Keeping Up Appearances

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Canon 2 of the Model Code of Judicial Conduct provides that "[a] judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities."[1] A similarly worded provision appeared in the Model Code of Professional Responsibility for lawyers, but was eliminated when the Code was replaced by the Model Rules of Professional Conduct. Despite its elimination, the "appearance of impropriety" standard continues to be used in some jurisdictions as a basis for lawyer disqualification and discipline.

For instance, the West Virginia Supreme Court recently applied the "appearance of impropriety" standard to disqualify a law firm from continuing to represent a client in litigation.[2] The firm in question represented plaintiffs in an action against a contractor. While the case was pending, the firm hired a lawyer from the firm that was representing the contractor in the same case. Although the lawyer had not personally worked on the case at his previous firm, the court found that permitting the lawyer's new firm to remain in the case would create an appearance of impropriety.

Quoting a 1985 opinion, the court stated that "Under the Code of Professional Responsibility, a lawyer may be disqualified from participating in a pending case if his continued representation would give rise to an apparent conflict of interest or appearance of impropriety based upon that lawyer's confidential relationship with an opposing party." Judges have "broad discretion to disqualify counsel when their continued representation of a client threatens the integrity of the legal profession," the court added. Based on the facts presented and the relatively short period of time between the lawyer's

departing his old firm and joining his new firm, disqualification was warranted, the court concluded.

In issuing its opinion, the court made no mention of the fact that West Virginia utilizes the Rules of Professional Conduct, rather than the Code of Professional Responsibility, and that furthermore the "appearance of impropriety" standard does not appear in the Rules. The court simply applied the standard in upholding the firm's disqualification. In doing so, West Virginia joined several other jurisdictions that adhere to the ABA Model Rules of Professional Conduct but use the Model Code's appearance of impropriety standard as a basis for disqualification or as an adjunct to other grounds for disqualification.[3]

This article will examine the evolution of the appearance of impropriety standard as applied to lawyers and its continuing viability in some jurisdictions, including West Virginia, despite its elimination from the ethics rules. The standard as applied to judges will also be examined and prospective changes that may be on the horizon in light of recently proposed revisions to the Model Code of Judicial Conduct will be considered.

A Brief History of the "Appearance of Impropriety" in Lawyer Ethics Rules

Model Code of Professional Conduct

The "appearance of impropriety" standard did not appear in the ABA Canons of Professional Ethics of 1908, although a similar "appearance of evil" doctrine was implicit in several Canons and was expressly stated in a number of ABA ethics opinions interpreting them.[4] For instance, the Preamble to the Canons provided that the conduct and motives of lawyers must "merit the approval of all just men."[5] And Canon 29

provided, in part, "[A lawyer] should strive at all times to uphold the honor and to maintain the dignity of the profession. . . . "[6]

The appearance of impropriety was first made an explicit part of the lawyer ethics rules when the ABA adopted the Model Code of Professional Conduct in 1969. Canon 9 of the Model Code provided that "A lawyer should avoid even the appearance of professional impropriety."[7] This provision reflected the bar's concern "that some conduct which is in fact ethical may appear to the layman as unethical and thereby could erode public confidence in the judicial system or the legal profession."[8]

The drafters of the Model Code intended Canon 9 to serve as an aspirational principle to guide lawyers in the exercise of their independent judgment and perhaps as a rule of interpretation. However, when courts, disciplinary authorities and ethics committees realized that the Code's disciplinary rules did not adequately address all types of questionable lawyer conduct some "seized upon the appearance of impropriety language as a catch-all to address the Code's perceived shortcomings."[9] As a result, the appearance of impropriety standard came to be used as a basis for judging lawyer conduct,[10] but disagreement ensued over what the "appearance of impropriety" actually meant and how the standard should be applied.[11]

When it comes to disciplining a lawyer for an appearance of impropriety, the primary criticism is that the standard is too vague and its contours are too difficult to define. The *Restatement (Third) of the Law Governing Lawyers* asserts that the breadth of the provision "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 and that subjective

and idiosyncratic considerations could influence a hearing panel or reviewing court in resolving a charge based only on it."[12] Courts in several jurisdictions concurred.[13]

The ABA also acknowledged the difficulty of applying Canon 9 as a disciplinary rule, noting in a 1975 ethics opinion that the standard is "too vague a phrase to be useful" and that "[i]f 'appearance of professional impropriety' had been included as an element in the disciplinary rule, it is likely that the determination of whether particular conduct violated the rule would have degenerated from the determination of the fact issues specified by the rule into a determination of an instinctive, *ad hoc* or even *ad hominem* basis."[14] Several legal scholars and commentators also weighed in, criticizing the appearance of impropriety standard for its vagueness and unpredictability.[15]

Despite the criticism of Canon 9 as a basis for lawyer discipline, it was used in some jurisdictions as grounds for disqualifying a lawyer. A few courts asserted that an appearance of impropriety standard could be the sole basis for granting a disqualification motion. For instance, the Ninth Circuit asserted that "[i]f Canon 9 were not separately enforceable, it would be stripped of its meaning and significance. This suggests that it must be a sufficient ground for disqualification in itself."[16] Other courts, however, used the canon only as a factor in considering whether to disqualify a lawyer or law firm[17] and held that an "appearance of impropriety" alone would not warrant disqualification absent a violation of some other ethical standard.[18]

Most courts that utilized Canon 9 to disqualify a lawyer "emphasized that there must be at 'at least a reasonable possibility that some specifically identifiable impropriety did in fact occur,' even though no wrongdoing was required for action under the Canon."[19] As a result, a two-pronged test developed to determine whether a lawyer

should be disqualified under Canon 9.[20] The first prong required a reasonable possibility that a specific identifiable impropriety occurred. The second prong required a finding that the likelihood of public suspicion outweighs the social interests served by the lawyer's continued representation in the case.[21]

A number of jurisdictions, however, rejected the notion that a violation of Canon 9 could be the basis for a lawyer's disqualification. The Fifth Circuit noted that "the more frequently a litigant is delayed or otherwise disadvantaged by the unnecessary disqualification of his lawyer under the appearance of impropriety doctrine, the greater the likelihood of public suspicion of both the bar and the judiciary."[22] And the Second Circuit "caution[ed] . . . that Canon 9 . . . should not be used promiscuously as a convenient tool for disqualification when the facts simply do not fit within the rubric of other specific ethical and disciplinary rules."[23]

Model Rules of Professional Conduct

When it came time to replace the Model Code with the Model Rules of Professional Conduct, the ABA Commission on Evaluation of Professional Standards (the "Kutak Commission") decided to do away with the appearance of impropriety standard. In the Comment to Model Rule 1.9, addressing representation adverse to a former client, the Commission identified two problems with the appearance of impropriety standard. First, it could be applied to any new client-lawyer relationship that might be of concern to a former client, which would make a lawyer's disqualification little more than a question of subjective judgment by the former client. Second, because "impropriety" is undefined, the "appearance of impropriety" is question begging, the Commission said.[24]

When the ABA Ethics 2000 Commission subsequently revised the Model Rules of Professional Conduct in 2002, reference to the "appearance of impropriety" standard was deleted from the Rule 1.9 Commentary altogether because it was "no longer helpful to the analysis of questions arising under this Rule."[25]

Most states have patterned their lawyer ethics rules on the Model Rules of Professional Conduct. In many of those states, courts adhere to the notion that the appearance of impropriety should not be used as a basis for disqualification or discipline.[26] However, not all courts agree and several continue to apply the standard despite its elimination from the ethics rules.[27] For instance, in *Lovell v. Winchester*,[28] the Kentucky Supreme Court acknowledged Rule 1.9's express rejection of the appearance of impropriety standard but concluded, "the appearance of impropriety is still a useful guide for ethical decisions."[29] "Although the appearance of impropriety formula is vague and leads to uncertain results," the court said, "it nonetheless serves the useful function of stressing that disqualification properly may be imposed to protect the reasonable expectations of former and present clients. The impropriety standard also promotes the public's confidence in the integrity of the legal profession. For these reasons, courts still retain the appearance of impropriety standard as an independent basis of assessment."[30]

Other courts have suggested that the appearance of impropriety principle should continue to be utilized despite its elimination because "its meaning pervades the Rules and embodies their spirit. It is included in what the preamble to the Rules refers to as 'moral and ethical considerations' that should guide lawyers, who have 'special responsibility for the quality of justice.'"[31]

Most jurisdictions that continue to apply the appearance of impropriety standard in disqualification motions reject the notion that such an appearance alone is sufficient grounds for disqualifying a lawyer in a case. For instance, in *Bergeron v. Mackler*[32] the Connecticut Supreme Court stated that "[a]lthough considering the appearance of impropriety may be part of the inherent power of the court to regulate the conduct of attorneys, it will not stand alone to disqualify an attorney in the absence of any indication that the attorney's representation risks violating the Rules of Professional Conduct."[33]

Some jurisdictions have formulated tests for determining if an appearance of impropriety mandates disqualification. A few courts continue to apply the two-pronged test enunciated in *Woods v. Covington County Bank* for disqualification based on appearance of impropriety, which requires reasonable possibility that a specific identifiable impropriety occurred and a finding that the likelihood of public suspicion outweighs the social interests served by the lawyer's continued representation in the case.[34] And some jurisdictions have held that a prosecutor can be disqualified on the basis of an appearance of impropriety if he or she might appear to have an emotional stake in the case that could disturb his or her exercise of impartial judgment.[35]

The issue of an appearance of impropriety as a basis for disqualification was recently addressed by the New Jersey Supreme Court Commission on the Rules of Professional Conduct ("Pollock Commission"), which made recommendations for revisions to the state's lawyer ethics rules. When New Jersey first adopted its Rules of Professional Conduct in 1984, it, unlike most jurisdictions, expressly retained the appearance of impropriety standard.[36]

In 2004, when New Jersey revised its ethics rules, the Pollock Commission concluded that "[b]ecause of their vagueness and ambiguity [the appearance of impropriety] provisions …are not appropriate as ethics standards...." However, the Commission went on to conclude that while the appearance of impropriety rule is inappropriate as a basis for lawyer discipline, "a court properly may consider the appearance of impropriety as a factor in determining that ... representation poses an unwarranted risk of disservice either to the public interest or the interest of the client." Therefore, in New Jersey, while the appearance of impropriety standard may not be used in a disciplinary action, it can be used as a basis for disqualification.[37]

Some jurisdictions, however, apply the standard in lawyer disciplinary proceedings. [38] Most courts applying the standard in disciplinary cases do so in conjunction with other rules violations. For instance, one court used the standard as a basis for discipline when a lawyer was charged with improper handling of client funds in violation of Rule 1.5.[39] And another court found that an attorney violated Rule 8.4(d) (engaging in conduct prejudicial to the administration of justice), where a lawyer engaged in an ex parte conversation with a judge about campaign contributions and a pending personal injury case, reasoning in part that the "negligent ramifications of his actions created an appearance of impropriety."[40]

Some courts simply mention the standard when meting out discipline. For instance, in *Kentucky Bar Association v. Bates*,[41] the Kentucky Supreme Court held that a lawyer violated Rule 1.12(a), which prohibits a lawyer from representing anyone in connection with a matter in which the lawyer participated personally and substantially as a judge when he signed an emergency protective order on in favor his own divorce client.

After noting the violation of the Rule, the court pointed out that under Canon 9 of the Code of Professional Responsibility, a lawyer should avoid even the appearance of impropriety. Even though Kentucky no longer employed the Code, the court used that provision to assert that the lawyer's decision to sign the order gave the appearance of an unfair advantage before the court and must be addressed through a public reprimand.[42]

Clearly, despite its elimination from the lawyer ethics rules, the appearance of impropriety is still being used in some jurisdictions as a basis for lawyer discipline and more often, as grounds for disqualification.

The appearance of impropriety standard as it relates to judges is now under consideration as the ABA undertakes a revision of the Model Code of Judicial Conduct. Current drafts of the judicial canons indicate that the Model Code, unlike the Model Rules, will retain the appearance of impropriety standard with some revisions. Those proposed revisions, however, have been the subject of some criticism and debate.

Judges and the Appearance of Impropriety

Although the "appearance of impropriety" standard was removed from the lawyers' ethics rules because it was too vague and imprecise, it was adopted as part of the Canons of Judicial Ethics in 1924[43] and retained when the Model Code of Judicial Conduct was adopted in 1972 and revised in 1990.[44] Canon 2 of the 1990 Code provides that "a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities."[45] The prohibition applies to a judge's professional and personal conduct.[46] The rationale for the prohibition is to prevent the erosion of public confidence in the judiciary that can result from judicial misconduct.[47]

Some legal commentators have suggested that the retention of the appearance of impropriety standard in the Model Code despite its deletion from the Model Rules and the standard's application to judges' off-the-bench conduct may be due to the different roles lawyers and judges play in the judicial system.[48] Both serve in functional roles, but judges also fill a symbolic role as "'the embodiment of the judicial system'" and so a judge's conduct is "more likely to effect public perception of the whole justice system."[49] Therefore, the appearance of impropriety standard "requires judges to consider the effect of both their conduct and their perceived conduct on the public's impression of the system."[50]

The test for appearance of impropriety under Canon 2 is an objective one, i.e., "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."[51] The Commentary to the Canon acknowledges that the language is cast in general terms, but asserts that such language is necessary because it is not practicable to list all prohibited acts. However, as with lawyers, difficulties arise when such general language serves as a basis for discipline, and Canon 2A has come under some criticism, with suggestions that it may raise due process concerns.[52]

Despite the criticism, the "appearance of impropriety" has been upheld as a basis for judicial disqualification and discipline. As noted, Canon 2 is cast in general terms and a wide variety of conduct by judges has been found to create an appearance of impropriety.[53] For instance, judges have been disciplined for accepting tickets to a sporting event from a lawyer who appeared in their court,[54] berating a government agency and public official[55] and doing favors for individuals who appeared before them.[56]

Judges have been required to recuse themselves from cases because they owned stock in a party to litigation, [57] had personal or professional relationship with a lawyer or party in a case[58] or engaged in ex parte communications.[59]

While the "appearance of impropriety" has been the sole basis for discipline in some cases,[60] it is usually used in conjunction with another Canon when charging a judge with misconduct. For instance, a judge's membership in an organization that engages in discriminatory membership practices prohibited by state law is likely to violate Canon 2C, which prohibits such conduct, but may also give rise to an appearance of impropriety.

This fact was acknowledged in the Joint Commission to Evaluate the Model Code of Judicial Conduct's recently proposed changes to this provision of the Model Code. The Commission retained the appearance of impropriety standard, moving it from Canon 2 to Canon 1. New proposed Commentary was added, however, stating that "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."

The new Commentary, which the Commission added to address concerns about the vagueness of the appearance of impropriety provision, has elicited some criticism. A New York Times editorial stated that this new Commentary waters down the appearance of impropriety standard and "transforms a crucial ethical mandate into 'an ancillary add-on' and significantly diminishes its moral force and deterrence value."[61] Vagueness concerns about the appearance of impropriety standard are "overblown" the editorial asserted, because judges interpret similar terms every day, and can rely on a substantial body of case law and ethics opinions in construing what appearance of impropriety

means. The proper way to address any concerns about vagueness is for the commission to provide further guidance, not to dilute expectations, the editorial suggested.

The Chair of the Commission, Mark Harrison, sent a letter in response to the editorial asserting that the change proposed is intended to "strengthen — rather than weaken — the standard requiring judges to avoid even the 'appearance' of impropriety, by moving a prohibition to a more prominent place in the rule."[62]

Chair Harrison also emphasized that the Commission hopes to obtain comments from many sources on the drafts Canons. Many individuals and organizations have obliged and several have submitted comments regarding the appearance of impropriety language of the Model Code. Some have criticized the standard, while others write in support of it but suggest amending the Canon language to make it less broad and subjective. Some commentators concur with the New York Times editorial, suggesting that the new "Ordinarily" language of the Commentary fails to take into account conduct that should be prohibited but that does not fall under another Code provision. And still others view the new Commentary as an "important first step in limiting the scope of the appearance of impropriety standard."[63]

It appears that an appearance of impropriety of standard is likely to remain in the Model Code of Judicial Conduct, although it remains to be seen whether it will undergo any changes in text or commentary and whether those changes will alter its usage and impact. The ultimate stance the Joint Commission takes on the appearance of impropriety standard will be determined when it issues its final recommendations to the ABA House of Delegates.

Conclusion

After years of criticism regarding its vagueness and imprecision, the appearance of impropriety standard was removed from the Model Rules of Professional Conduct. Some jurisdictions, however, have continued to apply the standard as a basis for lawyer disqualification and discipline, by asserting that the appearance of impropriety principle "pervades" the ethics rules or by simply applying the standard, alone or with other rule provisions, and seemingly ignoring the fact that it is no longer a part of the ethics rules.

The standard as applied to judges has also been criticized, but has been retained in the Model Code of Judicial Conduct, although it may undergo some changes as the ABA undertakes a revision of the Code. Despite problems with the "appearance of impropriety" standard some jurisdictions still find it useful when a judge or lawyer engages in unethical conduct that does not fit nicely into any other Rule or Code provision.

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[1] ABA Model Code of Judicial Conduct, Canon 2 (1990).
[2] *State ex rel. Cosenza v. Hill*, 607 S.E.2d 811 (W. Va. 2004).
[3] ABA/BNA Lawyer's Manual on Professional Conduct, 20 Law. Man. Prof. Conduct 609 (2004).
[4] *Woods v. Covington County Bank*, 537 F.2d 804, 813 (5th Cir. 1976) citing R. Wise, *Legal Ethics* 125 (1970). *See, e.g.*, ABA Formal Op. 103 (1933) ("'If the 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.'"); ABA Formal Op. 49 (1931) (lawyers "must avoid not only all evil but must likewise avoid the appearance of evil."); *cf.*, ABA Formal Op. 50 (1931) (lawyers should avoid "all improper relationships" and "all relationships which may appear to be improper.").
[5] Canon of Professional Ethics, Preamble (1908).
[6] Canon of Professional Ethics, Canon 29 (1908). In addition, Canon 32 provided, "above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen."
[7] Model Code of Professional Responsibility, Canon 9 (1969). The principle was also mentioned in EC 5-6, which advised a lawyer who is drafting a will or trust for a client in which the lawyer is named as executor or trustee to "avoid even the appearance of impropriety." For a history of the "appearance of impropriety" as a codified standard in the United States *see*, Peter W. Morgan, *The Appearance of Propriety: Ethics Reform and The Blifil Paradoxes*, 44 Stan. L. Rev. 593 (1992).
[8] *Woods v. Covington County Bank*, 537 F.2d 804, 813 (5th Cir. 1976). *See also*, *In re Wehringer's Case*, 547 A.2d 252 (N.H. 1988) (the legal profession is one that "'seeks to avoid even the appearance of impropriety' and, thus, strives to live by a higher standard of conduct than a layperson." "The confidences which [lawyers] receive and the responsibilities which they are obliged to assume demand not only ability of a high order, but the strictest integrity.").

[9] Bruce Green, *Conflicts of Interest in Legal Representation: Should the Appearance of Impropriety Rule be Eliminated in New Jersey—Or Revised Everywhere Else?*, 28 Seton Hall L. Rev. 315 (1997).
[10] *Id.*
[11] *Annotated Code of Professional Responsibility* at 400 (1979).
[12] *Restatement (Third) of the Law Governing Lawyers*, § 5 (c) (2000).
[13] *See, e.g., In re Powell*, 533 N.E.2d 831 (Ill. 1988) (Canon 9 does not afford basis for imposing sanctions against attorney independent of allegation and proof of violation of disciplinary rule contained within canon); *In re Gadbois*, 786 A.2d 393 (Vt. 2001) (holding that the use of appearance of impropriety could not be applied as a grounds for discipline where no other disciplinary rule was violated); *cf., Scholossberg v. State Bar Grievance Bd.*, 200 N.W.2d 219 (Mich. 1972) (Brennan, J., dissenting) ("For this court to tolerate, much less encourage, the practice of disciplining lawyers for unspecified violations of the general ethical aims of the Canons, without reference to the Disciplinary Rules, is a grave mistake."). *See also*, 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 (2003) ("under the Model Code of Professional Conduct, the 'appearance of impropriety' concept was not intended to be used as a disciplinary standard.").
[14] *See* ABA Formal Op. 342, n.17 (1975) citing, McKay, *An Administrative Code of Ethics: Principles and Implementation*, 47 A.B.A.J. 890 (1961); *In re Powell*, 533 N.E.2d 831 (Ill. 1989) (canon requiring lawyers to avoid even the appearance of impropriety does not afford basis for imposing sanctions against attorney independent of allegation and proof of violation of disciplinary rule contained within canon); *In re Sidman*, 614 P.2d 1135 (Or. 1980) (Canon 9 does not provide a proper or sufficient basis for a disciplinary proceeding).
[15] *See, e.g.*, 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 (1981) ("Canon 9 of the ABA Code has developed into a source of unpredictable, post hoc rule making regarding the standards of professional conduct."); Neil D. O'Toole, *Canon 9 and The Code of Professional Responsibility*, 62 Marq. L. Rev. 313 (1979) ("Canon 9 has generated more problems for the adjudicative process than it has solved."); Anthony G. Flynn, Note, *Disqualification of Counsel for the Appearance of Impropriety*, 25 Cath. U. L. Rev. 343 (1976) (stating that the limits of Canon 9 are difficult to determine).
[16] *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 658 F.2d 1355 (9th Cir. 1981). *See also, INA Underwriters Ins. Co. v. Rubin*, 635 F. Supp. 1 (E.D. Pa.1983) (Canon 9 alone could be sufficient to require the disqualification); *Colton v. Florida*, 667 So.2d 341 (Fla. Dist. Ct. App. 1995)(the appearance of impropriety may require disqualification); *Oswall v. Tekni-Plex, Inc.*, 691 A.2d 889 (N.J. Super. Ct. App. Div. 1997) ("The appearance of impropriety is enough to foster the disqualification of an attorney.").
[17] Polly M. Faltin, *"Agonizing" Over Disqualification Decisions: Fractionalizing the Nebraska "Bright Line" Rule in State ex rel. Wal-Mart Stores, Inc. v. Kortum*, 31 Creighton L. Rev. 279 (1997). *See, e.g., State v. Jones*, 429 A.2d 936 (Conn. 1981) (appearance of impropriety standard was not, without more, enough to disqualify prosecutor, who had represented defendant in a civil action arising out of an automobile accident).
[18] *See, e.g., Adoption of Erica*, 686 N.E.2d 967 (Mass. 1997) (Because there was no showing that lawyer violated any ethical standard under Canon 4, 5, or 7 court concluded that a statement of "appearance of impropriety" was not sufficient to support the order for her disqualification); *In re Eastern Sugar Antitrust Litig*., 697 F.2d 524 (3d Cir. 1982) (asserting that Canon 9 was "necessarily vague" and that its precise contours are determined by looking to other provisions of the Code for guidance).
[19] Roberta K. Flowers, *What You See Is What You Get: Applying the Appearance of Impropriety Standard to Prosecut*ors, 63 Mo. L. Rev. 699, 715 (1998) quoting *Woods v. Covington County Bank*, 537 F.2d 804, 813 (5th Cir. 1976).
[20] *Id.*
[21] *Woods v. Covington County Bank*, 537 F.2d 804, 813, n. 12 (5th Cir. 1976). *See also, United States v. Hobson*, 672 F.2d 825 (11th Cir. 1982); *Hicks v. State*, 468 So.2d 1046 (Fla. App. 1985).
[22] *Woods v. Covington County Bank*, 537 F.2d 804, 813 (5th Cir. 1976) ("overly broad application of Canon 9 . . . would ultimately be self-defeating."); *Spienza v. Hayashi*, 554 P.2d 1131 (1976) (Canon 9 of the Code of Professional Responsibility "was not intended to serve as a sweeping basis for the disqualification of attorneys who are otherwise free of potential conflicts of interest").

[23] *International Elec. Corp v. Flanzer*, 527 F.2d 1288, 1295 (2d Cir. 1975). *See also Board of Education v. Nyquist*, 590 F.2d 1241 (2d Cir. 1979) ("appearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest of cases.").

[24] Despite the criticism of the appearance of impropriety standard, some commentators favored its retention in the Model Rules of Professional Conduct. *See, e.g.*, Mark I. Steinberg & Timothy U. Sharpe, *Attorney Conflicts of Interest: The Need for a Coherent Framework*, 66 Notre Dame L. Rev 1, 7-8 (1990) ("Although the appearance of impropriety formula is vague and leads to uncertain results, it nonetheless serves the useful function of stressing that disqualification properly may be imposed to protect the reasonable expectations of former and present clients. The impropriety standard also promotes the public's confidence in the integrity of the legal profession. For these reasons, courts should retain the appearance of impropriety standard as an independent basis of assessment. This standard should be sparingly invoked by itself, but more often used in conjunction with the substantial relationship standard.").

[25] *See* Reporter's Explanation of Changes to Rule 1.9 at http://www.abanet.org/cpr/e2k-rule19rem.html.

[26] *See, e.g., Waters v. Kemp*, 845 F.2d 260, 265 (11th Cir. 1988) ("Under the Model Rules, the appearance of impropriety is not a ground for disqualifying a lawyer from representing a party to a lawsuit."); *State v. Dimaplas*, 978 P.2d 891 (Kan. 1999) ("In determining lawyer disqualification issues, the appearance of impropriety standard of review has been specifically rejected in favor of a 'function approach' concentrating on preserving confidentiality and avoiding positions actually adverse to the client."); *Schwartz v. Cortelloni*, 685 N.E.2d 871 (Ill. 1997) (appearance of impropriety is simply too weak and too slender a reed upon which to order disqualification); *Adoption of Erica*, 686 N.E.2d 967 (Mass. 1997) (appearance of impropriety was not alone sufficient to justify disqualification of attorney, absent showing that attorney had violated any other ethical standard).

[27] *See* 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, 228, n. 93 (1982) ("it does not follow from [the] rejection of apparent impropriety as a factor in disciplinary actions that courts will not continue to consider it as a factor in determining whether an attorney ought to be disqualified . . . . Nevertheless, since the reasons for rejecting the appearance of impropriety test in disciplinary actions apply with equal if not greater force in disqualification actions, it is likely that courts will also reject disqualification motions based solely on a potential for improper appearances.").

[28] 941 S.W.2d 466 (Ky. 1997*).*

[29] *Id.* at 468. *See also, Gomez v. Superior Court*, 717 P.2d 902 (Ariz. 1986) (holding that while the appearance of impropriety was no longer a standard in the Arizona Rules of Professional Conduct, it still remains a valid claim for purposes of disqualification of an attorney; the court also listed four factors for consideration when disqualification is sought on the basis of appearance of impropriety: (1) whether the motion is being made for the purpose of harassing the defendant, (2) whether the party bringing the motion will be damaged in some way if the motion is not granted, (3) whether there are any alternative solutions, or is the proposed solution the least damaging possible under the circumstances, and (4) whether the possibility of public suspicion will outweigh any benefits that might accrue due to continued representation); *but see, Humco, Inc. v. Noble*, 31 S.W.3d 916 (Ky. 2000) (declining to extend the appearance of impropriety standard to situations involving transactions with persons other than clients such as ex parte contacts with defendant's current and former employees under Rule 4.2).

[30] *Id.* at 469.

[31] *First American Carriers, Inc. v. Kroger Co.*, 787 S.W.2d 669 (Ark. 1990). *See also, Gomez v. Superior Court*, 717 P.2d 902 (Ariz. 1986) ("It would appear . . . that 'appearance of impropriety', however weakened by case law and its omission in the new Rules of Professional Conduct, survives as a part of conflict of interest and an appearance of impropriety should be enough to cause an attorney to closely scrutinize his conduct."); *Roberts v. Schaefer Co. v. San-Con Inc*., 898 F.Supp 356 (S.D. W. Va. 1995) ("The Court is aware that the comments to W.Va.R.Prof.Conduct 1.10 and the Model Rules criticize the 'appearance of impropriety' standard . . . . The Court, however, does not believe that those criticisms are wholly valid."); *Stowell v. Bennett*, 739 A.2d 1210 (Vt. 1999) ("Although the new Rules of Professional Conduct do not expressly state that a lawyer should avoid the appearance of impropriety, other courts have concluded that the principle continued to apply 'because its meaning pervades the Rules and embodies their spirit.'"); *Continental Resources, Inc. v. Schmalenberger*, 656 N.W.2d 730 (N.D. 2003) (citation omitted) ("Although the new Rules 'do not use the language, the 'appearance of impropriety' standard has not been wholly abandoned in spirit.'"); *State v. Retzlaff*, 490 N.W.2d 750 (Wis. App. 1992) ("The obligation to

avoid appearances of impropriety is nonetheless implicit in the new Wisconsin Rules of Professional Conduct.").

[32] 623 A.2d 489 (Conn. 1993).

[33] *Id.* at 494. *See e.g., Burkes v. Hales*, 478 N.W.2d 37 (Wis. App. 1991) ("While mere appearance of impropriety, without more, will no longer disqualify attorney, it is still appropriate to consider appearance of impropriety when weighing disqualification issues."). *See also*, Charles W. Wolfram, *Former Client Conflicts*, 10 Geo J. Legal Ethics 677, n. 35 (1997) ("Almost every scholarly analysis of the 'appearance' standard has disapproved of its use as an independent basis for finding conflict."). *But see, City of County of Denver v. County Court of City and County of Denver*, 37 P.3d 453 (Colo. App. 2001) (appearance of impropriety alone would justify disqualification of city attorney's office despite fact that "appearance of impropriety" no longer appeared in rules of professional conduct).

[34] *See, e.g. State v. Johnson*, 823 P.2d 484 (Utah Ct. App. 1991); *Willmes v. Reno Mun. Court*, 59 P.3d 1197 (Nev. 2002).

[35] *See People v. Witty*, 36 P.3d 69 (Colo. App. 2000); *People v. Superior Court (Greer)*, 137 Cal. Rptr. 476 (Cal. 1977) ("It was within the bounds of the court's discretion to determine that the prosecutor might *at least appear* to have an emotional stake in the case of the sort which could disturb his exercise of impartial judgment in pretrial and trial proceedings."); *People v. Mayhew*, 600 N.W.2d 370 (Mich. App. 1987) (holding that prosecuting attorney can be disqualified for an appearance of impropriety, but added that no such appearance arises unless the facts demonstrate an emotional or personal stake in the litigation).

[36] New Jersey Rule 1.7 (c)(2) provided that "This rule shall not alter the effect of case law or ethics opinions to the effect that: (2) in certain cases or situations creating an appearance of impropriety rather than an actual conflict, multiple representation is not permissible, that is, in those situations in which an ordinary knowledgeable citizen acquainted with the facts would conclude that the multiple representation poses substantial risk of disservice to either the public interest or the interest of one of the clients." In addition, Rule 1.9 incorporated Rule 1.7(c) by reference and Rule 1.11 expressly preserved the appearance of impropriety standard. *See* Bruce Green, *Conflicts of Interest in Legal Representation: Should the Appearance of Impropriety Rule be Eliminated in New Jersey—or Revived Elsewhere?*, 28 Seton Hall L. Rev. 315 (1997).

[37] *See State v. Davis*, 840 A.2d 279 (N.J. Super 2004).

[38] 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 (2003) ("Some courts have continued to use the appearance of impropriety concept in their disciplinary opinions, usually out of some apparent urge to improve the profession."). *See, e.g., In re Carey*, 89 S.W.3d 477 (Mo. 2002) (in suspending a lawyer for representing another person in a substantially related matter adverse to the interest of a former client and for making false discovery responses, the court stated that "'[t]he appearance of impropriety must be more than a fanciful possibility. It must have a rational basis.' The court's conclusion must be based on a close and careful analysis of the record. Without such an analysis, the test serves 'as a substitute for analysis rather than a guide to it. It is easier to find 'doubt' than to resolve difficult questions of law and ethics.'").

[39] *In re Kinkead*, 661 N.E.2d 823 (Ind. 1996) ("Failure to maintain a strict demarcation between a lawyer's property and that of a client or third party presents the appearance of impropriety, injects problems into the bookkeeping process, clouds the issue of who is entitled to the property, and makes safeguarding the property difficult or impossible.").

[40] *See In re Bolton*, 820 So.2d 548 (La. 2002) (attorney's intentionally entering into ex parte communications with the judge and the negligent ramifications of his actions created an appearance of impropriety in violation of disciplinary rule prohibiting conduct prejudicial to the administration of justice and prohibiting violations or attempted violates of rules of professional conduct).

[41] 26 S.W.3d 788 (Ky. 2000).

[42] *Id. See also, Kentucky Bar Association v. Marcum*, 830 S.W.2d 389 (Ky. 1992) (lawyer violated specific rule, but also created appearance of impropriety by accepting private employment in a matter in which he had substantial responsibilities as prosecutor).

[43] Canon 4 of the Canons of Judicial Ethics provided, in part, that "A judge's official conduct should be free from impropriety and the appearance of impropriety. . . . "

[44] 20 Law. Man. on Prof. Conduct 318 (2004).

[45] ABA Model Code of Judicial Conduct, Canon 2 (1990).

[46] ABA Model Code of Judicial Conduct, Commentary to Canon 2 (1990).
[47] ABA Model Code of Judicial Conduct, Commentary to Canon 2 (1990). *See In re Interest of McFall*, 617 A.2d 707 (Pa. 1992) ("'[T]he appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of either of these elements."); *In re Dean*, 717 A.2d 176 (Conn. 1998) (the appearance of impropriety standard "is as important to developing public confidence in the judiciary as avoiding impropriety itself.").
[48] Roberta K. Flowers, *What You See Is What You Get: Applying The Appearance of Impropriety Standard to Prosecutors*, 63 Mo. L. Rev. 699, 724 (1998) citing Andrew L. Kaufman, *Judicial Ethics: The Less-Often Asked Questions*, 64 Wash. L. Rev. 851, 854 (1989).
[49] *Id.* at 725 (citations omitted).
[50] *Id.*
[51] Model Code of Judicial Conduct, Canon 2, Commentary (1990). *See, e.g., Inquiry Concerning a Judge No. S-3675*, 822 P.2d 1333 (Alaska 1991) ("test is whether a judge fails 'to use reasonable care to prevent objectively reasonable persons from believing an impropriety was afoot'"); *Blaisdell v. City of Rochester*, 609 A.2d 388 (N.H. 1992) (("[w]hether 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.'").
[52] In 1969, Supreme Court Justice Arthur Goldberg said in comments to Congress that the appearance of impropriety canon was "unbelievably ambiguous" and that judges "can benefit greatly from having some ground rules against which to measure their conduct . . . particularly . . . in this area of avoiding even the appearance of impropriety." *Nonjudicial Activities of Supreme Court Justices: Hearing on S. 1097 and S. 2109 Before the Subcommittee on Separation of Powers of the Senate Comm. on the Judiciary*, 91st Cong. 1st. Sess. (1969). *See also Spector v State Comm'n on Judicial Conduct*, 392 N.E.2d 552 (N.Y. Ct. App. 1979) (Fuchsberg, J., dissenting) ("The 'appearance of impropriety' concept is beset by legal and moral complexity." The "lack of specificity as to what conduct makes a Judge vulnerable to a charge of appearance of impropriety may bear serious due process implications." *But see Mississippi Comm'n on Judicial Performance v. Spencer*, 725 So.2d 171 (Miss. 1998) (Canons of Judicial Conduct on appearance of impropriety, and diligence are not unconstitutionally vague in violation of due process).
[53] *See* Cynthia Gray, *Canons 1 and 2*, 25 Judicial Conduct Reporter, Vol. 3 (Fall 2003) for a list of cases.
[54] *Disciplinary Counsel v. Lisotto*, 761 N.E.2d 1037 (Ohio 2002).
[55] *In re Judge No. 93-154*, 440 S.E.2d 169 (Ga. 1994) (judge suspended for 90 days).
[56] *Matter of Barrett*, 593 A.2d 529 (Del. Jud. 1991) (judge conducted gratuitous title searches for police officers who appeared before her).
[57] *Huffman v. Arkansas Judicial Discipline and Disability Comm'n*, 42 S.W.3d 386 (Ark. 2001).
[58] *See, e.g., People for the Ethical Treatment of Animals v. Bobby Bersosini, Ltd.*, 894 P.2d 337 (Nev. 1995) (judge served on the board of a local animal shelter that had connections to a party in litigation before the judge).
[59] *See, e.g., Scogin v. State*, 227 S.E.2d 780 (Ga. App. 1976) (judge was required to recuse himself where he gave advice to a person regarding her inability to collect child support from father of her child and the abandonment case against the father subsequently came before judge's court).
[60] *Spector v. State Comm'n on Judicial Conduct*, 392 N.E.2d 552 (N.Y. 1979) (admonishment is appropriate discipline for appearances of impropriety stemming from appointments being made by a judge of sons of other judges during periods when such other judges are making appointments of his son).
[61] Editorial, *Weakening the Rules for Judges*, N.Y. Times, May 22, 2004, at A16.
[62]Letter from Mark I. Harrison, N.Y. Times, May 29, 2004, at A14.
[63] For comments on the Preliminary Draft of the Model Code of Judicial Conduct go to http://www.abanet.org/judicialethics/resources/comments.html.

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