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TESTIMONY BEFORE THE SENATE COMMITTEE ON THE JUDICIARY

Ronald D. Rotunda*

You have asked my opinion regarding the instances in which Solicitor General Kagan should disqualify herself under 28 U.S.C.A. § 455. The relevant subsections are as follows:

> **§ 455. Disqualification of justice, judge, or magistrate judge**
>
> **(a)** Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding *in which his impartiality might reasonably be questioned*.
>
> **(b)** He shall also disqualify himself in the following circumstances:
> . . .
>
> **(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;
>
> . . .
> **(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 . . .
>
> **(e)** *No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b)*. Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.
>
> **(f)** [Omitted].[1]

In interpreting §455(d)(1), we must take into account that it appears to be augmented by 28 U.S.C.A. § 455(a), which requires that any federal judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

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* I am attaching an updated resume for your information.

[1] Emphasis added.

Congress enacted § 455(b)(3) in response to cases like *Laird v. Tatum*, 409 U.S. 824 (1972). Respondents in *Laird* moved to disqualify Justice Rehnquist because "of his appearance as an expert witness for the Justice Department and Senate hearings inquiring into the subject matter of the case, because of his intimate knowledge of the evidence underlying the respondents' allegations, and because of his public statements about the lack of merit in respondents' claims."[2] Justice Rehnquist acknowledged that the respondents were—

> substantially correct in characterizing my appearance before the Ervin Subcommittee as an "expert witness for the Justice Department" on the subject of statutory and constitutional law dealing with the authority of the Executive Branch to gather information. They are also correct in stating that during the course of my testimony at that hearing, and on other occasions, I expressed an understanding of the law, as established by decided cases of this Court and of other courts, which was contrary to the contentions of respondents in this case.[3]

Justice Rehnquist also conceded that he had referred to *Laird v. Tatum*, by name, "in my prepared statement to the Subcommittee, and one reference to it in my subsequent appearance during a colloquy with Senator Ervin."[4]

> At the time of this case, the relevant statutory language read:
>
> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.[5]

Applying this language of the statute, Justice Rehnquist refused to disqualify himself.

At the time, many people thought that Rehnquist should have recused himself and the statute should be revised to make that clear. Hence, Congress responded by amending the language[6] so that it includes the following language: "participated as counsel, *adviser* or material

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[2] 409 U.S. 824, 825 (Memorandum of Rehnquist, J.)..

[3] 409 U.S. 824, 825-26 (Memorandum of Rehnquist, J.).

[4] 409 U.S. 824, 826-27 (Memorandum of Rehnquist, J.).

[5] 409 U.S. 824, 825 (Memorandum of Rehnquist, J.).

[6] 1974 U.S. Code, Congressional & Administrative News 6351, 6355 -6356 (1974), H.R. REP. 93-1453, H.R. Rep. No. 1453, 93TH Cong., 2nd Sess. 1974, 1974

witness concerning the proceeding *or expressed an opinion concerning the merits of the particular case* in controversy." The statute no longer requires that the judge have appeared as "of counsel." There is no requirement that the government lawyer (now judge or justice) have appeared on the brief.

Clearly, Rehnquist would have had to disqualify himself in *Laird v. Tatum*, if he had applied the test of this amended statute. The scope of that statute as applied to Solicitor General Kagan is the focus of my testimony.

First, it is clear that §455 applies to all federal judges, including those on the Supreme Court. It refers, after all, to any "*justice*, judge, or magistrate judge of the United States." In addition, the disqualification that §455(b)(3) imposes that is so important that the parties cannot waive it.[7]

Under this standard, Solicitor General Kagan obviously is correct when she says that she must recuse herself in all cases in which she is counsel of record. However, her obligation to

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U.S.C.C.A.N. 6351, 1974 WL 11635 (Leg. Hist.) refers specifically to the result in *Laird in Tatum*:

> "Subsection (b)(3) of the amended statute is an addition to the language of the ABA canon on disqualification. It is intended to cover the situations which can occur during the first two or three years of judicial service of a lawyer who is appointed to the bench from service as a government lawyer. This situation occurs more frequently in the federal judicial system than it does in state judicial systems and for this reason the committee believes that the federal statute should be more explicit than are the minimum standards adopted by the ABA for application in all the states. Subsection (b)(3) carries forward from subsection (b)(2) a required disqualification where the judge, as a government lawyer, had acted as counsel, adviser or material witness concerning the proceeding. In addition, the judge must disqualify himself where, as a government lawyer, he had expressed an opinion concerning the merits of the particular case in controversy. Thus, subsection (b)(3) is a statutory solution to the problems which have confronted many of our federal judges who came to the bench from prior service as a District Attorney, from the Department of Justice or from a federal agency. For example, Mr. Justice Byron White felt compelled to ask for a legal memorandum to guide his decision whether to remain in cases which were in the Department of Justice during his service there. A variation of this problem arose in *Laird v. Tatum*, 408 U.S. 1, wherein Mr. Justice William Rehnquist found it necessary to explain in a separate memorandum (409 U.S. 824) his decision not to disqualify himself because of prior testimony before a congressional committee."

[7] 28 U.S.C.A. § 455(e).

disqualify herself does not stop there. She also much recuse herself in all situations where she was an *adviser* "concerning the proceeding" or where she "*expressed an opinion concerning the merits of the particular case* in controversy."

The statute defines "proceeding" broadly, to include "pretrial, trial, appellate review, or other stages of litigation."[8] "Proceeding" is not limited to trial because it includes all stages of litigation. The question is whether it includes steps preparatory to litigation, even if those steps occur before a case is actually filed. We know that other federal judicial rules governing disqualification refer to "proceeding" and acknowledge that a proceeding can be "pending" or "impending."[9]

In addition, the United States Courts webpage advises that:

> Judges may not hear cases in which they have either personal knowledge of the disputed facts, a personal bias concerning a party to the case, *earlier involvement in the case as a lawyer*, or a financial interest in any party or subject matter of the case.[10]

The lawyer may have been involved in advising how the litigation should be structured, in which case she would have had "earlier involvement in the case as a lawyer."

It is not unusual for a lawyer to be involved in preparation for a particular case being filed by the client, or in preparation for expected litigation to be filed against the client. That advice is not part of "pretrial" in the sense that there is no motion or discovery in connection with pretrial matters. However, it is part of "pretrial" in the sense that it occurs prior to expected litigation; one of the "stages of litigation" occurs when the lawyer is preparing for particular

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[8] 28 U.S.C.A. §455(d)(1).

[9] *E.g.*, Recusal: Analysis of Case Law Under 28 U.S.C. §§ 455 & 144 (Fed. Judicial Center 2002) (discussing *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001), at p. 35 & n. 155, http://www.fjc.gov/public/pdf.nsf/lookup/recusal.pdf/$file/recusal.pdf . *See also*, Ronald D. Rotunda, *Judicial Comments on Pending Cases: The Ethical Restrictions and the Sanctions – A Case Study of the Microsoft Litigation*, 2001 U. ILL. L. REV. 611 (2001).

[10] http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct.aspx (emphasis added). *See also, e.g.*, GUIDE TO JUDICIARY POLICY, *Ethics and Judicial Conduct*, volume 2, at p. 55-1 (June 2009), http://www.uscourts.gov/uscourts/RulesAndPolicies/conduct/Vol02B-Ch02-OGC-Post2USCOURTS-PublAdvisoryOps.pdf .

> "To start, a 'judge should not make public comment on the merits of a matter *pending or impending* in any court.'" (emphasis added).

litigation that one expects to file or to defend. Either pre-litigation strategy or pre-litigation investigation is one of the things that lawyers do.

For example, *United States v. Arnpriester*,[11] held that §455(b)(3) applies and requires a judge to disqualify himself in a criminal case because he was the U.S. Attorney at the time of an "investigation *preceding* the indictment"[12] that eventually led to indictment. The court emphasized: "there can be no prosecution unless it is preceded by investigation."[13] The court relied on both §§ 455(a) [impartiality might reasonably have been questioned] & 455(b)(3) [he had served in government employment as counsel in connection with indictment] in reaching its result. The trial judge was not personally involved in the investigation. It simply occurred under his watch.

Hence, if General Kagan was offering advice in connection with particular litigation that the United States would file, or that the United States expected that particular litigation would be brought against it, it is likely that §455(b)(3) — as augmented by §455(a) — would apply.

We do not know how many cases where Solicitor General Kagan must disqualify herself if she is confirmed, but this statute assuredly requires disqualification in many instances where she is not counsel of record. The statute does not limit disqualification to cases where General Kagan's name is on the brief, nor does the statute require that she express her opinion "in writing."

Several years ago, the Solicitor General's office[14] handled or offered advice on many of the detainee cases, even in the lower courts, and gave advice on many issues related to those cases. I do not know if the Solicitor General's office is still involved on that issue. If it is, General Kagan would disqualify herself in those cases because she was involved as an "adviser" or "*expressed an opinion concerning the merits of the particular case* in controversy."[15] The

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[11] 37 F.3d 466 (9th Cir. 1994).

[12] 37 F.3d at 466 (emphasis added).

[13] 37 F.3d at 467.

[14] *United States. v. Arnpriester*, 37 F.3d 466 (9th Cir. 1994) disqualified a judge (and former U.S. Attorney) because of actions that an assistant U.S. Attorney took while the judge was the U.S. Attorney. The U.S. Attorney was *not* personally involved in the investigation. Nonetheless, the court disqualified the judge (who was the former U.S. Attorney): "This analysis imputes to the United States Attorney the knowledge and acts of his assistants." 37 F.3d at 467.

[15] Carter G. Phillips, a former assistant to the Solicitor General, has said that she should interpret the statute broadly, and she should therefore disqualify herself from any case in which she participated in "conversations — regardless of whether she ultimately signed the

advice, given the language of the statute, would relate to the "merits of the particular case" and not simply observations about law in general or law involving another case, as opposed to law in the particular case that is now before her as a Supreme Court Justice. It is not necessary that she be listed as "of counsel" on the brief or be counsel of record. The fact that she gave advice about the proceeding is all that is necessary to require her to disqualify herself. The Solicitor General will have to search her records and make sure that she disqualifies herself in such circumstances.[16]

Similarly, if the Administration has asked her advice (and she has given it) on the constitutionality of proposed legislation in connection with contemplated litigation so that it can be said that she has expressed an opinion concerning the merits of a particular case in controversy, she should disqualify herself if that case ever comes to the Supreme Court.

There are only a few cases that interpret this section.[17] None involve the Solicitor General, but that is not surprising because it has been over 40 years since a Solicitor General has moved to the high court.[18] Yet, the same basic principles discussed above still apply. We do not know if the Department of Justice (e.g., the Office of Legal Counsel), or the White House, asked

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office's filing." See, Seth Stern, CQ TODAY, *Kagan's Criteria for Recusals Not Wide Enough, Say Legal Scholars*, 5/18/2010, 2010 WLNR 10665560.

[16] For example, if she gave advice or was involved in lower court litigation in California involving the Defense of Marriage Act, she would have to disqualify herself on that litigation. It does not matter if her involvement was in support of DOMA or against it. If she was involved in that case, she cannot sit on it if it comes before the U.S. Supreme Court. See, e.g.,

> "Consistent with convention, SG Kagan's name does not appear on the district-court brief. But two former senior DOJ officials have confirmed that, under usual practices, she surely must have been aware of, and approved, the positions taken in it." Ed Whelan, http://www.nationalreview.com/bench-memos/49585/sg-kagan-breaks-her-vows/ed-whelan (Aug. 18, 2009).

I do not know if General Kagan was involved with this California case, but she can tell us. If she gave any advice regarding the Government's brief, she would have to disqualify herself in that litigation

[17] See 34 A.L.R. Fed. 2d 589 (Originally published in 2009).

[18] *E.g., United States v. Arnpriester*, 37 F.3d 466 (9th Cir. 1994), discussed above. *See also, Mixon v. United States*, 620 F.2d 486 (5th Cir. 1980)(per curiam), held that a magistrate judge was automatically disqualified to hear a motion for reduction of the sentence because the magistrate judge was the Assistant United States attorney who had represented the government in earlier proceedings on the defendant's motion for reduction of sentence.

her advice on how to structure health care legislation in order to prepare for particular litigation, or if she has "expressed an opinion concerning the merits" of the litigation that various states have recently filed. If she has, must disqualify herself if that case goes to the Supreme Court.

In short, Solicitor General Kagan should disqualify herself in all instances where participated as counsel, "*adviser* or material witness concerning the proceeding *or* expressed an opinion *concerning the merits of the particular case* in controversy." Her disqualification does not limit itself to cases where she is counsel of record. Under 28 U.S.C.A. § 455(b)(3), General Kagan must recuse herself from:

- Cases in which she approved appeals and/or amicus filings, whether or not she was "counsel of record;"
- Cases where she gave advice about, or "*expressed an opinion concerning the merits of the particular case* in the lower courts, or approved of lower court briefs in a case, although she is not listed a counsel on the brief;
- Cases in which she sat in on meetings with counsel and thereby "*participated* as counsel, *adviser* or material witness concerning the proceeding *or expressed an opinion concerning the merits of the particular case* in controversy," even though Deputy Solicitor General Neal K. Katyal is listed as the counsel of record;[19]
- Cases in which the Supreme Court asked the Solicitor General whether it should hear the case;
- Cases before the time she was officially confirmed as Solicitor General if she gave advice or *expressed an opinion concerning the merits of the particular case* with Government lawyers who would soon become subordinate to her once she was officially confirmed;
- Cases in litigation where the Department of Justice or other Government lawyers (e.g., lawyers in the office of Counsel to the President) may have asked for her views on questions of constitutional significance or where she offered other legal advice; and,
- Cases in the lower courts in which the Department of Justice solicited her views.

  - In all of these circumstances, it does not matter if her advice was oral or written, because the statute does not draw that distinction.

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[19] The court in *United States v. Arnpriester*, 37 F.3d 466 (9th Cir. 1994), disqualified a judge because actions were taken by an assistant U.S. Attorney when the judge was U.S. Attorney. The U.S. Attorney was *not* personally involved in the investigation. Nonetheless, the court disqualified the judge and former U.S. Attorney: "This analysis imputes to the United States Attorney the knowledge and acts of his assistants." 37 F.3d at 467.

> - And, if she recuses herself, her disqualification is not subject to wavier by the parties, pursuant to 28 U.S.C.A. § 455(e), which provides that no justice "*shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b).*"

We do not know how many cases that would be. However, she has been Solicitor General for a relatively short time, so the number of cases may not be that large. In addition, over the course of the next year or so, we should expect that number of disqualifications should drop substantially.

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Experience:

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August 2008-December 2008	PROFESSOR OF LAW, Chapman University School of Law
June 17, 2009 – Jan. 31, 2013	COMMISSIONER, Fair Political Practices Commission a regulatory body of the State of California,
2006- August 2008	UNIVERSITY PROFESSOR AND PROFESSOR OF LAW, George Mason University
2002-2006	THE GEORGE MASON UNIVERSITY FOUNDATION PROFESSOR OF LAW, George Mason University School of Law
Nov. to Dec. 2002	Visiting Scholar, Katholieke Universiteit Leuven, Faculty of Law, Leuven, Belgium
May 2004	Visiting Lecturer, The Institute for Law and Economics, Institut für Recht und Ökonomik, The University of Hamburg, Germany
June 2004-May 2005	Special Counsel to General Counsel, Department of Defense, The Pentagon
December 2005	Visiting Lecturer, The Institute for Law and Economics, Institut für Recht und Ökonomik, The University of Hamburg, Germany

1993 - 2002	THE ALBERT E. JENNER, JR. PROFESSOR OF LAW, University of Illinois College of Law
Since 2002	THE ALBERT E. JENNER, JR. PROFESSOR OF LAW, EMERITUS, University of Illinois College of Law
Fall, 2001	Visiting Professor, George Mason University School of Law
Spring & Fall 2000	Cato Institute, Washington, D.C.; Senior Fellow in Constitutional Studies [Senior Fellow in Constitutional Studies, 2001-2009]
Spring, 1999	Visiting Professor, holding the JOHN S. STONE ENDOWED CHAIR OF LAW, University of Alabama School of Law
August 1980 - 1992	Professor of Law, University of Illinois College of Law
March 1986	Fulbright Professor, Maracaibo and Caracas, Venezuela, under the auspices of the Embassy of the United States and the Catholic University Andres Bello
January – June, 1981	Fulbright Research Scholar, Italy
Spring 1981	Visiting Professor of Law, European University Institute, Florence, Italy
August 1977 – August, 1980	Associate Professor of Law, University of Illinois College of Law
August 1974 – August 1977	Assistant Professor of Law, University of Illinois College of Law
April 1973 - July 1974	Assistant Counsel, U.S. Senate Select Committee on Presidential Campaign Activities
July 1971 - April, 1973	Associate, Wilmer, Cutler & Pickering Washington, DC

August 1970 – July 1971 Law Clerk to Judge Walter R. Mansfield, Second Circuit, New York, N.Y.

Education:

Legal: HARVARD LAW SCHOOL (1967- 1970)
Harvard Law Review, volumes 82 & 83
J.D., 1970 Magna Cum Laude

College: HARVARD COLLEGE (1963- 1967)
A.B., 1967 Magna Cum Laude in Government

Member:

American Law Institute (since 1977); Life Fellow of the American Bar Foundation (since 1989); Life Fellow of the Illinois Bar Foundation (since 1991); The Board of Editors, The Corporation Law Review (1978-1985); New York Bar (since 1971); Washington, D.C. Bar and D.C. District Court Bar (since 1971); Illinois Bar (since 1975); 2nd Circuit Bar (since 1971); Central District of Illinois (since 1990); 7th Circuit (since 1990); U.S. Supreme Court Bar (since 1974); 4th Circuit, since 2009. Member: American Bar Association, Washington, D.C. Bar Association, Illinois State Bar Association, Seventh Circuit Bar Association; The Multistate Professional Responsibility Examination Committee of the National Conference of Bar Examiners (1980-1987); AALS, Section on Professional Responsibility, Chairman Elect (1984-85), Chairman (1985-86); Who's Who In America (since 44th Ed.) and various other Who's Who; American Lawyer Media, L.P., National Board of Contributors (1990-2000).

Scholarly Influence and Honors:

Symposium, *Interpreting Legal Citations*, 29 JOURNAL OF LEGAL STUDIES (part 2) (U. Chicago Press, Jan. 2000), sought to determine the influence, productivity, and reputation of law professors. Under various measures, Professor Rotunda scored among the highest in the nation. *E.g.*, scholarly impact, most-cited law faculty in the United States, 17th (p. 470); reputation of judges, legal scholars, etc. on Internet, 34th (p. 331); scholar's non-scholarly reputation, 27th (p. 334); most influential legal treatises since 1978, 7th (p. 405).

In May 2000, *American Law Media*, publisher of *The American Lawyer*, the *National Law Journal*, and the *Legal Times*, picked Professor Rotunda as one of the ten most influential Illinois Lawyers. He was the only academic on the list.

- Appointed UNIVERSITY PROFESSOR, August 2006, George Mason University.
- The 2002-2003 *New Educational Quality Ranking* of U.S. Law Schools (EQR) ranks Professor Rotunda as the eleventh most cited of all law faculty in the United States. *See* http://www.leiterrankings.com/faculty/2002faculty_impact_cites.shtml

- Selected UNIVERSITY SCHOLAR for 1996-1999, University of Illinois.
- 1989, Ross and Helen Workman Research Award.
- 1984, David C. Baum Memorial Research Award.
- 1984, National Institute for Dispute Resolution Award.
- Fall, 1980, appointed Associate, in the Center for Advanced Study, University of Illinois.

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BOOKS:

PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY (Foundation Press, Mineola, N.Y., 1976) (with Thomas D. Morgan).

CALIFORNIA SUPPLEMENT TO PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY (Foundation Press, Mineola, N.Y., 1976) (with Thomas D. Morgan).

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CONSTITUTIONAL LAW (West Publishing Co., St. Paul, Minnesota, 1978) (a one volume treatise on Constitutional Law) (with John E. Nowak and J. Nelson Young).

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THE UNITED STATES FEDERAL SYSTEM: LEGAL INTEGRATION IN THE AMERICAN EXPERIENCE (Giuffrè, Milan, 1982) (with Peter Hay).

SIX JUSTICES ON CIVIL RIGHTS (Oceana Publications, Inc., Dobbs Ferry, N.Y., 1983) (edited and with introduction).

CONSTITUTIONAL LAW (West Publishing Co., St. Paul, Minnesota, 2d ed. 1983) (with John E. Nowak and J. Nelson Young) (a one volume treatise on Constitutional Law).

PROFESSIONAL RESPONSIBILITY (West Publishing Co., 1984, Black Letter Series).

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THE POLITICS OF LANGUAGE: LIBERALISM AS WORD AND SYMBOL (University of Iowa Press, 1986) (with an Introduction by Daniel Schorr).

TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE (West Publishing Co., St. Paul, Minnesota, 1986) (*three volume treatise*) (with John E. Nowak and J. Nelson Young).

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Other Activities:

March-April, 1984, Expert Witness for State of Nebraska on Legal Ethics at the Impeachment Trial of Nebraska Attorney General Paul L. Douglas (tried before the State Supreme Court; the first impeachment trial in nearly a century).

July 1985, Assistant Chief Counsel, State of Alaska, Senate Impeachment Inquiry of Governor William Sheffield, (presented before the Alaskan Senate).

Speaker at various ABA sponsored conferences on Legal Ethics; Speaker at AALS workshop on Legal Ethics; Speaker on ABA videotape series, "Dilemmas in Legal Ethics."

Interviewed at various times on Radio and Television shows, such as MacNeil/Lehrer News Hour, Firing Line, CNN News, CNN Burden of Proof, ABC's Nightline, National Public Radio, News Hour with Jim Lehrer, Fox News, etc.

1985--1986, Reporter for Illinois Judicial Conference, Committee on Judicial Ethics.

1981-1986, Radio commentator (weekly comments on legal issues in the news), WILL-AM Public Radio.

1986-87, Reporter of Illinois State Bar Association Committee on Professionalism.

1987-2000, Member of Consultant Group of American Law Institute's RESTATEMENT OF THE

LAW GOVERNING LAWYERS.

1986-1994, Consultant, Administrative Conference of the United States (on various issues relating to conflicts of interest and legal ethics).

1989-1992, Member, Bar Admissions Committee of the Association of American Law Schools.

1990-1991, Member, Joint Illinois State Bar Association & Chicago Bar Association Committee on Professional Conduct.

1991-1997, Member, American Bar Association Standing Committee on Professional Discipline.

CHAIR, Subcommittee on Model Rules Review (1992-1997). [The subcommittee that I chaired drafted the MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT that the ABA House of Delegates approved on August 11, 1993.]

1992, Member, Illinois State Bar Association [ISBA] Special Committee on Professionalism; CHAIR, Subcommittee on Celebration of the Legal Profession.

Spring 1993, Constitutional Law Adviser, SUPREME NATIONAL COUNCIL OF CAMBODIA. I traveled to Cambodia and worked with officials of UNTAC (the United Nations Transitional Authority in Cambodia) and Cambodian political leaders, who were charged with drafting a new Constitution to govern that nation after the United Nations troop withdrawal.

1994-1997, LIAISON, ABA Standing Committee on Ethics and Professional Responsibility.

1994-1996, Member, Illinois State Bar Association [ISBA] Standing Committee on the Attorney Registration and Disciplinary Commission.

Since 1994, Member, Publications Board of the A.B.A. Center for Professional Responsibility; vice chair, 1997-2001.

Since 1996, Member, Executive Committee of the Professional Responsibility, Legal Ethics & Legal Education Practice Group of the Federalist Society; Chair-elect, 1999; Chair, 2000

Winter 1996, Constitutional Law Adviser, SUPREME CONSTITUTIONAL COURT OF MOLDOVA.

Under the auspices of the United States Agency for International Development, I consulted with the six-member Supreme Constitutional Court of Moldova in connection with that Court's efforts to create an independent judiciary. The Court came into existence on January 1, 1996.

Spring 1996, Consultant, CHAMBER OF ADVOCATES, of the CZECH REPUBLIC.

> Under the auspices of the United States Agency for International Development, I spent the month of May 1996, in Prague, drafting Rules of Professional Responsibility for all lawyers in the Czech Republic. I also drafted the first Bar Examination on Professional Responsibility, and consulted with the Czech Supreme Court in connection with the Court's proposed Rules of Judicial Ethics and the efforts of the Court to create an independent judiciary.

Consulted with (and traveled to) various counties on constitutional and judicial issues (*e.g.*, Romania, Moldova, Ukraine, Cambodia) in connection with their move to democracy.

1997-1999, Special Counsel, Office of Independent Counsel (Whitewater Investigation).

Lecturer on issues relating to Constitutional Law, Federalism, Nation-Building, and the Legal Profession, throughout the United States as well as Canada, Cambodia, Czech Republic, England, Italy, Mexico, Moldova, Romania, Scotland, Turkey, Ukraine, and Venezuela.

1998-2002, Member, ADVISORY COUNCIL TO ETHICS 2000, the ABA Commission considering revisions to the ABA Model Rules of Professional Conduct.

2000-2002, Member, ADVISORY BOARD TO THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS (This Board was charged with removing any remaining vestiges of organized crime to influence the Union, its officers, or its members.) This Board was part of "Project RISE" ("Respect, Integrity, Strength, Ethics").

2001-2008, Member, Editorial Board, CATO SUPREME COURT REVIEW.

Since 2003, Member, Advisory Board, the Center for Judicial Process, an interdisciplinary research center (an interdisciplinary research center connected to Albany Law School studying courts and judges)

2005-2006, Member of the Task Force on Judicial Functions of the Commission on Virginia Courts in the 21st Century: To Benefit All, to Exclude None

July, 2007, Riga, Latvia, International Judicial Conference hosted by the United States Embassy, the Supreme Court of Latvia, and the Latvian Ministry of Justice. I was one of the main speakers along with Justice Samuel Alito, the President of Latvia, the Prime Minister of Latvia, the Chief Justice of Latvia, and the Minister of Justice of Latvia