Written Testimony of
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United States Court of Appeals for the Fifth Circuit
Chair, Committee on Codes of Conduct
Of the Judicial Conference of the United States

appearing on behalf of the
Judicial Conference of the United States

before the United States House of Representatives
Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, and the Internet

Hearing on:
"Judicial Ethics and Transparency: The Limits of Existing Statutes and Rules"

October 26, 2021

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Introduction

Chairman Johnson, Ranking Member Issa, and members of the Subcommittee, good afternoon. I am Judge Jennifer Walker Elrod, a United States Circuit Judge for the Fifth Circuit. I also serve as the chair of the Committee on Codes of Conduct of the Judicial Conference of the United States.

The Codes of Conduct Committee of the Judicial Conference of the United States has the responsibility to provide advice, training, and other information on the application of the Code of Conduct for United States Judges (Code of Conduct) and other judicial branch codes of conduct and Titles III and VI of the Ethics Reform Act of 1989, as amended; to implement statutory provisions relating to deferral of capital gains tax on certain ethics-based divestitures of property by judicial officers; and to recommend policies concerning matters of judicial ethics.

I appreciate the invitation to appear today to discuss Judicial Ethics and Transparency. These two topics – identified as the subject of the hearing – are fundamental to an independent judiciary and the public's trust in the judiciary. The Third Branch works diligently to assure high standards of conduct and integrity for judges and staff, in order to guarantee each case or controversy a fair and impartial forum.

Ethical conduct is an essential element of the federal Judiciary. The framework of judicial ethics includes statutes – disqualification statutes, ethics legislation such as the Ethics in Government Act and the Ethics Reform Act – and related case law; the Code of Conduct Canons, and associated commentary; and the ethics regulations adopted by the Judicial Conference, including related policies and procedures. Supporting this framework is the Codes of Conduct Committee, which can respond to judges seeking ethics advice. Such advice may be informal, a formal private confidential letter of advice, or public advice provided through nearly one hundred Advisory Opinions available to the public at the Judiciary's website, www.uscourts.gov.

I am here on behalf of the Judicial Conference to highlight the relevant statutes, Code of Conduct provisions, and policies adopted by the Judicial Conference related to recusal and financial disclosure. I will discuss their implementation and application and summarize the Judiciary's response to the issues identified in recent media reports.

Recusal Standards for Federal Judges

Statutory provisions – The primary federal statutes relating to conflicts of interest or recusal, more properly referred to as disqualification, are 28 U.S.C. §144 and 28 U.S.C. § 455. These statutes articulate a federal judge's statutory recusal obligations and together address concerns of both actual bias and the appearance of bias. Section 144 permits a party to file a sufficient affidavit to attempt to establish personal bias or prejudice of a district judge. Section 455 is broader, addressing both the appearance of impartiality and other categories for disqualification. Although the Committee on Codes of Conduct is not authorized to render advisory opinions interpreting sections 455 and 144, Canon 3C of the Code of Conduct closely

tracks the language of section 455, and the Committee is authorized to provide advice regarding the application of the Code.

Code of Conduct provisions – Canon 3C provides that a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. In addition, the Code of Conduct requires a judge to disqualify himself or herself including instances, paraphrased here, in which:

1) the judge has a personal bias or prejudice concerning a party or has personal knowledge of disputed facts in the case;

2) the judge, or a lawyer with whom the judge previously practiced law, served as a lawyer in the matter in controversy, or the judge or lawyer has been a material witness in the matter;

3) the judge, judge's spouse, or minor child has any financial interest in the subject matter in controversy or in a party, or any other interest that could be affected substantially by the outcome of the proceeding;

4) the judge, judge's spouse, or a close relative is a party, a lawyer, a witness, or has some interest that could be substantially affected by the outcome of the proceeding; or

5) the judge served in previous governmental employment and participated as a judge, counsel, advisor, or material witness concerning the proceeding, or expressed an opinion concerning the merits of the particular case in controversy.

Of particular interest regarding recusal based on financial interest is the requirement for disqualification "[when] the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest…in a party to the proceeding…." Canon 3C(1)(c). A "proceeding" includes pretrial as well as other

stages of litigation. Canon 3C(3)(d). The Code of Conduct defines "financial interest" as "ownership of a legal or equitable interest, however small," subject to certain exceptions such as "ownership in a mutual or common investment fund." Canon 3C(3)(c).

All judges have a duty under the Code of Conduct to keep informed about their personal and fiduciary financial interests and "make a reasonable effort" to keep informed of the financial interests of the judge's spouse or minor child. See Canon 3C(2). Because of this duty, judges may not rely on a blind trust, or a "managed account" controlled by a financial advisor, to avoid recusal obligations. The Committee on Codes of Conduct has consistently advised that the use of a blind trust would be incompatible with a judge's duty to "keep informed" about financial interests under Canon 3C(2).

The Committee on Codes of Conduct has reminded judges investing in managed accounts to be mindful of both their recusal and their financial disclosure obligations. Under the Judicial Conference policy on electronic conflicts screening, a judge has a continuing obligation to update the judge's list of financial interests that would require recusal, which would include securities held in managed accounts. Similarly, because judges investing in managed accounts own the underlying securities, the scope of their financial disclosure obligations may change as their managed account portfolio develops.

Investments in a mutual fund will normally avoid triggering recusal concerns with respect to the securities that the fund holds. The Committee on Codes of Conduct has advised that investment in a mutual fund does not convey an ownership interest in the companies whose stock the fund holds and has also advised that a judge who invests in a mutual fund has no duty to affirmatively monitor the underlying investments of the fund for recusal purposes.

Although the Code of Conduct does not define "mutual or common investment fund," the Codes of Conduct Committee has explained that determining whether a fund qualifies involves several related considerations, including: (1) the number of participants in the fund; (2) the size and diversity of fund investments; (3) the ability of participants to direct their investments; (4) the ease of access to and frequency of information provided about the fund portfolio; (5) the pace of turnover in fund investments; and (6) any ownership interest investors have in the individual assets of the fund. The Committee has concluded that most mutual funds that are registered with the Securities and Exchange Commission and sold to the public as mutual funds will likely meet the criteria above.

Determining whether a particular sector fund, industry fund, or exchange traded fund qualifies as a "mutual or common investment fund" under the Code of Conduct involves the same criteria applied to more conventional mutual funds. Such funds normally should be treated as mutual or common investment funds under the Code of Conduct and are subject to the same recusal analysis as other funds.

Ideally, the employment of careful conflict checks by the individual judge and the judge's court prevent a judge from participating at all in a case in which the judge has a disqualifying interest. Canon 3C(4) of the Code of Conduct recognizes, however, that circumstances may arise where a disqualifying interest does not surface until after the judge has been assigned a case. In such instances, the Code of Conduct addresses the propriety of the judge continuing to sit on such a case. For example, a situation may arise where a judge, or the judge's spouse or child, inherits stock while a case is pending involving that company's stock. Another example might be where a judge or judge's spouse owns stock in a corporation that intervenes as a party or that is found to be a corporate parent of a party. The existence of a disqualifying interest may be

learned directly by the judge or may come to light in counsel's motion for recusal. The issue also may arise after the judge has taken minimal action, after years of discovery orders, or after trial but before decision.

The Codes of Conduct Committee has advised that Canon 3C(4) applies to cases in which a judge has already expended a substantial amount of time, cases in which a judge has expended no time, and those in between. Accordingly, if a judge learns of a disqualifying financial interest in a party before expending judicial time on the case, the judge may avoid disqualification by divesting himself or herself of the interest.

The Code of Conduct addresses whether a judge can "divest" a financial interest that is causing a conflict. Although disposing of a disqualifying interest may allow a judge to continue to sit on a case, Canon 3C(4) limits this option to the disposal of financial interests that will not be substantially affected by the outcome of the litigation. If the financial interest could be substantially affected, even after divestment, the judge could not continue to hear the case under Canon 3C(4).

Finally, the Committee on Codes of Conduct has advised that should a judge decide to continue to participate in a matter following disposal of a disqualifying interest, the facts giving rise to the disqualification, the judge's disposal of the disqualifying interest, and the public interest in continued participation of the judge should generally be disclosed to the parties and on the record in the case.

Occasionally, a judge may not discover a financial conflict until after final judgment has been entered. In this case, the Committee on Codes of Conduct has advised that a judge should disclose to the parties the facts bearing on disqualification as soon as those facts are learned, even though that may occur after entry of the decision. The parties may then determine what

relief they may seek, and a court (without the disqualified judge) will decide the legal consequence, if any, arising from the participation of the disqualified judge in the entered decision.

Judges are required to recuse in any proceeding in which they know they hold a financial interest in a party, whether the interest is held individually or as a fiduciary. A judge who serves as a trustee is deemed to have a financial interest in all assets held by the trust and, therefore, is required to recuse in cases where a corporation whose securities are held by the trust is a party.

Judicial Conference policies – The recusal statutes and Code of Conduct are central to the broader duty of the federal Judiciary to ensure impartiality and promote transparency. Other components are the system of random assignment of cases and the policies adopted by the Judicial Conference of the United States that provide additional obligations and safeguards.

In 2006, the Judicial Conference approved a new policy intended to assist judges to comply with their ethical obligations concerning recusal and financial conflicts. In particular, the Conference required federal courts to use conflict-checking computer software to identify cases in which judges may have a financial conflict of interest and should disqualify themselves.

In recommending the mandatory conflict-checking policy, the Conference's Committee on Codes of Conduct reported that: "A fair reading of the judiciary's record shows that federal judges take their recusal obligations very seriously, and this commitment will be underscored by adoption of a mandatory automated conflict screening policy." The Committee further stated, "While automated screening is not foolproof, it is an efficient and effective supplement to a judicial officer's individualized review."

The Judicial Conference required the Administrative Office of the United States Courts (AO), in cooperation with the courts, to continue developing, refining, and deploying the

necessary hardware and software for use in automated conflict screening in the Case Management/Electronic Case Files (CM/ECF) system and instructed the AO and courts to take additional action.

First, the policy directed the AO to examine methods to improve the screening (including incorporating more sophisticated matching mechanisms and features available in other software), and to provide information, training, and assistance to facilitate implementation of and participation in the screening.

Second, the policy required all judges to "develop a list identifying financial conflicts for use in conflict screening, [and to] review and update the list at regular intervals…." The AO has developed a checklist that judges may use when preparing or updating the list. Up-to-date recusal lists are the most effective tool for conflict screening.

Third, the policy provides that each judge "shall employ the list personally or with the assistance of court staff to participate in automated conflict screening." Importantly, the policy notes that use of automated conflicted screening is in addition to each judge's "personal review of cases for conflicts."

Fourth, courts are required to use "automated conflict screening to identify financial conflicts of interest for judicial officers, and to notify the judicial officer (or designee) when a financial conflict is identified, through the screening component of the CM/ECF system…."

Fifth, the clerk's office shall administer the screening (including obtaining from the parties and entering upon receipt, or causing the parties to enter and update, if feasible, corporate parent information and other relevant information). The clerk's office shall screen for financial conflicts on a regular schedule, including screening new matters as they are filed, and shall make reports as requested by the chief judge of the court and the respective circuit council.

Sixth, each clerk's office shall provide information (including periodic reminders to judicial officers), training, and assistance to facilitate participation in the screening.

The policy is administered and directed by the Circuit judicial councils, which also have the responsibility to "make all necessary and appropriate orders to implement the…mandatory conflict screening policy within the circuit."

Following adoption by the Judicial Conference in 2006, each chief judge was required to report to the respective circuit council on the status of automated financial conflict screening in the court, the number of judicial officers participating in automated conflict screening, and any additional information sought by the circuit council. In turn, each circuit council was required to report to the Judicial Conference their preliminary plan for implementation of the mandatory financial conflict screening program within their circuit. In 2007, the Committee on Codes of Conduct assisted the circuit judicial councils in reviewing each of those individual circuit implementation plans to ensure they complied with the Judicial Conference policy. The policy also provides that the Judicial Conference may require further reports by the circuit judicial councils as necessary.

The Judicial Conference also implemented a policy in 2007 requiring judges to disclose their attendance at privately funded seminars. The policy and the seminar disclosures are available to the public on court websites.

Training

The development and delivery of ethics education for judges and judiciary employees – including law clerks, staff attorneys, clerks, and judicial assistants – is an important function of the Committee on Codes of Conduct. The Committee offers explanatory booklets for judges, law clerks, and employees. In participation with the Federal Judicial Center, we have

significantly expanded training opportunities at judicial meetings and on-line. Judges receive ethics education in new judge orientations meetings, as well as continuing education programs. Committee members are actively engaged in ethics presentations at national and regional meetings of judges. Training presentations encourage discussions among judges on ethics scenarios drawn from both confidential inquiries and hypothetical ethics problems. Committee members also participate in ethics education programs that include both judges and attorneys. Lawyers are often very interested in knowing about judicial ethics, such as recusal procedures and what a judge is permitted to do within the bar and the community. We have highlighted ethics issues in joint bench/bar meetings.

On-line training includes a substantial number of publications, podcasts, videos, and other materials on a broad range of ethics and Code of Conduct issues. The Committee on Codes of Conduct prepares and distributes to all judges an annual ethics quiz on current ethics topics. These forms of training supplement additional ethics training for judges that is provided at various meetings that judges are required to attend. We regard ethics as a very serious matter and look upon these training opportunities as an excellent way of working with our judicial colleagues on ethics issues. Our extensive training effort underscores the value and the importance the federal Judiciary places on ethical conduct.

Financial Disclosure Requirements

In addition to recusal statutes, the federal Judiciary is covered under additional ethics legislation and policies that require filing annual financial disclosure reports. The Judicial Conference's Committee on Financial Disclosure, a separate and distinct committee from the Codes of Conduct Committee, supervises the filing of financial disclosure reports by judicial

officers and employees. Judicial officers are required to file financial disclosure reports by Title I of the Ethics in Government Act of 1978, Pub. L. No. 95-521, amended by the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716, 5 U.S.C. app. §§ 101-111 (the Act). The Act enumerates the types of information required and prescribes the general format and procedures for the reports.

The high level of compliance by judges with their financial disclosure duties and the reports we release are essential elements of public confidence in the federal Judiciary. In calendar year 2020, the Judiciary released over 13,000 reports. These reports provide transparency to the public and to litigants who may check on reportable financial and other interests that might require disqualification of a judge from a particular case.

We acknowledge that in some cases the release of reports takes too long. Efforts have been made and continue to be pursued to be more responsive to the public. Although slowly and cautiously, we are responsive to public input and have moved from an exclusively paper system to one that provides reports on thumb drives free of charge (if the requestor prefers this to paper) or electronically provides reports in PDF format as interest groups have desired.

The federal Judiciary has been engaged in continuing efforts to develop and implement a new electronic financial disclosure system, which would include both the features required for filing, reviewing, and reporting and the features needed for redacting and releasing financial disclosure reports to the public. Automating the processing of financial disclosure reports for release may improve the timeliness of response to requests to view financial disclosure reports.

It is important to note however, the financial disclosure system is separate from the recusal requirements. The disclosure requirements and exemptions from disclosure contained in the Ethics in Government Act neither define nor limit the standards imposed by the Code of

Conduct for United States Judges and other rules of the Judicial Conference or the statutory provisions for disqualification or recusal.

Judiciary's response to the issues identified in recent media reports

Recent media reporting on financial interest conflicts have highlighted gaps that we can address through education and technological improvements. While the number of cases with reported lapses is very small compared to the total number of cases that the federal courts handle, we must strive to achieve full compliance.

Over the past few months, the Director of the AO, Judge Roslynn R. Mauskopf, has communicated with judges and the courts to:

- ✓ remind judges of the published ethics guidance and resources available to judges and reiterating the importance of complying with the existing policy and requirements concerning financial interests and conflict screening;
- ✓ request judges to review the guidance and ensure compliance
- ✓ remind each judge of the duty under the Code of Conduct to keep informed about the judge's personal and fiduciary financial interests;
- ✓ remind each judge to develop a list of financial conflicts for use in conflict screening;
- ✓ remind judges to use the list and participate in automated conflict screening;
- ✓ remind courts to use the automated conflict screening to notify judicial officers of financial conflicts;
- ✓ request chief judges help ensure appropriate action is taken when a conflict has been identified in a closed case;
- ✓ remind chief judges that the Code of Conduct and the Judicial Conduct and Disability Act rules provide authority to consider actions that may be appropriate, based on the relevant facts and circumstances;
- ✓ encourage judges to consider potential improvements to the conflict screening process, and to contact the AO with any suggestions.

Director Mauskopf has requested relevant Judicial Conference committees, including my own, to consider recommendations at their next meetings that seek to clarify or improve the conflict screening process. I am hopeful the Judiciary will consider improved "best practices" for courts on how to use the conflict screening software and ensure conflicts screening software is used in each circuit. The AO will also be offering additional training for judges and court staff on conflict screening.

Conclusion

The fair and impartial adjudication of cases, in a transparent environment, is a fundamental duty of the federal Judiciary. An independent federal Judiciary is essential to the rule of law in our nation. The statutes and case law on recusal, the Code of Conduct provisions, as well as the Judiciary policies, practices, and enforcement mechanisms I have outlined in this testimony are the tools and resources available to the federal Judiciary and to the public to ensure the functioning of an ethical and independent judicial branch and to enhance the public's trust in the Third Branch. As Chair of the Codes of Conduct Committee, and on behalf of the Judicial Conference of the United States, I assure you the federal Judiciary takes these obligations seriously. We have taken and will continue to take action to ensure ethical obligations, including recusal and reporting requirements, are met.