

## ROBINSON: Ruling, while no surprise, included shocker

By Scott Robinson, Rocky Mountain News  
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Big news yesterday: Joe Nacchio gets a new trial, and he won't have to face the wrath of Judge Edward Nottingham again. Perhaps.

Although not unanimous, Monday's eagerly awaited court ruling reversed the Nacchio verdict on the basis of Nottingham's exclusion of most of the proposed testimony of defense witness Daniel Fischel, a stock market expert.

And in what can only be described as an extremely unusual decision, the majority agreed with Nacchio's attorneys that the retrial should be in front of a different judge, that it would be "unreasonably difficult" for Nottingham to retry the case with a "fresh mind." That was the real shocker.

The reversal of the Nacchio conviction itself was not altogether a surprise because the pointed questions asked by the judges months ago during oral argument revealed at least an inclination to rule in favor of Nacchio on the expert-exclusion issue. The extreme limitations placed on Fischel's testimony left the defense without its star witness, who, it was hoped, would portray Nacchio's stocktrading activity as innocuous.

Even during trial, this ruling by Nottingham seemed somewhat arbitrary and unfair, and now it will necessitate a new trial. If, that is, the appellate court opinion reversing the conviction becomes final, which is not a sure thing. In overturning the conviction, only two members of the three-judge panel ruled that Nottingham was wrong to circumscribe Fischel's testimony. The remaining appellate judge dissented, thus helping set the stage for what will surely come next: a request by prosecutors that the appeal be "reheard" by all 12 active 10th Circuit judges.

Such full court rehearings are permitted only occasionally and usually restricted to cases involving issues of "exceptional importance" or conflicting prior 10<sup>th</sup> Circuit decisions. But the issue that led to the reversal of the Nacchio conviction could well satisfy the "exceptional importance" standard, and the very existence of a dissenting opinion makes a rehearing before the entire 10th Circuit more likely. As does the almost unprecedented order kicking Nottingham off the case.

Most losing litigants understandably want a different judge to hear their cases the second time around. But ordered reassignment by an appellate court just does not happen. I could find only one prior 10th Circuit opinion forbidding the original judge from retrying a case after reversal, and that case involved extreme facts demonstrating unquestionable bias.

Some may speculate that allegations that have recently surfaced in the media about Nottingham's personal life played a role in the ordered recusal, but that is not how appeals work. Rather, ordering Nottingham off the case reflects the full extent to which at least two of the judges believe that Nacchio got a raw deal the first time.

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