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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-127

TITLE RICHARDSON-MERRELL, INC., Petitioner V.
ANNE ELISABETH KOLLER, ETC., ET AL.

PLACE Washington, D. C.

DATE February 26, 1985

PAGES 1 thru 43

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IN THE SUPREME COURT OF THE UNITED STATES

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RICHARDSON-MERRELL, INC., :

Petitioner :

V. : No. 84-127

ANNE ELISABETH KOLLER, ETC., ET AL. :

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Washington, D.C.

Tuesday, February 26, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:02 o'clock a.m.

APPEARANCES:

LAWRENCE E. WALSH, ESQ., Oklahoma City, Oklahoma; on behalf of the Petitioner.

MICHAEL H. GOTTESMAN, ESQ., Washington, D.C.; on behalf of the Respondents.

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C O N T E N T S

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PROCEEDINGS

CHIEF JUSTICE BURGER: We will hear arguments next in Richardson-Merrell against Koller.

Mr. Walsh, I think you may proceed when you are ready now.

ORAL ARGUMENT OF LAWRENCE E. WALSH, ESQ.

ON BEHALF OF THE PETITIONER

MR. WALSH: Thank you, Mr. Chief Justice. Mr. Chief Justice, and may it please the Court:

We are here on certiorari to review a judgment of the Court of Appeals for the District of Columbia Circuit. It reversed an order disqualifying two Los Angeles lawyers for misconduct.

The first lawyer, Mr. Butler, was disqualified on a finding that after a pre-trial -- after a series of pre-trial orders holding certain material inadmissible because of its unfair, prejudicial nature, and after the venire for the jury with which this case was going to be tried had reported to the courthouse, he released this material, this very material and nothing else, to a single correspondent for publication in Washington's leading newspaper.

The District Court found that he did this with an intent to circumvent its orders and to prejudice the Defendant.

Allis was disqualified on a finding that he

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procured a statement from a crucial witness into an investigation of fraud on the court with an intent to thwart that investigation.

These findings were coupled by a third principal finding of the District Court; that the removal of these two lawyers would not leave the Plaintiffs unrepresentative or ineffectively represented. Two of the remaining six lawyers are leaders in the Bendectin litigation and thy third is Mr. Jacob Stein, a former president of the Bar Association of this District and a bar leader by any definition who lead the Washington back-up team for these Plaintiffs.

One further point before I come to the question of appealability and that is that the removal of these lawyers occurred not during the trial but at a pre-trial phase where there would have been any adjustment necessary to permit the remaining counsel to absorb the full load of the case.

We would like first to go to the question of appealability. At the time the appeal was taken to the Court of Appeals, Flanagan against the United States had not been decided by this Court. It was decided a year ago and it held that disqualification of counsel orders in criminal cases are not appealable prior to final judgment.

There are two halves to the opinion as it was written. The first half sets out very strongly the urgency

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in criminal cases, but the second half measures disqualification orders against the standards of Cohen and Coopers and Lybrand and concludes that by their nature they cannot qualify with the second and third tests of the trilogy established by those two cases.

Without going to the question of whether a disqualification order is conclusive assuming that it is for the purpose of this case as the Court did in Flanagan. It leaves the question is the order entirely separate from the underlying case or not and this Court held that if a showing of prejudice in addition to error is needed. It is not entirely separate because the prejudice would require and examination of the trial record.

On the other hand, if an order is reversible without a showing of prejudice the third test is not met and it is effectively reviewable after judgment.

So, it seemed as soon as this came down that the logic projected into civil cases as well as criminal and a special brief was filed to point that out to the Court of Appeals. It, however, disagreed with our position and attempted to distinguish this Court's holding in Flanagan and suggest a different rule for civil cases.

Its first point -- Incidentally, its discussion of this begins on 20A of the Appendix to the Petition and the distinction begins on 29A.

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Its first point was that if in a civil case as distinguished from a criminal case to reverse a judgment it would be necessary to show that the error was prejudicial and that to show prejudice after trial in a civil case would be extremely difficult and would, according to the Court, would resolve itself into competing speculations as to whether Lawyer No. 1 would have tried the case differently from Lawyer No. 2.

In doing this it went back to holdings of Courts of Appeals prior to Flanagan and it in attempting to show why it would be more difficult to reach a decision as to prejudice after final judgment in a civil case rather than a criminal case. It suggested that in criminal cases there is experience with minimum standards of effective representation and that that type of -- that same question had not been coming up in civil cases. It did not explain why that was so esoteric that the learning in the criminal side couldn't be adapted to the civil side.

And, we respectfully suggest that it exaggerates the difficulty of reviewing for prejudice after judgment, that it would not turn on a speculative, retrospective comparison, it would turn on whether the Plaintiffs were able to get lawyers of a comparable standing with those they lost.

The holdings of this Court prior to Flanagan have

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clear that effectively unreviewable doesn't mean just reviewable with difficulty. It means truly unreviewable. That wsa a holding in Firestone and in the Coopers and Lybrand where they contention was a denial of class action treatment will make it financially impossible to go ahead with the case. The Court said, notwithstanding that, it was effectively reviewable and that the problems of financing the case would not be accepted as a substitute for meeting the Cohen trilogy.

And, finally, it is very hard to show a difference between criminal and civil cases except for this one added experience that have been had in criminal cases reviewing minimum effective standards, minimum standards for effective representation.

QUESTION: Well, how do the Courts of Appeals stack up on this other than in this case?

MR. WALSH: The Courts of Appeals prior to Flanagan followed the Fifth Circuit in Duncan against Merrill Lynch and all said --

QUESTION: They said that was appealable.

MR. WALSH: They said it was appealable because of the difficulty of showing prejudice after the appeal. But, after Flanagan, the Fifth Circuit rejected its old view of Duncan and said that Flanagan had changed that and it was convinced that there was no difference between civil

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and criminal and it refused to follow the decision of the Court itself.

QUESTION: The Circuit just didn't lie down and say Flanagan, they thought Flanagan was right or wrong?

MR. WALSH: I don't know whether they went to right or wrong but they -- Judge Albert Rubin said it should be followed and said that inasmuch as this Court has looked at orders denying disqualification in criminal cases and orders granting disqualification in criminal cases and orders denying disqualification in civil cases that it would be anomalous to say that this should be a different rule for an order granting disqualification.

QUESTION: How about your old Circuit?

MR. WALSH: The Second Circuit -- The first case that came up they said this raises a question that may require re-evaluation of our earlier holding. The second case said we are going to stay by our holding until the Supreme Court tells us differently. There was no consideration of the merits.

QUESTION: So, the Second agrees with this case?

MR. WALSH: It agrees only in the sense that it won't move until it is told. It did not itself by any rational process conclude that the Court of Appeals in Koller was right.

QUESTION: I see.

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MR. WALSH: And it preceeded Koller.

QUESTION: Mr. Walsh --

MR. WALSH: Yes.

QUESTION: -- I guess you agree that it is difficult to establish or examine the question of prejudice after the fact, after judgment.

MR. WALSH: With great respect, Justice O'Connor, it is a problem that comes with many kinds of error besides this. There is a certain element of speculation as to whether any error is prejudicial or not. Some may be very glaring, but it is -- So, there is a problem but it is not an insurmountable problem.

QUESTION: Well, suppose we were to agree with you that an interlocutory appeal is not proper, but then you get to the end of the line and you have this issue setting there. What about the propriety of a presumption of prejudice at that time so that the burden is really on the side that tries the disqualification in effect?

MR. WALSH: That could be a feasible -- certainly a rational position to reach. If it goes in that direction, and the Court below actually seems to be saying that, because of the --

QUESTION: I wanted to ask you that. Did the Court of Appeals in your view, even at the interlocutory stage, apply a presumption of prejudice?

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MR. WALSH: What it seemed to say -- What it says actually -- I refer to the paragraph beginning at the bottom of the 31A. What it said was that we don't need to look at the trial to see whether error was committed here. In our judgment, the error is clear and then because of the difficulty of proving prejudice it seems to say we don't have to prove it, but then that, of course, brings in into the other arm of the dichotomy of Flanagan; that if prejudice need not be proven -- Excuse me, I misspoke. If prejudice need not be proven, then, of course, it is effectively reviewable after final judgment and there is no excuse for interrupting the District Court --

QUESTION: That would just go to whether an interlocutory appeal is proper.

MR. WALSH: Yes, Justice O'Connor.

And, one more point on that. In Coopers against Lybrand, the proposal was made that there be a factual evaluation of the burdens. And, this Court held that that would be an indiscriminate standard for appealability; that appealability couldn't turn on such fact finding.

And, the Court below will get into that same box if it tries to suggest that the clarity of error is going to be a factor in determining appealability, that first you must see the error clear or do I need further help before deciding whether a case is appealable before judgment.

And, the same concept, if adopted, just as in Coopers and Lybrand, would spread to other types of pre-trial orders as well as this one.

If there are no further questions on appealability, I will go briefly to the merits and just say that what happened here is that notwithstanding Pullman and Swint and other cases the Court of Appeals, as it says, felt that the findings below were not sufficiently extensive or explicit and it took the record and went through and made the findings it would have found if it were trying the case de novo.

QUESTION: Did it hold that any of the findings were clearly erroneous?

MR. WALSH: It did not, Justice Rehnquist, it did not. It never addressed the question of was there a record support for the finding of the District Court.

The critical findings as to Allis was one of intent. Did he do what he did with an intent to thwart an investigation? This turned on credibility and on his knowledge at the time he did what he did and his credibility as a witness. And, it is perfectly clear the District Court rejected him as a witness. It found his explanation for what he did, the conduct of a true investigation, was not his purpose and it had support for it because there were other witnesses. All of these were hostile witnesses to the Defendant, but

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there were other witnesses who testified that, indeed, they did have knowledge, that Mr. Allis' partner, Mr. Butler, called people on that day and gave them the message that Allis professes not to have had knowledge of.

QUESTION: Mr. Walsh, could I interrupt you for a moment?

MR. WALSH: Yes.

QUESTION: Because in addition to the factual problem of this kind of a factual case, I was not entirely clear as to the legal standards that the district judge applied. What is it? Is it any time in an adversary proceeding and during discovery somebody tries to frustrate his opponent's efforts to get full discovery it is disqualification?

MR. WALSH: Not his opponent's. I think there is a misconception in the Court of Appeals that Ms. Janowski, the witness involved, was a witness for the Defendant. She wasn't. The Defendant tried to insulate itself from her and leave her available for the Court, so it is the Court's witness whose future is being thwarted here.

And, it is not a suggestion that any time a witness is impeached -- It is a mistake. But, on all the circumstances the Court concluded that the only rationalization for what he did so quickly and in the form of the statement took which was contrived that he had an intent to thwart

the investigation.

QUESTION: Is there any precedent for disqualifying a lawyer for that reason?

MR. WALSH: Well, to the extent that this is obstruction of justice there are precedents and they are in a footnote in our brief. There are four or five of them. They are more dramatic types of obstruction like getting a witness to leave town and things like that. But, it is the same --

QUESTION: And the remedy was disqualification of the lawyer. I can understand it as --

MR. WALSH: Disqualification, yes.

QUESTION: -- a disciplinary matter or something like that. Normally our disqualification cases are conflict of interest. It is a little bit of an unusual situation as far as I see.

MR. WALSH: It started about 40 years ago with about a 100-year history in conflicts and a 40-year history of discreet acts of misconduct.

QUESTION: I see.

MR. WALSH: Usually it has been used with discreet acts of misconduct whether our co-counsel and whether out-of-town lawyers where the forum only has one contact with the lawyer in question and, therefore, less of a reason for suggesting going to the Bar Association or something

like that.

QUESTION: Mr. Walsh, I am somewhat loathed to ask you this question, but I think it is bound to be in the back of one's mind. Is this sort of brouhaha between Mr. Allis and Ms. Janowski and some of the attorneys in your group a fairly common incident of the litigation practice nowadays?

MR. WALSH: I wouldn't think that, Justice Rehnquist. Your Honor, the burden of proof --

QUESTION: If it is, I am glad I went on the Bench.

(Laughter)

MR. WALSH: Well, I won't say it has gotten any better, but this was unusual. I don't think this had ever happened to any of us before.

QUESTION: By that you mean both sides?

MR. WALSH: I don't know about the other side, but I think that they also were reacting to an unusual situation, but the question was where one side tried to preserve the witness involiate for the Court, the other one was trying to destroy the usefulness of her testimony.

QUESTION: One other question going to the legal rules, do you think it is clear that a different standard should apply to out-of-town counsel and a regular member of the Bar?

MR. WALSH: We don't urge that.

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QUESTION: You don't?

MR. WALSH: As to the standard of misconduct we suggest it is best to keep that the same. There may be unusual situations I haven't seen, but the standard for misconduct should be the same. The sanction may very well turn on the relationship between the forum and the lawyer. A lawyer who is here for one case only is dealt with by taking him out of that case.

QUESTION: In terms of a remedy for misconduct, would you say that it would not be appropriate to disqualify a lawyer unless it were also appropriate to impose some kind of discipline?

MR. WALSH: Yes, even in a conflict case. If the lawyer resisted, there would be some --

QUESTION: And, in this case did the judge refer the matter to anybody for disciplinary purposes?

MR. WALSH: It did not. It did not. And, again, this goes, I think, to the transient relationship between the lawyer and the court and the case.

Coming to Butler, the Court below did not disturb the finding as to intent. That stands. Nor did it really reach the question of misconduct. It held that even if all of these things were so, that there was not a sufficient effect upon the underlying case to justify disqualification and that that should be restricted to truly egregious conduct.

Now, in holding that Mr. Butler's conduct was not truly egregious, the Court looked not to what he did but to the article as it was published and suggested that this was, indeed, a balanced article. Well, balance depends upon a definition. If you take a very strong case and a very weak case and make them look equal, I suppose you could say that is balanced. But, all of the emotional, heart-tugging part of that story was pro-plaintiff and anti-defendant And the worst part of the story the Court of Appeals didn't even recognize which was the attribution to the Defendant of responsibility for Thalidomide which crippled thousands of children in Europe where it was sold by German and English pharmaceutical companies.

Now, the Defendant is touched by Thalidomide because it had licensed it and was testing it for introduction into this country. At the time its teratogenicity was discovered was testing immediately stopped and -- but there were some cases that arose from the testing program which were settled. There other cases where people with misfortunes of having children with birth defects claimed to have taken Thalidomide and those cases were tried out.

Now, Mr. Butler tried one of those cases and won it and in the middle of this story is this discussion of how he won a case for a legless child against the Defendant who had sold Thalidomide.

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Now, it is not only a devastating reminder of a 20-year old tragedy, but it is a -- Thalidomide is going to be a source of daily discussion in the trial because Thalidomide is the classic teratogen against all other claims -- of which all other claims of teratogenicity are measured.

So, it is not as though it is going to be a forgotten thing. And a juror who has read the story, even though he has momentarily forgotten it, this is all going to come back as this horror of Thalidomide is reiterated on an almost daily basis.

For those reasons, Your Honor, we -- It was really the Butler thing that impelled our petition for certiorari, that the message could go out to the profession that it is not sufficiently egrecious to do this sort of thing; that if you don't get your evidence in legitimately you can use a newspaper correspondent to do it with you.

I would like to reserve the rest of my time for rebuttal if I may.

CHIEF JUSTICE BURGER: Mr. Gottesman?

ORAL ARGUMENT OF MICHAEL H. GOTTESMAN

ON BEHALF OF THE RESPONDENTS

MR. GOTTESMAN: Thank you, Chief Justice, and may it please the Court:

It may be helpful at the outside to define a little

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more clearly the posture in which this case is here and more precisely how it got through the two lower courts.

The District Court proceeded on a set of assumptions about how it could decide the disqualification issue which no one defends in this Court.

The District Court proceeded on the assumption that because these lawyers had been admitted pro hac vice they could be disqualified on grounds less substantial than those that would be applicable to regularly admitted counsel. The Court expressly said that in its opinion. And, the Court said further that precisely because of that reason she was not going to go on to determine whether these lawyers had engaged in any definable act of misconduct, any violation of disciplinary rules; that it was sufficient in her view if their conduct was "impermissible in the view of the Court." So, that was the standard by which these lawyers were judged. Was it impermissible in the view of the Court?

QUESTION: Do you suggest that that judge did not taken into account prevailing standards of the profession?

MR. GOTTESMAN: Well, Your Honor, the Court expressly said that she was not making the assessment of whether these counsel had violated the prevailing standards. At one point during the hearing, for example, she said to Mr. Allis while he was on the witness stand -- this is page 166 of the Joint Appendix -- I will not decide whether Mr. Allis violated

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any canon of conduct.

So, we had sort of a standard list determination that in the view of this judge this was impermissible and that that is all it took because these lawyers were from out of town.

Now, the Court of Appeals reviewed that and said that is wrong as a matter of the local rules. The local rules are quite clear that once an out-of-town counsel is admitted for the purpose of a case, that counsel is to be judged by the identical standards that are applicable to regularly admitted counsel. The Court quoted from the rules and explained that that was the applicable situation.

The Court then went on to say what he understood to be required before lawyers could be disqualified in a case. It said, look, the question here is, first of all, they said, there must be a definable act of misconduct, there must be a violation of the standard of conduct under the disciplinary rules or of some rule of court or, indeed, of some implicit powers that the court has to control its own courtroom. It is understood that the courts have those and can exercise a contempt power over them.

But, there must be one of those things before a court can disqualify lawyers because, after all, what is disqualification? You have lawyers and clients who have entered into a contract. In a free society, they are entitled

to do so. Disqualification is vitiation of that contract to the substantial injury of both parties to that contract. It was particularly aggravated in this case because these lawyers had invested literally 6,000 hours in the preparation of this case for trial and it was due to go to trial imminently and their disqualification meant that people were going to have to start over.

But, the Court said at a minimum to justify --

QUESTION: I thought there were something like eight lawyers representing the client.

MR. GOTTESMAN: There are eight lawyers who have entered appearances in this case, Your Honor. Several of them, including Mr. Stein, entered appearances solely to represent the lawyers in the disqualification proceeding when it was undertaken. Two others --

QUESTION: How many lawyers were representing the client otherwise?

MR. GOTTESMAN: Well, what the record clearly shows, and this is not contradicted, is that in terms of preparation of the case on the merits for trial Mr. Butler and Mr. Allis were regarded as the principal trial counsel. They had done the yeoman's work -- They had done almost all the major preparation. Two other lawyers had done some work in preparation for being back-ups, assistants to Mr. Butler and Mr. Allis.

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But, it is not disputable that they were the two lawyers who were gearing up to try this case. The other lawyers, this number that accumulates to eight, are lawyers who were not participating actively in the present preparation of this case on the merit.

In any event, the Court of Appeals said we must have a definable act of misconduct.

Secondly, the Court of Appeals said not every definable act of misconduct should produce a disqualification. There are ways to punish misconduct. There are obviously sanctions that the Bar can impose and there are sanctions that the Court can impose through its contempt power.

Disqualification, unlike those punitive sanctions, has the very unpleasant side effect that it deprives the client of the lawyer of his choice and can do so in a way that will be very injurious, which I want to get into at some length.

So, said the Court, we agree with the Second Circuit' rule in Nyquist which has now been rather generally embraced by the commentators and by several courts of appeals, that where disqualification is contemplated, its purpose is not punishment of the lawyers, punish the lawyers other ways. The function of disqualification is to assure that lawyers will not, by remaining in the case, imperil the integrity of the trial.

QUESTION: How much other options does a court have when you are dealing with people admitted pro hac vice? Where do the lawyers here practice, in California?

MR. GOTTESMAN: California, that is right.

QUESTION: That the District Court should refer the matter to the California Bar for discipline?

MR. GOTTESMAN: The District Court -- If these people had done a wrong, and they had not, but if they done a wrong, the District Court would have had the power of contempt over them.

QUESTION: If the District Court excerised the power of contempt -- I have seen enough cases come up here -- then the yelling that, no, they should have just disqualified them.

MR. GOTTESMAN: No, we wouldn't be yelling that at all.

QUESTION: It is a second guessing operation.

MR. GOTTESMAN: Well, there is a difference, Your Honor, and this is what all the courts have said, you have to decide what is the purpose of the disqualification? Disqualification is not a form of punishment. The Petitioner's brief is emphatic about that in this Court. We are not contending that disqualification is a form of punishment.

What we are saying is disqualification is a prophylactic. It is a means to assure that there will not

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be further conduct that imperils the trial.

QUESTION: So, if it were perfectly outrageous conduct on the part of an attorney at one stage of the case, and yet he was obviously totally penitent and said I won't do it again, the District Court would be obligated not to disqualify him, even though he would have violated 15 canons at the time he committed the outrageous conduct.

MR. GOTTESMAN: If the District Court could not find that his continued participation in that case would imperil the integrity of the trial, that is correct, Your Honor. They could cite him for contempt, could prosecute him for contempt, could cite him to his Bar Association, whether it be this state or another.

QUESTION: What is your authority for your view of disqualification?

MR. GOTTESMAN: It is now -- It started with the Second Circuit's decision in Nyquist. It has now been followed by the D.C. Circuit, by the Ninth Circuit, and every commentator in the area.

QUESTION: Was the Nyquist decision based on conflict?

MR. GOTTESMAN: That was what was involved in that case.

QUESTION: Well, it seems to me one could take -- Could quite easily distinguish between situations where

there have been conflicts and where one gets a certain feeling of gamesmanship in efforts to disqualify which don't relate to court conduct at all. But, when you are dealing with conduct before the Court, I don't see Nyquist as an authority for that.

MR. GOTTESMAN: Well, the question of whether gamesmanship was at work here, Your Honor, is one that I want to get to because it goes to the whole appealability issue and the need for an interlocutory appeal. But, even if one were to say that they were not going to require the second element and we firmly believe the second element is correct, that disqualification is not a means of punishing unless one wants to punish the client and there are other ways to punish the lawyer.

QUESTION: You haven't mentioned the word "deterrence." Is it implicit in what you have said?

MR. GOTTESMAN: Because there are punitive sanctions that can be used against lawyers who misbehave, there are deterrents. Disqualification is punishment largely of the client, not only of the lawyer, and that is why the principle has developed that disqualification should not be used simply because there was misconduct by a lawyer, because the implications for the clients are severe.

I do want to turn to that because that is, after all, the threshold question here which is appealability.

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But I do want to say just a minute what the Court of Appeals said about Allis and Butler and why it was not prepared to tolerate their disqualification in this case.

I have indicated the District Court decision can't stand. Nobody is defending the approach by which the District Court decided this case. No one is defending it here.

But, Petitioner asked the Court of Appeals as a first proposition to decide this case under the Rights Standard. They say you decide whether Allis and Butler engaged in an act of misconduct and you decide whether the District Court's result could be justified by the application of the proper principle.

And, the Court of Appeals said, well, obviously we can't do that if it turns on disputed issues that the District Court didn't decide, but on this record there are no disputed issues that are necessary for us to recognize that, number one, Mr. Allis committed no act of misconduct, no conceivable act of misconduct. What did he do? His secretary came to him one day and made a statement to him that the other side was trying to extract a false statement from her with promises of money. We now know that, in fact, she did receive substantial sums from the other side after that. And, she said those statements are not true. The truth is that your client's case is genuine and she has never said anything to me to the contrary.

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QUESTION: Well, Mr. Gottesman, I assume that Mr. Allis wittingly or unwittingly was going to become a witness in the trial it sounds like.

MR. GOTTESMAN: Well, he could only possibly be a witness --

QUESTION: And certainly would have been disqualified on that ground alone.

MR. GOTTESMAN: Well, the concurring opinion raised that possibility. That would depend, first of all, on whether the Petitioners were going to call Ms. Janowski at trial. When that question was asked of them, they said that in light of subsequent evidences that one might call of an impeaching nature about Ms. Janowski's character they were not at all certain they were going to call Ms. Janowski at trial. And, of course, if they were not going to call her, then Mr. Allis would not possibly be a witness.

QUESTION: Well, in any event, it wasn't decided so he was a potential witness at trial, I guess.

MR. GOTTESMAN: Well, at some point the Petitioner was going to have to announce a final decision on that point. If the announcement that she was going to be a witness, then the question, Your Honor, would have to be addressed. In this case, the standard is that he must withdraw at that point if it is obvious that he should be a witness.

QUESTION: Do you think an order of disqualification

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because someone is a prospective witness is immediately appealable?

MR. GOTTESMAN: That uniquely may not meet the second of the three factors because then the question of whether that judgment is correct, that is to say whether the lawyer truly was needed as a witness, can't be made until the trial.

So, as the Sixth Circuit said, this is the one area where we can recognize that in a civil case a disqualification order might not be --

QUESTION: Do you think that was correct in the Sixth Circuit case?

MR. GOTTESMAN: I think there is a respectable argument to be made for that position. It in no way jeopardizes our position on appealability.

But, the thing I want to emphasize is that Mr. Allis did absolutely nothing wrong. The assertion that the District Court found that he was desiring to thwart an investigation is not an accurate reflection of what the District Court found. The District Court's sole finding as to Allis' intent is that he wanted to get a written , sworn statement from his secretary retracting what she had told the other side and that is correct, because, after all, she had told him what was told to the other side was false. She also told him she was about to run off to Mexico.

And, he asked, are you willing to put that -- what you have just told me in a sworn statement and she said yes.

So, the District Court found he had the intent to take a statement from his secretary retracting what she had told the other side.

Then the District Court announced what were a series of legal propositions. He had a duty not to do that. Allis has the duty to investigate whether his client is committing a fraud upon the Court. He had no such duty. The Court of Appeals convincingly demonstrates that he had no such duty. This is not a case where he knew his client was engaged in a fraud. He had overwhelming evidence supporting the good faith of his client and his own secretary was telling him things that supported it.

The Court then said in its conclusion on page 77A, because he had this duty and because he took a retraction from his secretary, that can be characterized as an attempt to thwart an investigation by the Court.

So, a notion that that was his state of mind and that is what the Court has found is not accurate. The Court found only that he took a statement from a witness believing it to be true which she was telling him was true. That is not a violation of anything. It is a great injustice to both him and to the client that he was disqualified in this case.

Now, I want to turn to the issue of appealability because it obviously is the threshold issue in this case.

QUESTION: Are you at some point going to discuss Mr. Butler's conduct?

MR. GOTTESMAN: I would like to, Your Honor, yes. Maybe I should do it now and do appealability at the end.

I would be prepared to argue at length that a finding is not permissible that Butler had an improper motive here. He could not conceivably have thought that what he gave to Morton Mintz was going to be in the hands of the ultimate jury.

The questions had already been filed by the Defendant that were going to be asked of every prospective jury, have you read about that and that? He knew that. He is an experienced trial lawyer. They were not going to be on the jury if they had read that article.

QUESTION: You said what his motive was not. Are you going to say what his motive was?

MR. GOTTESMAN: Well, he said what his motive was, Your Honor. He said, I have spent the two years of my life trying to get this drug off the market, this drug is dangerous in my view. I have additional information now to support that. I am getting it to the Food and Drug Administration and I think that it should be in the hands of the public. He was telling that not only to Morton Mintz.

On the same day that the Mintz article appeared in the Washington Post, the record shows Butler appearing on a telecast in Los Angeles where so far as I know none of the jury -- prospective jurors -- in which he was again in Los Angeles advocating the --

QUESTION: Did the District Court credit his version of his motive?

MR. GOTTESMAN: No, the District Court did not. What I am suggesting is the District Court's rejection of his motive based on nothing but her disbelief in an affidavit that he filed is not sustainable on whatever standard of review may be applicable here given that this is a First Amendment case.

It should be noted that --

QUESTION: Why is it a First Amendment case?

MR. GOTTESMAN: Because the question of whether he can be punished for having made a statement to the press about an issue of paramount public importance. Judge Borck in another recent decision which is cited in the amici's brief has noted the enormous public importance about the safety of Bendectin at that point in time. Indeed, it was only four months later that Bendectin was withdrawn voluntarily by --

QUESTION: Are you saying there is a First Amendment right after a trial court rules that important

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evidence in the case is not admissible to send the evidence to the newspapers?

MR. GOTTESMAN: I am saying that if that evidence is relevant to a paramount public issue which far transcends this lawsuit as the safety of Bendectin does and -- this is very important. I don't mean to say lawyers can just, whenever evidence is ruled inadmissible, chuck it to the newspapers, by no means, but when that evidence is relevant to issues that far transcend that lawsuit as this does and when there is no substantial and imminent danger that it is going to reach the jury in the case, then, yes, indeed, that is protected by the First Amendment.

QUESTION: You would apply that to say a prosecutor who views what he thinks is the erroneous application of the exclusionary rule as an issue far transcending just the guilt of this defendant so he decides to send the person's confession, which the court has suppressed, to the newspapers?

MR. GOTTESMAN: Well, in the context of a highly visible trial where the whole community is reading the paper about that and in this case where a jury hasn't been sworn yet, there is a substantial risk, a substantial and imminent risk that that disclosure will prevent the selection of a jury. That is not the case here. The District Court didn't find that it was. The District Court didn't care what the impact of this was for the future. She was just

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mad that he had given it to the press. None of the relevant inquiries were made in this case by the District Court. The Court of Appeals made them in the first instance and said they really aren't susceptible to two determinations here. This was not going to prejudice the selection of a neutral jury in this case.

QUESTION: Because the jurors would be asked if they had read this article?

MR. GOTTESMAN: Sure. If they had read anything. There were ten questions about --

QUESTION: Then you can say with respect to any disclosure to a newspaper of evidence which a trial court has ordered suppressed in an earlier hearing, it won't prejudice the selection of the jury because if they have read about it in the newspaper they will be excluded from the jury. That is just a self-fulfilling prophecy.

MR. GOTTESMAN: No, because there are some issues of such importance that you can reasonably assume that the vast majority are going to have read and it is going to make it very hard to find a jury that hasn't seen this.

That was not the case with this disclosure. Indeed, three months later there was another Bendectin trial in the district. Not a single member of the jury venire had read a single article about Bendectin and that is not suprising. I must confess --

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QUESTION: Does that appear in the record, Mr. Gottesman?

MR. GOTTESMAN: Pardon?

QUESTION: Does that circumstance appear in the record?

MR. GOTTESMAN: Yes, it is, Your Honor. It is at pages 323 to 324 of the Joint Appendix. The voir dire questions which the company had already filed in this case which plainly showed Butler the question that were going to be asked here appear at pages 15 to 16 of the Joint Appendix.

Now, let me please move to appealability in my remaining time. It is the threshold issue in this case and I think it is terribly important that we say why this case is different from Flanagan.

It is different in two ways. Number one, it is different because it is a civil case and not a criminal case. This Court developed the three coinfactors in civil cases and it --

QUESTION: Mr. Gottesman, do you think it is possible that a defendant in a criminal case has an even stronger interest in being represented by his counsel than in a civil case?

MR. GOTTESMAN: Sure. In a particular case that may well be true. And the reason that this --

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QUESTION: But that didn't prevent the court from finding an order of disqualification of counsel was not immediately appealable?

MR. GOTTESMAN: It did not and I want to explain why that doesn't apply here.

First, the coinfactors developed in civil cases and what the court said is there are always weights on the scale against an interlocutory appeal, heavy weights. But then over the years certain exceptions developed and the Court was able to identify that. When these three factors are present, they outweigh the interest against an interlocutory appeal in a civil case.

Then the criminal cases came and as Flanagan succinctly demonstrates the weights against an interlocutory appeal are much, much heavier in a criminal case.

So, the same factors that would tip the scale in a civil case aren't sufficient to tip it in a criminal case. You need a lot, lot more and, indeed, there have been very few instances where this Court has been able to find that that was so.

The second thing that is different -- and this is key I think to this appealability case -- and that is that there is no effective review of the disqualification of counsel after judgment is entered.

The most persuasvie demonstration of that appears

in the Ninth Circuit's decision in Gough versus Perkowski and since I won't have time to lay it all out I strongly urge the Court to read that before deciding.

As they point out, what would the issue be on appeal? The issue would be whether the disqualified lawyer would have gotten a better result for the client than the lawyer who actually tried the case. That is not like any other prejudice finding courts make.

Ordinarily, if the issue is whether a piece of evidence was improperly admitted, the court can look at the record that was actually made, it can compare it to the record as it would have been, and it can -- it is not easy, but it can determine what that difference is. But, in this area, it is comparing a record that was actually made to a total unknown. What would have happened if the other lawyer tried the case? Lawyers are fungible. Some do much better jobs than others. How would that lawyer have tried the case? What tactical differences would have been made?

It is impossible to make that assessment. What the courts of appeals have uniformly said -- not a one has ever deviated from this -- we are not competent to measure prejudice after a judgment when a lawyer has been disqualified. We can't do it.

The Ninth Circuit considered how could we go about

doing it? How could we get the other record to compare what actually happened. Well, they said we could have a post-judgment motion in the District Court in which the disqualified lawyers come forward and show how they would have tried the case. Now, proposition one, who is going to make this post-judgment motion? Not the disqualified lawyers, they can't do it. Not the lawyer who tried the case. The purpose of this is to show that it should have been done better, that it could have been done better. So now the client is off to hire a third lawyer to make this post-judgment thing.

Now the lawyers come in and they say with the benefit of hindsight, to be sure, we would have tried this case in an entirely different way. We have much more effective jury arguers, we are much more articulate in the way we present it, we would have called three experts, they didn't. We would have done, this, that, and the other.

The Defendant is going to come running in saying, oh, no, no, if they had done that that wouldn't have affected the outcome of this case. We are going to generate a whole second trial at an enormous cost in judicial resources just to create the record so that you have something to compare. And even then the Court said we can't compare those two things. How can we sit and say, yes, if Lawyer A had tried this case instead of Lawyer B, his more articulate jury

argument would have swayed the outcome. It is unlike --

QUESTION: What if the Court would apply, as I think the Court of Appeals did here, a presumption of prejudice?

MR. GOTTESMAN: The Court here implied no presumption, Your Honor. The Court here said a wrong was committed because a contract freely entered into between two parties was vitiated without justification and the Court said that is a wrong we can correct now. We are not presuming that there is going to be --

QUESTION: Well, I think I read it differently. But assuming there is a presumption of prejudice at the end, does that affect your argument?

MR. GOTTESMAN: Well, if the Court said there will be an automatic reversal, it would affect --

QUESTION: No, just a presumption of prejudice.

MR. GOTTESMAN: I guess I don't know --

QUESTION: -- that affects the burden of proof, of course.

MR. GOTTESMAN: Right. I guess I don't know, Your Honor -- The reason it is hard for me to answer that is that I don't know what the implications of the presumption of prejudice will be. If the presumption will be overcome by arguments by the other side that say, look, this is a good lawyer, why should we think he did any less or any

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better than the first one. Then we are back in the same situation every court of appeals is talking about. We are guessing. We don't know. This is not in our competence to measure this.

That is why anything short of an absolute rule that says you reverse if this happens does not protect the client against the very serious injury that a different outcome may be obtained and it will never be detectable after the fact by any instrument the courts of appeals can use to measure that.

I would point out one other thing, one terrible consequence of that. If you can't get a post-judgment appeal because the courts are all saying they won't entertain it and if you can't get a pre-judgment appeal, there will never be the articulation of what standards should guide district courts in determining whether disqualification is proper or not. Every district court will be a barony unto itself applying whatever standards it wants. We saw that happening here. This District Court applied standards that everybody concedes are wrong. It could have gone on doing that for the rest of its career, whenever I see a pro hac vice lawyer I don't like I am going to disqualify him. And, there will be no means for correction, no means for articulating standards. That would fuel the very phenomenon that all the courts are talking about, the tactical abuses of motions

to disqualify. There is an epidemic of this now. For people who want to delay a trial, the greatest thing in the world is to file a motion to disqualify.

And, if the district courts are governed by any definable standards in ruling on those motions, everybody is going to have an incentive to do that. There is never any reason to think you will lose. How do we know, let's try. Maybe we can sell this idea to this judge.

It is only through the development of an appellate articulation of what the controlling standards are that we can ever have a definition of what district courts are supposed to do and yet if this Court says there are no interlocutory --

QUESTION: Of course, part of that cuts against the Flanagan rationale.

MR. GOTTESMAN: It cuts against Flanagan for a very important reason. In Flanagan nobody has got a motive to go out and try to disqualify lawyers. Prosecutors want to get their cases to trial. They don't want to delay it with disqualification motions.

But, in civil cases we know that there is an epidemic. Every circuit is writing about this. There is an epidemic of disqualification motions, efforts to delay trials by which every party has the interest in doing so. And, we need to have standards to prevent that.

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Now, the other part of Flanagan that distinguishes it is that the nature of the claim made in Flanagan was different. Here is the claim is the District Court has taken away our contract without justification. Sure, it is subject to being taken away if disqualification is proper, but it is not subject to be taken away otherwise.

In Flanagan the claim was that the Defendant's Fifth and Sixth Amendment rights were violated. And, as this Court explained very succinctly and clearly, it was an element of that claim that there be a conviction under improper circumstances. The claim, in other words, was not that the disqualification itself was improper. By invoking the Fifth and Sixth Amendments the claim was I am not going to get a trial that is a proper trial.

Because that was so, the Court was able to say in Flanagan the second criteria, that the issue decided be completely separate from the merits, is not present here since it is an element of the claim you are advancing that you ultimately be convicted in a way prejudiced you.

In our case, the claim being made is different. The claim is we had a contract. In our free society we were entitled to proceed with that contract. I as the client was entitled to have this lawyer represent me and there was a consummated wrong when the District Court vitiated that contract without cause. We don't need to know what

happens at the trial. To know that if the District Court did not have grounds for disqualification there was a reversible error.

Thank you.

ORAL ARGUMENT OF LAWRENCE E. WALSH, ESQ.

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. WALSH: Mr. Chief Justice, and may it please the Court:

Unless there are further questions, I would waive rebuttal.

QUESTION: I have one question, Mr. Walsh, that is prompted by Justice O'Connor's question about the whole prejudice problem.

MR. WALSH: Yes.

QUESTION: Based on something you said in your opening argument, would you think that there would be an absence of prejudice regardless of who has the burden if your client could show in the subsequent proceedings here that there were other counsel equally well recognized in the profession as those who were disqualified who would take the work -- substitute their same rate of pay and all the rest. Would that disprove prejudice?

MR. WALSH: Justice Stevens, we think it would. I think prejudice can't be measured over whether one question more was asked in cross examination or not, but with Mr.

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Stein, who incidentally is committed for the full commitment to these Plaintiffs --

QUESTION: But then does it not follow -- If that is an adequate disproof of prejudice, you will never have prejudice in any of these cases because the Bar is big enough. There is always another lawyer out there.

MR. WALSH: Let me give an example that occurred to me, Mr. Justice, where I think there could be a problem. If a person from New York with not such a good case -- where we have a strong, emotionally charged case like this, there would be no trouble getting the best lawyers in the country. But, supposing it was a weak case and a person came to the District from New York and didn't know the Bar and one thing or another and if the lawyer who came down is a friend to handle the case was disqualified, then I could see a problem. In that kind of a case I would think -- It goes to a question raised in Mr. Justice Rehnquist's concurrence in Firestone, that a court would reconsidered. There is nothing that forecloses further reconsideration here.

If Mr. Stein went to the court and became a judge and others went to the Department of Justice and were not available, even though the district judge might have strong reluctance to police Mr. Butler for a 12-week trial, I think there would be a basis for reconsideration on new evidence,

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but that is the example I --

QUESTION: It seems to me you are saying if the case is so weak that you don't care who represents the plaintiff, why, you would not worry about it.

MR. WALSH: I don't think that.

QUESTION: You could file a motion in that case.

MR. WALSH: I don't mean to minimize the case at all.

Thank you, Mr. Justice.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 11:56 a.m., the case in the above-entitled matter was submitted.)

* * * * *

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