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Is the Appearance of Impropriety an Appropriate Standard for Disciplining Judges in the Twenty-First Century?

Nancy J. Moore*

I. INTRODUCTION

In February 2007, the American Bar Association (“ABA”) revised its Model Code of Judicial Conduct, including significant changes in both form and substance.¹ The adoption of the 2007 Judicial Code concluded a three-and-a-half year revision process by the ABA Joint Commission to Evaluate the Model Judicial Code (“Commission”).² During the revision process, the Commission solicited comment on a number of provisions that had provoked extensive discussion and controversy in Commission hearings and meetings, including a provision in the 1990 Judicial Code that admonished judges to avoid not only impropriety, but also the appearance of impropriety.³

The majority of commentators supported retaining the admonition to avoid even the appearance of impropriety, including enforcing this

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1. MODEL CODE OF JUDICIAL CONDUCT (2007). For a comprehensive discussion of the changes in form and substance, see generally CHARLES E. GEYH & W. WILLIAM HODES, AMERICAN BAR ASS’N, CTR. FOR PROF’L RESPONSIBILITY, REPORTERS’ NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT (2009) (discussing Canons 1–4).

2. Statement of Mark I. Harrison, Chair, ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, available at http://www.abanet.org/judicialethics/Chair_Message.pdf.

3. See Memorandum from Mark I. Harrison, Chair, ABA Joint Commission to Evaluate the Model Code of Judicial Conduct to Individuals and Entities Interested in Judicial Ethics 1–3 (May 11, 2004), available at http://www.abanet.org/judicialethics/memo_canon1_051104.pdf (discussing the particularly pertinent revisions by the Joint Commission). For a discussion of the treatment of the appearance of impropriety standard in the 1990 Code, see, e.g., Leslie W. Abramson, *Canon 2 of the Code of Judicial Conduct*, 79 MARQ. L. REV. 949, 952–57 (1996); Ronald D. Rotunda, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code*, 34 HOFSTRA L. REV. 1337, 1353–54 (2006).

admonition through judicial discipline.⁴ Nevertheless, the Commission went back and forth on the question. First, the Commission sided with those who urged it to retain the appearance of impropriety standard;⁵ then it changed course, siding with those who urged its elimination.⁶

In February 2007, the Commission issued its Report to the ABA House of Delegates. In that report, the Commission recommended retaining the admonition to judges to avoid the appearance of impropriety, but only in the language of Canon 1 itself, not in one of the several black-letter rules under Canon 1.⁷ In addition, the Commission drafted commentary clarifying that judges could not be disciplined under the Canons alone; rather, only the rules themselves were subject to enforcement.⁸

Then on February 7, 2007—just days before the ABA House of Delegates was to meet and vote on the Commission's Final Report—the Conference of Chief Justices of the states' highest courts weighed in on the appearance of impropriety question. It did so in the strongest possible terms, adopting a resolution opposing the Commission's Final Report due to its failure to provide for enforcement of the prohibition on

4. ABA JOINT COMM'N TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, REPORT TO THE ABA HOUSE OF DELEGATES 4 (Dec. 20, 2006), *available at* http://www.abanet.org/judiciaethics/house_report.html [hereinafter ABA REPORT].

5. *See, e.g.*, ABA JOINT COMM'N TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, PRELIMINARY REPORT Canon 1 & R. 1.03 (June 30, 2005), *available at* <http://www.abanet.org/judiciaethics/Canon1.pdf> (indicating judicial obligation to comply with the appearance of impropriety standard); ABA JOINT COMM'N TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT Canon 1 (May 2004 Draft), *available at* http://www.abanet.org/judiciaethics/draft_canon%201_051204_cleanlb.pdf (including the appearance-of-impropriety standard only in Canon 1 itself and not as an enforceable rule).

6. *See* ABA JOINT COM'N TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, REPORTERS' EXPLANATION OF CHANGES 7 (2007), *available at* <http://www.abanet.org/judiciaethics/mcjc-2007.pdf> [hereinafter REPORTERS' EXPLANATION]:

To address the concern that a duty to avoid the appearance of impropriety was too vague to be independently enforceable, the Commission's preliminary draft included a comment to the effect that ordinarily, when judges are disciplined for violating their duty to avoid the appearance of impropriety, it is in combination with other, more specific rule violations that give rise to the appearance problem. When the preliminary draft was circulated for public comment in June 2005, that comment was criticized widely for, among other things, diluting the "appearance of impropriety" standard unnecessarily.

The comment referenced in the Reporters' Explanation appears in the June 2004 Draft. *See* MODEL CODE OF JUDICIAL CONDUCT R. 1.01 cmt. 2 (June 2004 Draft) (on file with the author).

7. ABA REPORT, *supra* note 4, at 30.

8. *Id.* Scope 2 ("For a judge to be disciplined for violating a Canon, violation of a Rule must be established.").

creating the appearance of impropriety.⁹ In addition, the Conference of Chief Justices intimated that if the Commission failed to amend its proposed code, as the Conference suggested, then the chief justices would not lend their support for the new code, thereby making it unlikely that it would be adopted in more than a few states.¹⁰

Not surprisingly, the Commission backed down and revised its report. As a result, the ABA House of Delegates quickly approved the newly revised report.¹¹ Currently, just two years later, nine state courts have already adopted the 2007 Code, an additional seven state courts are reviewing reports in which adoption of the Code has been recommended, and another twenty-two jurisdictions have committees reviewing the Code.¹²

In its present form, Canon 1 states: “A Judge Shall Uphold and Promote the Independence, Integrity, and the Impartiality of the Judiciary, and Shall Avoid Impropriety and the Appearance of Impropriety.”¹³ In addition, Rule 1.2, entitled “Promoting Confidence in the Judiciary,” states that “[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.”¹⁴

All of the state courts in which the 2007 Judicial Code has either been adopted or recommended appear to have retained the appearance of impropriety as an enforceable standard, in accordance with the view

9. Conference of Chief Justices, *Resolution 3: Opposing the Report of the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct in Light of its Failure to Provide for Enforceability of the Canon on “Appearance of Impropriety”* (Feb. 7, 2007), available at <http://ccj.ncsc.dni.us/JudicialConductResolutions/resol3AppearanceOfImpropriety.html>.

10. *Id.* The Conference stated:

FURTHER, BE IT RESOLVED that without speaking to the merits of any of the other revisions proposed by the Joint Commission, the Conference of Chief Justices respectfully encourages the House of Delegates to amend the proposed revised Code as described above, and if so amended, to act expeditiously in its consideration of the Joint Commission’s Report and Recommendations, at which time the Conference can commend to its members the revisions as a foundation upon which states can build to improve and clarify the standards of conduct for the judiciary.

Id.

11. See *supra* note 1 and accompanying text. The revised Model Code was adopted on February 12, 2007, just five days after the CCJ resolution was passed. See MODEL CODE OF JUDICIAL CONDUCT (2007), available at www.abanet.org/judicialethics/approved_MCJC.html (discussing implementation of the revised Model Code).

12. See Center for Professional Responsibility, State Adoption of Revised Model Code of Judicial Conduct, <http://www.abanet.org/cpr/jclr/map.html> (last visited November 13, 2009) (showing state by state stage of adoption of the revised Model Code).

13. MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2008).

14. *Id.* R. 1.2.

of the Conference of Chief Justices.¹⁵ Thus, in one sense, it seems that the debate is over, and the proponents of the appearance of impropriety standard have prevailed.

Nevertheless, the opponents of the appearance of impropriety standard have raised a number of important objections, and in my view, the supporters have not yet fully explained why the appearance of impropriety standard *should be retained* in a judicial disciplinary code for the twenty-first century. My purpose in this Article is to explain why I believe that the criticisms leveled against the appearance of impropriety standard for judges are unwarranted.¹⁶

II. APPLICATION OF THE STANDARD TO JUDGES BUT NOT LAWYERS

One of the arguments commonly made by critics is that if the standard is a good one, it would be applied to *both* lawyers and judges, but the ABA expressly rejected applying the appearance of impropriety standard to lawyers as long ago as 1983, when it first adopted the Model Rules of Professional Conduct.¹⁷ However, as set forth below, the appearance of impropriety was *never* used as a separate standard for lawyer discipline,¹⁸ and, more importantly, there are good reasons to apply the appearance of impropriety standard to judges and not to lawyers, although these reasons have not yet been adequately articulated.¹⁹

15. See CTR. FOR PROF'L RESPONSIBILITY POL'Y IMPLEMENTATION COMM., COMPARISON OF ABA MODEL JUDICIAL CODE AND STATE VARIATIONS 1 (Aug. 25, 2009), available at http://abanet.org/cpr/code/1_2.pdf (identifying the "appearance of impropriety" standard and state amendments in accordance with view of the Conference). Delaware replaced "shall" with "should," *id.* at 2, but it did so with respect to all of the black-letter rules, which are clearly intended to provide a basis for judicial discipline. See DEL. JUDGES' CODE OF JUDICIAL CONDUCT pmbl. 7 (2008), available at http://courts.delaware.gov/Rules/?DJJC_101608a.pdf.

16. As a member of the ABA Center for Professional Responsibility's Policy Implementation Committee (formerly the Joint Committee on Lawyer Regulation), I had been asked during the revision process to comment on the Commission's various drafts. I did not consider myself an expert on the Judicial Code, so I had few comments to make. I did, however, indicate that I supported continuing the use of the appearance of impropriety standard as a basis for judicial discipline, although I did not then state my reasons for doing so. See Memorandum from Nancy J. Moore to JCLR Subcommittee on ABA Code of Judicial Conduct (Jan. 30, 2006), available at http://www.abanet.org/judicialethics/resources/comm_rules_moore_013006_bw.pdf.

17. See, e.g., Rotunda, *supra* note 3, at 1344–51 (discussing the "appearance of impropriety" standard under the ABA's model code for lawyers); Letter from Ronald C. Minkoff & Ronald E. Mallen, Association of Professional Responsibility Lawyers ("APRL") to ABA Commission on the Model Code of Judicial Conduct 7–9 (June 30, 2004), available at http://www.abanet.org/judicialethics/resources/comm_rules_minkoff_063004.pdf [hereinafter APRL Letter] (highlighting APRL's comments on the canon of the model code).

18. See *infra* notes 20–28 and accompanying text.

19. See *infra* notes 29–43 and accompanying text.

Prior to the adoption of the Model Rules of Professional Conduct in 1983, the ABA Code of Professional Responsibility did not expressly prohibit representation adverse to a former client.²⁰ As a result, when the issue began surfacing in disqualification cases, courts seized on the language of Canon 9 of the 1969 Model Code of Professional Responsibility, captioned “Avoiding Even the Appearance of Professional Impropriety,”²¹ and interpreted it as providing a basis for disqualification when the lawyer represented a new client in the same or a substantially related matter adverse to a former client.²² Although it was fairly clear that the ABA never intended the appearance of impropriety language in Canon 9 to create a stand-alone basis for lawyer discipline,²³ courts deciding a disqualification motion are not bound by rules adopted for purposes of disciplinary proceedings.²⁴ Thus, the appearance of impropriety standard began to take on a life of its own in the context of lawyer disqualification.²⁵ Indeed, although the term “appearance of impropriety” disappeared altogether in the 1983 Model Rules of Professional Conduct,²⁶ there are some courts that continue to disqualify a lawyer in pending litigation because of an

20. See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 362–64 (1986) (discussing the 1908 and 1969 ABA Canons of Ethics and Code). The 1908 ABA Canons of Ethics prohibited “the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed,” but the 1969 Code “inexplicitly omitted any specific mention of the former-client conflict problem.” *Id.* at 363.

21. MODEL CODE OF PROF’L RESPONSIBILITY Canon 9 (1969).

22. See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 132 reporters’ note to cmt. b (2000) (noting “substantial body of case law” that relied on the duty “to avoid the appearance of impropriety,” despite the lack of a specific rule in the 1969 Model Code); 1 GEOFFREY C. HAZARD, JR. ET AL., *THE LAW OF LAWYERING* § 13.3 (3d ed. Supp. 2005) (discussing rules governing former client conflicts of interest).

23. See MODEL CODE OF PROF’L RESPONSIBILITY Preliminary Statement (1983) (stating that Canons are “statements of axiomatic norms,” Ethical Considerations are “aspirational in character” and that only Disciplinary Rules are “mandatory in character”); see also, e.g., Rotunda, *supra* note 3, at 1344–46 (“The ABA briefly flirted with the ‘appearances of impropriety’ standard for lawyers but never adopted it as an enforceable rule.”).

24. See generally Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 FORDHAM L. REV. 71, 77–78 (1996) (“The Judiciary’s Role in Establishing Conflict Standards”).

25. See generally 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, 244–47 (1980) (discussing the “federal judiciary’s interpretation of Canon 9 in the ten years since its adoption by the [ABA]”); James Lindgren, *Toward a New Standard of Attorney Disqualification*, 1982 AM. B. FOUND. RES. J. 419, 424–40 (1982) (discussing “widespread belief” that the Model Code should provide the guide for deciding disqualification motions); cf. WOLFRAM, *supra* note 20, at 32-1 (1986) (“The appearance-of-impropriety rubric is invoked much more commonly in cases dealing with the disqualification of lawyers . . . and less often in cases dealing with discipline of lawyers.”).

26. See, e.g., Rotunda, *supra* note 3, at 1349.

appearance of impropriety.²⁷ As in the past, however, disqualification for an appearance of impropriety almost always occurs in the specific context of an allegation that a lawyer was involved in a conflict of interest.²⁸

Of course, one can still ask the question whether, if avoiding the appearance of impropriety is a good standard for judges, would it not also be a good standard for lawyers? If so, why has the ABA not proposed that *lawyers* be disciplined for avoiding the appearance of impropriety? Commentators and courts have attempted to explain why the appearance of impropriety standard is relevant for judges but not lawyers; however, in my view, their explanations are unsatisfactory. As Professor Ronald Rotunda has noted:

[t]he rationales [for distinguishing judges and lawyers] are apt to be vague, such as: people expect more from judges and appearances are important, or judges are the ‘symbol of government under the rule of law’ or judges have different roles than lawyers. . . . [but a]ll those arguments tend to be conclusory.²⁹

In addition, “even if accepted at face value . . . they do not explain why these different rules must be [so] vague.”³⁰ Here I propose what I believe is a better and more detailed explanation of, first, why judges are different from lawyers with respect to the appearance of impropriety standard and, second, why the appearance of impropriety standard is necessarily general and cannot intelligibly be made more specific.

As neutral decision-makers, judges have a single, clearly articulated duty to conduct themselves with independence, integrity, and impartiality.³¹ As a result, under the 2007 Judicial Code, *actual* “impropriety” means judicial conduct that in fact compromises the

27. See, e.g., *City & County of Denver v. County Court of City & County of Denver*, 37 P.3d 453, 456 (Colo. Ct. App. 2001) (finding disqualification based on appearance of impropriety does not require impropriety in fact); *State ex rel. Cosenza v. Hill*, 607 S.E.2d 811, 817–18 (W. Va. 2004) (finding potential exposure to conversations pertaining to one party created appearance of impropriety that precluded attorney’s representation of another party); see also *Ark. Valley State Bank v. Phillips*, 171 P.3d 899, 908–09 (Okla. 2007) (discussing trend to abandon appearance of impropriety standard in disqualification cases and collecting authorities reflecting both the standard’s rejection and continued use, and ultimately rejecting the standard).

28. See, e.g., WOLFRAM, *supra* note 20, at 319–23 (discussing the “appearance of impropriety” standard and underscoring typical outcome of sanctions based on actual impropriety).

29. Rotunda, *supra* note 3, at 1350–51.

30. *Id.* at 1351.

31. See REPORTERS’ EXPLANATION, *supra* note 6, at 7 (“In the Commission’s view, independence, integrity, and impartiality are overarching, fundamental values that the Rules promote . . .”).

independence, integrity, and impartiality of a judge.³² And thus the “appearance of impropriety” denotes judicial conduct that reasonably *appears* to compromise the independence, integrity, and impartiality of the judiciary.³³ Avoiding not only impropriety, but also the appearance of impropriety, is important for judges because public confidence in the independence, integrity, and impartiality of the judiciary is critical to the public’s willingness to accept judicial decision-making and submit to the rule of law.³⁴

Consider an example from a reported case. A Louisiana judge appeared in blackface make-up and an orange prison jumpsuit and handcuffs at a Halloween party held at a restaurant.³⁵ The judge’s conduct was observed not only by party guests, but also by the staff of the restaurant, including black employees, and by customers who came in for take-out food.³⁶ One of the customers reported the incident to the local paper.³⁷

Canon 3 of the 1990 Judicial Code prohibited a judge from manifesting bias or prejudice in the performance of his judicial duties,³⁸ but of course the judge in *Ellender* was in a social, not professional, setting. In addition, there was no evidence that the judge’s decisions were influenced by race. In fact there was evidence that there was no disparity in his sentencing based on race, and several African-Americans testified that they believed that the judge was fair in his decisions and treatment of the litigants.³⁹ Nevertheless, the judge’s

32. MODEL CODE OF JUDICIAL CONDUCT Terminology 5–7 (2008) (“Impropriety includes conduct that violates the law, court rules, or provisions of this Code, and conduct that undermines a judge’s independence, integrity, or impartiality.”); *see also id.* R. 1.2, R. 1.2 cmt. 3 (Rule 1.2 is designed to avoid conduct that either “compromises or appears to compromise the independence, integrity and impartiality of a judge”).

33. MODEL CODE OF JUDICIAL CONDUCT R. 1.2 cmt 3 (2007); *see also id.* R. 1.2 cmt. 5 (“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.”).

34. *See, e.g., id.* R. 1.2 cmt. 3 (“Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary.”).

35. *In re Ellender*, 889 So. 2d 225, 227 (La. 2004).

36. *Id.*

37. *Id.* As a result, the local newspaper published an article entitled “Local Judge’s Masquerade Sparks Racial Concerns.” *Id.* The story was further publicized by local broadcast media, CNN, and two New Orleans television stations. *Id.* at 227–28. Six complaints were filed with the state Judiciary Commission. *Id.* at 228.

38. MODEL CODE OF JUDICIAL CONDUCT Canon 3 (1990). *See also* MODEL CODE OF JUDICIAL CONDUCT R. 2.3(B) (2008) (“A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice . . .”).

39. *Ellender*, 889 So. 2d at 232.

conduct clearly created the appearance that he was prejudiced against blacks and would not be impartial when they appeared before him as parties.⁴⁰ As a result, it was inevitable that blacks would have less confidence in the integrity of the judicial system.

There is, however, no analogous concern with the conduct of lawyers. Lawyers have no similar single, clearly articulated duty. Indeed, lawyers owe very different duties to clients, prospective clients, courts, third persons who might be affected by a client's conduct, and the public at large.⁴¹ Moreover, the duties that lawyers owe to different constituents of the legal system are often in conflict, and it usually takes a specific conduct rule to determine which duty trumps another in particular situations.⁴² Lawyer ethics codes have, therefore, never had a general rule that prohibits lawyers from committing an "impropriety," nor do they—or could they—have a general rule that prohibits lawyers from creating the mere "appearance" of impropriety.⁴³

40. *Id.* at 229.

41. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT pmbl. 1 (2008) ("A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."). The lawyer's duties to clients and prospective clients are set forth primarily in Parts 1 and 2 of the Model Rules. The lawyer's duties to courts and opposing parties are set forth in Part 3, and the lawyer's duties to persons other than courts are set forth in Part 4. The lawyer's duties to the public at large are set forth in Parts 5–8.

42. *See id.* pmbl. 9:

In the nature of law practice . . . conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts.

A good example of a specific conduct rule that resolves potentially conflicting responsibilities is the rule requiring lawyers to prevent or rectify false testimony, thereby determining that the lawyer's duty of candor to the tribunal trumps the lawyer's duty of confidentiality to a client. *See* MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3), (b) (2009) (discussing the rules governing a lawyer's "candor toward the tribunal").

43. It would be possible, of course, to adopt a rule prohibiting lawyers from engaging in conduct that "appears" to be in violation of a more specific disciplinary rule, for example, conduct that "appears" to create a conflict of interest, even though there is no actual conflict under Rule 1.7 or 1.8. The problem here is that such an undue broadening of the conflict of interest rules—which are already broadly drafted to cover not only actual but also potential conflicts—would interfere not only with the lawyer's interest in making a living, but also, and more importantly, with both a client's interest in retaining a particular lawyer and respect for client autonomy. *See, e.g.*, Nancy J. Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 TEX. L. REV. 211, 227–28 (1982) (noting criticism of the appearance of impropriety standard in determining when a conflict of interest between current clients is consentable, because "there is an increasing recognition that emphasis on the importance of protecting lawyers' reputations unduly interferes with legitimate interests of clients.").

III. THE NEED FOR GENERAL “CATCH-ALL” PROVISIONS IN BOTH JUDICIAL AND LAWYER CODES

What lawyer codes do have, however, are other general provisions that serve as “catch-all” rules for situations not addressed by the more specific rules. For example, Rule 8.4(d) prohibits lawyers from engaging in conduct “prejudicial to the administration of justice.”⁴⁴ In addition, a number of states continue to use a provision of the former ABA Model Code⁴⁵ that subjects lawyers to discipline for any conduct that “adversely reflects on [the lawyer’s] fitness to practice law.”⁴⁶ As a result, although it may be true that lawyer codes no longer contain references to the appearance of impropriety, they do contain equally general provisions that are subject to much the same criticisms leveled against the appearance of impropriety standard in the 2007 Model Judicial Code, namely, that they are impermissibly vague and thereby both unpredictable and unfair.⁴⁷

The charge of vagueness that is leveled against both the judicial appearance of impropriety standard and the more general lawyer conduct rules includes both constitutional and policy objections. The constitutional objections are, I believe, rather easily dismissed. Although a few courts have expressed concerns,⁴⁸ the clear majority of courts that have addressed these types of general provisions have upheld

44. MODEL RULES OF PROF’L CONDUCT R. 8.4(d) (2008).

45. MODEL RULES OF PROF’L CONDUCT R. 1-102(A)(6) (1983).

46. *See* ALA. RULES OF PROF’L CONDUCT R. 8.4(g) (2009); KAN. RULES OF PROF’L CONDUCT R. 8.4(g) (2007); MASS. RULES OF PROF’L CONDUCT R. 8.4(h) (2008); N.Y. RULES OF PROF’L CONDUCT R. 8.4(h) (2009); OHIO RULES OF PROF’L CONDUCT R. 8.4(h) (2009); VT. RULES OF PROF’L CONDUCT R. 8.4(h); *see also* COLO. RULES OF PROF’L CONDUCT R. 8.4(h) (2008) (lawyer shall not “engage in any conduct that directly, intentionally, and wrongfully harms others and that adversely reflects on a lawyer’s fitness to practice law”); *United States v. Hearst*, 638 F.2d 1190, 1197 (9th Cir. 1980) (“conduct unbecoming a member of the bar”); *Matter of Beaver*, 510 N.W.2d 129, 133 (Wis. 1994) (“offensive personality”).

47. *See In re Discipline of Two Attorneys*, 660 N.E.2d 1093,1099 (Mass. 1996) (noting that absent a limiting principle, Rule 8.4(d) “presents the risk of vagueness and arbitrary application”) (citing 2 G. HAZARD & W. HODES, *THE LAW OF LAWYERING* § 8.4:501, at 957 (2d ed. Supp. 1994)); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 5 cmt. c (2000) (“[T]he breadth of such provisions creates the risk that a charge using only such language would fail to give fair warning of the nature of the charges to a lawyer respondent”); Bruce A. Green, *Zealous Representation Bound: The Intersection of the Ethical Codes and the Criminal Law*, 69 N.C. L. REV. 687, 695–96 (1991) (positing some provisions “provide no clear guidance to lawyers” and serve as “catch-all[s]” to which courts “occasionally resort when they want to punish an advocate’s conduct that is not specifically proscribed by the ethical rules”).

48. *See, e.g., Spargo v. N.Y. State Comm’n on Judicial Conduct*, 244 F. Supp. 2d 72, 91 (N.D.N.Y. 2003), *rev’d on other grounds*, 351 F.3d 65 (2d Cir. 2003) (federal abstention) (holding the appearance of impropriety standard in the New York Judicial Code unconstitutional and void for vagueness); *see also* authorities cited *supra* note 47.

them against due process challenges for vagueness.⁴⁹ Admittedly, there are only a few decisions that directly address the constitutionality of the appearance of impropriety standard for judges.⁵⁰ However, there are a number of decisions that address similarly general provisions of the judicial code, such as the rule requiring conduct “that promotes public confidence in the integrity and impartiality of the judiciary.”⁵¹ There are also numerous decisions upholding the constitutionality of various general provisions of the lawyer codes, for example, the prohibition against “conduct prejudicial to the administration of justice”⁵² and “conduct that [adversely] reflects on [the lawyer’s] fitness to practice law.”⁵³

In these decisions, courts recognize that the purpose of professional discipline is not to punish criminals, but rather to protect the public by maintaining standards of professional fitness.⁵⁴ As a result, what are

49. See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 67, 86 & n.48 (1986) (“[M]ost attacks upon Code provisions charging that they are void for vagueness in violation of the due process clause have been unavailing.”); see also, e.g., *People v. Morely*, 725 P.2d 510, 516 (Colo. 1986); *Statewide Grievance Comm. v. Rozbicki*, 595 A.2d 819, 825 (Conn. 1991); *In re Crossen*, 880 N.E.2d 352, 379 (Mass. 2008); *In re Barr*, 13 S.W.3d 525, 564–65 (Tex. Rev. Trib. 1998); *In re Illuzzi*, 632 A.2d 346, 349–50 (Vt. 1993); Cynthia Gray, *Avoiding the Appearance of Impropriety: With Great Power Comes Great Responsibility*, 28 U. ARK. LITTLE ROCK L. REV. 63, 94 n.194 (2005) (citing additional cases).

50. See, e.g., *Spargo*, 244 F. Supp. 2d at 91; *In re Sims*, 462 N.E.2d 370, 375 (N.Y. 1984); *In re Conduct of Roth*, 645 P.2d 1064, 1067 (Or. 1982).

51. See, e.g., *In re Barr*, 13 S.W.3d at 565 (citing cases).

52. See, e.g., *Howell v. State Bar of Tex.*, 943 F.2d 205, 206 (5th Cir. 1988); *Rogers v. Miss. Bar*, 731 So. 2d 1158, 1164 (Miss. 1999); *In re Gadbois*, 786 A.2d 393, 399–400 (Vt. 2001); see also, e.g., *Att’y Grievance Comm’n of Md. v. Goldsborough*, 624 A.2d 503 (Md. 1993).

53. See, e.g., *In re Illuzzi*, 632 A.2d 346, 349–50 (Vt. 1993).

54. See, e.g., *In re Peasley*, 90 P.3d 764, 775 (Ariz. 2004) (“This court has long held that the objective of disciplinary proceedings is to protect the public, the profession and the administration of justice and not to punish the offender.”); *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (“In all cases, our purpose in imposing discipline is to serve the public and professional interests we have identified, rather than to visit punishment upon an attorney.”); Roederick C. White, Sr., *The Matrix Phenomenon: The Belief that the Lawyer Disciplinary System is Designed to Give Lawyers Another Chance. Revisiting Penological Theory*, 32 S.U. L. REV. 1, 12 (2004) (“The primary objective of discipline is to protect the judicial system and the public. As such, punishment of the lawyer is not the primary objective.”). In *In re Ruffalo*, the United States Supreme Court, in requiring lawyer disciplinary proceedings to protect certain procedural due process concerns, characterized the sanction of disbarment as “a punishment or penalty imposed on the lawyer,” but further noted that the sanction is “designed to protect the public.” *In re Ruffalo*, 390 U.S. 544, 550 (1968). Thus, *Ruffalo* has come to stand for the proposition that “[t]he criminal system is geared towards punishing the individual lawyer, but legal ethical rules and sanctions have different goals: to protect the profession and to protect the general public.” Brian Finkelstein, *Should Permanent Disbarment be Permanent?*, 20 GEO. J. LEGAL ETHICS 587, 593 (2007).

seen as necessarily general provisions⁵⁵ are upheld both because they are viewed as regulation, not punishment,⁵⁶ and because they apply not to laypersons but rather to professionals, “who [are said to] have the benefit of guidance provided by case law, court rules, and the ‘lore of the profession.’”⁵⁷

IV. CONCLUSION: THE APPEARANCE OF IMPROPRIETY IS AN APPROPRIATE STANDARD FOR JUDGES

Setting aside constitutional questions, what about the policy objections to the appearance of impropriety standard for judges? Critics have claimed that the standard risks discipline on “the whim of judicial disciplinary authorities,”⁵⁸ “chill[s] courageous and innovative judicial decision-making,”⁵⁹ and makes it difficult for judges to predict how the standard will apply.⁶⁰

In my view, the first two concerns are easily overcome. Although the standard for judges has been in place for decades,⁶¹ I am unaware of a single instance in which a judge has been disciplined for creating an appearance of impropriety in rendering a judicial decision.⁶² I am also unaware of any evidence that judges have been subject to discipline on the whim of judicial disciplinary counsel.⁶³ And, as a side note, it is the

55. See *In re Charges of Unprofessional Conduct Against N.P.*, 361 N.W.2d 386, 395 (Minn. 1985) (quoting *In re Gillard*, 271 N.W.2d 785, 809 n.7 (Minn. 1978)) (rejecting vagueness challenge to rules prohibiting conduct prejudicial to the administration of justice and conduct that adversely reflects on a lawyer’s fitness to practice law).

56. See, e.g., *In re Barr*, 13 S.W.3d at 564 (“[A] greater degree of flexibility is permitted with respect to judicial discipline than is allowed in criminal statutes.”).

57. See, e.g., *In re Snyder*, 472 U.S. 634, 645 (1985) (referring to rule prohibiting “conduct unbecoming a member of the bar”); *Howell v. State Bar of Texas*, 843 F.2d 205, 208 (5th Cir. 1988) (denying void for vagueness challenge to rule prohibiting conduct prejudicial to administration of justice).

58. APRL Letter, *supra* note 17, at 6.

59. *Id.* at 7.

60. See, e.g., *id.* at 9; Abramson, *supra* note 3, at 955; Rotunda, *supra* note 3, at 1342–44. Professor Rotunda also criticizes the vagueness and unpredictability of the appearance of impropriety standard on the ground that it “arm[s] any lawyer or any pundit with the equivalent of a blunderbuss to attack a judge.” Rotunda, *supra* note 3, at 1341.

61. For a brief history of the appearance of impropriety standard for judges, see Abramson, *supra* note 3, at 952–53.

62. See Gray, *supra* note 49, at 92 (describing how cases in which judges are disciplined based on a legal opinion do not rely on the prohibition against the appearance of impropriety but rather are based on other provisions such as those requiring the judge “respect and comply with the law”).

63. See *id.* at 65 (explaining that case law analysis demonstrates that “judicial discipline authorities are not using the standard as an arbitrary smell test but are applying it in a cautious, reasoned, and appropriate manner with no evidence of overly subjective interpretation”). The APRL Letter that raised the “risk” of disciplinary action on the “whim of judicial disciplinary

courts themselves, of course, and not the judicial disciplinary counsel, that have the ultimate authority to decide whether a judge will be disciplined for creating the appearance of impropriety.⁶⁴ More importantly, although reasonable minds may disagree whether any particular conduct creates the appearance of impropriety, the decisions I have read in this area are based on conduct that was, at best, highly questionable. If the critics are correct, then they should be able point to existing cases in which judges have been disciplined or even charged with conduct that no reasonable person would predict could involve the impermissible appearance of impropriety.

*Spector v. State Commission on Judicial Conduct*⁶⁵ and *Huffman v. Arkansas Judicial Discipline & Disability Commission*⁶⁶ are two decisions that have been cited by critics as examples of the unfairness of the appearance of impropriety standard.⁶⁷ To the contrary, I believe that these two decisions illustrate precisely why the appearance of impropriety standard is a necessary component of a judicial discipline code for the twenty-first century.

In *Spector*, a judge had made appointments of certain lawyers as guardians ad litem, receivers, and referees at a time when he knew that the lawyers' fathers were judges who were simultaneously making appointments of the judge's own son for similar positions.⁶⁸ The majority and the dissent agreed that the judges could not have appointed their own sons to these appointments, because such acts would be in violation of anti-nepotism rules; they also agreed that it would have been improper to have expressly arranged to make cross-appointments, as a form of disguised nepotism.⁶⁹ There was no evidence that the

authorities" cited no examples of arbitrary charging decisions. See APRL Letter, *supra* note 17 and accompanying text. And, with respect to the "experiences of APRL members throughout the country," the Letter notes only that "[m]embers report that disciplinary prosecutors and investigators, in order to put additional pressure on judge respondents, often tack on [appearance of impropriety] charges in addition to their more specific claims," thereby causing the judge respondents to settle. APRL Letter, *supra* note 17, at 10. The Letter does not claim that the AOI charges were arbitrary or that they were made on the mere "whim" of the disciplinary prosecutors.

64. See JEFFREY M. SHAMAN ET AL, JUDICIAL CONDUCT AND ETHICS 8 (3d. ed. 2000) (noting that decisions of judicial conduct commissions are ordinarily "appealable to a court, which has the final say as to what constitutes judicial misconduct").

65. *Spector v. State Comm'n on Judicial Conduct*, 392 N.E.2d 552 (N.Y. 1979).

66. *Huffman v. Ark. Judicial Discipline and Disability Comm'n*, 42 S.W.3d 386 (Ark. 2001).

67. See APRL Letter, *supra* note 17, at 10 (quoting Justice Fuchsberg's "scathing dissent" in *Spector*, 392 N.E.2d at 556 (Fuchsberg, J., dissenting)); Rotunda, *supra* note 3 at 1363-65 (criticizing decision in *Huffman*).

68. *Spector*, 392 N.E.2d at 552-53.

69. According to the majority, "[N]epotism is to be condemned, and disguised nepotism imports an additional component of evil because, implicitly conceding that evident nepotism

cross-appointments were in fact made to circumvent the nepotism rules. Nevertheless, the judge was disciplined for creating the appearance of disguised nepotism.⁷⁰ In a vigorous dissent, cited by critics of the appearance of impropriety standard,⁷¹ Judge Fuchsberg lambasted the majority for disciplining a distinguished judge on the mere appearance of impropriety.⁷² After all, he complained, there was no rule that prohibited the appointment of relatives of other sitting judges, no rule that automatically disqualified such individuals from consideration for appointments, and no rule advising that such selections would give rise to an appearance of impropriety.⁷³ Of course, the judge in question was not disciplined merely for appointing the relatives of other sitting judges, but rather for doing so *at a time when he knew* that his own son was being appointed by these very same judges for similar positions. This created the appearance that the appointments were being coordinated.⁷⁴

In *Huffman*, also cited by critics as inappropriately relying on the appearance of impropriety standard,⁷⁵ the judge and his wife owned 12,000 shares of Wal-Mart stock worth about \$700,000.⁷⁶ Judge Huffman argued that his family's economic interest in Wal-Mart was de minimis in relation to the total outstanding shares of Wal-Mart stock, and their interest could not have been substantially affected by the outcome of the proceeding.⁷⁷ As a result, Judge Huffman agreed to hear Wal-Mart's request for a temporary restraining order (TRO), even though he had recused himself in prior proceedings because of his stock ownership.⁷⁸ Judge Huffman argued that because his stock ownership

would be unacceptable, the actor seeks to conceal what he is really accomplishing." *Id.* at 553. In his dissent, Justice Fuchsberg emphasized that "there [was] no contention that one [appointment] was a *quid pro quo* for the other." *Id.* at 557 (Fuchsberg, J., dissenting).

70. See *id.* at 553 ("[E]ven if it cannot be said that there is proof of the fact of disguised nepotism, an appearance of such impropriety is no less to be condemned than is the impropriety itself.").

71. See APRL Letter, *supra* note 17, at 10.

72. *Spector*, 392 N.E.2d at 556–57.

73. *Id.* at 557.

74. *Id.* at 555 ("In the present case the fact that cross appointments were knowingly made by petition during the period in question is not disputed. Notwithstanding the absence of proof of any actual or intended impropriety there was thereby inescapably created a circumstantial appearance of impropriety.").

75. See *supra* note 67 and accompanying text.

76. *Huffman v. Ark. Judicial Discipline and Disability Comm'n*, 42 S.W.3d 386, 391 (Ark. 2001).

77. *Id.* at 390.

78. *Id.* at 388–89.

was *de minimis* he was not obliged to recuse himself.⁷⁹ Nevertheless, he was disciplined both for creating the appearance of partiality (under the more specific recusal rules)⁸⁰ and for creating the more general appearance of impropriety.⁸¹

Was it unfair to discipline Judge Huffman for creating either the appearance of partiality or, more generally, the appearance of impropriety? Here it helps to focus not on the stock ownership rules *per se*, but rather on the unique circumstances in which the judge agreed to rule on the TRO, including the fact that the judge had previously recused himself in cases involving Wal-Mart, but he failed to do so here.⁸² Having previously recused himself, his failure to do so in this instance was significant. In addition, the hearing over which he presided was one where the union was not even represented—it was an *ex parte* request for a TRO.⁸³ Under these specific circumstances, the fact that Wal-Mart received a favorable ruling from a judge who owned a considerable number of shares of Wal-Mart stock might reasonably create the appearance that the judge had bent over backwards to accommodate the company.

Spector and *Huffman* suggest three compelling reasons why the appearance of impropriety test is necessary, and why it is simply not possible, as the critics have suggested, to look back on thirty years of experience with the appearance of impropriety standard and simply codify specific prohibitions against the kind of conduct that has previously been condemned under that standard.⁸⁴

First, it would often be difficult, if not impossible, to prove that a judge has engaged in an actual impropriety. For example, if the judge in *Spector* was in fact engaged in a deliberate effort to bypass the nepotism rule, it is unlikely that the disciplinary authorities would have

79. *Id.* at 390.

80. *Id.* (citing ARK. CODE OF JUDICIAL CONDUCT Canon 3E(1), which states that “[a] judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned”); *see also* ABA MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1) (2003) (identical provision).

81. *Huffman*, 42 S.W.3d at 389.

82. *Id.* at 388–89.

83. *Id.*

84. *See, e.g.*, Rotunda, *supra* note 3, at 1362–63, 1376; *cf.* APRL Letter, *supra* note 17, at 11–12 (proposing limiting improper appearances to appearance of violating a specific conduct rule, such as prohibiting “conduct which involves, or appears to involve, repeated or flagrant disregard of established applicable law”).

been able to detect or prove that fact.⁸⁵ As a result, in order to prevent some *actual* improprieties, it will be necessary to discipline the judge for, at the very least, creating the appearance of impropriety. This was true not only of *Spector*, but also of the case involving the Louisiana judge who appeared in blackface paint at a Halloween party held in a public place.⁸⁶ Even if he was actually prejudiced against black litigants, this would be very difficult to prove.⁸⁷ In any event, he created the clear impression that he was so prejudiced.

Second, there are many ways in which a judge's conduct can create the appearance of impropriety, and there is no way that specific rules can capture all these situations. For example, prior to *Spector*, we might not have anticipated that judges could use cross-appointments to avoid application of the nepotism rules or, that if they did so, there would be virtually no way to prove that the judges were in fact engaged in disguised nepotism (i.e., a deliberate attempt to bypass the nepotism rules). Based on *Spector*, we could now create a rule that prohibits cross-appointments, regardless of whether or not they are intended to circumvent the anti-nepotism rule. However, such a specific rule would not prohibit other undesirable conduct that we simply did not and could not have anticipated at the time we drafted the rules.

Third, as illustrated in *Huffman*, sometimes it is the unique features of a situation that create the appearance of impropriety. If, in fact, there was no significant chance that the value of the judge's stock ownership could be affected by the judge's rulings in the case, then perhaps we would not want a specific rule that automatically disqualifies a judge who owns more than a few shares of a company that appears as a litigant.⁸⁸ But the facts in *Huffman* were more nuanced. Given that the judge had already recused himself twice in proceedings involving Wal-Mart,⁸⁹ and that he was ruling on an *ex parte* motion of the Wal-Mart lawyers,⁹⁰ his failure to recuse himself was more likely to create the belief on the part of the union—as well as the public at large—that his ruling was not impartial.

85. Judges engaged in a deliberate effort to bypass the rule are not likely to reduce their agreement to writing or tell others about their conduct. Similarly, they are unlikely to candidly admit their transgression when questioned by disciplinary authorities.

86. See *supra* notes 35–40 and accompanying text.

87. In this case, there was evidence of a lack of disparity in his sentencing based on race. See *supra* note 39 and accompanying text. Even if there was such evidence, however, it would not in itself be clear proof that the disparity was a result of prejudice and not some other cause.

88. But see Rotunda, *supra* note 3, at 1364–65 (urging adoption of bright-line federal rule requiring disqualification when judge has any financial interest in a party to a dispute).

89. See *supra* note 78 and accompanying text.

90. See *supra* note 83 and accompanying text.

Indeed, it is these three concerns that arguably lie at the heart of the more general prohibitions found not only in judicial disciplinary codes but also in lawyer disciplinary codes: (1) the difficulty of proving violation of many specific rules,⁹¹ (2) the inability to predict in advance all of the specific conduct that should be prohibited,⁹² and (3) the extent to which the impropriety (or appearance of impropriety) is a function of nuanced facts that are impossible to either predict or articulate in the more specific provisions of a disciplinary code.⁹³

Given these concerns, it is not surprising that both the Conference of Chief Judges and most of the individual judges who have spoken on the subject supported retaining the appearance of impropriety standard in the 2007 Judicial Code.

91. Discipline for these rules is sometimes the result of a stipulation of the parties. For example, in *People v. Blundell*, a lawyer stipulated that in an alleged attempt at “humor” he had made threatening remarks to the employer of several of the lawyer’s clients. *People v. Blundell*, 901 P.2d 1268, 1269 (Colo. 1995). As a result, he agreed to be disciplined for conduct adversely reflecting on his fitness to practice law. *Id.* In fact, he might have intended to physically assault the employer, which would have constituted criminal conduct for which the lawyer would likely have received a more severe sanction. Bar counsel might have agreed to the stipulation because of the difficulty of proving intent to assault.

92. See, e.g., *In re Charges of Unprofessional Conduct Against N.P.*, 361 N.W.2d 386, 395 (Minn. 1985):

The United States Supreme Court recognized long ago that “it is difficult, if not impossible, to enumerate and define, with legal precision, every offense for which an attorney or counsellor ought to be removed.” *Ex parte Secombe*, 60 U.S. (19 How.) 9, 14 (1856). We ourselves have, in the comparable situation of applying a legislative standard of judicial conduct, similarly recognized that “necessarily broad standards of professional conduct” are constitutionally permissible. *In re Gillard*, 271 N.W.2d 785, 809 n.7 (Minn. 1978).

For an example of this difficulty, see, e.g., *In re Gole*, 715 N.E.2d 399 (Ind. 1999). In *In re Gole*, an attorney was disciplined for conduct prejudicial to the administration of justice when he questioned two clients about their sexual experiences and gave details of his own. *Id.* at 399. Many states have adopted Model Rule 1.8(j), which prohibits most sexual relationships with clients, but it would be difficult to articulate all of the circumstances in which lawyers may behave inappropriately in a sexual manner without actually engaging or attempting a sexual relationship.

93. See Nancy J. Moore, *Lawyer Ethics Code Drafting in the Twenty-First Century*, 30 HOFSTRA L. REV. 923, 931–32 (2002) (noting that in drafting some of the more general provisions it proposed, the Ethics 2000 Commission “was less concerned with clarity and notice to lawyers and more concerned with flexibility, recognizing that the terms of disciplinary rules are (and should be) increasingly subject to case-by-case interpretation by ethics committees or courts”).