

# Attys Should Note Judges' Financial Conflicts Of Interest

By **Deborah Winokur** (August 15, 2022)

"[N]o one shall be judge in his own cause." This principle of the Justinian Code is equally applicable in the modern judicial context, and was clearly demonstrated by the U.S. Court of Appeals for the Federal Circuit recently vacating a \$2.75 billion patent infringement judgment.

The decision should serve as a wake-up call for lawyers that they and their clients could pay a heavy price if a judge fails to take appropriate action when they have financial ties to a litigant.



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In *Centripetal Networks Inc. v. Cisco Systems Inc.*,<sup>[1]</sup> the late U.S. District Judge Henry Morgan was in the midst of presiding over the trial when one of his clerks brought to his attention that his wife owned 100 shares of Cisco stock, valued at just under \$5,000. Judge Morgan then informed the litigants by email of his wife's financial interest in Cisco, and further explained that he had prepared a draft of his opinion without any awareness of his wife's ownership of the Cisco shares.<sup>[2]</sup>

Cisco sought the judge's recusal under the judicial disqualification statute, Title 28 of the U.S. Code, Section 455, governing recusal of federal judges. Judge Morgan ultimately denied the motion, and issued a final order in the litigation a few days later.

On appeal, the Federal Circuit held that disqualification was required because Judge Morgan had a financial interest in the litigation, and putting the stock in a blind trust was not equivalent to divesting himself of that interest.<sup>[3]</sup>

The *Centripetal* order is but one example of the renewed focus on rooting out judicial conflicts of interest and restoring public faith in the judicial system. A 2021 *Wall Street Journal* investigation revealed that more than 130 federal judges or their family members had financial ties to litigants in cases over which they presided.<sup>[4]</sup>

Following that report, Congress initiated hearings to investigate further. Rep. Hank Johnson, D-Ga., chairperson of the House Judiciary Committee's Subcommittee on Courts, Intellectual Property, and the Internet, stated "it is in the appearance of impartiality that Americans find faith in their courts and trust in their democracy."

Congress was prompted to enact the Courthouse Ethics and Transparency Act, which President Joe Biden signed into law in May. The act, a bipartisan effort, requires that federal judicial officials file a report for securities transactions over \$1,000 within 45 days, and that the judge's financial data be made publicly available on a searchable internet database within 90 days of the report being filed.<sup>[5]</sup>

For their part, federal judges are fighting against the perception of self-dealing when it comes to judicial proceedings. U.S. Circuit Judge Ralph Erickson, of the U.S. Court of Appeals for the Eighth Circuit, explained in a June 30 email to judiciary policymakers his supportive position.

In the email, he said the current disclosures — which parties are required to make under Rule 7.1 of the Federal Rules of Civil Procedure — are insufficient at tracing corporate ownership to the respective parent.<sup>[6]</sup>

He used the example of Orange Julius of America to illustrate that the Rule 7.1 disclosure would require that the party identify Dairy Queen Inc. as its owner, but not indicate that the ultimate parent is Berkshire Hathaway Inc. — thereby creating what he called a "thorny" situation for a judge who is not aware of the relationship. As a potential solution, he suggested that Rule 7.1 be amended to require disclosure of the parent corporation.

In a similar vein, U.S. Magistrate Judge Patricia Barksdale sent a letter to the House Rules Committee on June 8, offering her thoughts on ways to further guard against judicial impropriety. She suggested that the litigants themselves be required to detect judicial conflicts of interest — leveraging publicly available databases containing disclosures filed per the act — and to notify the court of any plans to file a motion for recusal or identify any potential conflicts of interest.[7]

Given these recent developments, what steps should attorneys practicing in the federal courts consider?

First, be proactive in your Rule 7.1 disclosures, so that a judge has a clear understanding of the corporate structure of your client, including its immediate parent, and the ultimate parent corporation. As Judge Erickson wrote in his email to the policymakers, "[i]t seems to me that more information rather than less is prudent in today's environment."

If a judge is able to identify and address any potential conflicts of interest early on, the judge and the parties can focus on the substantive issues, rather than engaging in time-consuming and expensive motion practice over judicial conflicts.

Second, do not assume that a judge's order against the party with which the judge has the financial interest removes the risk of prejudice. Centripetal unsuccessfully argued that Judge Morgan should not be disqualified because he ruled against Cisco, thereby demonstrating his impartiality.

But the appeals court found that "[w]here a judge becomes aware of a possible appearance of impropriety, there is a substantial risk that he or she might bend over backwards to rule against that party to try to prove that there is no bias." [8]

Third, remember that use of a blind trust is not the same as a divestment under the Disqualification Statute. Per Subsection (f), if a judge presiding over a matter for a substantial amount of time later learns that either the judge or a member of the judge's household has a financial interest in a party, the conflict may be cured if the judge divests himself or herself of that interest.[9]

A lawyer relying on a judge's representation that the conflict has been resolved because the judge put the contested security in a blind trust may find that the judge will be removed on appeal, and any findings or judgment may be remanded and relitigated.[10]

Fourth, run the names of your client and the other parties involved in the litigation through the publicly available databases at the outset, to independently determine if the judge may have a financial conflict of interest. Promptly bring any issues you identify to the attention of the judge and the other litigants.

As Judge Barksdale suggested in her letter advocating to amend Rule 7.1, the litigants themselves have the resources and interest in the outcome of the case such that obtaining this information themselves may help identify any potential issues earlier than a judge's

staff could.

Through it all, it is most important to stay abreast of legislative changes affecting the judiciary. Congress is currently mulling over a number of laws that could change practice before the federal bench.

The Open Courts Act, or Free PACER Bill, would eliminate fees for using PACER and modernize the search engine. Congress is also looking at two different bills aimed at expanding the number of available judge seats, and a separate bill for providing those who work for the judiciary with the same anti-discrimination and whistleblower protections as are available for other federal employees.

Keeping attuned to the ever-evolving laws — and judicial and legislative opinions that influence those laws — is an important navigational step for attorneys to take to assure their clients of fair, just and efficient outcomes.

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[1] Centripetal Networks Inc. v. Cisco Sys. Inc., Fed. Cir., No. 21-1888, op. 6/23/22.

[2] Recusal Op., 492 F. Supp. 3d at 617.

[3] Centripetal at 14.

[4] Grimaldi, James V., Jones, Court and Palazzolo, Joe (Sept 28, 2021) 131 Federal Judges Broke the Law by Hearing Cases Where They Had a Financial Interest. Wall Street Journal (<https://www.wsj.com/articles/131-federal-judges-broke-the-law-by-hearing-cases-where-they-had-a-financial-interest-11632834421>).

[5] Public Law No. 117-125 (05/13/2022).

[6] [https://www.uscourts.gov/sites/default/files/22-cv-h\\_suggestion\\_from\\_hon.\\_ralph\\_erickson\\_-\\_rule\\_7.1\\_0.pdf](https://www.uscourts.gov/sites/default/files/22-cv-h_suggestion_from_hon._ralph_erickson_-_rule_7.1_0.pdf).

[7] [https://www.uscourts.gov/sites/default/files/22-cv-f\\_suggestion\\_from\\_judge\\_barksdale\\_-\\_rule\\_7.1\\_0.pdf](https://www.uscourts.gov/sites/default/files/22-cv-f_suggestion_from_judge_barksdale_-_rule_7.1_0.pdf).

[8] Centripetal at 23.

[9] <https://www.law.cornell.edu/uscode/text/28/455>.

[10] Centripetal at 8.