

Judicial Profile

LUKE MCGRATH

Hon. Jed S. Rakoff U.S. District Judge, Southern District of New York

JUDGE JED S. RAKOFF has received a great deal of press coverage. Some of that press paints him as a rogue judge, an activist, or a harsh taskmaster. Whether readers consider these labels true or not depends on their perspective—that is, is it the role of the judiciary to hold the executive branch (embodied, for example, by the Securities and Exchange Commission) to task? Does the reader consider it

onerous for lawyers to keep to previously agreed-upon schedules? Perspective is a funny thing. For example, many people consider lawyers to be at the bottom of the moral and ethical food chain. From this perspective, highly paid lawyers are the tools used by the rich and powerful to escape from, rather than conform to, legal norms. This is one perspective. And Judge Rakoff disagrees with this view. Rather, Judge Rakoff believes that lawyers have gotten a bad rap. This point is important to the judge, who has previously been hard on lawyers himself in both written and public statements. However, according to Judge Rakoff, notwithstanding his previous critiques of certain lawyers, the profession as a whole should be lauded, not disparaged.

Judge Rakoff's Background

Jed Rakoff was born in Philadelphia on Jan. 1, 1943. As a young man, he graduated from Swarthmore College with honors, receiving his B.A. in English literature in 1964. After earning his M.Phil. from Balliol College at Oxford University in 1966, he went on to earn a J.D., cum laude, from Harvard University Law School in 1969.

Rakoff served as a law clerk to the late Hon. Abraham Freedman of the U.S. Court of Appeals for the Third Circuit, after which he spent two years as an associate at Debevoise & Plimpton before joining the U.S. attorney's office for the Southern District of New York. He served as a federal prosecutor for seven years and became the chief of the Business and Securities Fraud Prosecutions Unit. After leaving public service, he became a partner with Mudge, Rose, Guthrie, Alexander & Ferdon, and later with Fried, Frank, Harris, Shriver & Jacobson. He headed both firms' criminal defense and civil Racketeer Influenced and Corrupt Organizations Act (RICO) sections.



On the recommendation of Sen. Daniel Patrick Moynihan (D-N.Y.), on Oct. 11, 1995, President Bill Clinton nominated Rakoff to the U.S. District Court for the Southern District of New York. The Senate confirmed his nomination on Dec. 29, 1995, and he was appointed on Jan. 4, 1996. Judge Rakoff took the bench on March 1, 1996, filling the seat vacated by David N. Edelstein.

Currently, in addition to his busy schedule as a federal judge, Rakoff is a lecturer in law at Columbia University Law School, where he teaches a seminar on white-collar crime in the fall and a seminar on the interplay of civil and criminal law in the spring. He is a leading authority on the law related to white-collar crime and has authored many articles on the topic, in addition to leading treatises on RICO and corporate sentencing. Judge Rakoff is also becoming a leading authority on the application of science in the courtroom.

The Walls Adorned Inside His Chambers

One of the books on the coffee table outside Judge

Rakoff's office within his chambers is entitled *Adorn the Walls: A History of the Art Collection at Thomas Jefferson University*, by Julie Berkowitz. And Judge Rakoff has certainly done so. The walls are adorned with 14 pictures of his clerks (three clerks in each photograph) centered around one picture taken at the celebration of the judge's 10-year anniversary on the bench. Following the wall up and around the door to the office of the judge's current clerks, a visitor will be delighted to see two large frames containing numerous baby pictures of the offspring of the judge's law clerks. Also included are two large colorful modernist paintings evoking Venice and the Italian countryside by C. Lewis and dated 1974 as well as a series of three bright watercolors painted by Guna Mundheim, whose husband, Robert Mundheim, the former dean of University of Pennsylvania Law School, was Judge Rakoff's partner at Fried Frank. Other artwork, photos, and cartoons of the judge abound. Finally, a Judge Rakoff "bobble-head" doll completes the art collection.

Judge Rakoff's Take on Lawyers and the Legal Profession

In our interview, Judge Rakoff posed a rhetorical question: Why is it that lawyers have such low public esteem? As far as Judge Rakoff is concerned, the answer may comment poorly on the public's understanding of a lawyer's role in society rather than on the ethics or morality of members of the bar. Judge Rakoff thinks that the public tends to view the world in black-and-white terms, whereas lawyers understand that life may not be so simple. The judge explains that life is replete with nuance—there may be 10 different sides to one story. Nonetheless, people want answers, he says. The public is infuriated when a straight answer from a lawyer is not forthcoming or, for example, when an accused wrongdoer gets off on a "technicality." Judge Rakoff is quick to point out that "it depends" is a legitimate answer for a lawyer when a legal question is fact-intensive or involves the balancing of equities. Similarly, as it turns out, the technicality may be one of the protections provided by the Constitution of the United States.

According to Judge Rakoff, the problem lies with our adversary system, under which a lawyer is obligated to look for competing views to counter an adversary's argument—indeed, to test and challenge that argument, even if this is done merely through a general denial. Rakoff notes that such a system may not appeal to people who prefer their heroes to be unilateral, foolproof, and always right. Judge Rakoff reminds us of the old defense counsel cliché: If you don't have the law, argue the facts; if you don't have the facts, argue prosecutorial misconduct. Of course, it is not unethical to make an argument unless it offends Rule 11 (or similar rules in state courts). The question is whether the argument is colorable enough. A lawyer's use of obfuscation and diversionary tactics may be the price we pay for our adversarial system.

Nevertheless, lawyers cannot get away with such

antics in Judge Rakoff's court. The judge believes that diversionary tactics or obfuscation work only when a judge is too busy to give the case the attention required to see beyond the smoke screen—and Judge Rakoff pays attention. Still, Judge Rakoff believes that all judges can recall a case in which they realized, in the end, that they almost got it wrong. Judge Rakoff confides that, when he has these moments he wonders, "Gee, did one like that ever get by me?"

Judge Rakoff also thinks about state court dockets and admits that state court judges are overwhelmed. He is quick to say that, in his experience, he has found state court judges to be bright and hard-working individuals, who are not "hacks" in any way, as some have accused elected judges to be. Still, because of these judges' workloads, they are forced either to make a snap judgment or to adjourn the matter hoping that the case will be settled. According to Judge Rakoff, the same is true in India, where, he reports, judges are superb and would be considered the jewels of any legal system. However, because of the backlog of cases in India's court system, appellate judges are faced with determining cases that are 10–15 years old, and, because of the passage of time, their decisions ring hollow. This is why Judge Rakoff has a reputation for pushing lawyers to move cases along; he recalls that justice delayed is justice denied.

The judge's approach doesn't mean that lawyers can't get an extension of time if they need it. Judge Rakoff believes that professional courtesy is important; however, he also insists that a lawyer's ultimate duty is to his client, and delay may be contrary to that duty. Rakoff respects the lawyers who appear before him and agree to give their adversaries a requested extension but keep the time frame scheduled for their reply the same. This type of behavior scores points with Rakoff, who appreciates lawyers who display professional courtesy but also remain committed to their duty to their respective clients to push the litigation forward.

Law School and Law Clerks

Judge Rakoff confides that he did not particularly like law school (demonstrating that he is an honest man) but, nonetheless, he found law school to be a valuable experience. In fact, the classes that Judge Rakoff found the least exciting turned out to be the most valuable. It was in law school that Judge Rakoff realized that, although he may have been smart, his thinking was sloppy. He learned that the difference between sloppy thinking and sharp thinking is reason. Law school drums the sloppy thinking out of law students. The subject matter can be dry and narrow because it is not practical, but it is the law school methodology and process that are important—not the subject matter.

Good lawyers benefit from both law school training and practical experience. There is a trend toward law schools providing clinical, practical programs designed to teach young lawyers legal skills that are usually gained in practice and in the courtroom. The judge

thinks that these are positive developments: Judge Rakoff's brother, Todd Rakoff—a longtime full professor at Harvard Law School to whom Judge Rakoff refers as his “smarter, younger brother”—has recently inaugurated such a program. Still, when evaluating prospective law clerks, Judge Rakoff is not overly concerned about whether a candidate took courses dealing with federal courts or specialized subject matter (of course, a candidate cannot be completely ignorant of procedure and should know the difference between a motion to dismiss and a motion for summary judgment). Instead, Judge Rakoff looks for clear-thinking lawyers, who can analyze beyond the superficial. He reviews candidates' grades in traditional classes, because grades are comparable across law schools. This is not to say that other grades are not important, but, as all law students should know, the first-year grades are the crucial grades in any law student's career.

Court-Appointed Monitors

Judge Rakoff is well known for the successful resolution of the case against Worldcom, in which he appointed Richard Breeden to monitor Worldcom as part of a settlement with the SEC. Judge Rakoff believes that court-appointed monitors are a valuable tool, but he recognizes that there may be a danger of cronyism or the perception of cronyism. He fears that, whether a monitor is selected by the judge or by the parties, instances of cronyism in the process may undermine the public's perception of court-appointed monitors. In the Worldcom case, the SEC and corporate counsel approached the court with a proposed monitor. Rakoff responded, “I want three names” and told the parties that he would consider appointing a monitor but that he would choose the most qualified out of three candidates the parties proposed. The parties came back with three names, and Richard Breeden was the most qualified to serve as monitor in the case. Judge Rakoff was flying without a net at the time—there were no guidelines or legislated rules governing the appointment of monitors. Judge Rakoff states now that he would have been happy if the procedure he used had been a mandatory procedure.

In a much smaller case, Judge Rakoff needed to appoint a special master, and the parties gave him three names—one of which was a former state court judge. Judge Rakoff had never met the proposed candidate but told the parties that he had a slight prejudice against appointing the former judge, because Rakoff wished to avoid the appearance of cronyism. In the end, Judge Rakoff appointed one of the other candidates. Later, Judge Rakoff ran into the former judge at an event. The former judge lambasted Rakoff, scolding him because it was apparent the two had had no former relationship, and, thus, no cronyism could have existed. Rakoff believes that there is some truth to that. In addition, Rakoff acknowledges that judges may wish to appoint former judges from “down the hall,” because they know those judges to be fair and impartial. Accord-

ingly, Judge Rakoff would not be totally opposed to regulation in this area because of the pitfalls involved in the process and the need for transparency in the standards being brought to bear.

Another danger arises when a monitor or a bankruptcy trustee with a “big name” is appointed, but that person does not actually do the work. Judge Rakoff admits that there are “big names” who do perform the work themselves, but there are some who delegate the assigned work to other lawyers or consultants. These helpers may be talented, but they are not the individuals the judge thought he was getting when he appointed the “big name.” With a private client, the client can demand that the lawyer he hired do all the work, or, alternatively, the client can request information about the associates doing the work and can ensure that the team a firm uses meets the client's approval. None of that inquiry is usually available to a judge appointing a monitor or a trustee.

Judicial Decision-Making

It is not surprising that Judge Rakoff makes his own decisions. In fact, he always writes his own opinions, although he sometimes starts with a draft written by one of his law clerks. His law clerks work hard: they write bench memos and conduct extensive research that is included in all of the judge's written opinions. Still, when he does start with a law clerk's draft, the final product looks very different from what it was at the start. Every year, Judge Rakoff's clerks prepare a dinner at which they present a comedic skit at his expense. Last year, a former clerk held up his draft and compared it to the judge's final opinion and pointed out that only three words remained the same.

Judge Rakoff recognizes that other judges may not write their own opinions. For example, Judge Rakoff recounts that Supreme Court Justice William J. Brennan rarely, if ever, wrote his own opinions. Justice Brennan would discuss three things with his clerks: (1) the way he wanted the opinion to come out, (2) the reason he wanted it to come out that way, and (3) his reasoning. He would then review his law clerks' work and make needed changes.

Judge Rakoff also may differ from other judges when it comes to oral argument: he loves it and includes it in almost every motion. He notes that other judges—like Michael B. Mukasey, a former judge and U.S. attorney general in the George W. Bush administration—do not feel the same need for oral argument. According to Judge Rakoff, Judge Mukasey was able to make his decisions based on the papers submitted by the parties. Judge Rakoff doesn't think he is smart enough to do that. He notes that the Second Circuit's recent change in its local rules—which has the effect of making oral argument discretionary—is the result of pressure from an overloaded docket of immigration appeals. He would not be thrilled by a reduction in oral arguments in the circuit. After oral argument, the judge asks his clerks what they think but, generally, they always claim that

the judge persuades them that his decision is the right one. Once in a blue moon, a law clerk may convince the judge to change his mind or to look at an issue that he had not seen. The mark of a stellar law clerk is one who points out an argument that a party made and Judge Rakoff has missed.

Family, Dancing, Comedy, Baseball, Bridge, and Science

Judge Rakoff's biggest interest and passion is his family. Ann Rakoff, whom the judge describes as his "long-suffering wife of 35 years" is the executive director of the Corporate Law Center at Fordham University Law School. His wife and three daughters (Jena, Elana, and Keira) are everything to him. The judge's secondary passions include ballroom dancing (which he shares with Ann in partnership), baseball, bridge, and science. Another interest is writing the dialogue and lyrics for the "Judge's Skit" in the satirical show called "The Courthouse Follies," which is performed each Christmas by, and for, the courthouse staff. Judge Rakoff not only writes for the show but also has performed in the skit along with other Southern District jurists each year for the last decade.

Most recently, the judge has become interested in science in the courthouse. He originally became interested in the role of science in the law while participating in the planning of the MacArthur Foundation Initiative on Law and Neuroscience. Building on that experience, Judge Rakoff also serves on the Committee on the Revision of the Federal Judge Manual on Scientific Evidence. In addition, the judge participated on the committee formed to review the scientific approaches used during the FBI's investigation of the 2001 anthrax mailings.

Judge Rakoff notes that most judges have a limited background in science—if any—but they are often called upon to make decisions based on scientific evi-

dence as a result of the U.S. Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) or generally in complex commercial disputes. Judge Rakoff gives credit to U.S. District Judge Barbara Rothstein, who runs the Federal Judicial Center, which develops great programs to train "baby judges" who are new to the bench and, also, provide continuing legal education for all serving federal judges. The judge recognizes, however, that it is hard to educate federal judges in every area, because most judges have very little scientific background. Judge Rakoff believes that the wave of the future will include more science in the courts, and judges will need to be able to differentiate between good science and bad science.

Science comes easy for Judge Rakoff, because he has an advantage—not only is he a sharp thinker, but science also runs in his family. The book on the coffee table in his chambers, *Adorn the Walls*, has a post-it at pages 508–509. The two pages are devoted to the oil on canvas portrait inscribed Abraham E. Rakoff, M.D., 1913–1981. Walter Stuempfig Jr. (1914–1970) painted the portrait in 1966, and it was donated to the university by the Jefferson Medical College Class of 1964. The painting depicts a scholar—a man of science—with a microscope at his side: Judge Rakoff's father. Also on the coffee table is a book by Judge Rakoff's brother, *A Time for Purpose: Law and the Balance of Life* by Todd D. Rakoff (Harvard University Press, 2002). Dr. Abraham Rakoff's two sons—Jed the judge and Todd the Harvard law professor—are both scholars and chips off the old block. **TFL**

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