[L]et the suspect judge be removed and one who is not suspect substituted for him. . . . [I]t is a very fearful thing to litigate under a suspect justice and very often results in the saddest outcomes.

Thus wrote Henry of Bracton in 1270 on the absolute necessity of an impartial judiciary for the success of the judicial system. John T. Noonan & Kenneth I. Winston, The Responsible Judge, 278-279 (1993), quoting Bracton, The Laws and Customs of England (1270).

Which brings us full circle to Avery v. State Farm.

“Under the ABA model code, there is no doubt the Judge had to recuse himself.”

Those were the words Monroe H. Freedman, Hofstra law professor and renowned expert on legal and judicial ethics, said to me when I interviewed him about the Avery v. State Farm Illinois Supreme Court decision, rendered August 18, 2005.

After four years of waiting, the Illinois high court finally ruled on the Avery appeal, but the decision came after a very expensive and hard-fought election for a vacant seat on the State’s Supreme Court. That election only served to add another element of controversy in an already controversial case.

Justice Lloyd Karmeier, the winner of that pivotal election, was heavily funded by State Farm, the defendant in the $1 Billion+ aftermarket parts case, according to documents Plaintiffs submitted to the court. Karmeier took his place on the bench after defeating rival Gordon Maag, ironically, the Judge authoring the underlying appellate decision upholding the jury verdict but reversing some of the trial court’s damage award. Karmeier’s ascension to the bench transpired only after oral arguments took place. Nonetheless, Karmeier rejected Plaintiffs’ ™ request that he recuse himself, despite his extensive funding by State Farm, its employees, lawyers, friends, and associates, and he actively participated in the decision overturning and dismissing the Avery case.

As Professor Freedman clarified, under the June 2005 proposed ABA Model Code of Judicial Ethics, a judge has an obligation to recuse him/herself when the judge’s impartiality “might reasonably be questioned.” This is the standard used in the Federal Judicial Disqualification Statute, 28 U.S.C. Â§ 455, and it is also the standard governing the conduct of judges in the Illinois Supreme Court Rules, Code of Judicial Conduct, Rule 63(C)(1). According to Freedman, this standard is self-executing and demands the automatic recusal of a judge on his/her own volition.

So what exactly does it mean to say a judge’s impartiality might reasonably be questioned? According to the bible on the subject, Freedman and coauthor Abbe Smith’ Understanding Lawyers' Ethics, 243 (3rd Ed. 2004), “might” means a “tentative possibility.” In other words, it is the barest hint, a whisper or feather of suggestion that steals across one’s mind. A litigant in our system is entitled to the purest determination of his grievances, and those in whom we entrust this terrible obligation must be impeccable. A lofty standard of this type is the highest compliment we can pay to those who serve in our judiciary and a breach of the standard is the cruelest form of despotism to the millions who must live with the results.

Several U.S. Supreme Court decisions have addressed whether the Due Process Clause of The U.S. Constitution is violated when a potentially tainted judge participates in a decision. Most notably in Tumey v. Ohio, 273 U.S. 510, 532, 47 S.Ct. 437, 444 (1927), the Court found that a judge must recuse himself if there existed a “possible temptation . .

. which might lead him not to hold the balance nice, clear, and true" or when the matter "might create an impression of possible bias." Additionally, the opinions of Justices O'Connor and Ginsberg in Republican Party of Minnesota v. White, 536 U.S. 765, 12 S.Ct. 2528 (2002) demonstrate that a majority of the U.S. Supreme Court has grave concerns about whether any "elected judge subject to reelection can decide a controversial case without violating due process." Freedman, 248.

There is little doubt that State Farm had a significant interest in: 1) Preventing Judge Maag from winning the open Illinois Supreme Court seat; and 2) heavily subsidizing a candidate who might demonstrate his gratitude by helping to make a monstrously expensive case just "go away". Given the fact that Justice Karmeier did exactly that, after Plaintiffs legitimately asked him to recuse himself, rather speaks for itself.

"When lawyers and litigants appear to be buying influence with campaign contributions, the appearance of partiality goes beyond the highly publicized case, tainting any case in which money may have passed." Freedman, 249, indirectly citing a Justice at Stake survey (indicating that 76% of registered voters believe campaign contributions influence judicial decisions).

After the Avery decision was announced, I spent weeks answering questions from reporters and industry participants about it. What I found most noteworthy and saddest was the overall lack of faith in the judicial system, the uniform belief that justice had been sold to the entity capable of paying the most. After all, what are a few millions when you are playing for over one billion? That is exactly the message Karmeier's participation in the decision sent to the person on the street.

As I have said before, perhaps the most appalling thing about the Avery decision was the majority's idiotic and ill-conceived analysis about why the matter should be dismissed outright. It is embarrassing to the entire legal community that there is not an ounce of scholarship in the decision, the arguments do not tie together, and the court never condescends to tell us what standard of review it uses for any portion of its analysis.

There appears to have been an overall attitude of flippancy with which the Illinois Supreme Court handled this case. It began with the Supreme Court's initial denial of Plaintiffs' motion requesting Justice Karmeier to recuse himself from participation in the decision; then the hurried rethinking of whether the whole court should be involved and shunting the final decision off on Karmeier alone; Justice Karmeier's automatic refusal to recuse himself; and, ultimately, the Court's bizarre analysis attempting to justify the decision to dismiss.

I have to resort to The X-Files' ™ slogan for Fox Mulder, "I want to believe." If there is no faith in the judiciary, can we actually say we have a justice system? The integrity of the justice system is far more important than the Avery decision, but Avery serves to show how far adrift we really are. Justice Karmeier, you should have recused yourself. Take a look at the Illinois Code of Judicial Conduct. You had a duty to do so. After all, someone might reasonably believe that you were beholden to State Farm for your current position. In fact, more than one someone does.