IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA, Plaintiff, v. SHOLOM RUBASHKIN, Defendant.	Civil Action No. 2:08-CR-1324 LLR AFFIDAVIT OF MARK I. HARRISON

Mark I. Harrison, being first duly sworn upon his oath deposes and states:

1. I am a member of the law firm of Osborn Maledon, P.A. and have been licensed to practice law in the State of Arizona since 1961 and in the State of Colorado since 1991.

2. Over the past 49 years, I have been continuously engaged in the active practice of law. The bulk of my practice has been in litigation and trial work. For the past two decades, my practice has focused increasingly on matters involving legal ethics, lawyers' licensure and professional liability and judicial ethics.

3. I have represented more than four hundred lawyers in cases involving discipline, admission, reinstatement and specialization certification and have served as an expert on the subject of legal ethics in approximately 140 cases. I consult regularly with lawyers, law firms and judges in matters involving legal ethics, professional liability and judicial ethics. From 1994-1997, I served as an Adjunct Professor at the College of Law at the University of Arizona with responsibility for teaching the required course in Legal Ethics and since 2000, have been an Adjunct Professor at the College of Law at Arizona State University teaching the required course in Legal Ethics.

4. I represented the Arizona Commission on Judicial Conduct as Special Counsel for several years and have represented approximately fifteen judges over the past nineteen years in judicial discipline proceedings. From 2004-2007, I served as Chair of the ABA Commission to Revise

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the Model Code of Judicial Conduct, which was unanimously adopted by the House of Delegates in February 2007.[1] My professional and extra-curricular activities are set forth in greater detail on my resume which is attached to this Affidavit as Exhibit 1.

5. I was retained by Nathan Lewin (hereinafter "Mr. Lewin"), counsel for defendant Sholom Rubashkin (hereinafter "the defendant" or "Mr. Rubashkin"), to express opinions concerning whether the conduct of the federal judge presiding over the case in which Mr. Rubashkin was a defendant (hereinafter "this action" or "the case")[2] violated any of the provisions of the Code of Conduct (hereinafter "the Code of Conduct")[3] and/or 28 U.S.C. §455(a) applicable to federal judges.

6. I am being compensated at the rate of $500.00 per hour for my study and testimony in connection with this matter. I have no stake in the outcome of this matter.

7. In formulating my opinions, I relied on my background and experience in the field of legal and judicial ethics and on the facts set forth in the pleadings in this matter (specified below) or in documents produced as exhibits in this matter which were provided to me by counsel for the Defendant.

DESCRIPTION	DATE
Defendant's Motion Under Rule 33(b)(1) For a New Trial	August 5, 2010
Memorandum of Law In Support of Defendant's Motion for a New Trial	August 5, 2010
Affidavit of Attorney Guy R. Cook	August 4, 2010
Affidavit of Attorney F. Montgomery Brown	August 4, 2010
Declaration of Nathan Lewin	August 4, 2010
Exhibits 1-18 to the Declaration of Nathan Lewin	As Indicated on Each Exhibit
Government's Response to Defendant's Motion for New Trial and Memorandum in Support of same (including all exhibits)	August 23, 2010

[1] According to the ABA Center for Professional Responsibility, as of July 14, 2010, the 2007 Model Code of Judicial Conduct ("the 2007 Model Code") has been adopted – with some variations – in sixteen states; the courts in eight additional states have proposed revisions based on the 2007 Model Code and committees in eighteen additional states have been established to consider revisions based on the 2007 Model Code. In March 2009, the Judicial Conference of the United States made "substantial revisions" to the Code of Conduct applicable to federal judges. Although there are important differences between the codes, the Code of Conduct is based largely on the 2007 Model Code.

[2] *United States of America v. Sholom Rubashkin*, No. CR 08-1324 LRR (N.D. Iowa)

[3] Although the Code of Conduct was amended effective March 2009, the provisions applicable to the conduct of the judge implicated by Mr. Rubashkin's Motion for New Trial were not materially affected by those changes.

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8. Based upon my review and consideration of the listed pleadings and documents, I identified and relied upon the following facts, which for purposes of this Declaration, I assume to be true and which are pertinent to my opinions in this matter[4]:

(a) October 10, 2007 – The United States Attorney's Office ("USAO") "advised that they had met with Chief United States District Judge Linda Reade and had provided her with a briefing regarding the number of criminal prosecutions that they intend to pursue relative to this investigation."

(b) October 16, 2007 – The USAO "briefed Chief Judge Reade regarding the ongoing investigation and their expectation that it is anticipated to result in several hundred criminal arrests and subsequent criminal prosecutions with the judicial boundaries of the Northern District of Iowa. Judge Reade indicated full support for the initiative . . ." and further provided to prosecutors her travel schedule, indicating that she would be out of the country in February and first half of March 2008.

(c) October 29, 2007 – The USAO agreed to discuss with Judge Reade whether a May 11, 2008 date for raid "meets her scheduling needs."

(d) November 2007 – Memo dated November 14 confirms communication between USAO and U.S. District Court about holding proceedings at "National Cattle Congress" in Waterloo to follow planned raid. Separate (undated) memo further describes Judge Reade and USAO surveying and approving this location.

(e) January 28, 2008 – A 1:30 meeting was held with Judge Reade and, at her request, the clerk of court, the United States Marshal's Service ("USMS"), representatives of the United States Probation and Pretrial Services System, USAO and United States Immigration and Customs Enforcement ("ICE"). Judge Reade "was updated on the progress with the Cattle Congress as well as discussions about numbers, potential trials, IT issues for the court, and logistics. The court made it clear that they are willing

[4] The specified items were reviewed and relied upon only to the extent they contained information pertinent to the issues about which I was asked to express an opinion. It is not the function of expert witnesses to resolve factual disputes. Accordingly, to the extent my opinions are based on facts, it is my understanding that those facts are supported by facts already of record in the litigation or will be substantiated by admissible evidence at an evidentiary hearing relating to the pending motion.

to support the operation in any way possible, to include staffing and scheduling."

(f) February 14, 2008 – redacted e-mail states "The date for the operation was set by the availability of the courts, not by ICE and is the first date that the District Courts could go. Because we anticipate a very high percentage of the arrests going criminal, the Chief District Court Judge has requested we coordinate with her court."

(g) March 17, 2008 – Judge Reade met with ICE Resident Agents in Charge ("RAC"), USAO, Probation staff, USMS, and a United States Magistrate Judge to discuss "an overview of charging strategies, numbers of anticipated arrests and prosecutions, logistics, the movement of detainees, and other issues related to the CVJ investigation and operation." Although there is a further reference in this synopsis to a subsequent meeting "with the Court to take place the first week of April," no document has been produced regarding that meeting.

(h) March 20, 2008 – An e-mail from this date describes that "The Chief Judge has indicated she wants a final game plan in two weeks (April 4)" and that "The USAO and Chief Judge have asked that we work together to be able to do short-term housing at the temporary facility as our criminal arrests may then exceed the 450 mark."

(i) March 31, 2008 – An e-mail from this date describes a meeting with representatives from various government agencies and concludes: "The First Assistant for the Northern District Rich Murphy indicated that he has a meeting this Friday (April 4) with the Chief Judge who has requested a briefing on how the operation will be conducted. Murphy has requested an operation plan from ICE by COB Wednesday so that he can incorporate it into his presentation."

(j) April 2, 2008 – e-mail exchange in which Marcy Forman, Director of Investigations, ICE, asks "What is the status of our Op plan? Where are we on the doc for the USAO for his presentation to the judge? * * *" She received a response that same day that the "Exec summary of the op will satisfy Richard Murphy's requirement to brief the judge. * * *"

(k) April, 2, 2008 – In a document entitled "CVJ Exec Summary", the following statement appears: "In coordination with the U.S. Attorney's Office for the Northern District of Iowa (USAO) and

the United States District Court in the Northern District of Iowa, the RAC Cedar Rapids is currently planning a worksite enforcement operation in northeastern Iowa at Agriprocessors, Inc."

(l) April 4, 2008 – ICE e-mails dated March 20 and 31 describe Judge Reade requesting April 4 meeting with First AUSA Richard Murphy for purposes of a briefing on "how the operation will be conducted."

(m) April 11, 2008 – An e-mail from the unidentified Regional Director to an unidentified recipient states "On another note – there is a weekly operations/planning meeting with ICE/RAC [XXX] Chief Judge, AUSA, and USMS." The e-mail fails to indicate when the weekly meetings involving the Chief Judge started or ended.

(n) May 12, 2008 – ICE raid on Agriprocessors, Inc. plant in Postville, Iowa, leading to arrests of more than 300 undocumented aliens and proceedings in Waterloo relating to those arrests.

(o) July 24, 2008 – Hearing entitled "Immigration Raids: Postville and Beyond" before the U.S. House of Representatives Committee on the Judiciary Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law at which sworn testimony and written statements were presented by Deborah J. Rhodes, Senior Associate Deputy Attorney General, U.S. Department of Justice and Marcy M. Forman, Director, Office of Investigations, U.S. Immigration and Customs Enforcement. In their sworn testimony and written statements, neither Ms. Rhodes nor Ms. Forman made any mention or reference whatsoever to the role, *supra,* detailed in the references cited at paragraphs (a) through (n), of Chief Judge Reade in the planning and execution of the Agriprocessors raid and arrests, including the arrest of the defendant.

(p) July 24, 2008 – Letter submitted to Rep. Zoe Lofgren by Rockne Cole, Esq. in connection with the Hearing referred to in paragraph (o), *supra*, in which Mr. Cole describes a "secret" meeting of defense counsel assembled by a clerk in the office of the Clerk for the Northern District of Iowa on May 12, 2008 to arrange for the representation of defendants arrested in the Postville/Agriprocessors raid. The meeting was attended by representatives of the U.S. Attorney's Office who explained the procedures that had been pre-arranged for the processing of those

arrested in the raid. Mr. Cole's letter contains the following statement pertinent to this affidavit: "What I found most astonishing is that *apparently* Chief Judge Reade had already ratified these deals prior to one lawyer even talking to his or her client. Judge Reade's presence at the meeting seemed to confirm as much. This directly violates Rule 11 plea procedure, which provides that the 'court must not participate in these [plea] discussions.' Moreover, this ratification appeared to have been *ex parte* with the United States Attorney's Office. Indeed, it had to have been *ex parte* because no lawyers had even met with their clients prior to these Rule 11(c)(1)(C) plea bargains being announced."

(q) September 29, 2008 – Order issued by Chief Judge Reade denying defendant Martin De La Rosa-Loera's Motion for Recusal Pursuant to 28 U.S.C. § 455(a). In her Order, Judge Reade states, *inter alia*, "Defendant repeatedly confuses logistical cooperation with collusion or involvement in the executive function of pursuing prosecution." Judge Reade fails in her Order, or otherwise, to disclose to counsel the facts summarized in paragraphs (a) through (n), *supra*, or in Exhibits 1-17 of the Motion relating to her pre-raid involvement in the Agriprocessors case, including more than ten *ex parte* meetings with prosecutors and other law enforcement officials involved in the operation.

(r) August 4, 2010 – Affidavit of Attorney Guy R. Cook, trial co-counsel for Mr. Rubashkin, who states that based on his review of Judge Reade's characterization of her limited role in the planning of the Agriprocessors raid and her Order denying recusal in the Loera case, he and his co-counsel decided that a motion to recuse on behalf of Mr. Rubashkin had little chance of success. However, they decided to obtain information about pre-arrest law enforcement planning to independently evaluate the role of the court in pre-arrest planning. Mr. Cook further states that, despite repeated FOIA requests, he was forced to sue the Department of Homeland Security to obtain information about the nature and extent of Judge Reade's involvement in the planning and execution of the Agriprocessors raid. Finally, Mr. Cook states that "had we been fully informed of Judge Reade's involvement in the 2008 raid, there is no question we would have moved to recuse."

(s) August 4, 2010 – Affidavit of Attorney F. Montgomery Brown, trial co-counsel for Mr. Rubashkin, parallels the information

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contained in Mr. Cook's affidavit, concluding: "Had Judge Reade or the U.S. Attorney's Office fully informed me of Her Honor's full involvement in the planning for the raid and the nature and content of briefings relating to 'the ongoing investigation' and 'charging strategies' and 'other issues related to the CVJ investigation and operation' referred to without further explanation in the ICE materials acquired pursuant to the FOIA litigations, I believe we would have had no choice but to file a motion for Her Honor to recuse herself as the Judge in Mr. Rubashkin's case for all purposes including the detention appeal."

(t) The documents produced in response to FOIA requests and submitted as exhibits in support of the Motion for New Trial are heavily redacted and do not provide a complete or accurate record of "what was said, when it was said, by whom, and what effect could be drawn from their offerings." *In re Brooks,* 383 F. 3d 1036, 1046 (D.C. Cir. 2004)

9. Based on my experience and my review and consideration of the facts set forth in paragraphs (a)-(t), *supra*, in Exhibits 1-18 to the Declaration of Nathan Lewin, Esq., and in the exhibits submitted with the Government's Response to the Motion for New Trial, it is my opinion that the conduct of Chief Judge Reade violated several provisions of the Code of Conduct and 28 U.S.C. § 455(a), applicable to federal judges. My opinion is based on the following principles, established by rules, statutes and interpretative case law implicated by the facts set forth above:

a. Canon 2(A) of the Code of Conduct provides that "A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

b. The Commentary to Canon 2(A) states, *inter alia*, that "A judge must avoid all impropriety and appearance of impropriety. * * * The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired."

c. Canon 3(C)(1) of the Code of Conduct provides that "a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . ."

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d. Canon 3(C)(3)(d) states that "For the purposes of this section: * * * 'proceeding' includes pretrial, trial, appellate review, or other stages of litigation."

e. Canon 3(A)(4) states, *inter alia*, that "A judge should not initiate nor consider, permit or consider *ex parte* communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers"; "The rule is designed to prevent all of the evils of *ex parte* communications: 'bias, prejudice, coercion, and exploitation.'" *In re Kensington Int'l Ltd.,* 368 F.3d 289, 310 (3d Cir. 2004) quoting Jeffrey M. Shaman et al., *Judicial Conduct and Ethics* §5.03 (3d Ed. 2000).

f. Rule 1.2 of the 2007 Model Code is in accord with Canon 2(A) of the Code of Conduct, *supra* and Comment 5 to the Rule is in accord with the Commentary to Canon 2(A), *supra*.

g. Rule 2.11 of the 2007 Model Code is in accord with Canon 3(C)(1) of the Code of Conduct and Rule 2.9 of the 2007 Model Code is in accord with Canon 3(A)(4) of the Code of Conduct.

h. The phrase "impending matter" is defined in the Terminology section of the 2007 Model Code as "a matter that is imminent or expected to occur in the near future" and is in accord with Canon 3(C)(3)(4) of the Code of Conduct. "*Ex parte* communications are barred when they concern pending or impending litigation." Shaman, Lubet, Alfini & Geyh, *Judicial Conduct and Ethics*, section 5.03, p. 5-4 (4th ed. Lexis/Nexis, 2007).

i. A case is generally deemed to be "impending" when it is anticipated but has not yet begun. A judge who engages in *ex parte* communications regarding an impending proceeding creates an appearance of impropriety and should recuse himself or herself from the subsequent litigation. *See, e.g., Stivers v. Knox County Dept. of Public Welfare*, 482 N.E.2d 748, 751 (Ind. App. 1985).

j. The meetings which occurred between October, 2007 and May 12, 2008, which included the Chief Judge, all concerned an "impending matter" expected to occur in the near future – the Postville raid and the arrest of Agriprocessor employees and officials and, therefore, involved *ex parte* communications within the meaning of the Code of Conduct and the 2007 Model Code.

k. 28 U.S.C. §455(a) provides that "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

l. Section 455 "was amended in 1974 to clarify and broaden the grounds for judicial disqualification and to conform with the recently adopted ABA Code of Judicial Conduct, Canon 3C (1987)." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 858 n.7 (1988).

m. ". . . in drafting §455(a) Congress was concerned with the 'appearance' of impropriety and to that end changed the previous subjective standard for disqualification to an objective one; no longer was disqualification to be decided on the basis of the opinion of the judge in question, but by the standard of what a reasonable person would think [based on] the facts and circumstances *known* to the judge at the time." *Liljeberg*, 486 U.S. at 872 (Rehnquist, J., dissenting). "'The standard for disqualification under § 455(a) is an objective one. The question is whether a reasonable and informed observer would question the judge's impartiality.'" *In re Brooks,* 383 F.3d at 1043 *quoting U.S. v. Microsoft,* 253 F.3d 34, 114 (D.C. Cir. 2001).

n. Noting that *ex parte* communications are an "anathema in our system of justice." *Kensington*, 368 F.3d at 309.

o. "*[E]x parte* meetings with the parties are flawed because . . . no opportunity existed for their adversaries to know precisely what was said, when it was said, by whom, and what effect could be drawn from their offerings." *Id.* at 311. "Our concern is not with information that enters the record and may be controverted or tested by the tools of the adversary process; our concern is with information that 'leaves no trace in the record . . ." *In re Brooks,* 383 F.3d at 1046 (quotation and citation omitted).

p. ". . . the Government must have a 'compelling state interest' to conduct *ex parte* communications with the prosecution." *U.S. v. Barnwell,* 477 F.3d 844, 850 n.4 (6th Cir. 2007) *citing U.S. v. Minsky*, 963 F.2d 870, 874 (6th Cir. 1992) [quoting *In re Taylor,* 567 F.2d 1183, 1188 (2d Cir. 1977)].

q. "Closed proceedings 'are fraught with the potential of abuse and, absent compelling necessity, must be avoided.' The Government bears a heavy burden in showing that the defendant was not

prejudiced when his counsel was excluded from these communications." *Barnwell*, 477 F.3d at 850-851.

r. The Code of Conduct provides that "If a judge receives an unauthorized *ex parte* communication bearing on the substance of a matter, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested."

s. The Code of Conduct does not specify what a judge is required to do if there have been *ex parte* communications *initiated or authorized* by a judge. The current Code of Conduct and the 2007 Model Code both provide that "when circumstances require it, *ex parte* communications (are permitted) for scheduling, administrative or emergency purposes, but only if the *ex parte* communication does not address substantive matters and the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the *ex parte* communication." In such situations, Rule 2.9(A)(1)(b) of the 2007 Model Code also requires that "the judge make(s) provision promptly to notify all other parties of the substance of the *ex parte* communication, and gives the parties an opportunity to respond."

t. The logistical requirements of an impending matter or proceeding that require the active, ongoing involvement of the court, rather than the court's administrative staff, do not negate the prohibition against *ex parte* communications or justify such communications and do not excuse or explain the failure to make a complete record of such communications and disclose it at the earliest practicable time to all parties who did not participate in the *ex parte* communications.

u. Prompt disclosure of *ex parte* communications has generally been held to be the antidote to "other corrective action" such as recusal. *See, generally,* Shaman, Lubet, Alfini & Geyh, *Judicial Conduct and Ethics § 5.05*, pp. 5-22-24 (4th ed. Lexis/Nexis, 2007); *Annotated Model Code of Judicial Conduct*, pp. 147-148 (ABA Center for Professional Responsibility 2004).

10. Applying the principles summarized in paragraphs 9(a)-(u) to the facts summarized in paragraphs 8(a)-(t), it is my opinion that Chief Judge Reade violated the provisions of the Code of Conduct (and the comparable provisions of the 2007 Model Code) set forth and interpreted in paragraphs 9(a)-(u) and 28 U.S.C. § 455(a) by:

a. initiating and/or authorizing and participating in numerous[5] *ex parte* meetings with prosecutors and other law enforcement personnel in connection with an impending matter;

b. failing to require the preparation of a complete record of the *ex parte* meetings in which Chief Judge Reade participated;

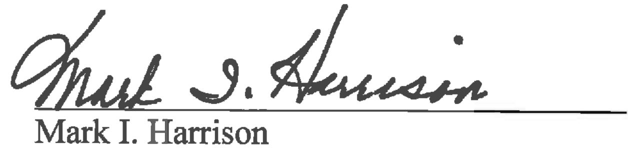
c. failing to disclose the nature, substance and extent of the *ex parte* communications to all parties at the earliest practicable time so that those parties would have a timely opportunity to respond, including filing a motion to recuse; and

d. participating in numerous *ex parte* meetings with the prosecution and other law enforcement personnel and then failing to recuse herself from presiding over the trial of the principal individual who was responsible for managing the business that was the subject of the *ex parte* meetings.

11. The affiant reserves the right to modify the opinions expressed in this affidavit and to offer additional opinions if and when he is provided with additional information, generated through discovery and investigation or otherwise, which warrants such changes.

Further affiant sayeth naught.

DATED this 7th day of September, 2010.



Mark I. Harrison

[5] In view of the reference in the April 11, 2008 e-mail [subparagraph 8(o), *supra*] to "weekly meetings" including the Chief Judge, and the absence of complete records concerning those meetings (if they occurred), it is impossible to state with precision how many meetings took place that included the Chief Judge.

State of Arizona)
) ss.
County of Maricopa)

On September 7, 2010, Mark Harrison personally appeared before me, who is personally known to me, to be the signer of the above instrument, and he acknowledged that he signed it.

Notary Public

My commission expires

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