

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

**UNITED STATES OF AMERICA,)
ex rel. S. PRAWER & COMPANY,)
GILBERT PRAWER and HARVEY)
PRAWER,)**

PLAINTIFFS)

v.)

Civil No. 93-165-P-H

**FLEET BANK OF MAINE and)
RECOLL MANAGEMENT CORP.,)**

DEFENDANTS)

**UNITED STATES OF AMERICA,)
ex rel. S. PRAWER & COMPANY,)
GILBERT PRAWER and HARVEY)
PRAWER,)**

PLAINTIFFS/RELATORS)

v.)

Civil No. 95-321-P-H

**VERRILL & DANA, P. BENJAMIN)
ZUCKERMAN, ANNE M. DUFOUR)
and AMY BIERBAUM,)**

DEFENDANTS)

**ORDER ON RELATORS' MOTION FOR
RANDOM ASSIGNMENT TO A JUDGE OUTSIDE
THE DISTRICT OF MAINE**

The private relators have moved in both these False Claims Act cases for “random assignment to a judge outside the District of Maine.” Relators’ Objection to, or in the Alternative, Appeal of Magistrate Cohen’s Order of January 22, 1996, and Motion for Random Assignment to a Judge Outside the District of Maine (“Relators’ Objection”) at 1, 9-10. I announced on February 16, 1996, that, the motion having been filed, I would not rule on any other issues in the two cases until I had heard argument on the motion. After the issues were fully briefed, I presided at a hearing on April 5, 1996.

In Civil No. 93-165-P-H, the Government has intervened. Accordingly, under the False Claims Act it has “primary responsibility for prosecuting” that particular lawsuit. 31 U.S.C. § 3730(c)(1). Because the Government had not filed any written position on the reassignment motion, I began the hearing by inquiring of its lawyer what position the Government took. Initially the lawyer stated that the Government had no position (except that the two cases belonged together), but when I pointed out the Government’s statutory responsibility, he replied that the Government did not seek reassignment.

I then heard from two of the private relators’ lawyers. After seeking and receiving confirmation concerning the scope of Magistrate Judge David Cohen’s recusal in both matters, they informed me that (1) the relators specifically did not want the administration (filing and docketing functions) of the case moved to a different judicial district; and (2) the relators did not seek my disqualification nor the disqualification of any further judicial officers in the District of Maine.¹

¹ After further research following the hearing, I have discovered that arguably I should not have asked any of the lawyers to take a position, see 13A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3550 (Supp. 1995) (“Wright & Miller”), citing Judicial Conference Resolution G (cited erroneously as “Resolution L”); see II Guide to Judiciary Policies and Procedures, Codes of Conduct for Judges and Judicial Employees, ch. VII, Judicial Conference Resolutions at VII-13 (Administrative Office of the United States Courts 1993) (continued...)

There was some suggestion by the defendants’ lawyers that the motion effectively had been withdrawn and by the relators’ lawyers that they were no longer seeking any action and had simply alerted me to possible concerns. I announced that, regardless of the positions taken by the various parties, now that the issue had been raised, I could not consider it withdrawn, but must proceed to evaluate the need for my disqualification under the standards of 28 U.S.C. § 455(a), and/or the need for a transfer of the clerical administration of the case. Accordingly, the private relators’ previously expressed written concerns were explored in detail in a recorded hearing of several hours.

The relators’ concerns as they expressed them both in writing and orally at the hearing fall into three categories: (1) unfavorable publicity about this judge, a magistrate judge, the chief judge and the District of Maine generally; (2) apparent bias (as perceived by the relators and/or their lawyer) in rulings by “the Court,” a term that they clarified at the hearing as referring to decisions by Magistrate Judge Cohen; and (3) so-called “divergent” or “disparate” treatment of nonsubstantive, administrative issues by the Clerk’s Office, the administrative arm of this Court. I proceed to consider each of these separately and then collectively.

I. UNFAVORABLE PUBLICITY

A. About This Judge

¹ (...continued)
 (“Guide to Judiciary Policies and Procedures”), but I believe that limitation may be inapplicable here for two reasons: first, all the lawyers except the Government already had taken a position voluntarily in written papers and it was necessary for me to understand the scope of their contentions in order to make an intelligent ruling; second, this is not a case where I had disclosed something that might call into question my impartiality and was then implicitly asking the lawyers for their approval—instead, the issue had been generated directly by the private relators. On the other hand, the position taken at the hearing by all lawyers that they did not seek my disqualification may have amounted to a proper waiver of disqualification under 28 U.S.C. § 455(e) and Canon 3D, Code of Conduct for United States Judges (1994), for I had nothing to disclose and therefore the parties and their lawyers had ample opportunity before the hearing to confer on all subjects debated in the written filings.

The relators are concerned about two newspaper stories which, they fear, might cause me in particular to feel bias against them. Specifically, the local newspaper printed an article referring to me on the first page of its business section after this motion was filed. John W. Porter, Lawyers Want Lawsuit Moved, *Portland Press Herald*, Feb. 2, 1996, at 1C. Next, the *Maine Lawyers Review* printed an article about Chief Judge Gene Carter's then recent response to charges concerning his earlier actions in the case, the final paragraph of which quoted excerpts about me from the local newspaper story. Commentary: Judge Carter's Statement Answers Many Questions, But Raises Others, *Me. Laws. Rev.*, Feb. 14, 1996, at 1, 17. The concern appears to be with the following statements in the *Portland Press Herald* story, of which 1, 2, and 4 were repeated in whole or in part by the *Maine Lawyers Review*:

1. "Carter has taken himself off the case, but Jeffrey Bennett, the Prawers' attorney, said that the judge and magistrate now assigned to the matter both work too closely with the chief judge to be impartial." Porter, supra, at 1C.
2. "'With all this cronyism and conflict taking place, would you want to litigate in this environment?' said Bennett." Id.
3. "Bennett said the results of a recent hearing before Cohen convinced him that his clients would not get a fair trial in Maine." Id. at 3C.
4. "'In light of all the publicity and public reaction, in light of what's happened with Judge Carter, it's in the court's interest to reassign this case,' said Bennett. 'If the Prawers or the government lose, everybody is going to wonder if it was on the merits.'" Id.

Attorney Bennett specifically denies making the first statement, asserts that the second statement was taken out of context (that he actually was referring to lawyer and party behavior), and asserts that in

fact he told reporter Porter that “he had the utmost confidence in the Court’s ability to fairly and impartially adjudicate the Praver matter.” Letter from Jeffrey Bennett to Deborah Firestone, Executive Editor, *Maine Lawyers Review* (Feb. 15, 1996) (on file with the United States District Court, District of Maine).² On February 28, 1996, the *Maine Lawyers Review* published a “Correction” to that effect noting, as well, that Attorney Bennett had requested a correction from the

² By sworn affidavit dated February 20, 1996, Attorney Bennett further states:

- “7. Furthermore, an article appeared in the Portland Press Herald on February 2, 1996. In that article, the reporter indicated that I had questioned Judge Hornby’s ability to preside over this matter because of his close association with Judge Carter. I absolutely deny saying anything of the kind, and on February 3, 1996, specifically requested that the Portland Press Herald print a correction. However, to date, no such correction has been printed.
8. Contrary to the article which appeared in the Portland Press Herald, I told John Porter during the interview, that ‘I had the utmost confidence in Judge Hornby’s ability to fairly and impartially adjudicate the Praver matter.’ On February 3, 1996, Mr. Porter agreed that the article gave a mis-impression and that I had said just the opposite of what appeared in the newspaper. Moreover, Mr. Porter apologized for the embarrassment and mis-impression the article caused, which he attributed to his editors [sic] ‘re-write’ of the article before it was printed. The article did not reflect my interview with Mr. Porter, and many statements attributed to me were either mis-phrased or taken so far out of context, that they were never said.
9. . . . the Relators have never suggested that Judge Hornby is an inappropriate Judge to oversee this case. I wish to add that I have never said that Judge Hornby is an inappropriate judge to hear this case. I have the utmost confidence in Judge Hornby, and my preference is to have him remain on the case. However, I am concerned about the recent media coverage which, in my opinion, may have colored the views of other court personnel. I am especially concerned, particularly due to the mis-reporting that I have described above.”

Declaration of Jeffrey Bennett at 2-3.

Portland Press Herald. Correction, *Me. Laws. Rev.*, Feb. 28, 1996, at 19. Apparently, the *Portland Press Herald* has declined to publish a correction.³

I accept Attorney Bennett's correction of the record and his intense efforts to distance himself from the statements. There is therefore no basis for me to harbor bias against him or his clients or for anyone reasonably to perceive that I might. Moreover, even if he made the statements as the *Portland Press Herald* reported them, they might be grounds for discipline of Mr. Bennett as a lawyer under the Maine Bar Rules, see Me. Bar R. 3.2(c)(2), 3.7(j), but they would not lead me to be biased toward him or his clients. Judges are routinely required to distinguish between admonishing a lawyer for unprofessional behavior and fairly adjudicating the merits of a dispute between the parties.⁴ There is certainly no suggestion anywhere that the Prawer themselves are responsible for the publicity.

B. About Chief Judge Carter, Magistrate Judge Cohen and the Federal Court in Maine

This case has generated tremendous media attention and recently most of it has been unfavorable to Judge Carter. That is a fact regardless of the outcome of the inquiry Judge Carter has requested into the charges about his previous handling of the case. It also is a fact that Judge Carter

³ Lending some credence to Attorney Bennett's claims, the February 14, 1996, *Maine Lawyers Review* revealed that the *Portland Press Herald* also has declined to publish a letter to the editor correcting the *Portland Press Herald's* editorial misstatement that Chief Judge Carter's failure until then to respond publicly to media charges concerning his handling of this still-pending case amounted to "stonewalling." The Responsibilities of the Press and Bar to the Public, *Me. Laws. Rev.*, Feb. 14, 1996, at 16. The *Maine Lawyers Review* reported that the *Portland Press Herald* said the letter was too long. Id. I am not aware that the *Portland Press Herald* has used any alternative device to correct the misstatement.

⁴ "Ordinarily the bias must be against the party, and bias against the party's lawyer will not suffice, although there can be instances in which the course of the controversy with the lawyer would demonstrate bias against the party. . . . A party cannot force disqualification by attacking the judge and then claiming that these attacks must have caused the judge to be biased against him. . . ." 13A Wright & Miller § 3542 (1984).

is chief judge of this District until sometime this November, when I will succeed him as the next most senior judge.⁵ Might the negative publicity about Chief Judge Carter or the Porter story's references to Magistrate Judge Cohen affect me as another judge in the District in treating all the parties fairly in this case, or might they reasonably be perceived to have that effect? To conclude that they would, an objective observer would have to assume that I believe the relators were responsible for the criticism and that because of loyalty or collegiality I would attempt to retaliate against them in rulings in these lawsuits.

First, it must be observed that the primary beneficiary of the lawsuits the relators have instituted, if they are successful, is the United States Government, and thus the American taxpayer. The relators stand to gain too, but at most 25% of the recovery in the lawsuit where the Government has intervened and 30% in the other. Thus, the primary beneficiary of these lawsuits is the Government, and there can be no reason for me to harm the Government or the taxpayer out of prejudice against the relators.

Second, the dispute over Judge Carter's earlier actions in the lawsuit⁶ is now before a Special Investigatory Committee of the Judicial Council of the United States Court of Appeals for the First Circuit. The issues in that proceeding have no bearing on the merits of the two cases now before me.

Third, the position of "chief" judge is more a title and a burden than it is a position of power. Primarily the chief judge's responsibilities are ceremonial and supervisory, with respect to the supervision of the heads of other arms of the Court, such as the United States Probation Office and

⁵ Under the statutory provisions a chief judge's term is limited to seven years. 28 U.S.C. § 136(a)(3)(A).

⁶ Judge Carter disqualified himself from the litigation on June 12, 1995, and I have been the assigned judge since then.

the Clerk, the head of the Court's administrative functions. The Chief Judge also must supervise relations with other agencies with which the Court deals, such as the United States Marshal (responsible for prisoners and for Court security); the United States Attorney (responsible for all federal prosecutions and for representing the Government in civil actions); the General Services Administration (the Court's landlord); and so forth. A chief judge has no control over any other Article III judge's salary or position or how he or she decides cases. The chief judge may have some limited authority over the assignment of cases to other judges, but only to the extent provided by the rules and orders of the Court generally, *i.e.*, the other judges. 28 U.S.C. § 137. In any event, here in this District, cases are randomly assigned. Thus, Judge Carter's authority as chief judge is irrelevant to the question of my ability to remain impartial.

Fourth, as all lawyers and judges know, federal trial judges are notoriously independent of one another. Often we are criticized for that: to some lawyers it may seem that each judge's courtroom has a different set of rules. That weakness also may be one of the federal system's great strengths, for it breeds a tradition of judicial independence such that a federal judge can be counted upon to hold an act of a state legislature or even of Congress unconstitutional if that is the direction the law leads him or her. It also leads us to reach conclusions independent of and sometimes different from our colleagues until a higher court has ruled. See, e.g., United States v. Labonte, 70 F.3d 1396, 1402-03 (1st Cir. 1995) (recounting and resolving conflicting rulings by Carter, J., and Hornby, J.).

Fifth, it probably is true that no federal judge *enjoys* seeing another federal judge or judicial officer criticized or demeaned, whether it be in his or her own District, in the Southern District of New York, or as far away as California. But federal judges routinely deal with the most difficult of

controversies. Cases are here only because there are no other solutions to the conflicts. Tempers run hot among the parties and their lawyers, for huge amounts and reputations often are at stake. Inevitably, at least one party and one lawyer are deeply displeased with what we do. *Pro se* litigants tend to accuse us of judicial misconduct whenever they lose a ruling. Sentences we impose on convicted criminals often are too lenient by the media's lights. In short, we are accustomed to criticism—heavy and sometimes deeply bitter criticism—of ourselves and our colleagues.

The framers of the Constitution gave federal judges life tenure, not as a license to act with impunity, but to enable us to decide even the most difficult cases fairly, regardless of the vitriolic accusations, regardless of the consequences and regardless of the pressures. See U.S. Const. art. III, § 1. The criticism that has been leveled in this case and the resulting scrutiny can be expected only to result in redoubled efforts to ensure that fairness. There is no basis for disqualification here.

II. APPARENT BIAS

At the hearing, the relators' lawyers stated that now that Magistrate Judge Cohen has either recused himself from these cases or is being assigned no duties in them⁷ they no longer have any concerns about bias and withdraw that ground for their motion. The issue having previously been

⁷ On March 12, 1996, Magistrate Judge Cohen recused himself from discovery-related proceedings in Civil No. 95-321-P-H when it came to his attention that Gerald Petruccelli, the senior partner of his previous law firm, was the subject of discovery requests. It is my understanding that Judge Cohen traditionally has recused himself in all cases where his former law firm is involved, presumably on the ground that he might be the continuing recipient of fees generated (but not yet paid) while he was a partner of that firm. See Guide to Judiciary Policies and Procedures, ch. V, Committee on Codes of Conduct Compendium of Selected Opinions § 3.3-1(b) ("A judge must recuse in all cases handled by the former law firm until all payments due the judge have been received, and for a reasonable period of time thereafter."). As a result, I ordered that during his recusal he would not be assigned duties in the companion case for the obvious efficiency reason that the two cases are related and should be considered together. Then, on March 22, 1996, he recused himself in Civil No. 93-165-P-H because one of the lawyers in that case (Attorney Thomas Monaghan) is chairing the committee to review the Magistrate Judge's reappointment by the Court when his eight-year term as a magistrate judge expires. For the same reason of efficiency, because Magistrate Judge Cohen is recused altogether in Civil No. 93-165-P-H, he will be assigned no duties in Civil No. 95-321-P-H.

raised, however, I believe that I must deal with it—in fairness both to the parties and to Magistrate Judge Cohen, as well as to maintain public confidence in the Court’s integrity.

It is not entirely clear to me whether the assertion is that Magistrate Judge Cohen is biased or has the appearance of bias, or both. I accordingly shall consider both. As I understand it, the charge arises from the following: on January 22, 1996, Magistrate Judge Cohen conducted simultaneously a scheduling conference in both cases and a hearing on the motions for protective order and for consolidation. No court reporter was present and no one requested that the proceedings be on the record.⁸ The private relators point to the following occurrences at that proceeding:

1. Magistrate Judge Cohen “solicited” objections to Fleet’s motion to consolidate and deferred ruling on the motion.

2. Magistrate Judge Cohen did not immediately initiate a voluntary recusal when the relators’ lawyer mentioned that he was seeking a file that assertedly had been stolen from Attorney Thomas Cox’s office while Attorney Cox was a partner at the law firm of Friedman & Babcock. Attorney Cox earlier had been a law partner of Magistrate Judge Cohen at a different firm

⁸ The lawyers asserted at the April 5 hearing that the January 22 conference/hearing occurred in the “large conference room” adjacent to Magistrate Judge Cohen’s office. I take this to refer to the joint library space in our current temporary quarters, for neither Magistrate Judge Cohen nor Judge Carter nor I have a separate conference room in our leased space. The relators’ lawyer’s asserted lack of awareness that no court reporter was present until the proceedings were over indicates either a complete unfamiliarity with the identities of the other people in the room (unlikely, since all were lawyers), or an obliviousness to his then current surroundings. I take judicial notice both (1) that the hearing room and its recording equipment often are unavailable because the room is in use by the grand jury or one of the other two judges (on January 22, 1996, for instance, the hearing room was otherwise reserved from 8:30 a.m. to 3:00 p.m.) and (2) that scheduling conferences are routinely conducted off the record because the participants are discussing the administration of the case rather than dispositive issues and the lack of formality often makes it easier for the lawyers to agree or compromise and reach a sensible solution. It truly is unfortunate that this proceeding took place off the record in light of the current controversy and its past history and, given the history of this case, I state now that all future proceedings **will be on the record**. But there is no basis for inferring any impropriety in the fact that the January proceeding was not on the record. At least one lawyer representing each party was present.

(Petruccelli, Cohen, Erler and Cox) before Magistrate Judge Cohen was appointed magistrate judge in 1988.

3. Magistrate Judge Cohen stated that he had read the Verrill & Dana defendants' motion to dismiss or for summary judgment in Civil No. 95-321-P-H and had been "persuaded" or "very persuaded" by it, at a time when the private relators had not yet filed their response.

4. Magistrate Judge Cohen entertained the Verrill & Dana defendants' motion for a protective order even though there had been no previous conference of counsel on the subject as Local Rule 18(e) requires.

5. Magistrate Judge Cohen granted the Verrill & Dana defendants' motion for protective order in Civil No. 95-321-P-H thereby halting discovery until the dispositive motion already filed (and the dispositive motion to be filed by the defendant Bierbaum later that day) could be ruled upon, and stated that discovery would be permitted only "if any aspect survives" the dispositive motion and that he doubted it would.

At the April 5 hearing, other lawyers who had been present at the January 22 proceeding mildly or strenuously disputed that Magistrate Judge Cohen "solicited" objections, or that he stated that he had been "persuaded" by the dispositive motions. Because there was no record and because the assertions, even if true, reveal absolutely no basis for a charge of bias or appearance of bias, I shall accept the relators' lawyer's version of the events. I consider their substance in the order listed.

1. "Solicitation" of an Opposition and Deferral of any Ruling on Consolidation.
Fleet Bank moved in Civil No. 93-165-P-H to consolidate it with Civil No. 95-321-P-H. No such motion was filed in Civil No. 95-321-P-H and there was therefore no motion for the defendants in that lawsuit (they are not parties in Civil No. 93-165-P-H) to oppose. The Clerk's Office did mail

a letter dated January 8, 1996, to all the lawyers stating: “In order that both of these motions [consolidation and protective order] be fully briefed before the conference, counsel are directed to file any reply to the motion to consolidate cases no later than January 18, 1996.” Letter from Deputy Clerk Susan Hall, U.S. District Court, District of Maine to All Counsel of Record, Civil No. 93-165-P-H and Civil No. 95-321-P-H (Jan. 8, 1996) (“Letter to All Counsel of Record II”). The letter contained both docket numbers in the caption, *id.*, but the state of affairs was still sufficiently ambiguous that I or any other judge would have inquired at the conference whether any party in either case was opposing the motion. The April 5, 1996, hearing before me revealed that the relators did not inform court personnel that they supported Fleet Bank’s motion until they disclosed their position to Magistrate Judge Cohen in that unrecorded proceeding. Finally and most importantly, a motion to consolidate is not granted as a matter of right even if it is unopposed. Fed. R. Civ. P. 42(a). The Court must make an independent determination whether consolidation will facilitate or hinder the progress of the two cases. Particularly because the most recent judicial action was my **severance** of the two actions at the Government’s and private relators’ requests, and over the objections of the Verrill & Dana and Bierbaum defendants, it is not at all surprising that the magistrate judge would press the parties on their positions and then defer action on the motion to consolidate (he did not deny it outright), perhaps expecting to leave it to me as the trial judge.

2. Disqualification. The reference to Attorney Cox at the proceeding did not require Magistrate Judge Cohen’s disqualification. Attorney Cox has not for several years been a member of Magistrate Judge Cohen’s previous law firm. Thus, the basis for Magistrate Judge Cohen’s disqualification when his previous firm is involved in a matter simply did not exist with respect to this matter. See note 7, supra. After a recess at the hearing on April 5, 1996, Attorney Bennett

asserted that his associate had discovered that, in the motion for a protective order, reference was made to the likely involvement of Attorney Petruccelli. I have searched those papers in vain for such a reference. (I observe, in any event, that when voluminous discovery papers are filed it is unlikely that a judge will review every detail of every question or request until he or she hears oral argument on what is really in dispute.) Thus, if Attorney Petruccelli's name does appear (and I have been unable to find it), it was incumbent on the lawyers, if they knew of it, at least to point it out to Magistrate Judge Cohen. I am satisfied that Magistrate Judge Cohen recused himself as soon as he became aware that his previous firm might have some involvement.

3. Prejudging a Matter. The essential issue in deciding whether to halt discovery while dispositive motions are ruled upon requires a judge or magistrate judge to make a tentative and preliminary judgment concerning the merits of the dispositive motion. If the motion is highly unlikely to win, there is little reason to put off discovery. On the other hand, if the motion has a high probability of winning, then discovery should be delayed to save the parties from having to pay unnecessary attorney fees and other costs. For a magistrate judge therefore to say that he is “persuaded” or even “very persuaded” that a dispositive motion has merit or that he is “persuaded” by the movants’ arguments is not at all improper. Magistrate judges and judges make such tentative predictions all the time and, as every lawyer knows, also change their minds without hesitation when the matter is finally presented for decision and the opposing arguments convince them that their initial inclinations were wrong. Moreover, Magistrate Judge Cohen ultimately may not have been asked even to rule on the dispositive motion. (I rule on most dispositive motions without a magistrate judge’s assistance.) At the most he would have been asked to make a recommended decision and I would have had to make a *de novo* review of the entire issue. See 28 U.S.C.

§ 636(b)(1); Fed. R. Civ. P. 72(b). In short, this unfortunate charge against Magistrate Judge Cohen reveals a basic unfamiliarity with pretrial proceedings.

4. The Local Rule 18 violation. Local Rule 18(e) of this District requires that a lawyer seeking to present a discovery dispute to the Court must first confer with the opposing lawyer to see if they can mutually resolve the issue or at least narrow their dispute. The initiating lawyer then must certify to the court that he or she has done so. See Local Rule 18(e). Nevertheless, the Clerk's Office is required under Fed. R. Civ. P. 5(e) to docket any filings regardless of whether they demonstrate compliance with the Local Rule requirement. Here the Verrill & Dana defendants filed their motion for a protective order seeking to halt discovery, without stating that the lawyer had tried to resolve the dispute with the other lawyers. The Clerk's Office properly accepted and docketed the motion. See Fed. R. Civ. P. 5(e). In advance of the January 22, 1996, proceeding at which Magistrate Judge Cohen heard the motion, the Clerk's Office sent out the letter of January 8, 1996, which included this statement: "To the extent counsel are able [this may refer to the difficulty presented by the Government lawyer's location in Washington, D.C. and another lawyer's location in Boston, Massachusetts], you shall meet and confer in accordance with our Local Rules concerning proposed scheduling order deadlines and submit a proposed order to the court no later than January 18, 1996." See Letter to All Counsel of Record II. Although this directive did not refer specifically to the discovery dispute presented by the motion for protective order, an important part of *every* scheduling order is limits on discovery generally. Thus, the letter was a directive to confer about any discovery disputes. The relators assert that no such meeting occurred before the January 22 proceeding and I take that statement as accurate. The fact that the magistrate judge nevertheless proceeded to hear and decide the motion does not demonstrate bias or any other impropriety. First,

a judicial officer must always exercise some discretion in such circumstances, weighing whether deferring action and ordering the parties to confer would only needlessly increase attorney fees and delay matters, because there is no hope of compromise, against the likelihood that an overall improvement in the lawsuit's posture would result from making the lawyers sit down together and talk about their disagreement. Second, this was not the ordinary sort of discovery dispute where a meeting was likely to result in a convergence of views. Instead, the issue was whether discovery should go forward at all before the dispositive motion was resolved. Basically, this was an issue that only the Court could resolve, depending upon its evaluation of the substance of the motion as I have described above. As a result, Magistrate Judge Cohen acted entirely properly in proceeding to hear and resolve the motion for protective order.

5. The Protective Order. This complaint is simply a charge that Magistrate Judge Cohen got it wrong. If he did, the private relators can appeal his order, as they have done. They can also seek limited relief under Fed. R. Civ. P. 56(f) so as to be able to respond adequately to the dispositive motions. This, too, they have done. I have not yet determined whether Magistrate Judge Cohen was right or wrong in his ruling, but in any event it is not the basis for a charge of bias. That, unfortunately, is what many *pro se* litigants seem to think—that instead of or in addition to appealing, they can charge the judge with misconduct—but lawyers should know better.

In sum, the allegations of bias—real or apparent—against Magistrate Judge Cohen on this record are lodged most unfortunately and wholly without justification. The relators may be displeased with his rulings, but that always is true of at least one party and lawyer.⁹

⁹ The Government's lawyer was apparently surprised and unsettled with Magistrate Judge Cohen's shortening of discovery dates after all the lawyers had agreed on a more leisurely schedule, but that is not unusual in this District, (continued...)

III. DIVERGENT OR DISPARATE TREATMENT

The charges here are twofold:

1. The Verrill & Dana and Bierbaum defendants' motions for extensions of time and extensions of page limits received different and more favorable treatment than did the private relators' motions for the same relief.

2. The Court (I use this vague term advisedly and will be more specific below) administratively authorized the lawyer defendants to initiate discovery so that they could file their dispositive motions, then later "the Court" cut off discovery so that the private relators could not make their case.

Again, I deal with these in order.

1. **Extensions.** The official docket unequivocally demonstrates the following. On November 29, 1995, the Clerk's office docketed an Unopposed Motion for Enlargement of Time in Which to Answer or Otherwise Respond in Civil No. 95-321-P-H. It was filed on behalf of all the defendants in that lawsuit, requested an extension from December 12 to December 20, 1995, and stated that "No prior enlargement of time has been requested, and counsel for plaintiffs have advised undersigned counsel that they have no objection to the instant motion." It is endorsed two days later

⁹ (...continued)

and it is something for which judges are both complimented and criticized (not on grounds of bias for or against a particular party). Lawyers understandably want as much time as they can reasonably get, for they are often juggling many cases with conflicting scheduling demands. Some lawyers want as much discovery as they can get, generally because they conservatively do not want to be surprised at trial. Some—few here in Maine, I trust—value the billable time that can add up in discovery. Congress and the clients, however, seem to have a different view. The federal courts have been ordered to reduce cost and delay in civil lawsuits, and the lengthy and voluminous discovery process has been identified as a major culprit. See 28 U.S.C. §§ 471, 473; see also Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 102, 104 Stat. 5089 (1990). Judges can only do their best to recognize and reconcile these conflicting interests.

as follows: “12/1/95 Motion granted without objection. For the Court Lisa R. Witham. Scheduling conference to be scheduled after 12/20/95.” Ms. Witham is the lead member of the team of courtroom deputy clerks who manage my docket. As Clerk William Brownell stated at the hearing, it is standard administrative practice to grant such an agreed-to extension, when it is the first request, without specific inquiry of a judicial officer. Nothing untoward is reflected in what the Clerk’s Office did. The Court is entitled to rely upon the statement of a lawyer as an officer of the court. If a lawyer tells the Court that her opponent has agreed to the motion, the Court may accept that representation until advised of the contrary. (A conscious misrepresentation could well be grounds for sanctions or professional discipline.) At the April 5 hearing, Attorney Bennett stated that he had agreed to the extension but understood that he was agreeing to an extension only for one defendant, not for all. If there was some misrepresentation to Attorney Bennett, then he immediately should have raised it with the Court. He did not do so.

On December 13, 1995, the Clerk’s Office docketed the Verrill & Dana Defendants’ Motion for Leave to File a Memorandum in Excess of Twenty Pages. The motion stated that these defendants had two dispositive motions but proposed to combine them and requested permission to exceed the ordinary page limit of 20 pages per legal memorandum by 10 additional pages. The motion is endorsed two days later as follows: “12/14/95 Granted. David M. Cohen USMJ.” The sequence reveals, as the private relators complain,¹⁰ that this motion, although not asserted as unopposed, was granted by a judicial officer without waiting for an objection. That, too, is customary, as Clerk Brownell stated at the April 5 hearing. Lawyers like to argue over a lot, but

¹⁰ “Notably, the Relators received a copy of the Court’s Order before receiving a copy of the Verrill & Dana Defendants’ motion. Furthermore, the Relators were never asked whether they had any objection to the Motion, nor were they given an opportunity to file such objection.” Relators’ Objection at 3.

most people would agree that it would carry things to an extreme to have them file separate briefs and have separate arguments over how many pages an opponent is entitled to write for his or her underlying argument. A judicial officer is the one who has to read those papers and the request for excess pages is therefore presented to him for discretionary action without inquiring what the opponent maintains about the length. That is the standard procedure; there may be exceptions where the judicial officer presented with the motion is concerned about it and seeks the opponent's view on whether, for example, a huge increase in page limits is needed, but this was not such a case.

On December 20, 1995, the Clerk's Office docketed the Relators' Motion to Enlarge the Time in Which to Respond to the Defendants' Motions to Dismiss or Alternatively for Summary Judgment. The motion stated that "It is uncertain at this time whether Defendants' counsel will agree to this request for enlargement of time," and went on to recognize that "[s]ince any agreement which may be reached between counsel with respect to enlargement of time is not binding upon the Court, the Relators now formally request" an extension from January 8 to January 30, 1996. Obviously, there were two differences in this motion from the defendants' requested extension of time earlier in December. First, there was no assertion that it was agreed to, but instead it contained a specific disclaimer of any agreement. Second, it was the *second* request for an extension in the case and therefore required additional scrutiny. As a result, two different things happened. First, the Clerk's Office called the defendants to inquire what position they took on the motion. Second, the motion was not acted on administratively, but presented to a judicial officer. The result? The motion was endorsed two days later as follows: "12/22/95 Granted. David M. Cohen USMJ." One might think that the granting of the motion within two days—just as the defendants' earlier motion for extension had been granted—would be the end of the matter, but the relators' lawyer perceives

divergent or disparate treatment in the fact that the Clerk's Office inquired of the defendants what position they took:

In contrast to the special treatment afforded the Verrill & Dana Defendants, the Court solicited an objection from the Verrill & Dana and Bierbaum Defendants. Since the Verrill & Dana Defendants indicated that they would file an objection, the Court declined to rule on the motions until after receiving Verrill & Dana's written submissions.

Relators' Objection at 3. I have explained why the Clerk's Office justifiably treated the motion differently. The second statement is just flat wrong. Attorney Bennett admits that at the time he wrote it, he had received a December 26 letter from the Clerk's Office stating that Magistrate Judge Cohen had endorsed the motion favorably on December 22, that his action was entered upon the docket December 26, and "that Judge Cohen has been advised that the Verrill & Dana Defendants have filed an Opposition to the Relators' Motion to Enlarge Time to Respond to Defendants' Dispositive Motions but has been unable to review said pleading as he is on vacation until 1/2/96." Letter from Deputy Clerk Susan Hall, U.S. District Court, District of Maine, to All Counsel of Record, Civil No. 95-321-P-H (Dec. 26, 1995) ("Letter to All Counsel of Record I"). In short, the Clerk's Office had informed Attorney Bennett (and the other lawyers) that his motion had been granted *without waiting for* the Verrill & Dana Defendants' objection. Furthermore, if Attorney Bennett perhaps had forgotten the letter and neglected to check his own file, it was incumbent on him to check the Court's docket before making a charge of disparate treatment. The docket clearly reveals that Magistrate Judge Cohen acted on December 22, granting his motion, and that the Verrill & Dana opposition was not received until December 26, 1995.

On December 20, 1995, the Clerk's Office also docketed the Relators' Motion for Leave to File Memoranda in Excess of Twenty Pages. It sought permission for 40 pages. The motion is endorsed two days later as follows: "12/22/95 Granted as follows: memorandum not to exceed 30 pages. David M. Cohen USMJ." In other words, Magistrate Judge Cohen granted the same page limit increase he had allowed the defendants.

Thus, there was no divergent or disparate treatment. The most cursory review of Court records or a simple inquiry of the Clerk's Office would have prevented the making of such an unfounded, yet serious charge.

2. Authorizations of Discovery. According to the relators, Magistrate Judge Cohen's grant of the motion for a protective order at the January proceeding was

particularly egregious given that the Court previously authorized the Verrill & Dana Defendants to commence discovery, before their responsive pleadings were due, in order that they might obtain testimony in support of their summary judgment motions. Once again, this Court has accorded the parties unequal treatment.

Relators' Objection at 8-9. In the same vein, the memorandum asserts that

the Court authorized the Verrill & Dana Defendants' discovery initiatives so that they might obtain testimony in support of their motion for summary judgment. In stark contrast, the Court has now issued a blanket protective order, prohibiting the relators from doing any discovery pending its decision on the dispositive motions.

Id. at 9-10 (footnote omitted).

It is undisputed that until the January 22, 1996, proceeding before Magistrate Judge Cohen, there had been no scheduling order entered in either case, nor had any stay of discovery been entered. The lawyers agreed at the April 5 hearing (and I confirmed) that the Federal Rules of Civil Procedure, as supplemented by this District's Local Rules, require no prior permission from the

Court for a party to begin discovery. See Fed. R. Civ. P. 26(d), (f); Local Rule 18(g). Questioning at the April 5 hearing revealed that the so-called Court “authorization” was a telephone answer by unidentified Clerk’s Office personnel who, when asked if there was such a prior permission requirement, responded, correctly, no. That answer was given to the Verrill & Dana defendants’ lawyer who apparently made the first call and the same answer was given to the relators’ lawyer when he placed the second call. Thus, there was no “authorization” by the Court of some procedural device so as to give one party an advantage. And the Clerk’s Office’s correct answers to the questions posed to it created no constraints on Magistrate Judge Cohen’s subsequent decision whether to grant the motion for protective order.

Thus, this too is a reckless accusation. It is doubly unfortunate because it is likely to lead to further formalities in the District of Maine’s legal practice, with resulting increased expense and reduced satisfaction in the practice of law. At the April 5 hearing, the Government’s lawyer, who customarily practices in other (I assume more metropolitan) districts, remarked that he was surprised by the lack of formality in dealing with the Clerk’s Office. Attorney Monaghan, a lawyer with much experience in this District, in contrast bemoaned the increase in formality over the years. It has been a tradition in this District that, although they will not give legal advice, Clerk’s Office personnel are very helpful to lawyers and nonlawyers in helping them understand what they need to do to get to the next step in a lawsuit or stay out of trouble with a judicial officer through inadvertent ignorance of a requirement. At the April 5 hearing, one request made to me was that at least in this case no lawyer should be permitted to have any “*ex parte*” contact with the Clerk’s Office. That presumably would end all telephone communications to administrative personnel except by conference call. All communications between lawyers and the Clerk’s Office would have to be by letter, everyone

copied. Questions about whether and when a document had been docketed, deadlines or page limits, and a judge's schedule for hearings, all presumably would be precluded. Must that become the pattern of law practice in this District?

IV. CONCLUSION

The original request in these cases was for assignment to a judge outside Maine. The relators now specifically do not want the administration of the case moved despite their apparent challenges to the Clerk's Office's procedures. In any event, I am aware of no basis in the statutes for a wholesale transfer (28 U.S.C. §§ 1404, 1406 do not apply). Even assuming that there is inherent power to undertake some such measure to ensure fair disposition of a case, there is no ground here for the reasons I have detailed above.

The cases cited by the relators in their request for assignment to a judge outside this District do not support them. They all involve only disqualification and reassignment within a district. United States v. Mavroules, 798 F. Supp. 61, 62-63 (D. Mass. 1992); United States v. Flood, 462 F. Supp. 99, 101 (D.D.C. 1978); United States v. Keane, 375 F. Supp. 1201, 1203 (N.D. Ill. 1974). To be sure, there are instances here as elsewhere where all the judges in a district are subject to disqualification and a case is assigned to a judge from another district. The standard for disqualification, however, applies to each judge separately, and I therefore will evaluate the question in terms of only myself, not Judge Morton Brody or Magistrate Judge Eugene Beaulieu, the remaining federal judicial officers in Maine (Chief Judge Carter having recused himself).

None of the various factors listed in 28 U.S.C. § 455(b) apply and I therefore direct my attention to § 455(a): "Any . . . judge . . . of the United States shall disqualify himself in any

proceeding in which his impartiality might reasonably be questioned.” The question is not simply whether I am impartial—I am confident that I am, for I have no interest in the cases’ outcomes and no animosity or favoritism toward or against any of the parties or their lawyers— but whether someone else might “reasonably” question my impartiality. Liteky v. United States, ___ U.S. ___, 114 S.Ct. 1147, 1154, 127 L. Ed. 2d 474, 486 (1994) (“[W]hat matters is not the reality of bias or prejudice but its appearance.”); United States v. Chantal, 902 F.2d 1018, 1023 (1st Cir. 1990) (“It attacks the appearance of bias, not just bias in fact.”). “Reasonably” is an important adverb. There is always someone to be found with a question, but it will not do to use such an excuse to rid oneself of what is obviously a difficult and cantankerous case that provokes continuing media attention and needling and unnecessary bickering among the lawyers.¹¹ There must be a **reasonable** question about my impartiality. Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 861, 108 S. Ct. 2194, 2203, 100 L. Ed. 2d 855, 873 (1988) (a judge’s impartiality is to be assessed from the standpoint of an “objective observer”).

Considering the charges individually and collectively, and even if all the so-called “reasonable” person had to go on is what has been reported in the *Portland Press Herald*, there simply is not enough here for disqualification. A reasonable person does not rely on unsubstantiated charges allegedly made by an advocate as reported in a newspaper story. The charges of bias, disparate and divergent treatment are all demonstrably unfounded. The statutory standard has been interpreted to require disqualification only if a reasonable person, *knowing all the circumstances*,

¹¹ Section 455(a) does away with the previous “duty to sit” doctrine but, as the Senate Judiciary Committee said in explaining the 1974 amendment, “the new test should not be used by judges to avoid sitting on difficult or controversial cases.” S. Rep. No. 419, 93d Cong. 1st Sess. 5 (1973); see In re United States, 666 F.2d 690, 694 (1st Cir. 1981).

would harbor doubts about a judge's impartiality. In re Cargill, Inc., 66 F.3d 1256, 1260 n.4 (1st Cir. 1995); United States v. Mitchell, 886 F.2d 667, 671 (4th Cir. 1989); Hall v. Small Business Admin., 695 F.2d 175, 179 (5th Cir. 1983); United States v. Alabama, 828 F.2d 1532, 1541 (11th Cir. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2857, 101 L. Ed. 2d 894 (1988); United States v. Barry, 961 F.2d 260, 263 (D.C. Cir. 1992). I have detailed the circumstances above. I am satisfied that no reasonable person knowing them all could have a basis for doubts. The motion is therefore **DENIED**.

ADDENDA

1. I told the lawyers the last time I saw them in September that this—now these—lawsuits have been overcome by too much shrillness, and that I expected it to stop. My admonition has not helped, and these files have grown geometrically with unnecessary documents, and documents containing unnecessary and unseemly verbiage. There is enough blame to go around. More strenuous measures obviously are needed to take control of these lawsuits and move them forward fairly and expeditiously to a conclusion under professional standards. Accordingly, as I proceed to consider the multitude of other motions pending (deferred until I could hear and rule on this motion), I hereby **ORDER** that no party make any further filing in these lawsuits without my permission (unless, of course, it be an appeal of this order).

2. I plan to act promptly on the other pending matters.

3. In light of the bickering that has plagued this matter and the confession to me at the hearing that the private relators' lawyer does not speak to the Verrill & Dana defendants' lawyer or the Bierbaum defendant's lawyer, nor they to him, and that all communications must therefore go through Attorney Monaghan who represents different defendants (and whom I commend for thereby attempting to continue the collegial relations that we all expect of Maine lawyers), I am seriously considering ordering a consistent and regular schedule of perhaps biweekly 8:00 a.m. meetings with me (on the record) at which all requests for action will be entertained. That will be a serious incursion on my time and likewise on the lawyers' time, but this case requires extraordinary measures. If we can thereby over time reestablish a pattern and habit of collegial and courteous relations among the lawyers, the arrangement will not have to be indefinite. The role of lawyers, as

counselors at law and officers of the court, is to lend some objectivity, thereby reducing the passion in their clients' quarrels, not succumb to the passion.

SO ORDERED.

DATED AT PORTLAND, MAINE THIS 9TH DAY OF APRIL, 1996.

D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE