July 2, 2024

Colorado Office of Judicial Performance Evaluation
Kent Wagner, Executive Director
Ralph L. Carr Judicial Center
1300 Broadway, Suite 220
Denver, CO 80203

Dear Executive Director Wagner:

§ 13-5.5-107(1)(a), C.R.S. requires the State and District Judicial Performance Commissions to evaluate each judge or justice for their integrity, including whether the judge or justice has engaged in any impropriety or appearances of impropriety. *See also* Colo. RGCJP 12(h), *Form 1*, pp. 1(a)-4-5; Colo. RGCJP 13(h), *Form 2* (III)(a)(2)(c), p. 3; Colo. RGCJP 14(b). Canon Rule 1.1 of the Colorado Code of Judicial Conduct (the Code) requires that judges comply with the law, including their ethical duties under the Code itself. Actual impropriety means and "includes conduct that violates the law, court rules, or provisions of this Code, and conduct that undermines a judge's independence, integrity, or impartiality." Colo. Code Jud. Conduct, Terminology. "The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge." Canon Rule 1.2, Comment 3.

Unfortunately, the Performance Commissions have a history of failing to scrutinize the integrity of evaluated judges based upon the judges' compliance with the Code. *See, e.g.*, Susan Greene, *Judges, Judged: Voters Turn Out Two in Larimer, But Retain One the State Urged Them to Fire*, DENVER POST, November 3, 2010 (retention recommendations made despite evidence of Canon Rule 1.2 violations by judges through pre-judicial non-disclosure of *Brady* material). In this context it is critically important for voters in the 2024 General Election to make informed choices about the judges subject to retention, particularly those judges who have been publicly identified as failing to perform their legally required financial reporting obligations as public officials.

On August 13, 2023, *The Denver Gazette* published an article detailing how one in six Colorado Judges had failed to file annual personal financial disclosure (PFD) statements required by § 24-6-202, C.R.S. and Canon Rules 1.1, 1.2, 2.5, and 3.15 of the Code.[1] As pointed out in the

[1] § 24-6-202, C.R.S. provides, in relevant parts:

> (1) Except as otherwise provided in subsection (1.7) of this section, not later than the January 10 following his or her election, reelection, appointment, or retention in office, written disclosure, in such form as the secretary of state shall prescribe, stating the interests named in subsection (2) of this section shall be made to and filed with the secretary of state of Colorado by:
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> (c) Each justice or judge of a court of record[.]
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article, violation of § 24-6-202(7), C.R.S. through the non-filing of the required annual PFD statements is recognized as a misdemeanor criminal offense. David Migoya, *One in Six Judges Lack Financial Disclosures: Little Enforcement Even as Misdemeanor Charge*, DENVER GAZETTE, August 13, 2023. With regards to judges, in particular, the required annual PFD statements are important to inform litigants and the public of financial conflicts of interest that require judges' disqualification under Canon Rule 2.11. Additional press reporting described how the Colorado Commission on Judicial Discipline had opened 73 investigations based upon the August 13, 2023 article as well as records obtained from the Colorado Secretary of State's Office. David Migoya, *73 Colorado Judges Under Investigation for Not Filing Financial Disclosures*, DENVER GAZETTE, January 12, 2024. The Performance Commissions may share information with and request information from the Discipline Commission according to § 13-5.3-105(1), (2), C.R.S. Notwithstanding the Discipline Commission's investigations, there has been significant public criticism of the Attorney General's Office and the Colorado Supreme Court for their failure to enforce the criminal penalties of § 24-6-202(7), C.R.S. within the statute of limitations. George Brauchler, *Column: Colorado Judges Break the Law—And Are Above It*, DENVER GAZETTE, August 18, 2023. Under § 13-5.5-107(1)(a), C.R.S., the Performance

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> (7) Any person . . . who willfully fails to make any filing required by this section is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than one thousand dollars nor more than five thousand dollars.

Canon Rule 1.1 provides, in relevant part:

> (A) A judge shall comply with the law,* including the Code of Judicial Conduct.
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> (B) Conduct by a judge that violates a criminal law may, unless the violation is minor, constitute a violation of the requirement that a judge must comply with the law.

Canon Rule 1.2 provides:

> A judge shall act at all times in a manner that promotes public confidence in the independence,*integrity,* and impartiality* of the judiciary, and shall avoid impropriety and the appearance of impropriety.

Canon Rule 2.5(A) provides:

> A judge shall perform judicial and administrative duties, competently and diligently.

Canon Rule 3.15 provides, in relevant parts:

> (A) A judge shall publicly report the source and amount or value of:
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> (1) compensation received for extrajudicial activities as permitted by Rule 3.12;
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> (2) gifts and other things of value as permitted by Rule 3.13(C), unless the value of such items does not exceed the statutory amount specified in Title 24, Article 6 of the Colorado Revised Statutes; and
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> (3) reimbursement of expenses and waiver of fees or charges permitted by Rule 3.14(A).
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> * * *
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> (C) The public report required by paragraph (A)(1) shall be made at least annually. Public reports required by paragraph (A)(2) and (3) shall be made quarterly.

Commissions have a separate and independent duty to examine judges' failures to file their required annual PFD statements when verifying the judges' integrity under the Code.

As correlated with the judges who are subject to retention in 2024, the August 13, 2023 *Gazette* article lists the following judges as having failed to file at least their most then-recent 2023 PFD statements:

Pitkin County Court Judge Ashley Andrews
Gunnison County Court Judge Ashley Burgemeister
Bent County Court Judge Lance P. Clark
12th Judicial District Court Judge Kimberly Cortez-Rodriguez
15th Judicial District Court Chief Judge Michael Davidson
San Juan County Court Judge Anthony Edwards
Adams County Court Judge Martin Flaum
2nd Judicial District Court Judge Jay Grant
Mesa County Court Judge Michael Grattan, III
17th Judicial District Court Judge Sharon Holbrook
Adams County Court Judge Madoche Jean
Yuma County Court Judge Kristei Jones
Adams County Court Judge Leroy Kirby
Sedgwick County Court Judge Myka Landry
20th Judicial District Court Judge Dea Lindsey
18th Judicial District Court Judge Bonnie McLean
Adams County Court Judge Joshua Nowak
Denver County Court Judge Frances Simonet
Douglas County Court Judge Kelly Waidler

Of the Judges listed above, the following Judges were further reported as either never having filed their annual personal financial disclosure statements or as having repeatedly failed to do so:

Ashley Andrews
Lance Clark
Kimberly Cortez-Rodriguez
Michael J. Davidson
Jay Grant
Madoche Jean
Kristei Jones
Dea Lindsey
Bonnie McLean
Joshua Nowak
Kelly Waidler

One can assume that each of the listed judges' failures to file their required PFD statements arose from individualized circumstances. Nevertheless, the failure to file the PFD statements and non-compliance with the Code are factors that must be considered and addressed by the respective Performance Commissions as they determine whether each of the listed judges either does or

does not meet performance expectations by demonstrating integrity through the avoidance of impropriety or even the appearance of impropriety. Colo. RGCJP 14(b).

Please accept this letter as a formal request for the respective Performance Commissions to publicly document consideration of the non-filing of required annual PFD statements in their evaluations and their required statutory findings with respect to each of the judges named in the August 13, 2023 *Gazette* article. The Performance Commissions should also verify whether the Discipline Commission opened investigations as to any of the other judges (beyond those listed in the August 13th article) included in this retention cycle for the subject judges' failures to file their annual PFD statements in years prior to 2023.

It is further appropriate under § 13-5.3-105, C.R.S. and § 13-5.5-107(1)(a), C.R.S for the Performance Commissions to verify the disciplinary histories (private or public) of all the judges and justices subject to retention elections in 2024. When considering such disciplinary histories, however, it should not matter whether the discipline occurred within the subject judge or justice's current review period or before. The Performance Commissions can make their own determinations as to whether issues arising through judicial disciplinary histories have been fully addressed by the subject judges or justices sufficient to verify their integrity under § 13-5.5-107(1)(a), C.R.S. Such an analysis will be particularly important if any of the judges identified as failing to submit annual PFD statements also have prior histories of judicial discipline.

Sincerely,

Anonymous