

**Responses of Mary Geiger Lewis
Nominee to be United States District Judge for the District of South Carolina
to the Written Responses of Senator Chuck Grassley**

- 1. In 1986, I authored amendments to the False Claims Act that empowered individual citizens to act on behalf of the federal government and recover taxpayer dollars lost to fraud and abuse of government programs. I also sponsored legislation to update the False Claims Act in 2009. Since the passage of the 1986 amendments, this important law has helped recover over \$30 billion for American taxpayers from those who seek to defraud the federal government.**

One of the cases of interest to me is your representation of a Hospital chain that was found to have violated the Stark law, which prohibits financial arrangements between hospitals and doctors that rely upon referrals of patients. This case also had a False Claims Act component. It appears that part of the defense strategy put forth was to attack the whistleblower who filed the *qui tam* case.

Specifically, one of the briefs for the defendants stated that the whistleblower who filed the case was “a malcontent physician with a long history of disruptive behavior and an economic motive to hurt [the Hospital chain]”. That same brief argued that the Government “made an ill-advised decision to intervene, apparently based on its view that its own crabbed and incorrect view of the law is more important than Tuomey’s health care mission.”

As an advocate of whistleblowers, I have long found the strategy of attacking a whistleblower as, to use the words in your brief, “ill-advised”. Ultimately, a jury found against the Hospital in this case and the judge awarded the federal government over \$44 million.

- a. What is your personal view of whistleblowers?**

Response: Whistleblowers play a very powerful, important and successful role in deterring fraud and abuse in government programs. My law firm currently represents three whistleblowers in two separate *qui tam* actions.

- b. Based upon your past involvement in a strategy to discredit a whistleblower, what assurance can you give the Committee that you will protect the rights of whistleblowers in the courtroom, should you be confirmed?**

Response: An advocate has a responsibility to test the credibility of an opposing witness by pointing out the witness’s biases, prejudices and motives, even if that witness is a whistleblower. Should I be confirmed, my role would be to apply the law fairly and impartially to all of the parties who came before me. Federal law protects whistleblowers, and if confirmed, I would faithfully apply that law.

- c. **Part of your defense of the Hospital included the argument that the Government’s enforcement of the Stark statute was “contrary to the Express Provisions and Purpose of the Medicare Statute.” The brief you filed supporting this argument claims that because the goal of Medicare is to ensure adequate medical care for the aged throughout the country, any attempt to enforce the Stark law would prohibit the hospital from carrying out that mission.**

Response: Our brief on behalf of Tuomey Healthcare System did not argue that the government may never enforce the Stark law or that any attempt to enforce the law would prevent hospitals from providing adequate medical care. Rather, our position was that a particular interpretation of the Stark law advanced by the government in the Tuomey case should be rejected.

One of our arguments was that the government’s interpretation of the Stark law was inconsistent with 42 U.S.C. § 1395, which provides that “nothing in this subchapter [which includes the Stark law] shall be construed to authorize any Federal officer or employee to exercise any supervision or control over . . . the manner in which medical services are provided, or over the selection, tenure, or compensation of any officer or employee of any institution, agency, or person providing health services....” We argued the government’s interpretation of the Stark law in *Tuomey* was inconsistent with this provision because it would have allowed the government to exercise supervision or control over the operation of Tuomey and other hospitals and the compensation of their employees.

We also argued that the government’s interpretation of the Stark law in *Tuomey* was inconsistent with implementing regulations of the Center for Medicare and Medical Services – the agency responsible for promulgating and interpreting the regulations. We argued that the government’s interpretation should be rejected because the guidance provided by CMS is entitled to controlling weight under well-established precedents.

- d. **The Stark law is an amendment to Medicare. This means that a condition of participation is that prohibited financial arrangements based upon self-referrals will not be reimbursed by the program. Based upon your argument, it appears you believe that the Government cannot enforce any condition that limits how a Medicare provider operates. Do you still believe that providers have a legal right to Medicare payments without any conditions set forth by Congress? How do you square this argument with the Supreme Court’s decision in South Dakota v. Dole, where the Supreme Court held that Congress can attach conditions on the receipt of federal funds?**

Response: Providers do not have a legal right to Medicare payments without complying with legal conditions set forth by Congress. Our argument in the *Tuomey* case was not that the government can never enforce the Stark law.

Rather, we argued that the government's interpretation of the Stark law was incorrect as applied to the facts of *Tuomey*, that our client had not violated the Stark law, and that even if it had done so, it did not act with the fraudulent intent required to violate the False Claims Act.

- e. **Please explain your argument that the Government cannot enforce the Stark law “to prevent Tuomey from achieving this important goal” of providing Medicare services to the elderly.**

Response: Please see my response to 1(c) above.

- f. **Do you believe that Congress is prohibited from placing conditions on Medicare providers? If so, why?**

Response: No. I do not believe that Congress is prohibited from placing conditions on Medicare providers.

- g. **Many federal courts have found that a violation of the Stark law is a basis for False Claims Act liability. Do you continue to believe that the Stark law does not form the basis for False Claims Act liability?**

Response: The particular Stark law violation alleged in *Tuomey* was not accompanied by the fraudulent intent required to establish liability under the False Claims Act. I have not previously expressed a view on whether the Stark law could form the basis for False Claims Act liability in other contexts, and do not believe it would be appropriate to give my personal view on an issue that could come before me as a judge.

- 2. **In *Littlejohn v. South Carolina*, your law firm, along with Attorney Dick Harpootlian, who was the State Democratic Chairman, negotiated a settlement with the State Budget and Control Board. The Chair of the State Board at the time was Democrat Governor Jim Hodges. Given not only Mr. Harpootlian's relationship to Governor Hodges, but also your previous work on the Governor's transition team, can you understand why concerns were raised that the agreement may not have represented an arms-length negotiation?**

Response: Particularly when public funds are involved, any settlement agreement in a class action case should be scrutinized for fairness and reasonableness. In federal court, for example, a district court may not approve a settlement that finds for the members of the class without first finding that it is “fair, reasonable and adequate.” FRCP 23(e)(2). In *Littlejohn*, the South Carolina Circuit Court found the settlement to be a reasonable and adequate result for the class.

- a. **Canon 2 of the Code of Conduct for United States Judges calls on a Judge to avoid even the appearance of impropriety. If a Judge had ties to attorneys**

similar to those between you, Mr. Harpootlian, and Governor Hodges in *Littlejohn*, do you believe Canon 2 would have been satisfied? Please explain.

Response: Canon 2 of the Code of Conduct for United States Judges requires, without exception, that a judge “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” It follows that there is no more basic principle pertaining to the judiciary than that judges should be free of personal interest or bias and free from predisposition in their decision-making.

Recusal is not required where the judge merely had a prior professional relationship with an attorney appearing before the judge. Such a relationship alone does not equate to bias when that attorney appears before the judge. Rather, the relationship between the judge and attorney must have occurred during the attorney’s involvement in a case now before the judge for recusal to be required.

A decision to recuse also depends upon whether the judge feels he or she can disregard the relationship and whether others can reasonably be expected to believe that the relationship is disregarded. The test for the appearance of impropriety is whether a judge’s “impartiality might reasonably be questioned.” 28 USC § 455. Specific disqualification circumstances are set forth in 28 U.S.C. § 455(b).

b. If you are confirmed as a judge, how would you go about handling any potential or actual conflicts of interest or other recusal issues that might arise because of your prior activities?

Response: It is the obligation of the judge to disclose all facts that might be grounds for disqualification. I would disclose any potential disqualifying facts to the parties and their counsel. In appropriate circumstances I might ask the parties and their lawyers to consider, out of my presence, whether to waive disqualification. If all of the parties so agree, I would continue to participate in the proceeding. If all parties do not agree, I would respect their decision. It should be emphasized that the parties’ agreement to waive disqualification must be on the record; otherwise, it would not be considered effective. See 28 USC § 455(e).

Even if the parties genuinely waive their objections to disqualification, if I still feel that I cannot be impartial, or if the ground for disqualification was one of those enumerated in 28 USC § 455 (b), then I would be obligated to recuse myself. A judge not only has the discretion, but the duty, to recuse himself or herself if the judge feels that he or she cannot be truly impartial. If confirmed, I would strictly adhere to all of the statutes and other applicable standards governing recusal.

3. **I am concerned about your lack of experience in criminal law matters. You mentioned in the hearing that you can quickly learn criminal law. You noted in your response that “criminal trials are very much like the civil trials that I’ve tried. The rules of evidence are the same.” Given that federal criminal trials are governed by a different set of procedures than are civil trials, could you please explain your statement?**

Response: I did not mean to suggest that there were no differences between the procedural rules that apply to criminal trials and those that apply in civil trials. I was attempting to convey the important fact that the same evidentiary rules apply. The introduction or exclusion of testimony and exhibits under the Federal Rules of Evidence is at the heart of a criminal trial, and I have a great deal of experience with those rules. I have also taken the opportunity to become more familiar with the rules of criminal procedure, as well as some areas of substantive criminal law with the assistance of my law partner who is a former Assistant United States Attorney and continues to focus his practice in the area of criminal law.

4. **You further responded: “I’ve also attended many sentencing proceedings, pleas, just the kinds of things that I would face as a district court judge. And I’ve even attended some seminars on the sentencing guidelines and stuff.”**

- a. **What role did you play in the criminal trials, other proceedings, sentencing proceedings and pleas you referenced in your response to my question at the hearing?**

Response: I was referring to proceedings that I attended after my nomination to further inform myself about criminal law and procedure. My role was as an observer who was allowed to discuss with the presiding judge the manner in which the proceedings were conducted, the rulings that were made and the basis for those rulings.

- b. **You further stated, “I will be completely prepared for whatever matter comes before me, be it civil or criminal.” Could you please further articulate what specific steps or actions you will take beyond mere attendance at seminars to ensure you are prepared?**

Response: I have been fortunate to have had district court judges who have allowed me to shadow them. I have spent an entire day of criminal proceedings with one district court judge who provided me with the same materials he reviewed in order to prepare to sentence criminal defendants convicted of a wide range of offenses. I was able to see how a pre-sentence report is structured and used, to observe sentencing proceedings, and to discuss the proceedings with the judge afterwards.

I have also observed plea proceedings and had the benefit of one-on-one instruction from the presiding judge on the proper conduct of such proceedings.

I have also accepted an invitation from a well-respected district court judge to join him for an entire session of criminal proceedings where I will be allowed to join him in the courtroom and in chambers to see exactly how he approaches the criminal matters before him.

I plan to continue to take advantage of the generous offers from our district court judges to allow me to shadow them, and to study substantive criminal law, the Sentencing Guidelines and the materials I have been provided by the Administrative Office of the U.S. Courts so that, if confirmed, I will be fully prepared to assume my duties.

5. What is the most important attribute of a judge, and do you possess it?

Response: The most important attribute of a judge is integrity. He or she must be committed to the fair and impartial application of the law to the facts and must treat everyone in the courtroom with dignity and respect. I possess this attribute.

6. Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?

Response: In my view, the appropriate temperament of a judge is one of humility. The most important elements are patience, diligence and respect for everyone who comes before the court. I believe I meet this standard.

7. In general, Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Response: Yes.

8. At times, judges are faced with cases of first impression. If there were no controlling precedent that was dispositive on an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?

Response: When faced with a matter of first impression, I would start with an analysis of the text of the provision at issue. If the plain language of the text did not provide a clear answer, I would look to the Supreme Court and the Court of Appeals for the Fourth Circuit for precedents interpreting a similar provision for guidance, as well as any persuasive authority from other federal courts.

- 9. What would you do if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you apply that decision or would you use your own judgment of the merits, or your best judgment of the merits?**

Response: I would be bound to apply that decision, as precedent from a higher court.

- 10. Under what circumstances do you believe it appropriate for a federal court to declare a statute enacted by Congress unconstitutional?**

Response: Statutes enacted by Congress are presumed to be constitutional. It is appropriate for a federal court to declare a statute enacted by Congress unconstitutional only when Congress has clearly exceeded its Constitutional authority or infringed on a right protected by the Constitution.

- 11. As you know, the federal courts are facing enormous pressures as their caseload mounts. If confirmed, how do you intend to manage your caseload?**

Response: If confirmed, I would manage my caseload by enforcing deadlines established by scheduling orders, by rendering prompt decisions, and by working as hard as is necessary to conduct the court's business.

- 12. Do you believe that judges have a role in controlling the pace and conduct of litigation and, if confirmed, what specific steps would you take to control your docket?**

Response: Yes, I believe that judges have a role in controlling the pace and conduct of litigation. If confirmed, I would take the steps that I describe in response to Question 11 above.

- 13. Please describe with particularity the process by which these questions were answered.**

Response: I received these questions on February 22, 2012. I prepared my responses which were reviewed by representatives of the Department of Justice, and I subsequently finalized my responses and submitted them on February 27, 2012.

- 14. Do these answers reflect your true and personal views?**

Response: Yes.