

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

IN RE: JEFFREY AUERHAHN ) MBD No. 09-10206  
PASQUALE BARONE )  
 )  
 v. ) Civ. No. 98-11104-MLW  
 )  
 UNITED STATES OF AMERICA )  
VINCENT FERRARA )  
 )  
 v. ) Civ. No. 00-11693-MLW  
 )  
 UNITED STATES OF AMERICA )

MEMORANDUM AND ORDER

WOLF, C.J. and D.J.

September 25, 2009

I. SUMMARY

Respondent Jeffrey Auerhahn has filed A Motion to Clarify Order to Seal to which Bar Counsel assents. He has also filed a Motion to Recuse or Disqualify, which Bar Counsel opposes as unnecessary. The motions request that the disciplinary case against Auerhahn, M.B.D. No. 09-10206, be assigned now to Judge Joseph Tauro. The motions also in effect request that: I recuse myself as the presiding judge in the 28 U.S.C. §2255 cases that generated the disciplinary action against Auerhahn, Ferrara v. United States, Civ. No. 00-11693-MLW, and Barone v. United States, Civ. No. 98-11104-MLW, and the related criminal case of United States v. Patriarca, Cr. No. 89-00289-MLW; that I direct that Barone and Ferrara be reassigned to Judge Tauro; and that Judge

Tauro decide Auerhahn's request for disclosure of the few sealed matters in Barone and Ferrara not already provided to Auerhahn in discovery. I have consulted Judge Tauro, who agrees that I should decide the pending motions.

As explained below, with regard to the disciplinary action, as the complainant and Chief Judge I have gone beyond the requirements of the Local Rules of the United District Court for the District of Massachusetts ("L.R.") to have Judge Tauro, the judge next senior in service, decide Auerhahn's previous requests for action favorable to him not provided for by the Local Rules. In addition, prior to the submission of the pending motions, I had directed that the disciplinary proceedings concerning Auerhahn, MBD No. 09-10206, be reassigned to Judge Tauro. That reassignment is being made in connection with the issuance of this Memorandum and Order. Therefore, the motion requesting reassignment of MBD No. 09-10206 to Judge Tauro is moot.

There is, however, not a proper basis for my recusal in the Ferrara and Barone 28 U.S.C. §2255 cases, or the underlying criminal Patriarca case. In the existing circumstances, recusal would be an abdication of my duty to provide any necessary clarification of my previous orders and to decide the few remaining issues concerning disclosure of documents that I ordered sealed. I am the only judge familiar with the hundreds of docket entries in the Ferrara and Barone §2255 cases, and the thousands of docket entries in Patriarca. It would be neither practical nor in the

interests of the administration of justice for me to delegate my responsibility for deciding the few remaining issues concerning discovery of documents that were sealed in those cases, at times because of concern for the safety of individuals involved and at times because the government did not want sensitive law enforcement information publicly revealed. Therefore, to the extent that the motions request my recusal in the Ferrara, Barone, and Patriarca cases, they are being denied.

In addition, the requested clarification of my previous orders concerning discovery is being provided.

## II. BACKGROUND

A judge has an ethical obligation to "initiate appropriate action when the judge becomes aware of reliable evidence indicating the likelihood of unprofessional conduct by a lawyer." Canon 3(B)(3) of the Code of Conduct for United States Judges (2000). The Local Rules establish standards and procedures for the District Court to decide whether an attorney should be disciplined by the Court for professional misconduct. See L.R. 83.6(5). If a judicial officer becomes aware of misconduct that warrants discipline, he may refer the matter to Bar Counsel or another attorney for prosecution of disciplinary proceedings. See L.R. 83.6(5)(A) and 83.6(9). To initiate formal disciplinary proceedings, counsel must request and obtain an order that finds probable cause to support specified charges and gives the respondent-attorney an opportunity to show cause why he should not

be disciplined. See L.R. 83.6(5)(C). If the respondent-attorney's answer justifies a hearing, the Chief Judge, who traditionally handles all disciplinary matters up to that point, establishes a panel of three judges of the District Court to decide the matter. See L.R. 83.6(5)(D). However, if the Chief Judge is the complainant who initiated the disciplinary action the Local Rules provide that he may not sit on that panel and at that time "the member of the court who is next senior shall assume his responsibilities in the matter." Id.

The Local Rules do not provide an attorney subject to a disciplinary complaint a right to discovery before a three-judge panel is established. Nor do the Local Rules provide for anyone but the Chief Judge to act for the District Court before the appointment of such a panel is required.

In June, 2007, I initiated disciplinary action against Auerhahn after my finding in Ferrara v. United States, 384 F. Supp. 2d 384 (D. Mass. 2005), that he engaged in intentional misconduct in failing to turn over crucial exculpatory information to Ferrara was affirmed by the First Circuit. See Ferrara v. United States, 456 F.3d 278 (1st Cir. 2006). In Ferrara, the First Circuit characterized Auerhahn's misconduct as "egregious," "outrageous," and "blatant." Id. at 291, 293. The First Circuit had also found that Auerhahn "deliberately chose not to reveal to [Ferrara] the stunning [exculpatory] evidence" that he had withheld. Id. at 297. In June, 2007, Auerhahn was sent a copy of the letter to Bar

Counsel initiating the disciplinary action against him.

By July, 2009, Auerhahn had been informed by Bar Counsel that she would file a petition for an order directing that he be required to show cause why he should not be disciplined. He was evidently also advised of the particular charges that would be made in the petition. Auerhahn filed a motion requesting the production of discovery to him before Bar Counsel's petition was filed. As reflected in a June 11, 2009 Sealed Order,<sup>1</sup> I had "assumed that the three-judge court that will be convened pursuant to Local Rule 83.6(5)(D) if Mr. Auerhahn disputes the charges against him would decide the parameters of permissible discovery pursuant to the protective order I have issued restricting use of certain documents and information to the litigation of the disciplinary proceedings and pursuant to any further restrictions that the panel may deem appropriate." July 28, 2009 Order at 2.

As indicated earlier, the Local Rules and established practice contemplate that I, as Chief Judge, would resolve any issues arising before a three-judge panel is established, including whether any pre-petition discovery was permissible and appropriate. However, I decided that because I was the complainant it would be preferable to ask Judge Tauro to decide the general issue of whether "providing any discovery to Mr. Auerhahn now [before the filing of Bar Counsel's petition] is permissible and justified."

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<sup>1</sup>The June 11, 2009 sealed order has been provided to Auerhahn.

July 28, 2009 Order at 3. I did not delegate to Judge Tauro the duty or authority to decide whether particular documents impounded by me in the Ferrara and Barone §2255 cases, or the related criminal Patriarca case, should be unsealed. Rather, I stated that "[i]f Judge Tauro decides that Mr. Auerhahn should be granted some discovery now, I will modify the June 11, 2009 protective order to permit appropriate discovery subject to a protective order comparable to that imposed on Bar Counsel." Id. (emphasis added).

Neither Judge Tauro nor any other judge has the authority to enter orders in the Ferrara, Barone, or Patriarca cases, which were assigned to me long before I became Chief Judge. Therefore, I had a Miscellaneous Business Docket matter opened and captioned "In re: Jeffrey Auerhahn MBD No. 09-10206" in order to create a case in which Judge Tauro could properly act. July 28, 2009 Order at 3, ¶2.

On August 3, 2009, Auerhahn filed in MBD No. 09-10206 a motion to unseal documents impounded in the Ferrara and Barone §2255 cases. In an Order dated August 12, 2009, and docketed and issued on August 20, 2009, Judge Tauro allowed the request for pre-petition discovery and referred the matter to me "for issuance of implementing order." On August 21, 2009, as the presiding judge in the Ferrara and Barone §2255 cases, I issued an Order directing Bar Counsel to make available to Auerhahn all of the documents and information provided to Bar Counsel by the court with the exception

of several pages of a transcript inadvertently provided to her without an intended redaction regarding a person who continues to be concerned about his or her safety. See Aug. 21, 2009 Order at 3. As explained in that Order, if a three-judge panel is established, I will consider further providing all of the sealed information concerning that individual to Bar Counsel and Auerhahn.<sup>2</sup> Id. As a result of the August 21, 2009 Order, Auerhahn received access to sealed information provided to Bar Counsel from the criminal case against Ferrara and Barone, Patriarca, in addition to information sealed in the §2255 cases that were the sole subject of Auerhahn's motion.

Auerhahn subsequently filed a motion to seal what he understood was a forthcoming petition of Bar Counsel for an order requiring that he show cause why he should not be disciplined. Bar Counsel opposed that motion. The Local Rules do not provide for the sealing of such petitions, either before or after a show cause order has been issued. See L.R. 83.6(5)(C). Nor has it been the practice to seal such petitions. See, e.g., In re: Lafayette, No. 08-MC-10132 (Docket No. 12); In re Sohmer, No. 08-MC-10275 (Docket No. 3). "Judge Tauro [] asked that I decide the [] motion to seal [the petition], in part because a petition formally invoking his involvement ha[d] not yet been filed and in part because the motion implicate[d] other disciplinary matters which I, as Chief Judge,

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<sup>2</sup>I expect I will do so after again giving the individual concerned notice and an opportunity to be heard.

[had] decided and [was] familiar with." Aug. 27, 2009 Memorandum and Order at 2.

I issued a sealed Memorandum and Order directing that the petition be filed under seal, at least temporarily. Id. at 12. I also explained that the Local Rules do not provide for the sealing of petitions seeking show cause orders, it has not been the practice of this District Court to seal such petitions, and in my view it would be contrary to the public interest to keep the Auerhahn petition under seal and, as Auerhahn requested, to have all submissions and proceedings concerning the petition closed to the public. Id. at 2-12. However, the Order that I issued expressly "provide[d] Judge Tauro an opportunity to decide whether the petition establishe[d] probable cause to believe that Mr. Auerhahn engaged in professional misconduct and, if so, to consider further whether the petition should remain sealed." Id. at 12.

The petition concerning Auerhahn was filed under seal. Judge Tauro found that it presented probable cause to believe that Auerhahn had engaged in the professional misconduct it alleged and should be disciplined. See Sept. 1, 2009 Order. Judge Tauro also decided that the petition should be made part of the public record and ordered that it be unsealed. Id.

On September 8, 2009, I ordered that my August 27, 2009 Memorandum and Order be unsealed. See Sept. 8, 2009 Order. Expecting that the next submission in the disciplinary proceeding

would be a response to the petition by Auerhahn which would require the appointment of a three-judge panel, I directed the Deputy Clerk to have MBD No. 09-10206 reassigned to Judge Tauro. That reassignment is being made in connection with the issuance of this Memorandum and Order. Therefore, as indicated earlier, Auerhahn's request for such a reassignment is moot.

### III. THE REQUEST FOR MY RECUSAL IN THE FERRARA, BARONE, AND PATRIARCA CASES

Auerhahn's motion for clarification and additional discovery of sealed documents and information from the Ferrara and Barone §2255 cases requires an exercise of my authority as the presiding judge in those matters, rather than the discharge of the duties of the Chief Judge. A judge of this court does not have the authority to order the unsealing of documents or information impounded by another judge in a case assigned to the other judge. Therefore, for example, when documents and transcripts that I ordered sealed in a case involving James Bulger, Stephen Flemmi, and Francis Salemme became relevant in criminal cases pending before other judges, motions requesting access to those impounded materials were filed in my case and acted on by me. See, e.g., United States v. Salemme, Cr. No. 94-10287-RGS, Feb. 28, 2005 and May 3, 2006 Orders (Docket Nos. 2297 and 2304) (authorizing, upon request of counsel and Judge Richard Stearns, counsel for Salemme in another criminal case against him assigned to Judge Stearns to have access to

exhibits that I sealed in my Salemme case, and retaining my authority to decide upon specific request whether any sealed transcripts should be disclosed).<sup>3</sup> Accordingly, Judge Tauro would have the authority to decide Auerhahn's motion for clarification and request for additional discovery of documents sealed in the Ferrara and Barone §2255 proceedings, and the related Patriarca criminal case, only if I recuse myself and those cases are reassigned to him.

Auerhahn is not a party to the Ferrara, Barone, or Patriarca §2255 cases. Therefore, he does not have standing to move for my recusal because of any purported personal prejudice under 28 U.S.C. §§144 or 455(b)(1). See §144 ("Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit . . . .") (emphasis added); §455(b)(1) (judge shall disqualify himself "[w]here he has a personal bias or prejudice concerning a party") (emphasis added); Hinman v. Rogers, 831 F.2d 937, 939 (10th Cir. 1987) ("Under §144, the only claim of bias to be considered is that against a party."). In any event, a motion to disqualify a judge pursuant to §144 requires that "a party . . . file a timely and sufficient affidavit" alleging personal bias or prejudice against him or in favor of an adverse party. See 28 U.S.C. §144. No affidavit has been filed in support of the request

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<sup>3</sup>Comparable orders were issued by me, at times under seal, in connection with criminal cases against John Connolly and Stephen Flemmi which were assigned to other judges.

that I recuse myself, and arrange for Judge Tauro to decide the motion for clarification and additional discovery of sealed documents. Therefore, no attempt to invoke §144 has been made.

Even if Auerhahn had standing to seek my disqualification for personal bias under §455(b)(1), my recusal in the Ferrara, Barone and Patriarca cases would not be necessary or appropriate. Usually an extrajudicial source of information is required to establish that recusal is required under §455(b)(1) because of actual prejudice. See Liteky v. United States, 510 U.S. 540, 551 (1994). There is in this matter no suggestion that I have an extra-judicial source for any purported prejudice against Auerhahn.

Recusal because of actual prejudice under §455(b) can be based on matters occurring in judicial proceedings only if "it is so extreme as to display clear inability to render fair judgment." Id.

"In determining whether a judge must disqualify himself under 28 U.S.C. sec. 455(b)(1), the question is whether a reasonable person would be convinced the judge was biased." Hook v. McDade, 89 F.3d 350, 355 (7th Cir. 1996) (internal quotation omitted). Recusal under Section 455(b)(1) "is required only if actual bias or prejudice is proved by compelling evidence." Id.

Brokaw v. Mercer County, 235 F.3d 1000, 1025 (7th Cir. 2000). I have no personal prejudice against Auerhahn and, for the reasons described below, an informed, reasonable person would not question my ability to decide impartially the remaining discovery matters, let alone be convinced that I am actually prejudiced against Mr.

Auerhahn.

The main thrust of Auerhahn's argument is that I should recuse myself in Ferrara, Barone, and Patriarca pursuant to 28 U.S.C. §455(a), which provides that a "judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

"[S]ubsection (a) requires recusal in some circumstances where subsection (b) does not." Liteky, 510 U.S. at 553 n.2. Often, but not always, an extrajudicial source is necessary to require recusal under §455(a). Id. at 554. "[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion" under §455(a). Id. at 555.

"The test in [the First Circuit] for determining whether a judge's impartiality might reasonably be questioned is long established." United States v. Voccola, 99 F.3d 37, 42 (1st Cir. 1996).

"[W]hether the charge of lack of impartiality is grounded on facts that would create a reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself or even necessarily in the mind of the litigant filing the motion under 28 U.S.C. §455, but rather in the mind of the reasonable man."

Id. (quoting United States v. Cowden, 545 F.2d 257, 265 (1st Cir. 1976), cert. denied, 430 U.S. 909 (1977)) (emphasis added). "Thus, the disqualification issue must be analyzed from the perspective of "an objective, knowledgeable member of the public.'" El Fenix de Puerto Rico v. M/Y JOHANNY, 36 F.3d 136, 141 (1st Cir.

1994) (quoting In re United States, 666 F.2d 690, 695 (1st Cir. 1981)); see also United States v. Salemme, 164 F. Supp. 2d 86, 92-93 (D. Mass. 1998).

"[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of . . . proceedings, do not constitute a basis for a bias or partiality motion [under §455(a)] unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." Liteky, 510 U.S. at 555. As Supreme Court Justice Anthony Kennedy has written:

[Section] 455(a) is triggered by an attitude or state of mind so resistant to fair and dispassionate inquiry as to cause [there to be] reasonable grounds to question the neutral and objective character of a judge's rulings or findings. I think all would agree that a high threshold is required to satisfy this standard. Thus, under §455(a), a judge should be disqualified only if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute.

Id. at 557-58 (Kennedy, J., concurring); see also United States v. Conforte, 624 F.2d 869, 881 (9th Cir. 1980) (Kennedy, J.), cert. denied, 449 U.S. 1012 (1980).

"[T]here is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is." Hinman, 831 F.2d at 939. If a judge were able to recuse himself under §455(a) in circumstances in which an objective, knowledgeable member of the public would not find a reasonable basis for doubting his impartiality, he "could abdicate in difficult cases at the mere sound of controversy or a litigant

could avoid adverse decisions by alleging the slightest factual bases for bias." In re: United States, 666 F.2d at 695. "Thus, under §455(a) a judge has a duty to recuse himself if his impartiality can reasonably be questioned; but otherwise he has a duty to sit." United States v. Snyder, 235 F.3d 42, 46 (1st Cir. 2000).

An objective, knowledgeable member of the public knowing the following facts would not believe that I am prejudiced against Auerhahn. Nor would such a person doubt my ability to put aside any negative views of his conduct that I may have formed in deciding matters in the Patriarca, Ferrara, and Barone cases in discharging my duty to decide fairly the few remaining discovery issues that he now presents.

In 1991, I held that Auerhahn had attempted to mislead the defendants and the court concerning a motion to suppress evidence of a La Cosa Nostra ("LCN") induction ceremony intercepted pursuant to a warrant for "roving" electronic surveillance. See United States v. Ferrara, 771 F. Supp. 1266, 1308 (D. Mass. 1991); Ferrara, 384 F.Supp.2d at 391-92. I did not, however, sanction Auerhahn for that misconduct or initiate any disciplinary action against him.

Nor did I sanction or initiate disciplinary action against Auerhahn for his repeated misconduct in connection with Barone's 1993 trial.

During the trial, it was discovered that Auerhahn had repeatedly improperly failed to disclose exculpatory evidence to Barone. Seven or eight of the discovery violations concerned the failure to disclose exculpatory information relating to Jordan's testimony. See Oct. 18, 1993 Barone Tr. at 35-6. Auerhahn was responsible for each of them. Id. at 48-9. The court informed the jury of the discovery violations that had been discerned. See Oct. 18, 1993 Barone Tr. at 51.

Ferrara, 384 F. Supp. 2d at 402. In denying Barone's request for dismissal or a mistrial based on Auerhahn's misconduct, I stated that I was considering initiating disciplinary action against him. See Barone Oct. 18, 1993 Tr. at 52; Oct. 3, 2003 Tr. at 56. I did not do so after the Barone trial, however.

As a result of lengthy hearings in 1998 in Salemme, I discovered that Auerhahn did not in 1991 completely correct the record regarding the motion to suppress the recordings of the LCN induction ceremony even after his attempt to mislead was discovered. See United States v. Salemme, 91 F. Supp. 2d 141, 269-89 (D. Mass. 1999); Ferrara, 384 F.Supp.2d at 392. Once again, in 1999, I did not sanction Auerhahn or initiate disciplinary proceedings concerning him.

In 2003, after evidentiary hearings in which Auerhahn and other witnesses testified, I found that Auerhahn violated Barone's constitutional right to due process by withholding from him material exculpatory information - the recantation of crucial testimony by the most important witness against Barone, Walter Jordan. See Barone Oct. 3, 2003 Tr. at 22-80; Ferrara, 384 F.

Supp. 2d at 389. As a result of that finding, with the agreement of the government, Barone was released from the life sentence he was serving.

In a submission made in 2003 for the public record in the Barone and Ferrara §2255 cases, the Department of Justice asked me not to make a finding concerning whether Auerhahn's failure to disclose material exculpatory evidence to Barone and Ferrara was intentional and, in any event, should be sanctioned until the Department of Justice Office of Professional Responsibility ("OPR") conducted an expedited investigation and provided the results of it to me. See Oct. 2, 2003 letter from Michael Sullivan to Judge Mark L. Wolf (Ferrara, Docket No. 111); Oct. 3, 2003 Barone and Ferrara Tr. at 19-20, 79-80, 85-88; Oct. 17, 2003 Aff. of Michael Sullivan (Ferrara, Docket No. 119). In reliance upon the Department of Justice's representation that OPR would promptly investigate further and report the results of its investigation to me, I deferred deciding whether Auerhahn's misconduct was deliberate and whether to initiate disciplinary action against him in any event. See Oct. 3, 2003 Tr. at 18-21; see also Jan. 20, 2004 Order at 3 (Ferrara, Docket No. 126) (granting OPR attorneys access to sealed exhibits).

By March, 2005, the Department of Justice had not provided me with the promised results of the OPR investigation. I then decided that Ferrara's constitutional right to due process had also been

violated by Auerhahn's failure to disclose Jordan's recantation to him and that Auerhahn's misconduct was intentional. See Ferrara, 384 F.Supp.2d at 397 n.10. As result of my decision, Ferrara too was released from prison. See Ferrara v. United States, 372 F.Supp.2d 108 (D. Mass. 2005).

Nevertheless, in 2005 I did not sanction Auerhahn or initiate disciplinary action against him. Rather, I deferred taking any action until the government had an opportunity to appeal my Ferrara decisions. In that appeal, the government argued that my findings concerning Auerhahn's misconduct were erroneous. However, in August, 2006, the First Circuit affirmed my findings and decisions. See Ferrara, 456 F.3d at 287-88, 290-98. As indicated earlier, the First Circuit also wrote that Auerhahn "deliberately chose not to reveal to [Ferrara] the stunning [exculpatory] evidence" and characterized that misconduct as "outrageous." Id. at 291, 297.

Nevertheless, in 2006, I still did not initiate disciplinary action concerning Auerhahn. Rather, I sought to determine the status of the OPR investigation by writing to Attorney General Alberto Gonzales. See Dec. 11, 2006 Order in Barone and Ferrara (Dec. 8, 2006 letter to the Attorney General). I explained to the Attorney General that:

Canon 3(B)(3) of the Code of Conduct for United States Judges states that "a judge should initiate appropriate action when the judge becomes aware of reliable evidence indicating the likelihood of unprofessional conduct by a . . . lawyer." Therefore, I am writing to bring this matter to your attention in the hope that further action

by me will not be necessary.

Id. In part because in the Ferrara and Barone cases the Department of Justice had requested in public submissions that I defer deciding whether to take disciplinary action against Auerhahn until OPR conducted its further investigation and reported the results to me, I made my letter to the Attorney General a matter of public record in those cases.

In a January 23, 2007 letter, an Associate Deputy Attorney General informed me that OPR had concluded that "Auerhahn engaged in professional misconduct." Feb. 1, 2007 Order (Jan. 23, 2007 letter from David Margolis to Chief Judge Mark L. Wolf). The Department of Justice promised to provide "a more detailed response" to my letter to the Attorney General "in the near future." Id. Once again, I did not initiate disciplinary action against Auerhahn, but rather waited for that response.

Hearing nothing further from the Department of Justice, I wrote again to the Attorney General on May 11, 2007. See May 11, 2007 Order (May 11, 2007 letter from Chief Judge Mark L. Wolf to Attorney General Alberto R. Gonzales). I explained in that letter that I was awaiting the Department of Justice's detailed response because "this matter remains important to the administration of justice in the District of Massachusetts [and] I must still decide if further action by me concerning Mr. Auerhahn is necessary." Id.

I was subsequently informed by an Associate Deputy Attorney

General that the OPR investigation and report had been completed by January 10, 2005. See May 29, 2009 Order (May 11, 2007 Letter from David Margolis to Chief Judge Mark L. Wolf). I was also then informed that on November 6, 2006, Auerhahn had received a written reprimand. Id. The Department of Justice did not ask that these facts not be made part of the public record. In view of the Department's public request in 2003 that I consider the results of the OPR investigation and the Department's disciplinary process in deciding whether to initiate disciplinary action against Auerhahn, there would not have been justification for granting any such request.

On June 29, 2007, I informed the Attorney General that "the Department of Justice's response to Mr. Auerhahn's misconduct [was] not, in my view, sufficient. Therefore, I have initiated the United States District Court's disciplinary process by sending the enclosed June 29, 2007 letter to Bar Counsel for the Massachusetts Board of Bar Overseers." See July 2, 2007 Order (June 29, 2007 Letter from Chief Judge Mark L. Wolf to Attorney General Alberto R. Gonzales with enclosures). In addition, I told the Attorney General that because OPR had found in January, 2005 that Auerhahn had failed in his duty to disclose Jordan's recantation, which OPR characterized as "clearly exculpatory to Ferrara," it was disturbing that the Department nevertheless later continued to argue to me and to the First Circuit that there was not such duty

of disclosure. Id. Orders initiating disciplinary action under the Local Rules by referring matters to counsel for investigation or prosecution are matters of public record in the District of Massachusetts. See In re Lafayette, MBD No. 08-10132, May 21, 2008 Order (Docket No. 1); In re Alec Sohmer, MBD No. 08-10275, Sept. 26, 2008 Order (Docket No. 1).

On October 2, 2007, the Associate Deputy Attorney General responded to my June 29, 2007 letter. See Jan. 4, 2008 Order (Oct. 2, 2007 Letter from David Margolis to Chief Judge Mark L. Wolf). On January 2, 2008, I wrote back to him, in part to point out that the Department of Justice had not performed its promise to provide me with the results of the OPR investigation when it was concluded. Id. (Jan. 2, 2008 Letter from Chief Judge Mark L. Wolf to David Margolis).

I also then wrote to the new Attorney General, Michael Mukasey. Id. (Jan. 2, 2008 Letter from Chief Judge Mark L. Wolf to Attorney General Michael B. Mukasey). That letter did not request that the Attorney General take any further action concerning Auerhahn. See id. It did, however, state that the Department's performance in the Auerhahn matter raised serious questions about whether judges should continue to rely upon the Department to investigate and sanction misconduct by federal prosecutors. Id. It also informed the Attorney General of his Department's repeated failures in in a series of matters, including but not limited to

Ferrara and Barone, to be candid and consistent in its representations to various judges in the District of Massachusetts. Id. As I explained, "I felt that I should bring these matters to [the Attorney General's] personal attention in the hope that with [his] leadership, the recent past will not be prologue, and the Department will soon again discharge its duties in a manner that commands the trust of federal judges and the people of the United States." Id.

Such communications between federal judges and the Attorney General concerning matters affecting the administration of justice, are not improper. Moreover, it is appropriate that such communications be made part of the public record. For example, Judge Emmet G. Sullivan has made part of the public record his correspondence to the Judicial Conference Advisory Committee on the Rules of Criminal Procedure and the Attorney General after he vacated the conviction of Senator Ted Stevens and dismissed the case because of government misconduct in failing to disclose material exculpatory information. See United States v. Stevens, District Court for the District of Columbia, No. 08-231-EGS (Docket No. 414; see also Docket No. 415).

At a meeting of Chief Judges in April, 2009, Attorney General Eric Holder asked the Chiefs to communicate with him directly if any of us encountered prosecutorial misconduct or problems with the Department of Justice's action concerning such misconduct. I

responded to that request in an April 23, 2009 letter to the Attorney General. See Apr. 28, 2009 Order (Apr. 23, 2009 Letter from Chief Judge Mark L. Wolf to Attorney General Eric H. Holder). Once again, I did not in that letter ask that any further action concerning Auerhahn be taken by the Department of Justice. Id. I did, however, note that his case foreshadowed the problems that prompted Attorney General Holder to request dismissal of the case against Senator Stevens, and caused Judge Sullivan to appoint special counsel to investigate and possibly prosecute high ranking Department lawyers for contempt in that case, rather than to rely on OPR to impose discipline for their misconduct. Id. Attorney General Holder responded to my letter on June 15, 2009. See July 2, 2009 Order (June 15, 2009 Letter from Attorney General Eric H. Holder to Chief Judge Mark L. Wolf).

An informed, objective member of the public would not find in my correspondence with several Attorneys General reason to doubt that I could not decide fairly Auerhahn's pending request for additional discovery of the few remaining sealed documents in the Ferrara and Barone §2255 cases.

Nor would my references to Auerhahn in my 2009 decisions in United States v. Darwin Jones cause, or contribute to causing, an informed, reasonable person to doubt my ability to be impartial in deciding Auerhahn's pending discovery motion. Jones involved an "egregious failure of the government to disclose plainly

exculpatory evidence" in connection with a motion to suppress. United States v. Jones, 609 F.Supp.2d 113, 119 (D. Mass. 2009). In denying the motion to suppress, I wrote that I was considering imposing a monetary sanction on the prosecutor because recent experience suggested that it would not be sufficient to rely on OPR to deal adequately with her misconduct. Id. at 118-20. The Department of Justice's handling of the Auerhahn matter was relevant and therefore referenced to explain why such a sanction was being considered. Id. at 119 n.3.

After giving the United States Attorney and the prosecutor an opportunity to be heard, in a second decision I left open the possibility of imposing a monetary sanction on her. See United States v. Jones, 620 F. Supp. 2d 163, 167 (D. Mass. 2009). In explaining the reasons for this decision, I recounted the long history of the government's failures to disclose material exculpatory information in the District of Massachusetts, id. at 168-177, and in other federal courts, id. at 174, 176, 185-93. The matters concerning Auerhahn were discussed in the context of at least five other relatively recent cases assigned to me involving such violations, id. at 171, 175-76, in order to explain how the prosecutorial misconduct in the Jones case "extend[ed] a long pattern of inadvertent failure to produce material exculpatory information, and cases of intentional misconduct as well." Id. at 179. This context was, again, important to explaining why the

authorized but unusual step of imposing a monetary sanction on the prosecutor personally might be necessary and appropriate. Id. at 180. Therefore, a reasonable person would not construe the references to Auerhahn in the Jones decisions to be gratuitous or, more importantly, evidence of any inability to decide his pending discovery motion fairly.

In addition, my conduct in discharging the duties of the Chief Judge in the Auerhahn disciplinary matter would not cause, or contribute to causing, a reasonable person to doubt my impartiality with regard to the pending discovery issues. As described earlier, the Local Rules contemplate that, even if he is the complainant, the Chief Judge will be responsible for a disciplinary matter unless and until it is necessary to appoint a three-judge panel to decide it. See L.R. 83.6(5)(D). Nevertheless, although the Local Rules do not provide for discovery before a petition is filed, when Auerhahn moved for such discovery, I asked Judge Tauro to decide the general issue of whether any pre-petition discovery should be permitted. See July 28, 2009 Order. When Judge Tauro authorized some pre-petition discovery and, as required, left to me the issue of deciding what sealed documents and information from the Ferrara, Barone, and Patriarca cases should be produced, I ordered that Auerhahn be given everything that Bar Counsel properly received, subject to the same protective order to which Bar Counsel is subject. See Aug. 21, 2009 Order.

In view of the foregoing, the instant case is materially different than those on which Auerhahn relies in asserting that my recusal is necessary. For example, in In re: Boston Children First the First Circuit ordered the disqualification of a judge because her extra-judicial, published statements to the media could reasonably have been construed as a comment on the merits of pending motions to be decided by her. See 244 F.3d 164, 169-70 (1st Cir. 2001). The First Circuit stated that "the very rarity of such public statements, and the ease with which they may be avoided, make it more likely that a reasonable person will interpret such statements as evidence of bias." Id. at 170. In contrast, I have declined to make such public statements to the media when asked about Auerhahn after the Ferrara and Barone cases were concluded and no motions or other matters were pending to be decided by me. See, e.g., John Gibeaut, The 'Roach Motel', ABA J., July, 2009, at 52 ("Wolf declined an interview request.").

Snyder, 235 F.3d 42, is also very different than the instant matter. In Snyder, the district judge departed downward and imposed a mandatory minimum fifteen year sentence, rather than a sentence at or above the low end of the Sentencing Guideline range of about twenty years. Id. at 44. The First Circuit reversed and remanded the case to the district judge for resentencing. Id. The district judge expressed "deep problems of conscience" about imposing the higher sentence required by the remand. Id. "[H]e

ultimately concluded he could not bring himself to do what the law required." Id. at 46. Therefore, the district judge recused himself and "expressly declared that he was flatly unwilling to sentence [the defendant] in accordance with [the First Circuit's] remand order." Id. at 47. When the defendant appealed the district judge's decision to recuse himself, the First Circuit found the issue to be governed by §455(a) and held that the judge did not abuse his discretion in deciding not to participate in the case any longer. Id. at 45-48.

In contrast, there has been no disagreement between the First Circuit and me concerning Auerhahn. I found that Auerhahn intentionally failed to disclose crucial exculpatory information to Ferrara and Barone. See Ferrara, 456 F.3d at 287. The First Circuit agreed, finding Auerhahn's misconduct to be deliberate and characterizing it as "outrageous". Id. at 291, 297. Moreover, I have not with regard to Auerhahn, or indeed anyone else, expressed an unwillingness to do what the law requires. Therefore, Auerhahn's reliance on Snyder in requesting my recusal is misplaced.

Ramos Colon v. United States Attorney, 576 F.2d 1 (1st Cir. 1978), also does not support Auerhahn's contention that my recusal under §455(a) is required. Ramos Colon addressed the standing or authority of private parties to compel judges to initiate disciplinary action against attorneys. Id. at 5, 9. In Ramos Colon

a criminal case was dismissed because of "outrageous" government misconduct. Id. at 3. The district judge denied the defendant's request that contempt proceedings or disciplinary action be initiated against the prosecutor. Id. The defendant appealed that decision. Id. The First Circuit held that a litigant has no standing to prosecute an action for criminal contempt or to take an appeal from the court's decision not to do so. Id. at 5. The First Circuit noted that having brought the allegation to the attention of the court, "the role of a party or counsel is at an end. It remains for the court to vindicate its authority . . . ." Id. at 9.

I, of course, am not a party or counsel. I did initiate disciplinary action against Auerhahn. As described earlier, the Local Rules address when my role as Chief Judge in the disciplinary matter would usually end and I have gone beyond what they require when Auerhahn has made requests for favorable treatment not provided for by the Local Rules. In any event, the disciplinary proceeding, M.B.D. No. 09-10206, is being reassigned in anticipation of Auerhahn's response to Bar Counsel's petition. His request for further discovery relates to my authority and duty in the Ferrara and Barone §2255 cases, and in the Patriarca criminal case. The reasoning in Ramos Colon does not suggest that my recusal in these matters is necessary or appropriate.

In Ramos Colon, the First Circuit wrote that:

in holding that appellant had no standing to challenge the alleged misconduct or to take this appeal, we should not be misinterpreted as discouraging district courts from conducting inquiry into suspected unethical behavior when the particular circumstances appear to warrant it. Nor do we intend to silence parties or counsel who encounter impropriety on the part of an opponent. On the contrary, "[w]hen an attorney discovers a possible ethical violation concerning a matter before a court, he is not only authorized but is in fact obligated to bring the problem to the court's attention", In re Gopman, 531 F.2d 262, 265 (5th Cir. 1976).

576 F.2d at 8-9. As explained earlier, the Code of Conduct for United States Judges creates a similar obligation, requiring federal judges to initiate appropriate action where there is reliable evidence indicating misconduct by an attorney. See Canon 3(B)(3). I could have - and perhaps should have - initiated disciplinary action against Auerhahn no later than 1993, after repeated instances of his misconduct were revealed during the Barone trial. A reasonable person would not view the fact that I initiated disciplinary action against Auerhahn in 2007 as a reason requiring my recusal from deciding his motion for discovery of a few additional sealed matters in the Patriarca, Ferrara, and Barone series of cases in which I began presiding almost twenty years ago.

In view of the foregoing, it would be an improper abdication of my responsibility to recuse myself from deciding Auerhahn's pending discovery motion. See In re United States, 666 F.2d at 695. As the First Circuit wrote in the Snyder decision on which Auerhahn relies:

[J]udges are not to recuse themselves lightly under

§455(a). See H.R. Rep. No. 93-1453, at 5 (1974), reprinted in 1974 U.S.C.C.A.N. 6351, 6355 ("[Section 455(a)] should not be used by judges to avoid sitting on difficult or controversial cases."). . . [A]n erroneous recusal may be prejudicial in some circumstances. See United States v. Arache, 946 F.2d 129, 140 (1st Cir. 1991) (finding that "there appears to be some force" to the argument that recusal may prejudice defendant where recusing judge has become familiar enough with facts of case to question reliability of key testimony). In any event, the unnecessary transfer of a case from one judge to another is inherently inefficient and delays the administration of justice. See Camacho v. Autoridad de Telefonos de Puerto Rico, 868 F.2d 482, 491 (1st Cir. 1989) (noting that the judicial system would be "paralyzed" were standards for recusal too low). For these reasons, "[a] trial judge must hear cases unless [there is] some reasonable factual basis to doubt the impartiality or fairness of the tribunal." Blizard v. Frechette, 601 F.2d 1217, 1221 (1st Cir. 1979). Thus, under §455(a) a judge has a duty to recuse himself if his impartiality can reasonably be questioned; but otherwise, he has a duty to sit.

235 F.2d at 45-46.

It is particularly important that I continue to discharge my duty to sit concerning requested discovery of sealed documents from the Patriarca, Ferrara, and Barone cases. As described earlier, there are several thousand docket entries in the Patriarca case and several hundred in each of the Ferrara and Barone cases. Many submissions and exhibits were sealed, as were many pages of transcripts. At times the documents were sealed because of concerns in these Organized Crime cases for the security of third parties or because the documents contained what the government characterized as "sensitive law enforcement information that is not part of the public record." See, e.g., Apr. 27, 2005 Government's Motion to

Seal and Impound (Ferrara, Docket No. 172 under seal). Nevertheless, as a result of many decisions that I made on requests from Bar Counsel after reviewing the requested sealed materials carefully, almost all of the sealed documents have been made available to Bar Counsel and Auerhahn subject to a protective order.

As I wrote on page 3 of the June 11, 2009 Sealed Order in Barone and Ferrara previously provided to Auerhahn, "[t]his court retains a responsibility to consider and, if necessary, protect the privacy, security, and other interests that caused the original sealing of certain documents and information. While the interest of fair trials, which are now concluded, no longer exists, the privacy and security interests that justified some of the sealing continue[] in varying degrees." It would be extremely difficult, if not impossible, for a judge not previously familiar with these cases to identify these interests and, on an informed basis, to balance them against the fact that I also recognized in the June 11, 2009 Sealed Order: "it is also important that the forthcoming disciplinary proceedings be fully informed and fair." Id.

After eighteen years, I look forward to the time when my duty to deal with issues relating to Auerhahn's conduct has concluded. However, that time has not yet come. There is not a proper basis for my recusal in the Patriarca, Ferrara, and Barone cases. I am, therefore, discharging my duty to decide the discovery issues

presented by the pending motion for clarification. See In re United States, 666 F.2d at 695; Snyder, 235 F.3d at 45-46.

#### IV. THE MOTION TO CLARIFY

In the Motion to Clarify, Auerhahn requests all sealed materials in the Barone and Ferrara §2255 cases. As explained earlier, he has already received everything requested and received by Bar Counsel, including all sealed documents and transcripts provided to her except for an excerpt of one transcript that was inadvertently not redacted.

The Deputy Clerk had advised me that the only sealed documents not requested by Bar Counsel are Ferrara Docket Nos. 172, 173, 182, 183, and 234.<sup>4</sup> Docket Nos. 172 and 173 were sealed at the request of the government because it was represented that they contained sensitive, confidential law enforcement information. They were made public in redacted form in a May 24, 2005 Order. See Ferrara, Docket No. 223. All of these sealed documents relate to whether Ferrara should have been released pending appeal of my April 12,

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<sup>4</sup>Shortly before the issuance of this Memorandum and Order, the Deputy Clerk revised his advice concerning the sealed documents that Bar Counsel requested and received. I am now informed that she did not request any documents submitted under seal after her appointment in the Auerhahn disciplinary matter in June, 2007. Some of those documents were submitted by her. Rather than delay the issuance of this Memorandum and Order to obtain and review any additional sealed documents that may be subject to Auerhahn's motion, I will do so in the future and, if necessary, supplement this Memorandum and Order.

2005 decision finding that his right to due process had been violated by the government's failure to produce to him the material exculpatory evidence of Jordan's recantation. The documents are not relevant to the disciplinary proceeding against Auerhahn. Nevertheless, the government and Ferrara are being ordered to inform the court whether they object to disclosure of the foregoing sealed documents to Bar Counsel and Auerhahn. If so, they are being directed to submit proposed redacted versions of these sealed materials for use if the court decides to disclose the documents to Auerhahn and Bar Counsel in redacted form.

There are three sealed matters that Bar Counsel requested that were not disclosed to her. As explained in the June 11, 2009 sealed Order previously provided to Auerhahn, Bar Counsel requested but did not receive the full, 254-page sealed government Trial Brief in Patriarca (Docket No. 683). The pertinent part of the Trial Brief relating to the Limoli murder and referenced in Ferrara, 384 F. Supp. 2d at 397, pages 207-11, was unsealed and provided to Bar Counsel. See June 11, 2009 sealed Order at 5; see also Feb. 26, 2009 Order at 2. The government, Ferrara, and Barone were ordered to state, by March 16, 2009, whether they objected to disclosure to Bar Counsel of the rest of the Trial Brief, which does not appear to relate to the Auerhahn matter. See Feb. 26, 2009 Order at 2. The parties did not respond to this Order. The court remained concerned that the Trial Brief may include

information, such as the reference to the Witness Protection Program on page 134 cited in the February 26, 2009 Order, that should not be disclosed to Bar Counsel. Therefore, the Court denied Bar Counsel's renewed request for the full Trial Brief without prejudice. See June 11, 2009 sealed Order at 5.

The concerns that caused me not to provide the full Trial Brief to Bar Counsel do not pertain to Auerhahn personally. He wrote the document and had authorized access to the information it contains. Therefore, he may personally inspect and copy the United States Attorney's or District Court's copy of the Trial Brief. The government, Ferrara, and Barone are again being ordered to inform the court whether or not they object to the full Trial Brief being disclosed to Bar Counsel and Auerhahn's four attorneys subject to the protective order previously issued.

I also denied Bar Counsel's request for certain documents pertaining to Ferrara's health that were filed in connection with his request to be released pending the appeal of my April 12, 2005 decision. See Dec. 28, 2007 Order at 3. These documents are not relevant to the disciplinary proceedings concerning Auerhahn. They continue to implicate Ferrara's legitimate privacy interests, which justified their sealing originally. See United States v. Amodeo, 71 F.3d 1044, 1050-51 (2nd Cir. 1995); United States v. Salemme, 985 F. Supp. 193, 195 (D. Mass. 1997). Therefore, to the extent that Auerhahn's request for all information sealed in the Ferrara

case includes these documents, it is being denied.

As explained earlier, the court denied without prejudice Bar Counsel's request for certain sealed documents relating to an individual who continues to express concern about his or her safety. See Aug. 21, 2009 Order at 3. Bar Counsel has been ordered to inform this court if and when a three-judge panel is constituted. Id. Auerhahn may do the same. As also explained earlier, I expect that I will disclose the sealed material after again giving the individual concerned notice and an opportunity to be heard.

Bar Counsel also requested Jordan's grand jury testimony. An excerpt of Jordan's July 27, 1988 grand jury testimony was attached to Ferrara's First Amended Motion Pursuant to 28 U.S.C. §2255 (Docket No. 51). This document was provided to Bar Counsel and is, therefore, available to Auerhahn.

The court does not now have the complete transcript(s) of Jordan's grand jury testimony, which Auerhahn requests. As the presiding judge in Patriarca, I may authorize the disclosure of the remainder of Jordan's grand jury testimony "preliminarily to or in connection with a judicial proceeding" if certain standards are met. Fed. R. Crim. P. 6(e)(3)(E)(i). The Supreme Court has "emphasiz[ed] that a court called upon to determine whether grand jury transcripts should be released necessarily is infused with substantial discretion." Douglas Oil Co. of Cal. v. Petrol Stops

Northwest, 441 U.S. 211, 223 (1979); see also United States v. McMahon, 938 F.2d 1501, 1504 (1st Cir. 1991). A party in a civil action seeking disclosure must demonstrate that "a particularized need for disclosure outweigh[s] the interest in continued grand jury secrecy." Douglas Oil, 441 U.S. at 223; see also United States v. Sells En'g, 463 U.S. 418, 443 (1983) (requiring "a strong showing of particularized need" when the request is made by the government acting as a party to civil litigation). Consequently, the party must "show that the material [the party] seek[s] is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that [the] request is structured to cover only material so needed." Douglas Oil, 441 U.S. at 222.

It does not appear that the First Circuit has decided the question of whether grand jury transcripts may be disclosed to attorneys subject to disciplinary proceedings. The First Circuit has, however, applied the Douglas Oil framework in the context of criminal matters. See McMahon, 938 F.2d at 1505 (holding criminal defendant demonstrated sufficiently particularized need for a grand jury transcript where the government used the transcript to impeach the defendant's witness); In re Grand Jury Investigations of the Cerro Maravilla Events, 783 F.2d 20, 20-21 (1st Cir. 1986) (affirming court's denial of a special prosecutor's request for grand jury testimony due to an insufficient showing of

particularized need).

The Second Circuit has considered an attorney's request for disclosure of grand jury transcripts in preparation for a disciplinary proceeding and, in doing so, applied the Douglas Oil framework. See In the Matter of Federal Grand Jury Proceedings, 760 F.2d 436, 438-39 (2nd Cir. 1985); cf. In the Matter of Grand Jury Proceedings, Special September, 1986, 942 F.2d 1195, 1198-99 (7th Cir. 1991) (applying the Douglas Oil framework to request for disclosure by administrator of Illinois Attorney Registration and Disciplinary Commission in connection with a disciplinary matter); but see In re Grand Jury 89-4-72, 932 F.2d 481, 488 (6th Cir. 1991) (declining to apply the Douglas Oil framework to request for disclosure by Michigan Attorney Grievance commission and the Judicial Tenure Commission because the state attorney discipline procedures were not a "judicial proceeding" within the meaning of the predecessor to Fed. R. Crim. P. 6(e)(3)(E)(I)).

Although neither the government nor Bar Counsel have briefed the issue, I assume that I have the authority to order disclosure of Jordan's grand jury transcript(s) in anticipation of the appointment of a three-judge panel to decide the Auerhahn disciplinary matter. Jordan's credibility is at issue in that matter. His prior statements to the grand jury could potentially be used to impeach the testimony he gave at the 2003 Ferrara and Barone hearings. Therefore, Auerhahn and Bar Counsel have a

particularized need for the transcripts.

However, without hearing from the government it is not possible to determine whether it asserts that an interest in maintaining the secrecy of the remainder of Jordan's grand jury testimony now exists. Nor is it now possible to balance any such asserted interest against the needs of Auerhahn and Bar Counsel. See Douglas Oil, 441 U.S. at 223. Therefore, the government is being ordered to file with the court, under seal, the complete transcript(s) of Jordan's grand jury testimony and state its position on the request that the undisclosed portions be produced to Auerhahn and Bar Counsel subject to the protective order previously issued.

Finally, Auerhahn states that he has obtained from OPR copies of documents that it provided to Bar Counsel. He also reports that he has asked to review all of OPR's file concerning him and "understands that OPR is unclear whether it can do so in light of the August 21 Order." Auerhahn Motion to Clarify Order to Unseal at 3. However, that Order explicitly states that:

I have not imposed any restrictions on the use or disclosure of documents or information that Bar Counsel obtained from the Department of Justice or any other source. This Order is not intended to affect any restriction on use or disclosure that may have been imposed by any other organization or individual.

In a January 20, 2004 Order in Ferrara, I allowed OPR's request to review the sealed exhibits that were introduced or marked for identification in Ferrara. Auerhahn already has access to all, or

almost all, of the sealed exhibits. In essence, it is my intention that any information obtained by OPR from the court be governed by my orders. I have not, however, attempted to impose any restrictions on the disclosure of any documents or information developed by OPR.

As I have repeatedly written, most recently on August 21, 2009, "if any party, Judge Tauro, or the three-judge panel has a question or concern about restrictions imposed on the documents and information provided . . . by this court, I will, upon request, clarify or reconsider" my orders. Aug. 21, 2009 Order at 5. I will also respond to any request from OPR for further clarification.

V. ORDER

In view of the foregoing, it is hereby ORDERED that:

1. As I had directed that In the Matter of Jeffrey Auerhahn, MBD No. 09-10206, be reassigned to Judge Joseph Tauro before Auerhahn's Motion to Recuse or Disqualify was filed, and that reassignment is being made in connection with the issuance of this Memorandum and Order, the request for such a reassignment is MOOT.

2. To the extent that Auerhahn's Motion to Recuse or Disqualify seeks my recusal as the presiding judge in Barone v. United States, Civ. No. 98-11104-MLW, Ferrara v. United States, Civ. No. 00-11693-MLW, and/or United States v. Patriarca, Cr. No. 89-00289-MLW, it is DENIED.

3. By October 8, 2009:

a. The government, Barone, and Ferrara shall inform the court whether they object to the disclosure to Bar Counsel, Auerhahn, and his attorney Ferrara Docket Nos. 172, 173, 182, 183, and 234, and the full Trial Brief in Patriarca, Docket No. 683. The Deputy Clerk will make these documents available for inspection if necessary. Any disclosure to Bar Counsel and Auerhahn will be subject to the existing protective order, which provides that the sealed documents and the information that they contain may be used solely for the purpose of the Auerhahn disciplinary proceedings. See Aug. 21, 2009 sealed Order at 4-5.

b) The government shall file, under seal, the complete transcript(s) of Walter Jordan's grand jury testimony.

c) The government shall inform the court of its position concerning whether the part of Jordan's grand jury transcript(s) that is not now in the public record may be disclosed to Auerhahn, his attorneys, and Bar Counsel, subject to the existing protective order. If the government opposes such disclosure, it shall file a memorandum in support of its position.

d) The foregoing submissions may be made under seal. Redacted versions of the sealed exhibits, but not the Jordan grand jury transcript(s) or the Patriarca Trial Brief, shall be submitted under seal for possible disclosure in that form. In addition, redacted versions of the statements of parties' positions and of

any memoranda of law shall be filed for the public record.

4. Auerhahn may personally review the District Court's or the United States Attorney's copy of the full Patriarca Trial Brief (Docket No. 683), subject to the limitations on use imposed by the August 21, 2009 Order.

5. The request for access to the documents filed and sealed after April 12, 2005 concerning Ferrara's health is DENIED.

6. The request for sealed documents concerning the individual who continues to express concern for his or her safety is DENIED without prejudice to being renewed if and when a three-judge panel is constituted.

/S/ MARK L. WOLF  
UNITED STATES DISTRICT JUDGE