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RECUSAL ON APPEAL: AN APPELLATE ADVOCATE'S PERSPECTIVE

Howard J. Bashman*

I. INTRODUCTION

My clients all share an overriding concern—to win on appeal. Only rarely in my fifteen years of appellate practice, however, has a client expressed concern over whether grounds exist to disqualify a judge assigned to hear and decide the case on appeal. I have concluded from this evidence that clients typically believe that appellate judges will hear cases in a fair and impartial manner, and I suppose that clients might even welcome the participation of appellate judges perceived as, for lack of a better term, biased in favor of their position on appeal. But, for understandable reasons, a client would be quite concerned about having an appeal heard and decided by a judge perceived as biased against the client's position.

Assuming that my clients are in these respects similar to those of other appellate lawyers, I will address in this article the considerations likely to affect a decision about whether to seek the recusal of a judge assigned to hear an appeal. First, however, I survey the field in order to place those considerations in the appropriate context.

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II. REPRESENTATIVE COURT RULES AND PROCEDURES

To discuss recusal from the perspective of an appellate practitioner, it is first necessary to understand the differing procedures that appellate courts employ in deciding which judges will hear and decide which appeals. And an appellate court's procedures concerning when the identities of the judges who will hear and decide an appeal are disclosed to the parties can also be of importance in a particular case. Only after understanding how appellate judges go about determining whether recusal is appropriate and determining the point during the appellate process when the identities of the judges assigned to hear and decide an appeal are disclosed to the parties can one usefully consider the recusal-related options and strategies available to an appellate practitioner.

The appellate court whose procedures I know best is the United States Court of Appeals for the Third Circuit.¹ That is the appellate court in which I represent clients most frequently, and before entering into private practice, I served a two-year clerkship for a Third Circuit Judge. I know from this experience that Third Circuit judges are expected to furnish the Clerk's Office with a list of parties, attorneys, and law firms on whose cases they will be recused from participating. Thus, if the judge's spouse or child is an attorney, the judge will likely include the law firm at which the spouse or child works as one in whose cases the judge will refrain from participating. Similarly, if the judge owns stock in a given company, the judge will include it on his recusal list.

The Third Circuit, like all the other federal Courts of Appeals, decides the vast majority of appeals using three-judge panels. The Third Circuit is authorized to have fourteen active judges,² and also calls on its senior circuit judges, along with visiting circuit and district judges from other courts, for assistance in hearing and deciding appeals. Drawing on this group of available judges, the Clerk's Office, in coordination

1. An online version of the Third Circuit's internal operating procedures, which contain information about the recusal process, is available at <http://www.ca3.uscourts.gov/Rules/IOP-Final.pdf> (accessed May 10, 2005; copy on file with Journal of Appellate Practice and Process).

2. See 28 U.S.C. § 44(a) (available at <http://uscode.house.gov>).

with the court's chief judge, compiles an oral-argument calendar that lists which panels will hear cases during which weeks of the year, along with the cities where the panels are scheduled to convene. The lists are randomly generated, although they are subject to change both to ensure that all active judges have the opportunity to sit on panels with one another and to accommodate the judges' anticipated unavailability for oral argument due to other work-related or personal obligations.

Once the oral-argument calendar is established, the Clerk's Office begins tentatively assigning appeals to the next available panel in the order in which cases become fully briefed and ready for disposition. Before a case is tentatively assigned to a panel, however, the Clerk's Office will compare the parties, their lawyers, and their law firms against the judges' recusal lists. If any judge on the initial panel is recused, the case will be assigned instead to a different three-judge panel.

After the Clerk's Office conducts this initial recusal screening, it submits to each judge on the panel a list of the parties, counsel, and law firms whose cases have been tentatively assigned to the panel. This procedure enables the judges on the panel themselves to determine at an early stage of the proceeding whether they should recuse themselves from hearing and deciding any of the cases tentatively assigned to the panel. If any judge sees the need to recuse from a particular case, that case will be assigned to another three-judge panel and will be replaced by another case, which will then be reviewed for recusal purposes.

Once this two-step screening process concludes, the judges on a given three-judge panel will receive the briefs and appendices in the cases assigned to it. Before oral argument occurs, the judges will review those briefs in detail, and that detailed review may reveal a need to recuse that was not apparent from earlier information. If a judge recuses after a case has been assigned to a panel but before oral argument occurs, a replacement judge will typically be assigned to hear that case. This replacement judge is usually not randomly selected; rather, if a judge has his resident chambers where the oral argument is scheduled to occur and is otherwise available, he may be asked to participate in the case either by the recused judge or by the chief judge.

In the Third Circuit, the names of the judges assigned to decide a case are revealed to counsel approximately two weeks in advance of the date scheduled for oral argument or, if a case is to be submitted on briefs without oral argument, about two weeks before the submission date. Thus, the parties and their attorneys have a relatively brief time in which to decide whether to seek the recusal of any of the judges assigned to hear and decide the case.

Some other state and federal intermediate appellate courts provide even less advance notice. In certain intermediate appellate courts, the lawyers will not learn the identities of the judges assigned to hear oral argument until they arrive in court on the day of oral argument. And some federal appellate courts employ an oral-argument screening process whereby, if a case is decided on the briefs alone without oral argument, the first notice that the parties and their attorneys receive of the judges assigned to decide the case will be when the appellate court issues a copy of its written ruling in the appeal.

Of course, in appeals that will be decided by a three-judge panel of an intermediate appellate court, parties and their lawyers will know which active and senior judges serve on that court, and thus have a chance of being selected to hear and decide the appeal. And some appellate courts, most commonly appellate courts of last resort, hear and decide most every appeal using all judges in active service. Thus, for example, when a case arrives on review to the Supreme Court of the United States or the Supreme Court of Pennsylvania, the lawyers and the parties know the identities of the Justices who will be deciding both whether to review the case on the merits and, if review is granted, what the outcome will be.

III. THE APPLICABLE FEDERAL STATUTE

In the federal court system, a federal statute governs judicial recusal.³ The statute describes two categories for disqualification, the first being that a judge “shall disqualify himself in any proceeding in which his impartiality might

3. See 28 U.S.C. § 455 (available at <http://uscode.house.gov>).

reasonably be questioned.”⁴ The parties to a case are allowed, following full disclosure of the basis for disqualification, to waive a judge’s recusal if the ground for disqualification arises only under this provision.⁵

The second situation in which recusal is necessary arises if a judge (1) has actual bias or prejudice concerning a party; (2) has a direct financial interest, however small, in a party; (3) has served as lawyer in the matter in controversy while in private or governmental practice; or (4) has a spouse or child who is a party, lawyer or witness in the proceeding.⁶ If any of these circumstances are present, the duty of a judge to recuse is not subject to waiver by the parties.⁷

For ease of discussion, it is useful to focus here on the four major grounds for judicial disqualification contained in the statute: (1) a financial interest in the result of the litigation; (2) a familial interest in the litigation, for example if a close family member of the judge is a party or serving as attorney for a party; (3) actual bias involving the facts, issues, parties, lawyers or law firms involved; and (4) circumstances in which the judge’s impartiality might reasonably be questioned.

The very first strategic question related to these issues concerns the most advantageous time for filing a recusal request. Assume, for example, that a product liability judgment awarding damages to a smoker has been returned against a tobacco company, and the tobacco company has appealed to the as-of-yet hypothetical United States Court of Appeals for the Fourteenth Circuit. Assume further that the spouse of one judge on that court is a partner in the law firm defending the tobacco company, while another appellate judge’s financial disclosure statement indicates that she owns stock in the tobacco company. Finally, assume that a third appellate judge on the court formerly ran for an elective state court judicial position, and in the campaign the candidate criticized those who would seek to impose liability against fast-food restaurants and companies that manufactured cigarettes.

4. 28 U.S.C. § 455(a) (available at <http://uscode.house.gov>).

5. See 28 U.S.C. § 455(e) (available at <http://uscode.house.gov>).

6. See 28 U.S.C. § 455(b) (available at <http://uscode.house.gov>).

7. See 28 U.S.C. § 455(e) (available at <http://uscode.house.gov>).

The lawyer for the plaintiff seeking to uphold a finding of liability against the tobacco company could, once an appeal is docketed, file a formal pleading that sought the recusal of those three judges. But such an immediate, post-appellate-docketing request could prove entirely superfluous. First, none of the three judges whose recusal is sought may be on the panel initially assigned to decide the appeal. Second, the judge who owns stock in the tobacco company and the judge whose spouse is a partner in the tobacco company's law firm should recognize the need to recuse if the appeal is assigned to them, in the unlikely event that automatic screening in the Clerk's Office fails to trigger recusal. Finally, the appellate judge who spoke critically of tobacco-liability claimants during his run for judicial office in the state court system may or may not perceive himself as actually biased or as someone whose impartiality might be reasonably questioned.

As a strategic matter, it would appear unnecessary to move as soon as the appeal is docketed for recusal of the judge who owns stock or the judge who is related to counsel, because recusal of those two judges should occur as a matter of course. Nevertheless, there are instances when recusals that should have occurred automatically—for example, recusals in the federal system based on direct stock ownership in a litigant—inexplicably have failed to occur. In 1999, the organization Community Rights Counsel issued a report concluding that eight federal appellate judges had taken part during 1997 in eighteen cases involving litigants in which the judges, their spouses, or trusts that they managed held stock. That report led to a front page article in *The Washington Post*.⁸ Earlier, *The Kansas City Star* had published a series of articles entitled *On Their Honor: Judges and Their Assets*, which revealed that federal judges in that region of the Midwest repeatedly have presided over lawsuits involving companies in which they hold stock.⁹

8. See Joe Stephens, *Judges Ruled on Firms in Their Portfolios*, *Wash. Post* A01 (Sept. 13, 1999) (available at <http://www.washingtonpost.com/wp-srv/politics/feed/a53063-1999sep13.htm>) (accessed Mar. 23, 2005; copy on file with *Journal of Appellate Practice and Process*).

9. Joe Stephens, *Stocks and Ethics Collide in Courtroom*, *Kansas City Star* (Apr. 4, 1998); Joe Stephens, *Judicial Ethics Law Contains Few Loopholes*, *Kan. City Star* (Apr. 4, 1998); *Most Area Federal Judges Have Owned Stock in Litigants*, *Kan. City Star* (Apr. 4, 1998); *Position Held at Hospital Poses Different Problem*, *Kan. City Star* (Apr. 4, 1998);

The organization Judicial Watch is currently in the process of posting online images of the Financial Disclosure Reports that federal judges are required to file each year.¹⁰ Consulting these reports on line often will allow litigants and their attorneys to ascertain whether an appellate judge assigned to a case has a disqualifying financial interest in the matter. And because the expected automatic recusal does not always occur, it is of course prudent for the appellate advocate to review them in any case in which the financial information they contain might be relevant.

The federal law governing judicial recusal requires a federal judge to recuse from hearing a case involving a publicly owned company if the judge directly owns even one share of stock in the company.¹¹ Presumably a judge who owns a single share of stock in Altria Group, the company that owns tobacco manufacturer Philip Morris USA, will not be influenced by that minor ownership interest in deciding how to rule in the hypothetical appeal I have outlined here. Yet the recusal requirement is inflexible, requiring a judge to recuse whether he directly owns one share or all shares of stock in a litigant.

But what if a judge who owned one share of Altria Group failed to recuse in an appeal involving Philip Morris USA? When should the plaintiff seeking to uphold a decision imposing tobacco-related product liability move to recuse the judge? Prudence dictates moving to recuse the judge before a decision issues. Otherwise, if the plaintiff's lawyer knew of the ground for recusal before a decision issued but was lying in wait to see whether that judge might rule for the plaintiff (or could be perceived as using that strategy), the plaintiff could be deemed to have waived the right to object to the judge's participation in

Joe Stephens, *KC Not Alone in Seeing Problem Cases*, Kan. City Star (Apr. 4, 1998); Joe Stephens, *Judges Escape Public Scrutiny on Ethics*, Kan. City Star (Apr. 5, 1998); Joe Stephens, *"Immunity from Mistakes" Disgusts Former Litigants*, Kan. City Star (Apr. 5, 1998). All articles in this series are available at <http://www.kcstar.com/judges/index.html> (accessed Mar. 24, 2005; copies on file with Journal of Appellate Practice and Process). And for more on this topic, see the editorial entitled *Judges' Financial Disclosures*, which ran on page A26 of the Washington Post of September 13, 1999.

10. The Financial Disclosure Reports are available at <http://www.judicialwatch.org/judges.shtml>. The Ethics in Government Act of 1978 requires federal judges to file these reports. See 5 U.S.C. app. § 101-111 (available at <http://uscode.house.gov>).

11. See 28 U.S.C. § 455(b) (available at <http://uscode.house.gov>).

the case, even though the ground for recusal falls into the category of “unwaivable” conflicts.¹²

It is more difficult to determine the optimal time to submit a recusal request to a court whose oral-argument screening process will, if argument is not ordered, result in the issuance of a decision with no advance disclosure of the panel’s composition. On the one hand, moving to recuse all judges who ought to refrain from participating in the case might be superfluous, because some or all of those judges may not be on the panel assigned to decide the case, either due to chance or to their own independent, behind-the-scenes recusals. On the other hand, waiting until a ruling issues very likely will create the sore-loser perception—that recusal is being sought only because the outcome was unfavorable.¹³ And even if the ruling is favorable, the opposing party would, it seems, be able to raise the issue of recusal in an attempt to overturn its loss. If two judges on a three-judge federal appellate panel own stock in the appellant corporation, and if the court’s ruling is adverse to that corporation, its lawyers could presumably argue that those judges should have recused even though their bias, if any, might at first have appeared likely to operate in favor of the corporation.

IV. A RISK TO CONSIDER—OFFENDING THE COURT

It is a curious aspect of the judicial system in the United States that the judge whose recusal is sought decides in the first instance whether she is biased and whether her impartiality might reasonably be questioned. Although the second of those inquiries—whether a judge’s impartiality might reasonably be questioned—is objective in theory, resolution of the question is

12. Although a detailed examination of the esoteric subject of how and why a litigant’s conduct could waive a supposedly unwaivable ground for recusal is beyond the scope of this essay, readers interested in this topic might profitably review *In re Kan. Pub. Employees Retirement Sys.*, 85 F.3d 1353, 1360 (8th Cir. 1996).

13. Appellate courts tend to frown on recusal motions that are employed “as a fall-back position in the event of adverse rulings on pending matters.” *In re IBM Corp.*, 45 F.3d 641, 643 (2d Cir. 1995); see also *Kan. Pub. Employees Retirement Sys.*, 85 F.3d at 1360 (same); *In re Cargill, Inc.*, 66 F.3d 1256, 1262–63 (1st Cir. 1995) (“In the real world, recusal motions are sometimes driven more by litigation strategies than by ethical concerns.”).

directed to the judicial officer whose bias is being alleged and who perhaps is not best situated to determine, objectively, whether her own impartiality might reasonably be questioned.

Whenever a party asks an appellate judge to recuse after the judge has already concluded to her own satisfaction that she may appropriately hear and decide the merits of an appeal, the party risks being perceived by the judge as second-guessing her own resolution of the issue. Where the ground for recusal is ownership of stock or the involvement of the judge's close family member as counsel, the judge is unlikely to take offense, because a failure to recuse was likely the result of an oversight. In contrast, where the ground for recusal is that the judge is biased in fact, or that his impartiality might be reasonably questioned, the party moving to recuse the judge invariably runs the risk of offending the judge.

Sometimes, as happened when Pledge of Allegiance challenger Michael A. Newdow filed a motion asking Justice Scalia to recuse from participating at oral argument and voting on the outcome in the Pledge case, a recusal request directed to an appellate judge will cause the judge to refrain from participating in a case in which the judge otherwise would have participated.¹⁴ More often, however, the recusal petition will be denied, as happened when Justice Scalia refused to recuse from a case involving his then-recent duck-hunting partner, Vice-President Cheney.¹⁵

The recusal standards applicable to intermediate appellate judges are the same as those applicable to trial court judges. And appellate courts with regularity hold that trial judges have abused their discretion in failing to recuse because, in the appellate courts' view, the trial judges' impartiality reasonably might be questioned. A key difference is that while an appeal as of right ultimately can be taken from a trial judge's decision refusing to recuse from a case, no appeal as of right usually exists from an appellate judge's decision not to recuse from hearing an appeal. At best, an intermediate appellate judge's failure to recuse is subject to discretionary review in the highest

14. *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 28 (2004) (noting that Justice Scalia took no part in the consideration or decision of the case).

15. See *Cheney v. U.S. Dist. Ct. for Dist. of Columbia*, 541 U.S. 913 (2004) (Memo. of Scalia, J.).

court of the state or, in the federal system, in the United States Supreme Court. Not surprisingly, however, courts of last resort rarely agree to review whether an intermediate appellate judge abused her discretion in refusing to recuse from deciding an appeal.

Because an appellate judge whose recusal is sought will often be not only the first but also the final arbiter of whether sufficient grounds exist for recusal, appellate lawyers ought to advise their clients that requests for recusal should not be filed unless the grounds for recusal are compelling. A less than compelling, and thus unsuccessful, recusal request could cause the appellate judge to harbor resentment toward the party which claimed that the appellate judge was incapable of being fair. After all, judges are only human. And therefore, a recusal request that unsuccessfully challenges the perception of a judge's impartiality can serve as a self-fulfilling prophesy.

V. ELECTED JUDGES—THE SPECIAL CONSIDERATIONS

A. Campaign Contributions

In states where appellate judges are elected to office, two additional concerns are present. The first concern, which has existed for quite some time, arises from the need to finance campaigns for elective judicial office. Individuals who run for judicial office often receive campaign contributions, and those contributions can come from lawyers who handle appeals and individuals and companies that may be parties to appeals. It comes as something of a shock to realize that federal law precludes a judge who directly owns even one share of stock in a company from ruling on an appeal in which that company is a party, but that most states would permit an elected appellate judge to rule on the cases of lawyers and litigants who contributed to his campaign.¹⁶ An appellate judge who, once elected to office, sought to repay supporters by means of favorable rulings would assuredly be acting in an unethical

16. See e.g. Kevin McDermott, *Court Says Karmeier Can Hear Donor's Case*, St. Louis Post-Dispatch B2 (Mar. 16, 2005).

manner. But the overarching question is whether the appellate judge's impartiality might reasonably be questioned, and that issue can be endlessly debated.¹⁷

Although federal judges do not face popular election to gain office, the issue of campaign contributions can arise with respect to federal appellate judges, too. For instance, in June of 2000, a federal appellate judge whose spouse had served in elective political office undertook to address publicly the appearance of impartiality arising from campaign contributions to her spouse. Third Circuit Judge Marjorie O. Rendell, whose husband had served as Mayor of Philadelphia and is now Governor of Pennsylvania, adopted a noteworthy recusal policy applicable to cases where the parties, their attorneys, or the law firms involved had made financial contributions to her husband's mayoral campaign. Judge Rendell announced that she would recuse herself from all cases in which a party or its law firm made contributions of at least \$2,501 to the political campaign of her husband, unless the parties agreed to waive the disqualification. The notice also stated that she would disqualify herself in cases in which a party or its law firm made a contribution of less than \$2,501 to her husband's campaign if any party objected to her participation. According to the notice, the Third Circuit Clerk's Office maintained a list of contributors for inspection.¹⁸

Ironically, the defeated Republican candidate for Pennsylvania governor in 2002 was D. Michael Fisher, who then served as Pennsylvania's Attorney General. In May 2003, President Bush nominated Fisher to the Third Circuit, and in

17. The extent to which an appellate judge who gains election to that office may feel beholden to supporters could also depend on whether the judge intends to serve more than one term in office and, if so, what procedures govern re-election. In some states, currently serving appellate judges must stand for re-election in contested races featuring challengers. In others, such as Pennsylvania, an appellate judge who desires to serve another term must receive a majority of votes cast in an uncontested retention election, where voters simply choose whether the judge will serve another term. Only if a judge is not retained—an extraordinarily rare occurrence—would a contested election be permitted to occur. Because retention elections are uncontested, campaign efforts and related fundraising tend to be quite minimal. Thus, it would seem that appellate judges elected in states that employ uncontested retention elections may feel less beholden to campaign donors than judges who face contested reelection campaigns that require significant fundraising efforts.

18. See *Montrose Med. Group Participating Sav. Plan v. Bulger*, 243 F.3d 773, 776 n.* (3d Cir. 2001) (setting out terms of recusal notice).

December 2003 the Senate confirmed him to that federal appellate court. Judge Fisher has not, however, publicly announced the recusal policy he employs in determining whether to participate in cases that involve lawyers and parties that donated to his failed campaign for governor just over a year before he reached the Third Circuit.

B. Free-Speech Concerns

A second way in which different recusal concerns apply to elected appellate judges arises from the Supreme Court's June 2002 ruling in *Republican Party of Minnesota v. White*.¹⁹ The Court held there that due to the dictates of the First Amendment, candidates for elective judicial office cannot be prohibited from announcing their views on disputed legal or political issues.²⁰ A candidate for judicial office who has announced views on a disputed legal or political issue may cause her impartiality to be reasonably questioned if the issue presents itself in an appeal. But that would not always be so. For example, assume that a candidate for judicial office expresses the view during his campaign that the Supreme Court was wrong to recognize a constitutional right to abortion in *Roe v. Wade*.²¹ If an abortion case arose on appeal before that judge, he would be required to apply relevant Supreme Court precedents no matter whether he believed those cases to be correctly decided. Thus, a persuasive argument can be made that, to the extent appellate judging does not consist of the judge's imposing on the parties her personal preferences in conflict with applicable law, a judge's earlier announcement of views on disputed legal and political issues should not give rise to a basis for recusal. Whether that argument would be compelling in a particular case, however, remains to be seen.

Even statements that do not explicitly announce the views of a candidate for judicial office on disputed legal or political issues can give rise to recusal concerns. For example, a candidate for judicial office could simply accuse his opponent of favoring a position that goes against the interests of the group

19. 536 U.S. 765 (2002).

20. *Id.* at 788.

21. 410 U.S. 113 (1973).

before which the speaker is appearing. Say, for example, that a candidate for the highest court in a state, while speaking at a union-sponsored rally, accused his opponent of favoring big business and being disposed to favor the controversial demutualization of a large health-insurance company based in the state. If the candidate speaking wins the election, and a challenge to the insurer's demutualization thereafter reaches that appellate court, would it be appropriate for the justice to participate in hearing and deciding the case? The judicial candidate's statement, taken at face value, did not express the judge's position on the merits or the legality of the demutualization. But the purpose of the statement was, implicitly at least, to suggest that the judge would if elected not favor the demutualization that his adversary supported. The question has no easy answer, but appellate lawyers should bear in mind that establishing an appellate judge's bias, or even establishing the appearance of bias, through inferences drawn from comparative statements made on the campaign trail is a difficult task.

VI. STRATEGIC MOTIONS FOR RECUSAL

Because, in the federal judicial system, some grounds for recusal operate inflexibly, it is possible for lawyers or their clients to attempt purposefully to engineer the recusal of appellate judges viewed as unfavorable to a client's position. After an appellate judge has produced a sufficient track record of decisions, he or she may develop a reputation based on whether those decisions appear to be plaintiff-friendly or defendant-friendly, prosecution-friendly or criminal-defendant-friendly. As a result, depending on the type of case that is being appealed, a client or the client's lawyer may fervently hope that certain appellate judges are not assigned to the panel that will hear and decide the case. But the subject of strategic recusal—by which I mean the recusal of one or more appellate judges accomplished purposefully by a lawyer or litigant—is not often discussed, no doubt because the goal seems unfair and perhaps unethical. In a culture where lawyers and litigants are so very focused on winning cases, however, you can be sure that strategic recusals do occur.

How might a lawyer go about engineering the strategic recusal of an appellate judge? One easy method is to have as counsel in the case the law firm at which the appellate judge's spouse or other close family member works. Or, if the appellate judge is the spouse of a politician, a law firm can attempt to engineer that judge's recusal by becoming a donor to the politician's campaign. It might, for example, seem odd at first glance for a law firm that represents corporate defendants to be donating money to a plaintiff-friendly politician, until you realize that the plaintiff-friendly politician's spouse is a plaintiff-friendly appellate judge who now will be recused from participating in cases involving that defendant-friendly law firm.

Some may view as audacious any attempt to engineer the recusal of appellate judges for strategic reasons, but it might strike others as quite a rational approach. Whatever one's view of the practice, however, it does happen, both at the trial-court and the appellate level. For example, in the United States District Court for the Northern District of Alabama, attempts at recusing a judge by hiring the law firm at which his close relative worked arose in so many different cases that the court adopted a standing order in the hope of alleviating the problem.²²

In February 2005, the Second Circuit issued an interim local rule that attempts to limit strategic recusals caused by amicus curiae briefs. Perhaps recognizing that a true friend of the court would not cause the disqualification of judges assigned to decide a case, the new local rule provides:

The Court ordinarily will deny leave to file a brief for an amicus curiae where, by reason of a relationship between a judge who would hear the proceeding and the amicus or counsel for the amicus, the filing of the brief would cause the recusal of the judge.²³

Appellate judges are certainly able to determine for

22. *In re BellSouth Corp.*, 334 F.3d 941, 945 (11th Cir. 2003) (quoting standing order). Earlier, the Eleventh Circuit, in an appendix to its ruling in *Robinson v. Boeing Co.*, 79 F.3d 1053, 1056-57 (11th Cir. 1996), listed numerous cases in which recusal had been sought based on the appearance, after the case was initially assigned to a particular federal district judge, of the law firm at which the judge's nephew worked.

23. Interim Loc. R. 29 (2d Cir.) (effective Feb. 7, 2005) (available at <http://www.ca2.uscourts.gov>) (accessed Mar. 24, 2005; copy on file with Journal of Appellate Practice and Process).

themselves what value to assign to amicus briefs and whether to prefer avoiding judicial disqualification over allowing the participation of a friend of the court. Yet the Second Circuit's interim rule appears to raise more questions than it answers.

First, many amicus briefs are filed on appeal without any need for permission from the court.²⁴ Why does the Second Circuit's concern about strategic recusal apparently not extend to amicus briefs filed with the consent of the parties to the appeal, for which no court approval is required?

Second, it is not clear whether the rule will operate to deny permission to file an amicus brief if the counsel for the amicus would cause the recusal of a particular judge, but that judge has not yet been, and may never happen to be, randomly assigned to hear that very appeal. As noted earlier, many appeals are briefed before they are assigned to a particular panel. In such a case, the Second Circuit's interim rule could operate in three different ways: (1) the appeal in which an amicus brief would cause one judge's recusal could be assigned to a panel on which that judge was not serving, thereby accomplishing the purpose of a strategic recusal; (2) the appeal could be randomly assigned to the next available panel, and the amicus brief would be refused only if the judge who would be forced to disqualify happened to be assigned to that panel; or (3) the Second Circuit could refuse to accept for filing any amicus brief that would disqualify any of that court's judges, without regard to whether any judge facing disqualification would in fact have been assigned to decide the case. It is impossible to tell from the text of the interim rule in which of these ways it will operate.

Third, the interim rule is entirely silent about whether Second Circuit judges remain free to apply different recusal standards if the potential recusal is triggered by a party as opposed to an amicus. In my experience, some federal appellate judges will be more reluctant to recuse where the recusal is triggered by an amicus than if the same grounds for recusal involve a party. The Second Circuit's interim rule does not expressly preclude such a double standard, but if one were allowed, perhaps amicus-related recusals would not be enough of a problem to require the interim rule in the first place.

24. Leave of court is not required to file an amicus brief where "the brief states that all parties have consented to its filing." Fed. R. App. P. 29(a).

Fourth and finally, if the purpose of the interim rule is to prevent strategic recusals, would it not make much more sense to adopt a rule that addresses the problem with respect not only to a subset of amici but with regard to all parties and all amici? Perhaps the Second Circuit is proceeding incrementally, which is certainly a valid rulemaking strategy. But if the concern of strategic recusals is important enough to address with regard to amici, then surely the problem is important enough to address with regard to the actual parties to an appeal.

It seems likely that attempts to prompt strategic recusal will typically be orchestrated subtly rather than in a brash and flamboyant fashion. Because this tactic will in consequence be difficult to spot in every case in which it is employed, appellate courts act properly when they adopt rules that attempt to prevent parties and their counsel from orchestrating a more favorable panel through the use of strategic recusals. To be sure, a party deserves to be represented on appeal by the lawyer of its choosing, but the decision concerning which lawyer to choose is not properly based on which appellate judge or judges the lawyer's presence would recuse from the case.

The issue of strategic recusal on appeal, to the extent that appellate courts are experiencing the problem, should be addressed directly by rules that apply to all the lawyers in the case, the parties, and any amici. The Second Circuit's interim rule is an encouraging first step toward solving the problem of strategic recusals on appeal, yet this vexing problem deserves a more comprehensive solution.

VII. A FINAL WORD: FAILURE IS NOT AN OPTION

When considering whether to seek the recusal of an appellate judge, my advice to clients is that failure cannot be an option. In other words, a party should move to disqualify an appellate judge only when disqualification is guaranteed to result. This is because the only thing worse than an appellate judge whose impartiality might reasonably be questioned is an appellate court that might well resent a party's attempt, without a convincing basis, to disqualify a judge from ruling on the merits of a case.