ABA/BNA Lawyers' Manual on Professional Conduct
ISSN 1521-5083

ABA/BNA

Lawyers' Manual on Professional Conduct

CURRENT REPORTS

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Judges

Appearance of Impropriety Issue Continues To Occupy Judicial Code Panel's Attention

NAPLES, Fla.—Although the “appearance of impropriety” is not a basis for subjecting lawyers to discipline under the ABA Model Rules of Professional Conduct, the appearance of impropriety standard has been a facet of the ABA’s judicial ethics code for eight decades.

But the question whether judges should be susceptible to discipline for doing something that may not look right is getting scrutinized—and proving very sensitive—as the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct proceeds in its two-year mission to formulate recommendations for revising the judicial conduct code.

At a panel on judicial ethics the commission held during the ABA 30th National Conference on Professional Responsibility, and at a public hearing conducted in conjunction with the conference, commission members heard competing views about the appearance of impropriety standard, ranging from entreaties to preserve the current prohibition to complaints about its vagueness.

Moreover, few of those who spoke seemed happy with the way the commission proposes to deal with the appearance of impropriety standard in its initial draft of revisions for the judicial conduct code.

While the appearance of impropriety issue attracted the most debate at the judicial ethics panel and public hearing, the commission also heard comments on several other issues, such as how the Code of Judicial Conduct should regulate private funding for judge’s educational junkets, and whether the code should encourage judges to engage in community outreach activities.

The commission has scheduled additional public hearings in Atlanta on Aug. 6 and Chicago on Oct. 22, with the goal of presenting a final report with proposed revisions for consideration at the ABA Annual Meeting in August 2005.

In May the commission released for public comment a partial first draft, which reorganizes Canons 1, 2, and 3 of the current code into two canons. See 20 Law. Man. Prof. Conduct 262.

The commission has not yet publicly released a draft of revisions to Canon 4, on extrajudicial activities, or Canon 5, on political activities. The commission plans to revisit the entire code again after receiving comments on all drafts.

Public Confidence.

At the judicial ethics program on June 4, commission member Loretta C. Argrett recounted that the prohibition against the appearance of impropriety by judges was adopted as part of the original Canons of Judicial Ethics in 1924, and was retained when the code was revised in 1972 and 1990. The underlying rationale for the prohibition—to maintain public confidence in the judiciary—has remained the same for 80 years, said Argrett, a mediator and legal ethics consultant in Silver Spring, Md.

The commission's preliminary draft of revisions to the judicial conduct code retains the prohibition against the appearance of impropriety, although it is shifted from Canon 2 to Canon 1. Likewise, the draft keeps language in the commentary stating that the prohibition applies to a judge's conduct both on and off the bench.

The draft commentary also contains the substance of the current test for an appearance of impropriety—namely, whether the judge's 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."

The proposed comment on the appearance of impropriety describes it as an "overarching principle of judicial conduct."The commission's proposal also includes the following language that is not part of the current commentary:
Ordinarily, 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.

Disapproval From N.Y. Times.

A May 22 *New York Times* editorial, "Weakening the Rules for Judges," charged that the new sentence in the commentary "waters down" the appearance of impropriety standard, transforms a crucial ethics mandate into an "ancillary add-on," and "significantly diminishes its moral force and deterrence value." The editorial disparaged any concern about the vagueness of the standard as "overblown" and asserted both that judges interpret similar terms every day and that they have plenty of case law and ethics opinions to consult about what the appearance of impropriety means. The proper way for the commission to address any concern about vagueness is to provide further guidance, not dilute expectations, the editorial argued.

As noted in the *Times* editorial, Sen. Patrick Leahy (D-Vt.)—the ranking Democrat on the Senate Judiciary Committee—sent a letter to ABA President Dennis Archer complaining about the draft. In a letter responding to Leahy, Archer said that the commission had neither removed the "appearance of impropriety" standard nor transformed it into an aspirational goal. The commission's draft of Canon 1 retains the mandatory directive that judges shall avoid the appearance of impropriety in all their activities, Archer stated.

Another response to the editorial came from legal ethics consultant W. William Hodes of Indianapolis, who wrote a letter to the newspaper contending that the appearance of impropriety standard "has a long history of misuse and abuse" by disciplinary prosecutors. "Punishing judges on the basis of such a subjective 'I know it when I see it' standard deprives them of their basic right to due process of law," Hodes argued in the letter, which apparently went unpublished.

Commission chair Mark I. Harrison, who moderated the judicial ethics program, told the audience of his

initial belief that the appearance of impropriety standard was too amorphous to serve as a useful standard or perhaps even to survive a due process challenge. But Harrison said his views were modified by the testimony of judges and judicial discipline administrators speaking at the commission's public hearings; their testimony characterized the appearance of impropriety standard as an essential part of the judicial conduct code. The appearance of impropriety issue has become a "flashpoint," said Harrison, who practices with Osborn Maledon in Phoenix.

'Neither Fish Nor Fowl.'

Speaking from the audience during the program, Hodes said he was "astonished"to see in the commission's draft that although the prohibition against impropriety appears only in the caption or title of Canon 1, no actual rule refers to it.

This point was conceded by Commission Reporter Charles G. Geyh, of Indiana Law School in Bloomington, Ind., but he pointed out that the current code takes the same approach, which is "neither fish nor fowl." Geyh said that he originally suggested moving the appearance of impropriety prohibition into a specific rule; however, the commission opted to continue the current approach, under which the exhortation to avoid the appearance of impropriety is to be used in combination with specific rules rather than being charged on its own, Geyh said.

This didn't satisfy Hodes, who emphasized that the commentary doesn't fit the rule. "You can't have a comment that refers to a rule you don't have," he said.

Panel member Robert H. Tembeckjian interjected that the canon titles are all "vague and unenforceable." An appearance of impropriety charge is typically followed by language detailing the specific conduct that underlies the appearance of impropriety charge, he noted, adding: "No one is charged only with the title of the canon." Tembeckjian serves as liaison to the commission from the Association of Judicial Disciplinary Counsel.

Speaking from the audience, law professor Nancy J. Moore of Boston University critiqued the draft as making "a very substantial change" that takes away the ability of judicial disciplinary officials to charge the appearance of impropriety.

Moore explained that in the current judicial conduct code, commentary about the appearance of impropriety fleshes out a rule that broadly obligates judges to act in a manner that promotes public confidence in the judiciary; however, in the commission's draft, commentary about the appearance of impropriety elaborates on a rule that merely requires judges to observe judicial conduct standards. You've created commentary where there's no rule to charge, Moore told the panel.

Difficult to Defend.

Addressing the panel from the floor, Ronald C. Minkoff stated that it is difficult to know how to defend judges against an appearance of impropriety accusation, so that such a charge can drive judges to settle even when they can defend against specific misconduct charges they are facing. Minkoff, of Frankfurt Kurnit Klein & Selz in New York, chairs a subcommittee of the Association of Professional Responsibility Lawyers that is discussing the revision of the judicial conduct code.

One approach, Minkoff suggested, may be to replace the term "appearance of impropriety" in the code with more specific language such as "appearance of bias" or "appearance of partiality." Such phrases, he said, would cover situations that have caused controversy in the last few months, such as Justice Antonin Scalia's duck-hunting trip with Vice President Cheney and a federal judge's numerous meetings with

plaintiffs' counsel in asbestos litigation, which the Third Circuit said appeared improper in *In re Kensington Int'l Ltd.*, 368 F.3d 289 (3d Cir. 2004).

On the other hand, law professor Bruce Green of Fordham Law School, speaking from the audience, called the appearance of impropriety standard an "important normative provision." The commission should include it, followed by some suggestions about how to implement it, he said.

Must Do, Should Do.

Yet another audience member argued that the real problem arises from combining hortatory and mandatory provisions. Set up aspirational standards, and don't confuse them with what can be charged, he said.

Harrison commented that when he was appointed commission chair and first looked at the code, it struck him as "a conglomeration of hortatory and mandatory language," unlike the ABA Model Rules of Professional Conduct. Accordingly, he asked the commission to think about revising the format to distinguish more clearly between enforceable rules and commentary.

That task has proved more challenging for judicial discipline than it probably was for lawyer discipline, Harrison said. He also noted that many judges at the commission's public hearings expressed a "strongly felt need" to preserve the aspirational quality of the judicial code.

Harrison said that the commission's proposed revision uses the changed format of enforceable rules followed by commentary that informs those rules, but he added that "we've already made a couple of compromises"—of which the treatment of the appearance of impropriety is one example, he said.

Everyman as Judge.

At the commission's public hearing later in the day, J.J. Gass of the Brennan Center for Justice at New York University Law School discussed the appearance of impropriety standard as part of his wide-ranging remarks on the revision of the judicial code. Gass said that the commission's proposed draft went in the right direction and "improved the situation,"but he urged the commission to add further guidance. The goal, he said, should be to balance more specificity with a general standard that can evolve over time.

Argrett solicited Gass's thoughts about the test set out in the commentary for the appearance of impropriety. Is the "reasonable person" standard too vague? she queried. And who should that reasonable person be?

The reasonable person standard is good, Gass replied, because it brings the public into the room. The vagueness problem comes up in figuring out what a reasonable person would think is improper, he said. Although impropriety is a broad term, the code can take note of the common-law development of the meaning of the word, he said.

Peter W. Bowie, a bankruptcy judge in the Southern District of California, asked Gass to describe the attributes of the hypothetical reasonable person. Is it a litigant, or maybe a person on the street? Bowie is the U.S. Judicial Conference's liaison to the commission.

Gass answered that the reasonable person would not be a judge or a lawyer, but a "reasonably engaged lay person" who is not completely unsophisticated and can take into account the litigant's perspective. This hypothetical person would be familiar, he said, with the idea of state courts versus federal courts, and trial proceedings versus appellate cases.

Commission member Jan Witold Baran voiced reservations about the vagueness of the prohibition against the appearance of impropriety as a charging mechanism. He noted that although it is usually linked to specific conduct that is clearly improper, it is sometimes used on its own when there is no other "handle." Baran is with Wiley Rein & Fielding in Washington, D.C.

A bigger problem, Baran added, is that disciplinary counsel are not "rigorous" about charging specific violations. The commission may consider the appearance of impropriety concept to be important as an aspirational matter to elevate the conduct of judges, he noted. But if the prohibition is applied in the disciplinary context, the commission needs to be careful and specific, he said, asking Gass whether more commentary might be helpful.

Gass responded that typically the appearance of impropriety concept has been used when a judge has done something clearly inappropriate. "Appearance of impropriety" is a "softer" way of characterizing objectionable conduct than "actual impropriety," he remarked.

Baran asked whether the appearance of impropriety standard meets due process concerns. Gass noted that the application of the standard over the years has given it some context, but Baran pressed him on the point. Isn't the standard too ad hoc? Gass replied that the vagueness issue needs to be evaluated case by case.

Gifts, Junkets.

On a separate issue, the *New York Times* editorial also lamented "the festering scandal of the well-attended, expense-paid judicial seminars that are held at nice resorts and underwritten by private interests bent on influencing judicial decisions."

Speaking at the judicial ethics program, Baran said that the Code of Judicial Conduct currently permits the cost of food, lodging, and transportation for attending conferences to be defrayed by others. He noted that other branches of the government regulate privately reimbursed travel in ways such as limiting the length of the trips or capping the amount of reimbursement. Another question Baran identified is how information about these trips should be disclosed to the public.

Audience member Sarah D. McShea, New York, urged the commission to focus on disclosure rather than imposing reimbursement limits. "Don't get embroiled in minutiae," she said, when the real problem is that "some people know what's going on and some don't." A Web site where information is posted naming those who bought judges' trips would be an extremely effective deterrent, she contended.

Family Court Judges' Proposal.

At the commission's public hearing, retired Illinois Judge Thomas Hornsby presented recommendations developed by the National Council of Juvenile and Family Court judges for revising the judicial conduct code.

Along with other changes, the council proposed adding a rule on civic responsibilities that would encourage judges to provide leadership such as by "engaging in community outreach activities to promote the fair administration of justice." The rule would expressly allow a judge to endorse the goals and funding of organizations or agencies concerning the legal system or "provision of services."

Hornsby explained that in some states judges are unsure whether the judicial conduct code permits them to become involved in their communities. A couple of commission members expressed concern, however,

that judges who are social advocates in their communities may wind up being viewed as partisan. Hornsby noted that judges would have to consider, before engaging in an activity, whether particular involvement in the community might bring about a need for recusal.

Harrison asked Hornsby whether the subject of civic responsibilities could be addressed in the commentary rather than the text of a rule. That, Hornsby responded, would be a step in the right direction.

by Joan C. Rogers