

Preliminary Report
Comments of the ABA Judicial Division National Conference of Specialized Court
Judges

-- With regard to the solicitation by the Commission for comment on the proposal to maintain the "appearance of impropriety" concept in the present Code, I wholeheartedly agree with the Commission to maintain the admonishment that judges avoid not only impropriety but also its appearance. Much of what a judge does, by necessity, is behind the closed chambers door. Thus it is extremely important that what is made known to litigants and the public be absolutely beyond reproach. The appearance of impropriety can have as much of a devastating effect on the legitimacy of the courts, especially in this day of sound-bite journalism, as actual impropriety. Like it or not, the appearance of impropriety in the minds of many IS impropriety. The judiciary would be best served by maintaining the "appearance of impropriety" concept.

-- New to Rule 2.12 (Disqualification) is subsection (a)(6)(v), which requires a judge to disqualify himself or herself where the judge previously presided as a judge over the proceeding in the same or another court. The Commentary does not discuss this new prohibition and do not believe that it is wise. It appears to prevent a judge from presiding over a case that has been returned by an appellate court for subsequent, remedial, corrective, or simply further action. This may occur because the higher courts reverse a ruling of the judge in an earlier proceeding or it may occur for reasons unrelated to a previous decision of the trial judge. In any event I see no reason why the original judge cannot continue with the case. In fact, this rule would prevent the judge from continuing with the case after an interlocutory appeal, which temporarily halted the proceedings, is denied by an appellate court. I see nothing that should case the original judge to be disqualified from continuing to preside over the case. Furthermore, even if an appellate court reversed a judge and send the case back for retrial, I see not compelling reason why the original trial judge could not preside over a retrial consistent with the ruling of the higher court.

-- Rule 4.15 (Reporting of Compensation, Reimbursement of Expenses and Waiver of Charges) would now require quarterly reporting of reimbursement and waivers as opposed to the annual requirement of compensation. I can see no compelling reason to require quarterly reporting of reimbursement and waivers. I believe that annual reporting of all is more than sufficient and (I believe) is consistent with the Executive Branch's Office of Government Ethics rules.

-- Finally, I considered the changes to Canon 3 adding "sexual orientation" to the list of factors that must not be the basis for discrimination in the policies of clubs and other membership entities in light of the Department of Defense's congressionally mandated policy regarding homosexual conduct. I do not believe that the proposed changes are inconsistent with the DoD policy. The DoD policy does not discriminate based on sexual orientation. On the contrary, the limitation on military service is conduct-based and is specifically not orientation or status-based.

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(On Behalf of the ABA Judicial Division National Conference of
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