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Legal Ethics in the News – NYC Bar Ass'n Podcast

Sources for Podcast #14

Press Release for the 21st Century Court Act, with links to the text and a summary of the Act: https://www.whitehouse.senate.gov/news/release/whitehouse-johnson-blumenthal-nadler-quigley-cicilline-jones-introduce-legislation-to-enforce-accountability-transparency-for-justices-and-judges A redline showing the proposed amendments to 28 U.S.C. § 455 appears below.

Rich Lowry, "Clarence Thomas Is Better Than His Critics," National Review (April 1, 2022)

Danny Hakim, Jo Becker and Alan Feuer, "Texts Show Ginni Thomas's Embrace of Conspiracy Theories," N.Y. Times (March 26, 2022)

Jane Mayer, "Legal Scholars Are Shocked By Ginni Thomas's 'Stop the Steal' Texts," New Yorker (March 25, 2022)

Jackie Calmes, "Has Clarence Thomas' Wife crossed a line. Yes, and then some," L.A. Times (February 25, 2022)

Danny Hakim and Joe Becker, "The Long Crusade of Clarence and Ginni Thomas," N.Y. Times Magazine (February 22, 2022)

Michael Kranish, "Critics say Ginni Thomas's activism is a Supreme Court conflict. Under court rules, only her husband can decide if that's true," Washington Post (January 31, 2022)

Jane Mayer, "Ginni Thomas's Crusades," New Yorker (January 31, 2022)

George Will, "Clarence Thomas and his wife's texts: A kerfuffle over appearances," Washington Post, April 1, 2022.

Association of Professional Responsibility Lawyers (APRL) Proposal to Amend Rule 5.5: https://aprl.net/aprl-asks-aba-to-revised-model-rule-5-5/

21st Century Courts Act Proposed Changes to 28 U.S.C. § 455:

SEC. 3. DISQUALIFICATION OF FEDERAL JUDGES.

(a) Any justice, judge, bankruptcy 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 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.

(6) Where the justice, judge bankruptcy judge, or magistrate judge of the United States received, during the 6-year period ending on the date on which the judge was assigned to the proceeding, income, a gift, or reimbursement required to be reported under section 102 of the Ethics in Government Act of 1978 (5 U.S.C. App.) from a party to the proceeding, a lawyer in the proceeding, an individual employed in a supervisory capacity by a party or law firm in the proceeding, or an affiliate of a party or law firm in the proceeding.

(7) Where a party to the proceeding, a lawyer in the proceeding, an individual employed in a supervisory capacity by a party or law firm in the proceeding, or an affiliate of a party or law firm in the proceeding made any lobbying contact or spent substantial funds in support of the nomination, confirmation, or appointment of the justice, judge, bankruptcy judge, or magistrate judge of the United States.

(8) Where the justice, judge, bankruptcy judge, or magistrate judge of the United States, their spouse, child, or spouse of their child has, during the 6-year period ending on the date on which the justice, judge, bankruptcy judge, or magistrate judge of the United States was assigned to the proceeding—

(A) received income, a gift, or reimbursement required to be reported under section 102 of the Ethics in Government Act of 1978 (5 U.S.C. App.) from, or been employed or volunteered for more than 6 consecutive months in an official supervisory or advisory capacity for a party to the proceeding, a lawyer in the proceeding, or an affiliate of a party or law firm in the proceeding; or

(B) been employed or volunteered for more than 6 consecutive months in an official supervisory or advisory capacity alongside a lawyer 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.~~

(c) A justice, judge, bankruptcy judge, or magistrate judge of the United States shall be informed about—

(1) the personal and fiduciary financial interests of the justice, judge, bankruptcy judge, or magistrate judge of the United States;

(2) the personal financial interests of the spouse and minor children residing in the household of the justice, judge, bankruptcy judge, or magistrate judge of the United States; and

(3) any interest that could be substantially affected by the outcome of the proceeding.

(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; and

(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;

(5) 'official supervisory or advisory capacity' includes acting as a director, officer, trustee, or any other equivalent position;

(6) 'affiliate' means an entity that effectively controls or is controlled by another entity or is associated with another entity under common ownership or control, regardless of tax status or corporate form. Whether an entity is an affiliate of another shall be determined under the totality of the circumstances, including—

(A) whether the entities share employees, board members, or officers;

(B) whether the entities share facilities or mailing addresses;

(C) whether the entities are related organizations, as defined by the Internal Revenue Service; and

(D) any indicia that the 2 entities are alter egos or otherwise effectively the same organization regardless of tax status or corporate form;

(7) 'substantial funds' means an amount of money that a reasonable person would consider to be significant based on the totality of circumstances, including—

(A) the proportion of funds spent relative to the revenues or expenditures of the individual or entity;

(B) the proportion of funds spent relative to other known spending in support of the nomination, confirmation, or appointment of the justice, judge, bankruptcy judge, or magistrate judge of the United States; and

(C) any other objective indicia of the significance of the financial support of the individual or entity for the nomination, confirmation, or appointment of the justice, judge, bankruptcy judge, or magistrate judge of the United States.;

(e) No justice, judge, bankruptcy judge or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b), unless the ground for disqualification arises under paragraph (7) of that subsection. 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. Where the ground for disqualification arises only under subsection (b)(7), waiver may be accepted only if offered by all parties to the proceeding;

(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 under subsection (b)(4) 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.

(g) If a justice, judge, bankruptcy judge, or magistrate judge learns that a condition requiring disqualification under this section is present, the justice, judge, bankruptcy judge, or magistrate judge shall—

(1) immediately notify all parties to the proceeding; and

(2) include the notification required under paragraph (1) in the official record of the proceeding.

(h)(1) A justice, judge, bankruptcy judge, or magistrate judge shall grant or certify to a reviewing panel a timely motion filed by a party to the proceeding that is accompanied by a certificate of good faith and an affidavit alleging facts sufficient to show that disqualification of the justice, judge, bankruptcy judge, or magistrate judge is required under this section or any other Federal law.

(2) A reviewing panel described in paragraph (1) shall be selected at random from judges of the United States who do not sit on the same court as the judge, bankruptcy judge, or magistrate judge who is the subject of the motion or as the other members of the reviewing panel. No more than 1 member of the reviewing panel may be a judge of the same judicial circuit as the judge, bankruptcy judge, or magistrate judge who is the subject of the motion.

(3) The Supreme Court of the United States shall be the reviewing panel for a motion seeking to disqualify a justice.

(i) The clerk of the applicable court shall publish timely notice on the website of the court of—

(1) any matter in which a justice, judge, bankruptcy judge, or magistrate judge of the United States disqualifies is disqualified under this section;

(2) in the case of any matter in which the reviewing panel under subsection (h) rules on a motion to disqualify; and

(3) an explanation of each reason for the disqualification or ruling, which shall include a specific identification of each circumstance that resulted in disqualification.