



New York University
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School of Law
Office of the Vice Dean

40 Washington Square South, Room 402
New York, NY 10012-1099
Telephone: (212) 995-6200
Fax: (212) 995-4658
E-Mail: stephen.gillers@nyu.edu

Stephen Gillers, Vice Dean and Professor of Law

VIA FACSIMILE and FEDERAL EXPRESS

May 17, 2002

Hon. Russell D. Feingold
United States Senate
506 Hart Senate Office Building
Washington, DC 20610
Fax # 202-223-0466

Dear Senator Feingold:

I am replying to your May 9, 2002 request for my views on three issues surrounding the nomination of Federal District Judge D. Brooks Smith to a seat on the United States Court of Appeals for the Third Circuit. I assume familiarity with your letter and with the facts, many of which have been discussed in testimony and correspondence the Committee has received. I do not know Judge Smith and have no interest one way or the other in whether Judge Smith is confirmed. I take my facts mainly from Judge Smith's testimony or his written submissions and partly from other materials you have sent me and which I cite below. The facts do not seem to be in dispute.

Briefly, my qualifications for giving my opinion on your questions are: I am vice-dean and professor of law at New York University School of Law, where I have taught since 1978. Regulation of Lawyers ("legal ethics") is my primary area of teaching and research and writing. I have taught this course for nearly a quarter century here and as a visitor at other law schools. I have a leading casebook in the area, first published in 1984 and now in its 6th edition. Legal ethics includes the ethical responsibilities of judges and a chapter of my book is devoted to those issues. I have published in the area in law journals and written extensively on the subject for the popular and legal press. I speak widely on legal ethics before bar groups, at judicial conferences, at law firms, and at corporate law departments.

In summary, my conclusions are:

A. If Spruce Creek Rod and Gun Club is in fact a purely social club, and not a venue in which business or professional interests are pursued, then Canon 2(C) of the Code of Conduct for United States Judges would not forbid a federal judge to be a member of the club. On this assumption, the answers to the first two questions under Part A of your

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letter are "yes" (the club is exempt from the prohibition against membership in an organization that invidiously discriminates) and "no" (Judge Smith did not violate the Code by maintaining membership for 11 years). My answer to your third question is that Judge Smith had no obligation to seek an opinion from the Advisory Committee on the propriety of his membership in the club. Judge Smith had the responsibility to make sure that the club was and remained a purely social club and that his membership was therefore allowed.

B. A federal judge who is invited to a privately funded judicial education seminar, with expenses paid, has an obligation to identify the source of funding to ensure that acceptance of the gift is proper. This duty is not eliminated because the sponsor of the seminar is a law school or other educational institution that would not itself require the judge to refuse the invitation. Funding for the seminar may come from a person or entity whose generosity the judge should not accept but whose contribution does not appear on the face of the invitation. Consequently, Judge Smith should have inquired of the sponsor of private judicial seminars he attended to learn the source of funding and establish that there was no impropriety in accepting the invitation under the circumstances.

C. Your third inquiry, concerning the timing of Judge Smith's recusal decisions in *SEC v. Black* and *U.S. v. Black*, is quite complicated. In sum, I conclude that Judge Smith should have revealed his and his wife's investment in Mid-State Bank or in Keystone Financial, Inc., its holding company (hereafter, collectively "Mid-State"), not later than October 27, 1997. Having failed to do so, he should have made this disclosure on October 31, when he did recuse himself. Failing to do so then, he should have done so as soon as he knew of Mid-State's financial exposure for Black's frauds so that counsel could, if advised, seek to vacate Judge Smith's rulings based on a violation of the judicial disqualification statute. Whether Judge Smith should have recused himself on October 27 given what he says he knew at the time is a more difficult question, which I address below. However, I conclude that Judge Smith should have recused himself on October 27 based on what he could have known and should have discovered on that day. Judge Smith should have recused himself from *United States v. Smith* as soon as it was assigned to him.

The Spruce Creek Rod and Gun Club

Judge Smith promised more than he had to at his 1988 confirmation hearings. The Code of Conduct for United States Judges did not then forbid membership in purely private clubs that had no business or professional purpose. Although the Code was thereafter strengthened, following on amendments to the ABA Model Code of Judicial Conduct in 1992, even as strengthened the Code does not forbid membership in Spruce Creek. This assumes, however, that the club has no business or professional purpose or function. Of course, the opportunity for

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club members to meet in informal, social situations, to get to know each other in that way, can itself be seen as professionally or commercially advantageous, but that alone does not make the club's discrimination "invidious." Defining the line between clubs that may exclude women (or men, for that matter) and those that may not because they have a business or professional dimension is not always easy. But there is a line and it is rooted in constitutional jurisprudence.

I am assuming that club members sponsor no events or meetings that could be characterized as business-related or profession-related. If my assumptions are wrong, however, if the club is not strictly social, then my conclusion will change. I understand that the Committee has received information that the club did allow its members to host business or professional meetings. If it did, it would not be purely private as I have been using that term, and its discrimination against membership for women would then be "invidious" within the meaning of the Code's prohibition. This would be true even if women were allowed to attend some or all business or professional meetings hosted by the club's male members. Since the propriety of Judge Smith's membership depended on the club maintaining a purely social purpose, he had the responsibility of assuring that it had and retained this status.

Judge Smith suggests that he reexamined his obligations under the Code of Conduct in 1992, when it was revised, and concluded that his 1988 promise obligated him to do more than the Code required him to do. As I wrote, the post-1988 amendments actually strengthened the prohibition against membership in discriminatory clubs, but even as strengthened, Spruce Creek does not, on the assumptions made, qualify as a club that "practices invidious discrimination on the basis of . . . sex" within the meaning of Canon 2(C).

Two other comments on this issue: First, while Judge Smith could have asked the Advisory Committee to give him an opinion on whether the club's discriminatory policy was "invidious," I know of no rule imposing a duty to do so. Second, I realize that Judge Smith made a promise to the Committee in 1988 and then seems to have concluded that he had promised more than the Code required. Whether and to what extent the Committee should be influenced by Judge Smith's failure to keep his promise notwithstanding this later conclusion, or by the Judge's failure to inform the Committee that he did not intend to keep his promise because of this conclusion, is not properly a question for me.

Judicial Education Seminars

As you know, expense-paid seminars for judges has been a challenging issue. The gap between judges' reactions to criticism of these events and the perspectives of the critics does not seem to be shrinking. Many judges are annoyed that anyone would think they would compromise their objectivity because of an invitation (or many invitations) to a privately funded judicial seminar. Critics, on the other hand, argue that only certain groups of litigants have the wherewithal to support these seminars and that it diminishes the appearance of justice when

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judges attend them at luxury resorts to hear programs designed by those who can afford to sponsor them. Unfortunately, we have little in the way of guidance, mainly Opinion 67 of the Advisory Committee and several judicial opinions, including Judge Winter's opinion in *In re Aguinda*, 241 F.3d 194 (2d Cir. 2001). Judge Winter wrote:

[A]ccepting something of value from an organization whose existence is arguably dependent upon a party to litigation or counsel to a party might well cause a reasonable observer to lift the proverbial eyebrow. . . . Judges should be wary of attending presentations involving litigation that is before them or likely to come before them without at the very least assuring themselves that parties or counsel to the litigation are not funding or controlling the presentation.

Judge Winter cites *In re School Asbestos Litigation*, 977 F.2d 764 (3d Cir. 1992), another leading case from Judge Smith's Circuit. The judge there was disqualified after attending a conference without ascertaining the source of funding for it. The source made the judge's attendance improper.

The authorities agree that before attending an expense-paid judicial seminar, a judge should learn who is picking up the tab for the judge's travel and housing. This indeed is what Opinion 67 says:

It would be improper to participate in such a seminar if the sponsor, or source of funding, is involved in litigation, or likely to be so involved, and the topics covered in the seminar are likely to be in some manner related to the subject matter of such litigation. If there is a reasonable question concerning the propriety of participation, the judge should take measures as may be necessary to satisfy himself or herself that there is no impropriety. To the extent that this involves obtaining further information from the sponsors of the seminar, the judge should make clear an intent to make the information public if any question should arise concerning the propriety of the judge's attendance.

Obviously, there would be room for much mischief if a judge invited to an expense-paid judicial seminar could rely on the non-profit nature of an apparently neutral sponsor to immunize the judge's attendance. Judge Smith is therefore wrong in his assumption, in reply to your follow-up question 6a, when he wrote that because "George Mason's sponsorship of LEC was apparent from the face of the materials I received regarding the seminars, I concluded that no further inquiry into sources of funding was required." It was required.

SEC v. Black

Conflicts in the *Black* cases arise from the fact that the Smiths owned stock in Mid-State or Keystone. How much is uncertain. I understand that Judge Smith's financial disclosure form

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in 1997 revealed between \$100,000 and \$250,000 in stock in Keystone. The form also indicated that his wife had a 401(k) account with Mid-State, where she was an officer. Her account ranged between \$100,000 and \$250,000, but Judge Smith's financial disclosure form did not say where the money was invested. In answers to recent questions you posed (question 14), Judge Smith wrote: "At the time in question [October 1997], my wife and I held stock in Mid-State and she was employed by the company." So now we do know that Mrs. Smith also held stock in Mid-State, but we don't know how much. As a result, we do not know the amount of the Smiths' joint holdings in Mid-State or Keystone in October 1997 and thereafter or what percentage of their wealth it represented.

Another basis for a possible conflict in the *Black* matters was the fact that Mrs. Smith was an officer in Mid-State. However, Judge Smith recently responded to your written question 17 by stating that his wife "was a corporate loan officer for Mid-State, a position far removed from those parts of the bank that had any dealings with John Gardner Black."

In this answer, I will assume that the Smiths had a substantial financial interest in Mid-State or Keystone or both (it was between \$100,000 and \$500,000) and that that interest represented a significant portion of their wealth. No submission offered by or on behalf of Judge Smith has asserted otherwise and the record we have supports this conclusion.

a. October 27, 1997

I want now to focus on October 27, 1997 and the weeks immediately preceding:

- On October 24, "all investment funds were removed from Mid-State Bank" by the Trustee. *Letter of Mark A. Rush, 2/22/02, at 2.* Judge Smith knew this because the fact is recited in an order he issued October 27. *Letter of Douglas A. Kendall, 2/20/02, at 5.*
- In a chambers conference with the Trustee and his counsel on October 27, Judge Smith was told "that information, although in its very early developmental phases, was being uncovered which may change Mid-State Bank's involvement in the case from that of merely a depository of funds." He was advised "of only a developing but not confirmed suspicion by the Trustee that Mid-State Bank's role may be more than a depository." *Rush letter at 2, 3.*
- In September and October, the press in Pennsylvania reported the possibility that defrauded school districts would sue Mid-State. *Kendall letter, 5/10/02, at 4 and exhibits.* Certainly, the possibility of bank liability, or at least exposure to litigation, would have been apparent to any lawyer. Suits were in fact filed,

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starting as early as October 31, 1997. *Id.* at 4. The suit was reported in the press the next day. *Id.*

- Papers before Judge Smith suggested that the bank prepared reports to the school districts showing the market value of their account at \$157 million, while reporting to Black that the market value of these accounts was only \$86 million. This information was in a footnote that was in an exhibit to an exhibit in the papers before Judge Smith, who apparently did not recognize its significance or did not see it. Reply to your follow-up question 8. However, this discrepancy was reported in the local press on October 31. *Id.* at 3.
- In the October 27 chambers conference, Judge Smith told the Trustee and his counsel "of his wife's employment in an unrelated division of Mid-State Bank." And the Judge "indicated an intention to consider recusing himself based on the potential for a future appearance of a conflict." *Rush letter* at 3. Judge Smith did not then reveal the Smiths' financial interest in Mid-State or Keystone.

The information Judge Smith knew on October 27 required him to reveal his family's financial interest before ruling on the applications before him. So far as the Trustee and his counsel knew, the only basis for recusal was Mrs. Smith's employment in an "unrelated division" of the bank. That is all they were told. Understandably, they did not see that as a fact that required recusal or further discussion. (More on this below.) But had Judge Smith revealed the Smiths' financial interests in Mid-State on October 27, then the Trustee and his counsel, and counsel for the school districts seeking to unfreeze money held by Black in non-Mid-State banks, would have been able to provide the Judge with information (already in the press) about Mid-State's and Keystone's potential future liability for Black's frauds. Then, the footnote in the exhibit to the exhibit in the papers before Judge Smith could have surfaced and its import explained. Then, too, the public discussion about the possibility of legal action against Mid-State could have surfaced. The Trustee and counsel would then have had reason to be more expansive about their statement in chambers that "Mid-State Bank's involvement in the case [may change] from that of merely a depository of funds."

In fact, had Judge Smith revealed not merely his wife's employment in an "unrelated division" of the bank on October 27, but also his family's substantial financial investment in the bank, it would have been incumbent on counsel to reveal all they knew about the bank's legal exposure and to explore with the Judge whether what they knew, but did not see any need to elaborate, and what Judge Smith knew, but did not reveal, required recusal under Section 455(b)(4), which disqualifies a judge if the judge or the judge's spouse has "any . . . interest that could be substantially affected by the outcome of the proceeding." Based on what the parties collectively knew at the time, this exploration should have led to Judge Smith's recusal on October 27, before he ruled on the school districts' effort to unfreeze non-Mid-State accounts in Black's control (totalling about \$175 million). Once Judge Smith learned of the probable

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lawsuits against Mid-State, he would have had to step out of the case. By failing to reveal his family's financial interest, however, Judge Smith effectively prevented the entire inquiry and led to a ruling he was disqualified from making because a bank in which his family had a substantial investment had an interest in the ruling, as discussed further below.

Although I focused above on the particular ruling Judge Smith made on October 27, that ruling is incidental to a more imposing fact. Even if there were no application for a ruling on October 27, Judge Smith should still have recused himself based on information that he could and should have discovered on that date. That information revealed the enormity of Mid-State's potential liability. As stated above, and as reported in the press in October, Mid-State's own documents showed a potential shortfall of \$71 million in school district funds that Black had deposited with Mid-State. So I want to stress that it was this exposure, and not alone the ruling Judge Smith was asked to make on October 27, that required recusal by that date if not sooner. In short, Judge Smith should not have been sitting in a matter when, as he could have and should have known, a bank in which he had a substantial investment faced financial liability in tens of millions of dollars. As we now know, Keystone eventually paid \$51 million to settle depositor claims.

b. October 31, 1997

On October 31, Judge Smith recused himself citing only his wife's employment. He has explained to the Committee that he did so because he foresaw the possibility that the bank might be a source of evidence in the case. *Letter of 2/25/02*, at 2. As stated, Judge Smith has acknowledged that his wife was in a "position far removed from those parts of the bank that had any dealings with John Gardner Black." It is hard to understand why Mrs. Smith's position caused Judge Smith to recuse himself, even assuming that Mid-State officials might be deposed or that Mid-State might be the source of documents. At this point Judge Smith believed that the bank was merely a "depository." If that were all it was, it should make no difference that officers or employees, from a part of the bank "unrelated" to the one in which his wife worked, might be deposed or that the bank might be a source of documents. In fact, Judge Smith does not appear to believe that he even had to recuse for this reason. In his answer to your question 13, he wrote that he had no "legal obligation" to recuse when he did, but did so "out of an abundance of caution." (See also the answer to your question 14.) Judge Smith acknowledges in his answer to question 18 that there was never a possibility that his wife might herself be a witness. By failing to reveal the Smiths' investments on October 31, Judge Smith denied the litigants information that they could have used to overturn his October 27 ruling refusing to unfreeze half the money (about \$77 million) that Black maintained in non-Mid-State accounts.

A ruling by a judge who should have been disqualified may be vacated. This is true even if the judge, when ruling, was unaware of the basis for the disqualification. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). Judge Smith's rulings in *SEC v. Black*, and in

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particular his ruling on October 27 refusing to unfreeze all of the non-Mid-State funds in Black's control, could have been challenged based on the Smiths' financial interest. However, because Judge Smith did not reveal the Smiths' financial interest in Mid-State on October 27, or on October 31 when the Judge did recuse himself, or thereafter, parties to the proceedings before him, including the school districts that sought to unfreeze all of their non-Mid-State funds, could not use this interest as a basis for vacating the Judge's rulings. While it is true that a judge may recuse without giving any reason, where there are reasons for recusal that could *retroactively* affect the legitimacy of orders already entered, the judge must reveal that information so that the parties can determine whether to challenge the judge's orders on this basis. *Id.* at 867. The fact that a judge might not believe that a particular fact would suffice to warrant recusal, or to warrant an order vacating a ruling, is not a justification for failing to make the disclosure. A judge should not, through silence, be the ultimate arbiter of his or her own disqualification. If a fact could reasonably support disqualification or an effort to overturn a ruling, as is true here, that fact should be revealed so that counsel may argue it or bring it to the attention of another judge or an appellate court. *Id.*

c. Events After October 31, 1997

Even if Judge Smith continued to believe on October 31 that the bank's role was solely as a prospective witness in its capacity as depository, it shortly thereafter became apparent, when lawsuits were filed, that this was not so, and that in fact the bank would be exposed to financial liability. At that point, at least, Judge Smith should have revealed the Smiths' financial investment in Mid-State. While it is true that Judge Smith no longer had jurisdiction over *SEC v. Black* after October 31, he did not need jurisdiction to make this financial information known. So even assuming Judge Smith did not realize the bank's financial exposure as of October 31, which I do assume, and even assuming (which I do not) that he had no duty even to explore the possibility of the bank's financial exposure with counsel on October 27, Judge Smith should nevertheless have revealed his family's financial interest in the bank once its potential civil liability became evident, as it did soon after October 31."

* Contrary to Judge Smith's statement in the answer to your question 15, a federal judge *does* have an affirmative duty to reveal information that a lawyer may reasonably view as disqualifying. *Litky v. United States*, 510 U.S. 540, 548 (1994) (construing duty under §455(b)(1)). Sometimes, there is no other way of gaining this information, at least not easily. In this very case, the Judge's financial disclosure statements did not reveal the nature of his wife's holdings, though he has now said that they included investment in Mid-State. Rather than expect lawyers to investigate judges and their families, it is preferable to impose on a judge the duty to reveal disqualifying information and we do. In *Liljeberg*, 486 U.S. at 866, the Court held that Judge Collins should have made "a full disclosure" of his fiduciary relationship to Loyola as soon as he remembered Loyola's interest in the litigation. If he had, "a different judge" could then have decided whether the judgment in the case should be vacated. By his "silence," the Court also said, Judge Collins deprived the losing party of its right to seek a new trial based on §455(b)(4). The same is true here. *Id.* at 867.

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Those appealing Judge Smith's order would have benefitted from knowledge of the facts and amounts of the Smiths' Mid-State investment because that investment meant Judge Smith should not have ruled on any issue that could affect Mid-State's financial exposure. The effort to unfreeze the non-Mid-State money is such an issue because the more money available from other sources to compensate school districts with Mid-State accounts, the smaller would be Mid-State's exposure. In other words, if money in non-Mid-State banks could be used to compensate districts whose funds were in Mid-State accounts, Mid-State could be benefitted. So could the Smiths as substantial investors.

In *Liljeberg, supra*, Judge Collins ruled in a case even though, at the time, he was a fiduciary of a non-party (Loyola) that stood to gain financially from the ruling. At the time he ruled, he did not know of Loyola's interest in the matter, although he previously knew of it and learned of it again later. The Court agreed that Judge Collins could not have recused himself when he lacked knowledge of the disqualifying fact. A "judge could never be expected to disqualify himself based on some fact that he does not know, even though the fact is one that perhaps he should know or one that people might reasonably suspect that he does know." 486 U.S. at 860. The Court then went on to hold that "[n]o one questions that Judge Collins could have disqualified himself and vacated his judgment when he finally realized that Loyola had an interest in the litigation." *Id.* at 861. Doing so might "promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Id.* at 865. Judge Collins' "silence," once he recalled Loyola's interest, "deprived respondent of the basis for making a timely motion for a new trial and also deprived it of an issue on direct appeal." *Id.* at 867. So, too, here.

Judge Smith no longer had jurisdiction of the case after October 31, and therefore could not recuse himself or vacate his orders, as the Supreme Court ruled Judge Collins could have done. But once he learned of the bank's exposure, Judge Smith could have taken the lesser step of informing counsel of his family's financial interests in the bank. He should have done this because he should have realized that the following facts, once publicly known, would undermine confidence in the judiciary and create the appearance of impropriety. These facts are:

- (1) Judge Smith was told on October 27 that the bank may be more than a mere depository;
- (2) papers before Judge Smith on October 27 showed a substantial discrepancy between what the bank was telling depositors and what the bank was telling Black;
- (3) the press in Pennsylvania was reporting on the prospect of lawsuits against the bank;
- (4) the Smiths had a substantial financial interest in the bank;

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(5) three days prior to October 27, as Judge Smith knew, the Trustee had removed all of the school district funds from the bank and placed it in another institution;

(6) on October 27 Judge Smith made a ruling that an objective observer could view as beneficial to Mid-State by keeping frozen monies that might be available to compensate school districts that had accounts in Mid-State;

(7) despite the information available to him on October 27, Judge Smith made no effort to conduct a further inquiry of counsel into the possible financial exposure of Mid-State or reveal his family's investment in Mid-State.

The upshot of this is that even if we assume that as of October 31 Judge Smith thought of Mid-State as merely a depository whose personnel might be witnesses, nonetheless, in retrospect, Judge Smith should have realized from the facts itemized above that his conduct threatened confidence in the impartiality of the courts and that he had to take steps to correct that. *Liljeberg*, quoting the lower court's opinion, states:

The goal of Section 455(a) is to avoid even the appearance of partiality. If it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exists because the judge does not recall the facts, because the judge actually has no interest in the case or because the judge is pure in heart and incorruptible. The judge's forgetfulness, however, is not the sort of objectively ascertainable fact that can avoid the appearance of partiality. Under section 455(a), therefore, recusal is required even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge.

Id. at 860 (internal citations omitted). See also *In re School Asbestos Litigation*, 977 F.2d at 784, quoting some of the same language from *Liljeberg*. It is hard to fathom Judge Smith's silence after October 31 even if one accepts his explanations for his conduct until that time.

United States v. Black

This brings me to *United States v. Black*, the criminal case against Mr. Black, assigned to Judge Smith in 1999, when Mid-State's financial exposure was apparent. Judge Smith kept the case for five months, until a motion to recuse him was made and granted. Again Judge Smith cited his wife's employment as the basis for granting the motion. I don't understand why, if an "abundance of caution" caused Judge Smith to recuse himself *sua sponte* in *SEC v. Black* because of the prospect of testimony from bank personnel, or because the bank might be a source

of documents, he did not recuse in *United States v. Black* immediately. Be that as it may, for other reasons Judge Smith should never have accepted *United States v. Black*. First, Third Circuit precedent directly on point prohibited Judge Smith from accepting the case. "We adopt the view that a judge who owns a substantial interest in the victim of a crime must disqualify himself or herself in the subsequent criminal proceeding because the strict overarching standard imposed by §455(a) requires that the appearance of impartiality be maintained." *United States v. Nobel*, 696 F.2d at 231, 235 (3rd Circuit 1982). This is a holding of the case and cannot be more explicit. The court went on to conclude that on the particular facts disqualification had been waived under §455(e). But the court would not have had to consider waiver unless it had first found that the judge, as an investor in the defrauded institution ("INA"), was disqualified from sitting in judgment of the man accused of defrauding that institution.

The facts here are even stronger than the facts in *Nobel*. *Nobel* also held that §455(a) would have required disqualification of the trial judge even though "by the time of the criminal trial a settlement had been effected which called for defendant to repay INA for substantially all of the funds which defendant received as a result of the fraud." *Id.* at 234. Since INA had recovered its lost money in *Nobel*, no ruling in that case could have affected the size of the investing judge's loss. Not so here. Mid-State was either the victim of Black's misconduct or civilly liable for facilitating it (or perhaps both). In either event, unlike INA, it stood to lose or have to pay a lot of money (as in the end it did) in part as a result of Black's acts. Obviously, it was in the bank's interest to minimize the amount it would lose or have to pay, and in furtherance of that goal it would want to shift as much blame to Black as possible. It was in the interest of the Smiths as Mid-State investors to achieve the same objectives. It should have been apparent that these objectives might be furthered by rulings in Black's criminal case and by limiting any monetary sanction against Black, as next discussed. Judge Smith's defense (in answer to your question 20) that *Nobel* is inapposite because Mid-State was not a "victim" in the same way that INA was a victim entirely misses the purpose of the disqualification statute and the reasoning of *Nobel*.

Judge Smith should have realized that decisions he might make in Mr. Black's criminal case could affect the civil actions then pending against Mid-State. This could happen in at least two ways. First, Judge Smith would be called upon in *Black* to make evidentiary rulings that could lead to the revelation, or to the concealment, of information that might affect the course of the civil litigation against Mid-State. Second, I understand that in the event of a conviction, Black would have been subject to monetary sanctions. Obviously, the more money Black had to pay as a criminal sanction, the less money he would have available to compensate the school districts allegedly harmed by Mid-State and Black. Consequently, Mid-State would have an interest in Black retaining as much money as possible so that his wealth could be used to offset depositor losses. If somehow Judge Smith did not appreciate that his family's Mid-State investments required recusal, he should have revealed this information to counsel so they, and the defendant, could decide whether to act on it.

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In sum, assuming that Judge Smith did not know of Mid-State's financial exposure on October 27, 1997, and did not therefore recognize a need to recuse himself in *SEC v. Black*, still there was sufficient information before him to warrant both further inquiry and revelation of his family's investments in Mid-State. Inquiry and revelation at this point would have resolved the issue and made disqualification immediately necessary. As stated above, a federal judge does have a duty to be forthcoming with facts that could support a request for recusal. Once Mid-State's financial exposure became apparent, as early as press reports of the first lawsuit on November 1, Judge Smith's continued silence is inexplicable. His order of October 27 was being challenged and his family's financial investment would have provided the challengers with strong arguments to vacate it, perhaps more quickly. Just as Judge Collins in *Liljeberg* should have immediately revealed his reawakened knowledge of Loyola's interest in a litigation before him, Judge Smith should have revealed his family's financial interest in the bank immediately on learning that the bank had financial exposure in the events underlying *SEC v. Black*.

For the reasons given above, Judge Smith should never have accepted *United States v. Black*. Rulings in that case could have affected the amounts of money Mid-State would eventually have to pay and therefore the value of the Smiths' investment. Even if they could not, Circuit precedent required his recusal.

I hope I have answered your questions. Please don't hesitate to ask if I can be of further assistance.

Sincerely,



Stephen Gilliers

SG:sg