

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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NEW YORK UNIVERSITY,	:	
Employer,	:	
-and-	:	Case No. 2-RC-23481
GSOC/UAW,	:	
Petitioner	:	
	:	
-----	X	
-----	X	
POLYTECHNIC INSTITUTE OF NEW YORK UNIVERSITY,	:	
Employer,	:	
-and-	:	Case No. 29-RC-012054
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),	:	
Petitioner	:	
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EXPERT OPINION OF RICHARD PAINTER

## **Background**

I am the S. Walter Richey Professor of Corporate Law at the University of Minnesota Law School. I received a B.A. from Harvard University in 1984 and a J.D. from Yale Law School in 1987. My professional experience includes a year of clerking for Judge John T. Noonan, Jr. of the Ninth Circuit Court of Appeals, 2 ½ years of law practice with Sullivan & Cromwell in New York City, another 2 ½ years of law practice with Finn Dixon & Herling in Stamford, Connecticut and 17 years of law teaching. My practice has been principally in corporate and securities law, securities litigation, commercial litigation and government ethics. From February 2005 to July 2007, I was the chief ethics lawyer for the President and the White House staff. At the White House I supervised work on ethics agreements and financial disclosure statements for the President's nominees for Senate confirmed positions in the Executive Branch, I advised the President and his staff on federal conflict of interest regulations and other ethics issues, and I worked on conflict of interest and other ethics matters that arose in the selection and confirmation of Chief Justice John Roberts and Justice Samuel Alito to the Supreme Court.

I have published books and articles on corporate law, securities law, and ethics. See, e.g., SECURITIES LITIGATION AND ENFORCEMENT: CASES AND MATERIALS (with Donna Nagy and Margaret Sachs) (West Publishing 2003); SECOND EDITION (2007) THIRD EDITION (2011); PROFESSIONAL AND PERSONAL RESPONSIBILITIES OF THE LAWYER (with Judge John T. Noonan, Jr., USCA 9); SECOND EDITION (2001); THIRD EDITION (2011); GETTING THE GOVERNMENT AMERICA DESERVES: HOW ETHICS REFORM CAN MAKE A DIFFERENCE (OXFORD U. PRESS 2009).

I am a member of the bar of the State of New York and am an advisor to the American Law Institute project on government ethics.

I have testified on five separate occasions before the United States House of Representatives or the United States Senate on legislation pertaining to securities law or government ethics. For example, in June 2011, I testified before the House Committee on Government Oversight and Reform on the effectiveness of the Hatch Act, and since then I have on several occasions met privately with the staff of Committee Chairman Representative Darrell Issa (R – CA), to discuss executive branch conflict of interest rules and other issues. A copy of my curriculum vitae is attached hereto as Exhibit A.

### **Summary of Expert Opinion**

I have been asked to opine on whether Nancy Schiffer, recently confirmed as a member of the National Labor Relations Board (“NLRB” or “Board”) must recuse from participating in two cases presently pending before the NLRB that involve efforts of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO (“UAW”) to unionize graduate students at New York University (“NYU”) and at Polytechnic Institute of New York University (“NYU Poly”), which has come under the control of NYU and will be merged into NYU effective January 1, 2014.

I conclude that Nancy Schiffer must recuse from participating in the two of these cases that are presently pending before the Board because they are the same legal dispute as an earlier case that was pending before the Board when Member Schiffer was Deputy General Counsel for the UAW. The three cases involve the same parties, namely the UAW and NYU, with the only difference being that the NYU case now has a separate docket number from the earlier case and the UAW added NYU Poly as a party to the matter by commencing yet another case with a separate docket number after Poly came under complete control of NYU. These three cases – all before the NLRB and involving the same opposing parties -- involve the same factual and legal

dispute, which is whether the graduate students who are appointed to teaching, research and other positions at NYU or by entities such as NYU Poly that are controlled by NYU and will be merged into NYU, are employees who can be organized by the UAW.

Member Schiffer served as Deputy General Counsel of the UAW in 1998-2000, during the time when the NLRB was considering the first of these three cases, a petition filed by the UAW to represent essentially the same group of NYU graduate assistants. In that capacity she almost certainly represented the UAW as counsel in the case, even if she only supervised the work of lawyers on her staff and the outside law firm that did the bulk of the work for the UAW in the case. She cannot as a member of the NLRB adjudicate the same matter in which she represented a client as a lawyer.

Furthermore, Member Schiffer also was a senior officer of the UAW at the time this matter was pending before the NLRB. A party to a case cannot fairly sit in judgment on the same case – or have a person who was one of its officers while the case was pending later sit in judgment on the same case. For this reason also Member Schiffer's recusal is required.

I reach this conclusion because I believe that Member Schiffer's ethical obligations as an adjudicator require her to recuse. Although constitutional due process issues are ultimately for courts to decide, due process considerations should inform an adjudicator's decisions about recusal, and in this case due process considerations weigh overwhelmingly in favor of Member Schiffer's recusal.

### **Facts Assumed for Purposes of this Opinion<sup>1</sup>**

The NLRB ruled in the first of three related cases, New York University, 332 NLRB 1205 (2000) (NYU I) that NYU's graduate assistants were "employees" within the meaning of the National Labor Relations Act ("NLRA"). NYU had contended that the graduate assistants were not "employees" and thus could not be organized by the UAW. This factual and legal issue was at the heart of the proceeding. Thereafter, the UAW was certified as the representative of a bargaining unit including the graduate assistants, and NYU and the UAW entered into a Collective Bargaining Agreement effective for four years, from September 2001 through August 2005.

While that contract was in effect, the NLRB reversed its position in the NYU decision in Brown University, 342 NLRB 483 (2004), holding that graduate student assistants are not "employees" under the NLRA. Based on the Brown decision, NYU withdrew recognition from the UAW at the end of the Collective Bargaining Agreement in 2005, and declined to negotiate a new contract.

The UAW filed the second case, a petition with NLRB in 2010 expressly asking the Board to reverse the Brown decision, reinstate NYU I as governing law, and restore the bargaining unit previously represented by the UAW at NYU. The UAW also filed a third case seeking to represent graduate assistants at NYU Poly, which is owned by and academically affiliated with NYU and will be merged into NYU on January 1, 2014. The UAW had not commenced any

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<sup>1</sup> The facts described in this section are based on the Affidavit of Edward A. Brill, which I have reviewed in connection with this opinion.

similar proceedings against Poly before it came under the control of NYU. The NLRB Regional Directors dismissed the petitions in both of these cases after hearing, based on the governing law in Brown. The Board granted the UAW's Request to Review in both cases in June 2012, consolidating the two cases for briefing, and the cases are presently pending before the Board.

These three cases – the first case against NYU, the second case against NYU, and the third case against NYU Poly after it came under the control of NYU – have different docket numbers, but there the difference ends. The cases involve the same opposing parties (the UAW and NYU or an entity controlled by NYU), and the same legal and factual issue of whether graduate students the UAW seeks to unionize are “employees” of NYU or NYU Poly. By the UAW's own statement the presently pending cases are an effort to restore the same bargaining unit that the Board found to exist in NYUI. The three cases thus are essentially the same matter.

Member Schiffer was Associate General Counsel for the UAW beginning in 1982 and was promoted to Deputy General Counsel in November, 1998. She remained in that position until 2000 when she became an Associate General Counsel of the AFL-CIO. Member Schiffer represented the UAW as its Deputy General Counsel at the time this matter was pending before the NLRB as the first NYU case. As Deputy General Counsel she was also an executive of the UAW at the time the first NYU case was pending.

The UAW was represented in the NLRB case by Daniel Ratner of the New York law firm of Levy, Ratner and Behroozi. There was no formal appearance in the case by Member Schiffer or any other in-house UAW attorney. Similarly, neither Member Schiffer nor any other UAW staff

attorney signed any of the pleadings or briefs submitted to the NLRB. I do not know if letters, email or other correspondence were sent between Mr. Ratner and Member Schiffer, although Ratner was communicating frequently with Betsy Engel, Associate General Counsel for the UAW, who reported to Member Schiffer. Ms. Engel was copied on numerous communications that Ratner sent to all of the parties in the first NYU case, suggesting Mr. Ratner must have communicated with Ms. Engel privately about the case even more frequently.

It is highly likely that Member Schiffer, as Ms. Engel's supervisor, was involved in the first NYU case, and furthermore that Member Schiffer was involved with the UAW's organizing campaign that was the subject matter of that case. The NYU I case was extraordinarily important for the UAW. The case received considerable national attention. Close coordination between outside counsel and the UAW in-house lawyers was to be expected under these circumstances, and Mr. Ratner did in fact coordinate his efforts with the UAW in-house legal staff that was under the supervision of the UAW's General Counsel and Deputy General Counsel, Member Schiffer.

According to Member Schiffer's July 23, 2013 Statement before the Senate HELP Committee considering her nomination to the Board, she "served as Deputy General Counsel at the UAW for two years, handling the day-to-day administration of the UAW Legal Department." Based on this statement also, it would appear that Member Schiffer had at least indirect responsibility for the NYU case. In addition, a brief biography of Member Schiffer states that her main practice areas as Deputy General Counsel of the UAW included "NLRA and public sector representation and unfair labor practice cases . . . [and] public and private sector organizing campaigns." The

hotly contested organizing campaign at NYU was very important to the UAW, and it is difficult to imagine that Member Schiffer would not have had some involvement in it.

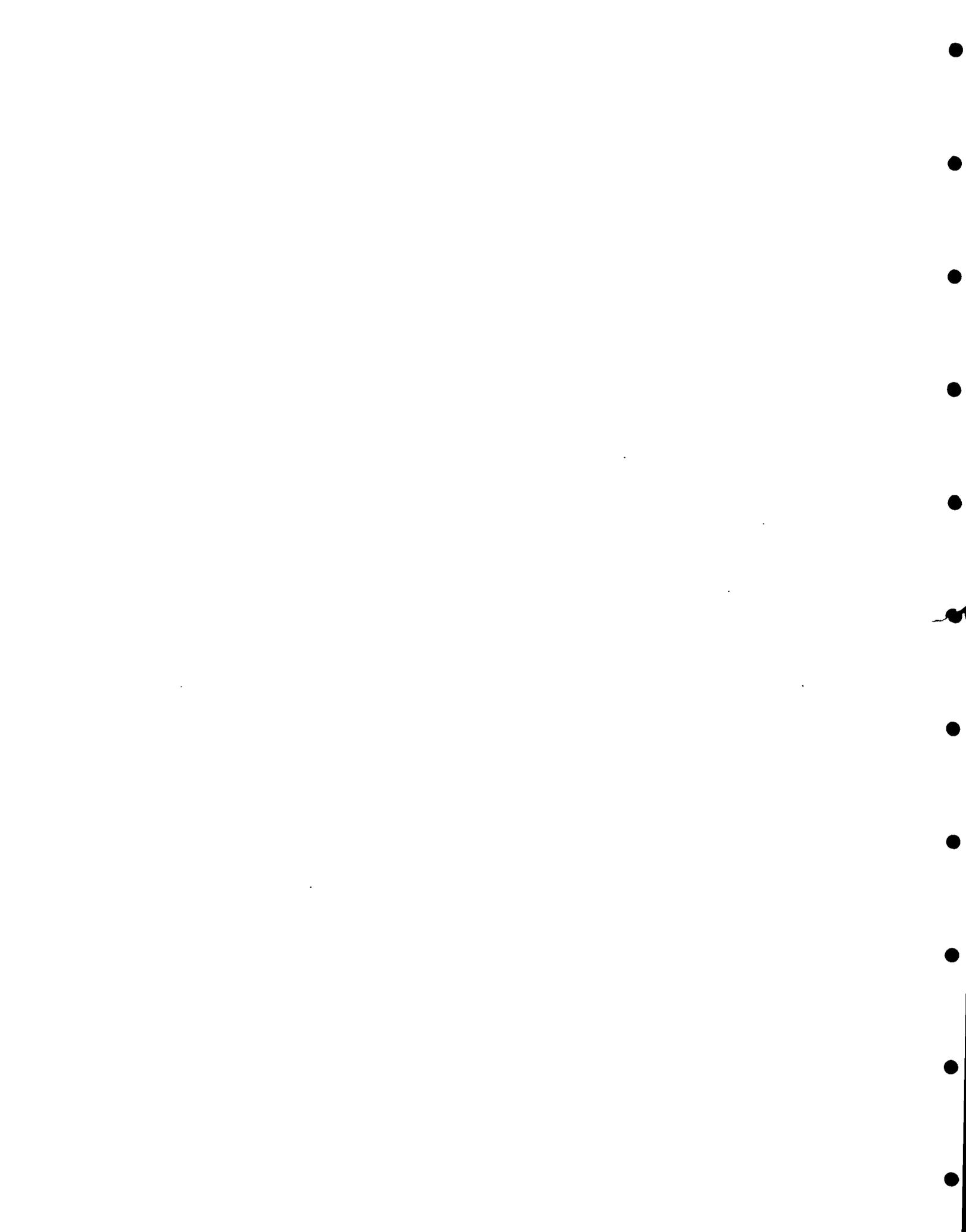
**The “Matter” Addressed by this Opinion**

The three NLRB cases in which the UAW seeks to unionize NYU graduate students all arise out of the same dispute and are the same particular party matter. They are the same matter under any test used to distinguish between the same matter and two or more separate matters, a determination that is common in both government ethics law and the law governing lawyers. For example, 5 CFR 2641.201, subsection 5, states that “in determining whether two particular matters involving specific parties are the same, all relevant factors should be considered, including the extent to which the matters involve the same basic facts, the same or related parties, related issues, the same confidential information, and the amount of time elapsed.” This definition is used for purposes of the criminal prohibition on a former government employee representing back to the government in the same particular party matter in which he or she participated personally and substantially as a government employee, 18 U.S.C. 207(a). Under this definition, the first NYU case is the same matter as the second NYU case and the NYU Poly case because the cases all involve the same parties, the same facts and the same controversy, namely the UAW’s attempt to unionize graduate students at NYU. The substantial amount of time that has elapsed should be viewed in context; union organizing campaigns take a long time, particularly when the NLRB addresses novel issues of fact and law. Thus, a former NLRB employee who had participated personally and substantially in the first NYU case at the NLRB would violate a criminal statute, 18 USC 207(a), by representing back to the NLRB with intent to influence its decisions on the other two cases. It would make little sense to impose such a restriction on an employee leaving the NLRB, if the three cases could instead be viewed as

separate matters when the “revolving door” turned the other way and a lawyer who had already represented one of the parties in the first NYU case were allowed to subsequently join the NLRB to participate personally and substantially in adjudicating the other two cases. They are the same matter whether the government official participating in them is moving in or out of government.

The three cases would also be considered the same matter for purposes of lawyer conflict of interest rules. A lawyer who had represented either party – NYU or the UAW – in the first NYU case, could not switch sides and represent the other party in the second or third case. See ABA Model Rule 1.9. A government lawyer who had participated in the first case while at the NLRB could not thereafter represent either party in the second or third case. See ABA Model Rule 1.11. The bar has sanctioned former government lawyers who violate this rule by taking on private client matters that arise out of the same facts as matters they worked on in government service. See *In Re Sofaer*, 728 A2d 625 (DC 1999) (former Legal Advisor to the State Department who participated in the government’s initial reactions to the bombing of Pan Am Flight 103 could not in private practice agree to represent the government of Libya in negotiating a settlement with the bombing victims’ families, because the two matters were the same matter for purposes Rule 1.11).

Such decisions would be nonsensical – and the system of ethics regulation incoherent -- if a narrower definition of the “same matter” were used when conflicts run the other way around and government officials have conflicts arising from their private practice. The incoherence – and lack of fundamental fairness -- would be even starker if an extremely narrow definition of the



same matter allowed government adjudicators to decide the same cases in which they had represented parties in private practice.

### **Recusal and Due Process**

The right of litigants to have an unbiased judge for their cause has for centuries been applied to proceedings before court and other tribunals adjudicating the rights of particular parties. As Chief Justice Chapman of the Massachusetts Supreme Judicial Court explained in 1870:

The provision of art. 2 of our Declaration of Rights, that “it is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit” rests upon a principle so obviously just, and so necessary for the protection of the citizen against injustice, that no argument is necessary to sustain it, but it must be accepted as an elementary truth. The impartiality which it requires incapacitates one to act as a judge in a matter in which he has any pecuniary interest, or in which a near relative *or connection* is one of the parties. It applies to civil as well as criminal causes, and not only to judges of courts of common law and equity and probate, *but to special tribunals, and to persons authorized on a special occasion to decide between parties in respect to their rights.* It existed under the common law from the earliest times. . . .”

Alvin Hall v. Edward Thayer, 105 Mass. 219 (1870) (emphasis added) See also Franklin Taylor v. Worcester County Commissioners, 105 Mass. 225 (1870) (opinion by Chapman, C.J.) (“As one of the county commissioners was a brother in law of Bullard, over whose land the highway was located, and who was entitled to damages, the proceeding was *coram non judice* and utterly void, and no subsequent waiver, consent or release could render it valid. Hall v. Thayer, *ante* 219”) (both of these cases are excerpted and discussed in John T. Noonan, Jr. and Richard W. Painter, *Personal and Professional Responsibilities of the Lawyer* 717-723 (Foundation Press, Third Edition 2011).

Federal judges, state judges, county board members, other local officials, Commissioners of the Federal Communications Commission and a wide range of other adjudicators have been required

to step aside in matters in which their impartiality might reasonably be questioned. See Noonan and Painter *supra* at 704-739, 762-777 (discussing cases in which recusal was required in each of these instances). Failure of an adjudicator to recuse in such circumstances is not only an ethics breach but can violate the substantive due process rights of the litigants and render an adjudicator's decision null and void.

The Supreme Court gave new urgency to the Constitutional due process component of judicial ethics in *Caperton et. al. v. Massey Coal Co.* 556 US 868 (2009), holding that due process required a West Virginia Supreme Court Justice to recuse from a case in which his most substantial campaign contributor was a party. The Court observed that because judicial integrity is "a state interest of the highest order" governmental authorities might choose to "adopt recusal standards more rigorous than due process requires." *Id.* quoting *Republican Party of Minnesota v. White*, 536 U.S. 765, 793 (2002). Sometimes, however, adjudicators' biases are so severe that the parties Constitutional rights have been violated and the judgment *must* be vacated regardless of what particular judicial ethics rules require.

Recusal decisions for members of government agencies, commissions and boards can be difficult because they sometimes perform rulemaking and policy functions where some degree of bias is tolerated just as some degree of bias is tolerated on the part of policy makers in the legislature. When, however, members of agencies, commissions and boards perform adjudicatory functions in particular matters involving specific parties such as the NYU cases at issue here, their role is similar to that of a judge, not a legislature or other policy maker. In this adjudicatory role, they must look to the ethical obligations of a judge - - not those of a legislator or an executive branch bureaucrat - in determining when to recuse from a matter. Their failure to recuse where appropriate may violate standards of ethics and may also violate the substantive due process

rights of the litigants. In either case, a reviewing court may vacate the adjudicator's order and direct that there be a new hearing.

For example, when Federal Communications Commission (FCC) Chairman George McConnaughey in the late 1950's had a few "get acquainted" lunches with parties to an adjudicative proceeding before the FCC, the proceeding was deemed by the FCC to have been sufficiently prejudiced that the FCC's decision granting a construction permit for a Boston television station had to be vacated. The FCC reached this conclusion after the United States Court of Appeals for the District of Columbia Circuit had remanded the case for findings of fact about the parties' attempts to influence the FCC Chairman and whether "any member of the Commission should have disqualified himself in the present case." See *WHDH, Inc. et al.* (July 14, 1960), 20 FR 397 (FCC) (1960), excerpted and discussed in Noonan & Painter, *supra* at 763-774.

In *American Cyanamid Company v. Federal Trade Commission*, 363 F.2d 757 (6<sup>th</sup> Cir. 1966), the Sixth Circuit held that participation of the Federal Trade Commission Chairman Paul Rand Dixon in a hearing on a charge against certain drug companies accused of violating the Federal Trade Commission Act amounted to denial of due process, because the FTC Chairman had previously served as counsel for a United States Senate subcommittee that had investigated many of the same facts and the same parties that were involved in the proceeding before the FTC. The FTC argued against Chairman Dixon's recusal on the ground that there were two entirely separate proceedings -- one legislative and investigative and the other administrative -- and that Dixon's participation in the former should not disqualify him from the latter. The Court, however, was not persuaded by this argument because the Senate investigation included a

detailed inquiry into the facts and whether the antitrust and monopoly laws of the United States were being enforced – e.g. the very same factual and legal issues before the FTC.

The NLRB itself has dealt with similar problems arising out of Board members' earlier activities. For example, in *Berkshire Employees Association of Berkshire Knitting Mills v. NLRB*, 121 F.2d 235 (3<sup>rd</sup> Cir. 1941), the Third Circuit granted the employer's motion to adduce additional testimony that Edwin Smith, a Board member, had already taken a side in the employer's dispute with its employees. In that case, Smith was alleged to have earlier participated in the same controversy by urging a customer boycott of the employer during a strike in 1936, before the complaint was filed with the NLRB. The Court said this was "comparable to a situation of a lawyer who has represented a client in an endeavor to get a settlement of a claim, and before the claim is settled, is appointed to the bench and sits in the very case as judge." *Id.* at 239. The allegation about NLRB board member Smith previously urging a boycott of Berkshire, if established, "show a case which goes beyond the line of fair dealing with a particular litigant. If the circumstances alleged are proved Berkshire did not have a hearing before an impartial tribunal, but one in which one member of the body which made exceedingly important findings of fact had already thrown his weight on the other side." *Id.*

Most relevant to the NYU and NYU Poly cases are two separate situations in which recusal is required.

First, recusal is required where a judge, administrative law judge or other adjudicator has previously represented a party to the same proceeding. The roles of judge and advocate are distinct and cannot be combined in the same proceeding. It is a fundamental ethics violation and

a due process violation for an administrative agency official to adjudicate a dispute in which the same official also represented one of the parties.

Second, recusal is required where a judge, administrative law judge or other adjudicator is a party to the proceeding. See *Caperton v. Massey supra*, 556 US at 876-77, quoting The Federalist No. 10, p. 59 (J. Cooke Ed. 1961) (J. Madison) (“[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.”). This disqualification rule not only applies to the extremely rare situations where the adjudicator is personally a party to the proceeding, but also to the more common situations where the adjudicator has a financial interest in, or is an important official of, a party to the proceeding during all or part of the proceeding. Needless to say, it does not suffice for a person with such close ties to a party to a proceeding to sever such ties and then later become an adjudicator in the same proceeding. That person’s participation in the proceeding as an adjudicator would still allow the party to be the judge of its own cause.

These principles are reflected in a wide array of ethics codes binding on adjudicators:

For federal judges, 28 U.S.C. § 455 states:

- (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:
  - (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
  - (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
  - ...
  - (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
    - (i) Is a party to the proceeding, or an officer, director, or trustee of a party;
    - (ii) Is acting as a lawyer in the proceeding;

- (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
- (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

The ABA Model Code of Judicial Conduct, the template used by most states for judicial ethics rules, imposes similar standards for disqualification. Like Section 455, Model Code 2.11, uses the term "matter in controversy" in place of "proceeding" in places, in recognition of the fact that not all matters in controversy have yet ripened into adjudicative proceedings. See ABA Model Code of Judicial Conduct Rule 2.11. Model Rule 2.11, for example, specifically provides that a judge is disqualified if he previously "served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association." Thus, a labor union lawyer who participated in controversial efforts to unionize a particular employer's employees, or who was associated with another lawyer who participated in such efforts, would later be disqualified under both Section 455 and Rule 2.11 from being a judge in a proceeding concerning the same organizing campaign.

Although neither 28 U.S.C. § 455 nor state codes of conduct for judges based on the ABA Model Code are technically applicable to members of the NLRB, several NLRB decisions set forth standards for recusal that are essentially the same. Even those NLRB members who in particular circumstances have refused to recuse themselves, have said that the applicable standards are essentially the same as those that apply to federal judges in § 455. In Overnite Transportation Co. 329 NLRB 990, 998-1000 (1999), NLRB Chair Wilma Liebman accepted the standards applicable to federal judges under § 455, because a party "is entitled as a matter of fundamental due process to a fair hearing" and because § 455 "enumerates specific grounds for disqualification." *Id.* at 998. Liebman carefully considered the evidence and denied a motion for recusal in a case involving the Teamsters union and Overnite Transportation, based on her

service 10 years earlier as a staff attorney for the Teamsters. She found that recusal was not warranted because she had never worked on any case involving Overnite while at the Teamsters, nor did she work with any lawyers in the Teamsters legal department who worked on “the matter in controversy.” Liebman even conducted her own search of the case records in order to determine if a staff attorney with whom she was associated at the Teamsters ever “served . . . as a lawyer” with respect to the relevant matter, and found nothing. *Id.* at 999. (this situation stands in sharp contrast to the situation in which Member Schiffer’s subordinate at the UAW, Ms. Engel, received frequent communication from outside counsel concerning the NYU case).

In Service Employees International Union (Pomona Valley Hospital Medical Center). 355

NLRB No. 40 (2010), NLRB member Becker addressed motions for recusal made on a variety of grounds based on his prior employment as an attorney for the Service Employees International Union and the AFL-CIO. He applied the Standards of Ethical Conduct for Employees of the Executive Branch instead of § 455, but nonetheless observed that the rules for judicial disqualification under § 455 “offer useful guidance in the application of the above-described standards applicable to executive branch employees.”

In Caterpillar, Inc., 321 NLRB 1130 (1996), NLRB Chairman William Gould denied a motion for his recusal. He found that § 455 did not apply in the administrative setting, although he then stated that “I take seriously the standards applicable to judges and believe that my participation in this case conforms to such standards.” *Id.* at 1133. Member Browning similarly denied a motion for her recusal in that case, which was based on her husband’s purported financial involvement with a party to the case. Like Gould, she found that § 455 did not literally apply,

but that she still would not recuse herself under those criteria. She furthermore said that the impartiality standards of § 455 “are substantially the same as those under the Standards of Ethical Conduct for Employees of the Executive Branch” Id at 1137.<sup>2</sup>

In sum, while NLRB Members have decided recusal issues under the Standards of Ethical Conduct for Employees of the Executive Branch because those are the federal ethics regulations that technically apply to them, these same NLRB Members have recognized that when they adjudicate particular party matters rather than carry out more general policy making and rulemaking functions of federal employees, they must be cognizant of the recusal rules that apply to judges. In each instance the NLRB member has gone out of his or her way to opine that his decision conforms not only with the Standards of Ethical Conduct for Employees of the Executive Branch but also with the rules that apply to judges. The reason for their doing so should be obvious – in this capacity, the NLRB members are acting as judges, their decisions being appealable only to the United States Court of Appeals, and they should with respect to their ethics also act like judges.

#### **Member Schiffer’s Acknowledgment of Her Duty to Recuse**

Member Schiffer herself acknowledges that she has a duty to recuse from NLRB matters in which she participated while working in the general counsel’s office for a union. In Member

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<sup>2</sup> I agree with the conclusion that the Standards of Ethical Conduct for Employees of the Executive Branch impose substantially similar requirements using different language. See 5 CFR 2635.502. I also believe Member Schiffer would have to recuse from both NYU cases under the Standards of Ethical Conduct for Employees of the Executive Branch. I also, however, agree with the view that the rules applicable to judges are critically important – even if not technically applicable – in discerning the ethically appropriate course of action when Executive Branch employees act as adjudicators in particular party matters. My analysis in this opinion is principally about ethics – what Member Schiffer should do so that there is adequate due process in NLRB adjudication -- not what is or is not technically required under the Standards of Conduct.

Schiffer's Ethics Agreement dated July 22, 2013, she states that she "will not participate personally and substantially in any particular matter involving specific parties in which I previously participated in my role as Associate General Counsel with the AFL-CIO". She does not say anything in the agreement about matters in which she participated while serving at the UAW – most likely because she left the UAW 13 years before. Her commitment in the ethics agreement, however, is not limited in time, and -- although the UAW is not expressly included in her Ethics Agreement – it is logical that the same disqualification should apply to any matter in which she participated while serving as a lawyer for any union, not just the AFL-CIO.

Ethics agreements for Presidentially Appointed Senate Confirmed positions are drafted at the relevant agency but are generally reviewed at the White House. As the chief White House ethics lawyer, I personally reviewed and signed off on ethics agreements for all nominees to Senate confirmed positions, and in some instances I tightened the language where I believed the recusals were insufficient. I also know that ethics agreements were handled in a substantially similar manner by the White House during the Clinton Administration. Based on this experience I believe it is very likely that Member Schiffer's ethics agreement was reviewed by one or more lawyers in the White House Counsel's office.

I also believe that it was an oversight not to reference in Member Schiffer's ethics agreement those particular party matters in which she had previously represented any labor union or any other private client, not just the AFL-CIO. For reasons explained elsewhere in this opinion, it is unethical for a member of the NLRB or any other tribunal to adjudicate the same particular party matter in which she represented any private client. It makes little difference whether the client

was the AFL-CIO or the UAW, a union that in any event is a member of the AFL-CIO confederation of unions.

Finally, the purpose of such ethics agreements is to set forth some of the most obvious conflicts of interest, particularly those most likely to be discussed in Senate confirmation hearings, not to list all of the possible conflicts of interest that an office holder could confront. The fact that a particular conflict of interest is not identified in an ethics agreement – or is not identified with language as encompassing as it might be – does not negate the existence of the conflict. Most federal employees do their work without any ethics agreement at all, yet they know they are bound by the Standards of Conduct for Employees of the Executive Branch and that when they adjudicate particular party matters, they are bound by due process considerations and norms of judicial ethics set forth in recusal rules for judges, magistrates and other types of adjudicators.

**Member Schiffer’s Recusal in the Pending NYU and NYU Poly Cases Is Required Because She Represented the UAW in the Same Matter**

As explained more fully above, the three NLRB cases in which the UAW seeks to unionize NYU graduate students are the same particular party matter.

Based on the facts assumed for purposes of this opinion and the legal standard set forth in the preceding section of this opinion, I conclude that Member Schiffer, as Deputy General Counsel of the UAW, almost certainly had personal involvement in connection with the first NYU case. It is beyond dispute that she supervised other attorneys in the UAW Legal Department who worked on the matter with outside counsel. Either way, she “represented” the UAW in this

matter just as she represented the UAW in other important legal matters to which the UAW was a party.

Representation of an entity such as the UAW in all or almost all of its important matters is the job of an entity's General Counsel and Deputy General Counsel, roles that are very different from those of subordinate staff attorneys who are given responsibility only for certain matters or types of matters. The fact that the bulk of the work on a matter is delegated to other people -- something that General Counsels and Deputy General Counsels routinely do when they represent their clients -- does not negate the fact that the General Counsel or Deputy General Counsel represented the entity as a client in the matter. Indeed, if delegation were to negate the fact of representation, a General Counsel and Deputy General Counsel would not be deemed to represent the organizational client in any legal matters simply because they delegated specific duties to inside lawyers or to outside lawyers. A General Counsel and Deputy General Counsel -- thus freed by their supervisory role from the ethical obligations of lawyers who represent clients -- would not be subject to conflict of interest rules and would even be free to turn around and sue the entity in matters substantially related to matters pending while they served. ABA Model Rule 1.9 (former client conflicts) and similar state ethics rules, of course would not allow this. Such a fallacy -- that General Counsels and Deputy General Counsels are only supervisors and not really lawyers representing clients in particular party matters -- is contrary to common sense and the entire body of conflict of interest case law concerning the role of in-house lawyers. See John T. Noonan, Jr. and Richard W. Painter, *Personal and Professional Responsibilities of the Lawyer* 313-324 (Foundation Press, Third Edition 2011) (discussing successive conflicts for lawyers including corporate General Counsels).

The only logical conclusion is that Member Schiffer represented the UAW in the same matter which consists of the three NYU cases, and as an adjudicator at the NLRB she must recuse from deciding the NYU and NYU Poly cases that are the same matter.

**Member Schiffer's Recusal in the Pending NYU and NYU Poly Cases Is Required Because She Was an Important Executive of the UAW during the Pendency of the Same Matter before the NLRB**

As set forth above in this opinion, it is universally acknowledged that a party cannot be a judge in his own cause. If this principle is to have any applicability to entities that are parties to adjudicative proceedings (these days, many if not most adjudicative proceedings involve at least one entity as a party), it must mean that a party cannot have its own executives and other agents adjudicate a proceeding to which that entity is a party. A banker at Goldman Sachs cannot sit on an arbitration panel deciding the validity of a customer claim against Goldman Sachs. The same banker would almost certainly be disqualified from serving on a jury in a case in which Goldman Sachs was a defendant.

This disqualification requirement furthermore would be pointless if an executive of a party to an adjudicated matter could, after the matter ripened into proceedings before a federal agency, resign from employment with the party and thereafter adjudicate the same matter that was pending while he or she was an executive of the party. Whether or not the former executive had intervening employment with another entity – or took time off from work entirely – disqualification would still be required. The important point is that while she was an executive of a party to a proceeding, the proceeding was pending and at that time she stood in the shoes of

the party. She cannot thereafter change roles and become an "impartial" adjudicator of the same matter or controversy.

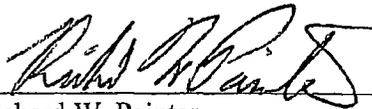
Based on the facts assumed for purposes of this opinion and the standards of ethical conduct set forth above and in the preceding section of this opinion, I thus conclude that Member Schiffer stands in the shoes of the entity of which she was a senior officer at the time the first NYU case was pending before the Board and that therefore she should disqualify herself from the two currently pending cases (NYU and Poly) that comprise the same matter.

#### **Conclusion**

For the reasons set forth above, my opinion is that ethics standards for Executive Branch employees serving as adjudicators of particular party matters and due process considerations both compel NLRB Member Schiffer to recuse herself from the two presently pending cases concerning efforts by her former client, the UAW, to unionize graduate students at NYU and NYU Poly.

Dated: Minneapolis, Minnesota  
October 4, 2013

Respectfully Submitted,



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Richard W. Painter  
S. Walter Richey Professor of Corporate Law  
University of Minnesota Law School  
318 Mondale Hall  
229-19<sup>th</sup> Ave. South  
Minneapolis, MN 55455  
(612) 626-9707

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**Richard W. Painter**  
**S. Walter Richey Professor of Corporate Law, University of Minnesota Law School**  
**229 19<sup>th</sup> Avenue South, Minneapolis, MN 55455 (612) 626-9707 rpainter@umn.edu**

**Education:**

**Yale Law School**, J.D. 1987; *YALE JOURNAL ON REGULATION* 1984-86 (editor 1985-86); Phi Delta Phi (Chapter President 1986-87) (sponsored lectures on professional ethics)

**Harvard College**, B.A. *summa cum laude* in History 1984; Phi Beta Kappa 1983; honors thesis in history; John Harvard Scholarship (awarded for class rank) 1982, 1983 and 1984; Detur Prize (awarded to highest 2% of freshman class) 1981; Phillips Brooks House Committee for the Homeless 1983-84 (Chairperson 1983-84) (founded and operated a shelter for the homeless in Harvard Square)

**Employment:**

**University of Minnesota Law School**, Minneapolis, Minnesota  
S. Walter Richey Professor of Corporate Law (with tenure) since 2005 (on leave 2005-2007). Courses in Business Organizations, Securities Regulation, Securities Litigation, Professional Responsibility, Professional Responsibility of Business Lawyers, and Government Ethics. Course at the Carlson School of Business in Business Ethics (fall 2008) Provost's Conflicts of Interest Review Committee 2007-10).

**The White House**, Washington, D.C.

Associate Counsel to the President (commissioned officer in the White House Counsel's Office) February 2005 to July 2007

Chief ethics lawyer for the President, White House staff and the President's nominees to Executive Branch agencies; head of four to six lawyer White House ethics office; responsible for ethics screening of Supreme Court nominees and preparation for confirmation; liaison between the White House and the Office of Government Ethics and designated ethics officers at Executive Branch agencies; periodic ethics briefings for White House staff and ethics consultations with White House staff; top secret security clearance

**University of Illinois College of Law**, Champaign, Illinois

Guy Raymond and Mildred Van Voorhis Jones Professor of Law 2003-2005; Professor 1999-2005 and Associate Professor (with tenure) 1998-99; Visiting Assistant Professor, Fall 1996.

Courses in Professional Responsibility, Business Ethics, Business Organizations, Securities Regulation, Securities Litigation, Corporate Finance and Comparative U.S. and E.U. Corporate Law.

Executive Committee 1998-99; Curriculum Committee 1998-2000; Admissions Committee 1999-2000 and 2003-05; Appointments Committee 2001-02; Lectures Committee 2003-04; Tenure and Promotion Committee 2004-05; Provost's Ad Hoc Committee on Public Engagement in Tenure and Promotion 2003-04; European Union Center 2000-01 (graduate seminar lecturer; grant recipient); Department of Accountancy, Ph. D dissertation committee for Deanna Lee, 2001; Graduate College, dissertation committees for J.S.D. candidates Svetoslavov Minkov, 2004 and Ariel Yehezkel, 2005.

**University of Michigan Law School**, Ann Arbor, Michigan

Visiting Professor; Fall 2002

Courses in Securities Regulation and Mergers and Acquisitions

**University of Wisconsin Law School**, Madison, Wisconsin

Warren P. Knowles Visiting Professor of Law and Government Ethics Spring 2001

Course in Business Organizations and seminar in Ethics of Business Lawyers.

**University of Bielefeld, Bielefeld, Germany**

Guest Professor, Summer 1999, 2000 and 2001

Course on U.S. corporate and securities law; fourday seminars in Luxembourg on Internet law (1999), European corporate takeover law (2000), and European antitrust law (2001)

**Cornell Law School, Ithaca, New York**

Visiting Associate Professor, Fall 1997 and Spring 1998

Courses in Professional Responsibility and Securities Regulation, seminar in Ethical Issues in Business Transactions and directed reading in Asset Securitization

**Boston University School of Law, Boston, Massachusetts**

Visiting Assistant Professor, Spring 1997

Course in Securities Regulation and seminar in Ethical Issues in Business Transactions.

**University of Oregon School of Law, Eugene, Oregon**

Associate Professor (with tenure) 1997-98; Assistant Professor 1993-96; Co-Director, Law and Entrepreneurship Center 1994-97.

Courses in Professional Responsibility, Partnerships and Corporations, Securities Regulation, Business Planning, Corporate Finance and Mergers and Acquisitions.

**Finn Dixon & Herling, Stamford, Connecticut**

Feb. 1991 - Aug. 1993

Associate in commercial and appellate litigation

On the briefs for petitioner in petition for *certiorari* and subsequent briefs on the merits in *Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources*, 112 S. Ct. 2019 (cert. granted Jan. 1992; decided June 1992) (reversing the Sixth Circuit and holding Michigan's solid waste import restrictions to be unconstitutional under the Commerce Clause)

**Sullivan & Cromwell, New York, New York**

Aug. 1988 - Feb. 1991

Associate in mergers and acquisitions, corporate law, securities law and commercial litigation

**Judge John T. Noonan, Jr.,**

**United States Court of Appeals for the Ninth Circuit, San Francisco, CA**

Aug. 1987 - June 1988

law clerk (subsequent coauthor of two editions of a legal ethics casebook with Judge Noonan)

**Professional Memberships:**

American Law Institute; Advisor for Principles of Government Ethics (2010-2013); speaker on the Sarbanes-Oxley Act for Program Preceding May 2004 Annual Meeting; Members' Consultative Group for Restatement of Agency and for Restatement of Law Governing Nonprofit Organizations.

American Bar Association; oral and written testimony for Ethics 2000 Commission; speaker for numerous section programs including 2012 Professional Responsibility Conference plenary panel on Watergate

Association of the Bar of the City of New York, Committee on Professional Responsibility (member 1990-93 and co-author of two published reports); speaker for Association panel on Sarbanes-Oxley Act (2003).

Association of American Law Schools, Section on Professional Responsibility, Section on Securities Regulation (Chair-elect 2012), Section on Business Organizations, House of Representatives (2002-03).

**Other Academic Affiliations:**

Harvard University, Visiting Scholar, Center for European Studies (2004)

Humboldt University, Berlin, Visiting Scholar (2000-2001)

**Biographical Listings:**

MARQUIS WHO'S WHO IN THE WORLD (2004 - )

MARQUIS WHO'S WHO IN AMERICA (2005 - )

**Invited Congressional Testimony:**

Oral Testimony and *Written Statement of Richard W. Painter Before the U.S. House of Representatives Committee on Financial Services*, May 17, 2012 (hearing entitled "Examining the Settlement Practices of U.S. Financial Regulators")

Oral Testimony and *Written Statement of Richard W. Painter Before the U.S. House of Representatives Committee on Government Oversight and Reform*, June 21, 2011 (hearing entitled "The Hatch Act: the Challenges of Separating Politics from Policy").

Oral Testimony and *Written Statement of Richard W. Painter Before the U.S. House of Representatives Committee on Finance, Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises*, February 4, 2004 (hearing entitled "The Role of Attorneys in Corporate Governance") (testimony on rules governing professional conduct of corporate attorneys issued by the SEC pursuant to Section 307 of the Sarbanes-Oxley Act of 2002)

Oral Testimony and *Written Statement of Richard W. Painter Before the U.S. Senate Committee on Banking, Housing and Urban Affairs Subcommittee on Securities* reprinted in *Hearing on S. 1260* (February 23, 1998) (hearing preceding the Securities Litigation Uniform Standards Act of 1998)

Oral Testimony and *Written Statement of Richard W. Painter Before the U.S. House of Representatives Committee on Commerce Subcommittee on Finance and Hazardous Materials* reprinted in *Hearings on H.R. 1689, The Securities Litigation Uniform Standards Act of 1998* (No. 10585) at 73-84 (May 19, 1998) (hearing preceding the Securities Litigation Uniform Standards Act of 1998)

**Congressional Legislation:**

Section 307 of the Sarbanes-Oxley Act of 2002 (mandating SEC rules requiring lawyers to report securities law violations up-the-ladder to client boards of directors) is based on a proposal made in an April 2002 letter to SEC Chairman Harvey Pitt and earlier in *Lawyer Disclosure of Corporate Fraud: Establishing a Firm Foundation*, 1996 SMU LAW REV. 101 (Section 307 was sponsored by Senators John Edwards (D. N.C.), Mike Enzi (R. WY) and John Corzine (D. N.J.) and had strong bipartisan support)

## Academic Publications:

### Books:

PERSONAL RESPONSIBILITY OF INVESTMENT BANKERS AFTER THE CRISIS (with Claire A. Hill) (under contract with the University of Chicago Press for publication in 2014)

GETTING THE GOVERNMENT AMERICA DESERVES: HOW ETHICS REFORM CAN MAKE A DIFFERENCE (January 2009, Oxford University Press)

SECURITIES LITIGATION AND ENFORCEMENT: CASES AND MATERIALS (with Donna Nagy and Margaret Sachs) (West Publishing 2003); SECOND EDITION (2007); THIRD EDITION (2011); and TEACHER'S MANUAL

PROFESSIONAL AND PERSONAL RESPONSIBILITIES OF THE LAWYER, SECOND EDITION (with Judge John T. Noonan, Jr.) (Foundation Press 1997); SECOND EDITION (2001); THIRD EDITION (2011); and TEACHER'S MANUAL

### Articles, Essays and Book Reviews:

*Selective Disclosure by Federal Officials and the Case for an FGD (Fair-er Government Disclosure) Regime*, 2012 WISCONSIN LAW REVIEW 1285-1365 (2012) (with Donna Nagy)

*Forum Competition and Choice of Law Competition in Securities Law After Morrison v. National Australia Bank*, 97 MINNESOTA LAW REVIEW 132-205 (2012) (with Wulf Kaal)

*"Extraordinary Circumstances": The Legacy of the Gang of 14 and a Proposal for Judicial Nominations Reform*, 46 UNIVERSITY OF RICHMOND LAW REVIEW 969-983 (2012) (with Michael Gerhardt)

*Of the Conditional Fee as a Response to Lawyers, Bankers and Loopholes*, 1 AMERICAN UNIVERSITY BUSINESS LAW REVIEW 42-57 (2011) (with Claire Hill)

*Transaction Cost Engineers, Loophole Engineers or Gatekeepers: The Role of Business Lawyers after the Financial Meltdown*, a chapter in RESEARCH HANDBOOK ON THE ECONOMICS OF CORPORATE LAW 255-272 (Claire Hill and Brett McDonnell editors) (Edward Elgar Pub. 2012).

*The Dodd-Frank Extraterritorial Jurisdiction Provision: Was it Effective, Needed or Sufficient?*, 1 HARVARD BUSINESS LAW REVIEW 195-229 (inaugural symposium volume)

*The Aftermath of Morrison v. National Australia Bank and Elliott Associates v. Porsche*, 1-2011 EUROPEAN COMPANY AND FINANCIAL LAW REVIEW 77-99 (2011) (with Wulf Kaal)

*When Courts and Congress Don't Say What They Mean: Initial Reactions to Morrison v. National Australia Bank and to the Extraterritorial Jurisdiction Provisions of the Dodd-Frank Act*, 20 MINNESOTA JOURNAL OF INTERNATIONAL LAW 1-25 (2010) (with Douglas Dunham, and Ellen Quackenbos)

*Compromised Fiduciaries: Conflicts of Interest in Government and Business*, 95 MINNESOTA LAW REVIEW 1637-1691 (2011) (with Claire Hill)

*The Moral Responsibility of Investment Bankers*, 8 ST. THOMAS UNIVERSITY LAW REVIEW 5-28 (2011) (Fall 2010 endowed law review lecture)

*Pro Se Litigation After the Financial Crisis* 45 FAMILY LAW QUARTERLY 64-94(2011) (Bob Levy editor)

*Initial Reflections on an Evolving Standard: Constraints on Risk Taking by Directors and Officers in Germany and the United States.* 40 SETON HALL LAW REVIEW 1433-1485 (2009 symposium on securities law) (with Wulf Kaal)

*Berle's Vision Beyond Shareholder Interests: Why Investment Bankers Should Have (Some) Personal Liability* (with Claire Hill), 33 SEATTLE LAW REVIEW 1 (June 2010) (symposium on Adolf Berle)

*President Obama's Progress in Government Ethics* CONSTITUTIONAL COMMENTARY (May 2010) (symposium on conservative and libertarian perspectives on the Obama Administration)

*Extraterritorial Application of US Securities Laws*(with Prof. Dr. Wulf Kaal), 7 EUROPEAN COMPANY LAW 90, (published by Wolters Kluwer and the Centre for European Company Law at the University of Leiden, The Netherlands) (June 2010).

*Bailouts: An Essay on Conflicts of Interest and Other Ethics Problems When Government Pays the Tab* 41 MCGEORGE LAW REVIEW (2009 symposium on government ethics).

*Ethics and Corruption in Business and Government: Lessons from the South Sea Bubble and the Bank of the United States* (published by the University of Chicago Law School) 2006 Maurice and Muriel Fulton Lecture in Legal History)(posted on SSRN Minnesota Legal Studies Research Paper 06-32).

*Regulatory Competition in EU Corporate Law after Inspire Art: Unbundling Delaware's Product for Europe* (with Prof. Dr. Christian Kirchner, Humboldt University, Berlin, and Dr. Wulf Kaal), EUROPEAN COMPANY AND FINANCIAL LAW REVIEW 159 (2005)

*Free the Lawyers: A Modest Proposal to Allow Restrictions on Future Law Practice in Settlement Agreements*, 18 GEORGETOWN JOURNAL OF LEGAL ETHICS 1 (with Stephen Gillers) (2005)

*The Impact of Recent Developments in Securities Law and Ethics Rules on Tax Lawyers and Tax Directors*, March, 2005 in TAXES (CCH) (University of Chicago Tax Conference papers)

*Ethics in the Age of Un-incorporation: A Return to Ambiguity of Pre-incorporation or an Opportunity to Contract for Clarity*, 2005 ILLINOIS LAW REVIEW 49 (2005) (Symposium on *Un-incorporation*)

*Convergence and Competition in Rules Governing Lawyers and Auditors* 29 JOURNAL OF CORPORATION LAW 1 (2004) (Symposium on *Evaluation and Response to Risk in Law and Accounting in the U.S. and E.U.*)

*The Dubious History and Psychology of Clubs as Self Regulatory Organizations* in AMERICAN ACADEMY OF ARTS AND SCIENCES OCCASIONAL PAPER SERIES, Corporate Governance Symposium; republished in JAY LORSCH, LESLIE BERKOWITZ AND ANDY ZELLEKE, RESTORING TRUST IN AMERICA'S BUSINESS (MIT Press 2004)

*Commentary on Brudney and Ferrell*, 69 UNIVERSITY OF CHICAGO LAW REVIEW 1219-1229 (2002) (commenting on article by Victor Brudney and Allen Ferrell on corporate charity)

*Contracting Around Conflicts in a Family Business: Louis Brandeis and the Warren Trust*, 9 UNIVERSITY OF CHICAGO LAW SCHOOL ROUNDTABLE 1-26 (2001)

*Standing Up to Wall Street*, 101 MICHIGAN LAW REVIEW 1512 (book review) (2003) (reviewing ARTHUR LEVITT, TAKE ON THE STREET (2002))

*The New German Corporate Takeover Law: Comparison with Delaware and Recommendations for Reform*, (with Christian Kirchner) 50 AMERICAN JOURNAL OF COMPARATIVE LAW 201-226 (2002)

*Rules Lawyers Play By*, 76 N.Y.U. LAW REVIEW 665-749 (June 2001)

*A European Modified Business Judgment Rule for Takeover Law* (with Christian Kirchner), 2 EUROPEAN BUSINESS ORGANIZATION LAW REVIEW 353-400 (Asser Institute- Max Planck Institute) (2000).

*Afterword: Jurisdictional Competition as Federalism's Answer to the Multidisciplinary Practice Debate* 36 WAKE FOREST LAW REVIEW 185-91 (2001) (March 2001 Symposium on Multidisciplinary Practice)

*Irrationality and Cognitive Bias at a Closing in Arthur Solmssen's THE COMFORT LETTER*, 69 FORDHAM LAW REVIEW 101-26 (2000) (Annual Ethics Symposium), reprinted in SECURITIES LAW REVIEW (2002)

*Lawyers' Rules, Auditors' Rules and the Psychology of Concealment* 84 MINNESOTA LAW REVIEW 1399-1437 (June 2000) (February 2000 Symposium on Multidisciplinary Practice)

*Advance Waiver of Conflicts*, 8 GEORGETOWN JOURNAL OF LEGAL ETHICS 289-329 (Winter 2000) (1999 Symposium on the Ethics of Business Lawyering)

*Open Chambers?*, 97 MICHIGAN LAW REVIEW 1430-71 (book review) (1999) (reviewing EDWARD LAZARUS, CLOSED CHAMBERS (Times Books 1998))

*Responding to a False Alarm: Federal Preemption of State Securities Fraud Causes of Action*, 84 CORNELL LAW REVIEW 1-108 (1998)

*Don't Ask, Just Tell: Insider Trading after United States v. O'Hagan*, 84 VIRGINIA LAW REVIEW 153-229 (1998) (co-author with Kimberly D. Krawiec and Cynthia A. Williams)

*Professional Responsibility Rules as Implied Contract Terms* 34 GEORGIA LAW REVIEW 953-71 (Fall 1999 Symposium on Business Law)

*Insider Trading Thirty Years Later*, 50 CASE WESTERN LAW REVIEW 305-11 (1999) (responding to essay by Professor Jon Macey in Symposium on the Legacy of Henry Manne)

*Second Opinions in Litigation*, 84 VIRGINIA LAW REVIEW 1411-37 (1998) (co-author with Michael Klausner and Geoffrey Miller) (presented at February 1998 Olin Foundation Symposium on Law and Economics of Lawyering)

*Lawyer Disclosure of Corporate Fraud: Establishing a Firm Foundation* 1996 SMU LAW REVIEW 101-157 (co-author with Jennifer E. Duggan) (Symposium on Securities Regulation) (presented at the May 1996 meeting of the American Law and Economics Association at the University of Chicago) (proposing at pages 261-63 legislative provisions resembling Section 307 of the Sarbanes-Oxley Act of 2002)

*Disclosure of Environmental Legal Proceedings Under the Securities Laws: A Potential Step Backward*, 11 J. ENVTL. LAW AND LITIGATION 101-126 (1996 Symposium on Business and the Environment)

*Game Theoretic and Contractarian Paradigms in the Uneasy Relationship Between Regulators and Regulatory Lawyers*, 65 FORDHAM LAW REVIEW 601-653 (AALS Professional Responsibility Section)

Symposium; presented at the January 1996 AALS annual meeting in San Antonio, Texas) (see Ian Ayres, *Response to Painter*, 65 FORDHAM LAW REVIEW 654 (1996))

*Contractarian and Cultural Perspectives on Value Creation by Business Lawyers* 74 OREGON LAW REVIEW 327-339 (1995) (comment on papers presented at November 1994 Symposium on Business Lawyering and Value Creation for Clients)

*Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty?* 70 CHICAGO-KENT LAW REVIEW 625-697 (1995) (Symposium on Fee Shifting)

*Toward A Market for Lawyer Disclosure Services: In Search of Optimal Whistleblowing Rules* 63 GEORGE WASHINGTON LAW REVIEW 221-296 (1995)

*The Moral Interdependence of Corporate Lawyers and Their Clients* 67 SOUTHERN CALIFORNIA LAW REVIEW 507-584 (1994), reprinted in 36 CORPORATE PRACTICE COMMENTATOR 755-834 (1995)

### **Editorials in Newspapers and Periodicals:**

*Invitation to a Dialogue: A Filibuster Alternative*, THE NEW YORK TIMES, Wednesday February 29, 2012 and Sunday March 4, 2012 (letter and reply to readers' responses in the "Sunday Dialogue" section of the op-ed page) (letter and reply coauthored with Michael A. Gerhardt)

*Marriage Amendment: Leave Marriage Well Enough Alone*, THE MINNEAPOLIS STAR-TRIBUNE, Monday May 9, 2011 (opposing proposed amendment to the Minnesota Constitution)

*Give All Judicial Nominees a Vote*, THE DALLAS FORT WORTH STAR-TELEGRAM, May 30, 2011 (urging an end to Senate filibusters of judicial nominees)

*The Separation of Politics and State*, THE NEW YORK TIMES, Monday June 14, 2010 at A-23 (op-ed) (urging curtailment of White House political operations)

*Topic A: Politics as Usual*, THE WASHINGTON POST, Sunday June 6, 2010 (op-ed discussing White House job offers to Senate candidates in Pennsylvania and Colorado)

*Tell Me No Lies: Don't Ask Don't Tell Institutionalizes Dishonesty in the Military* THE AMERICAN LAWYER, June 2010

*Court Nominee Liu Follows the Law*, LOS ANGELES TIMES, May 3, 2010 (op-ed supporting the President's nomination of Goodwin Liu to the Ninth Circuit)

*DOJ's Ex-Detainee Lawyers: the Ethics Issue*, THE WEEKLY STANDARD, March 2010. (with Edwin Williamson) (op-ed urging that Justice Department lawyers who previously represented detainees recuse from similar matters at DOJ)

*Mutual Funds: Fair Disclosure, Fair Regulation*, NEW YORK LAW JOURNAL, December 18, 2003 at 2 (op-ed urging sensible regulation of mutual funds)

*Lawyer-Client Confidentiality: Changing Model Rule 1.6 is Long Overdue*, CALIFORNIA BAR JOURNAL, August 2003 at 1.

*Congress Tells Corporate Lawyers to Tell Directors About Fraud*, THE WALL STREET LAWYER, August 2002 at 6 (discussing Section 307 of the Sarbanes-Oxley Act of 2002).

*Our Security Markets Should Be Secure*, WASHINGTON POST, September 25, 2001, at A23 (op-ed proposing alternative trading floors and other measures to protect stock exchanges from terrorist attack)

*Don't Disadvantage Europe: The European Parliament made the right call in rejecting the strict neutrality rule*, WALL STREET JOURNAL EUROPE, July 19, 2001, at 9 (op-ed criticizing proposed EU corporate takeover directive that was rejected by the EU Parliament).

*New Insider Trading Rules Attempt to Clarify SEC's Approach*, 15 CORPORATE COUNSEL WEEKLY 42, 8 (BNA, November 2000) (with Kimberly D. Krawiec)

*The New American Rule: A First Amendment to the Client's Bill of Rights*, 2000 CIVIL JUSTICE REPORT 1 (Manhattan Institute 2000)

*Proposal to Amend Model Rule 1.13 (Organization as Client)* (testimony before the ABA Ethics 2000 Commission, May 1998) reprinted in THE PROFESSIONAL LAWYER, Spring 1998 at 10 (ABA) (rejected by the ABA but later incorporated in substantial part into Section 307 of the Sarbanes-Oxley Act of 2002)

*Proposal to Amend the Model Rules to Provide for Advance Consent to Conflicts* (testimony before Ethics 2000 Commission, June 1999) reprinted in THE PROFESSIONAL LAWYER, Winter 1999 at 26 (ABA).

*A Law Clerk Betrays the Supreme Court*, WALL STREET JOURNAL, April 13, 1998, at A23 (op-ed) (critical of former Supreme Court clerk's use of confidential materials to write a book on the Court)

*SEC Discipline of Lawyers: In Search of a Firm Foundation*, 1997 THE PROFESSIONAL LAWYER 97-105 (ABA) (symposium issue) (coauthor with Jennifer E. Duggan)

*If This Is Mail Fraud, Then Most Lawyers Are Guilty*, WALL STREET JOURNAL, May 4, 1994, at A15 (cited in the WALL STREET JOURNAL'S lead editorial of June 23, 1994) (op-ed critical of mail fraud conviction in *United States v. Armand D'Amato* (E.D.N.Y. 1993), *rev'd* 39 F.3d 1249 (2d Cir. 1994))

#### **Bar Association Reports:**

*Discipline of Law Firms*, Report of the Committee on Professional Responsibility, 48 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 628 (1993); reprinted in LAWYER AND ACCOUNTANT LIABILITY AND RESPONSIBILITY (ALI-ABA 1993) (co-author with Karen B. Burrows) (New York in 1996 became the first state in the United States to provide for discipline of law firms when the Appellate Division adopted rules essentially identical to several of the rules suggested in this Report)

*The Attorney's Duties to Report the Misconduct of Other Attorneys and to Report Fraud on a Tribunal*, Report of the Committee on Professional Responsibility, 47 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 905 (1992) (co-author with Sandra E. Nickel)

#### **Bar Admissions:**

New York (1988) (98.0% rank on MBE in 1988 bar exam) (active)

Connecticut (1991) (98.2% rank on MBE in 1991 bar exam) (inactive)

United States Supreme Court (1992)

United States District Courts for the Southern District of New York and District of Connecticut (1991)

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