I'm Sorry, Please Recuse Me Before I Hurt Myself

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An adversarial legal process demands that opposing counsel zealously represent the interests of their clients. It is not the job of legal counsel to advocate the positions of the other parties to the proceedings or to ensure a just outcome. The job of the lawyer is to fight on behalf of the client. In this legal scrum, we expect the judge to ensure fairness and to allow each side to present its case. Judicial integrity demands that the judge be impartial. It is no coincidence that in the famous statue, the Goddess of Justice holds the scales of justice while blindfolded. Justice is impartial, favoring neither side.

Of course, life is never that simple. Justice is never blind in the sense of a judge's not bringing any and all preferences, beliefs, and background and prior activity to any matter before the judge. This is not to say that these prior beliefs and actions undermine the fairness of the judges, but determining when a judge is or might be less than fair is not easy. When impartiality cannot be ensured, the judge is supposed to remove him- or herself from the case. However, there is a surprising lack of clarity on when this is required, and many jurisdictions lack formal procedures for disqualification.

The issue then is deciding when recusal is proper. The controlling federal statute is 28 U.S.C. § 455, which sets forth the standards for recusal. That statute provides that a judge "shall" recuse "in any proceeding in which impartiality might reasonably be questioned." Attention to recusal issues is particularly important in a special issue on judicial conduct and such attention has a long pedigree in the journal. This article is an extension of the treatment of those issues, which has been evident in earlier issues of this journal.[1]

Given the language of "reasonably be questioned," the system depends heavily on self-recusal, and it is only in very rare circumstances that a higher court will consider ordering the recusal of a lower-court judge who has not voluntarily removed him- or herself from considering the matter. In a series of four decisions, federal courts have made clear that, barring any explicit action or behavior by the judge on the matter or matters currently before that judge, there is no barrier to a judge remaining on a case because of past associations or known preferences or actions. In the absence of overt evidence of bias, the decision is left to each individual judge, and deference is given to that individual judge's decision. In three of the cases, In *Re: Disciplinary Matter of Michael Robert Fletcher,* 424 F.3d 783 (8th Cir. 2005); *Comfort v. Lynn School*

[1] See the *Justice System Journal* articles by Stephen L. Wasby, "Recusal of Federal Judges: A Discussion of Recent Cases," vol. 14 (1990-91):525-49; "Forcing Recusal as a Form of Judge Shopping," vol. 18 (1995):204-06; "Disqualification Meets Whitewater," vol. 19 (1997): 369-72; "Another Aspect of Removing Judges," vol. 19 (1997):372-77; "Limits on Judicial Discipline: Constraining and Allowing Reassignment," vol. 21 (1999):92-98; "Rejecting a Challenge to the Federal Discipline Statute: More from the McBryde Proceedings," vol. 22 (2001): 84-88.

Committee, 418 F. 3d 1 (1st Cir. 2005); and *In re Charges of Judicial Misconduct,* 465 F.3d 532 (2d Cir 2006), U.S. Courts of Appeals denied recusal motions by a party to the proceeding seeking the removal of trial judges. In the last of these, the Second Circuit also dismissed disciplinary charges based on the failure to recuse. In the fourth case, *In Re CBI Holding Company,* 424 F. 3d 265 (2nd Cir. 2005), a court of appeals judge refused to recuse himself.

Although, as we will see, these cases demonstrate the difficulty in getting a judge to recuse on motion unless that judge agrees there are lines that may be crossed. A final cautionary note can be derived from a state case concerning the actions of a state judge. In this case, *In the Matter of Thomas J. Spargo,* 803 N.Y.S.2d 742 (2003), the actions of the judge resulted not in a recusal from one case but in removal from the bench.

The Fletcher case involved an employment-discrimination attorney fighting a three-year suspension from the practice of law before the Western District of Missouri. The suspension arose from a series of discrimination cases Fletcher brought against Honeywell Federal Manufacturing & Technologies LLC (Honeywell). The first case was on behalf of a client named Turner. In the course of the litigation, Fletcher and one of his associates conducted depositions of a former president of Honeywell and a former manager of human resources.

After the depositions, Fletcher learned of other individuals who wanted to sue Honeywell for racial discrimination. Unable to join them as parties in the current litigation, Fletcher then filed eighteen new complaints. Those complaints were assigned to several judges in the Western District of Missouri, one of whom recused himself under 28 U.S.C. § 455 and took no further role in the litigation. Fletcher's new complaints contained, in the words of the appeals court, "inaccurate and misleading" allegations based on the depositions (*In Re Fletcher,* at 787). By selectively quoting the depositions, Fletcher "distorted the deposition testimony" (at 788) to make it appear that the deponents favored whites and used racially insensitive language. Upon Honeywell's motions to strike the language, two judges granted the motions, and Fletcher complied but did not alter the language in the other complaints.

In the ensuing months, other judges acted on Honeywell's motions and, with various levels of analysis, granted the motions to strike. Among these judges was the district's chief judge, H. Dean Whipple. Whipple initially notified the chief disciplinary counsel for the State of Missouri, Maridee Edwards, of Fletcher's conduct in preparing the "misleading" complaints. After that referral, Chief Judge Whipple, in granting yet another motion, ordered Fletcher to "show cause why he should not be sanctioned" (at 788). The Western District judges then appointed counsel to conduct an investigation, and eventually charges were brought against Fletcher for this and several other matters. A three-judge panel then heard testimony and arguments and issued a report recommending a three-year suspension from the practice of law before the U.S. District Court for the Western District of Missouri. That court, sitting en banc, then issued an order accepting the report and the recommendation of sanctions. Participating in the en banc proceeding were the two judges who initially

agreed to strike the offending language from the complaints and the judge who had initially recused himself from any of the proceedings.

On appeal, Fletcher argued, among other things, that these latter three judges should have recused themselves from the en banc disciplinary proceeding, and therefore, the court's order was defective. The U.S. Court of Appeals for the Eighth Circuit denied this and all of other Fletcher's other arguments and upheld the sanctions. The court stated that there was no evidence to show that the complaining judges had formed opinions based on improper knowledge. As for the previously recused judge, there was no evidence tying the previous recusal to Fletcher's conduct. This was a separate matter with no connection to the charges against Fletcher. In short, there was no explicit or current evidence of improper conduct or bias.

Clearly, Fletcher was not a very sympathetic complainant seeking recusal or relief from discipline. However, the specifics and complainants were different in *Comfort v. Lynn School Committee*, where the facts derived from a complex series of cases centering on a city's plan for desegregation of its public schools. Lynn, the ninth largest city in Massachusetts, had experienced considerable racial imbalance in its schools. Because of this disparity, the district eventually adopted a proposal to combat the racial imbalance by designing a plan that allowed students to attend neighborhood schools, but that used race when a student sought a transfer to a school other than his or her neighborhood school.

An action was brought in the U.S. District Court for Massachusetts by parents of children whose appeals for transfer were denied. The parents asked the judge assigned to the case, Nancy Gertner, to recuse herself because of her background, and she declined to do so. Following an eleven-day bench trial, the district court rejected the plaintiffs' claims and denied the recusal motion. The recusal claim was premised on the fact that Judge Gertner had, before her appointment to the bench, been a member of the Lawyers' Committee for Civil Rights, a nonprofit organization, which unsuccessfully had moved to intervene in the litigation on behalf of the defendant school committee. Because of this prior association, the plaintiffs argued, the law required Judge Gertner to recuse herself. As noted above, Judge Gertner denied the recusal motion.

The appeals court stated that the standard under 28 U.S.C. § 455 is that the facts must provide "what an objective knowledgeable member of the public would find to be a reasonable basis" (at 69, citation omitted). In the case of Judge Gertner, the court noted that every judge comes to the bench with a lifetime of experiences, attitudes, and associations. That in itself is not enough for recusal. There must be some factual link or evidence to cast doubt on a judge's impartiality. Here, eight years had passed between the present case and the judge's last association with the Lawyers' Committee. The appeals court panel said there was no evidence of any public comment on the case by the judge, and the court added that the perception of policy preferences, standing alone and without any other evidence, was not a reason for disqualification. As the court rightly notes, if perception of policy preferences was enough to disqualify a judge, the judicial system would no longer function.

In *In Re CBI Holding Company, Incorporated,* a bankruptcy matter on appeal to the Second Circuit, Senior (and former Chief) Judge Ralph K. Winter wrote an opinion disclosing a potential conflict of interest with one of the law firms representing a party in the bankruptcy proceedings. In the year 2000, before moving to senior status, Judge Winter was approached by the firm to determine if the judge was planning to continue on the bench with senior status. The judge was informed that if he was planning to retire, the firm would be interested in "discussing employment" (at 266).

The judge stated that the conversation was extremely general, with no discussion of status or salary. A few days later, Judge Winter informed the firm of his intention to stay on the bench, and all contact ceased from that point forward. Citing an opinion by the Judicial Conference of the United States, Judge Winter noted that is permissible for a judge who is considering leaving the bench to explore future employment possibilities. The judge must recuse himself from all cases handled by the law firm during the discussions with the potential employer, both throughout the negotiations and for a reasonable period thereafter, depending upon the nature of the negotiations and the reasons for ending the negotiations. Given the limited nature of the discussions and the five years that had elapsed since then, Judge Winter saw no reason to recuse himself from the current bankruptcy proceeding. There was no further action by the Second Circuit.

In re Charges of Judicial Misconduct involved charges filed against Chief Judge Robert N. Chatigny of the U.S. District Court for the District of Connecticut. The allegations centered on Judge Chatigny's conduct in two district court actions challenging the imminent execution of Michael Ross, who had been convicted in Connecticut state court, for murder, kidnapping, and sexual assault. Ross had waived his right to further appeals, and his attorney, T. R. Paulding, standing by his client's decision, had refused to take additional action. However, in two separate actions—one filed by Ross's father, the other by one claiming "next friend" status—the claim was made that Ross was not competent and thus had no ability to waive his legal rights. Judge Chatigny, believing the evidence of Ross's incompetence to be credible, persuaded Paulding of his professional obligation to disregard his client's stated wish. Ultimately, Paulding was successful in moving the court to stay Ross's execution.

Attorneys for Connecticut's Criminal Justice Division and the Office of the Chief State's Attorney brought several complaints against Judge Chatigny. Among these was a charge that the judge had not disclosed his prior involvement with Ross's state criminal proceedings or recused himself from the district court actions based on that prior involvement.[2] The involvement was premised on an action taken by the judge in 1992 when he was in private practice. Acting on behalf of the Connecticut Criminal Defense Lawyers Association (CCDLA), Chatigny filed an application in the Connecticut Supreme Court for leave to file an amicus brief in Ross's direct

[2] Several other charges were brought against Chatigny, including threatening Ross's attorney with disbarment, abandoning neutrality in favor of advocacy, and interfering with the advice of counsel and client. All charges were dismissed.

appeal. The leave was granted, but no amicus brief was ever filed. The application did not set forth what position the CCDLA intended to take in the appeal. It stated simply that the "CCDLA is gravely concerned about the trial court's rulings on significant evidentiary issues in this capital case and the implications of those rulings for the practice of criminal law in this state." Chatigny was then placed on the Connecticut Supreme Court's list of attorneys to be served with papers and was acknowledged as the CCDLA's amicus counsel by Ross's attorney.

The complainants asserted that Judge Chatigny's appearance in Ross's case as amicus counsel required his recusal in the federal habeas action or at least a full disclosure to the parties to the federal actions. In response, in a sworn statement, Chatigny said that he had forgotten his brief inconsequential involvement with Ross's direct appeal and would have recused himself had he remembered it.

The Second Circuit Court of Appeals stated that the failure to recuse resulting from an innocent and reasonable memory lapse is not misconduct, that Judge Chatigny's sworn statement that he had no recollection of his prior involvement was supported by all of the evidence, and that his failure of recollection was reasonable based on the circumstances. The court's opinion states that "Judge Chatigny's personal involvement was fleeting, tangential, and inconsequential, in addition to being long past. He never represented a party; he had no significant contact with any participant in the proceedings; and he never devoted any substantial attention to the case. . . . Apart from responding to an inquiry letter from Ross by advising Ross that he was 'no longer participating,' he took no further action in the matter" (at 20-21). Thus the past association, although greater than that of Judge Gertner in the *Lynn* school case, was insufficient to warrant discipline of Judge Chatigny.

The Spargo matter, involving a state judge, raises a different issue. It is clear that judges are not disqualified from sitting on a case because of past experiences or preferences, or even prior rulings and interactions with parties and their attorneys. In a political system, federal judges are often nominated precisely because of past associations, experiences, and known preferences. Federal judges have political sponsors, usually a United States senator from the home state, whose support is vital to the nomination. Presidents and senatorial patrons expect the favored nominee to vote in accordance with their policy preferences. That is an important reason for the nomination.

The same holds true in many state systems where the judge runs for election. Partisan elections openly identify the partisan identification of the candidate running for judicial office. Judges can now advertise their policy positions. None of these behaviors are grounds for recusing judges from a particular case. The ideal that justice is blind does not mean the brain should be a clean slate. However, there are times when actions, past experience, and preference do cross a line of acceptable behavior. When that occurs, recusal is not the sole problem confronting the judge, who may also face judicial discipline.

Thomas J. Spargo was a justice of the New York State Supreme Court, that state's court of general trial jurisdiction; those seeking to be a justice of that court run

for office just as do candidates for many city judicial positions. Spargo, who had expertise in election law, was politically active in the Republican Party while he was a judge. For example, he flew to Florida in late 2000 to assist George W. Bush in that state's contested election recount. Although a complaint was filed against Spargo for those electioneering activities, that complaint, consistent with prior opinions, was dismissed. Past experience and political preferences, even party activity by itself if it has no tangible relation to the case before the judge, is no bar to being a judge or sitting on a case.

Before his election to the New York State Supreme Court, Spargo had run for the position of town justice for the Town of Berne, located near Albany, New York. Allegations of misconduct during Spargo's campaign for this local office triggered an investigation by the New York State Commission on Judicial Conduct. Among the allegations were that Spargo offered $2,000 worth of refreshments and coupons to potential voters in an effort to secure votes and that he had engaged in the political activities noted above, including participation in a demonstration at a Florida board of elections during the 2000 presidential election recount. During the investigation of this local campaign, the commission learned that Spargo paid an Independence Party official and a Democratic Party official $5,000 to cross-endorse him at the 2001 Supreme Court nominating conventions.

These behaviors were troublesome, but it was Spargo's actions following the initiation of the investigation that ultimately led to his dismissal.[3] According to the *Albany Times Union,* Spargo had already spent $140,000 in defending himself against the charges of judicial misconduct (Michele Bolton, "Spargo Loses Fight for Job," *Albany Times Union,* at A1, April 1, 2006). The commission found that, to continue to pay for his defense, Spargo personally solicited a $10,000 contribution from one attorney and arranged a lunch at a local restaurant at which the judge's friend solicited similar contributions from other attorneys, all of whom had pending cases before the judge. In the words of Robert Tembeckjian, the commission administrator, "the judge's misconduct that grew out of his effort to solicit money . . . was far more serious than the original complaint against him" (Marc Humbert, "Politically Active Judge Thrown off Bench," *The Associated Press, State and Local Wire,* March 31, 2006).

Clearly, Spargo crossed the line of ethical behavior to unethical activity. However, it was not his partisan experiences or preferences, but his solicitation of money to pay his defense fund from lawyers appearing before him that doomed Spargo. While the vote of the commission to remove him from judicial office was

[3] Spargo filed a federal action that sought to enjoin the commission from proceeding. Spargo alleged that sections of the New York state code on judicial conduct were an unconstitutional infringement on his First Amendment rights of free speech and association. The U. S. District Court agreed in part in *Spargo v. New York State Commission on Judicial Conduct,* 244 F.Supp.2d 72 (N.D.N.Y. 2003), enjoining the enforcement of several sections of the code. However, this decision was overturned in *Spargo v. New York State Commission on Judicial Conduct,* 351 F.3d 65 (2d Cir. 2003).

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

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

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

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

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

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