No. 99-372

In the
Supreme Court of the United States

October Term, 1999

In re* CARL BERNOFSKY, *Petitoner

DR. CARL BERNOFSKY,
Plaintiff - Petitioner,

v.

ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND (TULANE UNIVERSITY SCHOOL OF MEDICINE),
Defendant - Respondent.

Petition for Writ of Mandamus

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Petitioner, Pro Se

QUESTION PRESENTED FOR REVIEW

Should United States District Court Judge for the Eastern District of Louisiana, the Honorable Ginger Berrigan, who is an adjunct faculty member of Tulane University and who served on the Board of Directors of a Tulane University Research Center, be disqualified from presiding in cases in which Tulane University is a defendant?

PARTIES

Dr. Carl Bernofsky
- Plaintiff - Petitioner

The Honorable Ginger Berrigan, Judge
United States District Court for the Eastern District of Louisiana
- Respondent

Victor R. Farrugia, Esq.
- Counsel for Plaintiff

Administrators of the Tulane Educational Fund
(Tulane University School of Medicine)
- Defendant - Respondent

Julie D. Livaudais, Esq.
- Counsel for Defendant

G. Phillip Shuler, III, Esq.
- Counsel for Defendant

Richard B. Ramirez, Esq.
- Counsel for Defendant

John R. Beal, Esq.
- Counsel for Defendant

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PRIOR OPINIONS

The opinion whose review is sought is unpublished and is reproduced in the Appendix at A-9. The District Court opinion is reproduced in the Appendix at A-1.

JURISDICTION

Petitioner seeks this Court's review of the judgment entered on July 6, 1999 by the United States Circuit Court of Appeals for the Fifth Circuit, by a Petition for Writ of Mandamus pursuant to the jurisdiction conferred by 28 U.S.C. § 1651(a). This petition is timely filed because it was mailed within ninety days of July 6, 1999, the date a petition for mandamus was denied in the court below. Rules 13.1 and 29.2.

Jurisdictional basis for the Fifth Circuit is 28 U.S.C. § 1651(a) and Fed. R. App. P. 21(a), and for the District Court is 28 U.S.C. § 1331.

CONSTITUTIONAL PROVISIONS

Article V, United States Constitution in pertinent part provides:

> No person shall be deprived of life, liberty, or property, without due process of law.

Article XIV, Section 1, United States Constitution in pertinent part provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Title 28, U.S.C., Section 455(a) states:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Title 28, U.S.C., Section 455(b)(5)(i) in pertinent part states:

> He shall also disqualify himself . . . where he . . . is a party to the proceeding, or an officer, director or trustee of a party.

STATEMENT OF THE CASE

Procedural History

Petitioner, Dr. Carl Bernofsky, was plaintiff in a series of four lawsuits against defendant, Tulane University, in which the Honorable Ginger Berrigan presided. In the first lawsuit, Civil Action No. 95-358, filed Jan. 31, 1995 in United States District Court for the Eastern District of Louisiana, petitioner alleged discrimination under 42 U.S.C. § 1981 and joined various state law claims. The complaint asserted that petitioner was a professor at Tulane University Medical School where he had been a faculty member for 20 years and that a new Departmental Chairman, who arrived in Nov., 1991 had harassed him, interfered with his staff, hindered his performance, caused him to lose grant funding, and threatened termination. The complaint further alleged that these actions were based on the fact that petitioner was Jewish and that the other two senior Jewish faculty members in the Department were also being discriminated against on the basis of their Jewish parentage by the same Chairman, who was of Lebanese descent.

A First Amended Complaint, adding an age discrimination claim under state law, was filed Feb. 27, 1995. A trial date was initially set for Jan. 22, 1996, but was continued to July 8, 1996 because of petitioner's diagnosis and treatment for cancer. A Second Amended Complaint was filed on Nov. 21, 1995, adding an ADEA claim and a claim for conversion of laboratory equipment and materials.

Defendant filed a Motion for Summary Judgment on May 14, 1996, and a Reply Memorandum on May 31, 1996. Petitioner filed an Opposition Memorandum to Summary Judgment on May 21, 1996, and a Reply Memorandum Opposing Summary Judgment on June 5, 1996. In response to issues raised by the District Court, petitioner filed a Supplemental Memorandum Opposing Summary Judgment on July 1, 1996, a Memorandum in Response to Court's Request, and a letter setting forth each of

petitioner's claims, also in response to the District Court's directive. Defendant delivered a Pre-trial Memorandum on July 1, 1996, and petitioner responded on July 2, 1996.

A status conference was held July 5, 1996, at which time the District Court informed petitioner's counsel that defendant's motion for summary judgment would be denied and that the trial would commence as scheduled on July 8, 1996. However, as a result of defendant's complaints concerning the Exhibit Books assembled by petitioner, the parties agreed to continue the trial to the next available date which, after a series of scheduling conflicts, was set for Sept. 8, 1997. Although this trial date was reconfirmed as late as Apr. 2, 1997, the District Court nevertheless reversed itself, granting summary judgment in favor of defendant Apr. 15, 1997 and rendering final judgment Apr. 21, 1997.

Petitioner timely appealed, but the Fifth Circuit, in an unpublished opinion, affirmed the District Court for "substantially" the same reasons Jan. 8, 1998. The Appellate Court further denied petitioner's motion for a rehearing Feb. 5, 1998. Subsequently, as Case No. 97-1844, the U.S. Supreme Court denied a petition for *certiorari* Oct. 5, 1998.

Petitioner filed two other lawsuits, this time in State Court (Nos. 97-20805 and 98-6317). These were removed by defendant to Federal Court, where they were docketed as Civil Actions 98-2102 and 98-1577, respectively, and assigned to Judge Berrigan. A fourth lawsuit, Civil Action 98-1792, was filed directly in U.S. District Court on June 18, 1998. Civil Actions 98-1792 and 98-2102 were later consolidated under the former docket number and is currently pending, captioned as Dr. Carl Bernofsky v. Administrators of the Tulane Educational Fund. In this lawsuit, petitioner alleges retaliatory conduct by defendant for making false and malicious statements to prospective employers in violation of 42 U.S.C. § 1981 and 1981(b), 42 U.S.C. § 2000e-3(a), and 29 U.S.C. § 623(d).

Because petitioner was unapprised of Judge Berrigan's association with defendant, he had been precluded from addressing the conflict of interest issue until the matter now pending before her. Petitioner filed a motion to recuse Judge Berrigan Oct. 15, 1998, and defendant filed a memorandum in opposition Nov. 9, 1998. Petitioner's motion to recuse was denied Nov. 23, 1998 (*Appendix*, at A-1), and the Judge's order was appealed. The Fifth Circuit denied the appeal Feb. 2, 1999 (*Appendix*, at A-2), and petitioner's legal counsel withdrew from the case Feb. 8, 1999. *Appendix*, at A-4.

Petitioner, in proper person, then filed a Complaint of Judicial Misconduct against Judge Berrigan based on her material and continuing association with defendant throughout the above proceedings and her inexcusable failure to disclose this association. The Complaint, No. 99-05-372-0118, was dismissed Feb. 23, 1999 by order of Fifth Circuit Chief Judge and, upon appeal, the Judicial Council of the Fifth Circuit affirmed the dismissal Apr. 19, 1999.

Petitioner, in proper person, next filed a Petition for Writ of Mandamus that sought to recuse Judge Berrigan from the litigation presently before her. Attached to the petition were 25 exhibits with documentation of all claims.

A status conference was called June 17, 1999 at which time Judge Berrigan informed all counsel of her decision to recuse herself. Subsequently, however, Judge Berrigan reversed herself and submitted a response that opposed recusal June 21, 1999. *Appendix*, at A-6. Defendant responded June 28, 1999, and the Fifth Circuit Court of Appeals denied the petition July 6, 1999. *Appendix*, at A-9. The instant petition for mandamus followed.

Facts

Introduction

In the employment discrimination matter that was the subject of petitioner's first lawsuit, the District Court Judge who rendered summary judgment in favor of defendant, Tulane University, was an adjunct faculty member of Tulane University's Law School during the time that case was before the Court. The Judge continues her adjunct professorship to the present day. The Judge was also on the Board of Directors of one of Tulane University's research centers during the period that she rendered summary judgment in favor of defendant. Under the Model Codes of Judicial Conduct, the Judge not only had an obligation to disclose her association with the defendant university, she had a duty to disqualify herself pursuant to 28 U.S.C. § 455(a) and § 455(b)(5)(i). From Jan. 31, 1995 onward, the District Court Judge continually violated statutes regulating disqualification in all four of petitioner's lawsuits where she presided and failed to make any disclosure.

Professorship

Federal District Court Judge Ginger Berrigan is Adjunct Associate Professor of Law at Tulane University and taught the course, *Trial Advocacy*, during the 1995-96 academic year. Since then, Judge Berrigan has maintained a professional association with Tulane through her continued participation in the Law School's Judicial Externship Program and as a substitute instructor for the course, *Federal Practice & Procedure: Trials*, taught by 77-year-old Adjunct Professor, Federal District Court Judge Charles Schwartz, Jr. Under ordinary circumstances, Judge Berrigan would be expected to carry on this course when Judge Schwartz retires from teaching.

Judge Berrigan's affinity for Tulane University may be surmised from her willingness to devote the time and effort needed to prepare lecture materials, travel to the university campus, and teach classes - all without financial compensation. Nevertheless, Judge Berrigan has defended her qualification to sit by stating that her teaching activities in Tulane's Law School involve no [financial] compensation. *Appendix*, at A-1. Generally, adjunct professors are not paid by Tulane for their service in academic programs. However, with a lifetime salary provided, monetary compensation would appear to be secondary to the prestige a federal judge may derive from a university professorship. Furthermore, interacting in a university setting with university officials and prominent jurists is a professional benefit that allows a judge to keep abreast of academic politics and current legal developments, and to maintain social contacts. Finally, participating in a teaching program, or acting as a mentor, may satisfy a judge's sense of professional duty, the discharge of which is deemed compensation enough.

Board Membership

In 1990, Judge Berrigan, then an attorney, was appointed to the Board of Directors of Tulane University's Amistad Research Center, a position she occupied until 1997.[1] Significantly, Judge Berrigan recently altered her curriculum vitae by deleting three years from the time she previously claimed to serve on the Board of Tulane's Amistad Research Center. Whereas her previous vitae showed membership through 1997, the altered vitae now shows board membership only through 1994.[2] This change creates a new record that indicates that Judge Berrigan did not serve as a director of a Tulane research center at

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[1] *Almanac of the Federal Judiciary, **1997***, Vol. 1, 5th Circuit, p. 3.

[2] *Almanac of the Federal Judiciary, **1998***, Vol. 1, 5th Circuit, p. 3.

any time from Jan. 31, 1995 onward, when she presided in petitioner's lawsuits against Tulane. The *Almanac of the Federal Judiciary*, which is updated twice annually, cites Judge Berrigan's continuing Board membership in Tulane's Amistad Research Center for 1995, 1996, and 1997. The alteration of her record in 1998 implies that Judge Berrigan recognized that there was something improper about her association with Tulane during the 1995 - 1997 period. Specifically, as a "Director" of one of defendant's research centers, she was automatically disqualified pursuant to U.S.C. 28 § 455(b)(5)(i). Judge Berrigan's adjunct professorship with Tulane University was also omitted from the *Almanac of the Federal Judiciary*, although she continues to serve in this capacity.

The Amistad Research Center occupies a complete wing of Tilton Memorial Hall on the campus of Tulane University. Tulane not only furnishes the Center with a rent-free physical site, it funded $200,000 in improvements and contributed $12,000 in relocation costs. Tulane also provides a budget of about $63,200 in 1986 dollars, which is adjusted annually for inflation and used for unrestricted operating expenses. Two members of Amistad Center's Board of Directors are appointed by Tulane. Tulane also publically represents the Amistad Center as a "Tulane" center. Amistad's holdings are listed as part of Tulane's library system, and Amistad's Executive Director, Comptroller, and other key administrative personnel are entered in the Tulane Faculty and Staff Directory.

Judge Berrigan has defended her qualification to sit by inferring that the Amistad Research Center is an entity that is independent from Tulane. *Appendix*, at A-1. This statement ignores Tulane's investment in the Center, Tulane's annual budgeting for the Center, Tulane's appointments to the Center's Board of Directors, and Tulane's influence over the Center's key personnel. The facts demonstrate that the Amistad Center, as other Tulane centers, is materially dependent on Tulane for its existence.

According to Tulane's 1995 Faculty Handbook and recent updates from Tulane's Web site on the Internet, the Amistad Research Center is one of more than two dozen such centers affiliated with the University. It is also among those Tulane entities that are registered as non-profit corporations. These include the Southern Institute for Education and Research, the Tulane Public Interest Law Foundation, the Louisiana Public Health Institute, and others. Like most other Tulane centers, institutes, foundations, and departments that derive funding from extramural sources, the Amistad Research Center is still materially dependent on Tulane. Some centers, such as the Tulane Regional Primate Research Center and the Center for Bioenvironmental Research, receive substantial government grants in addition to the support they obtain from Tulane. However, like the Amistad Research Center, they are still considered integral parts of the University.

Abuse of Judicial Discretion

Petitioner's due process and equal protection rights under the Fifth and Fourteenth Amendments were, and continue to be, severely abridged in his civil suits against Tulane University.

Judge Berrigans's failure to disclose her association with defendant deprived petitioner of the opportunity to bring this association to the attention of the Appellate and U.S. Supreme Courts. Had the District Court's strong appearance of impropriety been timely addressed, its impartiality might reasonably have been questioned and affected the outcome of the appellate process. Petitioner complained that newly-created, deceptive and untruthful statements were employed by Tulane during oral arguments before the Appellate Court. When these falsehoods were pointed out in a brief that requested a rehearing, the Appellate Court declined to rehear the case. Had the Appellate Court been aware of the District Court's association with defendant and its willful concealment of this association, it may have been more inclined to examine those strongly disputed material facts. The U.S. Supreme

Court may also have been more receptive to the petition for *certiorari* had it been apprised that the Judge was disqualified under 28 U.S.C. § 455(a) and § 455(b)(5)(i) at the time she made her rulings and entered judgment in favor of Tulane.

At every critical junction, Judge Berrigan's reasoning appeared to be guided along a path that led to defendant's goal of denying petitioner a trial on the merits of his case. In some instances, this process involved treating as "undisputed facts" facts that were sharply disputed by documentary evidence and petitioner's sworn testimony. An egregious example of the District Court's abuse of authority was its treatment of petitioner's grant funding in his first lawsuit against Tulane. Documentation had thoroughly substantiated that petitioner had received notice of a new $250,000 grant award from the Air Force 10 weeks before he was terminated. The grant was officially accepted by Tulane and not returned to the Air Force until eight months after petitioner was terminated. Nevertheless, defendant claimed that petitioner had no grant funds with which to support his research, leading Judge Berrigan to state, "...Bernofsky was not qualified because of his lack of extramural funding..." (Civil Action No. 95-358, Apr. 15, 1997, *Order and Reasons*, at 18) and, "...all undisputed facts support the simple explanation that Bernofsky was terminated for his inability to meet his salary needs..." *Id.* at 28. The Judge's ruling was interpreted as follows:

> Former research professor at medical school asserted race and age discrimination and state law claims in connection with denial of tenure and ultimate termination for **failure to obtain grant funding**. *Bernofsky v. Tulane University Medical School*, 962 F.Supp. 895 (E.D.La. 1997) at 895. (Bold emphasis added).

During the past four-and-one-half years, the District Court repeatedly dismissed documentary evidence and sworn testimony that sharply contradicted defendant's claims while crediting the

defendant's positions and labeling them as "undisputed." Petitioner, a scientist untrained in law, was astonished that the Court would abandon objective reality to favor defendant's disputed claims, even when they were contradicted by defendant's own documents. Petitioner can cite numerous instances of this bias and lack of objectivity, but a full accounting is beyond the scope of this petition. These "judgments notwithstanding the evidence" suggested the existence of influence from an extrajudicial source and led petitioner to search for and ultimately discover the association that linked the District Court to the defendant.

Attempts at Intimidation

In her letter of June 21, 1999 to the Fifth Circuit Court of Appeals in response to petitioner's petition for mandamus, Judge Ginger Berrigan sought to divert attention from the core issue of disqualification by focusing on petitioner's efforts to locate representation following the withdrawal of his former counsel. She implied that there was something untoward in petitioner's attempt to recruit legal counsel through advertising. Petitioner's print ads, which appeared in the *ABA Journal*, *Louisiana Bar Journal*, and three other highly-regarded legal publications, neither mentioned Judge Berrigan nor contained critical remarks. Contrary to the Judge's assertion, petitioner placed no advertising on the Internet. *Appendix*, at A-6. Petitioner's personal Web site, for which he alone is responsible, contains reprints of selected court documents, other factual information, and commentary on matters related to his lawsuits against Tulane. The Web site is intended for attorneys and anyone else seeking information about petitioner's lawsuits and is constitutionally protected speech.

Petitioner's present counsel was retained solely to represent him in the matter now pending in District Court irrespective of presiding judge. Neither petitioner's counsel nor any other attorney assisted petitioner in his recent efforts to seek Judge Berrigan's recusal. Petitioner assumed full responsibility for pursuing recusal on a *pro se* basis after realizing that his retention of legal counsel was handicapped by attorneys' fears of retaliation for complaining about a judge in whose court they continue to practice. Similar fears contributed to the withdrawal of petitioner's former counsel following Judge Berrigan's initial refusal to disqualify herself. *Appendix*, at A-4.

Fear of reprisal is justifiable. After expressing her wish that the recusal issue "be laid to rest," Judge Berrigan reminded petitioner's counsel that he "had litigated several employment discrimination cases in [her] section of Court." This comment appears to be an attempt to intimidate petitioner's counsel with an implied threat of possible retaliation. *Appendix*, at A-7. Moreover, Judge Berrigan has directed her responses on this matter exclusively to petitioner's counsel, even though petitioner has been representing himself on the recusal issue.

Argument

Relief Sought

Petitioner, Carl Bernofsky, plaintiff in Civil Action No. 98-1792 c/w 98-2102, captioned as Dr. Carl Bernofsky v. Administrators of the Tulane Educational Fund, respectfully moves this court, pursuant to the provisions of 28 U.S.C. § 1651, to grant a writ of mandamus directing the Honorable Ginger Berrigan, Judge of the United States District Court for the Eastern District of Louisiana, to vacate her order of Nov. 23, 1998 denying petitioner's motion for recusal (*Appendix*, at A-1) and disqualify herself from presiding in the above-named action now pending before her. Recusal is justified on ground that the Judge is disqualified under 28 U.S.C. § 455(a), and that she willfully concealed and later misrepresented her long-term relationship with defendant with which she continues to be materially associated. Judge Berrigan's continued participation in the matter now before her creates the strong appearance of impropriety for which relief through disqualification is warranted. This writ should issue because the District Court indisputably abused its discretion, and petitioner has failed to obtain relief in the Fifth Circuit through the appellate process.

Second, petitioner respectfully moves this court, pursuant to the provisions of 28 U.S.C. § 1651 and 28 U.S.C. § 2106, to direct the Honorable Ginger Berrigan, Judge of the United States District Court for the Eastern District of Louisiana, to vacate her judgment in the case designated as Civil Action No. 95-358 (*Bernofsky v. Tulane University Medical School,* 962 F.Supp. 895 (E.D.La. 1997), cert. denied, ___U.S.___, 119 S.Ct. 48, 142 L.Ed. 2d 37 (1998)), and disqualify herself from further adjudication of that case. Vacatur is justified on grounds that the Judge was disqualified under 28 U.S.C. § 455(a) and § 455(b)(5)(i) at the time she ruled and entered judgment in favor of defendant; that she willfully concealed and later misrepresented her long-term relationship with defendant with which she continues to be

materially associated; and that this concealment obstructed justice, abridged petitioner's due process rights under the Fifth and Fourteenth Amendments, and prevented petitioner from receiving a valid *de novo* review in appellate court, which was unaware of the strong appearance of impropriety in the court below.

Petitioner invokes Fifth Amendment protection because of its applicability to federal jurisdiction.

> [D]ue process under the Fifth Amendment, along with the other guarantees of the Bill of Rights, when applied by federal courts, does serve as the basic protection of the citizen against unjust federal action. Crain v. United States, 162 U.S. 625 (1896), 16 S.Ct. 952, 40 L.Ed. 1097. . . In such cases, there is neither an intervening state court system nor an intervening state constitution. It is, therefore, the Court's view that Fifth Amendment due process must be given an even broader connotation than Fourteenth Amendment due process. *United States v. Townsend,* 151 F.Supp. 378 (D.C.D.C. 1957), at 387.

Petitioner further prays that the above cases be reassigned to a judge who is not associated with defendant so that they may be tried on their merits in a manner that will promote public confidence in the integrity and fairness of the federal judicial system and provide to the litigants the blessing of equal justice under the law.

Appropriateness of Mandamus

It is well-settled that mandamus petition is the proper procedure for an appellate court to review a district judge for disqualification from a case in which his or her impartiality might reasonably be questioned.

> A judge's refusal to recuse himself in the face of a substantial challenge casts a shadow not only over the individual litigation but over the integrity of the federal judicial process as a whole. The shadow should be dispelled at the earliest possible opportunity by an authoritative judgment either upholding or rejecting the challenge. In recognition of this point we have been liberal in allowing the use of the extraordinary writ of mandamus to review orders denying motions to disqualify. *Union Carbide Corp. v. U.S. Cutting Service, Inc.*, 782 F.2d 710 (7th Cir. 1986), at 712. (References deleted).

Moreover, few situations are more appropriate for mandamus than a judge's wrongful refusal to disqualify himself.

> This court has long taken the position that there are 'few situations more appropriate for mandamus than a judge's clearly wrongful refusal to disqualify himself.' *In re International Business Machines Corp.*, 618 F.2d 923 (2nd Cir. 1980), at 926 citing *Rosen v. Sugarman*, 357 F.2d 794, 797 (2nd Cir. 1966).

Although mandamus may be opposed on the premise that it should not to be used as a substitute for appeal, petitioner contends that no party should be required to submit to a presiding judge who has a prejudicial bent of mind, expecting that there will be another opportunity for justice after final judgment has been rendered. Rather, mandamus should be viewed as a means of avoiding a needless and judicially inefficient ordeal.

> [D]ue process . . . [requires] that a judge who is otherwise qualified to preside at trial or other proceeding must be sufficiently neutral and free of disposition to be able to render a fair decision. **No person should be required to stand trial before a judge with a 'bent of mind.'** *Collins v. Dixie Transport, Inc.*, 543 So.2d 160 (1989), at 166 citing *Berger v. United States*, 255 U.S. 22,

33, 41 S.Ct. 230, 233, 65 L.Ed. 481 (1921); Wolfram, *Modern Legal Ethics* § 17.5.5 Independence and Neutrality, p. 989 (1986). (Bold emphasis added).

Obligation to Disclose

According to Shaman, *et al.*, and the case law cited to support his determination, "...it is the obligation of a judge to disclose all facts that might be grounds for disqualification."[3]

Further, Canon 3C of the Code of Judicial Conduct of the American Bar Association, which was codified with modifications as 28 U.S.C. § 455 and extensively reviewed by Abramson,[4] states, in part, "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned... ."

Under Canon 3 of the Code of Judicial Conduct, Judge Berrigan had a duty to disclose her association with Tulane before sitting in any case in which Tulane was a defendant. However, from Jan. 31, 1995 onward, Judge Berrigan continually violated this Code with respect to the petitioner's lawsuits against Tulane University when she sat and failed to make any disclosure. More significantly, as a member of the Board of Directors of a Tulane research center during the time she ruled and entered judgment in favor of Tulane, Judge Berrigan was specifically disqualified pursuant to U.S.C. 28 § 455(b)(5)(i).

Judge Berrigan's actions infringed the ethical principle, elaborated by Shaman, *et al.* and supported by case law that, "It is

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[3] *Judicial Conduct and Ethics*, 2 ed., Shaman, J.M., Lubet, S., Alfini, J.J.; Michie Law Pub., Charlottesville, VA (1995), p. 146.

[4] *Judicial Disqualification under Canon 3 of the Code of Judicial Conduct*, 2 ed., Abramson, L.W., American Judicature Soc., Chicago, IL (1992), pp. 1-48.

not the duty of the parties to search out disqualifying facts about the judge . . . it is the judge's obligation to disclose all possibly disqualifying facts."[5]

Quoting Justice Scalia in *Liteky*:

> ...[T]wo paragraphs of the [most recent] revision [of § 455] brought into § 455 elements of general 'bias and prejudice' recusal that had previously been addressed only by § 144. Specifically, paragraph (b)(1) entirely duplicated the grounds of recusal set forth in § 144 ('bias or prejudice'), but (1) made them applicable to *all* justices, judges and magistrates (and not just district judges), and (2) **placed the obligation to identify the existence of those grounds upon the judge himself**, rather than requiring recusal only in response to a party affidavit. *Liteky v. U.S.*, 510 U.S. 540 (1994) at 548, 114 S.Ct. 1147, 127 L.Ed.2d 474. (Bold emphasis added).

Willful Misrepresentation

Judge Berrigan's failure to make any disclosure of her material and continuing association with defendant over the course of four-and-one-half years as Presiding Judge, coupled with the alteration of her curriculum vitae and omission of her adjunct professorship from the *Almanac of the Federal Judiciary*, constitutes a willful misrepresentation designed to thwart discovery of her association with defendant. When confronted with the evidence of these actions, Judge Berrigan declined to respond. Her silence is self-implicating. *Appendix*, at A-6. This violation of 28 U.S.C. § 455 goes beyond mere negligence or harmless error and suggests that Judge Berrigan has an interest in the outcome of the proceedings, perhaps derived from a sense of loyalty to the University. Nonetheless, the Judge's personal

[5] Footnote 3, p. 146.

agenda should not be allowed to become an impediment to the cause of justice. Judge Berrigan's partisanship infringes on petitioner's Fifth and Fourteenth Amendment rights to due process and equal protection and should not be tolerated.

> [T]here are two predicates for a 'wilful violation' of a rule of judicial conduct established by [the Supreme Court of Oregon], each of which is necessary for there to be a wilful violation: (1) that the judge must intend 'to cause a result or take an action contrary to the applicable rule' of judicial conduct, and (2) that the judge must be 'aware' of circumstances that in fact make the rule applicable, whether or not the judge knows that he violates the rule. *In re Schenck,* 870 P.2d 185 (Or. 1994), at 193.

Once the facts of her association with defendant were discovered by petitioner and brought to her attention, Judge Berrigan responded, "There is no basis for the plaintiff's suggestion that [my] impartiality might reasonably be questioned by virtue of these . . . circumstances..." *Appendix,* at A-1.

Judge Berrigan's disregard of disclosure principles are aggravated by the fact that she attempted to conceal the extent of her association with defendant by altering her curriculum vitae to create the appearance that her membership on the board of defendant's research center ended before petitioner's first lawsuit was filed on Jan. 31, 1995. Willful violations of judicial conduct are especially serious. With reference to *Schenck,* Shaman, *et al.* wrote:

> [A] judge will be subject to discipline (as distinct from reversal on appeal) for incorrectly failing to disqualify himself only where the failure was willful. The test is an objective one, and therefore a willful failure to disqualify may be present even though a judge states on the record that he does not believe disqualification is necessary. This approach has the advantage of requiring

judges to look to an external standard in addition to their subjective feelings to decide if disqualification is necessary. It thus takes into account that **disqualification is required if there is an appearance of partiality to the reasonable observer, and it precludes a judge from avoiding recusal merely by avowing his or her impartiality.** *In re Schenck, Id.* at 189, 193-195 (Bold emphasis added).[6]

Judges as Professors

With regard to writing, lecturing, and teaching, Shaman, *et al.* concluded:

> . . . [J]udges' personal and professional services must be dignified (footnote deleted) and, of course, must denote respect for and compliance with the law, these being the same restrictions that apply to all of a judge's extra-judicial activities whether compensated or not.
>
> Teaching requires that judges adhere to the same guidelines as apply to occasional or ad hoc lecturing, and also that the judge be sensitive to the nature of the institution at which she teaches. **Thus judges should not sit in cases where the educational institution is a party.** (Footnote deleted, bold emphasis added).[7]

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[6] *Judicial Conduct and Ethics*, 2 ed., Shaman, J.M., Lubet, S., Alfini, J.J.; Michie Law Pub., Charlottesville, VA (1995), p. 97.

[7] *Ibid*., pp. 240-241.

Prejudice in Favor of Defendant

At two critical junctures in petitioner's lawsuits against Tulane, one involving summary judgment (*supra*, at 2) and the other recusal, Judge Berrigan articulated decisions that she later reversed by rulings that favored defendant after "subsequent research." *Appendix*, at A-7. The collective evidence and questionable nature of the "subsequent research" leading to these reversals are consistent with the idea that Judge Berrigan relied upon knowledge acquired outside of the proceedings and displayed an unequivocal partiality that rendered fair judgment impossible.

The duties of Judge Berrigan's adjunct professorship periodically bring her into professional and social contact with Tulane employees, students, administrators, and other professors. Thus, there is no barrier to her private, non-judicial association with the University. Judge Berrigan's contact with defendant subjects her to the receipt of extrajudicial information that can include rumor and innuendo about petitioner. Judge Berrigan has admitted to receiving information about petitioner from unnamed "lawyers in town, although I have not sought them out myself." *Appendix*, at A-7.

> It is difficult to imagine a more serious incursion on fairness than to permit the representative of one of the parties to privately communicate his recommendations to the decision makers. *Camero v. United States*, 375 F.2d 777 (U.S. Claims 1967), at 781.

Animus Toward Petitioner

In a complaint of judicial misconduct and petition for writ of mandamus to the Fifth Circuit Court of Appeals, petitioner documented Judge Berrigan's activities that presumably would require her disqualification. In her response to the latter petition,

Judge Berrigan did not dispute any of the allegations raised against her. *Appendix*, at A-6.

Although petitioner exposed the Judge's partisanship and raised questions about her integrity, Judge Berrigan nevertheless claimed that she "... do[es] not harbor any ill will towards Dr. Bernofsky." *Appendix*, at A-7. Given the gravity of the charges brought against her, this claim has a disingenuous ring. More likely, Judge Berrigan's ability to render impartial judgment has been irrevocably injured by petitioner's criticism of her judicial conduct, the only purpose of which was to justify her recusal.

> The basic requirement of constitutional due process is a fair and impartial tribunal, whether at the hands of a court, an administrative agency or a government hearing officer. The Supreme Court has consistently enforced this basic procedural right and held that decision makers are constitutionally unacceptable in the following circumstances [including] . . . **where an adjudicator has been the target of personal abuse or criticism from the party before him**... *Valley et al. v. Rapides Parish School Board*, 118 F.3d 1047 (5th Cir. 1997), at 1052. (References deleted, bold emphasis added).

In a situation somewhat analogous to the case here under review, the Fifth Circuit vacated the sentence of defendant Avilez-Reyes and remanded his case to district court because defendant's attorney had participated in a judicial disciplinary proceeding a month earlier against the trial judge, who then erroneously failed to recuse himself.

> [W]e hold that Judge McBryde abused his discretion and reversibly erred by failing to recuse himself from the Avilez-Reyes' case. We conclude that a reasonable person, advised of all the circumstance of this case, would harbor doubts about Judge McBryde's

impartiality. *U.S. v. Avilez-Reyes* 160 F.3d 258 (5th Cir. 1998), at 259.

Prejudgment and Predisposition

In her response to petitioner's petition to the Fifth Circuit for mandamus, Judge Berrigan stated:

> [Dr. Bernofsky] has gone through some very difficult life transitions in recent years, some of which he genuinely perceives to [be] caused by the bias and fault of others, including myself. I regret that he continues to have that perception. *Appendix*, at A-7.

The Judge's condescending assessment of petitioner's psychological state of mind is subjective and prejudicial. More importantly, her implication that petitioner's difficulties *are not the "fault of others"* reveals that she has already formed an opinion in this matter, seven months before the scheduled trial date of January 18, 2000, and before the completion of discovery or the taking of a single deposition.

"[A]djudicative decisions . . . should be free of bias or prejudice. Thus an adjudicative decision maker should be disqualified if he or she has prejudged disputed adjudicative issues." *Valley et al. v. Rapides Parish School Board*, 118 F.3d 1047 (5th Cir. 1997), at 1053. Moreover, "Prejudgment as to the facts . . . or reason to believe such exists, if fairly supported, would, in the Court's view, satisfy Section 144." *Bradley v. School Board of City of Richmond, Virginia*, 324 F.Supp. 439 (E.D. Va. 1971), at 445.

The basic requirement of constitutional due process is a fair and impartial tribunal, and the Supreme Court has consistently enforced this basic procedural right.

> The problem of a procedural defect arises when decision makers have prejudged the facts to such an extent that their minds are 'irrevocably closed' before actual adjudication. *Valley*, at 1052 citing *Baran v. Port of Beaumont Navigation District of Jefferson County*, 57 F.3d, 436 (5th Cir. 1995), at 446.
>
> Bias or prejudice on the part of a judge may exhibit itself prior to the trial by acts or statements on his part. Or it may appear during the trial by reason of the actions of the judge in the conduct of the trial. **If it is known to exist before the trial it furnishes the basis for disqualification of the judge to conduct the trial.** Section 144, Title 28, U.S. Code. *Knapp v. Kinsey*, 232 F.2d 458, (6th Cir. 1956), at 465. Rehearing denied 235 F.2d 129, cert. denied 352 U.S. 892, 77 S.Ct. 131, 1 L.Ed.2d 86. (Bold emphasis added).

In the present case, Judge Berrigan's predisposition and bent of mind, as revealed by her actions and writing, satisfy the requirement for disqualification.

Pervasive Bias and Prejudice

Justice Scalia, joined by Justices Rehnquist, O'Connor, Thomas, and Ginsburg, expressed in *Liteky* the majority Court opinion that:

> A favorable or unfavorable predisposition can also deserve to be characterized as 'bias' or 'prejudice' requiring recusal because, even though it springs from the facts adduced or the events occurring at trial, it is so extreme as to display clear inability to render fair judgment. (That explains what some courts have called the 'pervasive bias exception' to the extrajudicial source doctrine. See, *e.g.*, *Davis v. Board of School Comm'rs of Mobile County*, 517 F.2d 1044, 1051 (CA5 1975), cert.

denied, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976).) *Liteky v. U.S.*, 510 U.S. 540 (1994), at 551.

In *Liteky*, Justices Kennedy, Blackmun, Stevens, and Souter challenged the extrajudicial source rule, arguing that undue emphasis should not be placed on the source of the contested mindset in determining whether disqualification is mandated by § 455(a).

> The statute does not refer to the source of the disqualifying partiality. And placing too much emphasis upon whether the source is extrajudicial or intrajudicial distracts from the central inquiry. One of the very objects of law is the impartiality of its judges in fact and appearance. . . . The relevant consideration under § 455(a) is the appearance of partiality, see *Liljeberg*, [*Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988)], at 860, 108 S.Ct., at 2202-03, not where it originated or how it was disclosed. *Liteky*, *Id.* at 558.

Justice Kennedy further expressed the opinion that the standard for disqualification under § 455(a) during the course of a judicial proceeding is too severe under *Liteky* and should be modulated to allow its intended protection.

> The [Supreme] Court holds that opinions arising during the course of judicial proceedings require disqualification under § 455(a) only if they 'display a deep seated favoritism or antagonism that would make fair judgment impossible.' (Reference deleted). That standard is not a fair interpretation of the statute, and is quite insufficient to serve and protect the integrity of the courts. *Liteky v. U.S.*, 510 U.S. 540 (1994), at 563.

> Section 455(a) . . . guarantee[s] not only that a partisan judge will not sit, but also that no reasonable

person would have that suspicion. See *Liljeberg*, at 860. *Liteky*, *Id.* at 567.

Notwithstanding the dichotomy of opinion over the extrajudicial source rule, petitioner contends that Judge Berrigan's long-standing, working relationship with Tulane University, and her duties as adjunct professor that bring her into contact with University administrators and faculty, meets the standard of a genuine extrajudicial source factor. Yet, even if this argument is discarded, the extraordinary circumstances of her prior rulings in *Bernofsky v. Tulane University Medical School* would re-qualify it on the basis of the "pervasive bias exception." And even if that argument were discarded, it would still be virtually impossible for Judge Berrigan to escape the appearance of partiality posed by the facts presented in the petition under review.

It may be noted that some courts now admit prior rulings in considerations of bias and prejudice.

> Because we seek to protect the public's confidence in the judiciary, our inquiry focuses not on whether the judge actually harbored subjective bias, **but rather on whether the record, viewed objectively, reasonably supports the appearance of prejudice or bias.** *United States v. Antar*, 53 F.3d 568 (3d Cir.1995) at 574; *United States v. Bertoli*, 40 F.3d 1384, 1412 (3d Cir.1994); *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155 (3d Cir. 1993) at 162; *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 98 (3d Cir.1992). *In re Antar*, 71 F.3d 97 (3rd Cir. 1995), at 101. (Bold emphasis added).

Determination of Impartiality

According to 28 U.S.C. § 455(a), recusal is required whenever there exists a genuine question concerning a judge's impartiality.

It may be argued that the determination of the judge concerned should be afforded great weight and should not be disturbed unless clearly erroneous. However, in the matter here under review, it is clear that Judge Berrigan engaged in actions that, in the aggregate, constitute serious and erroneous abuse of judicial discretion.

Judge Berrigan's claim of impartiality is contradicted by the facts of her working relationship with defendant and her willful concealment of these facts. Additionally, Judge Berrigan's deep seated favoritism toward defendant as revealed by prior rulings, and her "empathy" toward petitioner because he blames others for his "difficult life transitions" when he is the victim, demonstrates a pervasive bias that is so extreme as to indicate a clear inability to render fair judgment. The latter circumstance requires recusal. *Liteky v. U.S.*, 510 U.S. 540 (1994).

> The United States Supreme Court has made it clear that 'a fair trial in a fair tribunal is a basic requirement of due process,' in administrative adjudicatory proceedings as well as in courts. *Michigan Dept. of Soc. Servs. v. Shalala*, 859 F.Supp. 1113, 1123 (W.D.Mich.1994) (quoting *Withrow v. Larkin*, 421 U.S. 35, 36, 95 S.Ct. 1456, 1459, 43 L.Ed.2d 712 (1975)). Thus, as stated by Justice Kennedy in his concurring opinion in the most recent Supreme Court case construing the analogous federal statute on judicial disqualification, '[i]f through obduracy, honest mistake, or simple inability to attain self knowledge the judge fails to acknowledge a disqualifying predisposition or circumstance, an appellate court must order recusal no matter what the source.' *Liteky v. U.S.*, 510 U.S. 540, 563, 114 S.Ct. 1147, 1161, 127 L.Ed.2d 474 (1994) (Kennedy, J., concurring). This is because, as our court of appeals has declared, **'[l]itigants ought not have to face a judge where there is a reasonable question of impartiality . . . .'** *Alexander v. Primerica Holdings, Inc.*, 10 F.3d. 155, 162 (3d Cir.1993).

D.B. v. Ocean Tp. Bd. of Educ., 985 F.Supp 457 (D.N.J. 1997), at 540. (Bold emphasis added).

Furthermore, no judge should have ultimate authority over what constitutes his or her own conflict of interest.

> **No longer is a judge's introspective estimate of his own ability impartially to hear a case the determinate of disqualification under § 455. The standard now is objective. It asks what a reasonable person knowing all the relevant facts would think about the impartiality of the judge.** *Roberts v. Bailar,* 625 F.2d 125, (6th Cir. 1980), at 129. On remand, 538 F.supp 424. (References deleted, bold emphasis added).

The sentiments expressed in *Roberts v. Bailar, Id.,* are generally reinforced in *Liteky v. U.S.*, 510 U.S. 540 (1994).

In the final analysis, a reasonable person ***would*** question the impartiality of any judge who was an adjunct faculty member at a defendant university and had a continuing association with that university during even part of the time the case was before him or her. U.S. Senator John Breaux recently indicated that he would be receptive toward legislation "...establishing a presumption of conflict of interest and automatic recusal for judges... [who are] ...adjunct professors presiding as judges over civil cases in which the school at which that professor teaches is named as a defendant." *Appendix,* at A-10. Inquiring further into this situation, U.S. Senator Mary L. Landrieu has "...taken the liberty of contacting the appropriate officials, here in Washington, to request a report." *Appendix*, at A-12.

The concern expressed by the above legislators over the issue of recusal for adjunct faculty judges is clear, and indisputably, Louisiana's duly-elected U.S. senators are reasonable people.

CONCLUSION

To maintain the integrity of the federal judicial system, the Court must be concerned whether the parties received fair and impartial treatment of their claims. At the risk of undermining the public's confidence in the judicial process, the welfare of the parties must receive priority over other considerations should a violation of § 455(a) occur. In the matter presently under review, justice requires that the District Court's judgment be vacated and the issues placed before a new judge. "The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact." *Liljeberg*, 486 U.S. 847, at 870 quoting *Public Utilities Comm'n of D.C. v. Pollak*, 343 U.S. 451, 466-467, 72 S.Ct. 813, 822-823, 96 L.Ed. 1068 (1952). (Frankfurter, J., in chambers).

Judge Berrigan's conduct has cast a long shadow on the litigation that is now before her, and recusal is the only remedy that will renew the public's faith in the integrity and fairness of the judicial system, prompt other judges to more carefully search for and disclose grounds for disqualification, and restore impartiality to the litigants in the judicial process. When statutory standards for recusal are met, as has been demonstrated here, the trial judge should step aside and let another judge, who is not associated with the defendant, be assigned.

Furthermore, under the extraordinary circumstance created by the new knowledge that Judge Berrigan was disqualified at the time she granted summary judgment in favor of defendant, and pursuant to a finding of willful negligence and prejudicial conduct by the District Court, petitioner respectfully prays to be relieved from the operation of summary judgment in Civil Action No. 97-358 (*Bernofsky v. Tulane University Medical School*), so that the case can be fairly tried by a jury on its merits in front of an impartial judge who is not associated with the defendant.

In conclusion, petitioner, Dr. Carl Bernofsky, respectfully prays that a writ of mandamus be issued by this Court directed to respondent, the Honorable Ginger Berrigan Judge of the United States District Court for the Eastern District of Louisiana, directing her to vacate her order denying petitioner's motion for recusal and disqualify herself from presiding in the action now pending before her, and to grant all other requested relief as the Court may deem proper.

Respectfully submitted,

_____

Carl Bernofsky, Petitioner *Pro Se*
(In Proper Person)
6478 General Diaz Street
New Orleans, Louisiana 70124
(504) 486-4639

CERTIFICATE

I certify that one copy each of this Petition for Writ of Mandamus was hand delivered on or about August 26, 1999 to judge respondent and counsel for plaintiff and that three copies were hand delivered to counsel for defendant at the addresses indicated below. A separate, notarized certificate shows the actual date of service.

The Hon. Ginger Berrigan, Judge
U.S. District Court for the Eastern District of Louisiana
500 Camp Street
New Orleans, LA 70130
(504) 589-7515 - Respondent

Victor R. Farrugia, Esq.
228 St. Charles Avenue, Suite 1028
New Orleans, LA 70130
(504) 525-0250 - Counsel for Plaintiff

Julie D. Livaudais, Esq.
G. Phillip Shuler, III, Esq.
Richard B. Ramirez, Esq.
Chaffe, McCall, Phillips, Toler & Sarpy, L.L.P.
2300 Energy Centre
1100 Poydras Street
New Orleans, LA 70163 - Counsel for Defendant - Respondent
(504) 585-7000

_____

Carl Bernofsky, Petitioner *Pro Se*
(In Proper Person)
6478 General Diaz Street
New Orleans, Louisiana 70124
(504) 486-4639

APPENDIX

TABLE OF CONTENTS

MINUTE ENTRY
BERRIGAN, J.
NOVEMBER 23, 1998

DR. CARL BERNOFSKY	CIVIL ACTION
VERSUS	NO. 98-1792 c/w 98-2102
ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND	SECTION "C"

IT IS ORDERED that the plaintiff's motion for recusal is hereby DENIED. For the record, the undersigned's only teaching undertaking at Tulane University School of Law involved volunteer substitute teaching a few classes for Judge Charles Schwartz, Jr., which involved no compensation. In addition, the Amistad Research Center is a distinct corporate entity which is located on Tulane's campus. In any event, membership on the Amistad's Board of Directors ended several years ago. There is no basis for the plaintiff's suggestion that the undersigned's impartiality might reasonably be questioned by virtue of these two circumstances under 28 U.S.C. § 455.

s/ *Ginger Berrigan*

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-31417
USDC No. 2:98-CV-1792 c/w 2:98-CV-2102

CARL BERNOFSKY, DR., Plaintiff-Appellant,

versus

ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND, Tulane University Medical School, Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana

Before REYNALDO G. GARZA, DAVIS, AND PARKER, Circuit Judges.

BY THE COURT:

This court must examine the basis of its jurisdiction on its own motion if necessary. Mosley v. Cozby, 813 F.2d 659, 660 (5th Cir. 1987). In this employment discrimination case, the plaintiff has filed a notice of appeal from an order of the district court denying the plaintiff's motion for recusal of the district judge.

Federal appellate courts have jurisdiction over appeals only from (1) final orders, 28 U.S.C. § 1291; (2) orders that are deemed final due to jurisprudential exception or which can be properly certified as final pursuant to Fed. R. Civ. P. 54 (b); and (3) interlocutory orders that fall into specific classes, 28 U.S.C. 1292 (a), or which can be properly certified for appeal by the district court, 28 U.S.C. § 1292 (b). See Dardar v. Lafourche Realty Co., 849 F.2d 955, 957 (5th Cir. 1988); Save the Bay, Inc. v. United States Army, 639 F.2d 1100, 1102 (5th Cir. 1981). An order denying a motion to recuse is not immediately appealable. Nobby Lobby, Inc. v. City of Dallas, 970 F.2d 82, 85 & n.3 (5th Cir. 1992).

APPEAL DISMISSED.

MINUTE ENTRY
BERRIGAN, J.
FEBRUARY 8, 1999

DR. CARL BERNOFSKY	CIVIL ACTION
VERSUS	NO. 98-1792 c/w 98-2102
ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND	SECTION "C"

IT IS ORDERED that the motion to withdraw filed by Roger D. Phipps and Phipps & Phipps is hereby GRANTED. The upcoming trial, pre-trial conference and telephone status conference dates and all deadlines remain in effect. This order does not affect the representation of the plaintiff in any appeal.

IT IS FURTHER ORDERED that the plaintiff enroll substitute counsel no later than February 22, 1999, at 5:00 p.m.

A copy of this minute entry and order shall be sent to the plaintiff, certified mail, return receipt requested, at the following address:

Dr. Carl Bernofsky
6478 General Diaz Streeet
New Orleans, LA 70124

s/ *Ginger Berrigan*

BEFORE THE JUDICIAL COUNCIL OF THE

FIFTH CIRCUIT

IN RE: NO. 99-05-372-0118

PETITION FOR REVIEW BY CARL BERNOFSKY OF THE FINAL ORDER FILED MARCH 1, 1999, DISMISSING JUDICIAL MISCONDUCT COMPLAINT AGAINST UNITED STATES DISTRICT JUDGE GINGER BERRIGAN, UNDER THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980.

ORDER

An Appellate Review Panel of the Judicial Council of the Fifth Circuit has reviewed the above-captioned petition for review, and all the members of the Panel have voted to affirm the Order of Chief Judge King, dated March 1, 1999, dismissing the Complaint of Carl Bernofsky, against United States District Judge Ginger Berrigan, under the Judicial Conduct and Disability Act of 1980. The Order is therefore

AFFIRMED.

19 APR 99
Date

s/ *E Grady Jolly*
E. Grady Jolly
United States Circuit Judge,
For the Judicial Council of
The Fifth Circuit

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
500 CAMP ST.
NEW ORLEANS, LA 70120

CHAMBERS OF
GINGER BERRIGAN
UNITED STATES DISTRICT JUDGE

June 21, 1999

Hon. Charles Fulbruge, III
Clerk of Court
Fifth Circuit Court of Appeals
600 Camp Street
New Orleans, Louisiana 70130

RE: 99cv30614 In Re: Bernofsky

Dear Mr. Fulbruge:

This is in reply to your letter of June 16th, inviting a response to the above petition.

In a previous filing by Dr. Bernofsky, I did respond and provide some information regarding my connections with Tulane University which was the focus of that pleading, as well as this one.

I have no additional information regarding Tulane but I thought it might be useful to provide some more information generally. After Dr. Bernofsky's prior counsel resigned, Dr. Bernofsky did advertise in various outlets, including the Internet, seeking new counsel. In those various advertisements, he did continue his

criticism of my remaining in the case, in varying detail. Copies of some of these critiques have been sent to me by various lawyers in town although I have not sought them out myself. I didn't keep the copies but I imagine they can be re-accessed if the Court thinks they're pertinent. I was concerned to the extent that I felt Dr. Bernofsky's continuing insistence that the trial judge be recused was hindering his ability to obtain new counsel. Fortunately, he did locate an attorney in the New Orleans area who agreed to represent him. I was hopeful at that point that the recusal issue would be laid to rest. The counsel he retained is someone who had litigated several employment discrimination cases in our section of Court.

I was very surprised therefore to see the latest filing by Dr. Bernofsky. I convened a status conference by telephone with his counsel and opposing counsel this past Thursday. I expressed my concern that Dr. Bernofsky was apparently continuing to focus upon me as his problem and that this would continue to cause an undue distraction and disruption to the case. At that point, I felt it would be in the interest of judicial efficiency if I did step down, not because I felt I was biased or because of any appearance of partiality, but to eliminate the distraction.

We subsequently researched the issue some more and it appears to me that the <u>only</u> basis for recusal, self-triggered or otherwise, is either actual impartiality or the appearance of impartiality [*sic*]. I honestly believe that neither of those apply in this situation, so I don't feel I can or should step down.

I say all the above to tell you that I do not harbor any ill will toward Dr. Bernofsky. If anything, I feel empathy. He has gone through some very difficult life transitions in recent years, some of which he genuinely perceives to [be] caused by the bias and fault of others, including myself. I regret that he continues to have that perception. And while I don't wish to be part of the

problem, it doesn't seem that recusal is the viable solution - rather it may perpetuate the problem by reinforcing the perception.

Sincerely,

s/ *Ginger Berrigan*

Ginger Berrigan

cc: Victor R. Farrugia
Julie Livaudais

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 99-30614

In Re: CARL BERNOFSKY

Petitioner

Petition for Writ of Mandamus to the United States
District Court for the
Eastern District of Louisiana, New Orleans

Before JOLLY and SMITH Circuit Judges.*

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus is **DENIED.**

* This matter is being decided by a quorum. 28 U.S.C. 46 (d)

United States Senate
WASHINGTON, DC 20510-1804

May 24, 1999

Carl Bernofsky, Ph.D.
6478 General Diaz Street
New Orleans, LA 70124

Dear Dr. Bernofsky:

Thank you for contacting me regarding your concerns about adjunct professors presiding as judges over civil cases in which the school at which that professor teaches is named as a defendant.

I appreciate knowing your thoughts on this subject. As you point out, Section 3(E)(1) of the ABA Code of Judicial Conduct requires a judge to disqualify himself from any proceeding in which his or her impartiality might reasonably be questioned. Not knowing any more about the case to which you refer in your letter than what you have told me, I can only presume that no questions about the neutrality of the adjunct professor/judge in that case were shown to be within reason. Alternatively, it could well have been a bad decision, in which case it should be appealed. While I am hesitant to resort to a legislative remedy for every bad court case that is handed down, I do want to point out that we are in agreement that avoiding the appearance of impropriety is an essential component of the Judiciary's role in the rule of law.

Rest assured that I will keep your support for a law establishing a presumption of conflict of interest and automatic recusal for judges in these situations in mind. In the meantime, if I can assist you in any other way, please let me know.

With kind regards,

Sincerely,

s/ *John*

JOHN BREAUX
United States Senator

JB/jhl

United States Senate
WASHINGTON, DC 20510-1804

July 1, 1999

Dr. Carl Bernofsky
6478 Gen. Diaz St.
New Orleans, Louisiana 70124-3106

Dear Dr. Bernofsky:

Thank you very much for letting me hear from you concerning federal judges who serve as adjunct professors, yet preside in civil cases where the University they work for is a defendant.

I will certainly be pleased to look into this matter for you, and have taken the liberty of contacting the appropriate officials, here in Washington, to request a report. I will be back in touch with you as soon as I receive any additional information.

I appreciate your bringing this important matter to my attention, and I hope that you will continue to contact me when I can be of assistance to you.

With kindest regards, I am

Sincerely,

s/ *Mary L. Landrieu*

Mary L. Landrieu
United States Senator

MLL:lmc