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# Rakoff's 'Palin' Decision

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By **Joel Cohen** | March 02, 2022

Sarah Palin and U.S. District Judge Jed S. Rakoff. Credit: Courtesy photo/NYLJ/Rick Kopstein

The Book of Ruth (1:1) mercurially, maybe longingly, refers to a time "when judges judged." Today's judges judge, some more so than others.

When one asks the cognoscenti to name the finest trial judges in America, far more often than not U.S. District Judge Jed S. Rakoff in Manhattan is among them. And, unquestionably, it is because he never shies from the task—using his intelligence and experience to reach a result, often with intuitive and imaginative skill.

There is, however, a public questioning recently over *when and how* he declared his intention to dismiss the Sarah Palin defamation lawsuit, determining that she simply didn't have a case against *The New York Times*. The standard requires a public figure plaintiff, as is Ms. Palin, to prove "actual malice" when one sues for defamation. He found, as he had when she first filed her complaint some years ago, that she didn't. Few knowledgeable students of the libel law would disagree. Instead, the controversy is simply about Judge Rakoff telling the parties, while the jury was still deliberating (although without it present), that he found himself legally required to dismiss Palin's case even if the jury itself were to decide in her favor.

Yes, Rakoff's procedural device might seem harsh on its face to the layperson or uninitiated, as if he was saying "the heck with what the jury thinks, I know better." Any litigating lawyer, however, would understand the rightness of a judge taking the decision away from the jury when the evidence presented at trial is simply legally insufficient. The Federal Rules specifically say a judge can properly do that. Indeed, also, the Supreme Court's 1964 decision in *New York Times Co. v. Sullivan*, requiring proof of actual malice, has been the law of the land for nearly 60 years.

The issue, instead, is that Rakoff stated his intention in open court. Importantly, but barely mentioned in the coverage, there were no objections when the judge explicitly told the lawyers, after the jury began deliberating, that he was going to preview his decision to the parties, but would nonetheless allow the jury to continue so that the record would be complete for them on appeal. When lawyers are specifically told in advance what a judge intends to do, they should object if they disagree. They didn't.

For those in the know, this whole thing might have been handled differently in years past. Back when, if a judge in a high publicity case intended to "take the case away from the jury"—again, entirely appropriate when she finds the evidence lacking—she would simply have invited the lawyers into a *sealed* proceeding in her chambers and told them exactly her intentions. As with Judge Rakoff, she might have let the jury reach its verdict, so that the parties had the full record in event of an appeal. As the legal standard goes, she would have to decide that no "reasonable jury" could have properly found for the plaintiff, as Rakoff did here.

We live, though, in an age requiring utmost transparency. The media invariably demands, perhaps appropriately, that the courts make virtually all court proceedings public, and the appellate courts support that practice—particularly in a case of public interest. So, if Rakoff's mind was irreversible that, in his view, he was *required* to dismiss the case, wouldn't today's transparency dictates have required him to do precisely what he did? That is, notify the parties? Could he have waited until the jury reached a pro-Palin verdict, if it did, and then taken it away from them? Maybe, but wouldn't that actually look worse? Essentially, "the heck with the jury" even though it decided for Palin. Put simply, the Judge was arguably faced with: *Damned if you do, damned if you don't*!

By the way, judges have done this kind of thing more often than one might think. They let a case go to the jury even if they've already told the lawyers that they will overrule it if the verdict is inconsistent with the judge's view of the law. We don't know about it generally because most case aren't in the public domain, as is *Palin*.

Now, did Rakoff consider—or should he have—the "possibility" that some jurors might learn of his stated intention to dismiss while deliberations were still ongoing? I suppose. Although slightly different, judges rule on issues all the time in high profile trials, and they comment, without the jury present, about the strength of the evidence or about testimony that is too prejudicial and that the jurors, accordingly, will never learn in court. Jurors potentially hear about that kind of back and forth too. The legal system simply operates, though, as it must, with the *institutional* acceptance that jurors follow a judge's instruction to ignore anything they learn when not in the jury box.

In fact, the jurors in *Palin* said, after the trial was over, that they "assiduously" followed that instruction but yet involuntarily received push notifications about some of the judge's remarks—including that he would dismiss the case—while they were still deliberating. Maybe it's something to consider going forward. However, the only way to *absolutely* ensure that the jurors' minds aren't poisoned with what they read in the press or on their phones would be to sequester the juries in every case of public interest, along with taking their phones from them. We certainly don't want that, though.

Yes, some might argue that Rakoff's action raised a potential appellate issue for Palin ("an unforced error"). Judges—that is, *good judges who judge*—make rulings all the time that raise potential issues on appeal. Ruling is what they're supposed to do! Reversal over this issue is totally unlikely, parenthetically, given both the judge's analysis of the "actual malice" issue, and especially given that the jurors specifically said they weren't influenced by having inadvertently learned what occurred.

Remember, Palin sued in New York, not Alaska, Texas or Mississippi, for example, as she could have given that the Times is published or is online everywhere. Had she done so, she would likely have had a far more sympathetic jury given her extremely conservative politics. She presumably brought it in New York for the publicity value, probably not really expecting a trial victory. And her lawyers undoubtedly realized that her only road to ultimate victory would lie in the Supreme Court if Justices Thomas and Gorsuch managed to pull other justices toward their way of thinking that *Sullivan*'s time is past.

Interestingly, although Judge Rakoff ruled against her, Palin might have gotten exactly what she wanted in Judge Rakoff's borderline excoriation of The Times for its journalism in the offending editorial about her, which he put on the record even though he was dismissing the case.

As for Judge Rakoff and those likeminded, the job is to "judge" and we need, and expect, them to do so boldly. Society demands openness. A judge can't be transparent and simultaneously play hide the ball. And so, he told the lawyers exactly what he was planning to do. Isn't that what we should want from a judge?

Sometimes making a firm trial decision may have side effects. If we believe in the integrity of the jury system, though, we have to believe that a jury follows the judge's instructions. And, as far as the record currently stands, there's no reason to believe that, in *Palin,* the jury didn't.

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