

The Appearance of Impropriety -- Amended

Back in 1983 the ABA slayed the appearance of the impropriety dragon with hardly a tear shed. Too subjective, too undefined, too given to the whim of the beholder, the critics cried. And so we jettisoned ancient and hoary tradition in the name of blackletter rules which in most cases provided a better guidance for the practicing bar.

Something was lost. After all, everyone would agree that lawyers should conduct themselves in such a way that the appearance of what they do inspires no less confidence in the integrity of lawyers than its substance. But on balance, and only on balance, one can say that more was gained than was lost. Besides, it was hard to argue that lawyer should keep up appearances when sleazy advertisements for legal services were running during the late show right next to ads for the Veg-O-Matic.

But now the cry has been raised anew. This time the object of attention is not the appearance of impropriety as it applies to lawyers; no, now, the call is heard that the avoiding the appearance of impropriety requirement for judges should be jettisoned. Again we are told the standard is standardless, a trap for the wary, an antiquated and subjective rule whose demise is long past due.

I don't join those critics of the appearance of impropriety rule. Not necessarily. On the other hand I think we can craft a rule that captures its multiple beneficial characteristics and at the same time, at least in part, respond to its vociferous detractors.

The present standard raises two different issues. The first is whether any new disciplinary rule applying to judges should address appearances. As to this I would hope there is no debate. Whatever can be said of the importance to our system of justice of the appearance of

lawyers must be multiplied ten fold when it comes to judges. The public's confidence in the independence, impartiality and conscientiousness of judges depends almost entirely on how the judiciary appears to be acting.

Even twelve Bishops from Boston (from the days when they were the gold standard) assuring the public that a given judge's impartiality is beyond question cannot overcome the public's dismay with the disclosure that the judge was seen dining with one of the litigants in a case before her. Nor can uncontradicted testimony of a judge's brilliance overcome the public distrust of a judge who sleeps through oral argument.

In the world of judging, appearances count and anyone who thinks that a requirement – even one that is amply fulfilled – that judges be unfettered, honest and erudite in all things is enough, if appearance goes untended, is failing to recognize how fragile is whatever trust the American public is currently willing to repose in our judiciary.

So we must, I submit, preserve the appearance of something. But “impropriety” apparently will not do. It's too broad; it's too difficult to define; its too subjective. One person's impropriety is apparently another person's admirable conduct. Well maybe not quite that. But another person's even marginally permissible conduct.

What is it then that we don't want our judges to appear to be doing, even if they are not in fact doing it? We don't want them to engage in conduct that might lead the public to question their impartiality. We don't want them to engage in conduct that might lead the public to question their independence. We don't want them to engage in conduct that might lead the public to question their honesty. And we don't want them to engage in conduct that might lead the public to question their competence.

Well if those are the key subjects – and this list may not be complete – then why don't we draft a rule that says precisely that?

Canon 1

Conduct in general: A judge shall act with diligence, integrity and independence .
Moreover, a judge shall avoid engaging in conduct that would provide the appearance that any of these required standards of conduct have been compromised.

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Maybe that formulation does not capture every essential category. More could be added. But my idea is that, while appearance of impropriety could capture something as benign as using the wrong fork or donning a mismatched golf outfit, appearing to engage in dishonest conduct is a concrete standard that will not only put the judiciary on notice of what should not be done, but not let the judiciary hide, like Justice Scalia has done so effectively, by arguing that what the judge did was perfectly “proper.” This is because Justice Scalia’s adventure with Vice President Cheney not only reflected an appearance of impropriety, but also it reflected an appearance that Justice Scalia was not impartial.

He might assert in endless compound and complex sentences that he was uncorrupted as a result of his flight on Air Force 2 and his fishing and duck hunting excursion. He can argue further that what he did was proper. For proof of that proposition look no further than the Justice’s total absence of shame. But the one thing Justice Scalia cannot argue is that what he did avoided the appearance that he was biased.

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The comments to Canon 1 are hopeless. I mean no one ill will. And I understand that this is merely a draft. But these proposed comments are confused, unorganized, contradictory and unhelpful. Let me note just a few of the more egregious problems.

1. Comments are supposed to explain the text of the Canon. These obfuscate the Canon's meaning.
2. The Comments bounce around among disparate topics, circling back on themselves and addressing many topics more than once, often inconsistently.
3. Is violating the appearance of impropriety rule an independent violation? How would one know from reading these Comments?
4. Comments [3] and [5] seem out of place.

If one is going to be a harsh critic, one better be prepared to stand up naked in public as well. To that end I have drafted both a new proposed Canon, which I have already set out, and the following proposed Comments, in the hope that my contribution can advance the discussion. I would not include comments [9] and [10] but, if they are to be included, I think my placement would be preferred.

[1] A judge's diligence, integrity and independence in fact are fundamental requirements of the rule of law.

[2] Diligence of a judge is reflected in careful study and preparation; prompt attendance and rapt attention; and articulate and timely completion of opinions, orders and other essential written work product.

[3] The integrity of a judge is reflected in honesty, impartiality and fairness to all who come before the judge – lawyers, litigants and court personnel.

- [4] The independence of a judge is reflected in the judge's commitment to carry out the judge's duties without regard to outside influences, calling them as the judge sees them despite public opinion or other inappropriate influences and without regard to consequences other than as the law requires.
- [5] While being diligent, acting with integrity and maintaining independence are necessary, they are not sufficient to fulfilling a judge's duties under these Canons. Equally important is that the public have confidence that these standards are being achieved. Such confidence is eroded anytime a judge acts in a way that appears to compromise the judge's diligence, integrity and independence, even if that is not in fact what has occurred.
- [6] As a result, this Canon takes the position that the Code is violated whenever a judge conducts him or herself in a manner that conveys the appearance that this Canon has been violated.
- [7] For this reason, judges are required to conduct both court business and their out of court lives in a manner that is far more circumscribed than the average lawyer or member of the public. What may be a benign ex parte conversation can easily be misconstrued. Similarly, participation in certain social intercourse that in fact does not compromise a judge's integrity can be viewed as doing just that.
- [8] Under this Canon a judge must always be asking him or herself two questions: (1) am I acting with diligence, integrity and independence? (2) will the public view my conduct as conveying the appearance that my diligence, integrity and

independence remain uncompromised? If the answer to either question is in the negative, the judge shall refrain from the conduct.

[9] The duty to act in a manner that promotes public confidence in the integrity of the judiciary does not imply that judges have an obligation to refrain from discussion of important matters of public policy. Judges are in a unique position to identify and address problems affecting the courts, and judges accordingly are encouraged to address those matters in an appropriate way, as a means to promote the effective administration of justice.

[10] In addition to complying with the standards of judicial conduct, a judge is encouraged to participate in activities that promote ethical conduct generally among judges and lawyers, including efforts to study, develop, maintain, implement and enforce codes of conduct, encourage pro bono representation, and support professional responsibility within the judiciary and the legal profession.

I hope these comments are received in the spirit of good will with which they are sent. I would be glad to appear before the Commission if that would prove useful. I do apologize for jettisoning the wonderful “triple” alliteration. I am afraid I don’t know the difference between impartiality and integrity, and I think you must pick up some notion of competence in this first Canon.