

LEGAL NOTES

The Supreme Court Says Rules Are Rules: *Ballard v. Commissioner of Internal Revenue**

Robert M. Howard

All courts issue rules of procedure that instruct prospective litigants in every phase of a case, from the initial filing through discovery and trial to the decision, and even what will be included in the record on appeal. In the recent case of *Ballard v. Commissioner of Internal Revenue*, 125 S.Ct. 1270 (2005), by a 7-2 vote, with an opinion by Justice Ginsburg, the United States Supreme Court upheld the perhaps novel concept that courts, in this case the United States Tax Court, must follow, and adhere to, their own promulgated rules.

The United States Tax Court has a powerful influence on tax policy; it is one of three forums, along with the United States District Court and the United States Court of Federal Claims, where taxpayers may contest an assessment by the Internal Revenue Service. Because no prepayment of the assessment is required for someone to proceed in the tax court, significantly more cases are filed there than in either of the other courts.

The tax court consists of nineteen full-time judges, appointed by the president and confirmed by the Senate, for a fixed term of fifteen years. The chief judge of the tax court has the authority to appoint special judges to deal with any matter pending before the tax court “in accordance with these Rules and such directions as may be prescribed by the Chief Judge” (Tax Court Rule 180). In cases involving assessments exceeding \$50,000, the special judge tries the case and then submits a report to a regular tax court judge, who has the authority to adopt the special trial judge’s report, or the tax court judge may “modify it or may reject it in whole or in part,” with “due regard given to the circumstance that the Special Trial Judge had the opportunity to evaluate the credibility of witnesses, and the findings of fact recommended by the Special Trial Judge shall be presumed to be correct” (Tax Court Rule 183 (c)). The final opinion issued by the regular tax court judge is a collaborative second report, which is “agreed to and adopted” as the opinion of the tax court.

Through the year 1983, a report by a special judge was made public and was included in the record on appeal. This allowed litigants to see why and how the regular judge’s ruling may have differed from that initial opinion. Since 1983, however, the special judge’s opinion has been withheld from the litigants, and the public, and excluded from the record on appeal. Although the regular tax court judge overseeing

* **Editor’s Note:** Because of Professor Howard’s knowledge concerning the U.S. Tax Court, reflected in his article appearing elsewhere in this issue, we asked him to prepare this Legal Note on this recently decided case so that the note could appear concurrently with his article. **SLW**

the case can change the special judge's opinion, from 1984 onward the issued opinion always contained what Justice Ginsburg called the "stock statement" that the tax court judge "agrees with and adopts the opinion of the special trial judge." 125 S.Ct., at 1275.

In the present case, three taxpayers—Ballard, Lisle, and Kanter—were assessed deficiencies and charged with fraud by the IRS on the basis of a series of transactions that arose from Ballard and Lisle's work as real-estate executives with the Prudential Life Insurance Company. The case was assigned to and tried by Special Judge D. Irvin Couvillion, who, after a five-week trial, forwarded his report to tax court judge Howard A. Dawson, Jr. Judge Dawson, "agreeing with and adopting" the report of the special judge, found the taxpayers liable for tax deficiencies and for fraud. However, the taxpayers believed that Special Judge Couvillion's initial opinion had been substantially changed from what the tax court reported in its opinion as the "report of the special trial judge." Based on information that Special Judge Couvillion originally found that the petitioners did not owe certain taxes and that the fraud penalty was not applicable, the taxpayers then filed motions with the tax court seeking Couvillion's original report. When those motions were denied, they appealed to their U.S. Courts of Appeals—for the Eleventh, Seventh, and Fifth Circuits. All three courts denied the appeals upon accepting the commissioner's, and hence the tax court's, argument that the initial opinion by the special judge represented a first draft of what ultimately was a collaborative effort by the special judge and tax court judge in crafting the final opinion.

Ballard and Kanter's estate then sought review in the United States Supreme Court, which reversed the decisions of the courts of appeals. In her opinion for the Court, Justice Ginsburg stressed the language of Rule 183, which states that in addition to adopting, modifying, or rejecting the report of the special judge, the judge may "direct the filing of additional briefs, or may receive further evidence, or may recommit the report with instructions," and that "due regard shall be given to the circumstances that the Special Trial Judge had the opportunity to evaluate the credibility of the witnesses and the findings of fact . . . shall be presumed to be correct." For Justice Ginsburg, the clear understanding of Rule 183 is that deference is due to the trial judge's fact finding, and she noted that Judge Dawson invoked none of the Rule 183 methods to supplement the record of the trial judge; as a result, Judge Dawson's findings of facts had to rest on Special Judge Couvillion's report.

However, given the alleged discrepancy noted above, it appears that the final report did "not" rest on the initial report of Special Judge Couvillion. In contrast to the clear language of Rule 183, Judge Dawson treated this report as the tax court treats all reports of a special judge—as a first working draft. While changing the procedure specified in Rule 183 might be efficient, said Justice Ginsburg, construing the rule to provide for a collaborative draft process found no support in either the lan-

guage of Rule 183 or the history of the rule change. This led her to conclude that, through its rules, the tax court intended to give deference to the factual findings of the trial judge.

Having decided that the tax court's application of Rule 183 violated the rule's clear meaning, the Supreme Court specifically declined to decide whether the failure to provide the taxpayer with initial report of the special judge violated due process, although the Court noted that the general practice involving the use of hearing officers such as magistrates, special masters, and bankruptcy judges is to make the initial findings available for appellate review. Although joining in Justice Ginsburg's opinion, Justice Kennedy, joined by Justice Scalia, wrote a separate concurrence emphasizing some points to be considered in further proceedings by the courts of appeals or by the tax court.

That a court should follow the clear meaning of its own rules does not seem that surprising. However, Chief Justice Rehnquist, joined by Justice Thomas, dissented. He would have upheld the practice of the tax court and argued that deference should be given to a court in that particular court's interpretation of its own rules. The chief justice noted that the language in the 1983 amendment changed the rule to require that the special judge "submit" the report instead of "filing" it; for him, this removed the requirement that it be made part of the record on appeal. In short, he found the tax court's interpretation reasonable, and would have deferred to the tax court's interpretation of its own rule.

While it is understandable that the chief justice, particularly in his position as the chief administrative officer of the federal court system, would promote an interpretation that supports the federal judiciary and aids judicial efficiency, it is difficult to justify the position of the commissioner, the tax court, and the chief justice in this case, particularly given Rule 183's requirement of "due regard" and "presumed correctness" that is to be given the report of the special trial judge. This is especially true in cases such as *Ballard*, where there are allegations of substantial differences between the special trial judge's initial "submitted" report and the final opinion written by a regular tax court judge, particularly when the latter states he "agrees with and adopts the opinion of the special trial judge." Given basic rules of statutory construction, a potentially strong claim on the evidence, and the sense of lack of fairness to the petitioner's claims, any reasonable interpretation of Rule 183 would appear to require that the tax court adhere to Rule 183's plain meaning and allow petitioners to see why and how the initial report differs from the final outcome. jsj

The Freedom of Information Act, Personal Privacy, and Litigants

Todd Lochner

There is a belief that government should be highly transparent so that citizens may monitor its actions, including those of government officials who appear in court. While this belief has been enshrined in the Freedom of Information Act (FOIA) and the common-law right of access to judicial records in civil suits, it has not been absolute. One exception to a presumption of disclosure relates to personal privacy: under what circumstances may personal information about those involved in litigation be withheld from public view? Two cases bearing on this question are discussed here.

Capital Collateral Counsel. Capital Collateral Counsel (CCC), an organization representing death-row inmate Michael Mordent, sought to compel the Department of Justice to release information concerning disciplinary proceedings conducted against Assistant U.S. Attorney Karen Cox in connection with a previous case. In that case, *United States v. Sterba*, 22 F.Supp.2d 1333 (M.D.Fla. 1998), it was discovered that, to secure a conviction, Cox purposely misrepresented the identity of a witness. Cox was investigated by the department's Office of Professional Responsibility, which reported its findings to James Santelle, deputy director of the Executive Office for United States Attorneys. After a final meeting with Cox, Santelle imposed on her a two-week suspension without pay. Cox faced contemporaneous proceedings before the Florida Bar, whose recommendation of only a public reprimand was rejected by the Florida Supreme Court, which instead imposed a one-year suspension. *Florida Bar v. Cox*, 794 So.2d 1278 (Fla. 2001).

CCC requested that, pursuant to the FOIA, the Department of Justice disclose all records concerning Cox's disciplinary proceedings. The department initially neither confirmed nor denied existence of the requested documents but, after CCC filed a complaint in federal district court, agreed to release over 1,000 pages of material while refusing to divulge five requested documents. The district court reviewed those five documents in camera and held that two documents must be turned over although names of third parties in one could be redacted; the court also awarded attorney's fees to CCC. The department appealed.

The Eleventh Circuit reversed the district court's decision to compel release of the documents and remanded the case so that the district court could reconsider the fee award. *Office of the Capital Collateral Counsel v. Department of Justice*, 331 F.3d 799 (11th Cir. 2003). For the court, Judge Black began by noting that FOIA Exemption Six, 5 U.S.C. §552(b)(6), allows government officials to refuse to divulge "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" and that the Supreme Court had held that this exemption requires a court "to 'balance the individual's right of privacy against the basic policy of opening agency action to the light of public scrutiny,'" although

“the ‘peculiar interest of the requesting party is irrelevant to evaluating this general public interest.’” 331 F.3d, at 803.

Judge Black found that substantial information was already available to the public concerning Cox’s misconduct and sanction in the published *Sterba* and *Florida Bar* cases and in the Report of the Referee to the Supreme Court of Florida. Indeed, the information contained in the documents, which were the subject of the appeal, was simply Cox’s personal reflection on her misdeeds and how those misdeeds affected her emotional state and family life. Because her status as assistant U.S. attorney “does not enervate her privacy interest,” and because these personal reflections “are not relevant to the public interest in knowing what the government is doing,” Judge Black ruled that the documents fell within Exemption Six. *Capital Collateral Counsel*, 331 F.3d, at 803-04; the nature of the information concerning third parties in those documents provided an independent basis for their exemption.

John Doe. As the CCC case suggests, the FOIA may allow the government to withhold documents concerning wholly personal matters where information about related government activity is readily available. However, individual litigants are far less likely to be able to claim personal privacy as a justification for proceeding by pseudonym and under seal, as when a plaintiff state court judge sued the FBI for violating the FOIA and the Privacy Act.

A Colorado state judge who had been approached by the FBI to assist in the investigation of drug use and impropriety by other public officials agreed to assist so long as his involvement was kept strictly confidential. After three years of investigation, which resulted in inconclusive findings, the FBI closed its criminal investigation file. Years later, the judge became involved in a dispute with an attorney and filed a grievance against the attorney with the Attorney Regulation Council (ARC). ARC subpoenaed the FBI file, and the FBI, without a court order, turned over the file—which allegedly contained numerous damaging and untrue statements regarding the judge—without his consent, without redacting his name, and without providing for confidentiality. ARC subsequently released the file to third parties, who in turn attached portions of it to various pleadings and submitted them to individuals throughout the state. The judge moved for a protective order to ensure the confidentiality of the file, and the ARC disciplinary judge granted the motion. The Colorado Supreme Court upheld the motion, ruled that ARC was to treat the files as confidential, and ordered all files sealed.

The judge then filed suit in federal district court against the FBI for violating both the FOIA and the Privacy Act. In doing so, he also filed a Motion to Proceed by Pseudonym and to Proceed Under Seal, initially granted but then reconsidered when a timely objection was discovered. Ruling on the motion, Judge Clarence Brimmer (D.Wyo., sitting by designation in D.Colo.) began by noting that, although the common-law right of public access to judicial records in civil suits is not absolute, Federal Rule of Civil Procedure 17(a) requires that “[e]very action shall be prosecuted in the name of the real party in interest.” He noted that the Supreme Court had

implicitly waived this requirement on occasion by allowing particular lawsuits involving abortion, birth control, and illegitimate children to proceed under pseudonym, and said that the court of appeals had consequently determined, in *M.M. v. Zavaras*, 139 F.3d 798, 803 (10th Cir. 1998), that the ability to proceed anonymously should be allowed “only in those exceptional cases involving matters of a highly sensitive and personal nature, real danger or physical harm, or where the injury litigated against would be incurred as a result of disclosure of the plaintiff’s identity.”

Judge Brimmer found that this high threshold was not met in the present case. There were several reasons. First, the fact that a lawsuit makes public embarrassing or hurtful personal information does not by itself justify an anonymous proceeding, for if it did, “then any defamation plaintiff could successfully move to seal a case and proceed by pseudonym, in order to avoid ‘spreading’ or ‘republishing’ the defamatory statement.” *John Doe v. Federal Bureau of Investigation*, 218 F.R.D. 256, 259 (D. Colo. 2003). The nature of the allegations against the judge (who was referred to throughout as “Plaintiff”) were not of the highly sensitive and personal nature that would justify anonymity. Second, the plaintiff judge himself had chosen to sue the FBI and, thus, “surely knew that he was placing those [reputational] interests at risk by filing this lawsuit for damages.” *Id.*

Judge Brimmer then rejected Plaintiff’s argument that failure to proceed anonymously potentially could harm third parties’ privacy interests, saying that it “seems akin to holding hostage the privacy interests of the others for the sake of Plaintiff’s ability to pursue his personal damages claim confidentially.” *Id.* Finally, the damaging allegations flowed from earlier release of the FBI file rather than from evidence stemming from the damages suit itself. Inasmuch as “newspaper reports furnished to the Court . . . indicate that this cat has been out of the bag for quite a while,” sealing the case and allowing the judge to proceed anonymously would be a “futile task.” *Id.*, at 260. For these reasons, Judge Brimmer refused to grant the plaintiff judge’s motion.

Comment. Taken together, these two cases and instances when the Supreme Court did allow litigants to remain anonymous suggest that, although personal information such as observations about one’s emotional state or family life may suffice to create an exemption from FOIA disclosure, the possibility of mere reputational harm is insufficient to allow a litigant to proceed anonymously and under seal and that only dissemination of the most intimate and personal information, such as one’s decision to obtain an abortion or the paternity of minors, will justify anonymity. Further, when balancing the individual’s rights to privacy against the public’s right to know, courts will determine if the potentially damaging information is already in the public domain. If so, one’s privacy rights become far less compelling.

Court Budgets and the Mootness Doctrine

Todd Lochner

In times of budget crises, the judiciary, like any government organization, may be subjected to dramatic reductions in operating budgets. Unlike funding for many other government organizations, however, funding for some court programs, such as defense of indigent criminal defendants, implicates important constitutional obligations. For example, a state decision to “defund” its public defender system obviously would create enormous Sixth Amendment difficulties. But what happens if a state defunds part of its public defender system, places selected defendants’ trials on hold, is sued by these defendants—and then reinstates funding so as to allow the criminal trials to proceed? The answer, according to a recent Ninth Circuit Court of Appeals decision, is that the challenge to the defunding is moot.

In response to a severe economic downturn and rising state government budget deficits, the chief justice of Oregon in early 2003 issued a “Budget Reduction Plan” (BRP). This suspended criminal trials for some misdemeanors and all adult drug-possession felonies in Oregon state courts until July 1, 2003, when the next fiscal biennium was to begin. The BRP’s practical result was to shut down temporarily both criminal trials and access to public defenders for designated types of defendants from March through June 2003. As soon as Oregon trial judges implemented the BRP, they were subjected to lawsuits from a collection of public defenders, criminal defendants, and even the Lane County district attorney. The plaintiffs alleged violations of the First and Sixth Amendments, the Fourteenth Amendment Due Process and Equal Protection Clauses, and the Oregon State Constitution and Oregon state statutes. After the Oregon State Supreme Court refused to invalidate the BRP, *State ex rel Metropolitan Public Defender v. Courtney*, 335 Or. 236, 64 P.3d 1138 (2003), the plaintiffs brought suit in federal district court.

By the time the suit had reached the U.S. District Court, June had passed, the chief justice had lifted the BRP, and funds were being provided for indigent defense. Consequently, the district court dismissed the plaintiffs’ lawsuit as moot. Plaintiffs appealed to the Ninth Circuit Court of Appeals. In *Foster v. Carson*, 347 F.3d 742 (9th Cir. 2003), Judge Graber began by noting that as a matter of jurisdiction, federal courts cannot hear moot cases, and “if there is no longer a possibility that an appellant can obtain relief for his claim, the claim is moot.” *Id.* at 745. The plaintiffs had not requested monetary damages, but had sought simply a declaratory judgment invalidating the BRP, as well as attorney fees. Inasmuch as the BRP already had been revoked, declaratory relief was not possible; as Judge Graber noted, “we cannot undo the past,” *id.* at 746, and previous caselaw clearly established that an action for attorney fees does not revive an otherwise moot action.

Plaintiffs asked the court of appeals to invoke the “capable of repetition, yet evading review” exception to the mootness doctrine to reach the merits of the claim.

This exception, as articulated in *Cole v. Oroville Union High School District*, 228 F.3d 1092, 1098 (9th Cir. 2000), allows a court to reach an otherwise moot action when “(1) the challenged action is too short in duration to be fully litigated before cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again.” Judge Graber agreed that the first test was met, given the likelihood that any future BRP could again terminate before a court could reach the merits. Yet the second test was not met, for “the mere fact that a similar order from the Chief Justice *might* someday issue does not establish a ‘reasonable expectation’ that such an order *will* issue.” *Id.* at 748 (emphasis in original). Indeed, even though there was a strong probability that Oregon would again confront budget problems in the next biennium, it was a matter of speculation whether the state would rely on budget cuts rather than tax increases, and where any future budget cuts would be made was also speculative. Consequently, the court of appeals dismissed the action as moot.

Impanelling Multiple Juries in Civil Suits

Todd Lochner

Impanelling multiple juries in civil suits, although not without potential difficulties, may serve as an appropriate, innovative strategy to overcome otherwise insurmountable evidentiary problems when there are multiple defendants with somewhat conflicting interests.

The question of whether judges hearing civil suits against multiple defendants may impanel multiple juries was considered by the Seventh Circuit Court of Appeals in *In re High Fructose Corn Syrup Antitrust Litigation*, 361 F.3d 439 (7th Cir. 2004). Purchasers of high-fructose corn syrup brought a class-action suit under the Sherman Act against suppliers Archer Daniels Midland Company (ADM), A.E. Staley Manufacturing Company, Chargill, and American Maize-Products Company. The U.S. District Court for the Central District of Illinois originally granted summary judgment to the suppliers, but the Seventh Circuit, rejecting the lower court’s conclusion that “no reasonable jury could find in [the plaintiffs] favor on the record presented,” reversed the lower court’s holding and remanded the case for trial. 295 F.3d 651 (7th Cir. 2002).

Upon remand, the district court faced a problem in that “very damaging” evidence from a criminal trial against ADM was properly to be admitted against ADM but not against the other defendants. The evidence was so damning that the judge did not believe that a jury could ignore the evidence as to the other defendants, even if instructed to do so. The judge thus denied a motion to sever the trial of one defendant from the others but certified the question of whether he could impanel two juries to sit simultaneously. 2004 WL 102476.

Writing for a unanimous appeals court, Judge Posner began by noting that the criteria for severing claims or parties pursuant to Federal Rule of Civil Procedure 21

were not satisfied in this case, so the lower court could not use that rule to sever ADM from the other defendants. However, Judge Posner argued that there were compelling reasons to allow the lower court to impanel two juries, with one to be excluded during admission of the damaging evidence against ADM. First, this strategy of trial administration had not infrequently been used in criminal trials involving multiple defendants. Second, courts' ability in civil suits to impanel multiple juries "has not been denied"; in fact, a court had used it once before, in *Martin v. Bell Helicopter Co.*, 85 F.R.D. 654 (D.Colo. 1980). Third, judges in civil trials must administer the rules "in a way that will minimize the likelihood that the jury's verdict will be a product of confusion or inappropriate emotion." 361 F.3d at 441. Indeed, according to Judge Posner, "Imaginative procedures for averting jury error, as long as they do not violate any legal norm, are to be encouraged rather than discouraged." *Id.*

As to the possibility that the separate juries could render inconsistent verdicts, with one jury finding ADM guilty of conspiracy to fix prices but the other jury finding that the remaining defendants did not conspire, thus making a conspiracy on ADM's part legally impossible, Judge Posner suggested that such inconsistency would not be fatal. Rather, any discrepancy likely would be due to the fact that the different juries heard different evidence, so that "the inconsistency would be in result rather than in logic." *Id.*

The Judge and the Discharged Clerk Revisited

Todd Lochner

What are the First Amendment rights of judges' clerks who are terminated from their positions because of caustic comments they make to the judges who employ them? The case of *Sheppard v. Beerman*, 822 F.Supp. 931 (E.D.N.Y. 1993), involving such a situation, subsequently bounced between the federal district court and the United States Court of Appeals for the Second Circuit twice before appearing to reach a conclusion in *Sheppard v. Beerman*, 317 F.3d 351 (2nd Cir. 2003) (*Sheppard III*). For treatment of earlier aspects of this case, see Stephen L. Wasby, "The Judge and the Discharged Clerk," 18 *Justice System Journal* 93 (1995), and Wasby, "The Judge and the Discharged Clerk: A Follow-Up," 19 *Justice System Journal* 377 (1997).

Sheppard clerked for Judge Leon Beerman of the New York State Supreme Court (the state's general jurisdiction court) from 1986 until December 11, 1990. On December 6 of that year, Judge Beerman asked Sheppard to prepare a speedy trial motion in a pending murder case. Sheppard disagreed as to the judge's decision to set the trial date in January and, at a meeting the next morning, announced his refusal to work on the motion and further accused the judge of "railroading" the defendant. *Id.* at 353. Judge Beerman informed Sheppard that, while he was not firing him, Sheppard should consider looking for other employment. Sheppard responded by calling the

judge “a corrupt son of a bitch” and stating that he had kept records of other misconduct by Judge Beerman, which he would make public if forced to resign. *Id.*

Judge Beerman sought the advice of his son, an attorney, and of Administrative Judge Alfred Lerner. Sheppard did not show up for work that Monday, and on Tuesday, December 11, Judge Beerman met with Judge Lerner, who voiced the opinion that Sheppard should be terminated not only from Judge Beerman’s employment but also from “the employ of the entire court system.” *Id.* When Sheppard arrived at work that day, he was informed that he had been fired; he was allowed to return to the chambers several days later to claim his personal belongings.

Sheppard sued Judge Beerman in the U.S. District Court for the Eastern District of New York in April 1991, alleging that under 42 U.S.C. 1983 his First and Fourteenth Amendment rights had been violated. The district court granted Judge Beerman’s motion to dismiss the pleadings, and Sheppard appealed. In *Sheppard v. Beerman*, 18 F.3d 147 (2nd Cir. 1994) (*Sheppard I*), the Second Circuit ruled that the district court improperly had determined that “Sheppard was actually discharged for insubordination and not for his speech” at the pleadings stage without allowing the plaintiff the opportunity to develop the facts of his case. *Sheppard III*, 317 F.3d at 354 (quoting *Sheppard I*, 18 F.3d at 151, 153).

On remand, the district court determined that although Sheppard had made out a prima facie case of unconstitutional discharge, Judge Beerman was entitled to qualified immunity for having “acted within the realm of objective reasonableness” in terminating the clerk. *Sheppard III*, 317 F.3d at 354 (quoting *Sheppard v. Beerman*, 911 F.Supp. 606, 611 (E.D.N.Y. 1995)). Sheppard again appealed and again won, in *Sheppard v. Beerman*, 94 F.3d 823 (2nd Cir. 1996) (“*Sheppard II*”), in which the Second Circuit held that the district court erred both in finding that Judge Beerman’s actual intent in firing Sheppard was “irrelevant” and in refusing to allow the clerk adequate discovery to advance his claim of unconstitutional motive. *Sheppard III*, 317 F.3d at 354 (quoting *Sheppard II*, 94 F.3d at 829).

Upon the second remand, the trial court judge allowed Sheppard to conduct “exhaustive discovery,” which entailed the deposition of thirty witnesses, including Judge Beerman and Sheppard himself. *Sheppard III*, 317 F.3d at 354. Judge Beerman moved for summary judgment, and in February 2002 the district court granted his motion. Relying on *Pickering v. Board of Education*, 391 U.S. 563 (1968), the district court held that, given the facts that Sheppard alleged, no reasonable juror could find that Sheppard’s termination was due to an unconstitutional effort to silence speech on a matter of public concern, rather than the permissible desire of Judge Beerman to maintain the “efficiency, discipline and harmony of his public office.” *Sheppard v. Beerman*, 190 F.Supp.2d at 384. Furthermore, the district court found that Sheppard had failed to prove that his First Amendment interests in commenting on Judge Beerman’s alleged corruption outweighed the judge’s interest in maintaining office harmony. *Id.*

Sheppard appealed for a third time. The Second Circuit, in an opinion by Judge McLaughlin, began by noting that although public employees have limited First Amendment rights, those rights may be outweighed by the state employer's interest in "promoting the efficiency of the public services it performs through its employees." *Sheppard III*, 317 F.3d at 355 (quoting *Pickering*). Judge McLaughlin reiterated the rationale of *Sheppard II*, in which the court, quoting an earlier Second Circuit ruling, held that termination of a public employee under such circumstances is valid where "(1) the employer's prediction of disruption is reasonable; (2) the potential disruptiveness is enough to outweigh the value of the speech; and (3) the employer took action against the employee based on this disruption and not in retaliation for the speech." *Sheppard II*, 94 F.3d at 827. Judge McLaughlin, reasoning that "at the very minimum, a respectful, if not congenial, relationship between clerk and judge is a prerequisite to a productive work environment within a judge's chambers," concluded that "Judge Beerman's prediction that Sheppard's outburst would disrupt the efficient operation of chambers was eminently reasonable." *Sheppard III*, 317 F.3d, at 354.

Judge McLaughlin also noted that Sheppard simply had failed to produce any direct or circumstantial evidence whatsoever to support his assertion that he was terminated in retaliation for his speech rather than for the disruptive effects of the speech. *Id.* at 356. Indeed, Judge McLaughlin reasoned that to the extent that Sheppard contended that he was being fired in order to be silenced, "terminating an employee 'is far more likely to cause [one] to 'go public' than to silence him or her.'" *Id.* Recognizing the probable effects of Sheppard's speech, and lacking any evidence of retaliatory motive on the part of Judge Beerman, the Second Circuit affirmed the lower court's dismissal of Sheppard's case.

The clear lesson: As a clerk to a judge, one cannot call that judge a "son of a bitch," refuse assignments, and expect not to be fired. A judge's chambers cannot function effectively under those circumstances, and thus the firing would be legitimate.

Composition of Article III Courts of Appeals

Todd Lochner

In *Khanh Phuong Nguyen v. United States*, 539 U.S. 69 (2003), the U.S. Supreme Court considered whether territorial judges appointed under Article IV of the Constitution may sit by designation on a federal court of appeals. Justice Stevens, joined by Justices O'Connor, Kennedy, Souter, and Thomas, held that they could not, and that, as a result, the lower court's judgment had to be vacated. Chief Justice Rehnquist, joined by Justices Scalia, Ginsburg, and Breyer, dissented, arguing that while it was "undoubtedly a mistake" to allow an Article IV judge on a court-of-appeals panel, such a mistake did not constitute reversible error and thus did not justify vacating the convictions the court of appeals had affirmed.

Nguyen and Phan were convicted of narcotics violations in the District Court of Guam, which, pursuant to the Organic Act of Guam, 48 U.S.C. 1424, is a territorial court with subject-matter jurisdiction over both federal and local laws. They appealed their convictions to the Court of Appeals for the Ninth Circuit. The panel convened to hear the appeal consisted of the chief judge and a senior circuit judge of the Ninth Circuit, as well as the chief judge of the U.S. District Court of the Northern Mariana Islands. That court is an Article IV territorial court whose judges serve fixed ten-year terms unless “removed by the President for cause.” 48 U.S.C. 1821(b)(1). Although neither petitioner objected to the composition of the panel prior to the judgment in which the court of appeals unanimously affirmed their convictions, 284 F.3d 1086 (9th Cir. 2002), they subsequently filed a petition for a writ of certiorari requesting that the Supreme Court vacate the decision because the panel’s composition was invalid. (In a companion case, in which a panel of the same two Ninth Circuit judges were joined by the chief judge of the U.S. District Court of Guam, *Oden v. Northern Marianas College*, 284 F.3d 1058 (9th Cir. 2002), the Supreme Court granted certiorari, vacated the Ninth Circuit’s judgment, and remanded for reconsideration in light of its principal ruling. 123 S.Ct. 2601 (2003)).

Speaking for the Supreme Court’s majority in *Nguyen*, Justice Stevens began by stating that 28 U.S.C. 292(a) allows the chief judge of a circuit to assign district judges within the circuit to serve on the court of appeals but fails to define the term “district judges.” He concluded that territorial judges could not be considered “district judges” under Sec. 292(a) for two reasons. First, he noted that Title 28 contemplates that a “court of the United States” will be created under Chapter 5 of that title, whereas territorial courts are created under a different statutory provision. The relevant law, he noted, “exhaustively enumerates” all of the judicial districts in which there shall be a United States District Court but failed to mention the territorial court of the Northern Mariana Islands. *Id.* Second, Chapter 5 describes district judges as holding office “during good behavior” (the equivalent of lifetime appointments), whereas Article IV judges serve fixed terms. *Id.*

Having concluded that the statute “cannot be read to permit the designation to the court of appeals of a judge of the District Court for the Northern Mariana Islands,” *id.* at 75, Justice Stevens went on to reject the solicitor general’s arguments that the convictions below should be upheld. The government, drawing on *Ryder v. United States*, 515 U.S. 177 (1995), argued that although the panel was constituted improperly, the “de facto officer” doctrine “confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person’s appointment . . . is deficient.” *Id.* at 180. Justice Stevens disagreed. He noted that the de facto officer doctrine is applied only in cases of “merely technical” defects of statutory authority, not where the statutory violation “embodies a strong policy concerning the proper administration of judicial business,” the situation in the present case.

Justice Stevens also rejected the government's argument that because petitioners' hearing before the panel was not fundamentally unfair and did not impugn the integrity or public reputation of the court, and because the petitioners failed to lodge an initial objection to the panel's composition, relief was not appropriate under plain-error review. Justice Stevens suggested that the invalid composition of the panel was not cured simply by the fact that the Article IV judge was "well qualified" and the proceedings were "fair." *Id.* at 81. Indeed, even if all the parties below had *requested* an Article IV judge, that judge's mere presence rendered the panel invalid. The government's final argument was that the court-of-appeals decision should be upheld because 28 U.S.C. 46(d) allows two judges to constitute a proper quorum to legally conduct business. This claim was also rejected on the ground that the statute requires three judges in the first instance; that is, it contemplates a situation where, should a third judge die or be disqualified, the other two judges could finish the court's business, not a situation in which a properly composed panel did not exist *ab initio*.

Although agreeing that Article IV judges cannot sit on a U.S. Court of Appeals, Chief Justice Rehnquist and three other justices dissented as to the issue of remedy. Because the petitioners had failed to make a timely objection to the panel's composition, the plain-error doctrine allowed the court to vacate petitioner's sentences only if "the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* at 84. The chief justice noted that petitioners had never suggested that the territorial chief judge was biased or incompetent, and, consequently "even assuming that the error affected petitioners' substantial rights, it simply did not affect the fairness, integrity, or public reputation of judicial proceedings." *Id.*

Judicial Recusal and the Search for the Bright Line

Todd Lochner

The federal judicial disqualification statute, 28 U.S.C. § 455, creates two categories of recusal. In the first, § 455(a), judges must disqualify themselves whenever their "impartiality might reasonably be questioned," or what some refer to as "the appearance of impropriety." Inquiry under this provision does not turn on the subjective opinion of the judge but rather on an objective determination as to whether a reasonably knowledgeable person would find cause to question the judge's impartiality. The second category of recusal, § 455(b), contains specifically articulated situations where recusal is required, such as when the judge, or a former lawyer with whom the judge previously worked, served as a lawyer to a client in the "matter in controversy."

When judges should recuse themselves from hearing cases because of either actual bias or the appearance of impropriety presents several difficult issues. First, recusal creates a tension between the need to ensure the appearance of judicial propriety and the desire to prevent the overuse of attempts to recuse by lawyers engag-

ing in judicial forum shopping. Second, when appellate judges direct lower-court judges to recuse themselves from cases, requests for recusal can exacerbate tensions between district and appellate courts. Third, although the federal judicial disqualification statute and related Supreme Court rulings have created some “bright-line” rules, determining whether a particular judge should be recused from a particular case has often seemed a very subjective endeavor. Recusals, thus, are of interest not only to judges, but also to court administrators, who must reallocate caseloads to accommodate those recusals that take place.

This essay addresses recent court decisions on judicial recusal. (For earlier analyses, see Wasby, 1991, 1995, 1996.) It will summarize the Supreme Court’s primary case on the subject before turning to discuss three recent cases on requests for recusal—one because of a judge’s statements to the media concerning a pending lawsuit; another because the appellate judge considering a habeas-corpus petition was the same judge who had presided over the habeas petitioner’s original conviction; and another because a judge’s former law partners were indirectly associated with a lawsuit that was pending before the judge. Because judges differ both in their concepts of ethical behavior and in their willingness to limit trial judges’ discretion, “judicial disqualification issues will likely continue to be decided largely on a case-by-case basis, and many more rulings are likely to be necessary to flesh out elements of this significant issue” (Wasby, 1991:548). These cases help to clarify the law of judicial recusal by creating seemingly bright-line rules.

To clarify the circumstances requiring disqualification, in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), the Supreme Court held that judges need not be aware of the conditions warranting recusal for recusal to be statutorily required (see Wasby, 1991). One need not prove that a judge actually is biased to disqualify the judge; recusal is required simply to preserve the appearance of impartiality. *Liljeberg’s* strict interpretation of the federal recusal statute motivated lower courts to incrementally expand the caselaw on judicial recusal.

Recusal Due to a Judge’s Comments to the Media. *In re Boston’s Children First*, 244 F.3d 164 (1st Cir. 2001), involved application of § 455(a) to a situation where a judge made comments to a local newspaper concerning a case over which she was presiding. Boston’s Children First, an advocacy organization, had filed a federal court suit alleging that its members were denied preferred school assignments on the basis of race, in violation of federal and state statutes. After finding that five of ten individual plaintiffs lacked standing to seek injunctive relief, District Judge Nancy Gertner considered the remaining plaintiffs’ attempt at class certification. She held that the court would allow discovery on the issue of standing, then determine standing, and, if standing were found, would finally consider class certification. *Id.*, at 165.

Plaintiffs nonetheless filed a motion for class certification, alleging similarities between their case and one in which the judge had certified the class before all standing issues have been resolved. Furthermore, the Boston *Herald* printed a news story in which plaintiffs’ counsel complained as to Judge Gertner that “[i]f you get strip-

searched in jail [the situation in the other case], you get more rights than a child who is of the wrong color.” *Id.* On July 28, Judge Gertner sent a letter to the *Herald* and both parties to the suit, noting the inaccuracies in the July 26 story; in particular, she pointed out that she had not yet rendered a judgment on the issue of class certification. On August 4, the *Herald* published another article, based on a phone interview with Judge Gertner, and quoted her as saying that in the other case, “there was no issue as to whether [the plaintiffs] were injured. . . . This is a more complex case.” *Id.*, at 166.

Shortly thereafter, Boston’s Children First moved that Judge Gertner recuse herself from the case. Its argument was that the *ex parte* phone conversation between the judge and the reporter violated the Massachusetts Code of Judicial Conduct and that, inasmuch as her comments suggested that she was skeptical of class certification in their case, there was cause for a reasonable person to question her impartiality. Judge Gertner, concluding that her statements did not evince bias and were consistent with state ethical rules allowing judges to explain “for public information the procedures of the court,” denied the motion. *Id.*, at 166-67.

The plaintiffs successfully sought a writ of mandamus from the First Circuit Court of Appeals requiring Judge Gertner’s recusal. Chief Judge Juan Torruella began by noting that recusal is appropriate only when “the facts asserted ‘provide what an objective, knowledgeable member of the public would find to be a reasonable basis for doubting the judge’s impartiality’” but “‘if the question of whether § 455(a) requires disqualification is a close one, the balance tips in favor of recusal.’” *Id.*, at 167. The chief judge went on to caution that the mandamus procedure presents “additional hurdles for the party seeking recusal . . . [and] thus requires ‘a case not merely close to the line, but clearly over it.’” *Id.* Recognizing that the judge’s statements were a response to provocative statements on the part of plaintiffs’ attorneys but that “it is possible for a judge to comply with the Code yet still be required to recuse herself,” *id.*, at 168, the court held that § 455(a) required Judge Gertner’s disqualification.

The court of appeals thought the very ambiguity of Judge Gertner’s statements created the problem, as the quotation in the newspaper was “sufficiently open to misinterpretation so as to create the appearance of partiality, even when no actual prejudice or bias existed.” *Id.*, at 170. Although he reiterated the court’s belief that Judge Gertner was not in fact biased, Chief Judge Torruella cautioned that “when a judge makes public comments to the press regarding a pending case, he or she invites trouble . . . this comment was at the very least particularly unwise.” *Id.*, at 171.

Recusal in Habeas Corpus Petitions. The Court of Appeals for the Third Circuit explicitly adopted a bright-line rule on judicial recusal in the case of *Clemmons v. Wolfe*, 377 F.3d 322 (3d Cir. 2004). In 1981, in then-state-judge William W. Caldwell’s court, Charlie Clemmons was convicted of first-degree murder for a shooting stemming from an altercation caused by a traffic accident and was sentenced to life imprisonment. Clemmons filed four state court petitions for post-conviction relief, all of which ultimately were denied. In February 2002, Clemmons filed a habeas-corpus petition in federal court, and the petition was assigned to Judge Caldwell, who had,

since the earlier events, been appointed to the United States District Court for the Middle District of Pennsylvania. On November 27, 2002, after Clemmons had also applied for appointment of counsel, Judge Caldwell, recognizing that he had presided over Clemmons's original criminal trial, denied the habeas petition as untimely and all other motions as moot. Clemmons subsequently filed an application for a Certificate of Appealability with the Third Circuit, which granted the certificate as to whether Judge Caldwell was required to recuse himself. Three months later, the appeals court amended the Certificate to include the question whether Judge Caldwell abused his discretion in deciding the merits of the habeas petition without first addressing the request for counsel.

Judge Dolores Sloviter's opinion for the Third Circuit began by referencing the Supreme Court's observation in *Liljeberg* that the purpose of § 455(a) is "to promote public confidence in the integrity of the judicial process." She acknowledged that 28 U.S.C. § 47, which prohibits a judge from hearing "an appeal from the decision of a case or issue tried by him," does not directly apply to habeas petitions, but asserted that "the absence of a directly applicable statute in no way diminishes the importance to a litigant of review by a judge other than the judge who presided over the case at trial." *Clemmons*, at 325. That there was no evidence of actual bias on Judge Caldwell's part was irrelevant, for "the mere appearance of bias still could diminish the stature of the judiciary." *Id.*, at 327. Similarly, the fact that the original criminal conviction occurred twenty years before the habeas petition was irrelevant, for "the passage of time cannot overcome a reasonable person's doubts about a judge's impartiality in judging his or her own past works." *Id.*, at 327-28. Judge Sloviter also noted that the two other circuits to have issued published opinions on the question—the Seventh Circuit and the Fourth Circuit—had both required recusal.

On the basis of these conclusions, the court of appeals vacated Judge Caldwell's rulings and remanded both the habeas petition and the petition for assistance of counsel to a different district court judge. Yet the Third Circuit went beyond merely ordering recusal in this particular case. Holding that a reasonable person would always have doubts about a judge judging his or her own past works, the court of appeals, using its supervisory powers, created a rule that required "that each federal district court judge in this circuit recuse himself or herself from participating in a 28 U.S.C. § 2254 habeas corpus petition of a defendant raising any issue concerning the trial or conviction over which that judge presided in his or her former capacity as a state court judge." *Id.*, at 329.

Recusal Under § 455(b)(2). If § 455(a) is a generalized "catch-all" provision, the requirements of § 455(b)(2) are very precise, requiring recusal of a judge "[w]here in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it." That provision was the basis for the recusal motion in *Blue Cross & Blue Shield of Rhode Island v. Delta Dental of Rhode Island*, 248 F.Supp.2d 39 (D.R.I. 2003).

Blue Cross had entered into an agreement with the Rhode Island Interlocal Risk Management Trust, a nonprofit corporation authorized to “develop and administer local government insurance pools.” *Id.*, at 41. According to Blue Cross, Delta Dental began a media campaign in June 2002 “to distort the terms of the Agreement,” in an effort to deter Rhode Island municipalities from participating in the Trust, thereby reducing the number of municipalities offering Blue Cross dental insurance and in turn perpetuating Delta Dental’s market dominance. *Id.* Blue Cross, having sued Delta Dental in federal district court, subsequently filed a motion seeking Judge William Smith’s recusal, based on his previous association with the Edwards & Angell law firm. Blue Cross alleged that other attorneys in that firm, James R. McGuirk and Barry G. Hittner, previously had represented Delta Dental before a state government agency in connection with Delta Dental’s complaints about the Blue Cross agreement with the Trust; Blue Cross presented a letter demonstrating that McGuirk had met with the state agency on a prior occasion. Delta Dental countered that § 455(b)(2) was inapplicable, because neither McGuirk nor Hittner had served as “a lawyer concerning the matter” and neither could be called as a “material witness” in it.

As to the prior relationship, Judge Smith determined that, before the filing of the lawsuit, McGuirk had been present at one meeting with the state agency but that Hittner had never attended the meeting. The legal question thus became whether McGuirk’s presence as part of a delegation of representatives from Delta Dental to the state agency when Delta Dental complained of Blue Cross’s agreement with the Trust constituted “serving” as an attorney “in the matter in controversy” or could make McGuirk a material witness in the matter. *Id.*, at 42.

Ruling on the motion, Judge Smith began by noting that disqualification motions usually are brought pursuant to § 455(a) rather than § 455(b)(2), so the First Circuit had no caselaw interpreting the latter provision, on the scope of which other circuits held widely divergent views. He explained that both the Fourth and Ninth Circuits had interpreted the phrase “matter in controversy” expansively. In *Preston v. United States*, 923 F.2d 731 (9th Cir. 1991), the Ninth Circuit had ordered the recusal of a district court judge who previously had been “of counsel” to a law firm that represented a client not a party to the litigation before the judge but who had contractual interests that would be triggered if the judge found for the plaintiff in the case. That court, Judge Smith said, had held that the proper legal focus was on “the question whether the relationship between the judge and an interested party was such as to present a risk that the judge’s impartiality in the case at bar might reasonably be questioned.” *Delta Dental*, 248 F.Supp.2d, at 44.

By contrast, noted Judge Smith, the Eighth Circuit in *Little Rock School District v. Pulaski County Special School District No. 1*, 839 F.2d 1296 (8th Cir. 1998), had created a much more restrictive bright-line rule, holding that “matter in controversy” meant only the “proceedings conducted under the docket number of the case before the court.” *Delta Dental*, 248 F.Supp.2d, at 44. Agreeing with the Eighth Circuit,

Judge Smith held that § 455(b)(2) should be given a restrictive reading. His rationale was that to rule differently would have a “substantial” effect on judges. Moreover, granting a recusal motion in the instant case would mean that “the time invested on this case to date would be wasted; the dockets of other judges in the District would be disrupted; [and] other parties in other cases would be affected.” Moreover, he added, “future litigants appearing before this Court may well view potential recusal on the basis of similar attenuated connections between attorneys from E & A and the matter before the Court as an opportunity to ‘judge shop’ within the District.” *Id.*, at 47.

Judge Smith found that McGuirk’s attendance at a single meeting did not constitute “serving as a lawyer” in the “matter in controversy,” especially given that no attorneys from E & A had appeared in the case at bar, had viewed its pleadings, or had provided legal advice to Delta Dental in that particular suit. Finding also that the facts as then known offered no basis for concluding that McGuirk could be called as a material witness, Judge Smith denied the Motion to Disqualify.

* * *

The issue of judicial recusal involves competing interests and often necessarily subjective legal determinations. While the caselaw will continue its incremental development, and circuits sometimes will disagree, some bright-line rules serve to guide the disqualification decision in some instances. Judges who speak to the media about the substance of ongoing suits over which they preside will face recusal, as will judges who seek to preside over habeas petitions when they also presided over the original criminal convictions. However, some circuits have taken a narrow view; limiting the circumstances under which judges must recuse themselves because law firms to which they previously belonged have some modest or unrelated interaction with present litigants remains unsettled as long as the circuits vary in their interpretation of § 455(b)(2)’s requirements. *jsj*

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