Exhibit A

BEFORE THE FEDERAL TRADE COMMISSION

	)
In re Motion to Recuse	)
Chair Lina M. Khan	)
from Involvement in Certain Antitrust Matters	)
Involving Amazon.com, Inc.	)
	)

EXPERT DECLARATION OF PROFESSOR THOMAS D. MORGAN

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1. Professional Experience and Background

I am a 1965 graduate of the University of Chicago Law School and a member of the Bar of Illinois. I am S. Chesterfield Oppenheim Professor Emeritus of Antitrust and Trade Regulation Law at The George Washington University Law School where I was on the faculty from 1989 to 1998 and from 2000 to 2013. From 1998 to 2000, I was the first Rex E. Lee Professor of Law at the J. Reuben Clark Law School, Brigham Young University. From 1980 to 1985, I was Dean of the Emory University School of Law, and from 1985 to 1989, I was a professor at Emory. From 1966 to 1980, less time for military service, I was a professor at the College of Law, University of Illinois.

I have taught both antitrust law and administrative law during my career, and my law school casebook, *Modern Antitrust Law and Its Origins* (5th ed. 2014), was published by West Academic. However, most of my teaching and scholarly research has been in the field of legal and judicial ethics. I taught courses in both subjects one or more times each year for the forty years from 1974

through my retirement in 2013. I continue to co-author a law school casebook covering both legal and judicial ethics, *Professional Responsibility: Problems and Materials* (13th ed. 2018), published by Foundation Press.

I served as one of two Associate Reporters for the American Law Institute (ALI) project that produced the comprehensive *Restatement of the Law (Third): The Law Governing Lawyers* (2000). I then served as one of the two Associate Reporters for the American Bar Association's (ABA) Commission on Revision of the Model Rules of Professional Conduct—the Ethics 2000 Commission—whose work led to extensive revision of the ABA Model Rules in 2002. I currently serve as an Advisor to the ALI project on Principles of Government Ethics. I have received two awards for lifetime contributions to legal ethics scholarship—the American Bar Foundation's Keck Award in 2000 and the New York State Bar Association's Sanford D. Levy Award in 2008.[1] My curriculum vitae listing my publications, presentations and professional activities is attached to this report.

2. My Engagement

Outside counsel for Amazon.com, Inc. (Amazon) has retained me as an expert to consider whether it would be appropriate to conclude that judgments about Amazon expressed by FTC Chair Lina M. Khan prior to her confirmation as a Commissioner at the Federal Trade Commission (FTC) compel Chair Khan to recuse herself from all antitrust cases involving Amazon that consider factual issues she purports to have determined in her academic articles, her public advocacy publications, and her leadership role in preparation of a recent Majority Staff Report of the House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law. I have previously rendered expert opinions on questions concerning obligations of lawyers and judges in

[1] Organizations named above are for identification only. None is responsible for the content of this Declaration.

affidavits, depositions, and testimony in approximately one hundred cases, and my declarations, affidavits, and testimony as an expert have been admitted in state and federal courts all over the country. I am being compensated by counsel at my current regular rate for time spent preparing this report and any time later required. No part of the compensation I receive is dependent on the conclusions I reach or the result in any matter in which this Declaration might be introduced.

3. The Factual Record Relevant to My Opinions

Lina M. Khan graduated from college in 2010. In 2011, she went to work in the Open Markets Program at the New America Foundation, a think-tank advocating about what it sees as issues relating to the exercise of corporate power. She maintained an affiliation with that organization and its successor, the Open Markets Institute, in various roles through 2018. She was a Policy Analyst (2011-14), a Fellow (2014-17), and Legal Director (2017-18). Ms. Khan then served as Counsel to the Majority Staff of the House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law, and as an Associate Professor of Law at Columbia Law School.

Professor Khan was confirmed by the Senate and sworn in as a Commissioner of the Federal Trade Commission (FTC) on June 15, 2021. That same day, President Biden named Commissioner Khan the FTC Chair. In her new role, Chair Khan has all "the executive and administrative functions of the Commission, including functions of the Commission with respect to (1) the appointment and supervision of personnel employed under the Commission, (2) the distribution of business among such personnel and among administrative units of the Commission, and (3) the use and expenditure of funds."[2] In short, Chair Khan is in a position today to direct

[2] 15 U.S.C. § 41, implementing the Reorganization Act of 1949 pursuant to Reorganization Plan No. 8 of 1950 and Reorganization Plan No. 4 of 1961.

Federal Trade Commission staff to take action that affects particular companies. Whether the law permits her to so act in antitrust matters involving Amazon is the subject of this Declaration.

Beginning in 2014, the year she became a student at Yale Law School, Chair Khan began to write prolifically. She did some of her work at Yale, and later, some at Columbia. Some of Chair Khan's articles are written at a high level of generality and are not the subject of this Declaration. My focus will be on a series of other articles, begun at Open Markets/New America, in which Chair Khan has been aggressive in her condemnation of Amazon by name and in which she makes numerous specific assertions that Amazon has engaged in illegal practices that are within the jurisdiction of the FTC. I summarize each article briefly here to provide the context for my later opinions.

A Remedy for the Amazon-Hachette Fight? (2014) was an article for CNN about a dispute in which Amazon allegedly raised prices of books sold on the Amazon website that were published by Hachette, a major French publisher. Chair Khan said Amazon then offered to lower the prices to consumers (and thereby increase Hachette's sales) only if Hachette would lower prices at which it sold the books to Amazon. Chair Khan proposed invoking the Robinson-Patman Act against Amazon, saying that the Act "prohibits a retailer from wielding its mere size to bully suppliers for discounts." Amazon might be willing to sell books to consumers at lower prices than traditional publishers, she asserted, but the purpose of the Robinson-Patman Act is to "give smaller entities a fair chance at competing." "It's worth remembering," she concluded, "that [Amazon's] tactic—holding the publisher hostage unless it concedes to better terms—flouts the principles of anti-price-discrimination laws."

What Everyone's Getting Wrong About Amazon, QZ [Quartz] (Oct. 17, 2014), continued Chair Khan's attack on Amazon by name for charging low prices. Responding to articles

defending Amazon's growth, she contended that a "major way Amazon has secured its dominance is through steeply discounting products and using books as 'loss-leaders' to sell its other wares." She dismissed suggestions that Amazon faced serious competition in retail sales. "First off, approximating Amazon's command as a percent of *everything sold* (minus gas, food & drinks, building supplies) in America is insane. It dissolves the dominance Amazon enjoys in specific sectors—like books, but also in electronics like televisions and in industrial goods like valves." Amazon, she declared, "has a monopoly in books. It has also attained a dominant position in our economy unlike anything we've seen in the last 50 years. That alone should alarm us."

How to Reboot the FTC, POLITICO (Apr. 13, 2016), was Chair Khan's call for antitrust enforcement action against Amazon as a platform company. She argued that a reinvigorated Federal Trade Commission should "take seriously the threats to competition posed by online platform monopolies," and included Amazon in her list of supposed threats. While acknowledging that platforms often provide "great ease and convenience for consumers," Chair Khan complained that the companies "can also use their market power to squeeze or disadvantage the sellers and suppliers that depend on them."

Amazon's Antitrust Paradox, 126 YALE L.J. 710 (2017), a student note, assembled many of the charges Chair Khan previously made against Amazon into an integrated series of findings indicting Amazon for its alleged "structural dominance" and alleged "anticompetitive" activity.

> "In addition to using below-cost pricing to establish a dominant position in e-books, Amazon has also used this practice to put pressure on and ultimately acquire a chief rival. * * * In 2008, Quidsi was one of the world's fastest growing e-commerce companies. It oversaw several subsidiaries: Diapers.com (focused on baby care), Soap.com (focused on household essentials), and BeautyBar.com (focused on beauty products). Amazon expressed interest in acquiring Quidsi in 2009, but the company's founders declined Amazon's offer. Shortly after Quidsi rejected Amazon's overture, Amazon cut its prices for diapers and other baby products by up to 30%. * * * Struggling to keep up with Amazon's pricing war, Quidsi's owners began talks with Walmart about potentially selling

the business. Amazon intervened and made an aggressive counteroffer. * * * After completing its buy-up of a key rival—and seemingly losing hundreds of millions of dollars in the process—Amazon went on to raise prices."

Id. at 768-70.

Chair Khan asserted as established fact that:

"As its history with Quidsi shows, Amazon's willingness to sustain losses has allowed it to engage in below-cost pricing in order to establish dominance as an online retailer. Amazon has translated its dominance as an online retailer into significant bargaining power in the delivery sector, using it to secure favorable conditions from third-party delivery companies. This in turn has enabled Amazon to extend its dominance over other retailers by creating the Fulfillment-by-Amazon service and establishing its own physical delivery capacity. This illustrates how a company can leverage its dominant platform to successfully integrate into other sectors, creating anticompetitive dynamics."

Id. at 774.

Chair Khan outlined the future antitrust significance of her findings:

"Amazon is positioned to use its dominance across online retail and delivery in ways that involve tying, are exclusionary, and create entry barriers. That is, Amazon's distortion of the delivery sector in turn creates anticompetitive challenges in the retail sector. For example, sellers who use [Fulfillment-by-Amazon] have a better chance of being listed higher in Amazon search results than those who do not, which means Amazon is tying the outcomes it generates for sellers using its retail platform to whether they also use its delivery business."

Id. at 778.

Chair Khan summed up her conclusions about Amazon's likely antitrust liability:

"Amazon has responded to popular third-party products by producing them itself. * * * The anticompetitive implications here seem clear: Amazon is exploiting the fact that some of its customers are also its rivals. The source of [Amazon's market] power is: (1) its dominance as a platform, which effectively necessitates that independent merchants use its site; (2) its vertical integration—namely, the fact that it both sells goods as a retailer and hosts sales by others as a marketplace; and (3) its ability to amass swaths of data, by virtue of being an internet company. Notably, it is this last factor—its control over data—that heightens the anticompetitive potential of the first two."

Id. at 782-83.

In *Amazon Bites Off Even More Monopoly Power*, NEW YORK TIMES (June 21, 2017), Chair Khan protested Amazon's plan to acquire Whole Foods.

> "Amazon on Friday announced plans to acquire Whole Foods, the high-end grocer. * * * Amazon will argue to federal authorities, most likely the Federal Trade Commission, that the deal should be blessed because the combined entity's share of the American grocery market will be less than 5 percent. But antitrust officials would be naïve to view this deal as simply about groceries. Buying Whole Foods will enable Amazon to leverage and amplify the extraordinary power it enjoys in online markets and delivery, making an even greater share of commerce part of its fief."

Chair Khan called Amazon a "vast empire" that "self-deal[s] with great finesse" and "dictates terms and prices to those dependent on" its services.

Stop Amazon From Selling Books—or Anything Else—Below Cost is a portion of *6 Ideas to Rein in Silicon Valley, Open Up the Internet, and Make Tech Work for Everyone*, NEW YORK MAGAZINE (Dec. 11, 2017), and another article in which Chair Khan asserts the factual truth of her premises for deeming Amazon's practices unlawful:

> "In 2009, Amazon executives realized that another company was winning the diapers market, Diapers.com—a subsidiary of Quidsi—offered young parents a range of baby products, and soon became one of the fastest-growing online retailers in the country. When the founders declined an offer by Amazon to buy up the company, Amazon settled on another tactic to tame its rival: drive it into the ground. Amazon began slashing prices on baby products, pricing goods below the cost of production. Over the course of months, Amazon lost millions. While Quidsi initially tried to keep up, the relative newcomer lacked Amazon's almost endless ability to absorb losses. Soon, Quidsi's investors began to panic, and when Amazon then made another bid, the start-up's founders conceded. Once it had Quidsi in its grip, Amazon first jacked prices back up and scaled back loyalty programs. Then it shut down the operation completely."

Predatory pricing "is a standard trick from the monopolist's playbook," Chair Khan asserted, as she called for prosecution of Amazon for allegedly engaging in it.

Sources of Tech Platform Power, 2 GEO. L. TECH. REV. 325 (2018), continued Chair Khan's attack on "dominant platforms," a group in which she includes Amazon.

> "Platforms can use their gatekeeper power to extort and extract better terms from the business users that depend on their infrastructure. For example, Amazon has disabled the 'buy-buttons' for book publishers in order to extract better terms; executives have also described how the company tweaks algorithms during negotiations to remind firms of its power to sink their sales, through demoting their rank below where users usually look when making purchases. Recently, the company has started offloading costs onto suppliers by subsidizing shipping costs through increased fees for the companies that sell through its platform. Merchants attempting to negotiate with Amazon risk seeing their accounts suspended, and getting kicked off its platform often means not just seeing lower revenue, but having to lay off employees."

Id. at 327.

Platforms also can allegedly engage in "information exploitation" to enhance their own profits and penalize others. Chair Khan accuses Amazon, for example, of collecting

> "swaths of information on the merchants selling through its Marketplace. It routinely uses this data to inform its own sales and products, exploiting insights generated by third-party retailers and producers to go head-to-head with them, rolling out replica products that it can rank higher in search results or price below-cost. In this way Amazon's platform functions as a petri dish, where independent firms undertake the initial risks of bringing products to market and Amazon gets to reap from their insights, often at their expense. Notably, it is the other forms of power—the fact that Amazon is a gatekeeper and integrated across lines of business—that enable it to exploit information in this way; those two forms of power enhance its ability to leverage the third."

Id. at 327.

The Separation of Platforms and Commerce, 119 COLUM. L. REV. 973 (2019), again makes Amazon a target on the basis of Chair Khan's purported specific factual findings.

> "Amazon * * * is the dominant online marketplace, the world's largest cloud computing service, a massive shipping and logistics network, a media producer and distributor, a grocer, a small-business lender, a live video-gaming streaming platform, a digital home assistant, a designer of apparel, and an online pharmacy," she reports. "Two areas where it both serves as a bottleneck facility and competes with those reliant on its bottleneck include online retail and digital home-assistant systems."

Id. at 985. The core allegation of the article is that firms such as Amazon are "gatekeepers" for access to customers in Internet commerce. Platform companies like Amazon, Chair Khan asserts, should not also be able to sell their own products over their platforms in competition with third-party sellers.

Recently, Chair Khan served as Counsel to the Majority Staff of the House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law, a role in which she says that she "led the congressional investigation into digital markets and the publication of its final report." http://www.linamkhan.com/bio-1. The final report contains an 83-page section detailing Amazon conduct that allegedly violated the antitrust laws. Staff of H. Comm. on the Judiciary, 116th Cong., *Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations* (2020) [hereafter Majority Staff Report]. The report, also critical of Alphabet/Google, Apple and Facebook, extends Chair Khan's earlier articles into a call for use of the antitrust laws against Amazon and others. The Majority Staff Report begins:

> "Amazon has significant and durable market power in the U.S. online retail market. * * * Although Amazon is frequently described as controlling about 40% of U.S. online retail sales, this market share is likely understated, and estimates of about 50% or higher are more credible."

Majority Staff Report at 15.

The Report continues:

> "Amazon achieved its current dominant position, in part, through acquiring its competitors * * *. It has also acquired companies that operate in adjacent markets, adding customer data to its stockpile and further shoring up its competitive moats. This strategy has entrenched and expanded Amazon's market power in e-commerce, as well as in other markets. The company's control over and reach across its many business lines enable it to self-preference and disadvantage competitors in ways that undermine free and fair competition. As a result of Amazon's dominance, other businesses are frequently beholden to Amazon for their success.

> "Amazon has engaged in extensive anticompetitive conduct in its treatment of third-party sellers. Publicly, Amazon describes third-party sellers as 'partners.' But internal documents show that, behind closed doors, the company refers to them as 'internal competitors." Amazon's dual role as an operator of its marketplace that hosts third-party sellers, and a seller in that same marketplace, creates an inherent conflict of interest. This conflict incentivizes Amazon to exploit its access to competing sellers' data and information, among other anticompetitive conduct. * * * The company's early leadership in this market is leading to the collection of highly sensitive consumer data, which Amazon can use to promote its other business, including e-commerce and Prime Video."

Majority Staff Report at 16.

In a later discussion of barriers to entry in e-commerce, the Majority Staff Report asserts:

> "If current trends continue, no company is likely to pose a threat to Amazon's dominance in the near or distant future. * * * While some of [the] barriers to entry are inherent to e-commerce—such as economies of scale and network effects—others result from Amazon's anticompetitive conduct. As discussed elsewhere in the Report, Amazon's acquisition strategy and many of its business practices were successfully designed to protect and expand its market power."

Majority Staff Report at 87.

Chair Khan is now clearly in a position to order Federal Trade Commission staff to investigate whether to pursue Amazon based on some or all of the issues on which the Majority Staff Report makes findings.

4. My Opinions

a. Parties in Matters Before the FTC Have a Right to Neutral Decisionmakers

When the work of the Federal Trade Commission becomes focused on individual citizens and companies, targets have the right to be investigated, prosecuted, and judged by impartial Commissioners and an impartial Chair. For example, the law prohibits an FTC Commissioner from voting in a case when the Commissioner has a direct financial interest in the outcome. 18 U.S.C. § 208 and 5 C.F.R. §§ 2635.501-.502, "Impartiality in Performing Official Duties." Such

a vote would violate a defendant's right to due process of law, *e.g.*, *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986), and any Commissioner in a position to cast such a vote would clearly be obliged to recuse herself.

In my opinion, the same principles that underlie disqualification in financial conflict cases would extend to a Commissioner's non-financial interests as well. FTC Commissioners are as subject as any other government officers to the principle that those who are judged or prosecuted are entitled to have those decisions made by "impartial" persons who can hear all sides fairly. How that principle applies to someone in the position of Chair Khan is the key issue presented in deciding whether she must recuse herself from participation in future matters that involve Amazon.

b. The Appropriate Standards By Which to Judge Impartiality

Three cases involving former FTC Chairman Paul Rand Dixon are particularly helpful in understanding the legal standards that are relevant here. *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970), was a case of alleged deceptive advertising. While the case was pending before the Commission, Chairman Dixon gave a speech before the National Newspaper Association that suggested he believed the advertisement in question was deceptive. The court found that the Chairman's speech required reversal of the Commission's later cease and desist order.

> "[The law] does not give individual Commissioners license to prejudge cases or to make speeches which give the appearance that the case has been prejudged. Conduct such as this may have the effect of entrenching a Commissioner in a position which he has publicly stated, making it difficult, if not impossible for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record."

425 F.2d at 590.

The court concluded:

> "The test for disqualification has been succinctly stated as being whether 'a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it. *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 489 (2d Cir.), cert. denied, 361 U.S. 896 * * * (1959).'"

425 F.2d at 591.

American Cyanamid Co. v. FTC, 363 F.2d 757 (6th Cir. 1966), involved alleged fraud in obtaining pharmaceutical patents. During several years when the matter was under FTC investigation, Paul Rand Dixon was Chief Counsel and Staff Director of the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee. The Report of the Senate Committee expressed conclusions about many of the same issues and evidence that were before the FTC when Mr. Dixon became Chairman of the Commission. The 6th Circuit vacated the FTC cease and desist order and remanded for de novo consideration of the record without involvement of Chairman Dixon, saying:

> "It is fundamental that both unfairness and the appearance of unfairness should be avoided. Wherever there may be reasonable suspicion of unfairness, it is best to disqualify. See Prejudice and the Administrative Process, 59 Nw. U. L. Rev. 216, 231 (1964); Disqualification of Administrative Officials for Bias, 13 Vand. L. Rev. 713, 727 (1960).
>
> "It is to be emphasized that the Commission is a fact-finding body. As Chairman, Mr. Dixon sat with the other members as triers of the facts and joined in making the factual determination upon which the order of the Commission is based. As counsel for the Senate Subcommittee, he had investigated and developed many of these same facts.
>
> "The result of the participation of Chairman Dixon in the decision of the Commission is not altered by the fact that his vote was not necessary for a majority. 'Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured.' *Berkshire Employees Association of Berkshire Knitting Mills v. N.L.R.B.*, 121 F.2d 235, 239 (C.A.3 [1941])."

363 F.2d at 767-768.

Earlier still, *Texaco, Inc. v. FTC*, 336 F.2d 754 (D.C. Cir. 1964), *rev'd on other grounds*, 381 U.S. 739 (1965), was a case against Texaco and several tire companies. While the case was pending before an FTC hearing examiner, then newly-appointed Chairman Dixon gave a speech before the National Congress of Petroleum Retailers. In it, he said:

> "We at the Commission are well aware of the practices which plague you and we have challenged their legality in many important cases. You know the practices—price fixing, price discrimination, and overriding commissions on TBA. You know the companies—Atlantic, Texas * * * Goodyear, Goodrich, and Firestone.
>
> * * *
>
> "You may be sure that the Commission will continue and, to the extent that increased funds and efficiency permit, will increase its efforts to promote fair competition in your industry."

336 F.2d at 759.

The D.C. Circuit's reaction was concise and definitive:

> "In this case, a disinterested reader of Chairman Dixon's speech could hardly fail to conclude that he had in some measure decided in advance that Texaco had violated the Act. * * * We conclude that Chairman Dixon's participation in the hearing amounted in the circumstances to a denial of due process which invalidated the order under review."

Id. at 760.

In my opinion, it is fair to conclude that Chair Khan's published views about Amazon were even more definitive and critical than those of Chair Dixon that required reversal in the Commission cases just noted. Interestingly, the principle running through all the cases is closely analogous to the statutory standard for recusal of a federal judge. Judicial recusal is required when the judge's "impartiality might reasonably be questioned." 28 U.S.C. § 455(a), while 5 C.F.R. §§ 2635.501(a) & .502(a), "Impartiality in Performing Official Duties," use the same "question regarding * * * impartiality" test to describe when federal ethics regulations presumptively require

disqualification of any federal official, including an FTC Commissioner, in any "particular matter involving specific parties." In short, a person's fundamental right to an impartial adjudicator is essentially the same whether a judge or a Commissioner is involved and whether a lack of impartiality is asserted under the Due Process clause or under federal ethics standards.[3]

The 28 U.S.C. § 455(a) judicial standard is given further specificity in three circumstances that are also relevant to situations in which FTC Commissioners might find themselves. The section requires that a judge disqualify himself or herself:

> "(1) Where he [or she] has a personal bias or prejudice concerning a party, or [2] personal knowledge of disputed evidentiary facts concerning the proceeding; * * * [or]
>
> "(3) Where he [or she] has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy."

28 U.S.C. § 455(b).

In my opinion, one key point of both the judicial and the general federal ethics requirements is that disqualification turns on the prior formation of opinions about questions of fact rather than policy judgments. The principles outlined in § 455(a) do not make it a violation of due process "for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law." *FTC v. Cement Inst.*, 333 U.S. 683, 702-03 (1948). A judge also ordinarily may hear a matter in which he or she learned particular facts in earlier proceedings in the matter. *Liteky v. United States*, 510 U.S. 540 (1994).

[3] 5 C.F.R. § 2635.502(d) provides that an "agency designee" may authorize a federal official to continue acting in a matter in spite of a lack of impartiality if the designee determines "that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations." It seems unlikely that an agency designee could make that determination in this situation, but even if the designee did, in my opinion, the action might negate the official's liability under the ethics regulations, but it could not negate the government's due process obligation to persons affected by agency action.

A second key point of both requirements is that the standards are objective, not subjective. As applied to the FTC, they ask whether a reasonable person who knew all the facts and circumstances would decide that the Commissioner's impartiality is reasonably in doubt, not that future improper conduct is a certainty.[4] Fellow Commissioners can apply such an objective standard in reviewing each other's recusal decisions without casting aspersions on their colleague's personal integrity. Congress and reviewing courts can apply the standard in the same spirit. The standard neither requires nor permits proof about whether one Commissioner will act fairly while another will not, primarily because such judgments are personally awkward and often impossible to make in advance.

The specific examples of required recusal found in 28 U.S.C. § 455(b) are also informative here. It is beyond question that Chair Khan has published a great deal of independent research that she purports gives her what § 455(b) calls "personal knowledge of disputed evidentiary facts." Amazon, like any other defendant, will have the right to try to convince her and the other Commissioners that she has gotten the facts and inferences wrong, but the effect of taking such definitive public positions cannot help but "entrench[]" Chair Khan in her positions and make "it difficult, if not impossible * * * to reach a different conclusion in the event [s]he deems it necessary to do so after consideration of the record." *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d at 590.

In addition, like Chair Dixon, Chair Khan comes to the FTC after service as a leading staff member of a Congressional Committee studying issues that may later come before the Federal Trade Commission. There is good reason that 28 U.S.C. § 455(b) makes prior government service

[4] The relevant provision of the current Code of Conduct for United States Judges, Commentary on Canon 2A, uses the term "appearance of impropriety" to describe the inquiry that underlies this objective test: "An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's *** impartiality *** is impaired."

as counsel in a matter that comes before the same person as judge a specific circumstance mandating recusal. The Majority Staff Report in which Chair Khan played a large part in effect asserts that Amazon is guilty of violating the law. In my opinion, in any future matter tried before the FTC, Amazon is entitled to decision makers who have a more open mind about those issues than Chair Khan would appear to a reasonable observer to have.

c. Standards Affecting the Propriety of a Commissioner Voting to Investigate or to Bring an Action in Federal Court

Of course, each of the cases just discussed involved matters being tried before the FTC. That situation makes the judicial ethics analogy easy to see. It is at least possible that the matter facing Amazon might be a prolonged FTC investigation or the filing of an action in federal court. Such choices would not make the issue of Chair Khan's recusal go away. In my opinion, the fact or appearance of a Chair's lack of impartiality in the decision to investigate a firm or to file a judicial proceeding would most likely violate both the agency's due process obligations and the Chair's ethical duties to named respondents and to the public.

To be sure, a prosecutor who initiates proceedings plays a different role in our justice system than a judge does. A prosecutor presents the case that a defendant has violated the law. Prosecutors

> "need not be entirely 'neutral and detached.' * * * [T]hey are necessarily permitted to be zealous in their enforcement of the law. * * * [T]he strict requirements of neutrality cannot be the same for administrative prosecutors as for judges, whose duty it is to make the final decision and whose impartiality serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional regime." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248-50 (1980).

But acknowledging the differences between judges and prosecutors is only the start of the relevant analysis. The Supreme Court made equally clear in *Jerrico* that the decision to prosecute a private party is also subject to due process standards.

> "We do not suggest * * * that the Due Process Clause imposes no limits on the partisanship of administrative prosecutors. Prosecutors are also public officials; they too must serve the public interest. *Berger v. United States*, 295 U.S. 78, 88 (1935). * * * Moreover, the decision to enforce—or not to enforce—may itself result in significant burdens on a defendant or a statutory beneficiary, even if he is ultimately vindicated in an adjudication. Cf. 2 K. Davis, Administrative Law Treatise 215-256 (2d ed. 1979). A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions."

Id.

In my opinion, the Court in *Jerrico* was making the point that, while the impartiality of judges and prosecutors may take different forms, an FTC Chair who votes to have her agency initiate a matter may not simply act as if she were only a partisan. American Bar Association Model Rules of Professional Conduct, Rule 3.8, Comment 1, offers this often-heard insight about the role of a prosecutor:

> "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons."

A decision to prosecute involves choices of which firms to charge, what charges are appropriate, and how many of an agency's limited resources should be committed to one matter rather than another. That is as true at the FTC as in any prosecutor's office around the country. In my opinion, it is reasonable to conclude that an FTC Chair whose impartiality could reasonably

be questioned by an objective observer must step aside rather than personally participate in those decisions.

Cases prohibiting government agencies from delegating prosecution of enforcement cases to affected private parties help make the point. In *People ex rel. Clancy v. Superior Court*, 705 P.2d 347 (Cal. 1985), a California city passed an ordinance defining stores that principally sell "obscene publications" as a public nuisance. The city declared a local book store such a nuisance and retained a local attorney to go to court to abate it. The attorney's fee would be $60 per hour, but if the city were to lose the case, the fee would drop to $30 per hour.

The court found that having a personal interest in a government victory was "antithetical to the standard of neutrality that an attorney representing the government must meet * * *." *Id.* at 353. It justified the neutrality requirement particularly well, saying:

> "[A] prosecutor's duty of neutrality is born of two fundamental aspects of his employment. First, he is a representative of the sovereign; he must act with the impartiality required of those who govern. Second, he has the vast power of the government available to him' he must refrain from abusing that power by failing to act evenhandedly. These duties are not limited to criminal prosecutors: 'A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.'" (quoting ABA Code of Professional Responsibility, EC 7-14).

Id. at 350. For that reason, the court said, "prosecutors and other government attorneys can be disqualified for having an interest in the case extraneous to their official function." *Id.* at 351.[5]

[5] The most prominent federal case establishing the same principle is *Young v. United States ex rel. Vuitton et fils, S.A.*, 481 U.S. 787 (1987), in which the Supreme Court held that counsel for private parties who had settled a trademark case could not later be appointed as the special prosecutors in an action charging criminal contempt to enforce the injunction they had obtained. Instead, the lawyer must ask the U.S. Attorney to file the contempt action, and if that office appoints someone else the contempt, it must be someone not connected with the underlying matter.

The focus on financial incentives in many cases has led to a series of cases testing whether private counsel compensated by contingent fee are *per se* barred from representing public entities in civil cases. Several of the cases involve qui tam actions under the False Claims Act, 31 U.S.C. § 3730(b), under which a private party may file suit in

Explaining what it means to have "an interest in the case extraneous to [the prosecutor's] official function," the court in *Clancy* cited *People v. Superior Court (Greer)*, 561 P.3d 1164 (Cal. 1977), where the mother of a victim of violent crime was a non-lawyer employee in the office of the prosecutor. The employee was to be a material witness for the prosecution and, if the defendant were convicted, she might gain custody of her grandchild. The prosecutor had no personal financial interest in the case, but the court recognized that a reasonable judge could conclude that the interest of the prosecutor's employee might unduly influence the prosecutor. Constitutional guarantees of a fair trial, the court said

> "would seem better served when judges have discretion to prevent even the possibility of their violation. Individual instances of unfairness, although they may not separately achieve constitutional dimensions, might well cumulate and render the entire proceeding constitutionally invalid. The trial judge need not delay until the last straw of prejudice is added, by which time it might be too late to avert a mistrial or a reversal."

Id. at 1170.

That principle seems to describe Amazon's situation as well. Chair Khan has built a large portion of her professional reputation by articulating her own factual conclusions and legal opinions about Amazon's alleged guilt under the antitrust laws. Amazon will have the legal right to put on a defense, but in the words used by the D.C. Circuit about Chair Dixon: "[A] disinterested observer may conclude that [Chair Khan] has in some measure adjudged the facts as well as the

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the name of the Government and then be awarded a percentage of any sums recovered. That statutory scheme has been upheld in cases such as *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993), in part because the statute lets disinterested Government lawyers take a case over from private counsel. Indeed, government counsel may even dismiss the case if the court approves, *e.g.*, *United States ex rel. Cimznhca, LLC v. UCB, Inc.*, 970 F.3d 835 (7th Cir. 2020). *American Bankers Management Company, Inc. v. Heryford*, 885 F.3d 629 (9th Cir. 2018), extended the qui tam precedents to uphold a contingent fee in a suit to collect civil penalties under the California unfair competition law. In my opinion, such cases have been decided under the particular statutory schemes involved and, in spite of sometimes broad dicta, they do not undercut the principle that disinterested FTC officials must make key investigatory and prosecutorial decisions, not simply the final decisions, in agency matters.

law of a particular case in advance of hearing it," *Cinderella Career and Finishing Schools, Inc. v. Federal Trade Commission*, 425 F.2d 583, 591 (D.C. Cir. 1970). And in the words of 5 C.F.R. § 2635.502(a), "the circumstances would cause a reasonable person with knowledge of the facts to question [her] impartiality in the matter." *Cf.* 28 U.S.C. § 455(a).

Relying on the published statements cited earlier in this Declaration, in my opinion it would be reasonable to conclude that Chair Khan may not ethically participate in FTC antitrust matters involving Amazon and may not supervise FTC investigations into Amazon relating to practices about which Chair Khan has previously opined.

5. Conclusion

I have never met Chair Khan. I have no personal animus toward her; indeed, I have genuine respect for her energy and scholarly output. I presume that she can be expected to use her position as Chair to assess the conduct of most potential FTC respondents in a fair and impartial manner.

Chair Khan is clearly a person with strong opinions about how the U.S. economy should be structured and about industry practices that she believes too readily lead to industry concentration. Nothing in this Declaration is meant to say that an FTC Commissioner is biased merely because she brings her own sense of desirable public policy to the Commission's work. Nor do I believe that having written scholarly articles about subjects a Commissioner or Chair will face should disqualify an academic from service on a regulatory agency. The nation would be denied many fine public servants if that were the applicable standard.

The point of this Declaration is that when a Commissioner is in a position to sit in judgment on, or assume the function of an investigator or prosecutor against, a particular defendant after having built a great deal of her professional reputation asserting conclusions about the guilt of that defendant, in my opinion, it is reasonable to conclude that the Commissioner is required by federal

law and regulations to step aside and permit others who have not yet formed their opinion make those decisions.

In my opinion, it would be appropriate for Chair Khan to announce that she will recuse herself in all cases against Amazon that consider factual issues she purports to have determined in her academic articles, her public advocacy publications, or the Majority Staff Report. If she does not recuse herself voluntarily, in my opinion it would be appropriate for her fellow Commissioners to direct her to do so.

June 29, 2021
Date

Thomas D. Morgan
Thomas D. Morgan

Attachment

Curriculum Vitae
THOMAS D. MORGAN

Personal Data:

Born: February 8, 1942, in Peoria, Illinois

Home Office: 4251 Gulf Shore Blvd. N., Apt. 11D, Naples, FL 34103 (239) 263-7353

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Bar Membership: Illinois, since 1965

Undergraduate Education:

Northwestern University, Evanston, Illinois, 1959-62
B.A. degree, highest distinction Member, Phi Beta Kappa

Legal Education:

University of Chicago Law School, Chicago, Illinois, 1962-65
J.D. degree with honors; Member, Order of the Coif
Comment Editor, Volume 32, University of Chicago Law Review

Professional Experience:

Oppenheim Professor of Antitrust and Trade Regulation Law, George Washington University, 1989-1998; 2000-2013; Emeritus, since 2014

Rex E. Lee Professor of Law, Brigham Young University, 1998-2000

Dean, Emory University School of Law, 1980-85
Distinguished Professor of Law 1985-89

Professor of Law, University of Illinois, 1974-80
Associate Professor, Illinois, 1970-74; Assistant Professor, Illinois, 1966-67

Visiting Professor, Brigham Young University, Fall 1994
Monash University (Australia), Spring 1988
Cornell University, Winter 1974

Special Assistant to Assistant Secretary of Defense, 1969-70
Attorney, Office of Air Force General Counsel, 1967-69

Bigelow Teaching Fellow, University of Chicago Law School, 1965-66

Publications:

A. In the Field of Professional Responsibility

THE VANISHING AMERICAN LAWYER (Oxford University Press 2010)

PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS (Foundation Press 1976); 2nd Edition 1981; 3rd Edition 1984; 4th Edition 1987; 5th Edition 1991; 6th Edition 1995, 7th Edition 2000, 8th Edition 2003, 9th Edition 2006, 10th Edition 2008 (co-authored with R. Rotunda); 11th Edition 2011; 12th Edition 2014, 13th Edition 2018 (co-authored with R. Rotunda and J. Dzienkowski); all with Teachers' Manuals.

SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY (1981-2018), (co-authored with R. Rotunda); (2019 – 2021), published alone.

AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW (THIRD): THE LAW GOVERNING LAWYERS (2000) (with C. Wolfram & J. Leubsdorf)

LAWYER LAW: COMPARING THE ABA MODEL RULES OF PROFESSIONAL CONDUCT WITH THE ALI RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2005)

LEGAL ETHICS (Gilbert Law Summaries) (9th Edition 2017)

"Where Do We Go From Here with Fee Schedules?" 59 A.B.A.J. 1403 (1973)

"The Evolving Concept of Professional Responsibility," 90 Harvard L. Rev. 702 (1977)

"Appropriate Limits on Participation by a Former Agency Official in Matters Before an Agency," 1980 Duke L.J. 1

"Conflicts of Interest and the Former Client in the Model Rules of Professional Conduct," 1980 American Bar Foundation Res. J. 993

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"An Introduction to the Debate over Fee Forfeitures," 36 Emory L. J. 755 (1987)

"Public Financial Disclosure by Federal Officials: A Functional Approach," 3 Georgetown J. Legal Ethics 217 (1989).

"The Quest for Equality in Regulating the Behavior of Government Officials: The Case of Extrajudicial Compensation," 58 George Washington L. Rev. 490 (1990)

"Thinking About Lawyers as Counselors," 42 Florida L. Rev. 439 (1990)

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"Sanctions and Remedies for Attorney Misconduct," 19 S. Illinois U. L. Rev. 343 (1995)

"Legal Representation in a Pluralist Society," 63 George Washington L. Rev. 984 (1995) (co-authored with Robert W. Tuttle)

"American Perspectives on the Duty of Loyalty: Conflicts of Interest and Other Issues of Particular Concern to the International Practitioner," in Mary C. Daly & Roger J. Goebel, Eds., Rights, Liability, and Ethics in International Law Practice (1995)

"Law Faculty as Role Models," in ABA Section of Legal Education, Teaching and Learning Professionalism: Symposium Proceedings (1996)

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"Whose Lawyer Are You Anyway?," 23 William Mitchell L. Rev. 11 (1997)

"Use of the Problem Method for Teaching Legal Ethics," 39 William & Mary L. Rev. 409 (1998)

"Conflicts of Interest and the New Forms of Professional Associations," 39 S. Texas L. Rev. 215 (1998)

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"Interview with Professor Thomas Morgan on Professional Responsibility," 13 Antitrust 4 (Fall 1998).

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"Real World Pressures on Professionalism," 23 U. Ark. (Little Rock) L. J. 409 (2001)

"Practicing Law in the Interests of Justice in the Twenty-First Century," 70 Fordham L. Rev. 1793 (2002)

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"Should the Public Be Able to Buy Stock in Law Firms?" 11 Engage 111 (Sept. 2010).

"Client Representation vs. Case Administration: The ALI Looks at Legal Ethics Issues in Aggregate Settlements," 79 George Washington L. Rev. 734 (2011).

"Realistic Questions About Modern Lawyer Regulation," part of an on-line symposium at http://truthonthemarket.com/2011/09/19/thomas-morgan-on-realistic-questions-about-modern-lawyer-regulation.

"Calling Law a 'Profession' Only Confuses Thinking about the Challenges Lawyers Face," 9 U. St. Thomas L.J. 542 (2011).

"On the Declining Importance of Legal Institutions," 2012 Mich. St. L. Rev. 255.

"The Rise of Institutional Law Practice," 40 Hofstra L. Rev. 1005 (2012).

"*The Lost Lawyer*: An Important Outline of Symptoms, But a Flawed Diagnosis," 2014 J. Professional Lawyer 83.

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"Roger C. Cramton & the Delivery of Legal Services," 103 Cornell L. Rev. 1337 (2018).

B. In the Fields of Economic Regulation and Administrative Law

MODERN ANTITRUST LAW AND ITS ORIGINS: CASES AND MATERIALS (West Publishing Co. 1994; 2nd Ed. 2001; 3rd Ed. 2005; 4th Ed. 2009; 5th Ed. 2014)

ECONOMIC REGULATION OF BUSINESS: CASES AND MATERIALS (West Publishing Co. 1976)

ECONOMIC REGULATION OF BUSINESS: CASES AND MATERIALS (2nd Edition 1985) (co-authored with J. Harrison & P. Verkuil)

REGULATION AND DEREGULATION: CASES AND MATERIALS (West Publishing Co. 1997; 2nd Edition 2004) (co-authored with Harrison and Verkuil)

"The General Accounting Office: One Hope for Congress to Regain Parity of Power with the President," 51 N. Carolina L. Rev. 1279 (1973)

Review of "Inner City Housing and Private Enterprise," 1972 U Ill. L Forum 833 (1973)

"Achieving National Goals Through Federal Contracts: Giving Form to an Unconstrained Administrative Process," 1974 Wisconsin L. Rev. 301

"Toward a Revised Strategy for Ratemaking," 1978 U. Illinois L. Forum 21

"Procedural Impediments to Optimal Rate Making," in W. Sichel, Ed., Public Utility Rate Making in an Energy-Conscious Environment (Westview Press 1979)

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C. In the Field of Legal Education

"Computer-Based Legal Education at the University of Illinois: A Report of Two Years' Experience," 27 J. Legal Education 138 (1975) (with P. Maggs)

"Teaching Students for the 21st Century," 36 J. Legal Education 285 (1986)

"Thinking About Bar Examining: The Challenge of Protecting the Public," 55 Bar Examiner 27 (Nov.1986)

"President's Address", 90-1 AALS Newsletter 1 (Feb. 1990)

"Should We Oppose Ranking of Law Schools?, 90-2 AALS Newsletter 1 (Apr. 1990)

"Legal Education Organizations in Business," 90-3 AALS Newsletter 1 (Aug. 1990)

"The Challenge to Maintain Diversity in Legal Education," 90-4 AALS Newsletter 1 (Nov. 1990)

"A Defense of Legal Education in the 1990s," 48 Wash. & Lee L. Rev. 1 (1991)

"Admission of George Mason to Membership in the Association of American Law Schools," 50 Case Western Reserve L. Rev. 445 (1999)

"Training Law Students For the Future: On Train Wrecks, Leadership and Choices," 6 St. Thomas L. Rev. 297 (2009).

"The Changing Face of Legal Education: Its Impact on What it Means to Be a Lawyer," 45 Akron L. Rev. 811 (2012).

Participation in Public Programs:

A. Endowed Lectures Given

Mellon Lecture, University of Pittsburgh - 1981
Altheimer Lecture, University of Arkansas (Little Rock) - 1987
Dunwody Lecture, University of Florida - 1990
Lane Foundation Lecture, Creighton University - 1990 & 2010
Tucker Lecture, Washington & Lee University - 1990
Pirsig Lecture, Wm. Mitchell Law School - 1996
Van Arsdell Lecture, University of Illinois - 1997
Keck Award Lecture, American Bar Foundation - 2000
Tabor Lecture, Valparaiso University - 2003
Sullivan Lecture, Capital University - 2004
Miller-Becker Lecture, University of Akron - 2011
Lichtenstein Lecture, Hofstra Law School - 2012
Payne Lecture, Mississippi College – 2012
TePoel Lecture, Creighton University -- 2016

B. Representative Programs on Which Served as Speaker or Panelist

Let's Make a Deal (the Ethics of Negotiation) - ABA Conference on Professional Responsibility (Palm Beach) - June 1992

Reporting a Client's Continuing Crime or Fraud - ABA Conference on Professional Responsibility (Chicago) - May 1993

Ethical Issues in Representing Older Clients - Fordham University School of Law (New York) - December 1993

Problem of Representing a Regulated Client, Eleventh Circuit Judicial Conference (Orlando) - May 1994

Ethical Issues in Products Liability Cases - Products Liability Committee of the ABA Litigation Section (Tucson) - February 1995

Ethical Issues Arising in the O.J. Simpson Case - University of Washington School of Law (Seattle) - May 1995

Competition Policy for the New South Africa (Pretoria) - November 1995

Ethical Issues in Representing Children - Fordham University School of Law (New York) - December 1995

Are We a Cartel? The ABA/DOJ Consent Decree - AALS Annual Meeting (San Antonio) - January 1996

Professional Responsibilities of the Law Teacher - AALS (Washington) - July 1996

Ethical Issues for Mediators and Advocates - ABA Annual Meeting (Orlando) - August 1996

Legal Issues in Cyberspace - ABA Annual Meeting (Orlando) - August 1996

Teaching Legal Ethics by the Problem Method - College of William & Mary--Keck Foundation Conference (Williamsburg) - March 1997

Litigators Under Fire: Handling Professional Dilemmas In and Out of Litigation - televised ALI/ABA CLE program (Washington) - April 1997

Conflicts of Interest in the New Forms of Law Practice - South Texas Law School Symposium (Houston) - September 1997

Fiduciary Obligations in Dismissal of a Law Firm Partner - Washington & Lee Law School Symposium (Lexington, VA) - April 1998

Impact of Disciplinary Action on Lawyer's Status as Certified Specialist - ABA Committee on Specialization National Roundtable (Washington) - May 1998

Conflicts of Interest in the Restatement of the Law Governing Lawyers - National Organization of Bar Counsel (Toronto) - July 1998

The Ethics of Teaching Legal Ethics - Association of American Law Schools (Washington) - October 1998

The New Restatement of the Law Governing Lawyers: What Is It & How Does It Affect Your Practice? - Assn of Bar of City of New York (New York) - November 1998

Imputation, Screens & Personal Conflicts - ABA Conference on Professional Responsibility (La Jolla) - June 1999

The Future of Legal Education - Dedication of Sullivan Hall, the new Seattle University Law Building (Seattle) - October 1999

Legal Ethics in the New Millennium - J. Reuben Clark Soc. (Dallas) - November 1999

Unauthorized Practice of Law and Ethical Risks to Lawyers from Multistate Practice - ALAS Telephone Seminar (Chicago) - December 1999

Ethics 2000: Rewriting the Standards for Lawyer Conduct - American Intellectual Property Law Association (La Quinta, CA) - January 2000

Real World Pressures on Professionalism - University of Arkansas at Little Rock Law School (Little Rock, AR) - February 2000

Professional Responsibility Issues Arising Out of Electronic Commerce - ABA Section of Public Contract Law (Annapolis, MD) - March 2000

Multidisciplinary Practice: Curse, Cure or Tempest in a Teapot - American Intellectual Property Law Association (Pittsburgh, PA) - May 2000

Ethics 2000: Proposed Changes in the Law Governing Lawyers - Conference of Chief Justices (Rapid City, SD) - July 2000

Attorney Standards in Federal Courts and Developments in the Multidisciplinary Practice Controversy - Conference of Chief Justices (Baltimore) - January 2001

Multijurisdictional Practice - Turner Seminar (Memphis) - February 2001

Ethical Issues in Large Firms – Ass'n of Legal Administrators (Baltimore) - May 2001

Law Firm Ancillary Services - ALAS Annual Meeting (Bermuda) - June 2001

New Rule 1.6 on Disclosure of Confidential Client Information - ABA Civil Justice Roundtable (Washington) - March 2002

Ethics for Corporate In-House Counsel - American College of Investment Counsel (Chicago) - April 2002

Treading Water: A Young Lawyer's Guide to Ethics in Varying Practice Environments - ABA Tax Section Young Lawyers Committee (Washington) - May 2002

Shifting Ethical Sands: Ethics 2000 and Beyond - Federal Communications Bar Ass=n (Washington) - June 2002

Multijurisdictional Practice - ABA Forum on Franchising (Phoenix) - October 2002

The Sarbanes-Oxley Act of 2002 and the ABA Task Force on Corporate Responsibility Report (ALAS Telephone Seminar) - October 2002

At the Bar and in the Boardroom: The Ethics of Corporate Lawyering - Federalist Society (Washington) - Nov. 2002

Law Firm Risk Management: Post-Enron Challenges - Hildebrandt Conference (New York) - Nov. 2002

Future Regulation of Securities Lawyers - ABA Section of Business Law, Committee on Federal Securities Regulation (Washington) - Nov. 2002

What Lawyers Need to Know to Comply with the New SEC Professional Conduct Rules - ABA Section of Business Law Televised Forum (Washington) - Feb 2003

Ethics in Representing Organizational Clients After Sarbanes-Oxley - ABA Section of Business Law Spring Meeting (Los Angeles) - April 2003

Corruption in the Executive Suite: The Nation Responds - National Teleconference from ABA Public Utility Section Spring Meeting (Washington) - April 2003

Sarbanes-Oxley Revolution in Disclosure and Corporate Governance: Complying with the New Requirements - ABA National Institute (Washington) - May 2003

Client Confidentiality, Corporate Representation and Sarbanes-Oxley - ABA National Conference on Professional Responsibility (Chicago) - May 2003

Friend or Foe: The Restatement of Law Governing Lawyers - ABA National Legal Malpractice Conference (La Jolla) - September 2003

Where Were the Lawyers in Enron? - Cato Institute (Washington) - October 2003

Testified before the House Subcommittee on Capital Markets' Hearing on the Role of Attorneys in Corporate Governance (Washington) - February 2004

The Lawyer-Lobbyist "on the Frontier": What Legal and Ethical Rules Apply? - ABA Mid-Year Meeting (San Antonio) - February 2004

The Client(s) of a Corporate Lawyer - Capital U. Law School (Columbus) - March 2004

Ethical Issues Facing Public Interest Law Firms - Heritage Foundation (Washington) - October 2004

Drafting an Ethical Code for a Diverse Legal Profession - Univ. of Memphis Law School (Memphis) - October 2004

Ethical Issues in International Trade Cases - International Trade Trial Lawyers Association (Washington) - November 2004

Professional Regulation of Business Lawyers Isn't Going to Get Any Easier - ABA Section of Business Law (Washington) - November 2004

Problems for Corporate Lawyers in Complying with the Sarbanes-Oxley Act - New Jersey Corporate Counsel Association (Livingston, NJ) - January 2005

Avoiding Conflicts in Business Law Practice: Seven Deadly Sins - ABA Section of Business Law (Nashville) - April 2005

Fireside Chat on Legal and Accounting Ethics - SEC Historical Society (Washington) - November 2005

When Good Clients Go Bad - ALAS Annual Meeting (Toronto) - June 2006

Lawyers Face the Future - St. Thomas Univ. Law School (Minneapolis) - August 2006

Regulating Corporate Morality - George Washington Corporate & Business Law Society (Washington) - September 2006

Comments on Noisy Withdrawal - Case Law School Leet Symposium (Cleveland) - October 2006

The ABA Role in Law School Accreditation - Federalist Society Lawyers' Convention (Washington) - November 2006

Investigative Techniques: Legal, Ethical and Other Limits - ABA Section of Antitrust Law (National) - December 2006

Ethics Issues in Corporate Internal Investigations - Georgia Bar (Atlanta) - March 2007

Are Regulatory Lawyers' Ethical Obligations Changing? - ABA Section of Public Utility Law (Washington) - April 2007

Antitrust Litigation Ethics From Soup to Nuts - ABA Section of Antitrust Law (Washington) - April 2007

How to Survive in Today's Competitive Environment and Comply With the Rules of Professional Conduct - Wisconsin State Bar (Milwaukee) - May 2007

Audit Response Letters: Will There Be Peace Under the Treaty? - ABA National Conference on Professional Responsibility (Chicago) - May 2007

The Buried Bodies Case: Alive and Well After Thirty Years - ABA National Conference on Professional Responsibility (Chicago) - May 2007

Organization and Discipline for an Independent Legal Profession - Visit of Leaders of the Iraqi and Kurdistan Bar Associations (Washington) - November 2007

Feeling Conflicted? The Experts Opine and Prescribe - Tennessee Bar Foundation (Nashville) - January 2008

Ethics Issues in Qui Tam Litigation - ABA National Institute on Civil False Claims (Washington) - June 2008.

Ethics and the Lawyer-Lobbyist - ABA Administrative Law Conference (Washington) - October 2008

Ethics in the Early Going - ABA Tort & Insurance Practice Section, Aviation & Space Law Committee Litigation National Program (Washington) - October 2008

Professional Malpractice in a World of Amateurs - St. Mary's Law School Symposium on Legal Malpractice (San Antonio) - February 2009

The World Economic Crisis and the Legal Profession - Order of Advocates of Brazil (Brazilian counterpart of the ABA) - (Rio de Janeiro) - May 2009

Principles of United States Antitrust Law - Commissioners and Staff of the CADE (Brazilian counterpart of the FTC) - (Brazilia) - May 2009

The World Economic Crisis, Antitrust Law and the Lawyer - Institute of Advocates of Brazil (Brazilian counterpart of the ALI) - (Rio de Janeiro) - May 2009

The World Economic Crisis and Antitrust Law - American Chamber of Commerce - (Bela Horizonte, Brazil) - May 2009

Antitrust Law: The Real U.S. Policies - Seminar celebrating the retirement of Prof. Joao Bosco Leopoldino da Fonseca of the Federal University of Minas Gerais (Bela Horizonte) - May 2009

Where Does It End? Duties to Former Clients - American Bar Association Center for Professional Responsibility (Chicago) - May 2009

The Last Days of the American Lawyer - Creighton Law School (Omaha) - Oct. 2009

Ethics Challenges for National Security Lawyers In and Out of Government - ABA Standing Committee on Law and National Security (Washington) - Nov. 2009

The Transformative Effect of International Initiatives on Lawyer Practice and Regulation: The Financial Action Task Force Guidelines - Association of American Law Schools Annual Meeting (New Orleans) - Jan. 2010

Client Representation vs. Case Administration: The ALI Looks at Legal Ethics Issues in Aggregate Settlements - Humphreys Complex Litigation Center Conference on Aggregate Litigation: Critical Perspectives (Washington) - March 2010

Abandoning Homogeneity in Legal Education - Georgetown Center for Study of the Legal Profession Program on Law Firm Evolution: Brave New World or Business as Usual? (Washington) - March 2010

Ethics Issues in Housing - ABA Forum on Affordable Housing (Washington) - May 2010

The Vanishing American Lawyer - Conference on Regulating and Deregulating Lawyers - Institute for Advanced Legal Studies (London) - June 2010

The Vanishing American Lawyer - Federalist Society Podcast - Sept. 2010.

Developments in Ethics 2010 - ABA Teleconference - Jan. 2011

A Transforming Legal Profession: The Challenges for Bar Associations - National Conference of Bar Presidents (Atlanta) - Feb. 2011

A Transforming Profession: The Challenges for Lawyers Starting Out - ABA Law Student Division (Washington) - Feb. 2011

A Transforming Profession: A Look Back Forty Years and the Challenges Ahead - Alabama Bar Annual Meeting (Point Clear) - July 2011
Florida Bar Board of Governors (Palm Beach) - July 2011

On the Declining Importance of Legal Institutions - Conference at Michigan State Law School (East Lansing) - Sept. 2011

Calling Law a Profession Only Confuses Thinking About Challenges Lawyers Face - Conference at University of St. Thomas Law School (Minneapolis) - Sept. 2011

The Changing Face of Legal Education: Its Impact on What It Means to be a Lawyer - Miller-Becker Lecture at University of Akron Law School (Akron) - Oct. 2011

Law School Accreditation - Federalist Society (Washington) - Nov. 2011

Aggregate Litigation: Don't Let Your End Game Blow-Up - ALM Litigation Summit (Washington) - Nov. 2011

So Someone Objects to Your New Client - ABA Administrative Law & Regulatory Practice Section Fall Conference (Washington) - Nov. 2011

Ethical Dilemmas Facing Lawyers Practicing National Security Law - ABA Standing Committee on Law and National Security (Washington) - Dec. 2011

Needed Law Schools' Response to Changes in the Legal Profession - AALS Annual Meeting (Washington) - Jan. 2012

The Rise of Institutional Law Practice - Lichtenstein Lecture at Hofstra Law School (Hempstead, NY) - Feb. 2012

Blazing New Pathways Through the Legal World - Washington Area Legal Recruitment Administrators Association (Washington) - Mar. 2012

Ethics in Privacy and Social Media - ABA Antitrust Section (Washington) - Mar. 2012

Ethical Issues in Alternative Litigation Funding – Humphries Center at GW Law (Washington) – May 2012

The Vanishing American Lawyer: The Road Ahead - Utah Bar (Sun Valley, ID) - July 2012

The Vanishing American Lawyer: The Changing Legal Profession -- Federal Bar Ass'n (Memphis, TN) -- Oct. 2012

The Professional World Facing New American Lawyers – 2012 Georgia Convocation on Professionalism (Atlanta) -- Nov. 2012

Testimony -- ABA Task Force on the Future of Legal Education (Dallas) - Feb. 2013

Public Ownership of Stock in Law Firms -- Federalist Society Teleforum - Apr. 2013

The ABA's 2012 Changes in Ethics Rules -- ABA Antitrust Section Spring Meeting (Washington) -- Apr. 2013

Proposals for Training Required for Bar Admission – AALS Annual Meeting (New York) – Jan. 2014

Law Professors of the Future: A New Balance of Teaching, Scholarship and Service? – AALS Annual Meeting (New York) – Jan. 2014

Are Lawyers Vanishing? – Transport. Lawyers' Ass'n (St. Petersburg, FL) – May 2014

Higher Education: Run for the Benefit of Students, Faculty or Administrators? -- Federalist Society (Washington) – Nov. 2014

The Challenge of Writing Rules to Regulate Lawyer Conduct – Creighton Law School Symposium on the Kutak Commission – March 2016

Inverted Thinking About Law as a Profession or Business – International Legal Ethics Conference VII – Fordham Law School – July 2016

Who Wants To Be An Ethics Millionaire? – ABA Antitrust Law Section Spring Meeting (Washington) – March 2017

Ethical Issues for Antitrust Lawyers – ABA Antitrust Law Section Spring Meeting (Washington) – April 2018

Ronald D. Rotunda Memorial Lecture – Federalist Society Podcast – March 2019

Duty to Whom? Ethics Dilemmas Confronted by Government Lawyers – American Law Institute Annual Meeting (Washington) – May 2019

Covid-19 and Coming Changes in Lawyer Regulation – Georgetown Roundtable for Law Firm Counsel (virtual) – June 2020

Lawyer Discipline and Executive Branch Lawyers – Cardozo Law School (virtual) – Oct. 2020

Major Civic and Professional Activities:

A. In the Field of Professional Responsibility

Associate Reporter, American Law Institute Restatement of the Law (Third), The Law Governing Lawyers, 1986-2000

Associate Reporter, American Bar Association Ethics 2000 Commission, 1998-99

Reporter, American Bar Association Commission on Professionalism, 1985-86
Adviser, American Law Institute Principles of the Law, Government Ethics, since 2009.

Member, Advisory Board, ABA/BNA Lawyers' Manual on Professional Conduct, since 1984; Chair 1986-87 & 1992-93

Member, Advisory Council, Project on a Digital Archive of the Birth of the Dot Com Era: The Brobeck Papers, Library of Congress and Univ. of Maryland, 2005-2009

Chair, Federalist Society Practice Group on Professional Responsibility and Legal Education 2005-2007; Member since 2001

Member, Drafting Committee, Multistate Professional Responsibility Examination, National Conference of Bar Examiners, 1986-89

Member, Committee on Professional Ethics, Illinois State Bar Association, 1974-1980; Vice Chair 1979-80

B. In the Fields of Economic Regulation and Administrative Law

Vice Chair, ABA Section of Administrative Law & Regulatory Practice, 2001-2002; Council Member, 1983-86

Consultant, Administrative Conference of the U.S., 1975-1979 & 1985-1989

Chair, Section on Law and Economics, Ass'n of American Law Schools, 1979-1980

C. In the Field of Legal Education

President, Association of American Law Schools, 1990

Member, AALS Executive Committee, 1986-1991

Chair, AALS Special Committee on ABA Accreditation Standards, 2010

Chair, AALS Nominating Committee for President-Elect and Members of the Executive Committee, 2010 (Member 2008 & 2011)

AALS Delegate to the ABA House of Delegates, 2011-2013

Chair, AALS Long Range Planning Committee, 1988-1989

Member, Planning Committee for Workshop on Tomorrow's Law Schools: Economics, Governance and Justice, 2013

Member, AALS Special Committee on Faculty Recruitment Practices, 2005-2007

Member, AALS Committee on the Ethical and Professional Responsibilities of Law Professors, 1988-1989

Special Honors Received:

Illinois State Bar Foundation, Honorary Fellow (1988) (for contributions to study of lawyer professionalism)

American Bar Foundation, Keck Foundation Award (2000) (for distinguished scholarship in legal ethics and professional responsibility)

New York State Bar Association, Sanford D. Levy Professional Ethics Award (2008) (for lifetime contributions to legal ethics scholarship)

Legal Consulting:

Testified in twenty-seven contested trials or hearings involving issues such as lawyer discipline, disqualification, right to fees and malpractice.

Gave depositions in thirty cases resolved prior to trial.

Submitted declarations or affidavits in forty-three other cases, typically in connection with motions for summary judgment, disciplinary investigations or motions to disqualify.

Organization Memberships:

American Bar Association
American Law Institute (Life Member)
American Bar Foundation (Life Fellow)
Illinois State Bar Association
Illinois Bar Foundation (Honorary Fellow)
ABA Center for Professional Responsibility
Association of Professional Responsibility Lawyers
The Federalist Society

Current as of June 2021