Mar. 7, 2023

Well, Recu-u-use Me!

Benjamin G. Shatz
Partner, Manatt, Phelps & Phillips LLP

Appellate Law (Certified), Litigation

Email: bshatz@manatt.com

Benjamin is a certified specialist in appellate law who co-chairs the Appellate Practice Group at Manatt in the firm's Los Angeles office. Exceptionally Appealing appears the first Tuesday of the month.

A foundational assumption in litigation is that the judge deciding a case is completely neutral, having no interest in any given case or the well-being of the parties engaged in the dispute. This is why judges who do have an interest in the litigation or a financial stake with a litigant are supposed to recuse themselves and allow neutral judges to handle the case. By statute, federal judges must disqualify themselves when their impartiality could be questioned, including for any personal bias or connection to a party, or for any financial conflicts relating to the litigation. 28 U.S.C. § 455. Confidence of the litigants and the public in judicial impartiality is essential to the operation of a court and to ensure the appearance of fairness.

That fundamental assumption was recently shaken but then bolstered. In 2021, the Wall Street Journal ran a series of articles revealing how many federal judges had heard cases in which they or their family members held stock in companies that were parties to a case before the judge. The Journal's investigation revealed that over 130 federal judges had failed to disclose a financial interest in 685 cases from 2010 to 2018. *See generally Andrew Levinson et al., Hidden Interests: Federal Judges with Financial Conflicts*, The Wall St. J. (Sept. 28, 2021).

This remarkable investigative journalism prompted a real-world corrective response: Congress passed (nearly unanimously) the Courthouse Ethics Transparency Act (Pub. L. 117-125), which requires federal judges to disclose financial interests in excess of $1,000 that could be the source of potential conflicts of interest. *See* Nate Raymond & Moira Warburton, *Congress Approves Tougher Financial Disclosure Rules for U.S. Judges*, Reuters (April 27, 2022). President Biden signed the Act into law in May 2022.

The Act also required the Administrative Office of the U.S. Courts to create a searchable online public database of judicial financial disclosure forms. That database went online in November 2022 and is at https://pub.jefs.USCourts.gov. Database users may now quickly and easily download Federal Judicial Financial Disclosure Reports revealing information about federal judges' outside positions (i.e., roles with organizations and entities), agreements and arrangements, non-investment income (for judges and their spouses), reimbursements received, gifts, liabilities (e.g., creditors, including for spouses and children), and investments and trusts. This is similar to California's Fair Political Practices Commission's annual Form 700 database, which reveals investments, real property, income, loans, business positions, and gifts to California judges.

Despite the availability of these databases, most lawyers do not typically engage in searches for conflicts of interest. Instead, lawyers expect that judges will police and recuse themselves when appropriate. But *how*, precisely, is that supposed to happen? Judges cannot magically know which persons or entities may be connected to a given litigation. Thus, it is up to the parties to provide relevant information.

Federal appellate practitioners are familiar with the disclosure statement required in the parties' principal briefs (or any pre-brief motions) by Federal Rule of Appellate Procedure 26.1. That rule requires a corporate party to identify any parent corporation and any publicly held corporation that owns 10% or more of the party's stock. California's rule is similar, but different.

California Rule of Court 8.208 governs the required Certificate of Interested Entities or Persons in the Court of Appeal. The rule's express purpose and intent are to provide appellate justices with information to evaluate whether to disqualify themselves. (Rule 8.208(a).) Like its federal

counterpart, the disclosure must be filed with a party's principal brief and with any pre-briefing motion or opposition. (Rule 8.208(d)(1).) Like the federal rule, 10% is the disclosure threshold: An entity must list any other entity or person known to have an ownership interest of 10% or more in the party. (Rule 8.208(e)(1).) Further, parties must disclose any other person or entity having a financial or other interest in the outcome of the proceeding that the party "reasonably believes the justices should consider," and must explain the nature of that interest. (Rule 8.208(e)(2).) Both the federal and state rules require that if there is no one to disclose, then that statement must be affirmatively made (Rule 8.208(e)(3)); and if the situation changes, then the disclosure must be supplemented (Rule 8.208(f)).

Considering how basic the need for impartial judging is to the court system, it is surprising that the rule requiring parties to provide data for conflicts purposes is a relatively new development in California. The Judicial Council first circulated a proposal for an appellate disclosure rule in 2004, and after "substantial" public comment, Rule 14.5 was adopted in 2006. During the Great Renumbering of 2007, this rule became 8.208.

In 2008, the rule was amended to clarify that disclosures had to be made with a party's first filing in the Court of Appeal, and also to expressly narrow the rule to ordinary civil cases (i.e., excluding family, juvenile, guardianship and conservatorship matters). (Rule 8.208(b), (d)(1).) The 2008 amendment (with tweaks in a 2009 amendment) also expressly allowed parties to request to file their disclosures under seal when the information has not already been publicly disclosed. (Rule 8.208(d)(2); *see also Costa v. Road Runner Sports*, 84 Cal.App.5th 224, 239, n.16 (2022) (sealed filing); *State Water Resources Control Bd. v. Baldwin & Sons, Inc.*, 45 Cal.App.5th 40, 65-67 (2020) (granting motion to reverse order allowing conditional sealing).) This emphasizes how the information is to be used for the court's own purpose of evaluating recusal, and is not meant to be a required public disclosure or to serve as discovery for the benefit of opposing parties. (Rule 8.208(a).)

Notably, the Advisory Committee comment to the rule makes clear that parties need only disclose information that they "know," so the rule does not impose any affirmative duty to gather information about potentially affected entities or persons.

Lawyers being literal-minded creatures, disclosure forms were frequently filed that inanely listed the names of the parties, and also often included the names of their insurers. This was redundant and unnecessary. Any justice would readily realize that in an appeal captioned *John Smith v. Mary Jones*, the decision would affect John Smith and Mary Jones. "Disclosing" the obvious was no aid to any recusal analysis. And the fact that insurance companies might be affected was overkill as well. Thus, in 2009, the rule was amended again to explain that the parties themselves and their insurers need not be listed. (Rule 8.208(e)(2).)

Rule 8.208(d) sets forth details about filing and serving the certificate, which is to appear after the cover and before the tables in a brief (as in federal briefs). If a party fails to provide a certificate, the clerk must give notice of the defect and allow 15 days for a corrected filing. (Rule (d)(1), (3).) Judicial Council Form APP-008 exists to further compliance with the rule, but the form is not mandatory, and briefs often include typewritten disclosures.

If an appellant persists in failing to make disclosures, the court may dismiss the appeal; if a respondent refuses, then its brief may be stricken. (Rule 8.208(d)(3).) Given how easy it is to file

disclosures, it seems unlikely that a court has ever had to impose these drastic sanctions. *See Burdick v. Harlan* (A134802, Aug. 31, 2012) (court declines to dismiss for appellant's failure to file certificate). And parties unable or unwilling to comply with the rule invariably have bigger problems. *See Carrascal v. Avakian* (A146880, 2018) (appeal dismissed for brief's failure to comply with numerous rules, including the disclosure rule); *Qui v. St. Francis Mem. Hosp.* (A159716, 2022) (same). Alternatively, courts often excuse the failure to make disclosures and just proceed to the merits. *See Yvanova v. New Century Morg. Corp.*, 226 Cal.App.4th 495 (2014) (court excuses pro per appellant from disregarding numerous rules of court to reach the merits); *Guess v. Contra Costa Comm. College Dist.* (A141391, 2015) (same for counseled appellant); *Manning v. Investors Capital Corp.*, n.2 (B196915, 2008) (same). Again, issues with disclosures hardly ever arise because properly making disclosures is easy.

Or is it so easy? While the filing mechanics may be clear, the actual disclosure obligations are not always clear. Often it is not easy to know what persons or entities have an ownership interest of 10% or more in a party. For publicly traded companies, for example, ownership interests change on a daily basis. And even without temporal complications of perpetually changing shares, companies themselves frequently are unclear about their complex ownership structures. A simple appellate lawyer asking a client for a corporate ownership listing may be confronted with a flowchart of dizzying intricacy, revealing that the client is embedded in a constellation of myriad corporate parents, affiliates, and subsidiaries. This is one reason to obtain disclosure information from a client promptly. Waiting until the day before a brief is due may cause unnecessary headaches and distractions.

Returning to the heart of the matter, does it really help a court's recusal function to disclose that party XYZ, LLP is wholly owned by XYZ, LLC? Does it help to add that XYZ, LLC, in turn, is owned by XYZ, Inc.? How many layers must the corporate onion be peeled to reach potentially relevant information (e.g., that XYZ, Inc. is ultimately owned by the notorious Dr. Julius No, who happens to work for SPECTRE)? In practice, corporate disclosure forms typically contain only cursory first-level revelations, without delving deeper into tangled, imbricated corporate structures. Presumably, at some point, there must be actual human beings somewhere who are ultimately interested in the outcome of a case. But just as presumably, if a court cares about this, it will request further information.

Of course, if the purpose of recusal is to preserve judicial impartiality, then a judge's lack of knowledge about ultimate corporate ownership may protect litigants just as well as complete disclosure to the nth degree. On the other hand, any appearance of impropriety matters, especially to the losing side.

While disclosure statements appear to be a technical note that parties and courts typically gloss over without much focus or comment, there are instances where it is clear that the court is paying close attention. *E.g., MACC Consulting, Inc. v. California City* (F082647, 2022) (court notes that certificates indicated no persons or entities with 10% ownership of appellant, but then notes that statements of information disclose the company's only officers and directors); *People v. Accredited Surety & Cas. Co.*, 79 Cal.App.5th 656, 662 n.5 (F082677, 2022) (noting that certificate by appellant surety indicated no interested parties to disclose). The only other "interesting" mention of a disclosure form in precedent is a case in which the court did not treat

the disclosure information as evidence. *Rowsey v. Tesh*, n.3 (B194650, 2007) (assertion in certificate is not treated as evidence).

Returning to our beginning, it remains to be seen how effectively lawyers (and possibly judges themselves) will use the new federal database. In today's complicated financial world of mutual funds and other investment vehicles, mistakes of the sort uncovered by the Wall Street Journal seem inevitable. But we can hope that any future investigations will not turn up data so serious as to require a new federal law. The events of the past year or so, however, show journalism and government at their best in finding and responding to a concerning problem, albeit a minor one compared to others in the greater scheme of things.