**Research Team**

**Case Law and Secondary Sources on Bias**

**In re: Apollo, 2013 WL 4083236 (3d Cir. Aug. 14, 2013).**

Petitioner Madeline Apollo brought an action against her former employer, the Pennsylvania Convention Center Authority (“PCCA”), and the case was randomly assigned to Chief Judge Petrese B. Tucker.  Judge Tucker and Apollo, as well as two potential witnesses in Apollo’s case, were members of the Board of Directors for the Avenue of the Arts, Inc. (“AAI”).  AAI works closely with businesses in the district, including the convention center run by PCCA, and PCCA provides AAI with monetary contributions.  Both Judge Tucker and Apollo attended an AAI board meeting held the day after Apollo filed an amended complaint.  The board’s executive director emailed other board members regarding Apollo’s membership in light of several factors, including the assignment of Judge Tucker to Apollo’s case.  AAI offered Apollo a leave of absence that would last until the expiration of her term, but she declined.  At some point, Judge Tucker took a leave of absence from the board.

Before Judge Tucker made any substantive rulings in Apollo’s case, Apollo moved for the judge to disqualify herself.  Judge Tucker held a hearing and denied the request.  Subsequently, Judge Tucker partially granted PCCA’s motion to dismiss Apollo’s amended complaint.  Apollo then petitioned the Third Circuit for a writ of mandamus to disqualify Judge Tucker, alleging that Judge Tucker’s status as an AAI board member created the appearance of partiality.  The Third Circuit sought to determine whether there was the appearance of partiality by examining the degree and scope of the judge’s association to the parties.  The court concluded Judge Tucker’s connections to the litigation before her were numerous – she served on the AAI board, which received financial support from defendant, and even though she took a temporary leave of absence, her involvement brought her in regular contact with numerous individuals involved in the law suit, including key witnesses and Apollo. While each connection alone might not be enough to justify recusal, taken together, the scope of involvement created an appearance of impropriety.  The Third Circuit granted Apollo’s petition for writ of mandamus, vacated Judge Tucker’s order partially granting the motion to dismiss, and remanded the case for reassignment.

**Barnes v. Keller, 62 A.3d 382, 387 (Pa.Super. 2012) (Lazarus, J., concurring).**

Judge Lazarus authored a concurring opinion to express her “disapproval of the trial judge’s failure to disclose his wife’s employment with the defense law firm prior to the decision on the motion for summary judgment.” Philadelphia Court of Common Pleas Judge Tereshko failed to disclose in open court that his wife had been an attorney at the law firm, Post & Schell, which represented the defendant insurance company in the underlying action. He granted the defendant’s motion for summary judgment. It was only after Judge Tereshko granted the defendant’s motion that the plaintiff became aware of his connection to Post & Schell. Guided by Code of Judicial Conduct, Canon 3(A)(1), which provides that a judge should disqualify himself “in a proceeding in which his impartiality might be questioned,” Judge Lazarus found that it was Judge Tereshko’s affirmative duty to disclose his relationship to Post & Schell. “Because Judge Tereshko’s actions prejudiced the parties, I would not only join the majority in noting my disapproval, but vacate the trial court’s entry of summary judgment and remand the matter to allow the plaintiff to create a record for a full hearing on his recusal motion.” Id. at 389.

**U.S. v. Bergrin, 682 F.3d 261 (3d Cir. 2012).**

Paul Bergrin was a former federal prosecutor who became a successful defense attorney in Newark, N.J.  At some point, his law practice morphed into a criminal organization involved in prostitution, drug-dealing and witness-tampering.  The combination of Bergrin's success in the courtroom, his extravagant lifestyle, and his criminal enterprise led New York Magazine to label him "The Baddest Lawyer in the History of New Jersey."  (See NYMag's profile of Bergrin here: <http://nymag.com/news/features/paul-bergrin-2011-6/index2.html>).

Bergrin was indicted on a host of charges, including RICO.  In 2010, Judge Martini dismissed the RICO charges.  The government appealed that decision, and in 2011, the Third Circuit reversed, noting that Judge Martini's concerns about the RICO charges were "either endemic to RICO prosecutions or involved in the application of irrelevant legal standards."  United States v. Bergrin, 650 F.3d 257, 274 (3d Cir. 2011).

On remand, Bergrin was charged was a 33-count indictment, which included two counts related to killing a witness, Kemo McCray.  Judge Martini severed those counts from the rest of the crimes charged, and ordered that those counts be tried first.  At the ensuing trial, Judge Martini precluded the government from introducing evidence of two other "witness-murder plots" to prove Bergrin's intent to kill McCray.  The jury hung on both charges.

The government appealed Judge Martini's evidentiary rulings and his severance order, and asked that the case be assigned to a new judge.  The Third Circuit "reluctantly" agreed to reassign the case on remand, finding that Judge Martini's conduct and comments called his "appearance of impartiality" into question.  682 F.3d at 284.

According to the Third Circuit, Judge Martini repeatedly expressed "discomfort" with "the manner in which the Indictment pulls the various criminal acts, including the witness-tampering plots, together under the umbrellas of RICO charges."  Id. at 282-83.  Judge Martini's discomfort with the numerous and interrelated charges led him to try to dissuade the government from trying Bergrin on the RICO counts.  He told the government that, if convicted, Bergrin would receive a "sentence that would reflect the severity of" the Indictment's other charges.  Id. at 283.

Ultimately, the Third Circuit stated that "[i]t is not a court's prerogative to construct a detour around RICO simply because the court is uncomfortable with how that statute may significantly alter the way trials are conducted in cases that involve racketeering acts committed by members of an enterprise."  Id. at 284 (internal citations omitted).  In light of Judge Martini's reluctance to permit the government to try various witness-tampering counts together, which the Third Circuit previously held was authorized by Congress, the Third Circuit stated that "the Court's impartiality might reasonably be questioned."  Id. (internal citations omitted). The case was reassigned to District Judge Dennis M. Cavanaugh.

On March 18, 2013, Bergrin was convicted on 26 counts.

**United States v. Ciavarella, 716 F.3d 705 (3d Cir. 2013).**

Former state judge Mark Ciavarella was convicted of racketeering, honest services mail fraud, money laundering conspiracy, filing false tax returns, and several other related crimes in the Middle District of Pennsylvania.  The District Court denied three of Ciavarella’s motions to recuse Judge Edwin Kosik. On appeal, Ciavarella challenged the recusal refusals, arguing that Judge Kosik demonstrated a bias in favor of the prosecution through his interactions with the media and the public during the course of the proceedings.

Any United States justice, judge, or magistrate judge must recuse him or herself “in any proceeding in which his impartiality might reasonably be questioned.” 28 U.S.C. § 455(a). “The judge does not have to be *subjectively* biased or prejudiced, so long as he *appears* to be so.” Liteky v. United States*,* 510 U.S. 540, 553 n. 2, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). Additionally, a judge’s opinion based on prior proceedings does “not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.” Liteky*,* 510 U.S. at 555, 114 S.Ct. 1147.

Ciavarella’s first motion for recusal occurred after Judge Kosik was quoted in a local newspaper article making a statement about Ciavarella’s case.  The article implied that a reporter overheard Judge Kosik discussing the case outside of the courtroom and expressing disbelief at the defendant’s argument.  The article went on to quote extensively from Judge Kosik’s opinions. The Third Circuit found that every statement attributed to Judge Kosik in the article had in fact been expressed in his judicial opinions or in the courtroom. Because the article’s sources were not extra-judicial, the Third Circuit found that they did not create the appearance of partiality.

The Third Circuit next went on to consider whether Judge Kosik had a duty to recuse himself after he responded to letters from the public regarding Ciavarella’s case prior to sentencing.   In several letters, Judge Kosik expressed his personal opinion about Ciavarella’s behavior and the case before him.   Though troubled by Judge Kosik’s correspondence, the Third Circuit found that the contents of the letters did not mandate recusal because no reasonable person would question his impartiality under these unique circumstances. Judge Kosik expressly stated in the correspondence that his personal opinion would not guide his rulings, so the court found that his behavior did not constitute bias since it did not rise to the level of “deep-seated antagonism.”

Looking finally at the totality of the circumstances, the Third Circuit found that any negative views that Judge Kosik had of Ciavarella arose within the proceedings in front of him, and therefore did not amount to “extreme animus” necessary to make fair judgment impossible.

**Commonwealth v. Druce, 848 A.2d 104 (Pa. 2004).**

Dauphin County Court of Common Pleas Judge Joseph H. Kleinfelter presided over Thomas Druce's guilty plea to insurance fraud, leaving the scene of an accident involving death, tampering with evidence, and other vehicle code violations.  Mr. Druce, a state legislator from Bucks County, had driven his Jeep the wrong way on a local road, striking and killing a pedestrian.  Five months after the incident, an anonymous tip led to Druce's arrest.  He denied knowing that he had struck a person with his car; Druce claimed that he thought he hit a stop sign.  Ultimately, the Commonwealth dismissed the charge of homicide by vehicle in exchange for Druce's guilty plea to the remaining charges.

After accepting Druce's guilty plea, but prior to sentencing, Judge Kleinfelter was interviewed by a member of the Associated Press.  Portions of the interview were published in local newspapers.  Judge Kleinfelter was quoted as saying that he found Druce's claim that he thought he struck a stop sign to be "strange."  "The whole idea of a hit-and-run charge is it involves personal injury to a person," said Judge Kleinfelter.  "When Druce pleaded guilty to that charge, he admitted that he knew he hit somebody."

Following publication of the article, Druce filed a motion for recusal.  Judge Kleinfelter declined to do so, and continued to the sentencing proceeding.  Prior to sentencing, however, Judge Kleinfelter assured Druce that he harbored no ill-will and was not biased or prejudiced against Druce.  Judge Kleinfelter then handed down an aggregate sentence of 2-4 years.

On appeal, Druce challenged Judge Kleinfelter's denial of the recusal motion.  Our Supreme Court noted that Judge Kleinfelter's public comments violated Canon 3A(6) of the Code of Judicial Conduct:

Judges should abstain from public comment about a pending proceeding in any court, and should require similar abstention on the part of court personnel subject to their discretion and control.  This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

But ultimately, the Druce Court held that there was no "actionable error" in Judge Kleinfelter's denial of the recusal motion.  The Court examined the content of Judge Kleinfelter's comments, and found that "[t]he substance of the comments did not evince bias or prejudice, for or against appellant; it certainly did not impugn Judge Kleinfelter's integrity."  848 A.2d at 111.

Public comments about a pending case surely violates a canon of judicial conduct, however, without a showing that the comments revealed a bias for, or against, a party, recusal is not necessary.

**United States v. Kennedy**, 682 F.3d 244 (3d Cir. 2012)

The Third Circuit Court of Appeals granted the Government’s request to direct the Chief Judge of the United States District Court for the District of New Jersey to reassign the case on remand. 682, F.3d at 258. Defendant was charged with crimes related to possession with intent to distribute heroin in connection with a drug ring. Additionally, defendant was charged with crimes related to possession of a firearm by a convicted felon. Throughout the proceedings, the Judge explained ways that defendant could avoid a 40-year mandatory minimum, castigated the AUSA for their prosecutorial strategy, and most importantly, disregarded the Third Circuit’s “remand for resentencing *only*.” The Judge, among other things, *sua* *sponte* found some of the original counts to be multiplicitous and vacated other counts because of its own jury charge was plainly erroneous. The Government argued that a reasonable observer could “detect distrust and disfavor toward the government in the district court proceedings.” *Id.* Defendant maintained that a reasonable person could not attribute bias or partiality to the District Court and that its reassignment was unnecessary.

The Third Circuit concluded that the actions by the District Court Judge demonstrated an inability institute partiality and neutrality into the proceedings. Importantly, the Court described several factors for its decision. First, the judge characterized the timing of the governments discovery for a piece of evidence as suspicious while continuously questioning the AUSA’s competence. *Id.* at 259. Specifically, the Court stated, “when a judge openly questions the integrity of the Government’s evidence collection practices, undermines the professionalism of the prosecutor, and accuses the Government of prosecuting in bad faith – all without evidence of governmental misconduct – a reasonable observer could very well find neutrality wanting in the proceedings.” *Id.*  Moreover, at certain times the Judge conduct seemed more akin to that of a defense attorney rather than an unbiased adjudicator. For instance, he questioned witnesses substantively on matters which were unaddressed by the defense counsel, he urged the defendant to consider pleading guilty to avoid a 40-year mandatory sentence, at resentencing, he raised arguments on behalf of defendant even when defendant did not show concern for raising those issues.

Accordingly, the Third Circuit reassigned the case and all related matters to a different judge on remand and reinstituted the original convictions.

**Office of Disciplinary Counsel v. Surrick, 749 A.2d 441 (Pa. 2000).**

Surrick leveled accusations of case fixing against certain jurists in a pleading filed in the Superior Court. Along with his wife, Surrick was a surety on a mortgage. In a mortgage foreclosure action, all parties agreed that the court – not the jury – would decide the issue of Surrick’s liability as surety. The Hon. Harry J. Bradley ruled against Surrick. Surrick entered his appearance on the appeal docket and made a motion for recusal, alleging that there had been a conspiracy among jurists affiliated with the Republican Party to “fix” his case. Our Supreme Court held that Surrick’s knowingly false accusations violated Rule 8.4(c) of the Pennsylvania Rules of Professional Conduct:

It is professional misconduct for a lawyer to: (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

Surrick’s conduct was determined to merit a “severe sanction.” He was suspended for five years.

**Commonwealth v. Parker, No. MC-51-CR-18485-2011 (filed Nov. 21, 2011).**

Municipal Judge Charles Hayden did not recuse himself from a DUI case against State Representative Cherelle Parker. Judge Hayden suppressed the testimony of the arresting officers and dismissed the charges against Parker. Though Judge Hayden acknowledged that he and Parker were “friends” on Facebook, he refused to recuse himself from the case.  On appeal, Common Pleas Judge Paula Patrick reversed the dismissal, and ordered Judge Hayden to recuse himself from the case. Parker was subsequently convicted in January of 2013.

**Rohm & Haas Co. v. Lin, 992 A.2d 132 (Pa.Super. 2010).**

Plaintiff Rohm and Haas Company sought injunctive relief against a former employee for allegedly misappropriating trade secrets.  After the former employee failed to comply with court orders compelling discovery, the trial court granted the Rohm and Haas’s Motion for Default Judgment as a discovery sanction. The former employee appealed the default judgment on the grounds that the trial court abused its discretion in denying the former employee’s emergency motion for recusal.

On appeal, the Superior Court held that the trial court did not abuse its discretion in denying former employee's motion for recusal because there was no evidence of trial court bias, prejudice, or impropriety. Allegations of judicial bias place a burden on the complaining party to set forth, with specificity, evidence establishing the bias, unfairness and prejudice necessitating judicial recusal during a trial.  The court found that the former employee's motion for recusal looked like a “defensive reaction to trial court's imposition of default judgment and injunction.”