IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 1:96CV01285 (Judge Lamberth)
GALE A. NORTON, Secretary of the Interior, et al.,	)	Special Master Alan Balaran
Defendants.	)	

GOVERNMENT'S OPPOSITION TO SPECIAL MASTER'S PROPOSED RETENTION OF ANNE H.S. FRASER, ESQ. TO ASSIST THE SPECIAL MASTER WITH MOTIONS FOR ORDERS TO SHOW CAUSE

By letter dated October 11, 2002, Exhibit 1 hereto, the government notified the Special Master of its opposition to the proposed retention of Anne H.S. Fraser, Esq., to assist him with the motions for orders to show cause which the Court has referred to the Special Master. On October 16, 2002, the Special Master directed the government to set forth with specificity the factual, legal or ethical bases for its objections. *See* Exhibit 2.

Ms. Fraser is currently representing the plaintiff in Young v. Ashcroft, E.E.O.C. 100-A2-7097X, Agency No. JP-01-05, an administrative case in active litigation before the E.E.O.C. Ms. Fraser's client is pursuing a claim against a component of the Department of Justice, and Attorney General John Ashcroft in his official capacity is the named Respondent. While the government does not know Ms. Fraser's fee arrangements with her client, if her fees are dependent in any way on the outcome of the proceeding, she would have a financial stake in the outcome of the E.E.O.C. proceeding.

The Special Master proposes to hire Ms. Fraser, presumably in the capacity of a law clerk, to assist him in his review of the motions to show cause which have been referred by the Court.[1] The motions to show cause allege contemptuous conduct by at least twelve present or former employees of the Department of Justice, in both their official and individual capacities. Moreover, the Department of Justice is representing all respondents in their official capacity. Therefore, if she is hired, Ms. Fraser would be acting as a neutral assisting a review of claims against the Department of Justice and current and former Department of Justice personnel, while she is actively litigating another case in which the Department of Justice is both counsel and defendant.

The Special Master's letter of October 16, 2002 states that it does not appear that Ms. Fraser has "any actual or potential conflict of interest in that she is not being asked to, nor will she be required to, advance any two or more adverse positions on behalf of any client in connection with this engagement. See Rule 1.7 of the D.C. Bar Rules." The Special Master errs in viewing the issue as whether Ms. Fraser will have a conflict of interest as an attorney. Since she will be retained as a neutral to assist the Special Master in performing an adjudicatory function, the relevant test is whether she will have a conflict of interest in her role as a judicial officer or as an advisor to a judicial officer. Consequently, the proper question is whether, under the above described circumstances, statutes and ethical codes applicable to judicial officers and their staff disqualify Ms. Fraser from assisting the Special Master is his review of contempt motions against the Department of Justice while she is prosecuting a separate administrative case against the Department.

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[1] The Special Master has not precisely detailed what he contemplates Ms. Fraser's duties would be. This memorandum addresses Ms. Fraser's suitability to assist on the motions to show cause. However, the government reserves its position on the general question of whether it is appropriate for the Special Master to retain an attorney to assist him, as a law clerk or in some other capacity.

The D.C. Circuit determined in Jenkins v. Sterlacci, 849 F.2d 627, 632 (D.C. Cir. 1988), that on matters of conflict of interest, a special master is held to the standards applicable to the conduct of judges. A judge is disqualified in any proceeding in which his or her impartiality might reasonably be questioned. 28 U.S.C. § 455 (a). Section 455(a) focuses on what is revealed to the parties and to the public, as opposed to the existence in fact of any bias or prejudice. Hall v. Small Business Administration, 695 F. 2d 175, 178 (5th Cir. 1983) . Canon 3(C)(1) of the American Bar Association Code of Judicial Conduct for United States Judges, which has been approved by the Judicial Conference, also provides that a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned.[2] The Code is Exhibit 3 hereto.

While the Special Master, unlike a judge, *see* 28 U.S.C. § 454, is not prohibited from maintaining a law practice, he could not, while the motions to show cause are pending before him, prosecute or defend a separate case against a party to the show cause proceedings, as such representation would violate section 455(a) and Canon 3(C)(1). In Jenkins v. Sterlacci, 849 F.2d 627 (D.C. Cir. 1988), a special master appointed to determine damages represented a party in an unrelated administrative appeal. A law firm representing a party in the action pending before the special master also participated in the administrative appeal, on behalf of a party whose interests were adverse to the party represented by the special master. The court found that the special master's dual role as an adjudicator of damages claims by a party represented by the law firm and as an advocate in the administrative case against the interests of the law firm created a conflict of interest and an appearance of impropriety. 849 F.2d at 632, 633. The court noted that special masters, unlike judges, are often practicing attorneys, and stated:

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[2] Canon 3(C)(1) applies to special masters.

> They therefore may wear different hats depending upon the professional function they are performing from one day to the next. In one matter they may be required to observe the impartial decorum of a decisionmaker, while in another they may be call upon to assume the perspective, and the partiality, of an advocate. This duality of roles places a burden on the special master with an active law practice. . . . it is sufficient, and necessary, that an individual who accepts an appointment as a special master scrupulously avoid any undertaking, as an advocate or otherwise, that would tend or appear to compromise his impartiality as a decisionmaker.

849 F.2d at 632.[3] Thus, the Special Master could not prosecute or defend a separate cause against the Department of Justice while the motions to show cause are pending before him. His law clerks and staff are bound by the standards applicable to him. Hall, 695 F. 2d at 179 (5th Cir. 1983) ("the clerk is forbidden to do all that is prohibited to the judge."); Hamid v. Price Waterhouse, 51 F.3d 1411, 1416 (9th Cir. 1995) ("if the clerk has a possible conflict of interest, it is the clerk, not the judge, who must be disqualified," quoting Hunt v. American Bank & Trust Co., 783 F. 2d 1011, 1016 (11 Cir. 1986)). Indeed, Ms. Fraser's retention and participation in this case as a law clerk to the Special Master in evaluating claims against the Department of Justice while she is representing a party adverse to the Department of Justice in the administrative litigation would raise serious issues as to whether the Special Master could continue to evaluate the motions for orders to show cause. *See* Hall , 695 F.2d at 176-77 (magistrate recused because he permitted his law clerk to continue to work on the case after she started employment negotiations with plaintiffs' counsel).

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[3] Under the facts of the Jenkins case, the Court determined that the conflict of interest had been waived. The law firm entered its appearance in the administrative proceeding after the special master filed his appearance, thus, the Court concluded, creating the appearance of impropriety by its own actions. 489 F.2d at 632, 633. Moreover, the firm did not move to disqualify the special master until he had issued his report. *Id.* at 634. Here, the Department of Justice objected at the first available opportunity to a potential conflict of interest created by the contemplated retention of Ms. Fraser, and the appearance of impropriety is not created by any action of the Department of Justice.

The Special Master's October 16, 2002 letter requests the government to state the basis for its objections to retention of Ms. Fraser "so that I may fully evaluate your claim." The letter indicates that the Special Master may believe that he has discretion to retain Ms. Fraser, despite the government's opposition. If so, the Special Master's position is not correct. Ms. Fraser is disqualified unless the government waives the conflict of interest, and the government has chosen not to waive the conflict. Moreover, neither the Special Master nor Ms. Fraser has made a full disclosure, on the record, concerning the basis for disqualification, as required by 28 U.S.C. § 455(3) and Canon 3(D) of the American Bar Association Code of Judicial Conduct for United States Judges. *See* Jenkins, 849 F.2d at 633 (stating that the special master was ethically required to make such a disclosure, citing § 455(e), Canon 3(D) and Canon 11.A-C of the American Arbitration Association Code of Ethics for Arbitrators in Commercial Disputes (1977)). We do not know Ms. Fraser's fee arrangement in the E.E.O.C. proceeding, the precise role she would fulfill in assisting the Special Master on the motions for orders to show cause, or the basis for her compensation in the show cause proceedings. Moreover, what information we do have was not provided on the record. However, the rather limited information that is available is sufficient to demonstrate that Ms. Fraser is disqualified from participating in proceedings on the motions to show cause.

Respectfully submitted,
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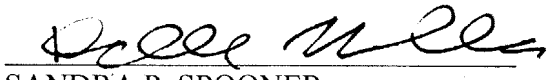

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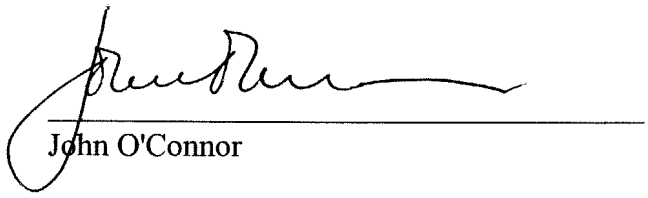
DATED: October 23, 2002

CERTIFICATE OF SERVICE

I certify that on October 23, 2002 I served the foregoing *Government's Opposition to Special Master's Proposed Retention of Anne H.S. Fraser, Esq. to Assist the Special Master with Motions for Orders to Show Cause* in the manner stated upon the persons listed on the attached service list.



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Civil Division

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October 11, 2002

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Alan L. Balaran, Esq.
Special Master
1717 Pennsylvania Ave., NW
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Washington, DC 20006

Re: *Cobell v. Norton*, Civ. Action No. 96-1285 (RCL) (D.D.C.)

Dear Mr. Balaran:

This will respond to our telephone conversation last week in which you mentioned that you were considering hiring Anne Fraser, Esq. to assist you with the show cause motions that the Court has referred to you. You informed me that Ms. Fraser is representing the plaintiff in a matter before the EEOC known as *Young v. Ashcroft* and asked if the Government or individual counsel would object to her participation in these proceedings. I contacted the Department of Justice attorney who is defending the case to learn its status. She informed me that the case is in active litigation and that there are no settlement proposals currently under discussion. This circumstance is sufficient to raise at least the appearance of a conflict of interest, and the Government believes it is not appropriate for Ms. Fraser to serve as an assistant to you in these proceedings.

I have informed individual counsel of your proposal, and they may contact you separately with their own views.

Sincerely,

Tracy L. Hilmer

Tracy L. Hilmer
Trial Attorney
Commercial Litigation Branch

cc (by fax): Attached service list

EXHIBIT 1
Gov't's Opposition to SM's
Retention of Anne H. S. Fraser

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ADMITTED IN DC AND MD

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October 16, 2002

VIA FACSIMILE AND FIRST-CLASS POSTAGE
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United States Department of Justice
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Re: Cobell v. Norton
CA No. 96-1285 (RCL) (D.D.C.)

Dear Ms. Hilmer:

Your letter of October 11, 2002 states that you object to my engagement of Anne H. S. Fraser, Esq. to assist me with the show cause motions assigned to me by Judge Royce C. Lamberth on September 17, 2002. You assert as grounds that this would create the "appearance of a conflict of interest" because Ms. Fraser is representing a party in litigation (Young v. Ashcroft, E.E.O.C. 100-A2-7097X, Agency No. JP-01-05) against the Office of Justice Programs, an agency of the Department of Justice, in which Attorney General John Ashcroft in his official capacity is the named Respondent.

It does not appear from my review of this matter that Ms. Fraser has any actual or potential conflict of interest in that she is not being asked to, nor will she be required to, advance any two or more adverse positions on behalf of any client in connection with this engagement. See, Rule 1.7 of the D.C. Bar Rules. She would not be functioning as an advocate in any way in this matter and it is not clear to me how any position she may assert in her pending case on behalf of a client could conflict with her obligations as a neutral in this case.

Your assertion that my intended use of Ms. Fraser's services creates the appearance of a conflict is, at this point, conclusory. Please set forth, with specificity, all factual, legal or ethical bases for your objection that my use of Ms. Fraser's services creates the appearance of a conflict of interest, in a writing and provide it to me on or before Wednesday, October 23, 2002, so that I may fully evaluate your claim.

Sincerely,

Alan L. Balaran
Special Master

EXHIBIT 2
Gov't's Opposition to SM's
Retention of Anne H.S. Fraser

CHAPTER I. CODE OF CONDUCT FOR UNITED STATES JUDGES

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Compliance with the Code of Conduct
Applicable Date of Compliance
Checklists for Financial and Other Conflicts of Interest (PDF)

CHAPTER I. CODE OF CONDUCT FOR UNITED STATES JUDGES[1]

Introduction

This Code applies to United States Circuit Judges, District Judges, Court of International Trade Judges, Court of Federal Claims Judges, Bankruptcy Judges, and Magistrate Judges. Certain provisions of this Code apply to special masters and commissioners as indicated in the "Compliance" section. In addition, the Tax Court, Court of Appeals for Veterans Claims, and Court of Appeals for the Armed Forces have adopted this Code. Persons to whom the Code applies must arrange their affairs as soon as reasonably possible to comply with the Code and should do so in any event within one year of appointment.

The Judicial Conference has authorized its Committee on Codes of Conduct to render advisory opinions concerning the application and interpretation of this Code only when requested by a

judge to whom this Code applies. Requests for opinions and other questions[2] concerning this Code and its applicability should be addressed to the Chairman of the Committee on Codes of Conduct as follows: Chairman, Committee on Codes of Conduct
c/o General Counsel
Administrative Office of the
United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544
(202) 502-1100

CODE OF CONDUCT FOR UNITED STATES JUDGES[3]

CANON 1

A JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

COMMENTARY

Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depend in turn upon their acting without fear or favor. Although judges should be independent, they should comply with the law, as well as the provisions of this Code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law.

The Canons are rules of reason. They should be applied consistent with constitutional requirements, statutes, other court rules and decisional law, and in the context of all relevant circumstances. The Code is to be construed so as not to impinge on the essential independence of judges in making judicial decisions.

The Code is designed to provide guidance to judges and nominees for judicial office. The Code may also provide standards of conduct for application in proceedings under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (28 U.S.C. §§ 332(d)(1), 372(c)), although it is not intended that disciplinary action would be appropriate for every violation of its provisions. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable application of the text and should depend on such factors as the seriousness of the violation, the intent of the judge, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system. Many of the proscriptions in the Code are necessarily cast in general terms, and it is not suggested that disciplinary action is appropriate where reasonable judges might be uncertain as to whether or not the conduct is proscribed. Furthermore, the Code is not designed or intended as a basis for civil liability or criminal prosecution. Finally, the purpose of the Code would be subverted if the Code were invoked by lawyers for mere tactical advantage in a proceeding.

CANON 2

A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL ACTIVITIES

A. A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow family, social, or other relationships to influence judicial conduct or judgment. A judge should not lend the prestige of the judicial office to advance the private interests of others; nor convey or permit others to convey the impression that they are in a special position to influence the judge. A judge should not testify voluntarily as a character witness.

C. A judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin.

COMMENTARY

Canon 2A. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. The prohibition against behaving with impropriety or the appearance of impropriety applies to both

the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules or other specific provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired.

Canon 2B. The testimony of a judge as a character witness injects the prestige of the judicial office into the proceeding in which the judge testifies and may be misunderstood to be an official testimonial. This Canon, however, does not afford the judge a privilege against testifying in response to an official summons. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.

A judge should avoid lending the prestige of judicial office for the advancement of the private interests of the judge or others. For example, a judge should not use the judge's judicial position to gain advantage in litigation involving a friend or a member of the judge's family. In contracts for publication of a judge's writings, a judge should retain control over the advertising to avoid exploitation of the judge's office.

A judge should be sensitive to possible abuse of the prestige of office. A judge should not initiate the communication of information to a sentencing judge or a probation or corrections officer but may provide to such persons information in response to a formal request. Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration, and by responding to official inquiries concerning a person being considered for a judgeship.

Canon 2C. Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired. Canon 2C refers to the current practices of the organization. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. See New York State Club Ass'n. Inc. v. City of New York, 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988); Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987); Roberts v. United States Jaycees, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d

462 (1984). Other relevant factors include the size and nature of the organization and the diversity of persons in the locale who might reasonably be considered potential members. Thus the mere absence of diverse membership does not by itself demonstrate a violation unless reasonable persons with knowledge of all the relevant circumstances would expect that the membership would be diverse in the absence of invidious discrimination. Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex, or national origin persons who would otherwise be admitted to membership.

Although Canon 2C relates only to membership in organizations that invidiously discriminate on the basis of race, sex, religion or national origin, a judge's membership in an organization that engages in any invidiously discriminatory membership practices prohibited by applicable law violates Canons 2 and 2A and gives the appearance of impropriety. In addition, it would be a violation of Canons 2 and 2A for a judge to arrange a meeting at a club that the judge knows practices invidious discrimination on the basis of race, sex, religion, or national origin in its membership or other policies, or for the judge to use such a club regularly. Moreover, public manifestation by a judge of the judge's knowing approval of invidious discrimination on any basis gives the appearance of impropriety under Canon 2 and diminishes public confidence in the integrity and impartiality of the judiciary, in violation of Canon 2A.

When a judge determines that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Canon 2C or under Canons 2 and 2A, the judge is permitted, in lieu of resigning, to make immediate and continuous efforts to have the organization discontinue its invidiously discriminatory practices. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible (and in all events within two years of the judge's first learning of the practices), the judge should resign immediately from the organization.

CANON 3

A JUDGE SHOULD PERFORM THE DUTIES OF THE OFFICE IMPARTIALLY AND DILIGENTLY

The judicial duties of a judge take precedence over all other activities. In performing the duties prescribed by law, the judge should adhere to the following standards:

A. Adjudicative Responsibilities.

(1) A judge should be faithful to and maintain professional competence in the law, and should

not be swayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should hear and decide matters assigned, unless disqualified, and should maintain order and decorum in all judicial proceedings.

(3) A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and should require similar conduct of those subject to the judge's control, including lawyers to the extent consistent with their role in the adversary process.

(4) A judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte communications on the merits, or procedures affecting the merits, of a pending or impending proceeding. A judge may, however, obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond. A judge may, with consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters.

(5) A judge should dispose promptly of the business of the court.

(6) A judge should avoid public comment on the merits of a pending or impending action, requiring similar restraint by court personnel subject to the judge's direction and control. This proscription does not extend to public statements made in the course of the judge's official duties, to the explanation of court procedures, or to a scholarly presentation made for purposes of legal education.

B. Administrative Responsibilities.

(1) A judge should diligently discharge the judge's administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

(2) A judge should require court officials, staff, and others subject to the judge's direction and control, to observe the same standards of fidelity and diligence applicable to the judge.

(3) A judge should initiate appropriate action when the judge becomes aware of reliable evidence

indicating the likelihood of unprofessional conduct by a judge or lawyer.

(4) A judge should not make unnecessary appointments and should exercise that power only on the basis of merit, avoiding nepotism and favoritism. A judge should not approve compensation of appointees beyond the fair value of services rendered.

(5) A judge with supervisory authority over other judges should take reasonable measures to assure the timely and effective performance of their duties.

C. Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:
(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
(b) the judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness;

(c) 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 the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding;

(d) the judge or the judge's spouse, or a person related to either within the third degree of relationship, 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; or

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.
(e) the judge has served in governmental employment and in such capacity participated as counsel, advisor, or material witness concerning the proceeding or has expressed an opinion

concerning the merits of the particular case in controversy.
(2) A judge should keep informed about the judge's personal and fiduciary financial interests, and make a reasonable effort to keep informed about the personal financial interests of the judge's spouse and minor children residing in the judge's household.

(3) For the purposes of this section:
(a) the degree of relationship is calculated according to the civil law system; the following relatives are within the third degree of relationship: parent, child, grandparent, grandchild, great grandparent, great grandchild, sister, brother, aunt, uncle, niece and nephew; the listed relatives include whole and half blood relatives and most step relatives;

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

(c) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, 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 policy holder in a mutual insurance company, or 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.

(d) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation.

(4) Notwithstanding the preceding provisions of this Canon, if a 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 judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

D. Remittal of Disqualification.

A judge disqualified by the terms of Canon 3C(1), except in the circumstances specifically set out in subsections (a) through (e), may, instead of withdrawing from the proceeding, disclose on the record the basis of disqualification. If the parties and their lawyers after such disclosure and an opportunity to confer outside of the presence of the judge, all agree in writing or on the record that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

COMMENTARY

Canon 3A(3). The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Courts can be efficient and businesslike while being patient and deliberate.

The duty under Canon 2 to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary applies to all the judge's activities, including the discharge of the judge's adjudicative and administrative responsibilities. For example, the duty to be respectful of others includes the responsibility to avoid comment or behavior that can reasonably be interpreted as manifesting prejudice or bias towards another on the basis of personal characteristics like race, sex, religion, or national origin.

Canon 3A(4). The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted. It does not preclude a judge from consulting with other judges, or with court personnel whose function is to aid the judge in carrying out adjudicative responsibilities. A judge should make reasonable efforts to ensure that this provision is not violated through law clerks or other staff personnel.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief amicus-curiae.

Canon 3A(5). In disposing of matters promptly, efficiently and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs. A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with the judge to that end.

Canon 3A(6). The admonition against public comment about the merits of a pending or impending action continues until completion of the appellate process. If the public comment involves a case from the judge's own court, particular care should be taken that the comment does not denigrate public confidence in the integrity and impartiality of the judiciary in violation of Canon 2A. This provision does not restrict comments about proceedings in which the judge is a litigant in a personal capacity, but in mandamus proceedings when the judge is a litigant in an official capacity, the judge should not comment beyond the record.

"Court personnel" does not include the lawyers in a proceeding before a judge. The conduct of lawyers is governed by the rules of professional conduct applicable in the various jurisdictions.

Canon 3B(3). Appropriate action may include direct communication with the judge or lawyer who has committed the violation, other direct action if available, and reporting the violation to the appropriate authorities.

Canon 3B(4). Appointees of the judge include officials such as referees, commissioners, special masters, receivers, guardians, and personnel such as clerks, secretaries, and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by this subsection.

Canon 3C(1)(d)(ii). The fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "the judge's impartiality might reasonably be questioned" under Canon 3C(1), or that the lawyer-relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Canon 3C(1)(d)(iii) may require the judge's disqualification.

NOTE: In September 1985, the Judicial Conference approved a form developed by the Advisory Committee on Codes of Conduct entitled "Notice Concerning Waiver of Judicial Disqualification" and authorized its distribution for consideration and possible adoption by the courts. The form is reprinted below.

NOTICE CONCERNING WAIVER OF JUDICIAL DISQUALIFICATION

FROM: The Clerk Date_____

TO: XXXX (Counsel) XXXX (Counsel) XXXX

RE: ABC v. DEF, Case No. _____

Canon 3D of the Code of Conduct provides (with exceptions not pertinent to this case) that when a judge is disqualified in a proceeding because "the judge's impartiality might reasonably be questioned", the judge may participate in the proceeding if all the parties and lawyers, after notice of the basis for the disqualification, agree in writing to waive the disqualification under a procedure independent of the judge's participation.

Unless a waiver is obtained from all parties and all counsel, Judge _____ intends to disqualify in this proceeding because of these circumstances:

If you and your client(s) wish to waive the judge's disqualification, letters to that effect from you and from your client(s) must be sent to me within _____ days of the date of this Notice. The letters should not be sent to the judge and copies should not be sent to other counsel. If all parties and all counsel submit such letters, this Notice and all responses will be made part of the record, as required by Canon 3D, and the judge will continue participation in the proceeding. If a waiver is not received from all parties and all counsel, this Notice and any responses will be kept under seal by the clerk and not shown to the judge, nor will the judge be informed of the identity of any party or lawyer who declined to waive the disqualification. If the disqualification is not waived, the case will be reassigned to another judge.

CANON 4

A JUDGE MAY ENGAGE IN EXTRA-JUDICIAL ACTIVITIES TO IMPROVE THE LAW, THE LEGAL SYSTEM, AND THE ADMINISTRATION OF JUSTICE

A judge, subject to the proper performance of judicial duties, may engage in the following law-related activities, if in doing so the judge does not cast reasonable doubt on the capacity to decide impartially any issue that may come before the judge:

A. A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

B. A judge may appear at a public hearing before, or otherwise consult with, an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice to the extent that it would generally be perceived that a judge's judicial experience provides special expertise in the area. A judge acting pro se may also appear before or consult with such officials or bodies in a matter involving the judge or the judge's interest.

C. A judge may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. A judge may assist such an organization in planning fund-raising activities and may participate in the management and investment of funds, but should not personally participate in public fund-raising activities. A judge may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice. A judge may solicit funds from other judges over whom the judge does not exercise supervisory or appellate authority. A judge shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or is essentially a fund-raising mechanism.

D. A judge should not use to any substantial degree judicial chambers, resources, or staff to engage in activities permitted by this Canon.

COMMENTARY

Canon 4. As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that the judge's time permits, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law. Within the boundaries of applicable law, see, e.g., 18 U.S.C. § 953, a judge may express opposition to the persecution of lawyers and judges anywhere in the world if the judge has ascertained, after reasonable inquiry, that the persecution is occasioned by conflict between the professional responsibilities of the persecuted judge or lawyer and the policies or practices of the relevant government.

Canon 4C. Service on the board of a public, as well as private, law school is permissible.

A judge may attend fund-raising activities of a law-related organization although the judge may not be a speaker, guest of honor, or featured on the program of such an event.

CANON 5

A JUDGE SHOULD REGULATE EXTRA-JUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH JUDICIAL DUTIES

A. Avocational Activities. A judge may write, lecture, teach, and speak on non-legal subjects, and engage in the arts, sports, and other social and recreational activities, if such avocational activities do not detract from the dignity of the judge's office or interfere with the performance of the judge's judicial duties.

B. Civic and Charitable Activities. A judge may participate in civic and charitable activities that do not reflect adversely upon the judge's impartiality or interfere with the performance of judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:
(1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly engaged in adversary proceedings in any court.

(2) A judge should not solicit funds for any educational, religious, charitable, fraternal, or civic

organization, or use or permit the use of the prestige of the judicial office for that purpose, but the judge may be listed as an officer, director, or trustee of such an organization. A judge should not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or is essentially a fund-raising mechanism.

(3) A judge should not give investment advice to such an organization, but may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

C. Financial Activities.

(1) A judge should refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality, interfere with the proper performance of judicial duties, exploit the judicial position, or involve the judge in frequent transactions with lawyers or other persons likely to come before the court on which the judge serves.

(2) Subject to the requirements of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity, but should not serve as an officer, director, active partner, manager, advisor, or employee of any business other than a business closely held and controlled by members of the judge's family. For this purpose, "members of the judge's family" means persons related to the judge or the judge's spouse within the third degree of relationship calculated according to the civil law system, any other relatives with whom the judge or the judge's spouse maintains a close familial relationship, and the spouse of any of the foregoing.

(3) A judge should manage investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge should divest himself or herself of investments and other financial interests that might require frequent disqualification.

(4) A judge should not solicit or accept anything of value from anyone seeking official action from or doing business with the court or other entity served by the judge, or from anyone whose interests may be substantially affected by the performance or nonperformance of official duties; except that a judge may accept a gift as permitted by the Judicial Conference gift regulations. A judge should endeavor to prevent a member of a judge's family residing in the household from soliciting or accepting a gift except to the extent that a judge would be permitted to do so by the Judicial Conference gift regulations.

(5) For the purposes of this section "members of the judge's family residing in the judge's household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household.

(6) A judge should report the value of any gift, bequest, favor, or loan as required by statute or by the Judicial Conference of the United States.

(7) A judge is not required by this Code to disclose his or her income, debts, or investments, except as provided in this Canon and Canons 3 and 6.

(8) Information acquired by a judge in the judge's judicial capacity should not be used or disclosed by the judge in financial dealings or for any other purpose not related to the judge's judicial duties.

D. Fiduciary Activities. A judge should not serve as the executor, administrator, trustee, guardian, or other fiduciary, except for the estate, trust, or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties. "Member of the judge's family" means any relative of a judge by blood, adoption, or marriage or any other person treated by a judge as a member of the judge's family.

As a family fiduciary a judge is subjected to the following restrictions:

(1) The judge should not serve if it is likely that as a fiduciary the judge will be engaged in proceedings that would ordinarily come before the judge or if the estate, trust or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(2) While acting as a fiduciary a judge is subject to the same restrictions on financial activities that apply to the judge in his or her personal capacity.

E. Arbitration. A judge should not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law.

F. Practice of Law. A judge should not practice law. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.

G. Extra-judicial Appointments. A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice, unless appointment of a judge is required by Act of Congress. A judge should not, in any event, accept such an appointment if the judge's governmental duties would interfere with the performance of judicial duties or tend to undermine the public confidence in the integrity, impartiality, or independence of the judiciary. A judge may represent the judge's country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural

activities.

H. Chambers, Resources, and Staff. A judge should not use judicial chambers, resources, or staff to engage in activities permitted by this Canon, except for uses that are de minimis.

COMMENTARY

Canon 5A. Complete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the society in which the judge lives.

Canon 5B(1). The changing nature of some organizations and of their relationship to the law makes it necessary for a judge regularly to reexamine the activities of each organization with which the judge is affiliated to determine if it is proper for the judge to continue the judge's relationship with it. For example, in many jurisdictions charitable hospitals are now more frequently in court than in the past. Similarly, the boards of some legal aid organizations now make policy decisions that may have political significance or imply commitment to causes that may come before the courts for adjudication.

Canon 5B(2) and (3). A judge may attend fund-raising activities of the organization although the judge may not be a speaker, a guest of honor, or featured on the program of such an event. Use of an organization's letterhead for fund-raising or membership solicitation does not violate Canons 5B(2) and (3) provided the letterhead lists only the judge's name and position in the organization, and, if comparable designations are listed for other persons, the judge's judicial designation.

Canon 5C. Canon 3 requires a judge to disqualify in any proceeding in which the judge has a financial interest, however small; Canon 5 requires a judge to refrain from engaging in business and from financial activities that might interfere with the impartial performance of the judge's judicial duties; Canon 6 requires a judge to report all compensation received for activities outside the judicial office. A judge has the rights of an ordinary citizen with respect to financial affairs, except for limitations required to safeguard the proper performance of the judge's duties. A judge's participation in a closely held family business, while generally permissible, may be prohibited if it takes too much time or involves misuse of judicial prestige or if the business is likely to come before the judge's court. Owning and receiving income from investments do not as such affect the performance of a judge's duties.

Canon 5C(4). Reimbursement or direct payment of travel expenses may be a gift and, if so, its acceptance is governed by Canons 5C(4) and (5). A judge or employee may receive as a gift travel expense reimbursement including the cost of transportation, lodging, and meals, for the

judge and a relative incident to the judge's attendance at a bar-related function or at an activity devoted to the improvement of the law, the legal system, or the administration of justice.

Canon 5D. Mere residence in the household of a judge is insufficient for a person to be considered a member of the judge's family for purposes of this Canon. The person must be treated by the judge as a member of the judge's family.

Canon 5D(1). The Applicable Date of Compliance provision of this Code qualifies this subsection with regard to a judge who is an executor, administrator, trustee, or other fiduciary at the time this Code becomes effective.

Canon 5D(2). A judge's obligation under this Code and the judge's obligation as a fiduciary may come into conflict. For example, a judge should resign as trustee if it would result in detriment to the trust to divest it of holdings whose retention would place the judge in violation of Canon 5C(3).

Canon 5F. This prohibition refers to the practice of law in a representative capacity and not in a pro se capacity. A judge may act for himself or herself in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with legislative and other governmental bodies. However, in so doing, a judge must not abuse the prestige of office to advance the interests of the judge or the judge's family.

Canon 5G. Valuable services have been rendered in the past to the states and the nation by judges appointed by the executive to undertake important extra-judicial assignments. The appropriateness of conferring these assignments on judges must be reassessed, however, in light of the demands on judicial resources created by today's crowded dockets and the need to protect the courts from involvement in extra-judicial matters that may prove to be controversial. Judges should not be expected or permitted to accept governmental appointments that could interfere with the effectiveness and independence of the judiciary.

The dangers attendant upon acceptance of extra-judicial governmental assignments are ordinarily less serious where the appointment of a judge is required by legislation. Such assignments ordinarily do not involve excessive commitments of time, and they typically do not pose a serious threat to the independence of the judiciary.

A code of conduct ought not compel judges to refuse, without regard to the circumstances, tasks Congress has seen fit to authorize as appropriate in the public interest. Although legislatively prescribed extra-judicial assignments should be discouraged, where Congress requires the

appointment of a judge to perform extra-judicial duties, the judge may accept the appointment provided that the judge's services would not interfere with the performance of the judge's judicial responsibilities or tend to undermine public confidence in the judiciary.

CANON 6

A JUDGE SHOULD REGULARLY FILE REPORTS OF COMPENSATION RECEIVED FOR LAW-RELATED AND EXTRA-JUDICIAL ACTIVITIES

A judge may receive compensation and reimbursement of expenses for the law-related and extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge in the judge's judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

A. Compensation. Compensation should not exceed a reasonable amount nor should it exceed what a person who is not a judge would receive for the same activity.

B. Expense Reimbursement. Expense reimbursement should be limited to the actual costs of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or relative. Any payment in excess of such an amount is compensation.

C. Public Reports. A judge should make required financial disclosures in compliance with applicable statutes and Judicial Conference regulations and directives.

COMMENTARY

Additional restrictions on the receipt of compensation by judges are imposed by the Ethics Reform Act of 1989 and regulations promulgated by the Judicial Conference thereunder. That Act and those regulations should be consulted before a judge enters into any arrangement involving the receipt of compensation. The restrictions so imposed include, but are not limited to: (1) a prohibition against receiving "honoraria" (defined as anything of value received for a speech, appearance, or article), (2) a prohibition against receiving compensation for service as a director, trustee, or officer of a profit or nonprofit organization, (3) a requirement that compensated teaching activities receive prior approval, and (4) a 15% limitation on the receipt of "outside earned income."

CANON 7

A JUDGE SHOULD REFRAIN FROM POLITICAL ACTIVITY

A. A judge should not:
(1) act as a leader or hold any office in a political organization;

(2) make speeches for a political organization or candidate or publicly endorse or oppose a candidate for public office;

(3) solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings, or purchase tickets for political party dinners, or other functions.
B. A judge should resign the judicial office when the judge becomes a candidate either in a primary or in a general election for any office.
C. A judge should not engage in any other political activity; provided, however, this should not prevent a judge from engaging in the activities described in Canon 4.

COMPLIANCE WITH THE CODE OF CONDUCT

Anyone who is an officer of the federal judicial system authorized to perform judicial functions is a judge for the purpose of this Code. All judges should comply with this Code except as provided below.

A. Part-time Judge. A part-time judge is a judge who serves on a continuing or periodic basis, but is permitted by law to devote time to some other profession or occupation and whose compensation for that reason is less than that of a full-time judge. A part-time judge:
(1) is not required to comply with Canons 5C(2), D, E, F, and G, and Canon 6C;

(2) except as provided in the Conflict-of-Interest Rules for Part-time Magistrate Judges, should not practice law in the court on which the judge serves or in any court subject to the appellate jurisdiction of the court on which the judge serves, or act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto.
B. Judge Pro Tempore. A judge pro tempore A judge pro tempore is a person who is appointed to act temporarily as a judge or as a special master.
(1) While acting as such, a judge pro tempore is not required to comply with Canons 5C(2), (3), D, E, F, and G, and Canon 6C; further, one who acts solely as a special master is not required to

comply with Canons 4C, 5B (except the first sentence thereof), 5C(4), and 7.
(2) A person who has been a judge pro tempore should not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto.
C. Retired Judge. A retired judge who is retired under 28 U.S.C. §§ 371(b) or 372(a), or who is recalled to judicial service, should comply with all the provisions of this Code except Canon 5G, but the judge should refrain from judicial service during the period of an extra-judicial appointment not sanctioned by Canon 5G. All other retired judges who are eligible for recall to judicial service (except those in Territories and Possessions) should comply with the provisions of this Code governing part-time judges. A senior judge in the Territories and Possessions must comply with this Code as prescribed by 28 U.S.C. § 373(c)(5) and (d).

APPLICABLE DATE OF COMPLIANCE

Persons to whom this Code becomes applicable should arrange their affairs as soon as reasonably possible to comply with it and should do so in any event within the period of one year following appointment. If, however, the demands on the person's time and the possibility of conflicts of interest are not substantial, such a person may continue to act, without compensation, as an executor, administrator, trustee, or other fiduciary for the estate or person of one who is not a member of the person's family, if terminating such relationship would unnecessarily jeopardize any substantial interest of the estate or person and the judicial council of the circuit approves.

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1. The Code of Conduct for United States Judges was initially adopted by the Judicial Conference on April 5, 1973, and was known as the "Code of Judicial Conduct for United States Judges." At its March 1987 session, the Judicial Conference deleted the word "Judicial" from the name of the Code. Substantial revisions to the Code were adopted by the Judicial Conference at its September 1992 session. Section C. of the Compliance section, following the code, was revised at the March 1996 Judicial Conference. Canons 3C(3)(a) and 5C(4) were revised at the September 1996 Judicial Conference. Canon 3C(1)(c) was revised at the September 1999 Judicial Conference. The Compliance Section was clarified at the September 2000 Judicial Conference.

2. Procedural questions may be addressed to: Office of the General Counsel, Administrative Office of the United States Courts, Thurgood Marshall Federal Judiciary Building, Washington, D.C., 20544, (202-502-1100).

3. This Code governs the conduct of United States Circuit Judges, District Judges, Court of International Trade Judges, Court of Federal Claims Judges, Bankruptcy Judges, and Magistrate Judges. In addition, certain provisions of this Code apply to special masters and commissioners as indicated in the "Compliance" section.