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# Judicial Discipline and the Appearance of Impropriety: What the Public Sees Is What the Judge Gets

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**Article**

**Judicial Discipline and the Appearance of  
Impropriety: What the Public Sees Is What  
the Judge Gets**

**Raymond J. McKoski<sup>†</sup>**

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## INTRODUCTION

In the *Allegory of the Cave*,<sup>1</sup> Plato describes a group of people imprisoned in a cavern. The prisoners are bound by the neck and legs in such a manner that they can only see the wall in front of them. Their view of the world is limited to the shadows projected on the wall by objects travelling past the cave entrance. Captives since birth, the residents have never directly observed the true form of the items casting the shadows. Thus, appearances, not substance, govern their lives. Judgments made in this distorted, two-dimensional world would have no basis in fact. Only those adventurous enough to leave the safety and security of their virtual world will come to discern the difference between reality and illusion.

This is not to minimize the importance of appearances. Even outside the cave, appearance and perception often triumph over substance and reality. Wise public officials learn this lesson early in their career. Abraham Lincoln, for example, knew that in order to maintain credibility in his personal and political life he “must not only be chaste but above suspicion.”<sup>2</sup> Recognizing that a “universal feeling, whether or not ill-founded, cannot be safely disregarded,”<sup>3</sup> President Lincoln declined an invitation to discuss a prisoner exchange with the Confederacy fearing that the meeting would compromise the Union’s war effort by giving the appearance of a peace negotiation.<sup>4</sup> Less astute leaders learn that perception trumps substance the hard way. After losing the first-ever televised presidential debate because of his less-than-photogenic appearance (especially compared to the adroitly coffered, tanned John Kennedy), Richard Nixon candidly admitted that in preparing for the debate he should have spent more time on appearances and less on substance.<sup>5</sup>

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1. PLATO, THE REPUBLIC 253–61 (Benjamin Jowett trans., Vintage Books 1991).

2. Letter from Abraham Lincoln to William B. Warren and Others (Apr. 7, 1849), in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 41, 41 (Roy P. Basler ed., 1953) [hereinafter COLLECTED WORKS] (“In relation to these pledges, I must not only be chaste but above suspicion.”); see also Abraham Lincoln, Remarks to a Pennsylvania Delegation (Jan. 24, 1861), in 4 COLLECTED WORKS 179, 180 (“Any man whom I may appoint to such a [Cabinet] position, must be, as far as possible, like Caesar’s wife, pure and above suspicion . . .”).

3. President Abraham Lincoln, Speech at Peoria, Illinois (Oct. 16, 1854), in 2 COLLECTED WORKS 247, 256.

4. See DAVID HERBERT DONALD, LINCOLN 175, 456 (1995).

5. See RICHARD M. NIXON, SIX CRISES 340 (1962) (“I recognized the basic

Judges, like other public officials, have long been affected by appearances. Future Supreme Court Justice David Davis, while serving as a circuit judge in mid-nineteenth century Illinois, made sure that everyone except the clerk and sheriff left the courtroom before he presided over matters in which he was a party.<sup>6</sup> The failure of Justice Abe Fortas to recognize the importance of appearances resulted in his forced resignation from the United States Supreme Court.<sup>7</sup> Similarly, Judge Clement Haynsworth's inattention to public perceptions thwarted his appointment to the high Court.<sup>8</sup> Both Fortas and Haynsworth learned too late that "[i]n matters of ethics, appearance and reality often converge as one."<sup>9</sup>

Presidents, judges, and other public officials are not the only ones who are prudent to avoid bad appearances. Saint Paul advised the Thessalonians to "[a]bstain from the appearance of evil."<sup>10</sup> Caesar held his wife to a "beyond reproach"<sup>11</sup> standard, and the Idaho Supreme Court cautioned husbands and wives that they must "conduct themselves that each may be above suspicion from the other."<sup>12</sup> Doctors,<sup>13</sup> teachers,<sup>14</sup> sports fig-

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mistake I had made. I had concentrated too much on substance and not enough on appearance.").

6. See HENRY CLAY WHITNEY, *LIFE ON THE CIRCUIT WITH LINCOLN* 81–82 (1940) (describing how Judge Davis would enter default judgments against defendants he had sued). Of course, even in Davis's time it was improper for a judge to preside over a matter in which the judge was a party. See *Trs. of Ill. & Mich. Canal v. Brainard*, 12 Ill. 487, 516 (1851) (Caton, J., dissenting) ("[A] law which makes a man a judge in his own case, is abhorrent to the first principles of natural justice . . ."); THE FEDERALIST NO. 10, at 47 (James Madison) (Clinton Rossiter ed., 1961) ("No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.").

7. See discussion *infra* Part I.C.1.

8. See discussion *infra* Part I.C.2.

9. *Liteky v. United States*, 510 U.S. 540, 565 (1994) (Kennedy, J., concurring).

10. 1 *Thessalonians* 5:22 (King James).

11. *Gesoff v. IIC Indus., Inc.*, 902 A.2d 1130, 1146 n.101 (Del. Ch. 2006) ("[W]hen Julius Caesar was asked why he chose to divorce his wife after a false accusation of adultery, Caesar's laconic answer is said to have been that 'Caesar's wife must be above suspicion,' or as it is usually rendered, 'Caesar's wife must be above reproach.'" (citing PLUTARCH, *PLUTARCH'S LIVES* 206 (Arthur Hugh Clough ed., John Dryden trans., 1963))).

12. *Spofford v. Spofford*, 108 P. 1054, 1055 (Idaho 1910).

13. See Peter Benesh, *GAO Report Might Stir More Changes in Drug Ads*, INVESTOR'S BUS. DAILY, Jan. 8, 2007, at A8 (reporting that some clinics, hospitals, and doctors avoid the appearance of impropriety by refusing "perks" from pharmaceutical companies).

ures,<sup>15</sup> journalists,<sup>16</sup> television performers,<sup>17</sup> law school officials,<sup>18</sup> and professional wrestlers<sup>19</sup> are often judged by the public under an appearance of impropriety standard. Judges, however, are not only liable to suffer popular disfavor for failing to avoid improper appearances, but are also subject to discipline for creating a perception of wrongdoing even where no actual misconduct occurs. Although it has been suggested that “[o]nly mothers are divinely capable of judiciously using the appearance of impropriety to judge someone” and that “[m]ere mortals should stick to facts,”<sup>20</sup> punishing judges for appearing to violate an ethical rule began with the first American Bar As-

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14. See Laura Diamond & Carroll Rogers, *Doctor Bolsters Flowe's Account*, ATLANTA J.-CONST., May 20, 2006, at D5 (“Teachers and school administrators should avoid even the appearance of impropriety . . .”).

15. See James Allen, *Ex-Pats Star Suspended*, TIMES UNION, Apr. 26, 2008, <http://www.timesunion.com/ASPStories/Story.asp?newsdate=12/24/2009&navigation=nextprior&category=SPORTS&storyID=683958> (reporting the suspension of a college basketball player for creating an appearance of impropriety by having another student complete part of his course work); Andy Staples, *SEC May Discuss Background Checks*, TAMPA TRIB., July 26, 2007, <http://www2.tbo.com/content/2007/jul/26/sp-sec-may-discuss-backgroundchecks/> (“[T]o eliminate the appearance of impropriety, officials [of sporting events] aren’t allowed to work games involving their alma maters or their former coaches.”); Jim Thomas, *This Season Down to the Joy of Six*, DAILY NEWS L.A., Nov. 14, 2007, at C4, available at 2007 WLNR 22764222 (“The appearance of impropriety should be avoided as much as possible, especially in a sport as wildly emotional as college football can be.”).

16. See Robert D. Richards, Editorial, *For Wine Reviewers, Freebies and Ethics Go Nose to Nose*, SACRAMENTO BEE, Feb. 9, 2004, at B5, available at 2004 WLNR 20783700 (“Journalists early in their careers learn the importance of remaining neutral, removing conflicts of interest and avoiding even the appearance of impropriety.”); Anthony Violanti, *Sound Ethics Make for Good Journalism*, BUFFALO NEWS, Jan. 31, 2003, at C4, available at 2003 WLNR 2185765 (“Journalists must recognize that they must avoid the appearance of impropriety.”).

17. See Richard Rushfield, *‘Idol’ Singer Disqualified*, L.A. TIMES, Feb. 13, 2009, at E2 (reporting that a performer was removed from the list of finalists in a talent competition in order to avoid the appearance of impropriety).

18. See STATE OF ILL. ADMISSION REVIEW COMM., REPORT & RECOMMENDATIONS 1, 30 (2009), available at <http://www2.illinois.gov/admissionsreview/Documents/FinalReport.pdf> (holding University of Illinois College of Law officials to an appearance of impropriety standard).

19. See Steve Anderson, Feature: Steve Anderson’s End of the Week Ramblings (Sept. 19, 2008), <http://wwe-news.hackd.org/7978-a-Feature-Steve-Andersons-End-of-the-Week-Ramblings.html> (criticizing professional wrestler, Jeff Hardy, for creating an “appearance of impropriety” by attempting to board an airplane while seemingly intoxicated).

20. Jim Crawford, Letter to the Editor, *Alaskans Shouldn’t Get Snookered When Considering Young, Stevens*, ANCHORAGE DAILY NEWS, Sept. 9, 2007, at H3.

sociation (ABA) model code of judicial ethics enacted in 1924.<sup>21</sup> The ABA reaffirmed the disciplinary rule in its most recent Model Code of Judicial Conduct: “A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, *and shall avoid impropriety and the appearance of impropriety.*”<sup>22</sup>

No one questions the utility of the appearance of impropriety standard when employed as an aspirational guide. The reputation of a judge and the judiciary as a whole is enhanced by circumspect conduct on and off the bench. The divisive issue within the judicial ethics community is whether a violation of the standard is sufficient to form an independent basis for disciplining a judge. Some hail the use of the appearance of impropriety for disciplinary purposes as the only effective means to maintain public confidence in the judicial system.<sup>23</sup> Others characterize the rule as “unbelievably ambiguous”<sup>24</sup> and “susceptible to great abuse and thus potentially dangerous to judicial legitimacy.”<sup>25</sup>

This Article examines the disciplinary use of the appearance of impropriety standard from a theoretical and practical standpoint. Part I begins with a review of the events which convinced the ABA to enact the 1924 Canons of Judicial Ethics (1924 Canons) and to marquee the appearance of impropriety as the cornerstone of the first judicial code. Part I then continues by tracing the refinement of the appearance standard through successor ABA Codes, including the 1972 Code of Judicial Conduct (1972 Code), the 1990 Model Code of Judicial Con-

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21. See CANONS OF JUDICIAL ETHICS (1924).

22. MODEL CODE OF JUDICIAL CONDUCT R. 1.2 (2007) (emphasis added).

23. For a comprehensive argument in support of the appearance of impropriety standard, see Cynthia Gray, *Avoiding the Appearance of Impropriety: With Great Power Comes Great Responsibility*, 28 U. ARK. LITTLE ROCK L. REV. 63 (2005); see also Nancy J. Moore, *Is the Appearance of Impropriety an Appropriate Standard for Disciplining Judges in the Twenty-First Century?*, 41 LOY. U. CHI. L.J. 285, 295–300 (2010) (arguing in favor of maintaining the appearance of impropriety prohibition as a disciplinary standard).

24. *Nonjudicial Activities of Supreme Court Justices and Other Federal Judges: Hearings on S. 1097 and S. 2109 Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 91st Cong. 175 (1969) (statement of Justice Tom C. Clark, U.S. Supreme Court, retired); see also Robert Post & Reva Siegel, *Questioning Justice: Law and Politics in Judicial Confirmation Hearings*, 115 YALE L.J. POCKET PART 38, 47 (2006), [http://www.law.yale.edu/documents/pdf/Faculty/Siegel\\_Questioning\\_Justice.pdf](http://www.law.yale.edu/documents/pdf/Faculty/Siegel_Questioning_Justice.pdf) (“The idea of an ‘appearance of impropriety’ is inherently vague . . .”).

25. Gregory C. Pingree, *Where Lies the Emperor’s Robe? An Inquiry into the Problem of Judicial Legitimacy*, 86 OR. L. REV. 1095, 1128 (2007).

duct (1990 Code), and the 2007 Model Code of Judicial Conduct (2007 Code). Part II critically reviews the most debated aspect of the appearance prohibition—whether the admittedly imprecise rule can withstand a void-for-vagueness challenge. A cost-benefit analysis is conducted in Part III, weighing the purported advantages against the chilling effect of a disciplinary system based on perceptions. Suggested solutions to the problems inherent in any disciplinary system which treats virtual reality the same as reality are presented in Part IV and include (1) jettisoning the use of the appearance of impropriety standard for disciplinary purposes, (2) replacing the vague test with rules specifically defining prohibited acts, and (3) placing a limiting construction on the term “appearance of impropriety” thereby supplying sufficient specificity to permit the ambiguous standard to survive a due process challenge. The Article concludes by acknowledging the painfully obvious—the appearance of impropriety standard is not really a standard at all; it only appears to be a standard.

#### I. DEVELOPMENT OF THE APPEARANCE OF IMPROPRIETY STANDARD

Saint Paul’s appeal to the Thessalonians to “[a]bstain from the appearance of evil”<sup>26</sup> served as the precursor to the modern ethical mandate that judges must avoid any behavior which, in fact or perception, reflects adversely on the judge or judiciary. Citing Paul,<sup>27</sup> early courts announced that “[t]o keep the fountain of justice pure and above reproach, the very appearance of evil should be avoided”<sup>28</sup> by jurors,<sup>29</sup> lawyers,<sup>30</sup> litigants,<sup>31</sup> wit-

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26. 1 *Thessalonians* 5:22 (King James).

27. See, e.g., *In re Harriss*, 4 N.E.2d 387, 388 (Ill. 1936) (“[The 1924 Canons] were all succinctly summed up by St. Paul centuries ago when he advised the Thessalonians to abstain from all appearance of evil.”); *Gantt v. Brown*, 134 S.W. 571, 571 (Mo. 1911) (“[Y]et we can with profit heed Paul’s admonition: Abstain from all appearance of evil.”).

28. *Eastham v. Holt*, 27 S.E. 883, 894 (W. Va. 1897); see also *State ex rel. Attorney Gen. v. Lazarus*, 1 So. 361, 376 (La. 1887) (“All those who minister in the temple of justice . . . should be above reproach and suspicion. None should serve at its altar whose conduct is at variance with his obligations.”).

29. See *Bonnett v. Glatfeldt*, 11 N.E. 250, 253–54 (Ill. 1887) (suggesting that a juror created an appearance of evil by accepting a ride home from the plaintiff); *Ayrhart v. Wilhelmy*, 112 N.W. 782, 783 (Iowa 1907) (“[Jurors] should be careful not only to avoid actual impropriety, but to keep themselves clear of the very appearance of evil . . . .”); *Bradbury v. Cony*, 62 Me. 223, 225 (1873) (“In the trial of a cause the appearance of evil should be as much avoided as evil itself. It is important that jurymen . . . should be free from the suspicion of prejudice.”).



nesses,<sup>32</sup> and judges.<sup>33</sup> Thus, it was no surprise that after substituting the secular term “impropriety” for the theological reference to “evil,” Paul’s exhortation became part of the ABA’s first Canons of Judicial Ethics. But it would take the actions of someone less saintly<sup>34</sup> than Paul to convince the ABA that the time had arrived not only to impose an appearance standard on judges, but to make appearances the centerpiece of the rules governing judicial conduct.

#### A. JUDGE KENESAW MOUNTAIN LANDIS AND THE 1924 CANONS OF JUDICIAL ETHICS

The 1924 Canons repeatedly reminded judges to avoid the appearance of impropriety in all professional and personal activities.<sup>35</sup> This preoccupation with the need to avoid even the suspicion of improper conduct is explained by the nature of the force that compelled the enactment of the first ABA model judicial code. That force was the hard-hitting, no-nonsense, call-them-as-you-see-them federal district court judge, Kenesaw Mountain Landis.<sup>36</sup> Judge Landis was appointed the first com-

30. See *In re Duncan*, 42 S.E. 433, 441 (S.C. 1902) (warning young lawyers to avoid the appearance of evil); see also ABA Comm. on Prof’l Ethics, Formal Op. 49 (1931) (“If the [legal] profession is to occupy that position in public esteem which will enable it to be of the greatest usefulness, it must avoid not only all evil but must likewise avoid the appearance of evil.”).

31. See *Omaha Fair & Exposition Ass’n v. Mo. Pac. R. Co.*, 60 N.W. 330, 332 (Neb. 1894) (“[P]arties, counsel, witnesses, and all other persons should be extremely careful to avoid evil, and the appearance of evil . . .”).

32. See *id.*

33. See *In re Davis*, 15 Haw. 377, 390 (1904) (Galbraith, J., dissenting) (“The law carefully guards not only against actual abuse, but even against the appearance of evil, from which doubt can justly be cast upon the impartiality of judges . . .” (citing *In re Dodge & Stevenson Mfg. Co.*, 77 N.Y. 101, 110 (1879))); *Dorlon v. Lewis*, 9 How. Pr. 1, 1 (N.Y. Sup. Ct. 1851) (“A referee . . . should not only avoid all improper influences, but even ‘the appearance of evil.’”).

34. See James Kirby, *The Year They Fixed the World Series*, A.B.A. J., Feb. 1988, at 65, 69 (“[Judge] Landis is widely regarded as a savior [of baseball]—though not a saint . . .”); see also discussion *infra* Part I.A.

35. See *infra* Part I.B (discussing the provisions of the 1924 Canons).

36. Judge Landis was named after Kennesaw Mountain near Atlanta, Georgia, where his father was wounded during the Civil War. Landis the “Big Umpire”: *Judge Accepts Baseball Job; Stays on Bench*, CHI. DAILY TRIB., Nov. 13, 1920, at 1. The judge’s headline-grabbing exploits while on the federal bench are well documented. See, e.g., Mitchell Nathanson, *The Sovereign Nation of Baseball: Why Federal Law Does Not Apply to “America’s Game” and How it Got That Way*, 16 VILL. SPORTS & ENT. L.J. 49, 68 (2009) (noting Landis’s then-record-setting fine of over \$29,000,000 against Standard Oil for antitrust violations, his attempt to exercise jurisdiction over Kaiser Wilhelm I,

missioner of major league baseball in November 1920,<sup>37</sup> in order to combat gambling and bribery influences that many thought were corrupting the national pastime.<sup>38</sup> The Commissioner's job was simple: to use whatever means necessary "to bring to book anyone connected with baseball in any capacity, from 'magnate' to bat boy, who is suspected of conduct or associations detrimental to the best interests of the sport."<sup>39</sup> In other words, Judge Landis was to "keep the sport above reproach."<sup>40</sup> In restoring the public's faith in baseball's integrity, "Landis planned on eliminating not only evil, but also the appearance of evil from the game."<sup>41</sup> The judge put his plan into action by barring for life the eight Chicago White Sox team members accused of fixing the 1919 World Series, notwithstanding the fact that each had been previously acquitted of the underlying criminal charges.<sup>42</sup>

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and his overall reputation as a "hanging judge").

37. See DAVID PIETRUSZA, *JUDGE AND JURY: THE LIFE AND TIMES OF JUDGE KENESAW MOUNTAIN LANDIS* 169–72 (1998) (describing the meeting with baseball club owners in which Landis accepted the commissionership); J. G. TAYLOR SPINK, *JUDGE LANDIS AND TWENTY-FIVE YEARS OF BASEBALL* 71–73 (1974).

38. See ELIOT ASINOF, *EIGHT MEN OUT: THE BLACK SOX AND THE 1919 WORLD SERIES* 13–15, 197–200 (1963); G. EDWARD WHITE, *CREATING THE NATIONAL PASTIME: BASEBALL TRANSFORMS ITSELF 1903–1953*, at 85–92 (1996) (describing the connection between gambling and player corruption in the early twentieth century); FRAN ZIMNIUCH, *CROOKED: A HISTORY OF CHEATING IN SPORTS* 19–20 (2009) (describing baseball bribery scandals in the late nineteenth century).

39. I.E. Sanborn, *Major Operation on B.B. Fabric to Restore Game*, *CHI. DAILY TRIB.*, Dec. 8, 1920, at 23.

40. SPINK, *supra* note 37, at 76 (quoting *SPORTING NEWS*, Jan. 20, 1921); see also WHITE, *supra* note 38, at 110 ("During his twenty-three years as commissioner Landis consistently attempted to keep baseball 'above reproach' . . ."); Daniel A. Nathan, *The Big Fix: Arnold Rothstein Rigged the 1919 World Series. Or Did He?*, *LEGAL AFF.*, Mar.–Apr. 2004, [http://www.legalaffairs.org/issues/March-April-2004/review\\_nathan\\_marapr04.msp](http://www.legalaffairs.org/issues/March-April-2004/review_nathan_marapr04.msp) ("Landis . . . was hired . . . to lend the game moral authority, stability, and the appearance of integrity.").

41. Jason M. Pollack, Note, *Take My Arbitrator, Please: Commissioner "Best Interests" Disciplinary Authority in Professional Sports*, 67 *FORDHAM L. REV.* 1645, 1652 (1999); see Robert I. Lockwood, *The Best Interests of the League: Referee Betting Scandal Brings Commissioner Authority and Collective Bargaining Back to the Frontcourt in the NBA*, 15 *SPORTS LAW. J.* 137, 141–42 (2008) ("Landis believed that he had a mandate . . . to assure that baseball did not even have the appearance of impropriety."); *Full Cry After the Crooks*, *SPORTING NEWS*, Jan. 20, 1921, at 4 ("The [baseball] player must avoid even the appearance of evil and so conduct himself at all times he will be above reproach and suspicion.").

42. See PIETRUSZA, *supra* note 37, at 186–88.

As Judge Landis was being proclaimed a “national hero” and “guardian of public virtue” for his efforts to clean up baseball,<sup>43</sup> he received harsh criticism from lawyers for tarnishing the image of the judiciary by retaining his federal judgeship while serving as Commissioner.<sup>44</sup> His detractors, however, were unable to identify any law or ethics rule barring Judge Landis from simultaneously holding both public and private employments.<sup>45</sup> After investigating the Landis matter, United States Attorney General A. Mitchell Palmer reported that: “There seems to be nothing as a matter of general law which would prohibit a district judge from receiving additional compensation for other than strictly judicial service, such as acting as arbitrator or commissioner.”<sup>46</sup>

The Attorney General further concluded that although Judge Landis might be disqualified from presiding over matters involving major league baseball, that fact did not affect his right to serve as a judge.<sup>47</sup> Nor was there any evidence that Landis’s baseball duties interfered with the timely performance of his judicial duties.<sup>48</sup>

The absence of any identifiable misdeed did not deter the ABA from heaping its “unqualified condemnation” upon Landis in the form of a resolution censuring the judge for maintaining dual employment.<sup>49</sup> Because Judge Landis violated no law or rule of conduct, the censure, by necessity, was based on an appearance of impropriety. As a result, the censure spoke in generalities describing the judge’s service as Commissioner “as conduct un-

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43. *Id.* at 188.

44. *See id.* at 196 (describing Chicago attorney Thomas J. Sutherland’s criticism of Judge Landis).

45. *See* Andrew J. Lievens & Avern Cohn, *The Federal Judiciary and the ABA Model Code: The Parting of the Ways*, 28 JUST. SYS. J. 271, 273 (2007) (“No law or ethical precept barred Judge Landis’s activity.”).

46. PIETRUSZA, *supra* note 37, at 197. One of Judge Landis’s severest critics, Congressman Benjamin Franklin Welty, introduced a bill in the House of Representatives on February 11, 1921, which would have prohibited federal judges from accepting outside salaries. *See id.* The bill was defeated in the Senate by a tie vote. *See Bill Aimed at Landis Fails*, N.Y. TIMES, July 19, 1921, at 13.

47. *See* PIETRUSZA, *supra* note 37, at 197.

48. During his attempt to obtain a bill of impeachment against Judge Landis, Congressman Welty was asked: “Have you any proof that Judge Landis has neglected the duties of his court?” “I have not,” was Welty’s reply. *Id.* at 202–03.

49. REPORT OF THE FORTY-FOURTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 61–68 (1921); *Bar Meeting Votes Censure of Landis*, N.Y. TIMES, Sept. 2, 1921, at 1 (reproducing the ABA resolution censuring Judge Landis).

worthy of the office of judge, derogatory to the dignity of the Bench, and undermining public confidence in the independence of the judiciary.”<sup>50</sup> So, just as Judge Landis punished the eight acquitted White Sox players for appearances detrimental to baseball, the ABA sanctioned Landis for appearances detrimental to the judicial system.<sup>51</sup>

Without question, the Landis affair renewed the ABA’s interest in enacting a judicial code of ethics.<sup>52</sup> Interestingly, however, the drafters of the first judicial code did not see fit to prohibit the precise conduct which led to the condemnation of Landis. The 1924 Canons did not bar a judge from receiving compensation for nonjudicial services. To the contrary, Canon 31 permitted a judge to serve as an arbitrator, teacher, or writer so long as the secondary employment did not interfere with the performance of judicial duties.<sup>53</sup> The Canons also permitted certain judges to maintain a private law practice.<sup>54</sup> Instead of

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50. REPORT OF THE FORTY-FOURTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION, *supra* note 49, at 61; *Bar Meeting Votes Censure of Landis*, *supra* note 49.

51. It is open to question whether Judge Landis’s simultaneous employments actually harmed public confidence in the judiciary. The ABA thought that it did. Others held a contrary view. *See, e.g.*, SPINK, *supra* note 37, at 74 (“[T]he entire country felt pleased and gratified with the selection of Landis as [baseball commissioner].”); Geo. W. Hall, Letter to the Editor, *Judge Landis and the American Bar Association*, CHI. DAILY TRIB., Sept. 5, 1921, at 6 (“What the public wants is results and not mere ethical theories, and we challenge the [ABA] to show us another United States judge whose services have been of greater public benefit than those of Judge Landis.”); *Landis Quits Bench for Baseball Job; Boomed for Mayor*, N.Y. TIMES, Feb. 19, 1922, at 1 (“[T]hough a mighty courageous man is lost to the bench, but Judge Landis should be drafted for the Mayoralty. He is one man to clean up Chicago.” (quoting Judge Scanlan of the Criminal Court of Cook County)); *Olson Condemns “Lynching” of Landis by Bar*, CHI. DAILY TRIB., Sept. 7, 1921, at 17 (“Just a word to let you [Landis] know that I do not approve of the lynching of your character by the [ABA]. . . . If more judges had your character and courage, the country would be better served than it often is now.” (quoting a letter from Chief Justice Harry Olson to Judge Landis)).

52. *See* JOHN P. MACKENZIE, *THE APPEARANCE OF JUSTICE* 180 (1974) (“[I]t was baseball’s ‘Black Sox’ scandal of the 1919 World Series that fathered the first Canons of Judicial Ethics.”); Peter W. Morgan, *The Appearance of Propriety: Ethics Reform and the Blifil Paradoxes*, 44 STAN. L. REV. 593, 598 (1992) (“[T]he Landis matter induced the ABA to take action to bolster public confidence in the judiciary; the ABA responded in 1924 by issuing its Canons of Judicial Ethics.”); Cara Lee Neville, *Discussing the Judicial Code Is Like Discussing Religion*, JUDGES’ J., Summer 2007, at 37, 37 (stating that the ABA formed a committee to draft the 1924 Canons as a result of Landis’s appointment as Commissioner of Baseball).

53. *See* CANONS OF JUDICIAL ETHICS Canon 31 (1924).

54. *See id.*

outlawing the specific conduct that the ABA considered unconscionable, the drafters of the 1924 Canons opted to prohibit bad appearances. Placing the appearance of impropriety on the same plane as actual impropriety would not face serious opposition for eighty-three years.

#### B. THE 1924 CANONS OF JUDICIAL ETHICS

The ABA's concern that Judge Landis's conduct created an appearance of impropriety spawned the paramount mission of the 1924 Canons—to encourage judges to avoid any professional or personal conduct that could be perceived to damage the ideal image of a judge as an impartial decisionmaker and model citizen. Canon 4 of the 1924 Canons, entitled “Avoidance of Impropriety,” reflected this overarching principal by advising that “[a] judge’s official conduct should be free from impropriety and the appearance of impropriety” and a judge’s personal behavior “should be beyond reproach.”<sup>55</sup> The focus on public impressions, perceptions, and suspicions continued throughout the first judicial code. For example, the Canons cautioned judges not to (1) permit the impression that any person could improperly influence the judge,<sup>56</sup> (2) incur any pecuniary or other obligation which appeared to interfere with the proper administration of justice,<sup>57</sup> or (3) give any ground for a reasonable suspicion that the judicial office was being used to promote a business or charitable enterprise.<sup>58</sup> Judges were further warned against business or investment relationships that “tend to arouse the suspicion that such relations warp or bias [the judge’s] judgment”<sup>59</sup> and to avoid business and social associations that “may reasonably tend to awaken the suspicion that [such] relations or friendships” influenced judicial actions.<sup>60</sup> Similarly, Canon 27 required that a judge forego any fiduciary appointment that interfered or seemed to interfere with the proper performance of

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55. *Id.* Canon 4.

56. *See id.* Canon 13.

57. *See id.* Canon 24 (“[A judge] should not accept inconsistent duties; nor incur obligations, pecuniary or otherwise, which will in any way interfere or appear to interfere with his devotion to the expeditious and proper administration of his official functions.”).

58. *See id.* Canon 25 (“[A judge] should avoid giving ground for any reasonable suspicion that he is utilizing the power or prestige of his office to persuade or coerce others to patronize or contribute, either to the success of private business ventures, or to charitable enterprises.”).

59. *Id.* Canon 26.

60. *Id.* Canon 33.

official duties.<sup>61</sup> Political activities were severely limited because "it is inevitable that suspicion of being warped by political bias will attach to a judge who becomes the active promoter of the interests of one political party as against another."<sup>62</sup> Canon 31 admonished judges that maintained a private law practice to avoid conduct which utilized or appeared to utilize the judicial office to further his law practice.<sup>63</sup> And in case the casual reader forgot the admonishment of Canon 4, Canon 34 once again reminded judges that in every particular a judge's life should be "above reproach."<sup>64</sup>

Illinois Supreme Court Justice Robert Shaw captured the sentiments of Saint Paul, the critics of Judge Landis, and the drafters of the inaugural code of judicial conduct when he observed that the 1924 Canons did no more than caution judges to "abstain from all appearance of evil."<sup>65</sup>

### C. THE 1972 CODE OF JUDICIAL CONDUCT

The 1924 Canons remained essentially dormant until 1969.<sup>66</sup> In that year the ABA created a committee to review and reinforce the Canons in response to another controversy arising from a federal judge's receipt of extrajudicial income. This time the misfortune befell Supreme Court Justice Abe Fortas.

#### 1. The Fortas Scandal: Giving New Importance to Appearances

Pursuant to an agreement with the Wolfson Family Foundation, Justice Fortas was to receive a fee of \$20,000<sup>67</sup> as com-

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61. *See id.* Canon 27.

62. *Id.* Canon 28. The 1924 Canons prohibited a judge from making political speeches, making or soliciting contributions or assessments to a political party, endorsing candidates, participating in party conventions, acting as a party leader or officer, or otherwise engaging in political activities. *See id.* A judge was required to resign before becoming a candidate for a nonjudicial office. *See id.* Canon 30. A judge running for reelection or a new judicial office was directed to refrain from all campaign conduct that "might tend to arouse reasonable suspicion that he is using the power or prestige of his judicial position to promote his candidacy or the success of his party." *Id.*

63. *See id.* Canon 31.

64. *Id.* Canon 34.

65. *In re Harriss*, 4 N.E.2d 387, 388 (Ill. 1936).

66. Minor amendments were made to the 1924 Canons between 1933 and 1964. *See* LISA L. MILORD, *THE DEVELOPMENT OF THE ABA JUDICIAL CODE* 131-43 (1992).

67. *See* Jake Garn & Lincoln C. Oliphant, *Disqualification of Federal Judges Under 28 U.S.C. § 455(a): Some Observations On and Objections to an*

pensation for his help in planning the charitable, educational, and civil rights activities of the Foundation.<sup>68</sup> At the time Fortas received the \$20,000 payment, the Foundation's director, Louis Wolfson, was under investigation by the Securities and Exchange Commission.<sup>69</sup> Only after the indictment of Wolfson for selling unregistered stock<sup>70</sup> did Justice Fortas return the consulting fee and cancel the agreement.<sup>71</sup> Although the Justice violated no law,<sup>72</sup> he could not "shake the appearance of wrong doing."<sup>73</sup> As far as the press was concerned, appearances were all that mattered.

*Time* magazine reported that the question of whether Fortas committed a crime "misses the point" because Fortas's conduct raised "a question about the appearance of virtue on the court."<sup>74</sup> In the article that broke the Fortas story, *Life* magazine reproduced verbatim Canon 4 of the 1924 Canons which required a judge to be free from the appearance of impropriety and to conduct his everyday life "beyond reproach."<sup>75</sup> The *Life* article also quoted the text of Canon 24 directing a judge not to incur pecuniary obligations which "appear to interfere with his devotion to the expeditious and proper administration of his official functions."<sup>76</sup> The ABA Committee on Professional Ethics agreed with the magazines' assessments and found Fortas's

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*Attempt by the United States Department of Justice to Disqualify a Judge on the Basis of His Religion and Church Position*, 4 HARV. J.L. & PUB. POL'Y 1, 22 (1981).

68. See *id.*; see also William Lambert, *Fortas of the Supreme Court: A Question of Ethics: The Justice . . . and the Stock Manipulator*, LIFE, May 9, 1969, at 32, 33 ("Ostensibly, Justice Fortas was being paid to advise the foundation on ways to use its funds for charitable, educational and civil rights projects.")

69. See Garn & Oliphant, *supra* note 67.

70. See *No Peace for Fortas*, TIME, May 9, 1969, at 28, 28.

71. *Id.*; see also Peter W. Bowie, *The Last 100 Years: An Era of Expanding Appearances*, 48 S. TEX. L. REV. 911, 928 (2007).

72. John Anthony Maltese, *The Selling of Clement Haynsworth: Politics and the Confirmation of Supreme Court Justices*, 72 JUDICATURE 338, 340 (1989) ("Fortas had broken no law . . ."); *The Fortas Affair*, TIME, May 16, 1969, at 20 ("Although Fortas had not broken any law, he had clearly been guilty of a gross indiscretion.")

73. Maltese, *supra* note 72, at 340-41.

74. *Judgment on a Justice*, TIME, May 23, 1969, at 23 (quoting Stanford law professor Gerald Gunther).

75. Lambert, *supra* note 68, at 36; see also Editorial, *Fortas Should Resign*, CHI. TRIB., May 6, 1969, at 16 (quoting Canon 4 of the 1924 Canons and criticizing Fortas' "insensitivity to ethical considerations in a position where, like Caesar's wife, he must be beyond reproach").

76. Lambert, *supra* note 68, at 36.

conduct “clearly contrary to the Canons of Judicial Ethics.”<sup>77</sup> The ABA Committee’s informal opinion censuring Judge Fortas mentioned eight Canons, “but the one most forcefully cited was Canon Four’s command that ‘a judge’s official conduct should be free from impropriety and the appearance of impropriety.’”<sup>78</sup> Justice Fortas “bowed to the iron rule that a judge must be beyond suspicion”<sup>79</sup> and resigned from the Supreme Court on May 16, 1969.<sup>80</sup>

The scandal convinced the ABA to create a committee, headed by retiring California Chief Justice Roger Traynor, to revise and strengthen the 1924 Canons.<sup>81</sup> With the Fortas resignation still reverberating, the Traynor Committee promoted the prohibition against improper appearances from the text of old Canon 4 to the title of Canon 2 of the new 1972 Code.<sup>82</sup> Canon 2’s title advised that “A Judge Should Avoid Impropriety and the Appearance of Impropriety in all His Activities.”<sup>83</sup> The 1972 Code also upgraded the appearance standard from the purely aspirational purpose it was meant to serve under the 1924 Canons to an enforceable rule of judicial conduct.<sup>84</sup>

But, the 1972 Code’s major contribution to the developing world of judicial ethics was to graft the appearance of impropriety standard onto the rules governing judicial disqualification. Once again a perceived conflict between a judge’s official duties and his personal finances would lead the Traynor Committee to dramatically restructure disqualification rules. Henceforth,

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77. 4 THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 1463 (Leon Friedman & Fred L. Israel eds., 1997) [hereinafter THE JUSTICES]; see also Glen Elsasser, *Fortas Violated Judicial Ethics, ABA Rules*, CHI. TRIB., May 21, 1969, at 28 (describing the informal opinion issued by the ABA Committee on Professional Ethics finding that Fortas violated the 1924 Canons).

78. THE JUSTICES, *supra* note 77, at 1463–64.

79. *Mr. Fortas Resigns*, N.Y. TIMES, May 16, 1969, at 46.

80. THE JUSTICES, *supra* note 77, at 1464.

81. See Garn & Oliphant, *supra* note 67, at 23 (noting that the ABA’s appointment of a special committee to revise the Canons of Judicial Ethics was “[m]otivated in part by the Fortas scandal”).

82. CODE OF JUDICIAL CONDUCT Canon 2 (1972). The Code of Judicial Conduct was adopted by the ABA House of Delegates on August 16, 1972. MILORD, *supra* note 66, at 109.

83. CODE OF JUDICIAL CONDUCT Canon 2 (1972).

84. Charles Gardner Geyh, *Roscoe Pound and the Future of the Good Government Movement*, 48 S. TEX. L. REV. 871, 879 (2007) (“The 1972 Code thus effectively strengthened the commitment to regulating appearances as a means to promote public confidence in the courts by making its rules enforceable.”).



disqualification would be required any time a judge's participation in a matter created an "appearance" of partiality.

## 2. Judge Haynsworth, Appearances, and Judicial Disqualification

Immediately upon his nomination to fill the Fortas vacancy, Clement Haynsworth, Chief Judge of the Fifth Circuit Court of Appeals, faced conflict-of-interest charges. The Senate Judiciary Committee learned that Judge Haynsworth, while holding a one-seventh interest in a vending machine company, ruled in favor of a customer of the company.<sup>85</sup> The judge also owned stock in several corporations which appeared as litigants before him.<sup>86</sup> While he violated no law, rule of conduct,<sup>87</sup> or disqualification statute,<sup>88</sup> his "nomination ultimately failed because of the Senate's sensitivity to the appearance of conflict-of-interest improprieties after the Fortas defeat."<sup>89</sup> Judge Haynsworth's perceived impropriety in presiding over matters in which he had a de minimis or indirect financial interest helped persuade the Traynor Committee to drastically overhaul the judicial disqualification rules of the 1924 Canons.<sup>90</sup>

The 1924 Canons required disqualification in two situations. First, a judge could not "act in a controversy where a

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85. Garn & Oliphant, *supra* note 67, at 23–24.

86. *Id.*; Maltese, *supra* note 72, at 341.

87. A Justice Department probe into the financial interests of Judge Haynsworth disclosed no wrongdoing or "basis for opposing [his] nomination." William Kling, *Haynsworth Absolved by Justice Dept.*, CHI. TRIB., Sept. 10, 1969, at 22 (quoting the joint statement of the chair and ranking Republican member of the Senate Judiciary Committee); *see also* Maltese, *supra* note 72, at 341 ("Haynsworth . . . was guilty of no crime.").

88. At the time of the Haynsworth nomination, the federal disqualification statute required "disqualification only where a judge had 'a substantial interest, had been of counsel, had been a material witness, or was connected to a party or attorney in a case so as to render it improper 'in his opinion' to sit.'" *Winslow v. Lehr*, 641 F. Supp. 1237, 1239 (D. Colo. 1986) (quoting Note, *Judicial Disqualification in the Federal Courts: Maintaining an Appearance of Justice Under 28 U.S.C. § 455*, 1978 U. ILL. L.F. 863, 867–68 (1978)).

89. NPR Legal Affairs, *A History of the Conflict in High Court Appointments*, July 6, 2005, <http://www.npr.org/templates/story/story.php?storyId=4732341>.

90. *Taking Disqualification Seriously*, 92 JUDICATURE 12, 14 (2008) ("In 1972, the ABA, responding in part to the Haynesworth [sic] episode, adopted the Model Code of Judicial Conduct, which sought to encapsulate the ethics of disqualification into a unified rule."). *Commonwealth Coatings Corp. v. Continental Causality Co.*, 393 U.S. 145 (1968), also influenced the revision of the disqualification rules. *See* E. WAYNE THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 61 (1973).

near relative is a party.”<sup>91</sup> Second, the Canons forbade a judge from “performing . . . any judicial act in which his personal interests are involved.”<sup>92</sup> The drafters of the 1972 Code found these provisions wholly unsatisfactory because of their vagueness and incompleteness.<sup>93</sup> To remedy these shortcomings, the new Code established four specific grounds for disqualification.<sup>94</sup> In addition, one general catch-all category of disqualification was created in order to capture unforeseen or marginal situations posing a threat to public confidence in the judiciary.<sup>95</sup> The Fortas and Haynsworth episodes dictated that the governing principal of judicial disqualification was now to be appearance based. That principal was embodied in Canon 3C(1) of the 1972 Code which required disqualification “in a proceeding in which [the judge’s] impartiality might reasonably be questioned.”<sup>96</sup>

Professor Thode described the intimate relationship between the new disqualification provision and the general appearance of impropriety prohibition:

Any conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge’s “impartiality might reasonably be questioned” is a basis for the judge’s disqualification. Thus, an impropriety or the appearance of impropriety in violation of Canon 2 that would reasonably lead one to question the judge’s impartiality in a given proceeding clearly falls within the scope of the general standard, as does participation by the judge in the proceeding if he thereby creates the appearance of a lack of impartiality.<sup>97</sup>

Thus, under the 1972 Code appearances governed a judge’s personal and official behavior and determined which cases the judge would be permitted to hear. Appearances officially became, and would continue to be, the heart of judicial ethics.

#### D. THE 1990 MODEL CODE OF JUDICIAL CONDUCT

The drafters of the 1990 Code continued in the belief that the appearance standard served a critical function—“to caution judges to avoid certain prospective conduct even if the conduct only appears suspect, and to proscribe any act that is harmful

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91. CANONS OF JUDICIAL ETHICS Canon 13 (1924).

92. *Id.* Canon 29.

93. THODE, *supra* note 90, at 60.

94. CODE OF JUDICIAL CONDUCT Canon 3C(1)(a)–(d) (1972).

95. *Id.* Canon 3C(1).

96. *Id.*

97. THODE, *supra* note 90, at 60–61.

even if it is not specifically prohibited in the Code.”<sup>98</sup> Accordingly, the 1990 Code left the appearance of impropriety rule of the 1972 Code “relatively intact, albeit considerably amplified.”<sup>99</sup> The 1990 Code strengthened Canon 2 by substituting “shall” for “should” in order to eliminate any lingering doubt concerning the mandatory nature of the prohibition.<sup>100</sup> Moreover, an expanded commentary explicitly reminded judges that the rule applied to both professional and personal conduct of a judge.<sup>101</sup> But the most significant amplification of the old code was the creation of an objective, reasonable person test for judging appearances. The Commentary to Canon 2 of the 1990 Code provided: “[t]he 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.”<sup>102</sup>

With the addition of gender neutral language, the disqualification provision of Canon 3C(1) of the 1972 Code was transferred to Canon 3E(1) of the 1990 Code. Canon 3E(1) continued the duty to disqualify whenever it appeared that the judge’s impartiality “might reasonably be questioned.”<sup>103</sup>

#### E. THE 2007 MODEL CODE

In July 2003, the ABA Commission on the 21st Century issued a report detailing thirty-one recommendations designed to “address and counteract the developments adversely affecting the fair and impartial administration of justice.”<sup>104</sup> One of the recommendations urged a reexamination of the 1990 Code.<sup>105</sup> A comprehensive review of the Code was suggested in light of the recent “politicization” of the courts, the Supreme Court’s decision in *Republican Party of Minnesota v. White*,<sup>106</sup> and the pro-

98. MILORD, *supra* note 66, at 13.

99. *Id.*

100. MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1990) (“A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.”).

101. *Id.* cmt.

102. *Id.*

103. *Id.* Canon 3E(1).

104. ABA, JUSTICE IN JEOPARDY: REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY, at i (2003) [hereinafter JUSTICE IN JEOPARDY], available at <http://www.abanet.org/judind/jeopardy/pdf/report.pdf>.

105. *Id.* at 57.

106. 536 U.S. 765 (2002) (expanding the permissible scope of judicial campaign speech).

liferation of problem-solving courts.<sup>107</sup> In response to the report, the president of the ABA created the Joint Commission to Evaluate the Model Code of Judicial Conduct (Joint Commission).<sup>108</sup> Because some members of the Joint Commission questioned the fairness of retaining the admittedly vague appearance of impropriety concept as a disciplinary standard, the proper role of appearances in judicial ethics was also targeted for review.<sup>109</sup> Members of the Joint Commission would toil for three and one-half years over whether improper appearances should remain a basis for judicial discipline or be reassigned to the status of an unenforceable aspirational guideline. The Joint Commission's first attempt to resolve the issue straddled these two diametrically opposed positions.

#### 1. Preliminary Drafts of Canon 1 of the 2007 Model Code

The May 2004 draft of what was to eventually become Canon 1 of the 2007 Code prominently displayed the appearance of impropriety prohibition in the text of the Canon: "Conduct in General: A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All the Judge's Activities, So as to Uphold the Integrity, Impartiality, and Independence of the Judiciary."<sup>110</sup> However, the black-letter rules following the Canon did not mention the appearance of impropriety.<sup>111</sup> This omission led many observers to conclude that the appearance standard was relegated to a hortatory status and could no longer form the basis of a disciplinary charge.<sup>112</sup>

The ABA vehemently denied that any change was intended. ABA President Dennis Archer attempted to reassure critics by announcing that the Joint Commission had retained the mandatory and disciplinary nature of the standard and did not transform it into anything less.<sup>113</sup> Unconvinced, the oppo-

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107. JUSTICE IN JEOPARDY, *supra* note 104, at 13–39, 57–58.

108. Mark I. Harrison, *The 2007 ABA Model Code of Judicial Conduct: Blueprint for a Generation of Judges*, 28 JUST. SYS. J. 257, 257 (2007).

109. Siobhan Morrissey, *Revising the Rules: Update of the Judicial Conduct Code Will Address the Changing Justice System*, 90 A.B.A. J., Feb. 2004, at 62.

110. MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2007) (Draft of May 2004), available at <http://www.abanet.org/judicialethics/drafts.html>.

111. *Id.* R. 1.01–1.02.

112. See *id.* R. 1.2; REPORTER'S EXPLANATION OF CHANGES: ABA MODEL CODE OF JUDICIAL CONDUCT 9 (2007), available at <http://www.abanet.org/judicialethics/mcjc-2007.pdf> (stating that the appearance of impropriety prohibition was added to Rule 1.2 at the urging of the judiciary and others to establish the appearance of impropriety as an independent basis for discipline).

113. *Appearance of Impropriety Issue Continues to Occupy Judicial Code*

nents of the first draft of Canon 1 countered that even accepting President Archer's assurance, the commentary accompanying Canon 1 unjustifiably precluded the use of the appearance standard as the sole basis of discipline. The commentary provided that "[o]rdinarily, when a judge is disciplined for engaging in conduct that creates an appearance of impropriety, it will be in conjunction with charges that the judge violated some other specific rule under this or another canon."<sup>114</sup> Although the commentary accurately described the vast majority of judicial disciplinary decisions under the 1972 and 1990 Codes,<sup>115</sup> opponents, including the editorial board of the *New York Times*, felt that the commentary weakened the appearance standard by transforming "a crucial ethical mandate into 'an ancillary add-on.'"<sup>116</sup>

A majority of the organizations and individuals that submitted comments to the Joint Commission urged that Canon 1 and the black-letter rules accompanying the Canon be clarified to ensure that (1) a judge was subject to discipline for conduct creating an improper appearance, and (2) an appearance of impropriety charge could stand alone without an accompanying charge citing a more specific rule violation.<sup>117</sup>

To appease critics, the Joint Commission issued a revised version of Canon 1 on June 30, 2005. The June draft placed the prohibition against the appearance of impropriety in the text of Canon 1 and in disciplinary Rule 1.3.<sup>118</sup> The maligned commentary of the March 2004 draft, indicating that ordinarily an appearance of impropriety charge will accompany a specific rule

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*Panel's Attention*, 20 ABA/BNA LAW MANUAL PROF. CONDUCT, June 16, 2004, at 318 (citing a letter sent by President Archer to Senator Patrick Leahy (D-Vt.) responding to the Senator's criticism of the May draft of Canon 1).

114. MODEL CODE OF JUDICIAL CONDUCT Canon 1 cmt. (2007) (Draft of May 2004), available at [http://www.abanet.org/judiciaethics/drafts\\_canon1\\_051204\\_cleanlb.pdf](http://www.abanet.org/judiciaethics/drafts_canon1_051204_cleanlb.pdf).

115. See *infra* Part III.B.1.

116. Editorial, *Weakening the Rules for Judges*, N.Y. TIMES, May 22, 2004, at A16; see also Harrison, *supra* note 108, at 262 (stating that the code commentary was criticized for "unnecessarily diluting the 'appearance of impropriety' standard").

117. ABA JOINT COMM'N TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, REPORT TO THE ABA HOUSE OF DELEGATES 4 (2006), available at [http://abanet.org/judiciaethics/house\\_report.pdf](http://abanet.org/judiciaethics/house_report.pdf) (reporting that a majority of the commentators urged the Joint Commission to retain the appearance of impropriety as a disciplinary standard).

118. MODEL CODE OF JUDICIAL CONDUCT Canon 1 & R. 1.3 (2007) (Preliminary Draft of June 2005), available at <http://www.abanet.org/judiciaethics/preliminaryreport.html>.

violation, was deleted. By placing the appearance standard in both the Canon and Rule it became a core code principle and an independent basis for discipline. Canon 1 remained unchanged in the next draft of the Code released in December 2005.<sup>119</sup> Rule 1.3 also remained intact in the December draft, but was renumbered as Rule 1.2.<sup>120</sup>

## 2. Final Draft of Canon 1 and Rule 1.2 of the 2007 Code

In its Final Report to the ABA House of Delegates, issued in December 2006,<sup>121</sup> the Joint Commission did an about face on the appearance issue. The drafters decided that a judge should not be subject to discipline for conduct that did no more than create a bad impression. To accomplish this reversal, the Joint Commission simply removed any mention of the appearance of impropriety from the black-letter rules accompanying Canon 1.<sup>122</sup> The fact that the Canon itself retained the admonition against improper appearances was meaningless from a disciplinary standpoint because the Scope section of the Code specifically stated that “a judge *may* be disciplined only for violating a Rule.”<sup>123</sup>

The demotion of the appearance standard from an enforceable rule to a guiding principle created a small firestorm. The Conference of Chief Judges communicated its displeasure at this last-minute retreat,<sup>124</sup> one advisor to the Joint Commission

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119. MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2007) (Final Draft Report of Dec. 2005), available at <http://www.abanet.org/judicialethics/finaldraftreport.html>.

120. *Id.* R. 1.2.

121. ABA JOINT COMM'N TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, REPORT TO THE ABA HOUSE OF DELEGATES (2006), available at [http://www.abanet.org/judicialethics/house\\_report.pdf](http://www.abanet.org/judicialethics/house_report.pdf).

122. MODEL CODE OF JUDICIAL CONDUCT 4 (2007).

123. *Id.* at 2 (emphasis added). The section goes on to say that “[w]here a rule contains a permissive term,” disciplinary action is a matter of discretion. *Id.*

124. Press Release, Nat'l Ctr. for State Courts, Conference of Chief Justices: “Appearance of Impropriety” Must Remain Enforceable in the Model Code of Judicial Conduct, Feb. 7, 2007, available at <http://ccj.ncsc.dni.us/PressReleaseAppearanceofImpropriety07.html> (reporting that the Conference of Chief Judges voted to oppose the Joint Commission’s Final Report to the House of Delegates because of the Commission’s decision to abandon the appearance of impropriety as a basis for judicial discipline). The American Judicature Society also opposed the change. See Editorial, *Steps Forward, Steps Back on Judicial Ethics*, JUDICATURE, Nov.–Dec. 2006.

resigned in protest,<sup>125</sup> and the *New York Times* claimed a foul.<sup>126</sup> In the face of united criticism the Joint Commission relented and supported an amendment introduced on the floor of the ABA House of Delegates reincorporating the appearance of impropriety prohibition into disciplinary Rule 1.2.<sup>127</sup> The House of Delegates accepted the amendment by what was described as a nearly unanimous vote.<sup>128</sup> Thus, disciplinary Rule 1.2 of the Model Code of Judicial Conduct adopted by the ABA in February 2007 provides: “A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”<sup>129</sup>

The ABA House appended Comment 5 to Rule 1.2 in an effort to add some precision to the vague rule prohibiting impropriety in fact and appearance. The Comment defines “actual impropriety” to include “violations of law, court rules or provisions of this Code.”<sup>130</sup> This definition, however, is not very helpful because the term “actual impropriety” does not appear in the disciplinary rule. Instead, Rule 1.2 uses the term “impropriety,” which the Terminology section of the Code defines more broadly to include “conduct that violates the law, court rules, or provisions of this Code, and conduct that undermines a judge’s

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125. John Caher, *Judicial Watchdog Blasts ABA Panel’s Change to Ethics Rules*, N.Y. L.J., Feb. 6, 2007, at 1 (reporting that Robert H. Tembeckjian resigned as an advisor to the Joint Commission because the ABA would make a “monumental mistake” if it reduced the impropriety and appearance of impropriety provision to an unenforceable guideline).

126. See Editorial, *The ABA’s Judicial Ethics Mess*, N.Y. TIMES, Feb. 9, 2007, at A18 (referring to the appearance of impropriety as the “gold standard of judicial conduct”); Adam Liptak, *ABA Panel Would Weaken Code Governing Judges’ Conduct*, N.Y. TIMES, Feb. 6, 2007, at A14.

127. Harrison, *supra* note 108, at 262 (“[A]t the urging of the Conference of Chief Justices and other legal organizations, the Commission accepted an amendment during the debate in the House of Delegates that reinstated the duty to avoid impropriety and the appearance of impropriety as part of Canon 1 and as Rule 1.2.”); Charles Toutant, *Appearance-of-Impropriety Standard for Judges Holds Ground in ABA*, N.J. L.J., Feb. 19, 2007, at 547 (reporting that Cynthia Gray, director of the American Judicature’s Center for Judicial Ethics, attributed the Joint Commission’s “about-face” to media coverage and the Conference of Chief Justices’ support for the appearance standard).

128. James Podgers, *Judging Judicial Behavior*, 93 A.B.A. J. 61 (2007) (reporting that the ABA House approved returning the appearance of impropriety standard to a disciplinary rule “in a voice vote that sounded close to unanimous”).

129. MODEL CODE OF JUDICIAL CONDUCT R. 1.2 (2007).

130. *Id.* R. 1.2 cmt. 5.

independence, integrity, or impartiality.”<sup>131</sup> “Appearance of impropriety” is ascribed a similar but not identical meaning. According to Comment 5 “[t]he test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge’s honesty, impartiality, temperament, or fitness to serve as a judge.”<sup>132</sup> Applying the definitions found in Comment 5 and in the Terminology section of the Code to the text of Rule 1.2, it becomes apparent that the 2007 Code subjects a judge to discipline for (1) violating a law, court rule, or Code provision; (2) conduct that undermines a judge’s independence, integrity, or impartiality; and (3) conduct that a reasonable person views as reflecting adversely on a judge’s honesty, impartiality, temperament, or fitness to serve. This definition of sanctionable conduct is more verbose, but not more precise, than the mandate of the 1924 Canons that judges should remain “beyond” or “above reproach.”<sup>133</sup>

## II. IS THE APPEARANCE OF IMPROPRIETY STANDARD VOID FOR VAGUENESS?

The debate over the appearance of impropriety standard as a basis for judicial discipline usually centers on the issue of whether its inherent vagueness violates due process. Opponents assert that the rule is the poster child of statutory imprecision and no judge can be expected to divine when an act would appear improper to a third party.<sup>134</sup>

Proponents of the constitutionality of the appearance of impropriety standard admit that the phrase is “murky,”<sup>135</sup> “the nearest to being hortatory of any provision in the Code,”<sup>136</sup> “ex-

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131. *Id.* R. 1.2 cmt. 4.

132. *Id.* R. 1.2 cmt. 5.

133. CANONS OF JUDICIAL ETHICS Canons 4, 34 (1924).

134. See, e.g., Letter from Ronald C. Minkoff, Chair, Ass’n of Prof’l Responsibility Lawyers, to the Joint Comm’n on the Model Code of Judicial Conduct (June 30, 2004), available at [http://www.abanet.org/judicialethics/resources/comm\\_rules\\_minkoff\\_063004.pdf](http://www.abanet.org/judicialethics/resources/comm_rules_minkoff_063004.pdf) (stating the Association’s opposition to the use of the appearance of impropriety standard as a disciplinary rule).

135. ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 31 (2004) (“When the analysis involves the ‘appearance of impropriety,’ as opposed to actual impropriety, the waters get murky.”).

136. THODE, *supra* note 90, at 49 (“The black-letter statement of Canon 2 is very broad in its terms and perhaps the nearest to being hortatory of any provision in the [1972] Code.”).



tremely broad in scope,”<sup>137</sup> and “fraught with subjectivity and elasticity.”<sup>138</sup> Nevertheless, supporters rely on the proposition that due process demands less precision in rules governing a particular profession as opposed to criminal laws, or even civil laws, regulating the conduct of the general public. Advocates of appearances contend that court cases, ethical codes, and the judges’ own knowledge of norms within the judicial profession supply the needed specificity to the otherwise “murky” rule.<sup>139</sup>

#### A. VAGUENESS AND RULES OF PROFESSIONAL DISCIPLINE

In order to survive a void-for-vagueness challenge, a statute or rule must (1) give a person of ordinary intelligence fair warning of the nature of the prohibited conduct, and (2) provide “explicit standards” for the police, judges, juries, and others charged with enforcing the enactment.<sup>140</sup> It is not necessary that a regulation “spell out with perfect precision what conduct it forbids”<sup>141</sup> because “[w]ords inevitably contain germs of uncertainty.”<sup>142</sup> The degree of specificity that the Constitution requires largely depends upon the nature of the challenged provision.<sup>143</sup> Thus, civil laws are subject to a less demanding vagueness test than laws with criminal consequences.<sup>144</sup> Regulatory or disciplinary rules governing a discrete professional group receive a lesser degree of scrutiny not only because of their noncriminal nature, but also because learned professionals can supply needed specificity through “the common knowledge and understanding of members of the particular vocation or profession to which the standard applies.”<sup>145</sup> Justice Bren-

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137. MILORD, *supra* note 66, at 13.

138. *In re Hey*, 452 S.E.2d 24, 33 (W. Va. 1994).

139. *See, e.g., Gray, supra* note 23, at 93–98; *see also infra* Part II.A.

140. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

141. *Comm’n for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 437 (Tex. 1998).

142. *Id.*

143. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982).

144. *Id.* at 499–500; *Arriaga v. Mukasey*, 521 F.3d 219, 223 (2d Cir. 2008) (“Laws with civil consequences receive less exacting vagueness scrutiny.”).

145. *See Perez v. Hoblock*, 368 F.3d 166, 176 (2d Cir. 2004) (“[W]here the language of a statute fails to provide an objective standard by which conduct can be judged, the required specificity may nonetheless be provided by the common knowledge and understanding of members of the particular vocation or profession to which the standard applies.” (quoting *Cranston v. City of Richmond*, 710 P.2d 845, 851 (Cal. 1985))).

nan explained how professional norms may cure an otherwise vague attorney disciplinary rule:

Given the traditions of the legal profession and an attorney's specialized professional training, there is unquestionably some room for enforcement of standards that might be impermissibly vague in other contexts; an attorney in many instances may properly be punished for "conduct which all responsible attorneys would recognize as improper for a member of the profession."<sup>146</sup>

Put another way, when a regulation is designed to govern an attorney's conduct rather than the behavior of the general public, "the central consideration in resolving a vagueness challenge should be whether the nature of the proscribed conduct encompassed by the rule is readily understandable to a licensed lawyer."<sup>147</sup> In making that determination, it is contemplated that the lawyer will be guided by narrowing factors such as case and statutory law, court rules, rules of conduct, and norms informally accepted by the members of the legal profession.<sup>148</sup> Rules of judicial conduct are evaluated by the same vagueness test, namely, whether the ordinary judge aware of applicable cases, statutes, rules, judicial codes, and customary norms, traditions, and practices of the judicial profession could understand and comply with the disciplinary rule.<sup>149</sup>

The question becomes, can the appearance of impropriety prohibition be saved from vagueness attacks by application of the "professional norms" doctrine which permits less specificity in disciplinary rules governing professionals? The answer is no for two reasons. First, the doctrine only speaks in terms of conduct that actually violates an accepted norm. It does not encompass conduct that only appears to violate a norm. Second, under the doctrine, unless a rule, court decision, or statute proscribes a particular act, it is the professionals themselves who

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146. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 666 (1985) (Brennan, J., concurring in part and dissenting in part) (quoting *In re Ruffalo*, 390 U.S. 544, 555 (1968)).

147. *People v. Morley*, 725 P.2d 510, 516 (Colo. 1986).

148. See *In re Snyder*, 472 U.S. 634, 645 (1985); see also *United States v. Colo. Supreme Court*, 189 F.3d 1281, 1285 (10th Cir. 1999); *Comm'n for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 437 (Tex. 1998).

149. *In re Halverson*, 169 P.3d 1161, 1176 (Nev. 2007) ("Thus, when evaluating a [disciplinary] statute that applies only to judges, the issue is whether an ordinary judge could understand and comply with it."); Gray, *supra* note 23, at 93-94 ("Application of a vagueness analysis depends upon context, and judges, like lawyers, are professionals who have the benefit of guidance provided by case law, court rules, the lore of the profession, the traditions of the judicial profession, and its established practices." (internal quotation marks and citations omitted)).

establish the norms and determine what conduct violates those norms. As Justice Brennan observed, attorneys or other professionals may be held responsible for conduct which all responsible members of the profession would recognize as improper.<sup>150</sup> But what constitutes an improper appearance under a judicial code is not determined by judges but by the hypothetical reasonable person. For these reasons, the professional norms exception is unavailable to save the impermissibly vague appearance standard.

### 1. Professional Norms Require Actual Misconduct

Applying professional norms to save a vague disciplinary rule is arguably justifiable when evaluating conduct that constitutes an actual impropriety. For example, a college professor's vagueness challenge to a rule requiring faculty members to "maintain standards of sound scholarship and competent teaching" is properly rejected because a reasonable professor knows what academia expects.<sup>151</sup> Under this same rationale, courts have rejected due process challenges to vague rules sanctioning lawyers for "conduct that is prejudicial to the administration of justice."<sup>152</sup> It is correctly presumed that lawyers in the daily course of their practice learn what type of conduct is deemed unacceptable within the legal profession. Equally broad judicial disciplinary standards, proscribing "misconduct in office"<sup>153</sup> and "conduct prejudicial to the administration of justice," survive vagueness attacks<sup>154</sup> because judges, like lawyers, know they are expected to act in accordance with established professional practices.

But each of these imprecise disciplinary rules punishes actual impropriety. They require that the offender actually com-

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150. See *supra* note 146 and accompanying text.

151. San Filippo v. Bongiovanni, 961 F.2d 1125, 1134 (3d Cir. 1992).

152. See, e.g., Howell v. State Bar of Tex., 843 F.2d 205, 206 (5th Cir. 1988); *In re Comfort*, 159 P.3d 1011, 1024 (Kan. 2007); *In re Charges of Unprofessional Conduct Against N.P.*, 361 N.W.2d 386 (Minn. 1985). Some courts have approved the "conduct prejudicial to the administration of justice" attorney disciplinary standard only after giving the phrase a limiting construction. See, e.g., *In re Crossen*, 880 N.E.2d 352, 379 (Mass. 2008) (restricting the phrase, "conduct that is prejudicial to the administration of justice," to "egregious" acts which "undermine the legitimacy of the judicial process." (citing *In re Discipline of Two Attorneys*, 660 N.E.2d 1093, 1098-99 (Mass. 1996))); *Two Attorneys*, 660 N.E.2d at 1099; *In re Hinds*, 449 A.2d 483, 491-92 (N.J. 1982); *In re Gadbois*, 786 A.2d 393, 400 (Vt. 2001).

153. Keiser v. Bell, 332 F. Supp. 608, 614-15 (E.D. Pa. 1971).

154. *In re Disbarment of Gillard*, 271 N.W.2d 785, 806 (Minn. 1978).

mit an improper act which violates a norm established and accepted by members of the regulated profession. These standards do not prohibit acts which merely appear to be improper, but in fact violate no professional norm. Thus, a professor may suffer adverse consequences for failing to engage in "sound scholarship," but does not violate any rule by only appearing to fail to produce a scholarly piece. Similarly, an attorney is subject to discipline for conduct prejudicial to the administration of justice, but not for conduct which only appears to be prejudicial.<sup>155</sup> The fact that impropriety-based disciplinary rules may withstand constitutional attack does not lend support to the argument that rules imposing sanctions for appearances, in the absence of actual wrongdoing, also comply with due process.

## 2. Professionals Establish Professional Norms

More fundamentally, vague conduct rules survive constitutional challenge only because of the special knowledge members of a profession gain from dealing with their fellow professionals. Thus, a lawyer is legitimately presumed to recognize conduct considered improper by lawyers, even in the absence of a rule, statute, or case outlawing the particular deed in question. Similarly, judges know what behavior other judges uniformly deem improper. If a judge's responsibility was limited to avoiding actual improprieties as set forth in rules, statutes, and court decisions, or established less formally by mutual consent of members of the profession, then a disciplinary standard prohibiting "impropriety," although vague, arguably could be sustained under a professional norms theory. But under the appearance standard, perceived improprieties are not determined by the collective judgment of members of the judicial profession. Instead, appearances are judged by the ordinary reasonable person. Insertion of the ordinary observer into the equation defeats any argument that professional norms supply needed specificity to the appearance standard. Once the rea-

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155. Canon 9 of the ABA's 1969 Model Code of Professional Responsibility provided that "[a] lawyer should avoid even the appearance of professional impropriety." MODEL CODE OF PROF'L RESPONSIBILITY Canon 9 (1969). No similar provision appeared in the Model Rules of Professional Conduct enacted in 1983 because the "appearance of impropriety" standard was considered too vague to govern attorney conduct. MODEL RULES OF PROF'L CONDUCT R. 1.9 cmt. 5 (1983); Lee E. Hejmanowski, *An Ethical Treatment of Attorneys' Personal Conflicts of Interests*, 66 S. CAL. L. REV. 881, 897 (1993) (commenting that the appearance of impropriety standard of Canon 9 was removed "on the grounds that, standing alone, it was inherently vague and insufficient to justify [attorney] disqualification orders").

sonable observer enters the picture, the question is no longer what the judicial profession deems improper but what individuals outside the profession perceive as appearing improper. For due process purposes, a judge can be held to professionally generated and accepted norms but not to public perceptions. And it is no answer to suggest that disciplining judges based on lay impressions is acceptable because the reasonable person's judgment is relied upon in virtually every field of law. As demonstrated in Part II.B, the reasonable person is designed to determine facts not appearances, and is ill-fitted to assist in the task of narrowing ambiguous statutes.

#### B. THE REASONABLE PERSON, VAGUENESS, AND THE APPEARANCE OF IMPROPRIETY

Rule 1.2 of the 2007 Code provides that a judge may be disciplined for any conduct which creates an appearance of impropriety.<sup>156</sup> Comment 5 to the Rule defines "appearance of impropriety" to include any conduct which (1) causes a perception that the judge violated a specific code provision or (2) "reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge."<sup>157</sup> In determining whether a judge's conduct creates an unacceptable appearance, the judge's subjective view of his or her behavior is irrelevant.<sup>158</sup> A disinterested, objective arbiter is needed for such an important task and, as usual, that means that the reasonable person is called into service.

Without question, the go-to-guy in the law is the reasonable person. This standard bearer routinely decides matters such as the meaning of the U.S. Constitution,<sup>159</sup> whether an

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156. See MODEL CODE OF JUDICIAL CONDUCT R. 1.2 (2007).

157. *Id.* cmt. 5.

158. See *Miller v. Blackden*, 913 A.2d 742, 749 (N.H. 2006) ("Whether an appearance of impropriety exists is determined under an objective standard, i.e., would a reasonable person, not the judge himself, question the impartiality of the court." (quoting *Blaisdell v. City of Rochester*, 609 A.2d 388, 390 (N.H. 1992))); ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 32 (2004) ("Because the standard for determining the appearance of impropriety is objective, a judge's own perception of motivation for behavior is irrelevant to the analysis.").

159. See Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 48 (2006) ("We focus here on one particularly significant, and significantly underappreciated, legal function of the reasonable person: The reasonable American person of 1788 determines, for 1788 and today, the meaning of the federal Constitution.").

automobile driver exercised ordinary care,<sup>160</sup> the intention of contracting parties,<sup>161</sup> whether a suspect is in custody for Fourth Amendment<sup>162</sup> or Fifth Amendment purposes,<sup>163</sup> the applicability of sentencing enhancement factors,<sup>164</sup> and a myriad of other factual and legal issues.<sup>165</sup> The reasonable person is assigned these various responsibilities because “[t]he standard of conduct which the community demands must be an external and objective one, rather than the individual judgment, good or bad, of the particular actor, and it must be, so far as possible, the same for all persons, since the law can have no favorites.”<sup>166</sup>

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160. See *Martinovic v. Ferry*, 34 Cal. Rptr. 692, 697 (Dist. Ct. App. 1963) (finding that a truck driver was required to use the degree of care that the ordinary, reasonable person would use under the same or similar circumstances); *Pontello v. Quartz & Dugas, Inc.*, 534 S.W.2d 386, 389 (Tex. Civ. App. 1976) (finding little evidence “that the driver failed to take such precautions . . . as should have been taken by an ordinarily reasonable person in the exercise of ordinary care”).

161. *Towson Univ. v. Conte*, 862 A.2d 941, 947 (Md. 2004) (“[T]he true test of what is meant [by a contract term] is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant.” (quoting *Calomiris v. Woods*, 727 A.2d 358, 363 (Md. 1999))); Larry A. DiMatteo, *The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment*, 48 S.C. L. REV. 293, 301 (1997) (“Professor Slawson states that “[t]he objective theory of contracts . . . dictates that a contract shall have the meaning that a reasonable person would give it under the circumstances under which it was made . . . .” (first omission in original)).

162. *Brendlin v. California*, 127 S. Ct. 2400, 2405 (2007).

163. *Yarborough v. Alvarado*, 541 U.S. 652, 662 (2004).

164. See, e.g., *United States v. Stitman*, 472 F.3d 983, 986 (7th Cir. 2007) (finding sentencing enhancement for possessing a weapon in connection with a robbery applicable where a reasonable person, under the circumstances of the robbery, would regard the object displayed as a dangerous weapon).

165. E.g., *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 863 (7th Cir. 2008) (stating that whether a message on a specialty license plate is considered government or private speech is determined by the ordinary reasonable person); *McCoy v. Shreveport*, 492 F.3d 551, 557 (5th Cir. 2007) (employing the reasonable person standard to determine if an employee suffered a constructive discharge); *Veitch v. England*, 471 F.3d 124, 128 (D.C. Cir. 2006) (using the reasonable person standard to determine whether the resignation of an armed services member is a product of duress); *Schreiber v. Physicians Ins. Co. of Wis.*, 588 N.W.2d 26, 33 (Wis. 1999) (defining informed consent in terms of what a reasonable person in the position of the patient would want to know).

166. W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 32, at 173–74 (5th ed. 1984) (footnotes omitted).

## 1. The Reasonable Person's Appearance in Judicial Ethics

With the reasonable person firmly entrenched in most areas of the law, it was natural that the judicial ethics community would select the hypothetical observer as the standard by which to assess the propriety of a judge's conduct. Professor Thode initiated the movement by interpreting Canon 3C(1) of the 1972 Code to require judicial disqualification whenever a judge's conduct "would lead a reasonable man knowing all the circumstances to the conclusion that the judge's impartiality might reasonably be questioned."<sup>167</sup> Following Thode's lead, the 1990 Code adopted the reasonable person test for judging not only the appearance of partiality, but also the appearance of any type of impropriety.<sup>168</sup> The 2007 Code followed suit.<sup>169</sup> Indeed, the overwhelming majority of states evaluate the propriety of a judge's personal and professional conduct through the eyes of the reasonable person.<sup>170</sup>

The reasonable person, however, was conceived and designed to determine facts, not appearances. Consequently, the characteristics built into this fictional creature which help to facilitate a factual determination in a contract or tort case, for example, do not assist, and in many ways are inconsistent with, the task of evaluating appearances and perceptions. Of special

167. THODE, *supra* note 90, at 60–61.

168. See MODEL CODE OF JUDICIAL CONDUCT Canon 2A cmt. (1990) ("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.")

169. MODEL CODE OF JUDICIAL CONDUCT R. 1.2 cmt. 5 (2007) ("The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge."). Rule 2.11 of the 2007 Code requires a judge to "disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." *Id.* R. 2.11(A).

170. See Leslie W. Abramson, *Canon 2 of the Code of Judicial Conduct*, 79 MARQ. L. REV. 949, 956 (1996) ("The leading view is that a court should review judicial behavior by its appearance 'to a reasonable person following review of the totality of circumstances.'"); see also *In re Chaisson*, 549 So. 2d 259, 263 (La. 1989) ("The proper test of whether Judge Chaisson's actions gave the appearance of impropriety is an objective one: whether a reasonable person would be justified in suspecting that Judge Chaisson lent 'the prestige of his office to advance the private interest' of [another].") (quoting *In re Foster*, 318 A.2d 523, 533 (Md. 1974)); *Mosley v. Nev. Comm'n on Judicial Discipline*, 102 P.3d 555, 560 (Nev. 2004) (employing the "objective reasonable person standard" in disciplining a judge); *In re Gallagher*, 951 P.2d 705, 714 (Or. 1998) (finding that an objective reasonable observer would conclude that the judge used court stationery for a private purpose); *infra* Part II.B.2.

concern in the context of a vagueness analysis is the reasonable person's attribute of possessing all relevant facts and circumstances.

## 2. The Fully Informed Reasonable Person and the Appearance of Impropriety: A Paradox

When determining civil or criminal law issues, the reasonable person is presumed to know and understand all material facts.<sup>171</sup> For example, when judging whether an automobile driver exercised ordinary care, the reasonable person (acting through the trier of fact)<sup>172</sup> is presented with all the circumstances surrounding the accident.<sup>173</sup> Similarly, when called upon to determine whether a suspect is in custody for *Miranda* purposes, the objective observer reviews every aspect of the interrogation.<sup>174</sup>

The reasonable person employed by the judicial ethics community also possesses all the facts.<sup>175</sup> This ubiquitous observer of judicial conduct is variously described as "fully informed,"<sup>176</sup> "knowing all the circumstances,"<sup>177</sup> "know[ing] and

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171. See *Radtke v. Everett*, 501 N.W.2d 155, 166 (Mich. 1993) ("[T]he reasonable person standard examines the totality of circumstances to ensure a fair result."); see also cases cited *infra* notes 173–74.

172. DiMatteo, *supra* note 161, at 312 ("The reasonable person is applied through the mind of the judicial interpreter.")

173. See *Barron v. Honeywell, Inc.*, 69 F.R.D. 390, 392 (E.D. Pa. 1975) ("[S]ummary judgment is usually not appropriate in negligence cases . . . because the application of the reasonable person standard normally requires full exposition of all the underlying facts and circumstances."); *Cucinella v. Weston Biscuit Co.*, 265 P.2d 513, 515 (Cal. 1954) (permitting evidence of custom for the purpose of giving the jury "full knowledge of all the facts and circumstances which existed at the time and place of the accident, which were known to the parties, so as to permit the jury to pass upon the question of whether plaintiff conducted himself as an ordinary and reasonable person would have conducted himself in the light of all the circumstances" (quoting *Muir v. Cheney Bros., Inc.*, 148 P.2d 138, 141 (Cal. Dist. Ct. App. 1944))).

174. *Morales v. United States*, 866 A.2d 67, 71–72 (D.C. Cir. 2005) (holding that in determining whether a suspect is in custody for *Miranda* purposes "the court is obliged to consider 'all of the circumstances surrounding the interrogation' in reaching its conclusion" (quoting *Stansbury v. California*, 511 U.S. 318, 322 (1994))).

175. See *infra* notes 176–80 and accompanying text.

176. *Union Carbide Corp. v. U.S. Cutting Servs., Inc.*, 782 F.2d 710, 715 (7th Cir. 1986) (quoting *Pepsico, Inc. v. McMillen*, 764 F.2d 458, 460 (7th Cir. 1985)); *Drake v. Birmingham Bd. of Educ.*, 476 F. Supp. 2d 1341, 1345 (N.D. Ala. 2007); *Miller v. Blackden*, 913 A.2d 742, 749 (N.H. 2006).

177. *Richardson v. Quarterman*, 537 F.3d 466, 470 (5th Cir. 2008) (knowing all the circumstances); *United States v. Amico*, 486 F.3d 764, 775 (2d Cir. 2007) (knowing all the facts); *McGuire v. McGuire*, 924 A.2d 886, 891 (Conn.



understand[ing] all the relevant facts,”<sup>178</sup> and aware of the “totality of circumstances.”<sup>179</sup>

But the person who is fully informed of all facts and circumstances surrounding a suspect act of a judge *knows* whether or not an actual impropriety occurred, so mere *appearances* of impropriety cannot logically be gauged from the perspective of a fully informed reasonable person. Applying such a standard is therefore paradoxical. As pointed out by Professor Rotunda, if the informed observer concludes that the judge *actually* committed a rule violation, an impropriety should be charged. On the other hand, if the observer’s review of pertinent facts leads to the conclusion that no actual impropriety occurred, there is no appearance of impropriety.<sup>180</sup> An example will illustrate the paradox.

Assume that a judge proceeds to the courthouse cafeteria for lunch. After purchasing a sandwich, the judge takes the only vacant seat, which happens to be at the table occupied by an attorney currently on trial before the judge. The judge advises the attorney that the case will not be discussed. The lawyer agrees and no further discussion of any kind takes place.<sup>181</sup>

How does the reasonable lunchroom guest view this situation? Unfortunately, it depends on how much information the observer possesses. Most cafeteria patrons might recognize the judge, and possibly the lawyer, but probably would not know the two were on trial together. An observer who was fully informed would conclude that no *ex parte* communication or other impropriety occurred. In fact, the knowledgeable observer might applaud the judge’s ethical sensitivity. Appearances

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App. Ct. 2007) (knowing all the circumstances); *State v. Ross*, 974 P.2d 11, 20 (Haw. 1998) (knowing all the facts); *Kan. Judicial Review v. Stout*, 196 P.3d 1162, 1179 (Kan. 2008) (knowing all the circumstances); *Miss. Comm’n on Judicial Performance v. Boland*, 975 So. 2d 882, 895 (Miss. 2008) (knowing all the circumstances).

178. *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1313 (2d Cir. 1988); *State v. Perala*, 130 P.3d 852, 859 (Wash. Ct. App. 2006) (requiring the reasonable person to know and understand all the relevant facts).

179. *In re Larsen*, 616 A.2d 529, 583 (Pa. 1992); Abramson, *supra* note 170, at 956 (“The leading view is that a court should review judicial behavior by its appearance ‘to a reasonable person following review of the totality of circumstances.’”).

180. Ronald D. Rotunda, *Judicial Ethics, The Appearance of Impropriety, and the Proposed New ABA Judicial Code*, 34 HOFSTRA L. REV. 1337, 1360 (2006) (“[I]f it is not an impropriety, how can it look like an impropriety . . . ?”).

181. This illustration is based on *Wells v. Del Norte School District C-7*, 753 P.2d 770, 772 (Colo. App. 1987).

simply are of no concern to the observer who is aware of reality. It is only the partially informed onlooker who encounters an appearance problem. So, a person aware of the trial, but unaware of the availability of a single lunch seat and unaware of the judge's admonishment, might believe that an impropriety was afoot. But the selectively informed observer is not the standard by which the judge's conduct is evaluated. Courts and judicial codes dictate that a judge's behavior is evaluated by a person who by definition knows and understands all facts surrounding an occurrence. The law does not and should not recognize the partially informed reasonable person.

### 3. The Birth of the Partially Informed Reasonable Person

Instead of admitting that the reasonable person standard cannot be employed in judging appearances because appearances generally depend on less-than-complete information, some courts have surgically removed the requirement that the observer of judicial conduct be fully informed. While giving lip-service to the traditionally accepted definition of the fully informed reasonable person, these courts find an appearance of judicial impropriety on the probable opinion of the partially informed observer.<sup>182</sup> As redefined, the reasonable person "is not necessarily one who is informed of every conceivably relevant fact,"<sup>183</sup> and may be no more than a "casual reasonable observer."<sup>184</sup> A few jurisdictions specifically reduce the quantum of knowledge from all the facts to "the facts that a reasonable inquiry would disclose,"<sup>185</sup> or the "facts in the public domain."<sup>186</sup>

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182. The attempt by some courts to rely on a less than fully informed observer is surprising because the drafters of the 1990 Code rejected a proposal which would have directed judges to evaluate their behavior from the perspective of the person who only knows what is "apparent." Abramson, *supra* note 170, at 956-57 n.24 (citing MODEL CODE OF JUDICIAL CONDUCT 7 (1990) (Discussion Draft of 1989)).

183. *In re Inquiry Concerning a Judge*, 822 P.2d 1333, 1340 (Alaska 1991).

184. *In re Haley*, 720 N.W.2d 246, 270 (Mich. 2006) (Kelly, J., dissenting).

185. *E.g.*, CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 2A (2009), available at [http://www.uscourts.gov/library/codeOfConduct/Code\\_Effective\\_July-01-09.pdf](http://www.uscourts.gov/library/codeOfConduct/Code_Effective_July-01-09.pdf) ("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 honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired."); DEL. CODE OF JUDICIAL CONDUCT R. 1.2 cmt. (2010) ("The test for the appearance of impropriety is whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the judge's ability to carry out judicial responsibilities with integrity,

For some judges and commentators, the partly informed observer may determine appearances from available information, including incomplete or unproven media reports.<sup>187</sup> This view is illustrated by Justice Allen's concurring opinion in *Childers v. Florida*.<sup>188</sup> Justice Allen, relying on information contained in newspaper articles, criticized a fellow judge for failing to disqualify himself from an appeal.<sup>189</sup> While admitting that he could not vouch for the accuracy of the articles, Justice Allen concluded that since public perceptions were at stake, "[w]hether completely accurate or not, the significant point here is that these articles reflect what the public has been told."<sup>190</sup> Legal commentator Howard Bashman, adopting Justice Allen's reasoning, agrees that the observer evaluating the propriety of the judge's conduct should only be charged with the knowledge "available to the ordinary person."<sup>191</sup> But that is clearly not the case.

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impartiality, and competence is impaired."); FLA. CODE OF JUDICIAL CONDUCT Canon 2A cmt. (2009) (same).

186. See, e.g., *Sears v. Olivarez*, 28 S.W.3d 611, 615 (Tex. App. 2000) ("[T]he inquiry should be 'whether a reasonable member of the public at large, knowing all the facts in the public domain concerning the judge's conduct, would have a reasonable doubt that the judge is actually impartial.'").

187. As observed by Justice Fuchsberg, "appearances' more often are the product of the publicity rather than that of the underlying conduct." *In re Nicholson v. State Comm'n on Judicial Conduct*, 409 N.E.2d 818, 827 (N.Y. 1980) (Fuchsberg, J., dissenting in part).

188. 936 So. 2d 619, 623 (Fla. Dist. Ct. App. 2006).

189. See *id.* at 623–29.

190. *Id.* at 623. The Florida Supreme Court publically reprimanded Justice Allen for using a concurring opinion to personally attack a fellow judge and for accusing the fellow judge of official corruption based on unverified "facts" in newspaper stories. *In re Allen*, 998 So. 2d 557, 563 (Fla. 2008). The Supreme Court's opinion, however, did not undermine the use of press reports in assessing appearances. In fact, the court buttressed its conclusion that Justice Allen's concurring opinion damaged faith in the judiciary with the fact that, "[t]he proliferation of newspaper articles and public commentary statewide after the publication of the Childers [concurring] opinion was a clear indication that the opinion did not promote public confidence in the judiciary but instead had the opposite effect." *Id.* at 563. *But see* Lucy Morgan, *State High Court to Discipline Judge*, ST. PETERSBURG TIMES, Dec. 19, 2008, at 7B (observing that while critical of Justice Allen's use of news reports, the court relied on newspapers to support its reprimand of Justice Allen).

191. Howard J. Bashman, *When Should a Judge Face Discipline for What an Opinion Says?*, LAW.COM, May 14, 2007, <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=900005555174> (defending Justice Allen's use of press reports because the relevant disqualification inquiry is whether a person with knowledge of the facts would conclude that a judge's impartiality might reasonably be questioned and such determination is necessarily based on information available to an average person).

Like all legal issues, judges determine appearance of impropriety—not by considering what a straw poll of the only partly informed man-in-the-street would show—but by examining the record facts and the law, and then deciding whether a reasonable person knowing and understanding all the relevant facts would recuse the judge.<sup>192</sup>

Information gleaned from newspaper reports was also controlling in *In re Blackman*.<sup>193</sup> In *Blackman*, the court held that a judge must avoid any conduct that might be open to criticism by the press whether or not the media's interpretation of the judge's behavior is accurate or reasonable.<sup>194</sup> Taking appearances one step further, another court concluded that information sufficient to necessitate an investigation may itself create an appearance of impropriety, even if the subsequent investigation dispels any suspicion of misconduct.<sup>195</sup>

The fact that the fully informed observer does not fit nicely into the appearance of impropriety test is no reason to reduce the quantum of information traditionally attached to the reasonable person.<sup>196</sup> Such a concession is especially dangerous

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192. *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1313 (2d Cir. 1988); see also *United States v. Tucker*, 82 F.3d 1423 (8th Cir. 1996) (McMillian, J., dissenting) (criticizing the majority's decision to question a judge's impartiality on the basis of information retrieved from newspapers and magazines); *In re Hamilton*, 932 A.2d 1030, 1035 (Pa. Ct. Jud. Discipline 2007) (“[T]his court does not make its decisions on whether particular conduct . . . brings the judicial office into disrepute based upon the level of media coverage the conduct may attract.”).

193. 591 A.2d 1339, 1341 (N.J. 1991).

194. See *id.* at 1342. Judge Blackman was reprimanded for attending an annual Labor Day picnic hosted by a felon. *Id.* at 1340–41. In reaching its decision, the court did not rely upon the ordinary reasonable person's view of the propriety or impropriety of the judge's conduct. Instead, the court found the controlling test to be “whether there is a fair possibility that some portion of the public might become concerned on that score.” *Id.* at 1342. This test is certainly troubling when one considers that some portion of the American public, nearly sixteen million people, believe that Elvis Presley is alive. Dana Blanton, *Poll: For a Few True Believers, Elvis Lives*, FOXNEWS.COM, Aug. 14, 2002, <http://www.foxnews.com/story/0,2933,60353,00.html>.

195. *In re Johnstone*, 2 P.3d 1226, 1237 n.38 (Alaska 2000) (“Because conduct that necessitates a full-scale inquiry to allay public suspicion itself suggests impropriety, an impermissible appearance also might be found—regardless of whether an investigation eventually dispelled suspicion of actual misconduct.”).

196. See *In re Larsen*, 616 A.2d 529, 582 (Pa. 1992) (“While we agree with the suggested application of the reasonable person standard, [in judicial discipline cases] we reject as entirely untenable the suggestion that it be a reasonable uniformed or misinformed person standard.”); Roberta K. Flowers, *What You See Is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors*, 63 MO. L. REV. 699, 727 (1998) (“Because misinformed or uninformed persons may assign guilt where none exists, courts have required

where the improper appearance is created by media criticism or publicity generated by partisans.<sup>197</sup> Disciplinary decisions, just like any other adjudicatory result, must be based on the law and all relevant facts, not mirages.<sup>198</sup>

#### 4. Summing Up: The Reasonable Person and Professional Norms

The reasonable person is a proven master in evaluating actual conduct and misconduct. However, he or she is no help when it comes to judging appearances or saving vague disciplinary rules. In fact, appointing this hypothetical observer as the arbiter of improper judicial appearances defeats any attempt to use professional norms to cure the facial imprecision of the appearance of impropriety standard. First, as previously demonstrated, professional norms, other than those set by rule, statute, or case law, are established by the members of the regulated profession, not by those outside the profession. Second, assuming that the reasonable person's views are relevant in establishing norms, the objective observer is, by definition, imbued with all relevant facts and therefore knows whether an impropriety has taken place. If it has, a disciplinary proceeding should be instituted based on actual wrongdoing. But if the reasonable person determines that no misconduct occurred, then inescapably there is no appearance of wrongdoing, at least to the individual aware of all the circumstances.<sup>199</sup> And finally, even if the reasonable person is reconstructed to possess only information "reasonably available," or

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the appearance of impropriety to be judged based on the totality of the circumstances.").

197. See *Cheney v. U.S. Dist. Court*, 541 U.S. 913, 923 (2004) (Scalia, J., in chambers) (order denying motion to recuse) (disagreeing with the proposition that a judge must disqualify where "a significant portion of the press, which is deemed to be the American public, demands it"); *In re Aguinda*, 241 F.3d 194, 202 (2d Cir. 2001) ("The appearance of partiality . . . must have an objective basis beyond the fact that claims of partiality have been well publicized. . . . The test . . . is one of reasonableness, and the appearance of partiality portrayed in the media may be, at times, unreasonable."); *United States v. Bayless*, 201 F.3d 116, 129 (2d Cir. 2000) (concluding that most courts do not find media criticism sufficient grounds for recusal); *Larsen*, 616 A.2d at 583 ("Indeed if appearances were gauged without reference to the full and true facts, then false appearances of impropriety could be manufactured with ease by anyone with personal or political animus toward a judge.").

198. Cf. *United States v. El-Gabrowni*, 844 F. Supp. 955, 961 (S.D.N.Y. 1994) ("[T]o say that [the recusal statute] requires concern for appearances is not to say that it requires concern for mirages.").

199. See *supra* note 180 and accompanying text.

within the “public domain,” or accessible to the “casual observer,” a judge cannot be charged with violating a professional norm set by a partially informed observer. There is simply no way for a judge to identify the norm because a judge can only guess what part of the full picture the observer possesses. The reliance of the appearance of impropriety standard on either the fully or partially informed reasonable person defeats any argument that professional norms save the vague disciplinary standard.

### III. THE COSTS AND BENEFITS OF DISCIPLINING APPEARANCES

Although a cost-benefit analysis has been described as “essential to the regulation of professional conduct,”<sup>200</sup> the concept is rarely discussed or applied in evaluating rules governing judicial behavior.<sup>201</sup> It may be that the lack of attention to the otherwise well-traveled analytical method is due to the abstract rather than measureable interests involved in judicial ethics. Or it may be that no cost is too great to further, or at least appear to further, public confidence in the judiciary. In any event, the benefits of the appearance of impropriety standard are generally exaggerated and overemphasized while the costs are ignored, undervalued, and rationalized.<sup>202</sup>

This Part does not purport to conduct a comprehensive assessment of the advantages and disadvantages of employing

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200. David Ira Rosenbaum, Comment, *Punitive Damages in Professional Malpractice Cases*, 61 TEMP. L. REV. 1431, 1439 (1988).

201. *But see* WIS. CODE OF JUDICIAL CONDUCT SCR 60.03(1) cmt. (2007), available at <http://www.wicourts.gov/sc/rules/chap60.pdf> (providing a list of factors disciplinary bodies should consider in “achiev[ing] a balance between the need to maintain the integrity and dignity of the judiciary and the right of judges to conduct their personal lives in accordance with the dictates of their individual consciences”).

202. *See* Miss. Comm’n on Judicial Performance v. Osborne, 11 So. 2d 107, 114 (Miss. 2009) (“A judge must therefore accept restrictions on the judge’s conduct that might be reviewed as burdensome by the ordinary citizen and should do so freely and willingly.” (quoting MISS. CODE OF JUDICIAL CONDUCT Canon 2A cmt. (2009))); M. Margaret McKeown, *Don’t Shoot the Canons: Maintaining the Appearance of Propriety Standard*, 7 J. APP. PRAC. & PROCESS 45, 54 (2005) (“[A]spir[ing] to avoid the appearance of impropriety imposes no significant burden on the judiciary.”); Letter from Nancy L. Cohen, President, Nat’l Org. of Bar Counsel, to the Joint Comm’n to Evaluate the Model Code of Judicial Conduct (Dec. 5, 2006), available at [http://www.abanet.org/judicial-ethics/resources/comm\\_rules-NOBC\\_120506\\_bw.pdf](http://www.abanet.org/judicial-ethics/resources/comm_rules-NOBC_120506_bw.pdf) (“The ‘Appearance of Impropriety’ standard has been a part of judicial ethics for a long time and its application has not caused any undue concern over that time period.”).

the appearance of impropriety as a disciplinary standard. It attempts, however, to expose some of the hidden costs of punishing appearances and to place in perspective the often highly touted benefits of the rule.

#### A. COSTS

Two disadvantages are inherent in the prohibition against improper appearances. First, the vague rule has a “chilling effect” on the First Amendment activities of judges and their family members. Second, on occasion, the standard is misapplied resulting in unwarranted damage to a judge’s reputation, or worse, the imposition of a disciplinary sanction.

##### 1. The Chilling Effect of Appearance-Based Discipline

Vague laws suffer from a lack of predictability. Individuals subject to an imprecise regulation often play it safe and forego lawful activity, even constitutionally protected activity, rather than risk a wrong guess as to whether a contemplated act is forbidden.<sup>203</sup> This “chilling effect” is especially offensive when First Amendment freedoms are at stake.<sup>204</sup> Although the extent to which a vague rule actually results in an actor’s abstention from protected activity is often a matter of speculation, it is undeniable that the uncertainty surrounding application of the appearance standard has resulted in judges declining to exercise constitutionally guaranteed rights.<sup>205</sup> Sadly, it is not only judges who suffer from the ambiguous nature of the appearance standard. Family members of judges are also called upon to sacrifice important rights in the name of upholding the appearance of judicial propriety.<sup>206</sup>

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203. See *In re Hey*, 452 S.E.2d 24, 33 (W. Va. 1994) (“[V]ague regulations fail to adequately direct regulatees and cause them to play it safe by foregoing participation in public discussion, thus discouraging them from engaging in what would be protected expression and also depriving the public of their contributions.”).

204. *NAACP v. Button*, 371 U.S. 415, 432–33 (1963).

205. See Deanell Reece Tacha, *Liberty, Justice, Freedom: Without Lawyers They’re Only Words*, *JUDGES’ J.*, Winter 1996, at 26, 46 (“I fear that in the name of ethics—that is, the avoidance of conflicts of interests and appearances of impropriety—we have withdrawn to a greater extent than necessary from the lives of our communities and from the civic life of the nation.”); *infra* Part III.A.1.a.

206. See *infra* Part III.A.1.b.

a. *Judges and the Big Chill*

One example illustrating how the fundamental rights of judges may be infringed by the appearance clause is found in an advisory opinion issued by the Virginia Judicial Ethics Advisory Committee. The opinion advised judges that voting in a primary election created an appearance of impropriety in violation of Canon 2 of the Virginia Code of Judicial Conduct.<sup>207</sup> The Virginia Advisory Committee opined that “‘reasonable’ people could easily perceive that a judge who votes in a party primary is unable to act with impartiality.”<sup>208</sup> The Committee further explained that the public perceives primary voters as partisan and therefore judges who vote in a primary put at risk the apolitical nature of the judiciary and erode public confidence in the courts.<sup>209</sup>

Two Virginia judges fearful of violating a state advisory opinion, but valuing their right to participate in the electoral process, filed a lawsuit challenging the advisory opinion’s bar against primary voting.<sup>210</sup> The federal district court dismissed the case as “non-justiciable.”<sup>211</sup> Not until four years later did the Virginia Supreme Court disavow the advisory opinion by amending the state’s judicial code to declare that “[t]he act of a judge voting in a primary election is the discharge of an honorable civic duty, an obligation of responsible citizenship, and does not give the ‘appearance of impropriety.’”<sup>212</sup> Presumably, the majority of Virginia judges, like the two plaintiffs who attempted to enjoin the operation of the advisory opinion, forewent their “obligation of responsible citizenship”<sup>213</sup> and did not

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207. Va. Judicial Ethics Advisory Comm., Op. 99-6 (1999), <http://www.courts.state.va.us/agencies/jirc/opinions/1999/99-6.html>. Many states have issued opinions permitting judges to vote in primaries. *See, e.g.*, Colo. Judicial Ethics Advisory Bd., Op. 2008-2 (2008), [http://www.courts.state.co.us/userfiles/File/Court\\_Probation/Supreme\\_Court/Committees/Judicial\\_Ethics\\_Advisory\\_Board/opinion2008-02\\_1.pdf](http://www.courts.state.co.us/userfiles/File/Court_Probation/Supreme_Court/Committees/Judicial_Ethics_Advisory_Board/opinion2008-02_1.pdf) (permitting judges to vote in primary elections); Utah Judicial Ethics Advisory Comm., Formal Op. 02-1 (2002), [http://www.utcourts.gov/resources/ethadv/ethics\\_opinions/2002/02-1.htm](http://www.utcourts.gov/resources/ethadv/ethics_opinions/2002/02-1.htm) (permitting judges to vote in primaries but observing that “whether a judge may participate in the primary election” is a difficult question).

208. Va. Judicial Ethics Advisory Comm., Op. 99-6 (1999), <http://www.courts.state.va.us/agencies/jirc/opinions/1999/99-6.html>.

209. *See id.*

210. *Kemler v. Poston*, 108 F. Supp. 2d 529, 530 (E.D. Va. 2000).

211. *Id.* at 543.

212. VA. CODE OF JUDICIAL CONDUCT Canon 2A cmt. (2004).

213. *Id.*



participate in the primary process until the state supreme court spoke in 2004.<sup>214</sup>

Further restricting voting rights, several ethics advisory committees caution judges against attending political nominating caucuses because it may appear that the judge is participating in a prohibited political meeting or endorsing a political candidate.<sup>215</sup> Other jurisdictions, in the name of protecting appearances, forbid judges from signing a petition to place a candidate's name on the ballot.<sup>216</sup>

214. *Kemler*, 108 F. Supp. 2d at 533 (noting that the plaintiff-judges had refrained from voting in primaries pending adjudication of the lawsuit). Judges, as a general rule, obey their state's judicial ethics advisory opinions partly because judges are a cautious breed, but also because of the potential adverse consequences arising from ignoring such opinions. *See, e.g., In re Ambrecht* (N.Y. Comm'n on Judicial Conduct Oct. 29, 2008) <http://www.sjc.state.ny.us/Determinations/A/Ambrecht.htm> (disciplining a judge for violating "guidelines provided in numerous opinions of the Advisory Committee on Judicial Ethics"); *In re Bonner*, at 2 (Wash. Comm'n on Judicial Conduct Aug. 3, 2007), <http://www.cjc.state.wa.us/Case%20Material/2007/5324%20Stip%20w%20attach.pdf> (citing advisory opinions in support of its conclusion that a judge violated judicial conduct rules by voluntarily writing a character reference on behalf of a criminal defendant); *see also* *State v. Smith*, 50 P.3d 825, 830 (Ariz. 2002) (en banc) (citing Arizona Judicial Ethics Advisory Committee opinions in a judicial discipline case); *In re Luzzo*, 756 So. 2d 76, 78–79 (Fla. 2000) (citing Florida advisory opinions in a judicial discipline proceeding); *Summe v. Judicial Ret. & Removal Comm'n*, 947 S.W.2d 42, 46–47 (Ky. 1997) (same); *In re Runyan*, 707 N.E.2d 580, 585–86 (Ohio Comm'n of Judges 1999) (citing ethics advisory opinions in a disciplinary decision).

215. *See, e.g.,* Colo. Judicial Ethics Advisory Bd., Op. 2008-2 (2008), [http://www.courts.state.co.us/userfiles/File/Court\\_Probation/Supreme\\_Court/Committees/Judicial\\_Ethics\\_Advisory\\_Board/opinion2008-02\\_1.pdf](http://www.courts.state.co.us/userfiles/File/Court_Probation/Supreme_Court/Committees/Judicial_Ethics_Advisory_Board/opinion2008-02_1.pdf); Kan. Judicial Ethics Advisory Panel, Op. JE-24 (1988), <http://www.kscourts.org/pdf/ClerkCt/JE24.pdf>; Neb. Judicial Ethics Comm., Op. 08-1 (2008), <http://supremecourt.ne.gov/professional-ethics/judges/ethics-committee/pdf/08-1.pdf>; Utah Judicial Ethics Advisory Comm., Informal Op. 88-7 (1988), [http://www.utcourts.gov/resources/ethadv/ethics\\_opinions/1988/88-7.htm](http://www.utcourts.gov/resources/ethadv/ethics_opinions/1988/88-7.htm); Wash. Ethics Advisory Comm., Op. 08-1 (2008), [http://www.courts.wa.gov/programs/orgs/pos\\_ethics/index.cfm?fa=pos\\_ethics.dispopin&mode=0801](http://www.courts.wa.gov/programs/orgs/pos_ethics/index.cfm?fa=pos_ethics.dispopin&mode=0801); *see also Political Party Caucuses and Primaries/Inaugural Events*, JUD. CONDUCT REP., Spring 2008, at 3, 3.

216. *See, e.g.,* Fla. Comm. on Standards of Conduct Governing Judges, Op. 92-32 (1992), <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/ninet2/92-32.html> (finding that signing a nominating petition violates Canons 2 and 7A(1)(b) of the Florida Code because the act could be perceived as an endorsement of a candidate); Pa. Conference of State Trial Judges Judicial Ethics Comm., Formal Op. 2000-1 (2000), <http://www.pabulletin.com/secure/data/vol30/30-18/692.html> ("A bare majority of the Committee is of the opinion that signing a nomination petition is prohibited . . ."); Mass. Judicial Ethics Comm., Op. 99-13 (1999), <http://www.mass.gov/courts/sjc/cje/99-13h.html> (finding that signing a candidate's petition violates Canon 2(A) of the Massachusetts Code). Other states take a more enlightened view. *E.g.,* Ill. Judicial

The conclusion that the public perceives primary voting as improper political involvement rather than a praiseworthy act of citizenship simply has no empirical, anecdotal, or common-sense support.<sup>217</sup> Equally unfounded is the suggestion that public confidence in the judiciary is weakened by attendance at nominating caucuses or by signing nomination petitions.<sup>218</sup> Nevertheless, based upon phantom appearances judges have been deprived of cherished rights necessary to the success of a democratic form of government. Nor can it be seriously claimed that mandated abstention from the political nomination process is merely another example of the price judges must willingly pay for the right to hold a position of public trust. As recognized in *Wesberry v. Sanders*:<sup>219</sup>

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.<sup>220</sup>

Regrettably, interference with First Amendment rights is not restricted to a judge's political activity. Under the guise of protecting appearances, advisory committees have cautioned judges against serving their religious congregations as a weekend pastor,<sup>221</sup> acting as a minister or pastor at any "regular"

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Ethics Comm., Op. 03-06 (2003), <http://www.ija.org/ethicsop/opinions/03-06.htm> (advising that judges may sign nominating petitions).

217. See Utah Judicial Ethics Advisory Comm., Informal Op. 02-1 (2002), [http://www.utcourts.gov/resources/ethadv/ethics\\_opinions/2002/02-1.htm](http://www.utcourts.gov/resources/ethadv/ethics_opinions/2002/02-1.htm) ("A judge appearing at a polling place will be seen by few people and the perception of the appearance is most likely to be recognition of the fact that the judge is participating in an election process, and not a perception that the judge is tied to any political ideology. The public recognizes the rights of judges as citizens and understands that a judge's participation in that process does not have significant meaning related to the integrity and partiality of the judiciary."); see also MODEL CODE OF JUDICIAL CONDUCT R. 4.1 cmt. 6 (2007) ("Judges and judicial candidates retain the right to participate in the political process as voters in both primary and general elections.").

218. See N.Y. Advisory Comm. on Judicial Ethics, Op. 89-89 (1989), <http://www.nycourts.gov/ip/judicialethics/opinions/89-89.htm> ("The signing of a nominating petition is a minuscule act in the overall election process, akin to the voting process rather than to the campaigning process."); MODEL CODE OF JUDICIAL CONDUCT R. 4.1 cmt. 6 (2007) (stating that participation in a caucus-type election does not constitute prohibited political activity).

219. 376 U.S. 1 (1964).

220. *Id.* at 17-18.

221. See Kan. Judicial Ethics Advisory Panel, Op. JE-25 (1988), <http://www.kscourts.org/pdf/ClerkCt/JE25.pdf> (finding that a judge may not serve as a weekend pastor because "the appearance to a litigant or lawyer member of a

church service,<sup>222</sup> holding the position of church treasurer,<sup>223</sup> or passing a collection basket at a worship service.<sup>224</sup>

*b. Leaving Family Members in the Cold*

It is bad enough when the inability to gauge the breadth of a judicial code provision causes persons subject to the code to forego the exercise of fundamental rights. It is far worse when a vague restriction chills the activities of individuals not even governed by the code.

Codes of judicial conduct regulate the behavior of judges, not the activities of a judge's family members.<sup>225</sup> For example, no rule of judicial conduct could legitimately claim to restrict a family member's First Amendment right to engage in political activity.<sup>226</sup> Ignoring this fact, many judicial advisory commit-

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denomination other than that of the minister-judge could well create a feeling of being disadvantaged").

222. See Va. Judicial Ethics Advisory Comm., Op. 08-1 (2008), [http://www.courts.state.va.us/agencies/jirc/opinions/2008/08\\_1.html](http://www.courts.state.va.us/agencies/jirc/opinions/2008/08_1.html) ("[A] judge should not act as a pastor or minister at a regular church service . . ."). *But see* S.C. Advisory Comm. on Standards of Judicial Conduct, Op. 4-2008 (2008), <http://www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=04-2008> (holding that a magistrate may serve as pastor of a church).

223. Compare Md. Judicial Ethics Comm., Op. 1975-10 (1975), <http://mdcourts.gov/ethics/opinions/1970s/1975-10.pdf> (recommending that judge not serve as church treasurer), with Md. Judicial Ethics Comm., Op. 1979-05 (1979), <http://mdcourts.gov/ethics/opinions/1970s/1979-05.pdf> (permitting judge to serve as bar association treasurer).

224. See Va. Judicial Ethics Advisory Comm., Op. 08-1 (2008), [http://www.courts.state.va.us/agencies/jirc/opinions/2008/08\\_1.html](http://www.courts.state.va.us/agencies/jirc/opinions/2008/08_1.html).

225. See MODEL CODE OF JUDICIAL CONDUCT pmbl. para. 3 (2007) ("The Model Code of Judicial Conduct establishes standards for the ethical conduct of judges and judicial candidates."); see also N.Y. Advisory Comm. on Judicial Ethics, Op. 06-142 (2006), <http://www.nycourts.gov/ip/judicialethics/opinions/06-142.htm> ("The Rules Governing Judicial Conduct do not impose obligations upon spouses of judges."); Ind. Comm'n on Judicial Qualifications, Op. 2-93 (1993), <http://www.in.gov/judiciary/jud-qual/docs/adops/2-93.pdf> ("Judicial spouses are not personally bound by the Code in the sense that, unlike their spouses, they are not subject to the Supreme Court's jurisdiction for Code violations."); U.S. Judicial Conference Comm. on Codes of Conduct, Op. 53 (1977) (amended 1998), <http://www.uscourts.gov/guide/vol2/53.html> ("The Code of Conduct does not govern the conduct of judge's [sic] spouses.").

226. See *In re Gaulkin*, 351 A.2d 740, 745 (N.J. 1976) ("[I]n voluminous writings of recent years concerning judicial ethics there does not seem to be the slightest suggestion that any prohibition of a spouse's service in or candidacy for public office is either necessary or appropriate."); Ariz. Judicial Ethics Advisory Comm., Op. 03-05 (2003), [http://www.supreme.state.az.us/ethics/ethics\\_opinions/2003/03-05.pdf](http://www.supreme.state.az.us/ethics/ethics_opinions/2003/03-05.pdf) ("[N]othing in the code of judicial conduct in any state prevents members of a judge's family from running for political office, supporting others' candidacy for political office, or being involved publicly

tees, under the pretext of protecting appearances, purport to limit the independent political endeavors of a judge's spouse. Restrictions are purportedly justified on the theory that a spouse's campaign activities in support of a cause or candidate may appear to reflect the views of the judge. Illustrating this point is judicial ethics expert Cynthia Gray's observation that "[s]everal advisory opinions prohibit a judge from allowing his or her spouse to hold gatherings in support of a candidate in the judge's home."<sup>227</sup> Ms. Gray's observation is accurate. The Kansas Ethics Advisory Panel concluded that the wife of a judge could not host a meet-the-governor event at a home held in joint tenancy with the judge because the gathering "may well be viewed by the general public as a political endorsement by the judge himself of a candidate for public office."<sup>228</sup> A Texas opinion reached the same result, surmising that the public views a fundraiser in a home shared by a judge and spouse as sponsored by the judge, not the spouse.<sup>229</sup>

A spouse's attempt to place a campaign sign in the yard of a jointly owned marital residence has likewise met resistance from advisory committees. New York cautions that political signs should not be posted by a judge's spouse on property jointly held with the judge because to do so "may create the impression that the judge concurs with [the] spouse's endorsement of the candidate."<sup>230</sup> Because the appearance standard has no bounds, the New York Advisory Committee on Judicial Ethics unabashedly requires a judge to "strongly urge" that a

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in other political activities . . ."); Ill. Judicial Ethics Comm., Op. 06-02 (2006), <http://www.ija.org/ethicsop/opinions/06-02.htm> ("[C]odes of judicial conduct do not, and cannot, regulate the independent political activities of a judge's spouse."); Wis. Judicial Conduct Advisory Comm., Op. 97-2 (1997), <http://www.wicourts.gov/sc/judcond/DisplayDocument.pdf?content=pdf&seqNo=904> ("[T]he Code does not address political activities of a judge's spouse, nor could it in view of the First Amendment."); see also MODEL CODE OF JUDICIAL CONDUCT R. 4.1 cmt. 5 (2007) ("[M]embers of the families of judges and judicial candidates are free to engage in their own political activity . . .").

227. Cynthia Gray, *When a Family Member Supports a Political Candidate*, JUD. CONDUCT REP., Spring 2008, at 9.

228. Kan. Judicial Ethics Advisory Panel, Op. JE-33 (1990), <http://www.kscourts.org/pdf/ClerkCt/JE33.pdf> (hosting a political event at a jointly owned home violates Canons 2 and 7A(1) of the Kansas Judicial Code).

229. Tex. Comm. on Judicial Ethics, Op. 284 (2001), <http://www.courts.state.tx.us/judethics/281-290.htm>; accord Del. Judicial Ethics Advisory Comm., Op. 2008-1 (2008), <http://courts.state.de.us/jeac/opns/JEAC2008-1.pdf> (advising judge not to permit campaign or political activity in the marital residence).

230. N.Y. Advisory Comm. on Judicial Ethics, Op. 96-112 (1996), <http://www.nycourts.gov/ip/judiciaethics/opinions/96-112.htm>.

sign not be placed on property solely owned by the judge's spouse.<sup>231</sup> Similarly, Massachusetts judges "should not allow" spouses or children to place political signs on "the judge's lawn."<sup>232</sup>

In a magnanimous gesture, some advisory bodies allow the spouse or child of a judge to make political contributions, but only from separately maintained funds.<sup>233</sup> Again, the rationale for this restriction is that a contribution from a joint account appears to be made by the judge and the "administration of justice must be free of such appearance."<sup>234</sup>

The immediate concern is not the archaic way in which some ethics committees describe the marital residence as the "judge's home," or the unstated assumption that a judge has the right or ability to control the independent activities of a spouse or adult child,<sup>235</sup> or even the erroneous belief that a

231. N.Y. Advisory Comm. on Judicial Ethics, Op. 99-118 (1999), [http://www.nycourts.gov/ip/judicialethics/opinions/99-118\\_.htm](http://www.nycourts.gov/ip/judicialethics/opinions/99-118_.htm). It is unusual, to say the least, for a governmental or quasi-governmental agency to dictate the substance of communications that must take place between a married couple. Some judges may prefer not to have strongly worded conversations with their spouses.

232. Mass. Comm. on Judicial Ethics, Op. 98-4 (1998), <http://www.mass.gov/courts/sjc/cje/98-4h.html>; *accord* Mass. Comm. on Judicial Ethics, Op. 2005-8 (2005), <http://www.mass.gov/courts/sjc/cje/2005-8n.html> (rebuking judge's adult daughter's attempt to place a campaign sign in support of her brother at the home occupied by the judge and daughter); Me. Judicial Ethics Advisory Comm., Op. 94-3 (1994); S.C. Advisory Comm. on Standards of Judicial Conduct, Op. 33-2001 (2001), <http://www.judicial.state.sc.us/advisory/Opinions/displayadvopin.cfm?advOpinNo=33-2001>; *cf. In re McCormick*, 639 N.W.2d 12, 15 n.2 (Iowa 2002) (acknowledging, but not deciding, the issue of whether a judge is responsible for a spouse's campaign sign).

233. *See, e.g.*, Colo. Judicial Ethics Advisory Bd., Op. 2006-4 (2006), [http://www.courts.state.co.us/userfiles/File/Court\\_Probation/Supreme\\_Court/Committees/Judicial\\_Ethics\\_Advisory\\_Board/opinion2006-04\\_1.pdf](http://www.courts.state.co.us/userfiles/File/Court_Probation/Supreme_Court/Committees/Judicial_Ethics_Advisory_Board/opinion2006-04_1.pdf); Kan. Ethics Advisory Panel, Op. JE-13 (1985), <http://www.kscourts.org/pdf/ClerkCt/JE13.pdf>; Mass. Comm. on Judicial Ethics, Op. 98-4 (1998), <http://www.mass.gov/courts/sjc/cje/98-4h.html>.

234. *In re Gaulkin*, 351 A.2d 740, 747 (N.J. 1976).

235. Of course, outside the courtroom, a judge has no right or authority to control another adult's actions. *See* Ethics Comm. of the Ky. Judiciary, Op. JE-50, <http://courts.ky.gov/NR/rdonlyres/310ED452-B8F8-4854-9016-74292F892007/0/JE50.pdf> (finding that a judge has no ability to prohibit spouse's political activity); *cf. Horstkoetter v. Dep't of Pub. Safety*, 159 F.3d 1265, 1275 (10th Cir. 1998) ("The [state] trooper clearly does not have the right to remove [political] signs placed in a yard owned by a spouse or someone else, or in which the spouse or others have a property interest, such as a joint tenancy or tenancy in common."); *Wrzesinski v. Danielson*, 231 F. Supp. 2d 611, 622 (W.D. Mich. 2002) (finding that firing a court employee because the employee's spouse posted a political sign on joint property violates the First Amendment).

husband and wife share the same political views.<sup>236</sup> What matters here is the dilemma judges and their families face when confronted with an advisory opinion purporting to limit the exercise of important rights. The judge and other household members can choose to follow the opinion and thereby sacrifice rights of citizenship such as voting and political activity. Alternatively, the judge or family member may decide to ignore the pronouncement and risk disciplinary proceedings against the judge. By nature, judges are cautious individuals<sup>237</sup> who generally value their reputation and office and are reticent to risk losing either by violating even an obviously flawed advisory opinion. The fear of disobeying an advisory opinion is heightened by the fact that even though not binding on disciplinary bodies, these opinions are often considered persuasive in determining whether a judge violated a disciplinary rule.<sup>238</sup> When judges and family members, based on a fear of violating the imprecise appearance standard, forego political or religious activities, they unnecessarily and unjustifiably suffer an injury to their First Amendment rights.<sup>239</sup>

## 2. Judge Andrew J. Smithson

The unsuitability of the reasonable person for judging appearances invites judges and other members of disciplinary bodies to subconsciously substitute their own subjective evaluation of a judge's conduct for the objective test outlined in judicial codes. When this happens, judges become the victims of

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236. See Ill. Judicial Ethics Comm., Op. 06-02 (2006), <http://www.ija.org/ethicsop/opinions/06-02.htm> ("While marriage is many things, it is not a merger of the political thoughts and beliefs of the individuals joined in marriage. To the contrary, marriage 'is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.'" (quoting *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965))).

237. Commentators often characterize judges as risk-averse. See, e.g., Donald P. Judges, *Of Rocks and Hard Places: The Value of Risk Choice*, 42 EMORY L.J. 1, 82 (1993) ("[J]udges . . . by temperament are likely to be risk-averse . . .").

238. See Jonathan D. Persky, Note, "Ghosts That Slay": A Contemporary Look at State Advisory Opinions, 37 CONN. L. REV. 1155, 1209–14 (2005) (discussing the nonbinding doctrine).

239. See Note, *Speech, Spouses, and Standing: Is There Standing to Sue When Sanctions Threatened Against One's Spouse Chill Protected Expression?*, 45 B.C. L. REV. 147, 163 (2003) ("When the spouse of a public employee forgoes or hesitates to engage in protected speech out of fear that doing so will result in direct, employment-related sanctions against the public employee, the spouse has suffered an injury to rights protected by the First Amendment.").

the limitless nature of the appearance standard. One example is the disciplinary investigation of New Jersey state court judge Andrew J. Smithson.

During the course of jury selection, Judge Smithson's wife, without objection, was chosen as a juror in a criminal case presided over by her husband.<sup>240</sup> At the conclusion of the trial, she was identified as an alternate juror and did not participate in the deliberations that resulted in the defendant's conviction.<sup>241</sup> After the conviction was affirmed on appeal, the defendant filed a complaint with the New Jersey Advisory Committee on Judicial Conduct claiming that Judge Smithson violated the state's judicial code by permitting his wife to serve as a juror.<sup>242</sup>

The New Jersey Advisory Committee found that the judge's decision to permit his wife to serve as alternate juror violated the state code of judicial conduct because it "created, minimally, an appearance of impropriety."<sup>243</sup> The Committee's reasoning took several steps. First, it determined that the judge enjoyed a unique relationship with one juror that was not "shared with nor duplicated by any other juror in the case."<sup>244</sup> Next, the Committee determined that marital relationships "are significantly different from other relationships and engender associations of closeness and continuity."<sup>245</sup> Based on these premises, the Committee concluded that it was possible, if not probable, that Ms. Smithson would be viewed differently by the other jurors. The difference would lie in "her background and understanding derived from her experiences as [the judge's] spouse" and the possibility that her opinion might carry more weight with the jurors.<sup>246</sup> No evidence was offered in support of this conclusion.<sup>247</sup> Neither did the Committee ex-

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240. See Letter from Alan B. Handler, Chair, N.J. Supreme Court Advisory Comm. on Judicial Conduct, to Andrew J. Smithson 1 (May 29, 2007), <http://www.judiciary.state.nj.us/pressrel/acjcajs.pdf> [hereinafter Handler Letter].

241. See *id.*

242. See *id.*

243. *Id.* at 2.

244. *Id.*

245. *Id.*

246. *Id.*

247. The New Jersey Advisory Committee on Judicial Conduct cited *Elmore v. Arkansas*, 144 S.W.3d 278 (Ark. 2004), in support of its finding. Handler Letter, *supra* note 240, at 3. *Elmore* reversed a defendant's conviction because the trial judge, over objection, permitted his wife to serve on the jury. *Elmore*, 144 S.W.3d at 279. The court reasoned that since the jury might give the judge's spouse's opinion "more credence or weight" an appearance of impropriety was created. *Id.* at 280. The opinion does not indicate if a discipli-

plain how this special background and understanding could influence the jury since Ms. Smithson did not participate in the deliberations.

The New Jersey Advisory Committee committed an error common when dealing with the amorphous appearance standard. Simply put, the Committee answered the wrong question. The Committee members, relying on their own subjective assessment of the situation, decided that a judge's spouse should not serve as a juror in a case presided over by the judge.<sup>248</sup> But that is a policy question properly left to those charged with writing a judicial code. A disciplinary committee's assignment in investigating a claimed appearance of impropriety is to answer a different question: would the reasonable person knowing and understanding all the facts and circumstances conclude that the judge violated, or appeared to violate, the judicial code, or engaged in other behavior calling into question the judge's ability or willingness to competently perform judicial duties with impartiality, independence, and integrity?<sup>249</sup>

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nary investigation was commenced as a result of the appellate court's finding. The opinion also does not explain why the appearance of impropriety standard required the disqualification of the juror rather than the judge. In situations where a judge's relative is involved in proceedings before the judge as a witness, lawyer, or party, it is the judge, not the relative, who is disqualified. See ARK. CODE OF JUDICIAL CONDUCT Canon 3E(1)(d) (2009).

248. See Handler Letter, *supra* note 240, at 3 ("The Committee firmly believes, however, that the spirit of Canon 2 precludes the ability of a judge's spouse to serve as a juror in a matter over which the judge is presiding."); cf. Jeffrey M. Hayes, *To Recuse or to Refuse: Self-Judging and the Reasonable Person Problem*, 33 J. LEGAL PROF. 85, 99 (2008) ("[T]he reasonable person standard often serves as a proxy for the judge's own views . . ."); Robert J. Martineau, *Disciplining Judges for Nonofficial Conduct: A Survey and Critique of the Law*, 10 U. BALT. L. REV. 225, 245 (1981) ("It sometimes appears as if particular courts have merely imposed their own moral standards of what is or is not proper conduct.").

249. The 2007 Code defines the appearance of impropriety as follows: "The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament or fitness to serve as a judge." MODEL CODE OF JUDICIAL CONDUCT R. 1.2 cmt. 5 (2007). The 1990 Code included a slightly different test. See MODEL CODE OF JUDICIAL CONDUCT Canon 2A cmt. (1990) ("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."). Ostensibly, the New Jersey Advisory Committee employed this reasonable-person test. See Handler Letter, *supra* note 240, at 2 (finding that the "average person" would view Mrs. Smithson's jury service as reflecting adversely on the judge's objectivity, thereby undermining public confidence in the judiciary).



In addressing this question the fully informed observer in the *Smithson* matter would know that (1) the judge's wife was called to the courtroom randomly; (2) neither attorney requested that Ms. Smithson be excused; (3) Ms. Smithson was identified as an alternate juror and did not deliberate with the jury; (4) ethical rules require that a judge not afford special treatment to relatives;<sup>250</sup> (5) ethical rules prohibit a judge from hearing a case in which his or her spouse is a party, witness, or lawyer, but say nothing about a spouse's service as a juror;<sup>251</sup> and (6) the defendant did not raise the issue of the judge's wife's jury service at trial or on appeal. Under these facts, a reasonable person would be hard pressed to conclude that Judge Smithson violated, or appeared to violate, a code provision, or that the engaged in conduct adversely impacted his honesty, impartiality, temperament, or fitness for judicial office.

Because "of the lack of direct guidance in the [New Jersey] Code of Judicial Conduct,"<sup>252</sup> the Advisory Committee declined to recommend the commencement of disciplinary proceedings against Judge Smithson.<sup>253</sup> But as grateful as a judge would be to escape a reprimand or censure, the damage to the judge's reputation, the financial and emotional drain, and the message to the public that yet another judge "violated" his oath and the

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250. The New Jersey Code of Judicial Conduct provides that "[a] judge should not allow family, social, political, or other relationships to influence judicial conduct or judgment." N.J. CODE OF JUDICIAL CONDUCT Canon 2B (2009). Most judges understand this provision to mandate that family members must receive no special treatment from the court system. Judge Smithson was acutely aware of this professional norm. See Letter from Andrew J. Smithson, Judge, Superior Court of New Jersey, to Patrick J. Monahan, Jr., Advisory Comm. on Judicial Conduct (June 9, 2006), available at <https://www.judiciary.state.nj.us/pressrel/acjcajs.pdf> ("[A]ny unilateral action on my part to excuse [my wife] would have been a violation of Canon [sic] 2.B as I would have allowed a family relationship to influence my conduct and judgment.").

251. See N.J. CODE OF JUDICIAL CONDUCT Canon 3C(1)(d) (2009) (mandating a judge's disqualification from a proceeding in which the judge's spouse or other relative is involved as a party, witness, or lawyer, but not requiring similar action when a family member of a judge is a prospective juror); see also MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(2) (2007) (including a provision similar to Canon 3E(1) of the New Jersey Code but adding "domestic partner" to the class of individuals requiring the judge's recusal).

252. Handler Letter, *supra* note 240, at 3.

253. *Id.* The Advisory Committee also declined to recommend disciplinary action because of the considerable time that had elapsed between the trial and the Committee's investigation. *Id.* The Committee indicated that it would communicate with the Director of the Administrative Office of the Courts regarding the issuance of an Administrative Directive instructing judges how to handle the issue of spousal jury service. *Id.* at 3.

code of ethics, remains.<sup>254</sup> Additionally, the Committee's decision generates new questions for judges to address at their peril. May a judge's parent,<sup>255</sup> child, or in-laws serve as a juror before the judge?<sup>256</sup> Is it permissible for a judge's spouse to serve on another judge's jury?<sup>257</sup> Should a state supreme court justice be permitted to sit as a juror, or does the justice's service create a risk of improper jury influence even greater than that of a judge's spouse?<sup>258</sup> Most likely, fear of creating an appearance of impropriety will lead judges to "steer far wide[] of the unlawful zone."<sup>259</sup>

## B. BENEFITS

The major benefit attributed to the appearance prohibition—providing a basis for charging judges with misconduct not specifically outlawed by other code provisions—is discussed in Part III.B.1. Another claimed advantage, the use of appearances as a bargaining chip to facilitate negotiated judicial disciplinary dispositions, is discussed in Part III.B.2. In actuality, neither purported benefit advances the goal of enhancing public confidence in the judiciary.

### 1. The Appearance of Impropriety as a Safety Net

The primary argument offered in support of a disciplinary rule based on appearances proceeds as follows: the judicial

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254. The proceedings before the New Jersey Advisory Committee were made public at the request of Judge Smithson. See Press Release, N.J. Advisory Comm. on Judicial Conduct (May 29, 2007), available at <http://www.judiciary.state.nj.us/pressrel/acjcajs.pdf>.

255. See *State v. Tody*, 764 N.W.2d 737, 747–48 (Wis. 2009) (ordering a new trial because the judge's mother was a juror). The *Tody* opinion does not indicate whether the matter was referred to a judicial disciplinary body.

256. The legislature could easily clarify the propriety of a judge's family member serving as a juror by enacting a rule on the subject. For example, New York law disqualifies anyone from sitting as a juror who is related within the sixth degree of consanguinity or affinity to a defendant, victim, witness, or prosecutor in the case. N.Y. CRIM. PROC. LAW § 270.20(1)(c) (McKinney 2002). Judges could easily be added to the list.

257. See *People v. Collins*, 478 N.E.2d 267, 283 (Ill. 1985) (concluding that defense attorneys made a strategic decision to permit the wife of a judge not presiding over the trial to become a jury member).

258. New Jersey Supreme Court Chief Justice Deborah Poritz served as a juror during her second year as Chief Justice. Peter Lattman, *Law Blog Q&A with Drinker Biddle's Deborah Poritz*, WALL ST. J. LAW BLOG, Dec. 14, 2006, <http://blogs.wsj.com/law/2006/12/14/law-blog-qa-with-deborah-poritz>.

259. *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

branch survives only because the public trusts the system.<sup>260</sup> Judges symbolize the justice system and its essential components—*independence, impartiality, and integrity.*<sup>261</sup> Thus, confidence in the administration of justice is synonymous with confidence in judges. This all-important confidence is undermined by any conduct which diminishes society's belief in, or respect for, the independence, impartiality, fairness, integrity, honesty, uprightness, dignity, or moral character of judges.<sup>262</sup> A judge's boorish, offensive, dishonest, immoral, or undignified conduct, in or out of court, lessens respect for the judge and the entire judiciary and therefore must be prohibited. Because there is no way to conceive, much less list, every potential improper deed a judge may commit, a broad, all-inclusive standard must be established against which the propriety of a judge's behavior is measured.<sup>263</sup> Accordingly, codes of judicial conduct prohibit judges from engaging in any "impropriety."<sup>264</sup>

But preventing actual wrongdoing, the argument continues, is insufficient to protect public confidence because "[a]voiding the appearance of impropriety is as important to developing public confidence in the judiciary as avoiding im-

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260. See, e.g., *In re Ferrara*, 582 N.W.2d 817, 827 (Mich. 1998) ("The effectiveness of our judicial system is dependent upon the public's trust."); *Judicial Inquiry & Review Comm'n v. Shull*, 651 S.E.2d 648, 658 (Va. 2007) (recognizing that the legal system depends on the public's respect and confidence); JAMES J. ALFINI ET AL., *JUDICIAL CONDUCT AND ETHICS* § 10.03, at 10-4 (4th ed. 2007) (discussing the need for public confidence in the judiciary and concluding that "[i]f this confidence were lost, the judicial system could not function").

261. See *In re Sloop*, 946 So. 2d 1046, 1049 (Fla. 2007) ("Judges stand at the pinnacle of the justice system, and each judge . . . represents the face of justice.").

262. MODEL CODE OF JUDICIAL CONDUCT R. 1.2 cmt. 3 (2007) ("Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary."); MODEL CODE OF JUDICIAL CONDUCT Canon 2 cmt. (1990) ("Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges.").

263. See MODEL CODE OF JUDICIAL CONDUCT R. 1.2 cmt. 3 (2007) ("Because it is not practicable to list all [improper] conduct, the Rule [prohibiting impropriety and the appearance of impropriety] is necessarily cast in general terms."); ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 30 (2004) (stating that the rule against impropriety and the appearance of impropriety is cast in general terms because it is not practicable to list all prohibited acts).

264. See, e.g., MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1990) ("A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities."); CODE OF JUDICIAL CONDUCT Canon 2 (1972) ("A judge should avoid impropriety and the appearance of impropriety in all his activities.").

propriety itself.”<sup>265</sup> Therefore, judicial codes must prohibit conduct that even appears suspect. Of course, there is no way to identify every possible act that creates a bad appearance, so judicial codes employ the nonspecific prohibition against the “appearance of impropriety.”<sup>266</sup> By barring every conceivable and inconceivable impropriety, in fact and in appearance, the public is assured that any behavior inimical to trust and confidence in the judiciary will be prevented or at least punished. Nothing will slip through the cracks in the specific code prohibitions.

The argument that a prohibition against the appearance of impropriety is needed to provide a basis for charging misconduct that otherwise would slip through the cracks<sup>267</sup> is undercut by the fact that proponents,<sup>268</sup> and opponents,<sup>269</sup> of the appearance standard, as well as neutral observers,<sup>270</sup> agree that seldom is a judge punished solely on the basis of appearances. The overwhelming majority of cases finding a judge guilty of an improper appearance also find that the judge violated a more specific code provision. For example, according to the website of the Indiana Judicial Qualifications Commission, the Indiana Supreme Court issued thirty-six published disciplinary decisions between 1987 and 2007.<sup>271</sup> Ten of the opinions refer gen-

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265. *In re Dean*, 717 A.2d 176, 184 (Conn. 1998); see also *In re Greenberg*, 280 A.2d 370, 372 (Pa. 1971) (“Without the appearance as well as the fact of justice, respect for the law vanishes in a democracy.”).

266. See, e.g., MODEL CODE OF JUDICIAL CONDUCT R. 1.2 (2007).

267. See Kathleen Maher, *Keeping Up Appearances*, 16 PROF. LAW. 1, 15 (2005) (“[S]ome jurisdictions still find [the appearance of impropriety standard] useful when a judge or lawyer engages in unethical conduct that does not fit nicely into any other Rule or Code provision.”).

268. See, e.g., Gray, *supra* note 23, at 67 (“Although in most judicial discipline cases, a judge is charged with violating a specific canon such as the prohibition on ex parte communications, there are cases based on findings of an appearance of a violation.”).

269. See, e.g., Patricia Manson, *Debate over Ethics Heats Up as Confab Opens*, CHI. DAILY L. BULL., Feb. 8, 2007, at 24 (“Creating the appearance of impropriety seldom appears as a stand-alone charge in disciplinary cases brought under the current [1990] code. . . . It’s a charge which is thrown in, but is never or rarely the sole basis for discipline . . . .” (quoting Mark I. Harrison, Chair of the Joint Commission)).

270. Maher, *supra* note 267, at 14 (“While the ‘appearance of impropriety’ has been the sole basis for discipline in some cases, it is usually used in conjunction with another Canon when charging a judge with misconduct.”).

271. See Indiana Supreme Court Judicial Disciplinary Opinions, <http://www.in.gov/judiciary/jud-qual/dis-opinions.html> (last visited Apr. 4, 2010). All Indiana disciplinary proceedings referred to in this Article were decided under judicial codes in effect prior to January 1, 2009.

erally to the appearance of impropriety prohibition or specifically find that a judge violated the standard.<sup>272</sup> But none of the thirty-six Indiana disciplinary orders relies solely on the appearance of impropriety.<sup>273</sup> Each opinion finds a code violation other than the prohibition against improper appearances.<sup>274</sup>

The Wisconsin Code of Judicial Ethics,<sup>275</sup> which governed the conduct of state judges from 1968 until 1997, did not contain a disciplinary or aspirational provision regarding the appearance of impropriety.<sup>276</sup> There is no indication that the ab-

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272. The ten opinions are: *In re Kouros*, 816 N.E.2d 21, 29 (Ind. 2004) (finding the judge violated Canons 1, 2, and 3(B)(9) of the Indiana Code); *In re Jacobi*, 715 N.E.2d 873, 875 (Ind. 1999) (finding a violation of Canons 1, 2(A), and 3(B)(2)); *In re Johnson*, 715 N.E.2d 370, 371–72 (Ind. 1999) (finding a violation of Canons 1, 2(A), and 3(B)(8)); *In re McClain*, 662 N.E.2d 935, 944 (Ind. 1996) (finding that the judge's role in sending his used condom with a vulgar letter to a court employee violated Canon 1 by failing to preserve the integrity of the judiciary and violated Canon 2(A) by failing to promote public confidence in the integrity of the judiciary); *In re Goodman*, 649 N.E.2d 115, 116 (Ind. 1995) (finding a violation of Canons 2A, 3B(2), and 3B(4)); *In re Sallee*, 579 N.E.2d 75, 76 (Ind. 1991) (finding a violation of Canons 1, 2, and 7A(1)(c)); *In re Sauce*, 561 N.E.2d 751, 753 (Ind. 1990) (finding that the judge's ex parte communications violated Canons 1 and 2(A) and that his off-color, threatening comments violated Canon 2(A) "in that he failed to avoid the appearance of impropriety and did not conduct himself in a manner that promoted public confidence in the integrity of the judiciary"); *In re Hammond*, 559 N.E.2d 310, 312 (Ind. 1990) (finding a violation of Canons 2 and 5); *In re Boles*, 555 N.E.2d 1284, 1288 (Ind. 1990) (finding a violation of Canons 2, 3, and 7); and *In re Katic*, 549 N.E.2d 1039, 1040 (Ind. 1990) (finding a violation of Canons 1, 2, and 7).

273. See disciplinary actions cited *supra* note 272. Interestingly, the phrase "appearance of impropriety" does not appear in the seven most recent Indiana disciplinary orders. See *In re Hawkins*, 902 N.E.2d 231 (Ind. 2009); *In re Felts*, 902 N.E.2d 255 (Ind. 2009); *In re Scheibenberger*, 899 N.E.2d 649 (Ind. 2009); *In re Hanley*, 867 N.E.2d 157 (Ind. 2007); *In re Newman*, 858 N.E.2d 632 (Ind. 2006); *In re Cruz*, 851 N.E.2d 960 (Ind. 2006); *In re Pfaff*, 838 N.E.2d 1022 (Ind. 2005). The phrase, however, may make a comeback in future disciplinary orders since Indiana's most recent code of judicial conduct, effective January 1, 2009, includes a specific disciplinary rule prohibiting conduct which creates an appearance of impropriety. IND. CODE OF JUDICIAL CONDUCT R. 1.2 (2009).

274. See disciplinary actions cited *supra* note 272.

275. WIS. CODE OF JUDICIAL ETHICS (1968). The Wisconsin Code of Judicial Ethics is reproduced in *In re Code of Judicial Ethics*, 153 N.W.2d 873, 875–78 (Wis. 1967).

276. Enacted in 1967, the original Wisconsin Code of Judicial Ethics included "standards" intended to serve as advisory "statements of what the general desirable level of conduct should be" and separately designated rules "the violation of which shall subject an individual judge to sanctions." *In re Code of Judicial Ethics*, 153 N.W.2d at 874. No appearance of impropriety clause was included in the Code. *Id.* at 875–78. Standard 3 of the Code brought appearances into play to a limited extent by providing that a judge "should administer the law free of partiality and the appearance of partiality." *Id.* at 875. The

sence of the appearance standard hampered judicial discipline in Wisconsin.<sup>277</sup> Canon 3 of the successor Wisconsin Code of Judicial Conduct does include a prohibition against the appearance of impropriety,<sup>278</sup> but reported disciplinary cases do not reveal its use as an independent basis for discipline.<sup>279</sup> North Carolina, since removing any mention of the appearance of impropriety standard from its code of judicial conduct in 2003,<sup>280</sup> has not lost the ability to sanction judges for such di-

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accompanying Rules provided that an aggravated or persistent violation of a standard could rise to the level of a rule violation. *Id.* at 878. But the appearance of partiality was never used as the sole basis for discipline. *See, e.g., In re Carver*, 531 N.W.2d 62, 69 (Wis. 1995) (finding that the judge violated four standards of judicial conduct including the obligation to administer the law without partiality or the appearance of partiality); *In re Breitenbach*, 482 N.W.2d 52, 56–57 (Wis. 1992) (disciplining a judge for, among other things, intemperate, rude, and discourteous conduct in violation of the duty to avoid the appearance of partiality and five other standards of judicial conduct). Decisions applying the Wisconsin Code of Judicial Ethics occasionally mentioned the appearance of impropriety but only in the context of explaining the rationale behind the enactment of specific prohibitions. *See, e.g., In re Seraphim*, 294 N.W.2d 485, 499 (Wis. 1980) (explaining that the rule prohibiting the acceptance of gifts from persons whose interests were likely to come before the judge was based on the need to prevent improper appearances).

277. “Reported Judicial Disciplinary Public Cases” are collected at the Wisconsin Judicial Commission’s website. *See* Public Cases, <http://www.wicourts.gov/about/committees/judicialcommission/publiccases.htm> (last visited Apr. 4, 2010).

278. WIS. SUP. CT. R. 60.03 (“A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.”).

279. *See, e.g., In re Ziegler*, 750 N.W.2d 710, 723 (Wis. 2008) (“Judge Ziegler’s [failure to disqualify from cases in which her spouse served as a director of a party] violated not only the plain language of the Code but also a principal underlying the Code: Judges should avoid partiality and even the appearance of partiality.”); *In re Crawford*, 629 N.W.2d 1, 8–9 (Wis. 2001) (citing the Wisconsin Code provision prohibiting improper appearances but finding that an attempt to coerce the chief judge to vacate an administrative order by threatening disclosure of personal family matters is an actual impropriety). According to the Wisconsin Judicial Commission website, seven public disciplinary opinions have been issued since adoption of the Wisconsin Code of Judicial Conduct in 1997. *See* Public Cases, *supra* note 277 (citing *Ziegler*, 750 N.W.2d at 710; *In re Laatsch*, 727 N.W.2d 488 (Wis. 2007); *In re Crawford*, 629 N.W.2d 1 (Wis. 2001); *In re Waddick*, 605 N.W.2d 861 (Wis. 2000); *In re Michelson*, 591 N.W.2d 843 (Wis. 1999); *In re Stern*, 589 N.W.2d 407 (1999); and *In re Tesmer*, 589 N.W.2d 307 (Wis. 1998)).

280. *See* N.C. CODE OF JUDICIAL CONDUCT Canon 2 (2009) (“A judge should avoid impropriety in all his activities.”). Prior to being amended in 2003, Canon 2 of the North Carolina Code provided that “[a] judge should avoid impropriety and the appearance of impropriety in all his activities.” N.C. CODE OF JUDICIAL CONDUCT Canon 2 (1991); *accord* *Lange v. Lange*, 605 S.E.2d 732, 736 n.1 (N.C. Ct. App. 2004).

verse conduct as the uninvited touching of a paralegal,<sup>281</sup> the filing of a complaint claiming that attorneys and judges conspired to assassinate the judge,<sup>282</sup> and pushing and yelling at an elevator passenger.<sup>283</sup> Oregon abandoned the appearance-of-impropriety standard in 1996.<sup>284</sup> On the federal level, the canons of judicial conduct governing United States judges (including a provision prohibiting the appearance of impropriety) have historically been viewed as establishing aspirational guides and not disciplinary rules.<sup>285</sup>

Notwithstanding the fact that many jurisdictions have successfully addressed judicial misconduct without the need to resort to appearances, proponents of the standard identify several types of confidence-damaging behavior that purportedly are not governed by specific code provisions. It is argued that these behaviors would go unpunished without the option of an appearance-based charge. The following subsections examine three of these professed areas of unregulated judicial misconduct.

*a. Personal Relationships with Criminals*

It is suggested that the appearance standard provides a basis for disciplining a judge who damages public confidence by

281. See *In re Daisy*, 614 S.E.2d 529, 531 (N.C. 2005) (finding that the unwanted touching violated Canons 1, 2A, and 3A(3) of the North Carolina Code of Judicial Conduct).

282. See *In re Harrison*, 611 S.E.2d 834, 836 (N.C. 2005) (finding that the bizarre conduct violated Canons 1, 2A, 3A(6), and 7(B)(2) of the North Carolina Code).

283. See *In re Hill*, 609 S.E.2d 221, 223 (N.C. 2005) (finding that the elevator episode and the improper remarks in court violated Canons 1, 2A, 3A(2), and 3A(3) of the North Carolina Code).

284. OR. CODE OF JUDICIAL CONDUCT (2002) (omitting the appearance of impropriety provision which had appeared in previous versions of the Oregon Code); see also OR. CODE OF JUDICIAL CONDUCT Canon 2 (1975) (“A Judge Should Avoid the Appearance of Impropriety In All His Activities.”); OR. CANONS OF JUDICIAL ETHICS Canon 4 (1952) (“A judge’s official conduct should be free from impropriety and the appearance of impropriety.”).

285. See, e.g., *In re Complaint of Judicial Misconduct*, 575 F.3d 279, 282 (9th Cir. 2009) (describing the Code of Conduct as “in many potential applications aspirational rather than a set of disciplinary rules”); *In re Complaint of Judicial Misconduct*, 425 F.3d 1179, 1202 (9th Cir. 2005) (Winmill, J., dissenting) (“Of course, the Canons are only guidelines, and so not all violations of the Canons amount to misconduct.”); *In re Charge of Judicial Misconduct*, 62 F.3d 320, 322 (9th Cir. 1995) (“The Canons are aspirational goals . . . .”); *An Interview with Judge M. Margaret McKeown*, THIRD BRANCH, July 2009, at 10, 12 (“Our Code [of Conduct for United States Judges] remains advisory and aspirational.”).

engaging in a close relationship with a convicted criminal.<sup>286</sup> But identifying a judge who has been disciplined for no more than a close association with a lawbreaker is as difficult as defining the phrase “appearance of impropriety.” Most decisions imposing punishment for an ongoing relationship with a crime figure do so not on the basis of the social or personal relationship, but because the judge provided advice to, or accepted gifts or favors from, the offender.<sup>287</sup> The authors of *Judicial Conduct and Ethics* state that “[a]lthough numerous dicta indicate that judges may be disciplined merely for ‘close and intimate association’ with criminals, there appears to be only one reported instance of punishment being imposed in the absence of palpable misconduct.”<sup>288</sup> The authors add that even in that case, involving former Rhode Island Chief Justice Joseph Bevilacqua, the precise acts for which the judge was disciplined are unknown because no official decision was rendered and the record of the proceedings remains confidential.<sup>289</sup> However, newspaper articles appearing at the time of the Bevilacqua investigation indicate that the receipt of gifts and favors may have played a role in the judge’s suspension.<sup>290</sup>

*In re Harris*<sup>291</sup> is sometimes cited in support of the proposition that an appearance prohibition is needed to regulate associations with felons.<sup>292</sup> But the discipline imposed on Judge Harris hardly needed to be justified by appearances.

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286. See Gray, *supra* note 23, at 81; *Speakers Urge Commission to Eschew Drastic Rewrite of Judicial Conduct Code*, 72 U.S.L.W. 2611, 2611 (2004) (summarizing testimony before the Joint Commission suggesting that the appearance-of-impropriety standard was necessary to discipline a judge having “an [extramarital] affair with a felon that the judge previously sentenced”).

287. See ALFINI ET AL., *supra* note 260, § 10.05B, at 10-24.

288. *Id.* at 10-24 to 10-25. The disciplinary action referred to is the Rhode Island Commission on Judicial Tenure’s suspension of Joseph Bevilacqua in 1985. *Id.* at 10-25 n.155. At the time of Justice Bevilacqua’s suspension, a review of disciplinary decisions around the country disclosed that “[o]nly seven other judges had been disciplined for their associations with criminals, and in all but one of the cases, there was additional evidence of wrongdoing, such as accepting gifts or favors.” *Rhode Island Chief Justice Suspended*, JUD. CONDUCT REP., Spring 1985, at 2, 6.

289. ALFINI ET AL., *supra* note 260, § 10.05B, at 10-25 n.155.

290. See, e.g., Ken Franckling, *Photos at Mob-Linked Motel Further Harm Judge’s Image*, MIAMI HERALD, May 13, 1985, at 2A (reporting that Judge Bevilacqua loaded several boxes into his car while at a wholesale food warehouse owned by a convicted felon with no money passing hands, and reporting that the judge engaged in midday and evening one-hour visits with women at a motel owned by persons allegedly linked to drug smuggling).

291. 713 So. 2d 1138 (La. 1998).

292. See, e.g., Gray, *supra* note 23, at 81. *In re Blackman* is also cited in



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In that case, Judge Harris not only associated publically with a known felon, she entered into an extramarital affair with a felon who pleaded guilty in her court and was illegally sentenced by her for his criminal act, which allowed the felon to be paroled. . . . Toward the end of their extramarital affairs, the convicted felon engaged in a crime spree in East Baton Rouge Parish, including car theft, burglary of an inhabited dwelling, and armed robberies of two fast food outlets and a shoe store before his parole was revoked.<sup>293</sup>

Assuming that a tool is necessary to govern a judge's relationships, enacting a rule is a more efficient and fair method of accomplishing that goal as opposed to a random application of the appearance standard. The public vetting attendant to the rulemaking process is especially important when privacy and freedom of association concerns are present and where the bias that "friendships suggest may be so innocent as to preclude significant regulation."<sup>294</sup> If a rulemaking body concludes that close association with criminals should be prohibited, a code provision to that effect can be adopted. Even a general rule providing, for example, that "a judge shall not knowingly engage in a close or intimate personal relationship, or social relationship, or business relationship, with a non-relative charged with or convicted of a felony or other crime involving moral turpitude," would provide some guidance.<sup>295</sup> A rule not only adds specificity but also transforms the ethics problem from one of appearances to one of realities. With a specific rule the question becomes, does the judge maintain a prohibited relationship? Under the appearance standard a judge is subject to discipline for either (1) actually engaging in a prohibited rela-

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support of the proposition that the appearance standard provides a basis upon which to punish associations with criminals. 591 A.2d 1339 (N.J. 1991). But *Blackman* is of limited value outside of New Jersey. Unlike most states, New Jersey, when evaluating appearances created by public contact between a judge and a criminal, does not view the situation through the lens of the reasonable, fully informed observer. At least where criminal associations are involved, the issue in New Jersey is not whether a reasonable person would conclude that a judge appeared to commit an impropriety, "but whether there is a fair possibility that some portion of the public might become concerned on that score." *Id.* at 1342 (internal citation omitted); *see also supra* note 194.

293. *In re Miller*, 949 So. 2d 379, 399 (La. 2007) (Knoll, J., dissenting) (describing the facts in *In re Harris*).

294. ALFINI ET AL., *supra* note 258, § 10.05B, at 10-25.

295. The author is not suggesting such a rule. After all, a rule prohibiting relationships with felons would prevent a judge, for instance, from maintaining a close association with Martha Stewart or Charles Colson. *See United States v. Stewart*, 433 F.3d 273, 288-89 (2d Cir. 2006) (describing the felony convictions of the doyenne of domesticity); *In re Colson*, 412 A.2d 1160 (D.C. Cir. 1979) (relying on a felony conviction to disbar a former White House Aide to President Richard Nixon).

tionship or (2) appearing to engage in such a relationship without actually doing so.

*b. Misuse of the Prestige of Judicial Office*

Codes of judicial conduct specifically prohibit a judge from using the prestige of judicial office to obtain a private benefit for the judge or a third party. For example, Rule 1.3 of the 2007 Code provides that “[a] judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.”<sup>296</sup> Notwithstanding these explicit rules, it is claimed that the appearance standard is needed to charge indirect or subtle attempts to exploit the judicial office.<sup>297</sup> But that is simply not the case. Rule 1.3 and similar rules in state codes are not limited to in-your-face attempts to misuse judicial power or prestige. A judge who in any manner gratuitously interjects his or her judicial status in nonofficial dealings with law enforcement officials, school officials, insurance agents, neighbors, judges, or anyone else commits an actual impropriety in violation of these rules. Thus, an impropriety in fact is committed when a judge, after being stopped for a traffic violation, states to the officer “Do you know who I am?”<sup>298</sup> or displays a judicial identification card<sup>299</sup> or badge,<sup>300</sup> or repeatedly advises the officer of his or her judicial status.<sup>301</sup>

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296. MODEL CODE OF JUDICIAL CONDUCT R. 1.3 (2007).

297. See Gray, *supra* note 23, at 67–80.

298. *In re Heiple* (Ill. Cts. Comm’n Apr. 30, 1997) (order) (finding that Justice Heiple responded to a police officer’s instructions during a traffic stop by stating, “Do you know who I am?”); *In re Garza*, 161 P.3d 876, 870 (N.M. 2007) (removing judge for asking a traffic enforcement officer “Do you know who I am?”); cf. *In re Sasso*, No. ACJC 2007-162, at 4 (N.J. Advisory Comm. on Judicial Conduct Mar. 31, 2009), <http://www.judiciary.state.nj.us/pressrel/Sasso%20Presentment.pdf> (finding that Judge Sasso improperly responded to inquiries from Torpedo’s Go-Go Bar employees by stating “Do you know who I am?” and “You don’t know who I am?”).

299. Werner (N.Y. State Comm’n on Judicial Conduct Oct. 1, 2002) (determination), <http://scjc.state.ny.us/Determinations/W/Werner.htm> (finding judge violated Canon 1 and Canon 2 of the New York Code of Judicial Conduct by gratuitously interjecting his judicial status into a traffic stop by offering his judicial identification card to the officer).

300. Travis (Ill. Cts. Comm’n Feb. 21, 2003) (order).

301. Rushing, at 5 (Cal. Comm’n on Judicial Performance June 8, 2006) (decision and order), [http://cjp.ca.gov/userfiles/file/Censures/Rushing\\_06-08-06.pdf](http://cjp.ca.gov/userfiles/file/Censures/Rushing_06-08-06.pdf) (finding that the judge repeatedly invoked her judicial status, and that of her husband, in an attempt to avoid arrest).

Even where a specific request for favorable treatment is not communicated, there is no need to invoke appearances because exploitation of the judicial office is inferred from the circumstances. For example, a judge who merely inquires of another judge about a friend's traffic citation,<sup>302</sup> or sends a letter on court stationery to a school official concerning the expulsion of the judge's son,<sup>303</sup> commits a wrong in actuality, not in perception. While it is true that many disciplinary decisions involving the exploitation of the judicial office pay homage to appearances,<sup>304</sup> such references are generally no more than window dressing because specific rules prohibiting the misuse of judicial prestige are also cited in support of the discipline imposed.<sup>305</sup> Most significantly, numerous disciplinary decisions sanction judges for misusing judicial status in subtle, nonblatant ways without any mention of the appearance of improprie-

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302. See, e.g., *In re Magill* (N.Y. State Comm'n on Judicial Conduct Oct. 6, 2004) (determination), <http://www.scjc.state.ny.us/Determinations/M/Magill.htm> (finding that a judge interjected judicial prestige into his wife and daughter's case by delivering the court file together with his business card to the judge handling the matter); *In re Jarrell* (N.C. Judicial Standards Comm'n Aug. 14, 2007) (public reprimand), [http://www.aoc.state.nc.us/www/public/coa/jsc/public\\_reprimands/jsc06-233.pdf](http://www.aoc.state.nc.us/www/public/coa/jsc/public_reprimands/jsc06-233.pdf) (finding judge's use of a business card in a private matter evidenced an intent to misuse the prestige of office).

303. *In re Nesbitt* (N.Y. State Comm'n on Judicial Conduct June 21, 2002) (determination), <http://www.scjc.ny.us/Determinations/N/Nesbitt.htm>.

304. Gray, *supra* note 23, at 68 ("More subtle, less bald-faced but still manifest attempts to gain an improper advantage from the judicial office are captured by the appearance of impropriety standard and represent the largest number of cases finding an appearance of impropriety.").

305. See, e.g., Simpson (Cal. Comm'n on Judicial Performance Dec. 9, 2002) (decision and order), [http://cjp.ca.gov/userfiles/file/Censures/Simpson\\_12-9-02.pdf](http://cjp.ca.gov/userfiles/file/Censures/Simpson_12-9-02.pdf) (finding that contacting government officials regarding a friend's ticket violated Canons 1, 2A, 2B(1), 2B(2), and 3E of the California Code); *In re Harned*, 357 N.W.2d 300 (Iowa 1984) (relying on Canons 1 and 2 of the Iowa Code in disciplining a judge for contacting a magistrate about the judge's daughter's traffic citation); *In re Snow*, 674 A.2d 573, 577-79 (N.H. 1996) (paying lip service to the importance of avoiding the appearance of impropriety but basing discipline on the fact that the judge, in contacting a police officer regarding a relative's ticket, lent the prestige of office to promote a private undertaking in violation of Canon 2A and 2B of the New Hampshire Code); *In re Rivera-Soto*, 927 A.2d 112, 113 (N.J. 2007) (censuring judge based on the findings and recommendation contained in the presentment of the Advisory Committee on Judicial Conduct); *Rivera-Soto*, at 4 (N.J. Advisory Comm. on Judicial Conduct July 11, 2007) (presentment), <http://www.judiciary.state.nj.us/pressrel/D-140-06%20RiveraSoto%20Presentment.pdf>. (finding that Judge Rivera-Soto violated New Jersey Canons 1, 2A, and 2B by distributing official business cards to police and directly calling the county prosecutor regarding a family legal matter).

ty.<sup>306</sup> Simply put, the ability to discipline a judge for actions that (1) imply that the judge is exploiting official prestige or (2) create an unacceptable risk that the judge's office could be a factor in how others deal with the judge in his or her personal capacity,<sup>307</sup> would not suffer one bit if the appearance standard did not exist.

c. *Favoritism in Appointments*

Proponents of the appearance standard suggest its usefulness in situations where it appears that a judge has hired or appointed an individual on a basis other than merit, but direct evidence of actual favoritism or nepotism is lacking. As subsection (i) will show, most cases cited in support of this claim<sup>308</sup> contain conclusive proof of actual favoritism, but the disciplin-

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306. See, e.g., *In re Harned*, 357 N.W.2d at 301 (finding letter on official stationery and telephone call to magistrate assigned to the judge's daughter's ticket a misuse of prestige without discussing appearances); *In re Mosley*, 102 P.3d 555, 559 (Nev. 2004) (finding no need to discuss appearances where a judge wrote letters on judicial stationery to his son's school for the purpose of gaining an advantage); *In re Samay*, 764 A.2d 398, 407 (N.J. 2001) (finding judge's use of the judicial title in a letter to his son's school violated New Jersey Canons 1, 2A, and 2B without discussing appearances); Quall, at 6 (Cal. Comm'n on Judicial Performance June 4, 2008) (decision and order), [http://cjp.ca.gov/userfiles/file/Public\\_Admon/Quall\\_DO\\_6-2-08.pdf](http://cjp.ca.gov/userfiles/file/Public_Admon/Quall_DO_6-2-08.pdf) (concluding that the use of judicial letterhead for charitable fund-raising constitutes misuse of prestige without discussing appearances); Di Loreto, at 1 (Cal. Comm'n on Judicial Performance June 13, 2006) (decision and order), [http://cjp.ca.gov/userfiles/file/Public\\_Admon/DiLoreto\\_DO\\_06-13-06.pdf](http://cjp.ca.gov/userfiles/file/Public_Admon/DiLoreto_DO_06-13-06.pdf) (finding the use of judicial stationery in a private dispute with the city building department misused the prestige of judicial office without discussing appearances); Kraucunas (N.Y. State Comm'n on Judicial Conduct Nov. 18, 2002) (determination) (finding a misuse of prestige where a judge made gratuitous references to his judicial position when dealing with court personnel regarding his daughter's small claims case; the determination included no mention of the appearance of impropriety); Cipolla (N.Y. State Comm'n on Judicial Conduct Oct 1, 2002) (determination), <http://www.scjc.ny.us/Determinations/C/Cipolla.htm> (disciplining judge for identifying himself as a judge in a dispute with night club employees and contacting another judge on behalf of a girlfriend's speeding ticket because such conduct, even in the absence of a specific request, constitutes the misuse of judicial prestige; the decision containing no mention of the appearance of impropriety).

307. See *In re Rivera-Soto*, 927 A.2d at 112; *In re Rivera-Soto* (N.J. Advisory Comm. on Judicial Conduct July 11, 2007) (presentment), <http://www.judiciary.state.nj.us/pressrel/D-140-06%20Rivera-Soto%20presentment.pdf> (finding that providing a judicial business card to a police officer and calling the county prosecutor regarding a personal matter created a significant and unacceptable risk that the judicial office would influence decisions made by the police and prosecutor).

308. The three cases discussed in Part III.B.1.c are cited in Gray, *supra* note 23, at 74-77.

any body finds it easier or more expedient to rely on appearances. *In re Spector*, discussed in subsection (ii), is an exception. In that case, evidence of actual misconduct did not exist and the only basis for discipline was a finding of an appearance of favoritism. *Spector*, it is submitted, is another example<sup>309</sup> of a disciplinary proceeding in which the result was dictated more by the subjective views of the decisionmakers than by application of the reasonable person test. In any event, the unique circumstances surrounding *Spector* render the decision of little aid to appearance standard advocates.

i. Relying on Appearances Where Actual Favoritism Is Demonstrated

Based on the following facts, the New York Commission on Judicial Conduct censured Judge Ray,<sup>310</sup> not for favoritism in fact, but for creating the appearance that two court-appointed guardians received favored treatment:

- Judge Ray circumvented established procedures in order to give two guardians a “grossly disproportionate” number of appointments;<sup>311</sup>
- The judge approved, without reviewing, “grossly inflated bills” which included double billing, fees for cases not assigned to the guardians, and billing for more court hours than court was in session;<sup>312</sup>
- Judge Ray ignored the Chief Administrative Judge’s warning regarding the guardians’ improper appointments and fees;<sup>313</sup>
- One guardian previously ran against Judge Ray for judicial office, but agreed not to oppose the judge in the next election and further agreed to solicit political endorsements for the judge.<sup>314</sup>

The Commission’s finding that that the guardians appeared to receive favored treatment certainly is an understatement. This case warranted a finding of actual misconduct.

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309. See *supra* Part III.A.2 (discussing the disciplinary investigation of Judge Andrew Smithson).

310. *In re Herbert B. Ray* (N.Y. State Comm’n on Judicial Conduct Apr. 26, 1999) (determination), [http://www.scjc.state.ny.us/Determinations/R/Ray/ray,\\_herbert.htm](http://www.scjc.state.ny.us/Determinations/R/Ray/ray,_herbert.htm).

311. *Id.* at 3.

312. *Id.*

313. *Id.*

314. *Id.*

Appearances are not necessary to capture the type of behavior exhibited by Judge Ray.

In a comparable situation, Judge Feinberg was disciplined for firing the Counsel to the King's County, New York, Public Administrator and hiring his close personal friend and political supporter, Louis Rosenthal, to fill the vacancy.<sup>315</sup> Judge Feinberg did not examine the billing statements submitted by Mr. Rosenthal, did not give individual consideration to each fee request, failed to weigh statutory factors in setting fees, violated agreements with the Attorney General's office, ignored statutory requirements by granting fees in hundreds of cases without a fee affidavit, and awarded his friend nearly \$9,000,000 plus extra compensation for real estate closings and referral fees.<sup>316</sup> In another gross understatement, the Commission found that the judge's actions conveyed the appearance of being motivated by favoritism. Indeed, the "appearance" was so bad that Judge Feinberg was removed from office.<sup>317</sup>

Finally, in *In re Johnstone*,<sup>318</sup> the judge was acquitted of actual favoritism but was censured for creating the appearance of favoritism by hiring a new coroner recommended at the last minute by the coroner candidate's good friend, the Chief Justice. At Judge Johnstone's insistence, the candidate was interviewed by the merit screening committee after the application deadline had passed and all qualified applicants had been ranked.<sup>319</sup> The candidate never completed the required application.<sup>320</sup> Although the candidate ranked sixth of the ten individuals interviewed, the judge hired him without inquiring about the reason for his low ranking.<sup>321</sup> In order to allow the candidate to retain his existing retirement benefits, the judge, against the court administrator's advice, took the unusual step of hiring the candidate as a temporary coroner appointee.<sup>322</sup>

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315. *In re Feinberg*, 833 N.E.2d 1204, 1206 (N.Y. 2005); *In re Feinberg*, (N.Y. State Comm'n on Judicial Conduct Feb. 10, 2005) (determination), <http://www.scjc.state.ny.us/Determinations/F/Feinberg/htm>.

316. *Feinberg*, 833 N.E.2d at 1207.

317. *Id.* at 1210. On October 21, 2009, an order was entered in the Surrogate Court of King's County vacating the attorney fees awarded to Louis Rosenthal by Judge Feinberg. *In re Estate of Adelson*, 25 Misc. 3d 1215, 1216 (N.Y. Sup. Ct. 2009).

318. 2 P.3d 1226 (Alaska 2000).

319. *Id.* at 1236.

320. *Id.*

321. *Id.*

322. *Id.*

The court found that the facts gave rise to an “overwhelming” appearance of impropriety.<sup>323</sup>

Whatever the reasons for finding apparent rather than actual favoritism in *Ray*, *Feinberg*, and *Johnstone*, it was not due to a lack of evidence. Findings of actual favoritism have been based on far less.<sup>324</sup> The appearance of impropriety should play no role in disciplining judges for such outrageously improper conduct.

ii. *Spector* and Fiduciary Appointments in New York

*In re Spector*<sup>325</sup> is one of the rare cases in which a judge was disciplined solely on the basis of improper appearances. The eleven members of the New York Commission on Judicial Conduct, the referee appointed by the commission, and all participating members of the court of appeals agreed that no actual impropriety occurred.<sup>326</sup> The referee, eight of the eleven members of the commission, and five of the six members of the court of appeals found that Judge Spector created an appearance of impropriety by granting fiduciary appointments to the sons of other judges while the fellow judges appointed Judge Spector’s son to similar posts.<sup>327</sup>

Between March 1968 and November 1974, Judge Spector appointed the son of Judge Sidney Fine to fiduciary positions on two occasions and appointed the son of Judge Postel on ten occasions. During the same period, Judge Spector’s son was appointed eight times by Judge Fine and ten times by Judge Postel.<sup>328</sup> As argued in the dissent, the appointments were inconsequential considering (1) their infrequency; (2) the thousands of similar appointments made at the trial level; (3) the modest, customary fee (and in some cases no fee) received by the fiduciaries; (4) the fact that each appointee was qualified and completely fulfilled his responsibility; and (5) the lack of any indication of a “quid pro quo” arrangement.<sup>329</sup> Further, at the time of the appointments, there was no rule or canon of eth-

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323. *Id.* at 1236–37. Three of the eight Commissioners did find clear and convincing evidence of an actual impropriety. *Id.* at 1237.

324. *See, e.g., In re Fine*, 13 P.3d 400, 411 (Nev. 2000).

325. 392 N.E.2d 552 (N.Y. 1979).

326. *Id.* at 552; *In re Spector* (N.Y. State Comm’n on Judicial Conduct Dec. 14, 1978) (determination), <http://www.scjc.state.ny.us/Determinations/S/Spector.htm>.

327. *Spector*, 392 N.E.2d at 552.

328. *Id.* at 552–53.

329. *Id.* at 556–57 (Fuchsberg, J., dissenting).

ics in New York that prohibited the appointment of relatives of judges or that indicated that such selections might create an appearance of impropriety.<sup>330</sup> Nevertheless, the New York Court of Appeals found that the cross-appointments “inescapably created a circumstantial appearance of impropriety.”<sup>331</sup> On a related charge, however, Judge Spector was found not to have created an appearance of impropriety by granting a receivership appointment to a partner of the law firm employing Judge Spector’s son.<sup>332</sup>

The court of appeals did not identify the test employed in reaching its conclusion, but it is unlikely that the fully informed reasonable person’s perceptions were determinative. The failure to evaluate Judge Spector’s conduct by the objective observer’s appraisal of whether the judge’s conduct impaired his ability to perform the judicial function with integrity, impartiality, and independence is not surprising since that standard was not yet developed by the ABA.<sup>333</sup> In addition, the circumstances surrounding the fiduciary appointments were not so egregious as to cause a reasonable person to question Judge Spector’s integrity or impartiality.<sup>334</sup>

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330. *Id.* at 557. This omission from the New York Code of Judicial Conduct is significant because other states did enact rules prohibiting cross-appointments by judges. *See, e.g.*, ILL. SUP. CT. R. 61(c)(11) (“A judge should avoid nepotism and action tending to create suspicion of impropriety. He should not offend against the spirit of this standard by interchanging appointments with other judges . . .”).

331. *Spector*, 392 N.E.2d at 555.

332. *In re Spector*, at 2 (N.Y. State Comm’n on Judicial Conduct Dec. 14, 1978) (determination), <http://www.scjc.state.ny.us/Determinations/S/Spector.htm>.

333. The 1972 Model Code did not define the phrase “appearance of impropriety.” *See* MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1972). The 1990 Code defined the appearance of impropriety to include conduct that would “create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.” MODEL CODE OF JUDICIAL CONDUCT Canon 2A cmt. (1990). The New York Code of Judicial Conduct, adopted in 1996, included the reasonable person test of the 1990 Model Code. N.Y. CODE OF JUDICIAL CONDUCT Canon 2 cmt. (1996). Prior to the adoption of the 1996 New York Code, some state judges employed a similar reasonable person test in evaluating the propriety of a judge’s conduct. *See, e.g.*, *In re Fuchsberg*, 426 N.Y.S.2d 639, 653 (1978) (Suozi, J., concurring) (“I cannot believe, given the complete facts as to this transaction, that a fair-minded person or public would have perceived it as an instance of special privilege or judicial impropriety.”).

334. This is especially true since discipline was imposed for cross-appointing relatives in both compensated and noncompensated cases. A reasonable person would have, at least, parsed out the appointments in which the judges’ relatives in effect donated fiduciary services. It is difficult to objectively



Most probably, the *Spector* outcome was dictated by the subjective view of the members of the Commission and court of appeals, rather than an application of the reasonable person test. Operating on a clean slate, even the purely subjective assessment of the commissioners and appellate judges would likely have been less critical. But no one was operating on a clean slate. Favoritism in fiduciary appointments had long been a common and criticized practice in New York.<sup>335</sup> Justice Benjamin Cardozo's father, for instance, "clearly used his appointing power for political and personal patronage purposes principally benefiting his nephew."<sup>336</sup> Judge Albert Cardozo resigned in order to avoid impeachment on these and other charges.<sup>337</sup> One hundred years later, shortly before the *Spector* proceedings, the *New York Times* complained that close relatives of judges in Bronx and Manhattan (including Judges Fine, Postel, and Spector) received 460 appointments as guardians, receivers, and referees in a nine-year period.<sup>338</sup> And despite the fact that Chief Judge Judith S. Kaye "has struggled heroically to control favoritism,"<sup>339</sup> fiduciary appointment and oversight problems continue in the Empire State.<sup>340</sup>

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find an appearance of favoritism where the recipient of the "favor" works for free. Even today New York permits a judge's relative to be appointed as a non-compensated fiduciary. N.Y. COMP. CODES R. & REGS. tit. 22, § 36.1(b)(3) (2008). Additionally, any objective observer finding an appearance of impropriety in Judge Spector's cross-appointments would surely find equal culpability in his act of appointing, as a receiver, a partner of the law firm in which the judge's son was employed. Yet, neither the commission nor the court found any appearance of impropriety in that conduct. *Spector*, at 2 (N.Y. State Comm'n on Judicial Conduct Dec. 14, 1978) (determination), <http://www.scjc.state.ny.us/Determinations/S/Spector.htm>.

335. Andrew Kaufman, *The First Judge Cardozo: Albert, Father of Benjamin*, 11 J.L. & RELIGION 271, 296 (1994–95) ("Favoritism in appointments was a common practice in New York and elsewhere.").

336. *Id.*

337. *Id.* at 310; COMM'N ON FIDUCIARY APPOINTMENTS, STATE OF N.Y., REPORT OF THE COMMISSION ON FIDUCIARY APPOINTMENTS (2001), reprinted in N.Y. State Bar Association, *Report of the Commission on Fiduciary Appointments*, 74 N.Y. ST. B.J. 38, 38 (2002) [hereinafter *Report on Fiduciary Appointments*] (stating that Judge Albert Cardozo was forced to leave the bench in large part because of his repeated appointment of relatives and political cronies as fiduciaries).

338. Howard Blum, *Relatives of 9 New York Justices Received \$526,353 in Court Fees*, N.Y. TIMES, July 26, 1977, at L1; see also *Report on Fiduciary Appointments*, supra note 337 (finding extensive and significant flaws in the fiduciary appointment system).

339. Editorial, *Friends of the Court*, N.Y. TIMES, Feb. 27, 2005, at CY11.

340. See *Kraham v. Lippman*, 478 F.3d 502, 509 (2d Cir. 2007) (upholding the New York rule prohibiting political party officials, their families, and their

Regardless of the objective or subjective nature of the test employed in *Spector*, New York's special circumstances dictated the result. The case is little support for the general proposition that the appearance standard is necessary to plug the gap where proof of actual favoritism is lacking.<sup>341</sup> The best method to protect against the improper selection of judicial appointees, in fact or perception, is to enact a rule, not to stretch the appearance standard.<sup>342</sup> And enacting a rule is exactly what New York did seven years after *Spector*.<sup>343</sup>

## 2. The Appearance of Impropriety as a Bargaining Chip

The appearance of impropriety prohibition is sometimes employed "as a lesser included offense that facilitates 'plea' bargains in disciplinary proceedings."<sup>344</sup> A judge confronted with disciplinary charges based on serious acts of misconduct may avoid or minimize a finding of actual impropriety by admitting to only an appearance of wrongdoing.<sup>345</sup> Some commentators commend the use of the appearance standard as a bargaining

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law firms from receiving fiduciary appointments); N.Y. ST. UNIFIED COURT SYSTEM, FIDUCIARY APPOINTMENTS IN NEW YORK: A REPORT TO THE CHIEF JUDGE JUDITH S. KAYE AND CHIEF ADMINISTRATIVE JUDGE JONATHAN LIPPMAN, Executive Summary (2001), available at <http://nycourts.gov/ip/gfs/igfiduciary.html> ("Despite the extensive problems found, we are confident that significant reform of the fiduciary appointment process is underway."); Daniel Wise, *Trio of Democrats Square off in Race for Manhattan Surrogate*, N.Y. L.J., Aug. 21, 2008, at 1 ("[A]ll three [New York judicial] candidates stressed the need to take steps to end the public perception that patronage is involved in the many appointments surrogates are required to make.").

341. For a contrary view see Nancy J. Moore, *Is the Appearance of Impropriety an Appropriate Standard for Disciplining Judges in the Twenty-First Century?*, 41 LOY. U. CHI. L.J. 285, 296–97 (2010).

342. See *infra* Part IV.B.

343. See *Report on Fiduciary Appointments*, *supra* note 337, at 41 ("The new rules, Part 36 of the Rules of the Chief Judge, . . . effect[ive] on April 1, 1986 . . . [g]overned [the appointment] of guardians, guardians ad litem, conservators, committees for the incompetent, receivers and persons designated to perform services for a receiver . . . Part 36 rendered ineligible for appointment any known relative of any judge of the Unified Court System, whether by blood or marriage."). For the current version of Part 36, see N.Y. COMP. CODES R. & REGS. tit. 22, § 36 (2008).

344. Gray, *supra* note 23, at 77 (internal quotations omitted).

345. Admitting responsibility for creating an improper appearance appeals to some judges because it is a simple and inexpensive method of avoiding a disciplinary hearing. See Pam Louwagie, *Judge is Scolded for His Handling of Two Drunken-Driving Cases*, STAR TRIB. (Minneapolis), Apr. 21, 2007, at 1B ("He [the judge] decided, I'm sure, that it was much simpler and cheaper to merely stipulate that there might have been the appearance of impropriety and get it over with." (quoting the judge's attorney)).

chip because it allows a judge to save face<sup>346</sup> and serves as a “useful conflict avoidance” device.<sup>347</sup>

Whether appearance-based plea bargaining is a benefit or a detriment to maintaining confidence in the judiciary is open to serious question. Even in the realm of criminal law, plea negotiations are not looked upon favorably. As observed by Professors Bradley and Hoffman, “[p]erhaps the least popular facet of the criminal justice system in the eyes of the American public is the widespread practice of plea bargaining.”<sup>348</sup> There is no reason to believe that negotiated dispositions are less offensive in judicial discipline cases where the accused, unlike the usual criminal defendant, holds the public trust. Indeed, there is some anecdotal evidence indicating that society’s reaction is more critical where a judge is the beneficiary of a plea agreement, even if the judge abandons his or her office as part of the deal.<sup>349</sup> But more important than the underlying distrust of plea-bargaining is the fact that the pressures of the criminal justice system necessitating, or at least explaining, plea negotiations are not present in matters of judicial discipline.

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346. Gray, *supra* note 23, at 77 (“In an agreed disposition, the appearance of impropriety standard gives the judge a face-saving way to admit with the benefit of hindsight to apparently committing misconduct without having to admit to actually meaning to do anything wrong.”); *see also* ABA/BNA, *Appearance of Impropriety Issue Continues to Occupy Judicial Code Panel’s Attention*, 20 LAW. MAN. PROF. CONDUCT, June 16, 2004, at 318, 318 (“Appearance of impropriety’ is a ‘softer’ way of characterizing objectionable conduct than actual impropriety.” (quoting J.J. Gass, Brennan Center for Justice)).

347. McKeown, *supra* note 202, at 54–55 (“Refocusing the debate on the appearance of impropriety relieves pressure on all concerned and serves as a useful conflict avoidance principle.”).

348. Craig M. Bradley & Joseph L. Hoffmann, *Public Perception, Justice and the “Search for Truth” in Criminal Cases*, 69 S. CAL. L. REV. 1267, 1292 (1996); *see also* Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. PA. L. REV. 1, 4 n.13 (2002) (sampling the “vast” literature critical of plea-bargaining).

349. *See, e.g.*, Helen C. Robbins, Letter to the Editor, *Unfair to Taxpayers*, PITTSBURGH POST-GAZETTE, Sept. 28, 2002, at A12 (criticizing a plea negotiation that permitted a Pennsylvania judge to retire and collect disability and pension benefits); Diane Stanesic, Letter to the Editor, *It’s Unfair to Many Others for Judge McFalls to Get This Deal*, PITTSBURGH POST-GAZETTE, Aug. 16, 2002, at A16 (same); *see also* Sheila D. Byers, Letter to the Editor, *The State Has Fired Others for Much Less*, PITTSBURGH POST-GAZETTE, Aug. 21, 2002, at A14 (same). *But see* Editorial, *Barred From the Bench McFall’s Resignation is the Best Conclusion*, PITTSBURGH POST-GAZETTE, Sept. 27, 2002, at A18. For a description of the terms of Judge McFalls’s plea agreement, *see* Marylynne Pitz, *McFalls Cuts a Deal: Collect Disability, Retire*, PITTSBURGH POST-GAZETTE, Aug. 14, 2002, at A1.

The principal function of negotiated criminal dispositions is to relieve backlogs by facilitating prompt and final resolution of pending cases.<sup>350</sup> Prearranged pleas also (1) eliminate the “enforced idleness” of confined defendants awaiting trial, (2) protect the public from persons released on bail who are likely to continue their criminal ways, and (3) reduce “the time between charge and disposition . . . [thereby enhancing] the rehabilitative prospects of the guilty when they are ultimately imprisoned.”<sup>351</sup> Prosecutors favor plea bargaining not only because it reduces court congestion, but also because it assists in maintaining a high conviction rate.<sup>352</sup> Pleas provide a financial advantage to defense attorneys because while a flat fee may be sufficient to negotiate an agreed disposition, it is usually inadequate to compensate for the time and expense involved in preparing and trying a case.<sup>353</sup>

The considerations underpinning the acceptance of plea bargaining in the criminal realm,<sup>354</sup> in the main, are not applicable to disciplinary proceedings instituted against judicial officers. The calendars of judicial disciplinary bodies will not come to a standstill in the absence of plea bargaining.<sup>355</sup> Judges

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350. See *Santobello v. New York*, 404 U.S. 257, 264 (1971) (Douglas, J., concurring) (stating that plea bargains “serve an important role in the disposition of today’s heavy calendars”); *United States v. DeMarco*, 401 F. Supp. 505, 511 (D.C. Cal. 1975) (“[P]lea bargaining is sanctioned because without it the system of criminal justice could not function effectively.”); *Rise v. Bd. of Parole*, 745 P.2d 1210, 1216 (Or. 1987) (noting the “endemic reliance on plea agreements to manage . . . overloaded criminal dockets”); *State v. Lee*, 847 P.2d 25, 28 (Wash. Ct. App. 1993) (“Without such plea bargaining our already congested judicial system would grind to a virtual halt.”).

351. *Santobello*, 404 U.S. at 261.

352. Steven P. Grossman, *An Honest Approach to Plea Bargaining*, 29 AM. J. TRIAL ADVOC. 101, 104 n.17 (2005).

353. Combs, *supra* note 348, at 23.

354. Plea agreements are often employed to resolve criminal charges against a judge. See, e.g., Bill Braun, *Case Against Judge Dismissed*, TULSA WORLD, June 16, 2009, at A2 (describing the agreement by which a felony charge against a judge was dismissed in return for “deferred prosecution” on a misdemeanor charge); *Federal Judge Sentenced for Obstruction of Justice*, NAT. L.J., May 18, 2009, at 17 (reporting that a federal judge pled guilty to one count of obstructing justice in return for the dismissal of five other charges and a promise by the prosecution not to seek a penitentiary sentence in excess of three years).

355. The task before many judicial disciplinary bodies, however, is substantial. For example, each year the New York State Commission on Judicial Conduct averages 1440 new complaints, 400 preliminary inquiries, and 200 investigations involving the state’s approximately 3500 judges. N.Y. COMM’N ON JUDICIAL CONDUCT, ANNUAL REPORT 1 (2008). Investigations can also be expensive. See, e.g., Carri Geer Thevenot, *Comments Taken on How State*

who are at risk to reoffend if allowed to remain on the bench awaiting disposition of the disciplinary charges can be assigned to administrative duties<sup>356</sup> or placed on an interim suspension.<sup>357</sup> But even if plea bargained dispositions are appropriate in some judicial discipline cases, the agreement should be based upon actualities, not appearances.

At stake in judicial disciplinary proceedings is public confidence in the integrity of the prosecuting authority, the body charged with determining the judge's guilt or innocence, the judge, and the entire judiciary.<sup>358</sup> Masking an actual impropriety with a finding or admission of an appearance of wrongdoing is not only disingenuous, but also defeats the public's right to know exactly how their judges are performing.<sup>359</sup> Facts, not appearances, are needed to support public trust and to inform citizens preparing to vote for or against the retention of a misbehaving judge.<sup>360</sup> The "benefit" of employing appearances as a plea bargaining tool does not warrant compromising the fact-finding process or hindering the public's ability to learn wheth-

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*Handles Judicial Complaints*, LAS VEGAS REV.-J., Jan. 16, 2009, at 2B (stating that the investigative cost of a complaint against Nevada Judge Elizabeth Halverson reached nearly \$78,000).

356. *E.g.*, ILL. SUP. CT. R. 56 (1990) (amended 2008) (authorizing reassignment of a judge to restricted or nonjudicial duties during the pendency of disciplinary proceedings).

357. *See, e.g.*, MICH. CT. R. 9.219 (1985) (amended 2003) (providing for the interim suspension of a judge under investigation for, or awaiting final adjudication of, a disciplinary complaint); *see also In re Shenberg*, 632 So. 2d 42, 46 (Fla. 1992) (upholding the temporary suspension of a judge without compensation pending disposition of criminal charges because of the need to protect public confidence in the judiciary); *In re Kirby*, 350 N.W.2d 344, 347-48 (Minn. 1984) (finding inherent authority to temporarily suspend a judge pending disposition of disciplinary charges); *In re Halverson*, 169 P.3d 1161, 1183 (Nev. 2007) (upholding interim suspension of a judge).

358. *Cf. United States v. Carter*, 454 F.2d 426, 428 (4th Cir. 1972) (stating that the prosecution must abide by all terms of a plea-agreement because "[a]t stake is the honor of the government[,] public confidence in the fair administration of justice, and the efficient administration of justice . . .").

359. *Cf. Sarah M.R. Cravens, In Pursuit of Actual Justice*, 59 ALA. L. REV. 1, 16 (2007) (arguing that using the appearance standard in determining whether a judge is disqualified from a proceeding "may grease the works in some way, but it does more harm than good in the end by masking the real underlying concern about unbiased judging").

360. *See E. Keith Stott, Jr., Confidentiality Rules Change in Arizona*, JUD. CONDUCT REP., Summer 2006, at 1 ("Judges are elected or retained by the voting public. In order to vote responsibly, the public needs information about judicial disciplinary actions and complaints." (quoting from a petition filed in the Arizona Supreme Court by the Maricopa County Attorney's Office in 2004)).

er a judge violated a rule or only appeared to do so. An example of how the disciplinary process can be compromised by a negotiated plea to an appearance of impropriety is presented in *Office of Disciplinary Counsel v. Mascio*.<sup>361</sup>

Judge John Mascio was charged with (1) misusing public funds, (2) manipulating his retirement date and reelection campaign so as to simultaneously receive a pension and salary for the same judicial office, (3) jailing a prosecutor for contempt after disqualifying himself from the case, and (4) distributing pool party invitations containing the “sophomoric” reference that “young female attorneys in good physical shape must attend.”<sup>362</sup> The Ohio Supreme Court accepted a stipulation and reprimanded the judge for creating an appearance of impropriety by sending the invitations.<sup>363</sup> The court did not set forth the offending text of the invitations or identify the conduct charged in the three dismissed counts.<sup>364</sup> As a result, the disciplinary order was singularly unhelpful in determining the nature of the charges against the judge, what the judge did or did not do, the seriousness of the misconduct (or apparent misconduct), the reasons for abandoning three of the four charges, and the degree of thoroughness accompanying the investigation. Dismissing the more serious charges in return for a plea of creating a bad appearance, without some explanation by the court, does not build public confidence in the judiciary or the judicial disciplinary system.

As illustrated in *In re Livingstone*,<sup>365</sup> an appearance-based negotiated plea compromises the disciplinary process even where the judge resigns as part of the negotiation.<sup>366</sup> The Massachusetts Commission on Judicial Conduct charged Judge Livingstone with serious violations of the state’s code of judicial conduct including (1) knowingly filing a false affidavit in a

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361. *Office of Disciplinary Counsel v. Mascio*, 725 N.E.2d 1111 (Ohio 2000).

362. Mike Lafferty, *Judge Faced with Four Count Complaint*, COLUMBUS DISPATCH, Oct. 15, 1998, at 1C; see also Mike Lafferty, *Poor Conduct Could Result in Reprimand: Mascio Agreed that Sophomoric References in Invitations to Two Pool Parties Were Demeaning*, COLUMBUS DISPATCH, July 10, 1999, at 5B; Stephen L. Wasby, *Legal Notes: Take the Money and Run Right Back to the Bench: A Double-Dipper’s Success Story*, 21 JUST. SYS. J. 89, 100 (1999) (explaining how Judge Mascio was able to simultaneously receive a pension and salary).

363. *Mascio*, 725 N.E.2d at 1111.

364. *Id.*

365. *Livingstone* (Mass. Comm’n on Judicial Conduct Mar. 28, 2008) (agreed disposition), <http://www.mass.gov/cjc/livingstone4162008.pdf>.

366. *Id.*

small claims case, (2) transmitting a threatening letter to a tenant, (3) improper fee-sharing with a lawyer, (4) claiming personal expenses as business expenses on tax returns, (5) serving as the manager of a real estate business, and (6) false reporting to the state judicial conduct commission and state ethics commission.<sup>367</sup> An attempt to negotiate an agreed disposition that would have allowed the judge to remain on the bench was rejected by the state supreme court.<sup>368</sup> The court did accept a revised plea agreement that permitted the judge to retire.<sup>369</sup> As part of the agreement, the judge submitted a letter of apology acknowledging his regret in creating an appearance of impropriety.<sup>370</sup> Neither the judge's apology letter<sup>371</sup> nor the court's Agreed Disposition Order<sup>372</sup> mentioned the false affidavit, the misrepresentations on tax returns, the false statements to the state judicial conduct commission and state ethics commission, or any of the original charges. The Agreed Disposition Order, including the letter of apology, simply did not give the public a true picture of the circumstances surrounding the judge's resignation.

Confronting a similar situation, the Indiana Supreme Court employed a far superior method of dealing with a resignation in the face of serious allegations of judicial misconduct. In *In re Pfaff*,<sup>373</sup> the judge was charged with entering a home searching for his daughter, grabbing and threatening a male at gunpoint, and stating words to the effect of "[t]his Mother F\_\_\_\_\_ better talk or he's going to die."<sup>374</sup> It was also claimed that the judge provided false information concerning the incident to a special prosecutor and the state Commission on Judicial Qualifications.<sup>375</sup> After a report was issued by three masters assigned to take evidence, the judge resigned his office and

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367. Complaint, *In re Livingstone* Mass. Comm'n on Jud. Conduct (Mass. Comm'n on Jud. Conduct Oct. 1, 2007), <http://www.mass.gov/cjc/livingstone10222007.pdf>.

368. Martin Finucane, *Judge Accused of Misconduct Retires: In Apology, Regrets Business Conflicts*, BOSTON GLOBE, Apr. 17, 2008, at 2B.

369. Livingstone (Mass. Comm'n on Judicial Conduct Mar. 28, 2008) (agreed disposition), <http://www.mass.gov/cjc/livingstone4162008.pdf>.

370. *Id.* attachment B.

371. *Id.*

372. In the Agreed Disposition, Judge Livingstone "acknowledges that he has violated certain provisions of the Code of Judicial Conduct (SJC Rule 3:09), as described in the Formal Charges . . ." *Id.* ¶ 2.

373. 838 N.E.2d 1022 (Ind. 2005).

374. *Id.* at 1024.

375. *Id.* at 1025.

issued a letter of apology expressing deep remorse for the negative impact of his actions.<sup>376</sup> The Indiana Supreme Court accepted the resignation but also issued an opinion documenting the circumstances surrounding the resignation including a detailed recitation of the masters' findings and recommendations.<sup>377</sup> The court's opinion provided the public with complete information regarding the conduct of one of its judges. This open, transparent approach to judicial discipline enhances public confidence.<sup>378</sup> The face-saving substitution of appearance for reality does not.<sup>379</sup>

#### IV. SOLUTIONS

The deficiencies inherent in the use of the appearance-of-impropriety as a disciplinary standard can be remedied in one of three ways. First, the role of the appearance prohibition could be confined to that of an aspirational goal rather than a disciplinary rule. Second, the woefully imprecise test could be replaced with specific rules. Because the first two recommendations are unlikely to receive widespread support, a third proposal is offered—narrowing the appearance standard so that it applies only to behavior that flagrantly violates professional norms and either undermines the judicial process, or clearly compromises the judge's ability to act with independence, integrity, and impartiality.

##### A. ELIMINATE THE APPEARANCE OF IMPROPRIETY AS A DISCIPLINARY STANDARD

The simplest and most direct approach to curing the problems caused by a rule that subjects judges to discipline for appearing to engage in misconduct without actually doing so is to eliminate the rule. Jurisdictions adopting the 2007 Code can

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376. *Id.*

377. *Id.* at 1023–25.

378. See Steven Lubet, *When Judges Investigate Judges*, CHI. TRIB., June 3, 2004, at 23 (“The [judicial disciplinary] system would work better if there were more public information about its procedures and especially about the results of investigations.”); see also Robert H. Tembeckjian, *Judicial Discipline Hearings Should Be Open*, 28 JUST. SYS. J. 419, 424 (2007).

379. In *In re Sherrill*, the North Carolina Judicial Standards Commission proceeded with a disciplinary action even after the judge resigned. 403 S.E.2d 255 (N.C. 1991). The Commission did so in order to determine if the judge would lose his pension and be disqualified from holding judicial office in the future. *Id.* at 257. The North Carolina Supreme Court's opinion describes the judge's misconduct. *Id.*



easily achieve this result by deleting the requirement that a judge avoid the appearance of impropriety from Rule 1.2 of the Model Code.<sup>380</sup> Because Canon 1 of the Code also contains the appearance prohibition, it would continue to serve as one of the “overarching principles of judicial ethics that all judges must observe.”<sup>381</sup> But its function would be hortatory, not disciplinary.<sup>382</sup>

This suggested solution—deleting the appearance standard from the disciplinary rule while retaining it in the canon—was the approach taken by the Joint Commission in its Final Report to the ABA House of Delegates.<sup>383</sup> The Joint Commission was forced to abandon its recommendation, however, after substantial opposition surfaced.<sup>384</sup> And although North Carolina<sup>385</sup> and Oregon<sup>386</sup> have removed any mention of the appearance-of-impropriety from their judicial codes without any apparent concomitant inability to discipline judges, it is unlikely that other jurisdictions will follow suit.<sup>387</sup> To date, ten states have revised their codes of judicial conduct in light of the 2007 Model Code and each has enacted the appearance-of-impropriety prohibition as a disciplinary rule.<sup>388</sup>

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380. Rule 1.2 provides: “A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.” MODEL CODE OF JUD. CONDUCT R. 1.2 (2007).

381. *Id.* scope 2.

382. *Id.* (“[A] judge may be disciplined only for violating a Rule . . .”).

383. *See supra* note 120.

384. *See supra* notes 123–27 and accompanying text.

385. *See* N.C. CODE OF JUDICIAL CONDUCT Canon 2 (2009) (explaining that the appearance of impropriety standard was removed from the North Carolina Code in 2003).

386. *See* OR. CODE OF JUDICIAL CONDUCT (2002) (explaining that the appearance of impropriety standard was removed from the Oregon Code in 1996).

387. *But see* WASH. STATE SUPREME COURT, SUPREME COURT TASK FORCE ON THE CODE OF JUDICIAL CONDUCT tab 3 (Sept. 2009), *available at* <http://www.courts.wa.gov/> (enter “Supreme Court Task Force on the Code of Judicial Conduct” in the search bar; then select the first result) (recommending that the state supreme court eliminate the appearance of impropriety as a basis for judicial discipline).

388. ARIZ. CODE OF JUDICIAL CONDUCT R. 1.2 (2009); ARK. CODE OF JUDICIAL CONDUCT R. 1.2 (2009); DEL. JUDGES’ CODE OF JUDICIAL CONDUCT R. 1.2 (2009); HAW. REVISED CODE OF JUDICIAL CONDUCT R. 1.2 (2009); IND. CODE OF JUDICIAL CONDUCT R. 1.2 (2010); KAN. CODE OF JUDICIAL CONDUCT R. 1.2 (2009); MINN. CODE OF JUDICIAL CONDUCT R. 1.2 (2009); MONT. CODE OF JUDICIAL CONDUCT R. 1.2 (2009); OHIO CODE OF JUDICIAL CONDUCT R. 1.2 (2009); WYO. CODE OF JUDICIAL CONDUCT R. 1.2 (2009).

## B. REPLACE THE APPEARANCE STANDARD WITH SPECIFIC RULES

Courts, judicial disciplinary bodies, and ethics advisory committees determine permissible and impermissible behavior by applying the appearance standard to fact-specific situations. By doing so, they, in effect, create new rules of judicial conduct. For example, a court which finds an appearance of impropriety in the fact that a judge holds a real estate broker's license<sup>389</sup> clearly creates a new rule—a judge may not be a licensed real estate broker. The finding by a disciplinary commission that a judge's spouse's jury service in a trial before the judge creates an improper appearance<sup>390</sup> establishes a new juror exemption. A judicial ethics advisory opinion declaring that voting in a primary creates an appearance of impropriety<sup>391</sup> establishes a prohibition against participation in the nominating process. But this is a poor method of enacting judicial conduct standards.<sup>392</sup> Case-by-case rulemaking simply does not foster uniformity<sup>393</sup> or public confidence in the end product.<sup>394</sup>

The drafting and adoption of rules governing a judge's conduct should be a transparent process involving lawyers,

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389. See *In re DeSaulnier*, 279 N.E.2d 296, 309–10 (Mass. 1972) (“There is no evidence that Judge DeSaulnier has made any use of his broker's license, but his possession of the license gives an impression of an improper intention to engage for others generally in real estate transactions and activities.”); see also N.Y. Advisory Comm. on Judicial Ethics, Op. 95-100 (1995), [http://www.nycourts.gov/ip/judicialethics/opinions/95-100\\_.pdf](http://www.nycourts.gov/ip/judicialethics/opinions/95-100_.pdf) (stating that possession of a real estate license “if not in itself an impropriety, may well give the appearance of an impropriety which the judge should avoid”).

390. See *supra* Part III.A.2.

391. See *supra* Part III.A.1.a.

392. Edward C. Brewer, III, *Some Thoughts on the Process of Making Ethics Rules, Including How to Make the “Appearance of Impropriety” Disappear*, 39 IDAHO L. REV. 321, 333 (2003) (arguing that a regulatory rule made on an ad hoc basis “will often be of a lesser quality than it would have been had the [rulemaking authority] given notice to the regulated parties and the public, received their comments, and reflected on them before promulgating the final rule”).

393. Neil D. O'Toole, *Canon 9 of the Code of Professional Responsibility*, 62 MARQ. L. REV. 313, 343 (1979) (“[T]he very fact-orientedness of the [case-by-case] approach lends little to the formulation of uniform principles for resolving ethical problems where improper appearances are in contention.”).

394. See Michael Asimow, *Interim—Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 748 (1999) (“Public comment can provide both useful information to the agency and enhanced public acceptance of the rule.”); Jeffrey S. Lubbers & Nancy G. Miller, *The APA Procedural Rule Exemption: Looking for a Way to Clear the Air*, 6 ADMIN. L.J. AM. U. 481 (1992) (recognizing the advantage of “enhanced legitimacy and public acceptance of rules that comes from having public participation in the process”).

judges, professors, the public, and law-related and non-law-related organizations. An open rulemaking procedure is essential for several reasons. First, public input is vital because the entire purpose of a judicial code is to protect public confidence in the judiciary. Members of courts and judicial disciplinary bodies are simply not very good at evaluating public sentiment.<sup>395</sup> Second, a participatory process allows for a thorough review of a proposed regulation including its compatibility with the existing conduct code, and the potential impact of the rule on public trust. Third, nonadjudicatory-based rulemaking is not restricted by the factual, legal, and procedural limitations attached to proceedings before a court, disciplinary body, or advisory committee.<sup>396</sup> For example, a court examining whether possession of a real estate broker's license by a judge creates an appearance of impropriety cannot consider the propriety of a judge holding other types of licenses. However, if the issue is left to a rulemaking rather than an adjudicatory body, an assessment can be made whether a real estate license prohibition is warranted and if so whether the prohibition should extend to medical, nursing, teaching, plumbing, or similar licenses. Likewise, if the propriety of a judicial spouse's jury service is left to a rulemaking committee, the inquiry could be expanded to consider whether other household members or relatives should be prohibited from serving on a jury before the judge. More comprehensive rules would result.

The superiority of the nonadjudicatory rulemaking process is amply demonstrated by the development of the 2007 Code. The ABA recruited a diverse and distinguished group of individuals to serve on the Joint Commission and created a sepa-

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395. See *State v. Paulucci*, No. 04-12-02625-ID, 2007 WL 858853, at \*5 (N.J. Super. Ct. App. Div. Mar. 23, 2007) ("Lawyers and courts can only guess at what an ordinary citizen acquainted with the facts might conclude . . . . Thus, the bar does not know whether the conduct will be deemed to create the appearance of impropriety until after the Advisory Committee on Professional Ethics or a court reaches that conclusion."); Victor H. Kramer, *The Appearance of Impropriety Under Canon 9: A Study of the Federal Judicial Process Applied to Lawyers*, 65 MINN. L. REV. 243, 264-65 (1980) (arguing that attorney disqualification based on appearances is unworkable because judges do not assess public perception uniformly).

396. One limitation imposed upon judicial ethics advisory committees is that they are generally prohibited from considering constitutional issues. See, e.g., Ark. Judicial Ethics Advisory Comm., Op. 2006-02 (2006), [http://www.arkansas.gov/jeac/opinions/advisory\\_2006\\_02.pdf](http://www.arkansas.gov/jeac/opinions/advisory_2006_02.pdf) (stating that the Arkansas Advisory Committee is not authorized to address constitutional issues or other "issues of law"); Kan. Judicial Ethics Advisory Panel, Op. JE-139 (2006), <http://www.kscourts.org/pdf/ClerkCt/JE139.pdf> (same).

rate panel of experts to serve as advisors.<sup>397</sup> The Joint Commission solicited and received hundreds of written comments and heard oral testimony praising and criticizing multiple drafts of the new Code.<sup>398</sup> The press even took an interest.<sup>399</sup> This inclusive, deliberate, and transparent drafting and revision process substantially increased the cohesiveness, clarity, and utility of the final product.<sup>400</sup>

Although the benefits of a deliberative rulemaking procedure are not contested, supporters of the appearance standard reject the suggestion that the appearance of impropriety should be replaced by rules identifying specific misconduct citing the impracticability of listing all prohibited acts.<sup>401</sup> But even assuming that all misconduct serious enough to warrant discipline cannot be identified, there is no excuse for failing to use the rulemaking process to proscribe conduct currently recognized as producing improper appearances.<sup>402</sup>

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397. For a list of the Joint Commission members and advisors, see ABA, Joint Commission to Evaluate the Model Code of Judicial Conduct, Commission Roster, <http://www.abanet.org/judicialethics/roster.html> (last visited Apr. 4, 2010).

398. Written comments submitted to, and testimony taken by, the Joint Commission are available at Comments—Joint Commission to Evaluate the Model Code of Judicial Conduct, <http://www.abanet.org/judicialethics/resources/comments.html> (last visited Apr. 4, 2010). See Harrison, *supra* note 108, at 258 (describing the process of drafting the 2007 Code).

399. See *supra* note 126 and accompanying text.

400. See Raymond J. McKoski, *Charitable Fund-Raising by Judges: The Give and Take of the 2007 ABA Model Code of Judicial Conduct*, 2008 MICH. ST. L. REV. 769, 795.

401. MODEL CODE OF JUDICIAL CONDUCT R. 1.2 cmt. 3 (2007); MODEL CODE OF JUDICIAL CONDUCT Canon 2A cmt. (1990) (“Because it is not practicable to list all prohibited acts, the prescription [against impropriety and the appearance of impropriety] is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code.”).

402. For example, it has been suggested that the appearance standard is needed to prevent judges from “publically drink[ing] a great deal of alcohol before sitting on the bench even if their competence is not impaired.” Letter from Andrew L. Kaufman, Professor of Law, Harvard Law Sch., to Eileen Gallagher, Judicial Ctr. Counsel, ABA Joint Comm’n (June 9, 2004), available at [http://www.abanet.org/judicialethics/resources/comm\\_rules\\_kaufman\\_060904.pdf](http://www.abanet.org/judicialethics/resources/comm_rules_kaufman_060904.pdf). If that is true, a policy requiring abstention during the workday is certainly superior to a case-by-case determination of the amount of alcohol, short of intoxication, which creates an appearance of impropriety. *But see* JUDICIAL CONDUCT BD. OF PA., JUDICIAL CONDUCT BOARD POLICY ON JUDICIAL MISCONDUCT INVOLVING SUBSTANCE ABUSE 2 (2003), available at <http://www.judicialconductboardofpa.org/SubstanceAbusePolicy.pdf> (providing that the rule against consuming alcohol or other mood-changing chemicals on court property or while

The combination of codifying prohibited acts where possible and narrowing the application of the appearance standard, as suggested in the next section, is at least a step in the right direction.

C. PLACE A LIMITING CONSTRUCTION ON THE PHRASE  
“APPEARANCE OF IMPROPRIETY”

Usually there is no need to rely upon an appearance of wrongdoing when imposing discipline because the offending judge has violated another, more specific section of the governing code.<sup>403</sup> In the rare case where a reprimand, censure, suspension, removal, or other sanction is issued exclusively on the basis of an appearance of impropriety, cabining the scope of the phrase may allow it to survive a due process challenge. A proposed limiting construction follows.

The appearance-of-impropriety standard is appropriately narrowed by applying it only in particularly egregious situations where the judge’s behavior flagrantly violates accepted norms of the judicial profession.<sup>404</sup> The appearance prohibition should be further limited to conduct which either undermines the judicial process<sup>405</sup> or clearly compromises a judge’s ability to perform his or her responsibilities with independence, integrity, and impartiality.<sup>406</sup>

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performing judicial duties “does not apply to limited alcohol consumption at meals off of the court premises”).

403. See notes 268–70 and accompanying text.

404. See *In re Hinds*, 449 A.2d 483, 498 (N.J. 1982) (limiting the discipline of attorneys for violating the “appearance of impropriety” standard to situations “involving conduct flagrantly violative of accepted professional norms”); cf. *In re Two Attorneys*, 660 N.E.2d 1093, 1099 (Mass. 1996) (refusing to apply an attorney disciplinary rule prohibiting conduct “prejudicial to the administration of justice” unless the conduct is egregious and flagrantly violative of accepted professional norms); *In re Gadbois*, 786 A.2d 393, 400 (Vt. 2001) (adopting the “flagrantly violative of accepted professional norms” limitation in applying a disciplinary rule prohibiting attorneys from engaging in conduct which is prejudicial to the administration of justice).

405. See *In re Two Attorneys*, 660 N.E.2d at 1098 (construing the attorney disciplinary standard “prejudicial to the administration of justice” to include flagrant conduct which “undermine[s] the legitimacy of the judicial process[es]”); Fla. Bar v. Pettie, 424 So. 2d 734, 737–38 (Fla. 1982) (construing the phrase “conduct prejudicial to the administration of justice” to prohibit acts which undercut the legitimacy of the judicial process).

406. See *In re Larsen*, 616 A.2d 529, 612 (Pa.1992) (holding that in order to violate the appearance of impropriety standard the judge’s act must relate to the judicial function or judicial integrity). Professor Lubet also defines judicial misconduct in terms of its effect on the judging process:

In applying this refined appearance-of-impropriety standard, a disciplinary body might consider, among other things, whether the judge's conduct (1) misused judicial power or prestige;<sup>407</sup> (2) exhibited actual or potential bias or prejudice for or against a party, potential party, or class of litigants;<sup>408</sup> (3) directly impacted a litigant's rights, the legitimacy of a legal proceeding, or the legitimacy of the judicial system;<sup>409</sup> (4) was of a public or private nature;<sup>410</sup> (5) occurred in the judge's official or unofficial capacity;<sup>411</sup> and (6) violated a norm uniformly observed by members of the judiciary.<sup>412</sup>

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I propose that we evaluate the nature of the [judge's] act in question with regard to its implications for judging. The proper inquiry is not whether the act is moral or immoral, or whether it is acceptable or unacceptable. We need not even ask whether it is criminal or noncriminal. Rather, we must ask how the act reflects upon the central components of the judge's ability to do the job for which he or she has been empowered: fairness, independence and respect for the public.

Steven Lubet, *Judicial Impropriety: Love, Friendship, Free Speech, and Other Intemperate Conduct*, 1986 ARIZ. ST. L.J. 379, 386 (quoted in *Larsen*, 616 A.2d at 581); see also Abramson, *supra* note 170, at 955 (1996) ("A judge may be punished for any conduct that legitimately reflects upon the judge's ability to act in an official capacity."); Patrick Donald McCalla, Note, *Judicial Disciplining of Federal Judges is Constitutional*, 62 S. CAL. L. REV. 1263, 1292-93 (1989) (proposing that disciplinary rules exclude nonjudicial conduct "which does not affect a judge's ability to perform official functions").

407. See *supra* notes 396-97 and accompanying text; see also *In re Murphy*, 897 N.E.2d 1220, 1225 (Mass. 2008) (finding a judge's actions were "a misuse of the power and prestige of judicial office").

408. See WIS. CODE OF JUDICIAL CONDUCT SCR 60.03(1) cmt. (2010) (suggesting that the degree to which the judge's conduct is indicative of bias or prejudice be considered in determining whether a judge's off-bench behavior violates standards of judicial conduct); Steven Lubet, *Judicial Ethics and Private Lives*, 79 NW. U. L. REV. 983, 995 (1984) (same).

409. Cf. WIS. CODE OF JUDICIAL CONDUCT SCR 60.03(1) cmt. (2010) (considering the degree to which the judge's act is protected as an individual right); Lubet, *supra* note 408, at 995 (same).

410. WIS. CODE OF JUDICIAL CONDUCT SCR 60.03(1) cmt. (2010) (listing "the public or private nature of the conduct" as one of the factors to be balanced in determining whether a judge's off-bench behavior violates standards of judicial conduct); Lubet, *supra* note 408, at 995 (same).

411. See *Larsen*, 616 A.2d at 581 (restricting application of the appearance of impropriety standard to "(1) conduct of a judge acting in an official capacity, (2) any other conduct which affects the judge while acting in an official capacity, and (3) conduct prohibited by law"); cf. *In re Ellender*, 889 So. 2d 225, 232 (La. 2004) (considering whether the judge's impropriety took place in the judge's official capacity or private life in assessing the seriousness of the transgression).

412. See *In re Charge of Judicial Misconduct or Disability*, 85 F.3d 701, 703-04 (D.C. Cir. Judicial Council 1996) (declaring discipline inappropriate "where reasonable judges might be uncertain as to whether or not the conduct is proscribed"); *In re Comm'n on Judicial Tenure and Discipline*, 916 A.2d 746,

This suggested construction would not condone, but also would not punish, purely “oafish,”<sup>413</sup> “ill-advised,”<sup>414</sup> or “unjudicial”<sup>415</sup> conduct. Nor would it discipline behavior creating minor, nonaggravated improper appearances<sup>416</sup> or behavior offensive to the personal sensibilities of a segment of society.<sup>417</sup>

A narrowly tailored appearance standard is most likely to find application in disciplinary matters based upon out-of-court conduct. This is not because judges are necessarily better behaved on the bench, but because codes of conduct are replete with explicit provisions proscribing unprofessional and even socially unacceptable behavior while wearing a robe. For example, a judge whose official behavior is not patient, dignified, or courteous can be charged with a violation of Rule 2.8(B) of the 2007 Code.<sup>418</sup> Similarly, any type of courtroom conduct which indicates a judicial bias or prejudice is punishable under Rule 2.3 of the 2007 Code, which broadly provides:

A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual

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755 (R.I. 2007) (“[I]f a reasonably prudent and competent judge would consider that conduct obviously and seriously wrong in all the circumstances, the judge’s action constitutes judicial misconduct.” (quoting *In re Benoit*, 487 A.2d 1158, 1163 (Me. 1985))).

413. *In re Nakoski*, 742 A.2d 260, 265 (Pa. Ct. Judicial Discipline 1999).

414. *Id.*

415. *Disciplinary Counsel v. Medley*, 756 N.E.2d 104, 106 (Ohio 2001) (restricting application of the appearance of impropriety standard to “conduct which would appear to an objective observer to be not only unjudicial but prejudicial to public esteem for the judicial office” (quoting *In re Kneifl*, 351 N.W.2d 693, 695–96 (Neb. 1984))).

416. Some jurisdictions classify an inconsequential violation of a judicial code provision as a minor transgression not warranting discipline. *See* MASS. CODE OF JUDICIAL CONDUCT S.J.C. R. 3:09 cmt. 3D (2009–10) (describing less serious code violations); WIS. ADMIN. CODE: JUDICIAL COMM’N § 4.08(4)(d) (2009) (directing that some allegations of judicial misconduct do not warrant prosecution because of their “minor nature”); *see also* MODEL CODE OF JUDICIAL CONDUCT scope 6 (2007) (stating that the 2007 Code does not contemplate that every rule violation will result in discipline).

417. *In re Larsen*, 616 A.2d 529, 582 (Pa. 1992); Abramson, *supra* note 170, at 955 (suggesting against disciplining a judge merely because he or she is an offensive person).

418. MODEL CODE OF JUDICIAL CONDUCT R. 2.8(B) (2007); *see also* MODEL CODE OF JUDICIAL CONDUCT Canon 3B(4) (1990) (“A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity . . .”).

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orientation, marital status, socioeconomic status, or political affiliation . . . .<sup>419</sup>

Likewise, any hint that a judge, while performing official duties, lacks impartiality, practices favoritism, or unfairly restricts a party's opportunity to be heard, can be charged under specific code provisions.<sup>420</sup> There is simply no need to resort to an appearance charge for judicial misconduct occurring during the execution of adjudicatory or administrative duties.

Two types of private, nonjudicial behavior are most likely to create disciplinary problems for judges—using the prestige of office for private gain and manifestations of bias or prejudice. Since codes of conduct contain specific provisions prohibiting a judge's misuse of official prestige either on or off the bench,<sup>421</sup> there is little need to rely on appearances to sanction a judge for conduct which expressly or impliedly exploits the judicial office.<sup>422</sup> However, while judicial codes prohibit the manifestation of bias or prejudice in the performance of official duties,<sup>423</sup> codes usually contain no specific rule barring displays of bias or

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419. MODEL CODE OF JUDICIAL CONDUCT R. 2.3(B) (2007); *see also* MODEL CODE OF JUDICIAL CONDUCT Canon 3B(5) (1990) ("A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status . . . .").

420. *See, e.g.*, MODEL CODE OF JUDICIAL CONDUCT R. 2.2 (2007) ("A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially."); *id.* R. 2.4(B) ("A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment."); *id.* R. 2.6(A) ("A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.")

421. *See, e.g., id.* R. 1.3 ("A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so."); MODEL CODE OF JUDICIAL CONDUCT Canon 2B (1990) ("A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others . . . ."); CODE OF JUDICIAL CONDUCT Canon 2B (1972) ("He [the judge] should not lend the prestige of his office to advance the private interests of others . . . .").

422. *See supra* Part III.B.1.b.

423. *See, e.g.,* MODEL CODE OF JUDICIAL CONDUCT R. 2.3(B) (2007) ("A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment . . . ."); MODEL CODE OF JUDICIAL CONDUCT Canon 3B(5) (1990) ("A judge shall perform judicial duties without bias or prejudice."). One court has held that Canon 3B(5) prohibits a judge from exhibiting bias or prejudice in fulfilling adjudicatory duties but does not bar similar discriminatory manifestations when carrying out administrative or other nonadjudicatory duties. *Miss. Comm'n on Judicial Performance v. Boland*, 975 So. 2d 882, 895 (Miss. 2008). This interpretation seems unduly restrictive.



prejudice during a judge's nonjudicial endeavors. As a result, a narrowed construction of the appearance prohibition is most likely to come into play where unofficial, off-the-bench conduct indicates a predisposition against a class of persons that may appear before the judge. This type of conduct is illustrated in *In re Ellender*.<sup>424</sup>

Judge Ellender and his wife attended a private Halloween party at a restaurant. In addition to party guests, restaurant staff and a few diners were present. For the occasion, the judge wore an orange prison jumpsuit, handcuffs, and a black afro wig. Ms. Ellender was dressed as a police officer. According to the Ellenders, the costumes intended to convey the humorous impression that the judge was under his wife's control. The intended hilarious effect did not immediately materialize so Mr. and Ms. Ellender applied black makeup to their faces.<sup>425</sup> No one explained precisely how the black face enhanced the notion that the judge had a domineering spouse.

This type of offensive, extrajudicial behavior, which is not specifically governed by most judicial codes,<sup>426</sup> could be punished under a narrowly constructed appearance of impropriety standard. The factors identified previously<sup>427</sup> certainly weigh heavily in favor of treating the conduct as both flagrant and clearly compromising the judge's ability to discharge official duties fairly and impartially. First, Judge Ellender's Halloween costume exhibited potential, if not actual, bias against a race of individuals appearing before the court as witnesses, jurors, lawyers, litigants, and victims. Second, the use of black face, which remains a dehumanizing and anger-provoking symbol of racial stereotyping,<sup>428</sup> added substantially to the appearance of

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424. 889 So. 2d 225 (La. 2004).

425. *Id.* at 227.

426. Judge Ellender's conduct arguably could fall within the prohibition of Rule 3.1 of the 2007 Code disallowing participation in any extrajudicial activity which appears to undermine a judge's independence, integrity, or impartiality. MODEL CODE OF JUDICIAL CONDUCT R. 3.1 (2007). Comment 3 to Rule 3.1 warns that "[d]iscriminatory actions and expressions of bias or prejudice by a judge, even outside the judge's official or judicial actions, are likely to appear to a reasonable person to call into question the judge's integrity and impartiality." *Id.* cmt. 3.

427. See *supra* notes 404–12 and accompanying text.

428. John Canzano, *Some Suffer a Blackout of Good Sense*, OREGONIAN, Nov. 14, 2008, at Sports Section ("[B]lackface was used in performance art once upon a time to cement and proliferate racist perceptions and stereotypes. Basically, it was used to shape perception and prejudice about African Americans, and it was wrong then, and it's wrong now."); Eric Lipton, *Official Had*

prejudice.<sup>429</sup> Third, Judge Ellender's performance took place in a public restaurant. Finally, and most importantly, the judge's conduct violated a norm uniformly observed by members of the judiciary. While judges might debate whether a professional norm prohibits a judge from allowing his wife to sit on a jury,<sup>430</sup> or whether a norm bars a judge from appointing another judge's relative as a trustee,<sup>431</sup> the judiciary uniformly considers demonstrations of racial bias or stereotyping as unacceptable,<sup>432</sup> detrimental to a judge's ability to perform judicial duties fairly,<sup>433</sup> and prejudicial to the administration of justice.<sup>434</sup> As-

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*Controversial Photos Deleted, Report Says*, N.Y. TIMES, Apr. 9, 2008, at A18 (summarizing the findings of a Congressional Committee's investigation into the awarding of the "most original costume" prize at a federal agency's Halloween party to a person dressed in a prison jumpsuit, a dreadlock wig, and black face paint); Jeff Shelman, *Blackface Skit Shocks NDSU Campus: North Dakota State Is Latest on a Growing List of Schools to Poke Fun at People of Color Using Face Paint*, STAR TRIB. (Minneapolis), Mar. 29, 2008, at B1.

429. The 2007 Code provides examples of conduct that a judge must avoid in performing judicial duties because the acts evidence prejudice, including "epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics." MODEL CODE OF JUDICIAL CONDUCT R. 2.3 cmt. 2 (2007).

430. See *supra* Part III.A.2.

431. *In re Spector*, 392 N.E.2d 552, 555 (N.Y. 1979) (admonishing Judge Spector for creating an appearance of impropriety by appointing other judges' sons as receivers and referees especially while other judges appointed Judge Spector's son to similar positions); see also *supra* Part III.B.1.c.ii (discussing the *Spector* decision).

432. See *In re Agresta*, 486 N.Y.S.2d 886, 887 (App. Div. 1985) ("[W]e have held that it is improper for a judge to make remarks of a racist nature even when the remarks are made out of court."); OHIO CODE OF JUDICIAL CONDUCT R. 3.1 cmt. 3 (2009) ("Discriminatory actions and expressions of bias or prejudice by a judge, even outside the judge's official or judicial actions, are likely to appear to a reasonable person to call into question the judge's integrity and impartiality."); ALFINI ET AL., *supra* note 260, § 3.03, at 3-19 to 3-20 ("[T]he use of racial or ethnic epithets and racially or ethnically stereotypical remarks is strongly disapproved in modern society . . ."); Mary Owen, *Judge Quits After She Is Accused of Racial Slurs*, CHI. TRIB., Nov. 14, 2008, at 16 (reporting judge's resignation after receiving a disorderly conduct citation following a traffic incident in which she allegedly used racial slurs).

433. See *In re Ellender*, 889 So. 2d 225, 232 (La. 2004) (finding that the judge's actions "have caused the public to question his integrity and ability to be fair to African-Americans and has diminished the integrity and respect citizens hold for Louisiana's judiciary"); *In re Lowery*, 999 S.W.2d 639, 656-57 (Tex. Rev. Trib. 1998) ("Judges who freely use racial or other epithets, on or off the bench, create, at the very least, a public perception that they will not fairly decide cases involving minorities."); *In re Jensen*, (N.Y. State Comm'n on Judicial Performance May 29, 1997) (determination), <http://www.scjc.state.ny.us/>

suming that a specific code provision is unavailable to regulate conduct similar to that exhibited by Judge Ellender, a narrowly construed appearance-of-impropriety prohibition could fill the disciplinary void.<sup>435</sup>

### CONCLUSION

Judgments based on appearances are inescapable. However, important decisions, to the extent possible, must be founded on substance, not shadows. Our legal system is designed to cut through facades, pretences, and appearances to discover the truth. We should demand no less of the judicial disciplinary process.

But even more important than the general proposition that reality, not appearance, should decide a judge's fate, is the fact that appearance-based discipline does not work. It fails from a constitutional standpoint because the current definition of appearance of impropriety is as hopelessly vague as the first Model Code's admonishment to conduct one's life beyond reproach.

The appearance test also fails on a practical level. In order to avoid the appearance of impropriety a judge must know what the prohibition encompasses. The best way to provide this guidance is to enact rules defining the forbidden conduct. The second best method is to supply judges with an analytical

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Determinations/J/jensen.htm ("Remarks with racial overtones cast doubt on a judge's ability to be impartial in all matters that come before the court.").

434. *In re Stevens*, 645 P.2d 99, 100 (Cal. 1982) (Kaus, J., concurring) ("The administration of justice is prejudiced by the public perception of racial bias, whether or not it is translated into the court's judgments and orders."); *In re Removal of a Chief Judge*, 592 So. 2d 671, 672 (Fla. 1992) (finding that the judge's statements embracing and endorsing stereotypes eroded public confidence in the judiciary, cast doubt on the judge's impartiality, and threatened the effective functioning of the judiciary). *But see In re Nakoski*, 742 A.2d 260, 262 (Pa. Ct. Jud. Discipline 1999) (refusing to find an appearance of impropriety where a judge in response to a seminar instructor's question as to whether it was unlawful or illegal to be black, answered "yes" and further explained that "[t]hey're all in jail. They're the ones doing all the robberies and burglaries.").

435. *See Miss. Comm'n on Judicial Performance v. Boland*, 975 So. 2d 882, 886 (Miss. 2008) (disciplining judge for stating, among other things, that African-Americans in Hinds County could "go to hell for all I care"). The judge made the remark during a break-out session at a judicial conference. The judge was found to have violated not only Canon 2 of the Mississippi Code prohibiting the appearance of impropriety, but also Canon 3C(1), requiring a judge to diligently discharge administrative responsibilities without bias or prejudice. *Id.* at 895-96.

framework for distinguishing acceptable from unacceptable behavior.<sup>436</sup> The appearance rule does neither. What remains is a boundless rule compelling judges and their families to abstain from protected, society-building activities for fear that a wrong guess will destroy a judicial career or reputation. Worse yet, the appearance standard usurps the rulemaking function from bodies better equipped to establish comprehensive and uniform rules through a public vetting process.

While the new and improved 2007 Code brings hope to judges struggling with everyday ethical issues, one unforeseen consequence of the current Code lurks beneath the surface. The 2007 Code may encourage more appearance-based charges than preceding Model Codes. This is because both the 1972 and 1990 Codes included the appearance-of-impropriety prohibition only in the title of Canon 2, not in the actual text of the Canon. Some prosecutors may have been hesitant to premise a charge merely on a claimed violation of a canon's title and therefore based complaints on the specific rules located in the text of canons. This approach would be expected since, as a general rule "the title of a statute is not part of the statute."<sup>437</sup> For the same reason, disciplinary bodies may have been reluctant to rely on the heading of a canon to impose discipline. But now that the appearance of impropriety is part of a disciplinary rule, on equal footing with more specific rules, there is no reason not to include an appearance charge in every disciplinary complaint. Similarly, there is no reason not to rely on appearances as the primary or sole basis of discipline. Hopefully, we are not headed into the cave.

In the final analysis, one conclusion is clear. Whether included in a canon title or disciplinary rule, whether found in the Judge Landis-inspired 1924 Canons or the modern 2007 Code, the appearance-of-impropriety standard is no standard at all. It only appears to be a standard.

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436. Steven Lubet, *The Search for Analysis in Judicial Ethics or Easy Cases Don't Make Much Law*, 66 NEB. L. REV. 430, 435 (1987).

437. *Jungbluth v. Hometown, Inc.*, 531 N.W.2d 412, 415 (Wis. Ct. App. 1995); see also *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co.*, 331 U.S. 519, 528 (1947) ("But headings and titles are not meant to take the place of the detailed provisions of the text."); Eileen C. Gallagher, *The ABA Revisits the Model Code of Judicial Conduct*, JUDGES' J., Winter 2005, at 7, 8 (observing that because the appearance of impropriety provision appeared in the title, but not in the body of Canon 2, many individuals looked to Canon 2A for enforcement purposes).