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FEATURE ARTICLE

The Business Interests of Judicial Spouses

Over the past several years an increasing number of commentators have begun to question the propriety of Ginni Thomas's political and business activities in situations where her husband, United States Supreme Court Justice Clarence Thomas, might be involved in hearing cases related to these interests. The press has begun to follow up on the broader question of whether federal judges should be required to disclose certain business interests of their spouses.[1] It has been pointed out that four Supreme Court Justices—Justice Thomas, Justice Amy Coney-Barrett, Justice Ketanji Brown Jackson, and Chief Justice Roberts—have spouses who are lawyers or lobbyists. Most recently, on October 18, 2022, four progressive watchdog groups sent a letter to members of Congress asking them to consider passing legislation that would require all federal judges—not just members of the U.S. Supreme Court—to disclose more extensive information about their spouses' business interests.

To be clear, the letter does not request changes to the federal rules on judicial recusal. These already exist in 28 U.S.C. §455:

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> > (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
> >
> > (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
> >
> > (3) Where he has served in governmental employment and in

1 The journal *Politico* has reported on this and published several articles on this subject that we used in writing this column, the last of which is available online at https://www.politico.com/news/2022/10/20/judicial-activists-income-judges-spouses-00062670.

such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.[2]

Instead, the debate at the moment is over greater transparency in the financial disclosure rules. Currently, federal judges must disclose the name of a spouse's employer, but they are not required to disclose clients of an employer or the amount of

2 This section, in effect, gives U.S. Supreme Court Justices a free pass since there is no higher judicial authority in the federal court system.

compensation received from a job.[3]

The letter sent to Congress is short but clear:

> October 18, 2022
>
> Dear Chairmen Durbin, Whitehouse, Nadler and Johnson; Ranking Members Grassley, Kennedy, Jordan and Issa:
>
> We, the undersigned organizations, write to encourage you to draft legislation that will close a disclosure loophole in the judiciary and ensure that judges, justices and the American people can more fully appreciate and account for potential judicial conflicts of interest.
>
> Our recommendation comes as a new report[1] has illustrated how the work of several judicial spouses — those in the legal and legal services industries and those who do consulting work[2] — might intermingle with the cases and petitions considered by the Supreme Court. These concerns are no doubt more acute in circuit and district courts, which, including senior judges, comprise close to 1,400 jurists.
>
> We therefore seek the following insertion into 5 U.S.C. App. § 102(e)(1), with the current subsections (B) through (F) being redesignated as (C) through (G):
>
> "(B) If a spouse renders legal services; strategic or legal advice related to litigation, lobbying, or business activities; lobbying or public relations services; or testimony as an expert witness, and the value of that service, advice, or testimony in the reporting year is greater than $5,000 or its equivalent in billable hours or bonuses, then the name of the payor for that service, advice, or testimony and the amount of compensation need be reported."
>
> We believe $5,000 to be the proper threshold since that number is used elsewhere in government financial disclosure rules as a reporting floor, including in the rules that govern reporting of major clients by incoming officials and nominees.[3]
>
> We applaud your recent work[4] to ensure that judges' and justices'

3 See https://www.uscourts.gov/rules-policies/judiciary-policies/ethics-policies/financial-disclosure-report-regulations.

annual disclosures reports and reports on their stock transactions are posted online in a timely manner. We hope we can work with you in the coming weeks to improve judicial disclosures once more.

Sincerely,

Citizens for Responsibility and Ethics in Washington (CREW)
Free Law Project
Fix the Court
Project On Government Oversight

[1] See Hailey Fuchs, Josh Gerstein and Peter S. Canellos, "Justices shield spouses' work from potential conflict of interest disclosures," *Politico*, Sept. 29, 2022 (link)

[2] Jane Roberts is managing partner at legal recruiting firm Macrae, where she "advises high-profile law firm partners and [...] senior government attorneys" (link); Ginni Thomas is president of Liberty Consulting (link), which has been involved in several high- profile political and policy battles in Washington; Jesse Barrett in 2021 opened the Washington-based practice for Southbank Legal (link); and Patrick Jackson receives "self-employed consulting income [...] from consulting on medical malpractice cases" (link)

[3] See 5 U.S.C. App. § 102(a)(6)(B); U.S. Office of Government Ethics, Financial Disclosure Reporting Guidelines, § 2.07: Part 4

[4] See the Courthouse Ethics and Transparency Act, P.L. 117-125

Many commentators have argued that this change is not only desirable, but necessary. Nevertheless, if one thinks about this in terms of the rights of a judicial spouse, then the question of whether expanding the judicial financial transparency rules becomes more complex. One must ask what effect such rules might have on the spouse, the spouse's employer, and the spouse's employer's clients.

The arguments for transparency are certainly strong: litigants—and the public—should have as much information about potential judicial conflicts as possible to determine whether to move for a judge to recuse herself. Furthermore, were judges required to disclose more information about spousal activities, this would increase pressure on them to recuse themselves in borderline cases.

However, the difficulty with the letter's proposal to increase transparency is

that it may cause significant disruption to a spouse's legal or lobbyist practice—to the point that some judicial spouses may have to give up their professional activities entirely. Such a possibility might well be a reason why potential judges will decline to go on the bench.

In the end, much of the controversy over disclosure of spousal activities comes from a growing distrust of our judiciary. This, in itself, is highly problematic. It is not clear that increasing disclosure will solve this problem. If some judges are disinclined to follow the conflicts and recusal rules, is it likely that they will make required disclosures?

The bar and the judiciary should have serious discussions about the proposals and have input into any proposed legislation on this issue.

OLD AUTHORITY

A Reminder Re: Judicial Impartiality

The media has been full of stories during the past year about high-profile government officials who belong to groups that discriminate or otherwise adhere to doctrines that may lead people to question their impartiality in official activities. This month, rather than offering new authority, we offer a reminder of the rules governing judges' participation in such groups and organizations.

Kansas Rule of Judicial Conduct 3.6 states:

> (A) A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation.
>
> (B) A judge shall not use the benefits or facilities of an organization if the judge knows or should know that the organization practices invidious discrimination on one or more of the bases identified in paragraph (A). A judge's attendance at an event in a facility of an organization that the judge is not permitted to join is not a violation of this Rule when the judge's attendance is an isolated event that could not reasonably be perceived as an endorsement of the organization's

practices.

The Comments to Rule 3.6 state:

> [1] A judge's public manifestation of approval of invidious discrimination on any basis gives rise to the appearance of impropriety and diminishes public confidence in the integrity and impartiality of the judiciary. A judge's membership in an organization that practices invidious discrimination creates the perception that the judge's impartiality is impaired.
>
> [2] An organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation persons who would otherwise be eligible for admission. Whether an organization practices invidious discrimination is a complex question to which judges should be attentive. The answer cannot be determined from a mere examination of an organization's current membership rolls, but rather, depends upon how the organization selects members, as well as other relevant factors, such as whether the organization is dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members, or whether it is an intimate, purely private organization whose membership limitations could not constitutionally be prohibited.
>
> [3] When a judge learns that an organization to which the judge belongs engages in invidious discrimination, the judge must resign immediately from the organization.
>
> [4] A judge's membership in a religious organization as a lawful exercise of the freedom of religion is not a violation of this Rule.
>
> [5] This Rule does not apply to national or state military service.

Missouri Rule 2-3.6 states:

> A judge shall not hold membership in any organization that practices invidious discriminatory conduct against any person who is protected by law from discrimination.
>
> A judge shall not use the benefits or facilities of an organization if the judge knows or should know that the organization practices invidious discrimination. A judge's attendance at an event in a facility

> of an organization that the judge is not permitted to join is not a violation of this Rule 2-3.6 when the judge's attendance is an isolated event that could not reasonably be perceived as an endorsement of the organization's practices.

The Comments to Rule 2-3.6 read:

> [1] A reasonable person standard should be used to determine whether a judge's membership in the organization creates the perception that the judge's impartiality, integrity or independence is impaired.
>
> [2] Whether an organization practices invidious discrimination is a complex question to which judges should be attentive. The answer cannot be determined from a mere examination of an organization's current membership rolls, but rather, depends upon how the organization selects members, as well as other relevant factors, such as whether the organization is dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members, or whether it is an intimate, purely private organization whose membership limitations could not constitutionally be prohibited.
>
> [3] When a judge learns that an organization to which the judge belongs engages in invidious discrimination against any person who is protected by law from discrimination, the judge must resign from the organization unless the organization corrects its practice within six months.
>
> [4] A judge's membership in a religious organization as a lawful exercise of the freedom of religion is not a violation of this Rule 2-3.6.
>
> [5] This Rule 2-3.6 does not apply to national or state military service.

We live in a time of growing partisanship, increasing political division, and increasing questions about the impartiality of our judicial system. One of the most fundamental concepts underlying our judicial system in this country is that judges are fair and impartial and that every litigant in court is entitled to a fair and impartial hearing and judgment. This places a great burden on judges because it means that they come under scrutiny not only for what they do on the bench, but also in their extra-judicial activities. When judges belong to organizations that inspire questions regarding their impartiality, this is problematic. Deciding what is proper and what

is not proper is not always easy. The Comments to both Kansas Rule 3.6(A)(2) and Missouri Rule 2-3.6(A)(2) give some guidance on how to answer this complex question.

Judges are not the only ones who must know Rule 3.2 as adopted in their jurisdictions. Lawyers should also be aware of this rule to protect their clients. Further, lawyers and judges should be able to cite this rule in discussions with the public to reassure them that the judiciary and the legal profession are sensitive to this issue and have taken concrete steps to protect litigants.

ETHICS & MALPRACTICE RESEARCH TIP

New Articles from *The Current Index of Legal Periodicals*

1. Sande L. Buhai, Confidential Settlements for Professional Malpractice, 95 St. John's L. Rev. 31 (2021).

   Focusing primarily on legal malpractice, Buhai explores how confidentiality provisions in professional malpractice settlements interact with regulatory reporting requirements.

2. Sybil Dunlop, A Call for Action: How Clients and Judges Can Do More to Address the Legal Profession's Diversity Problem, 18 U. St. Thomas L.J. 78 (2022).

   Dunlops says firm action is not enough to increase diversity; the profession has a collective problem requiring a collective solution.

3. Augustus Calabresi, Machine Lawyering and Artificial Attorneys: Conflicts in Legal Ethics with Complex Computer Algorithms, 34 Geo. J. Legal Ethics 789 (2021).

   Calabresi discusses the newest innovations assisting the legal profession and legal professionals' responsible use of the same.

4. Melinda C. Church, The Ethics of Addiction and Legal Partnership Agreements:

How Current Partnership Laws and the Rules of Professional Conduct Fail to Account for the Epidemic of Addiction in the Legal Profession, 34 Geo. J. Legal Ethics 843 (2021).

Church argues that the law—Model Rules, as well as statutory and common law pertaining to partnership—has not yet caught up to the contemporary understanding of addiction as a disease or medical condition, rather than a conscious choice.

5. Andrew Lee, Defense Attorneys at a Dead End: Representing Stateless Terrorist Clients Detained Indefinitely, 34 Geo. J. Legal Ethics 1113 (2021).

   Lee considers whether additional limits should be imposed on attorneys representing stateless terrorists detained indefinitely.

6. Mark Lipnicky, The English Roots of American Legal Regulation: An Examination of Early Legal Regulation in Virginia, Massachusetts, and New York, 34 Geo. J. Legal Ethics 1131 (2021).

   Lipnicky examines the distinct cultures of the English and American legal professions and how they were influenced by local conditions.

A BLAST FROM THE PAST

A Cynical View of Legal Ethics

> "The one great principle of the English law is, to make business for itself. There is no other principle distinctly, certainly, and consistently maintained through all its narrow turnings. Viewed by this light it becomes a coherent scheme, and not the monstrous maze the laity are apt to think it. Let them but once clearly perceive that its grand principle is to make business for itself at their expense, and surely they will cease to grumble."

Charles Dickens, *Bleak House* 467 (1852), available online at https://www.google.com/books/edition/Bleak_House/1OTbzCGIT2YC?hl=en&gbpv=1.

josephhollander.com