-respected judge disqualified because of his view of the evidence. It poorly serves the justice system when substantial litigation expenditures are wasted due to the disqualification of a judge who has presided over proceedings that have been pending for years. It poorly serves the justice system to allow defendants to engage in "judge-shopping" in the guise of a disqualification motion. Finally, even the appearance of impartiality is not preserved if the reviewing court, in rushing to disqualification, itself appears partial.

Employing a presumption of impartiality does not mean that disqualification will never be justified. Certainly if the judge has a direct or indirect financial interest in the litigation, as in *Liljeberg*, even a strong presumption of impartiality will be overcome. As Professor Gillers points out, the public clearly understands the dangers imposed by a financially interested judiciary.²⁰¹ Disqualification or recusal would also be warranted if the judge had previously ruled upon the case in a different court. For example, in the recent New York Court of Appeals case of *Wieder v. Skala*,²⁰² Judge George Bundy Smith, a recent appointee to the court, recused himself, because he had sat on the lower appellate court whose decision was appealed to the court of appeals. Disqualification makes sense in this situation, since the very notion of appeal is that a different court is hearing the case; appeal would be a nullity (or at best transformed into a motion to reargue) if the same judges were transferred to a different court to hear the appeal.

But these are the rare cases. In most cases—and especially where the judge is merely expressing an opinion on the evidence before him or her—the integrity of the judicial system is more

²⁰¹ See *Ward v. Village of Monroe*, 409 U.S. 57 (1972) (in a traffic offense, judge not impartial where he is also the Mayor, responsible for village finances); *Tumey v. Ohio*, 273 U.S. 510 (1927) (judge not impartial where he is paid for his services only if the defendant is convicted).

²⁰² 80 N.Y.2d 628, 609 N.E.2d 105, 593 N.Y.S.2d 752 (1992).

properly preserved by assuming that judges will decide the case as fairly as humanly possible on the basis of the evidence before them. A judicial system based on human decisionmaking should expect no more and no less.