

The Choice: Judge Sotomayor's Ethnicity v. Equal Justice Under Law¹

In a recent email concerning Judge Sonia Sotomayor of the U.S. Court of Appeals for the Second Circuit (CA2) and her nomination as Supreme Court Justice, the emailer asked, "Are we looking for symbolism or substance?, because I will only support her if it is the latter." Let's consider a summary¹ of some issues that are appropriate to answer that question and ask where the Judge stands on them. Their appropriateness rests on the fact that they concern the essence of the fair administration of "Equal Justice Under Law" and judicial integrity affecting all cases. Hence, there is no reason for a nominee not to address them by claiming that to do so would prejudice the outcome of future cases before her. As you read the summarized issues below, ask yourself whether any adverse effect that they may have on your professional success does not 'count' because the judge belongs to your ethnic group or is from your state.

1. **Pro-forma justice through summary judgment orders and unpublishable opinions.**² Your client pays his CA the appeal filing fee of \$455 as one of the "fees to be charged for services provided by the courts of appeals".³ The main service is to have it provide a dispositive answer to the "Issues presented for review". (FRAP 28(a)(5))⁴ A contract for services arises therefrom. However, CA2 implements its policy of caseload clearing through expediency "to utilize judicial time effectively" (FRAP CA2 Local Rule 32.1)⁵ The result is that "Approximately 75% of all cases are decided by summary order [, which] have no precedential authority."⁶ As such, those orders do not bind any judge in the circuit. Necessarily so since in the overwhelming majority of cases their only operative word is "AFFIRMED" or "DISMISSED" because they do not address, let alone answer, the questions presented. A reversal would require CA2 to state the reversible error and its legal grounds, how to avoid it on remand, what issues to retry, what evidence to include or exclude, etc....time-consuming details that defeat expediency.⁷ Now tell your client that neither the order is a mockery of justice and a breach of contract nor you are a bad lawyer, because the judge shares your ethnicity.
2. **Non-publication of orders and opinions protects their cursoriness.** In the 12 regional circuit courts the overwhelming majority of all "Opinion[s] or Order[s] Filed In Cases Terminated on the Merits After Oral Hearing or Submission on Briefs" is unpublished: 81.8%, but in CA2 it is 86.7%.⁸ They are practically unavailable and unknowable and meant to become secret since they are neither to be sought nor worth seeking given their non-precedential character. Even when they are "reasoned" and signed, CA2 judges themselves deemed them of such poor quality that they leave 86.5% of them unpublished. This allows for arbitrary, unprincipled, and capricious decision-making. They are not vehicles 'to do justice that must be seen done in public'; they are expedients of justice ashamed. They result from denial of equal protection. The 11% of litigants that got their day in court with a reasoned, signed, and published opinion paid the same \$455 filing fee as the 89% who only got to read on the court's closed door a rubberstamped summary order form or the notice of unpublishable "reasons". Did the ethnic judge help you build your reputation by her giving you 8 in 9 chances of your being dispatched with a cursory fiat, which increases its unreviewability?
3. **T-1080 Motion Information Statement to avoid reading by circling DENIED or GRANTED.**⁹ CA2 Local Rule 27 requires this form to accompany each motion as its top page. The movant must "Set forth below precise, complete statement of relief sought"...because the judges cannot bother to flip to the last page to read it there. That assumes that a judge will read it. The form itself reads "FOR THE COURT: CATHERINE O'HAGAN WOLFE, Clerk of Court, By: _____" This means that disposition of the motion is not even by the Clerk of Court, but rather by a subordinate clerk, who need not be a staff lawyer. So why would the judges ever bother to read your

researched “memorandum...with legal arguments” required under Local Rule 27 –or your brief– when a clerk can circle “DENIED” or “GRANTED” and get rid of it? In fact, CA2 judges have adopted “§ 0.18. Entry of Orders by the Clerk” providing that “The clerk shall prepare, sign and enter the following without submission to the court or a judge unless otherwise directed”. By the same token, judges can craft, whether in an unpublished writing or through practice, ‘Directions for Issuance by the Expediency Clerk’ of any motion-disposing or summary order concerning appeals that, for example, fall below a certain amount in controversy; involve a small law firm client against a big defendant able to appeal to the Supreme Court and embarrass CA2 due to its cursory opinion; or lead to...

4. **Incrimination in tolerating or running a bankruptcy fraud scheme.** In FY08 there were filed 1,043,993 new bankruptcy cases.¹⁰ This represented a 30% increase over the 801,269 in FY07. Yet the number of such type of case filed in the 12 regional CAs decreased 9% from 845 to 773.¹¹ So bankruptcy judges who allocate \$10s of bls. annually were all but sure that whatever they decided would stand since only 0.07% of all bankruptcy cases went to the CAs or only 1 in every 1,351 cases. Yet, 61,104 appeals were filed there. Moreover, since bankruptcy judges are appointed by circuit judges¹², the former are further assured that the latter will not overturn their rulings on appeal, which would cast doubt on their capacity to appoint competent bankruptcy judges and their collegial complicity. Judges that dispose of \$10s of bls. however they want with no adverse consequences have the most powerful incentive to engage in wrongdoing¹³: riskless enormous profit. Must you ethically disclose this to your client before taking his money?
5. **Systematic self-exemption from judicial discipline.** Circuit judges benefit from that risklessness, for they assure it. In the system of self-discipline set up in the Judicial Conduct and Disability Act¹⁴, they dispose of complaints against federal judges filed by any person. The 1oct96-30sep8 posted reports show that they abused that power by dismissing with no investigation 99.82% of the 9,466 complaints filed.¹⁵ Of the thousands of judges that served during those 12 years – 2,153 in 2008 alone¹⁶– only 7 were censured. They held themselves unaccountable, thus protecting their effective unimpeachability: In the 220 years since 1789 only 7 judges have been removed¹⁷. Yet, they exercised power over people’s property, liberty, and lives. Hence, they wielded absolute power, which corrupts absolutely.¹⁸ Judge Sotomayor is a member of the 2nd Cir. Judicial Council, which during those 12 years denied 100% of petitions to review complaint dismissals.¹⁹ She would not protect you from a corrupt judge, no matter your ethnicity.
6. **Judge Sotomayor’s participation in a bankruptcy fraud scheme cover-up.** With that attitude, Judge Sotomayor and other colleagues of her decided *DeLano*, which was appealed to the Supreme Court²⁰. They ruled in favor of their appointed bankruptcy judge’s non-disclosure of the whereabouts of at least \$673,657 of the most unlikely of ‘bankrupts’: a 39-year veteran banker who at the time of filing for bankruptcy was an M&T Bank bankruptcy officer! To protect such concealment of assets by a bankruptcy system insider preparing his debt-free golden retirement, they denied *every single document* in all creditor-requests intended to expose where the banker had stashed his salary and other receipts during his working life. Such denials were blatant violations of discovery rights. But when the top judges do wrong²¹, those below them do whatever they want. Due process is nobody’s doing, not even Judge Sotomayor’s.

You can use the process of confirming a Justice nominee to expose through a Watergate-like *Follow the Money!* investigation the institutionalized wrongdoing of Judge Sotomayor²² and her colleagues and thus contribute to “Equal Justice Under Law” regardless of ethnicity. This is your opportunity to become our generation’s Woodward/Bernstein or their editor, B. Bradlee. Use it to establish your professional reputation and render meritorious service to millions of litigants and the public at large who receive or are denied justice at the mercy of judges that administer it without having to worry about being held accountable and subject to discipline.²³ To that end, I offer to make a presentation of the evidence and the investigation before your colleagues.²⁴

- ¹ Petition to the U.S. Supreme Court for certiorari to the Court of Appeals for the Second Circuit, *Richard Cordero v. David DeLano et ux.*, docket 08-8382; http://Judicial-Discipline-Reform.org/US_writ/DrCordero-SCt_petition_3oct8.pdf >US:2467§XIII.A-B.
- ² Comments on the proposed permanent adoption of interim Local Rule § 0.23 on Summary Order without any opinion or appended explanatory statement; http://Judicial-Discipline-Reform.org/docs/CA2_summary_orders_19dec6.pdf.
- ³ Judicial Conference Schedules of Fees Court of Appeals Miscellaneous Fee Schedule (Issued in accordance with 28 U.S.C. §1913. Effective 01/01/2007); Federal Civil Judicial Procedure and Rules, 2008 Ed., Thomson West, p. 1014.
- ⁴ Federal Rules of Appellate Procedure and Local Rules of the Second Circuit; http://Judicial-Discipline-Reform.org/docs/CA2_rules.pdf; <http://www.ca2.uscourts.gov/rules.htm>.
- ⁵ Id.
- ⁶ <http://www.ca2.uscourts.gov/clerk.htm> >2nd Circuit Handbook, pg.17; http://Judicial-Discipline-Reform.org/docs/CA2_Handbook_9sep8.pdf >17.
- ⁷ See how Judge Sotomayor and her panel colleagues decided *Ricci v. DeStefano*, aff'd per curiam, 530 F.3d 87 (2dCir., 9 June 2008), 264 Fed.Appx. 106, 2008 WL 410436, involving white and black firefighters and raising substantial racial discrimination issues under the equal protection clause of the Constitution. Their decision was harshly criticized by one of their own CA2 colleagues, Circuit Judge Jose Cabranes, who wrote in dissent:

“The questions raised in this appeal...are indisputably complex and far from well-settled....Presented with an opportunity to address en banc questions of such "exceptional importance," Fed. R. App. P. 35(a)(2), a majority of this Court voted to avoid doing so.... the panel withdrew its summary order and published a per curiam opinion that contained the same operative text as the summary order...This per curiam opinion adopted in loco the reasoning of the District Court, without further elaboration or substantive comment, and thereby converted a lengthy, unpublished district court opinion, grappling with significant constitutional and statutory claims of first impression, into the law of this Circuit. It did so, moreover, in an opinion that lacks a clear statement of either the claims raised by the plaintiffs or the issues on appeal. Indeed, the opinion contains no reference whatsoever to the constitutional claims at the core of this case...**This perfunctory disposition** rests uneasily with the weighty issues presented by this appeal.” (emphasis added)

Nevertheless, the majority of the court voted not to hear the case en banc, thereby upholding the summary/per curiam order. As a result, CA2 Chief Judge Dennis Jacobs criticized “a Circuit "tradition" of deference to panel adjudication. In effect, this has become a Circuit tradition of hearing virtually no cases in banc....But to rely on tradition to deny rehearing in banc starts to look very much like abuse of discretion.” http://Judicial-Discipline-Reform.org/docs/Ricci_v_DeStefano.pdf. On petition for certiorari, the Supreme Court announced on June 29, 2009, that it had overturned the decision; <http://www.supremecourtus.gov/opinions/08slipopinion.html>.
- ⁸ Table S-3; U.S. Courts of Appeals—Types of Opinions or Orders Filed in Cases Terminated on the Merits: Unpublished opinions; Judicial Business of the U.S. Courts, 2008 Annual Report of the Director of the Administrative Office of the U.S. Courts (AO); James C. Duff; <http://www.uscourts.gov/judbus2008/JudicialBusinesspdfversion.pdf> >p.44; collected at http://Judicial-Discipline-Reform.org/statistics&tables/caseload/how_CAs_terminate_cases.pdf
- ⁹ <http://www.ca2.uscourts.gov/forms.htm> >T-1080 (Motion Information Statement).
- ¹⁰ “November 25, 2009—Bankruptcy cases filed in federal courts for fiscal year 2009 totaled 1,402,816, up 34.5 percent over the 1,042,993 filings reported for the 12-month period ending September 30,

the U.S. Courts. That is a 35 percent increase compared to filings for the 12-month period ending June 30, 2008, when cases totaled 967,831.” Bankruptcy Filings Continue Rise in June, News Release of the Administrative Office of the U.S. Courts; http://www.uscourts.gov/Press_Releases/2009/BankruptcyFilingsJun2009.cfm; also at http://Judicial-Discipline-Reform.org/statistics&tables/bkr_stats/bkr_filings_to_june9.pdf.

- ¹¹ http://www.uscourts.gov/ttb/2009-01/article02.cfm?WT.cg_n=TTB_Jan09_article02_teaserTitle; also at http://Judicial-Discipline-Reform.org/statistics&tables/caseload_SCt_report_08.pdf.
- ¹² 28 U.S.C. §152. Appointment of bankruptcy judges; http://Judicial-Discipline-Reform.org/docs/28usc151-159_bkr_judges.pdf.
- ¹³ “Republican Suggests a Judicial Inspector General”, David Kirkpatrick, *NYTimes*, May 10, 2005; <http://www.nytimes.com/2005/05/10/politics/10watchdog.html>. “Specter Speaks on the Senate Floor Regarding the Televising of Supreme Court Proceedings”, Sen. Arlen Specter, News Room, January 29, 2007; http://Judicial-Discipline-Reform.org/docs/Sen_Specter_on_SCt.pdf
- ¹⁴ 28 U.S.C. §§351-364. Judicial Conduct and Disability Act of 1980; http://Judicial-Discipline-Reform.org/docs/28usc351_Conduct_complaints.pdf.
- ¹⁵ Table S-22 [previously S-23 & S-24] Report of Complaints Filed and Action Taken Under Authority of 28 U.S.C. §§351-364, produced by the Administrative Office of the U.S. Courts pursuant to 28 U.S.C. §604(h)(2); <http://www.uscourts.gov/judbususc/judbus.html>; see also 28 U.S.C. §332(g); collected at http://Judicial-Discipline-Reform.org/statistics&tables/judicial_complaints.pdf.
- ¹⁶ http://Judicial-Discipline-Reform.org/statistics&tables/num_jud_officers/jud_officers_08.pdf.
- ¹⁷ <http://www.fjc.gov/history/home.nsf> >Judges of the U.S. Courts>Impeachments. Judicial Act of 1789, ch. 20, 1 Stat. 73-93; http://Judicial-Discipline-Reform.org/docs/Judiciary_Act_1789.pdf
- ¹⁸ Here are applicable the aphorisms of Lord Acton, Letter to Bishop Mandell Creighton, April 3, 1887: “Power corrupts, and absolute power corrupts absolutely”, and 1 Timothy 6:10: ‘Money is a root of all evil and those pursuing it have stabbed many with all sorts of pains’: When unaccountable power, the key element of absolute power, strengthens the growth and is in turn fed by the root of all evil, money, the result is that both corrupt absolutely. http://Judicial-Discipline-Reform.org/Follow_money/Dynamics_of_corruption.pdf
- ¹⁹ Ent. 13 supra. See also http://Judicial-Discipline-Reform.org/JNinfo/25Committee/2DrCordero-petition_25feb9.pdf >N:51¶¶1-4; N:39 and 47.
- ²⁰ Ent. 1 supra, *Petition for certiorari*, 08-8382, SCt, at US:2456§X. See also http://Judicial-Discipline-Reform.org/US_writ/2DrCordero-SCt_rehear_23apr9.pdf. The decision in *In re DeLano*, 06-4780, CA2, by the CA2 panel of which Judge Sotomayor was a member is an exhibit in both of those briefs at CA:2180. See also the appeal brief in CA2; http://Judicial-Discipline-Reform.org/docs/DrCordero_v_DeLano_06_4780_CA2.pdf >CA:1746§IX; and the petition for panel rehearing and hearing en banc at http://Judicial-Discipline-Reform.org/docs/DrCordero_v_DeLano_CA2_rehear.pdf.
- ²¹ http://Judicial-Discipline-Reform.org/SCt_nominee/JSotomayor_integrity/12table_JSotomayor-financials.pdf
- ²² “Sotomayor Rose High, with Few Assets”, Joe Stephens, *The Washington Post*, May 7, 2009; http://voices.washingtonpost.com/44/2009/05/07/sotomayor_rose_high_with_few_a.html?sid=ST2009050702123; “N.Y. Federal Judge Likely on Shortlist”, Keith B. Richburg, *The Washington Post*, May 7, 2009; <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/06/AR2009050603762.html>; and “For a justice, Sonia Sotomayor is low on dough”, Josh Gerstein, *Politico*, May 28, 2009; <http://www.politico.com/news/stories/0509/23045.html>.
- ²³ http://Judicial-Discipline-Reform.org/Follow_money/why_j_violate_due_pro.pdf
- ²⁴ http://Judicial-Discipline-Reform.org/DeLano_course/14Law/1DrCordero-Dean.pdf >11