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Stephen Gillers, *Vice Dean and Professor of Law*

VIA FACSIMILE

February 20, 2002

Hon. Russell D. Feingold  
United States Senate  
506 Hart Senate Office Building  
Washington, DC 20510  
Fax # 202-228-0466

Dear Senator Feingold:

I am replying to your inquiry of February 12, 2002. I assume familiarity with Judge Pickering's testimony and will address the two questions you ask. I address only these questions. I take no position on whether Judge Pickering should be confirmed for the Fifth Circuit or the weight, if any, that should be given to my analysis. Obviously, many facts are relevant to a confirmation vote.

It was improper for Judge Pickering to solicit letters in support of his nomination from lawyers who regularly appear before him. It is important to my answer that the Judge asked the lawyers to fax him the letters so that he could send them to the Justice Department for transmittal to the Senate. He did not ask the lawyers to send any letters directly to Washington. Consequently, the Judge would know who submitted letters and what the letters said, as would be obvious to the lawyers.

I will assume initially that none of the Lawyers whose letters the judge solicited had current cases pending before the judge. If a solicited lawyer (or litigant) did have a pending matter, the situation is more serious, as discussed further below.

Judge Pickering's solicitation creates the appearance of impropriety in violation of Canon 2 of the Code of Conduct for U.S. Judges. This document, based on the A.B.A. Code of Judicial Conduct, contains the ethical rules that apply to all federal judicial officers below the Supreme Court.

Judge Pickering's conduct creates the appearance of impropriety, in part, because of the power federal judges, and particularly federal trial judges, have over matters that come before

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them. Federal judges enjoy a wide degree of discretion, which means that many of their decisions will be upheld absent an abuse of discretion. This is a highly deferential standard. It means that for many decisions, the district judge is the court of last resort and lawyers know that.

Given this power over their cases, and therefore over the lawyers whose cases come before them, ethics rules for judges forbid them to make certain requests of lawyers and others that "might reasonably be perceived as coercive." Canons 4(C); 5(B)(2). These particular Canons deal with soliciting charitable contributions. They absolutely forbid the judge "personally" to participate in charitable or other non-profit fundraising activities. They also forbid participation in "membership solicitation" that "might reasonably be perceived as coercive." A narrow exception is made for fundraising from other judges "over whom the judge does not exercise supervisory or appellate authority." Canon 4(C).

In these situations, of course, the judge would be soliciting a benefit for an organization, and not, as here, for the judge himself. That difference makes the present case more troubling because a judge would ordinarily have a greater, and certainly a personal, interest in a significant promotion than he or she would have in a contribution to an organization with which the judge is affiliated.

Judge Pickering's solicitation was "coercive" because a lawyer who regularly practices before him was not free to fail to provide a letter endorsing Judge Pickering's promotion. Given the risk to lawyers' (and their firms') clients - a risk they would readily perceive - lawyers would feel coerced to comply with the Judge's solicitation of letters and in fact to exaggerate their support for the Judge.

I do not suggest that Judge Pickering would actually retaliate against a non-complying lawyer or his or her clients. Nor should the word "coercive" be understood to describe the Judge's subjective intent. Canon 2 tells judges to "avoid...the appearance of impropriety in all activities." In evaluating Canon 2, we use an objective standard. We do not ask whether Judge Pickering would in fact "punish" a recalcitrant lawyer or what was really on his mind. We should not have to make that inquiry. We focus on the situation itself and how it will appear to the public.

Directly on point is Advisory Opinion 97 (1999), which I attach. It was written by the Committee on Codes of Conduct of the Judicial Conference of the United States (the body of federal judges that interprets the Code of Conduct in response to questions from judges). The Committee was asked whether and when a person being considered for the position of U.S. Magistrate, or for reappointment to that position, must recuse himself or herself under the following circumstances.

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Initial appointments as a magistrate judge are made by district judges from a list compiled by a panel of lawyers and others. Identity of the members of the panel is public. Reappointments as a magistrate judge are made following a report of the same kind of panel.

The Committee wrote in Opinion 97 that a person appointed or reappointed as a federal magistrate judge did not have to recuse himself or herself from sitting in a case where a lawyer before the magistrate judge had been on the panel recommending the appointment or reappointment. But the opinion emphasized that the panel "operates under a requirement of strict confidentiality," so that the candidate was "not privy to the individual opinions of the panel members concerning any candidate." If this were not so for a particular panel member, recusal might be required. (The Opinion states: "Of course, in the unlikely event that during the selection process something were to occur between a panel member and the magistrate judge that bears directly on the magistrate judge's ability to be, or to be perceived as being, fair and impartial in any case involving that panel member, then the facts of that particular situation would have to be evaluated by the magistrate judge to determine if recusal is an issue and if notification should be provided to the parties.") In the situation you present, Judge Pickering removed the opportunity for confidentiality by having the lawyers' letters sent directly to him for transmittal to Washington.

The testimony does not clarify whether any of the lawyers or litigants whom Judge Pickering solicited had current matters pending before him. The only reference to this issue is at line 23 on page 81, where you ask whether "present or former litigants, parties in cases that you handled" were asked to write letters. Judge Pickering answered "some." This is ambiguous.

The impropriety becomes particularly acute if lawyers or litigants with matters currently pending before the Judge were solicited. Then the desire to please the Judge would be immediately obvious and the coercive nature of the request even more apparent. In addition, soliciting favorable letters from lawyers or litigants in current matters could lead to recusal on the ground that the Judge's "impartiality might reasonably be questioned." 28 U.S.C. §455(a). As stated below, judges are instructed to avoid unnecessary recusals.

In Opinion 97, the Committee addressed the situation where a lawyer currently appearing before a magistrate judge was *simultaneously* sitting on a panel considering whether to recommend the same judge's reappointment. The Committee concluded that while the issue of the magistrate judge's reappointment was under consideration by a panel, the judge should not sit in any matter in which a lawyer on the panel represented a party. This was true even though the lawyer's own position on the panel was confidential and unknown to the judge. (The Opinion states: "Therefore, in the opinion of the Committee, during the period of time that the panel is evaluating the incumbent and considering what recommendation to make concerning reappointment, a perception would be created in reasonable minds that the magistrate judge's

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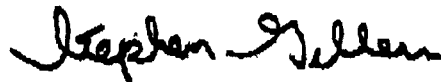
ability to carry out judicial responsibilities with impartiality is impaired in any case involving an attorney or a party who is a member of the panel.") Here, of course, the situation is more serious because Judge Pickering would know what, if anything, a lawyer wrote.

Opinion 97 is consistent with court rulings that have disqualified judges, or reversed judgments, when the judge, personally or through another, was exploring the possibility of a job with a law firm or government law office then appearing before him. See, e.g., *Scott v. U.S.*, 559 A.2d 745 (D.C. 1989)(conviction reversed where judge was negotiating at the time for a job with the Justice Department). *Pepsico, Inc. v. McMillen*, 764 F.2d 458 (7th Cir. 1985)(judge disqualified after headhunter for judge contacted law firms appearing before judge). Recusal has also been required where the judge's contact with a litigant or lawyer in a pending case was not employment-related but was otherwise viewed as favorable to the judge. *Home Placement Service, Inc. v. Providence Journal Co.*, 739 F.2d 671 (1<sup>st</sup> Cir. 1984) (recusal required where judge cooperated with a newspaper reporter in a complimentary article about the judge and his wife while newspaper's case was pending before judge).

The Code of Conduct for U.S. Judges requires judges to refrain from activity that could lead to unnecessary recusal. Canon 3 states that the "judicial duties of a judge take precedence over all other activities." Canon 5 instructs judges to "regulate extra-judicial activities to minimize the risk of conflict with judicial duties." Opinion 97 and the cases cited would have given a current litigant who did not write (or whose lawyer did not write) a letter recommending the Judge a strong legal basis to seek to recuse the Judge in the litigant's case. A litigant whose case came before the Judge reasonably soon thereafter, but whose lawyer had not written a letter in response to the Judge's earlier request (as the Judge would be aware), would also have a basis for a recusal motion.

I hope this letter assists your important work.

Sincerely yours,



Stephen Gillers

SG:sg  
Enc.