

LABI JUDICIAL SYSTEM MODERNIZATION PROJECT

Enhancing Transparency in Judicial Ethics

LABI presents the second installment in its four-part Judicial System Modernization Series, for more information or to view other series installments visit www.LouisianaJudiciary.com.

INTRODUCTION

Transparency is a fundamental tenet of democracy, establishing public trust and facilitating citizens' understanding and meaningful participation in public matters – especially those with a direct effect on their community, livelihood, safety and security. In practice, public bodies have a duty to the citizens they represent to provide information both in a timely manner and in a way that is broadly accessible to citizens. It is the principle behind open meeting requirements, mandatory access to public records and more.

Transparency is particularly important in judicial institutions because it fosters accountability, combats corruption, helps promote fairness, and ultimately enhances public confidence and trust by reassuring society that justice is being served. Indeed, a well-functioning third branch of government cannot exist unless the people have trust and confidence in both their judges and the proceedings they conduct.

Like lawyers, judges in Louisiana must abide by certain canons of judicial conduct that require them to act in a manner promoting public confidence in the integrity and impartiality of the judiciary. An impartial judiciary must be proactive in sharing information with the public so ordinary citizens can ensure high standards are being met. An effective system with no transparency and no public confidence will not suffice.

To that end, in this installment, *Enhancing Transparency in Judicial Ethics*, we begin by examining the current state of judicial ethics requirements.

Financial disclosure requirements have been a bright spot for judicial ethics reform. Traditionally, Louisiana's judiciary has not made information about judges' financial interests readily available to the public. However, over the past two years, intense scrutiny of the judiciary's current practices by the media, Legislature and outside groups has created a groundswell of momentum and support for reform. To its credit, the judiciary has responded by implementing several positive changes. Nonetheless, the judiciary still has yet to embrace certain other reform measures that would bring it in line with the other two branches of state government.

In the second part of this installment, we offer several specific policy recommendations to improve judicial ethics and create a more level playing field for all branches of state government in terms of ethics and transparency requirements.

LOUISIANA'S ETHICS REFORM HISTORY AND JUDICIAL ETHICS

In 2008, under then-Governor Bobby Jindal, the Louisiana Legislature passed a major ethics reform package for government employees and board members. The package strengthened requirements for financial disclosures, prohibited certain sources of income, established reporting requirements and a limited certain "perks" and other gifts to public servants. Since then, Louisiana legislators and other public officials — including department heads, senior state officials, local officials, and even private citizens serving on public boards and commissions — have had to abide by these ethics requirements, which include filing financial disclosure forms each year that are made available to the public online. The forms are intended to show how public servants earn their income and what outside business interests, if any, they may have. In addition to requiring officials to disclose salaries earned performing their official duties, the disclosures also require officials to list property they own, investment accounts they use, travel reimbursements they claim and nonprofits they support. The forms also include information about spouses and their financial interests. The forms are published on the Louisiana Ethics Board's website and can easily be accessed by the public.

The initial version of the 2008 ethics reform package would have required state judges be held to the same standard as legislators and other public officials, but judges balked at the Legislature creating and enforcing rules governing judicial ethics and financial disclosures. They cited privacy and security concerns with making public certain information and ultimately were successful in exempting themselves from the bill's provisions entirely. Instead, the Louisiana Supreme Court promised it would focus on financial disclosures and strengthen its rules to hold the state judiciary to a standard equivalent to the other branches later that same year.¹

In March 2008, the Louisiana Supreme Court adopted Rule XXXIX, which enacted financial disclosure provisions for state court judges comparable to the provisions adopted by the state Legislature for legislators and other public officials. However, unlike the financial disclosure forms filed by other public officials, the forms for judges were never made broadly available to the general public. Instead, for the next 12 years, they were simply housed, presumably in hard copy, at the Louisiana Supreme Court—only made available upon written request. This system stood in stark contrast to most other states, including Alabama, Arkansas, Georgia, Mississippi, North Carolina, Tennessee and Virginia, where financial disclosure information is easily accessible by the public.

Not only was this system cumbersome and time-consuming, but it also lacked provisions of anonymity, presenting the possibility that anyone who requested a financial disclosure form could be the subject of retribution for requesting such information from a member of the judiciary. As the Public Affairs Research Council (PAR) noted in 2008, “requiring standardized, easy-to-access personal financial disclosure for high-level public officials is one of the most important steps the state can take to build citizen confidence in the integrity of government.”²

MOMENTUM FOR CHANGE: FINANCIAL DISCLOSURES

In early 2020, momentum began to build for bringing the judiciary's financial disclosure rules in line with other branches of government. The Metropolitan Crime Commission (MCC), a private criminal justice watchdog group based in New Orleans, began publicly advocating for the Louisiana Supreme Court to post judges' financial disclosure forms. When those efforts were unsuccessful, the Commission filed public records requests with the Louisiana Supreme Court and launched a database on its website that allowed anyone to search judicial disclosure forms. The database included financial disclosure forms dating back five years for each of the nearly 300 judges seated on Louisiana district and appellate courts, along with the Louisiana Supreme Court. In setting up the database, the Commission stated that it hoped to “mak[e] the supreme court reassess the way they manage the judges and the courts of Louisiana.” The Commission also noted that attorneys and members of the public would now be able to use the forms to determine if the judges who oversee their cases have any financial conflicts of interest that could impede their objectivity on the bench.

Around that same time, during the 2020 Regular Session, Sen. Sharon Hewitt (R-Slidell) filed a bill (SB 194) requiring the Louisiana Supreme Court to maintain a website that would allow the public to quickly and easily review disclosure reports, as well as a list of individuals who fail to file a statement, fail to file a timely statement, omit information from a statement or provide inaccurate information in a statement. Rep. Lance Harris (R-Alexandria) filed a similar bill (HB 201) requiring all elected members of the judiciary, as well as judicial candidates, to annually file financial disclosure statements containing the same information required of legislators and other elected officials.³ The bill also required the Louisiana Supreme Court to transmit all disclosure statements filed to the Board of Ethics, which would have been required to post the forms online, along with the listing of any judge who failed to file a timely statement.

In May 2020, less than five months after the Metropolitan Crime Commission publicly announced it was launching the database and amidst mounting public pressure and media attention, the Louisiana Supreme Court began posting the current financial disclosures of state judges on its website. Rafael Goyeneche, President of the MCC, described the change as “the beginning of the supreme court moving from the Dark Ages into the new millennium.”⁴ For now, the Louisiana Supreme Court has posted statements for active judges filed for the 2018, 2019 and 2020 tax years, searchable by name and court. New reports will be posted going forward, but disclosures from previous years remain offline.

¹ <https://publicintegrity.org/state-politics/our-private-Legislatures/louisiana-tightens-its-ethics-standards/>

² Public Affairs Research Council of Louisiana (PAR), “PAR Wraps Up the Special Session on Ethics”, available online at (Feb. 27, 2008).

³ See La. R.S. § 42:1124.2.

⁴ The New Orleans Advocate, “Louisiana Supreme court Publishes Judges' Financial Disclosures Online for First Time” (May 15, 2020), available online at https://www.nola.com/news/courts/article_a0849aee-96d3-11ea-92ab-c72ad8dbf608.html.

OTHER DISCLOSURES

Improving transparency around judges' financial activities and interests was an important step forward, but there is more to be done. The Louisiana Supreme Court should reexamine its transparency rules related to judges' outside income from activities related to their position as a judge, and the receipt of "perks" and other gifts.ⁱ

i. Quasi-Judicial Compensation and Expenses

Under current rules, a judge may accept reasonable compensation and expenses for "quasi-judicial and extra-judicial activities," as long as any income over \$500 is reported annually.ⁱⁱ Based on a review of several of these annual reports ("Quasi-Judicial Compensation and Expenses Reports"), it appears that most outside income and reimbursed expenses judges reported relate to speaking opportunities at seminars and conferences, although some may also teach or provide assistance to the law institute, to name a few examples of compensated quasi-judicial activities. This includes expenses incurred for travel, lodging, mileage, airfare, and car rentals to and from these events. Unfortunately, the reports are not made available online, but instead require a member of the public to file a public records request with the Judicial Administrator of the Supreme Court to access the reports. Additionally, judges are only required to file a report if they have received compensation. A system in which judges are also required to file a report certifying that they did *not* receive income would provide the public with greater assurance that judges are not failing to report outside income.

It is also worth noting that the rules related to accepting and reporting outside compensation are different than those for legislators and other public officials. Legislators, who are part-time public servants, are allowed to have expenses such as travel and lodging related to speaking events covered, but they must file an affidavit with the Board of Ethics within 60 days of making the speech and must disclose the name of the sponsoring group and the amount that the group expended on behalf of the legislator. Legislators also cannot be directly compensated for those services.ⁱⁱⁱ Other government employees, such as agency heads or employees are prohibited altogether from receiving any compensation outside of their government paycheck for anything related to their employment.^{iv}

ii. Gifts and Other Perks

Canon 6B(1) of the Louisiana Code of Judicial Conduct provides that a judge "shall not accept, directly or indirectly, any gifts, loans, bequests, benefits, favors or other things of value that might reasonably appear as designed to affect the judgment of the judge or influence the judge's official conduct, or would appear to a disinterested reasonable person to undermine the judge's independence, integrity, or impartiality." Canon 6B(2) lists several specific circumstances when a judge is allowed to accept a gift without reporting it, *provided that* the gift does not violate the "appearance and impartiality" test set forth in Canon 6B(1). Among other things, the list includes gifts given for special occasions such as a birthday or wedding and "ordinary social hospitality." The Canon also includes a separate list of gifts that a judge may accept but must report, once again, as long as the gift does not violate the "appearance and impartiality" test.

Adding even more confusion to this complex set of rules, Canon 6(C) suggests that a judge must only report this latter group of gifts if the value of the gift alone or aggregated with other gifts from the same source exceeds \$350 in one year.^v So a judge likely would not be required to report a \$325 ticket to a Saints game, but would be required to report a \$400 concert ticket. It seems nearly impossible for a judge to know how much a gift, benefit or favor is worth and to therefore know when his reporting obligation has kicked in.

Notably, the only set of rules governing gifts and perks provided to judges places the reporting onus on the judge. The Louisiana Ethics Code does not require lawyers, lobbyists, or other individuals who take a judge to dinner or pay for his or her food to report that expenditure. There is also no set limit on how much someone can spend on that meal or "perk." Unlike judges, all other elected officials and public employees in Louisiana are prohibited from accepting gifts of any kind from people they interact with based on their employment with the state.^{vi} And while the prohibition does not prohibit lobbyists from buying a meal for elected officials, there are well-defined limitations. The person providing the food and drink cannot provide a public servant more than \$61 worth of food and drink per single event and is required to report expenditures monthly.^{vii} No similar requirements exist for lawyers or other individuals providing gifts, meals and entertainment to judges.

Another difference in the treatment of judges and other elected officials and public employees is the availability of these reports. LABI reached out to the Judicial Administrator's Office at the Louisiana Supreme Court, which is responsible for collecting and maintaining the judicial financial disclosure reports as well as other Cannon 6 reports. We were informed an official public records request was required to receive any reports. This is a vastly different level of transparency than the disclosure reports for the legislative and executive branch officials, which are readily available online.

ENFORCEMENT

Rules and regulations are only as good as the enforcement mechanisms that accompany them. Ensuring a robust enforcement system is in place to keep judges compliant with their disclosure duties is therefore necessary to give the public confidence in the rules and regulations themselves. Under the Louisiana Supreme Court's current rules, if a judge fails to file a report or files an inaccurate report, the Judicial Administrator's Office may refer the matter to the Judiciary Commission. The Judiciary Commission, which is also charged with investigating complaints of judicial misconduct, is composed entirely of judges or individuals appointed by judges. One commissioner reported he had never seen a referral from the Judicial Administrator's Office regarding reporting. If the Judiciary Commission determines a violation has occurred, a hearing is conducted. Based on the findings of the hearing, the Judiciary Commission may then choose to file a recommendation for civil penalties to the Louisiana Supreme Court, which must then hold an oral argument on the issue and may impose civil penalties up to a maximum of \$100 per day. If the Louisiana Supreme Court determines the failure to file or false statements were knowing and willful, the Court must refer the matter to the local district attorney where the judge sits.

In sum, the process for dealing with a judge's violation of the Louisiana Supreme Court's disclosure requirements is long and complex and lacks the checks and balances found in other enforcement procedures. Moreover, at every step in the process, a judge's conduct is evaluated only by his or her fellow peers or individuals appointed by the judge's peers. Every state has some version of a judicial commission tasked with investigating and enforcing allegations related to judicial ethics and misconduct. Yet unlike in Louisiana, membership on most other state commissions includes at least one, and in most cases multiple, *non-attorney, non-judge* members of the public who are appointed by the governor, and in some cases also confirmed by the State Senate. Twenty states have a majority of commission members who are appointed by the governor and/or the legislature.^{viii} Presumably, this feature is designed to ensure that other branches of government provide some checks and balances of the judiciary when it comes a matter as important as performance of judicial functions and allegations of official misconduct. Louisiana is unique in having a judicial commission composed entirely of judges or judicial appointees.

The checks and balances present within the judiciary also are not on par with that of the other two branches of government. If a legislator or other public official in Louisiana fails to file or files an inaccurate financial disclosure form, the matter is handled by the Louisiana Board of Ethics. That board is composed of seven members appointed by the governor, two members appointed by the House of Representatives and two members appointed by the Senate. The checks and balances present in each system – that of the judiciary and that of the executive or legislative branches – are vastly different.

LABI RECOMMENDATIONS

- The Louisiana Supreme Court should update its rules to require the Court to annually post on its website all financial disclosure statements filed by members of the judiciary. This rule update would simply codify the informal practice recently adopted by the Louisiana Supreme Court in May 2019. The rule should also ensure the information contained in the disclosures is searchable and user-friendly. To the extent the Louisiana Supreme Court is not proactive in formalizing the requirement to post financial disclosure forms, the Legislature may wish to grant some oversight to the Louisiana Board of Ethics, which oversees financial disclosure compliance of legislators and other public officials.
- The Louisiana Supreme Court should consider requiring all judges to submit Cannon 6 reports annually regardless of if they have anything to report. It should also post all the reports on its website. The information contained in the reports should be searchable and user-friendly.
- Lawyers should be required to report anything they give to a judge in the same manner as lobbyist expenditures on legislators and other public officials are reported.

¹ *PAR Wraps Up the Special Session on Ethics*. Public Affairs Research Council, February 2008

² Cannon 5 and Cannon 6

³ LSA R.S. 42:1123(16).

⁴ LSA R.S. 42:1101 et seq.

⁵ Cannon 6

⁶ LSA R.S. 42:1115

⁷ LSA R.S. 42:1115

⁸ National Center for State Courts, "Composition of Judicial Commissions" (Aug. 2019), available at https://www.ncsc.org/_data/assets/pdf_file/0027/14877/composition.pdf.