

1 CHAIRMAN HARRISON: Bob?

2 MR. CUMMINS: Well, maybe your prior
3 answer already indicated the answer to this question,
4 but I want to get clear. Appearance to whom? Is it
5 to a reasonable judge? Is it to the legal
6 profession? Is it to the person on the street? Who
7 decides the appearance if we use this word?

8 MR. FOX: Well, my view was that the
9 appearance, the purpose of the appearance was to
10 maintain and enhance the view of the judiciary in the
11 eyes of the public, so it is "How does the public
12 view what the judge did?" is where I was coming from,
13 but I guess you could have it from a different
14 perspective.

15 But I thought the whole purpose of the
16 appearance -- I mean it was sort of like, well, in
17 the profession, we can all understand this. We can
18 all say, "Oh, yeah. I understand judges. They can
19 have dinner with me tonight and they could still beat
20 the crap out of me in the courtroom tomorrow."

21 That's okay maybe within the club but it isn't

22 okay outside the club. It isn't okay for the public
23 to say, "Okay, we trust you on this. It's perfectly
24 okay for the judge to have had the weekend before the
25 trial visiting at my summer house."

78

1 I don't go into duck blinds.

2 CHAIRMAN HARRISON: Bob Cummins, then Judge
3 Wynn.

4 MR. CUMMINS: I think the discussion
5 of the efficacy of the appearance standard is
6 worthwhile but the syllogism is false and doesn't
7 have an appropriate major premise if we begin this
8 dialogue by saying that there's been a violation of
9 due process on some continuum basis as a result of
10 that provision of the code because that's just not
11 the case and there's no evidence of that, and I think
12 it's important that we not buy into the notion that
13 we have to analyze this appearance-of-impropriety
14 standard on the basis that a lot of judges over the
15 years have been abused by its application. That's

16 simply not the case. So the debate is worthwhile,
17 but let's not premise the debate on the theory that
18 it's been misused as a vague and indefinite standard,
19 because, frankly, there are decades of jurisprudence
20 that refute that notion.

21 MR. FOX: Bob, let me say I thought -- I mean
22 the thing that got me started on this road -- and I
23 do not consider myself judicial-ethics guy at all --
24 was in fact the Scalia event. And I thought that by
25 changing it from the appearance of impropriety to

79

1 something more specific we were going to strengthen
2 that concept.

3 The appearance of impropriety may be fine. I'm
4 not even -- I don't know. I'm not an expert on it.
5 I know we've talked about it in the context of the
6 model code and the switch to the model rules, we
7 discussed it again in New Jersey when they just
8 recently jettisoned it.

9 But, to me, the point was that we were making

10 the code -- we could make the code stronger; but then
11 you would be making an important statement, which is
12 that independent of the conduct of the judge, the
13 appearance of the conduct of the judge could in fact
14 be a disciplinable event.

15 And that's what I think I'm arguing for, and I
16 think that's a big thing because I think in fact what
17 Bob is saying it's mostly been a tag-along.

18 In this case, then, it wouldn't necessarily be
19 a tag-along. You don't have to prove that Scalia was
20 biased in deciding the case. You prove that, you
21 know, everybody is shocked that somebody would go on
22 a vacation with a guy who's got a case pending before
23 him whether it's a personal case or in his official
24 capacity.

25 COMMISSIONER WYNN: Larry, this term

1 "appearance of impropriety" has really come to be I
2 think very involved and more a term of art, it is
3 understood, to some extent.

4 As I understand, your intent is to be more
5 specific by putting in words like "bias" or
6 "partial," and that sort of thing; "appearance of
7 partiality." And yet, in *Minnesota versus White*,
8 Scalia again, in a different role of course than duck
9 hunting, writes that judges come to the bench with
10 bias; that you don't want anybody who does not
11 already have some level of partiality, that you don't
12 want anybody who does not already have some level of
13 partiality because we all have that inherently in us.

14 So I mean what you're advocating -- Unless you
15 have some value-laden term such as "prejudicially
16 biased" or "improperly biased," because bias in and
17 of itself is not bad from the perspective of
18 *Minnesota versus White*. And what I gather you're
19 trying to reach is some level of specificity and say,
20 "Well, I just don't understand this term
21 'impropriety, but yet I tend to understand it a
22 little better than I do just saying 'bias' or saying
23 'partial.'

24 MR. FOX: I don't know that what Justice Scalia
25 says in *Minnesota versus White*, that we all come to

1 the bench with bias, he means that we can then decide
2 cases based on that bias. And I don't think that
3 anybody could say that it's okay to come to the bench
4 with no impartiality. I mean maybe if "bias" is the
5 wrong word, then "impartiality" may be the right word
6 --

7 COMMISSIONER WYNN: He says --

8 MR. FOX: -- because nobody could say that a
9 judge should not be impartial.

10 COMMISSIONER WYNN: He says you can't come with
11 a blank slate.

12 MR. FOX: Well, he certainly didn't.

13 CHAIRMAN HARRISON: Other reactions to Larry's
14 --? Any questions? Comments?

15 MR. FOX: Well, thank you.

16 CHAIRMAN HARRISON: Thank you.

17 MR. FOX: I really appreciate you taking me out
18 of time. I appreciate that, too.

19 CHAIRMAN HARRISON: We were expecting Professor
20 Hill, and Eileen told me that she was unable to

21 attend because of a death or something of a friend,
22 and so our next speaker will be Chuck Kettlewell.

23 Mr. Kettlewell, would you identify yourself
24 fully for the commission and tell us whether you're
25 here in a representative capacity or flying solo

82

1 today?

2 MR. KETTLEWELL: Do you just want name, rank
3 and serial number?

4 CHAIRMAN HARRISON: Nothing like that, right.

5 MR. KETTLEWELL: I'm Charles William
6 Kettlewell. I am here in my own capacity today. For
7 those who do not have my background, in short
8 summary, is I'm a past president of the National
9 Organization of Bar Counsel, the Association of
10 Professional Responsibility Lawyers, and last year's
11 recipient of the Michael Franck Award. And I have
12 worked I can't say exclusively in the area of legal
13 ethics since 1977 because I've probably done ten
14 things that weren't in that area and I want to be

15 careful and not get disciplined for misrepresentation
16 but I have certainly concentrated in that area since
17 1977, '77 to '78, prosecuting grievance cases against
18 lawyers and judges from '83 to date, defending
19 lawyers, multiple advisory opinions, risk management,
20 and testifying as an expert witness.

21 But for purposes of here, I am here in my
22 individual capacity. I will tell you that APRL has
23 submitted a written report, and their members are
24 probably stuck in the same traffic I was stuck in
25 coming down here and will be here very shortly. I do

83

1 support the positions that they have set forth in
2 writing more eloquently than I. Because I've not
3 given you anything in writing, I can safely make that
4 statement.

5 And so that I don't forget later, I want to
6 thank the commission. I've had the privilege of
7 serving on a couple ABA commissions. And I want to
8 thank you-all for the credible work and hours that

9 you put into these projects, and your staff; hours
10 that most people have no clue as being spent.

11 I guess there's a -- I'm here to talk only
12 about -- Well, I'll talk about anything you want, but
13 I'm here with the intent to talk about the
14 appearance-of-impropriety issue and the concerns I
15 have seen about it over the years; and with some
16 degree of humor, I would ask all those who have ever
17 engaged in conduct that gave rise to the appearance
18 of impropriety to remain seated.

19 Now, if I were a smart lawyer, I would thank
20 you and get up and leave. But I'm not a smart
21 lawyer, I'm a typical lawyer, so I now will probably
22 proceed to hang myself on my own petard.

23 I have defended I don't know how many judges
24 over the years. In most instances we have been
25 successful in getting the grievance complaint

1 dismissed. Some that went forward involved very
2 egregious conduct. There was never any problem --

3 I'm from the state of Ohio, incidentally. There was
4 never any problem in any of the cases involving
5 serious conduct, in finding a section of the canons
6 under which they could specifically be charged and
7 found to have violated some rule. However, in the
8 majority of those cases if not all of them, there was
9 also some indication of a charge of appearance of
10 impropriety. And in virtually every case that either
11 resulted in what I'll call --

12 Well, there's two kinds of dismissal letters
13 you can get from disciplinary agencies: one says,
14 "We've investigated this and we find no conduct and
15 it's dismissed." The other is substantially longer
16 than that in jurisdictions that don't have private
17 censures or what-not, and it goes on ad nauseum.

18 And although I support such letters very
19 strongly and they give very good guidance to judges
20 who perhaps have been errant to some extent but not
21 to the level that it resulted in discipline, it is my
22 concern and my experience that judges do get charged
23 on the appearance of impropriety on a much more
24 frequent basis than I seem to sense that some people
25 believe to be true. I have had judges charged, and

1 all these were dismissed with one exception: wearing
2 a necktie -- actually, he had a selection of neckties
3 that he got from a rural store that sold men's
4 clothes in a rural community -- and he would wear the
5 tie and he would be known to turn it around and show
6 people where he bought the tie from.

7 Now, I don't dispute that maybe that was kind
8 of cheap advertising for the tie store and what-not,
9 but it resulted in a grievance complaint and an
10 investigation, and time, and money, and a dismissal.
11 It was motivated by something, and appearance of
12 impropriety seemed to be the only thing that there
13 was any real consideration of looking at.

14 We had a judge in a rural community who kept
15 his docket very current but he nevertheless took a
16 half day off every day to take courses -- I mean it
17 wasn't basket-weaving but it was the equivalent of
18 that; he was just educating himself as an adult --and
19 his docket was never slow. Grievance complaint

20 because he's neglecting and avoiding his duties, but
21 appearance of impropriety was the primary issue.

22 We had a judge who took six weeks off for his
23 two weeks' active duty every year, again in a rural
24 community, where his docket was good. We were able
25 to establish no slow-down in his docket. I don't

86

1 know that he was all that patriotic, but for whatever
2 reason, he took six weeks. Ordinarily, you only have
3 to take two. Subject of a grievance complaint:
4 appearance of impropriety.

5 A judge who rode his Harley hog to the
6 municipal court. He rode it to court every day. And
7 it was a time when the Mothers Against Drunk Driving
8 were very upset about many things, and quite
9 appropriately. But among other things, a grievance
10 complaint was filed that that was the appearance of
11 impropriety for a judge to ride a Harley hog.

12 If you want to know whether he had a black
13 leather jacket; yes, he did. Did it say Hell's

14 Angels? No, it did not; nor was he a member of the
15 Hell's Angels. But it was a big, nice Harley hog.

16 Benny Hill retorts. Now, this is the one that
17 did result in discipline. It was a 62-year-old judge
18 who had grown up in a community in Ohio going to
19 truck stops and flapjack restaurants where the give-
20 and-take banter between the waitress and whoever they
21 were serving, man or woman -- and I grew up in such a
22 neighborhood -- rivaled those comments that you would
23 hear on Benny Hill. I mean they would just -- I mean
24 if you didn't say it to them, they would be offended.

25 And I mean I don't say the judge should have

1 done this, but he was used as the toastmaster by his
2 bar association for twenty years because of his wit
3 and sense of humor, which was off-color. Then he
4 went on the bench. You know, you just don't break
5 those habits overnight. And so he continued,
6 inappropriately, in my opinion, to use such comments
7 with women prosecutors and with other court

8 employees. Now, he did some other things for which
9 he deserved to be disciplined, but a significant
10 portion, 80 percent of the complaint against him had
11 to do with give-and-take comments back and forth that
12 you have probably all heard in your law firms within
13 the last six months, and are heard in courtrooms in
14 other places, because none of it was intended in a
15 personal manner, but they were smart aleck remarks.
16 I almost forgot where I was and called them something
17 else. They were just Benny Hill.

18 I was cited in the other paper in Columbus,
19 Ohio, for perhaps being the only lawyer in the
20 history of law to cite Benny Hill in a supreme court
21 argument to a supreme court. I lost, but I cited.

22 And a judge wished a repeat offender a happy
23 birthday, again in a rural community in Ohio. I mean
24 the guy showed up fairly regularly. The judge knew
25 him, and he -- "Happy birthday to you, Fred," and

1 whatever, and it got out of hand on some things like

2 that. Now, he also had moose heads all around the
3 courtroom. He also didn't have a courtroom. He had
4 kind of a closet in the court that was used for his
5 courtroom. And he was a bit of a character and he'd
6 been around a long time.

7 Now, he also forgot that some of our speedy-
8 trial rules apply to the judiciary, so he had
9 something else that was going on. You want good,
10 fair justice? You went to his county; you got it.
11 But you want compliance with the rules? No, he
12 didn't quite muster up there. Significant part of
13 the complaint, though, was the appearance of
14 impropriety; nothing else that it could have stood up
15 with.

16 Now, there's all sorts of fun that can be poked
17 at these examples. I can give you many, many more,
18 but that's just to highlight a few of them.

19 And I must take exception to any argument that
20 the due-process issue or the abuse of this rule does
21 not exist. Because I can tell you in many instances
22 when you are charged as a judge, with, say, two or
23 three things that are not the appearance of
24 impropriety and you might have a very good defense on

25 those, if you went to hearing, you would win.

89

1 But the appearance of impropriety, how do you
2 know you're going to win? I mean who in here can
3 tell me which one of those things might or might not
4 have stuck? Tell me in advance who could have told
5 the judge in advance which one of those things might
6 or might not have stuck.

7 And so in my experience -- I can't speak for
8 the rest of the country other than I can tell you
9 what my colleagues around the country who have
10 prosecuted and defended have reflected to me, and
11 they're similar in experience -- in those situations,
12 judges end up accepting perhaps that long dismissal
13 letter.

14 I mean I'll tell my client, "Take that in a
15 heartbeat and call me back in thirty days if you're
16 upset and tell me what you want to do and I'll throw
17 the letter in the wastebasket because we've
18 accomplished your objective."

19 So you're not going to see many cases that come
20 out where the only issue is appearance of
21 impropriety. That does not mean that it's not being
22 abused. The due-process issue, who in here is going
23 to spend thirty, forty, fifty thousand dollars taking
24 a public-reprimand case or a matter of that sort
25 through your own supreme court and up to the U.S.

90

1 Supreme Court? I've had disciplinary cases --

2 The most gross violation in my opinion of due
3 process was a case in which the complaint was
4 withdrawn before the hearing. This was a lawyer, not
5 a judge. It was not reinstated at the panel; it was
6 not reinstated at the board. It was not an issue on
7 appeal to the supreme court. No one appealed to the
8 supreme court.

9 The supreme court reinstated the issue,
10 disciplined the lawyer and suspended him for six
11 months. We asked for a motion to stay while we did
12 reconsideration. Month and a half passes; denied.

13 We asked for a motion to stay pending petition for
14 writ to the U.S. Supreme Court. Month and a half
15 passes; denied. Now, three of six months of his
16 suspension has passed.

17 Would you pay the \$50,000 to take a case up?

18 No. You can't afford to do it either on reputation
19 or time or money. So judges can be left in the
20 situation where the leverage being applied against
21 them. And in many states, this may not happen, but
22 they are certainly susceptible to having the leverage
23 of these appearance issues being the bundled charge.
24 The other charge that's there sounds more serious but
25 cannot be proven and yet it may result in some

1 acceptance of working out an arrangement so the judge
2 doesn't face suspension, which, in Ohio, would mean
3 that he or she loses her judicial position.

4 I had a case -- I'm a retired, well, reservist
5 Navy JAG officer and switched to the JAG Corps after
6 law school. My prior duty had been as a line

7 officer. And so I was used at these cases and what-
8 not. But we had a Navy captain judge in the judge
9 advocate, Navy judge advocate -- extremely well
10 thought of. He had been married for a great number
11 of years, had four adult children; he was Catholic
12 and had been separated from his wife for fifteen
13 years, but they would not get a divorce.

14 And he moved to a state and a lady friend of
15 his, who was a school teacher with whom he had had a
16 relationship for many years moved to that state with
17 him and moved into the house with him. And for that,
18 he became subjected because of the cry that came up -
19 - just on that; there were no other allegations --
20 but it came up as to whether -- Now, he was
21 potentially subjected to UCMJ charges: conduct
22 unbecoming an officer and a gentleman, and adultery
23 but also code of judicial conduct matters. These
24 standards -- And I understand that conduct unbecoming
25 an officer and a gentleman has stood the test, but I

1 don't think that is a fair statement, then, to
2 conclude that the appearance of impropriety is as
3 good or that it would withstand.

4 I think it is laudatory. I think it's a goal,
5 it's an aspirational objective. It's one that we as
6 lawyers should live up to to the extent we can. It's
7 one that judges certainly should live up to to the
8 extent that we can. But we should not have rules for
9 public-relation purposes, we should not have rules
10 that cannot be reasonably identifiable as to what
11 types of conduct could result in any individual
12 losing their license. I've certainly done some
13 things in my past that could give rise to questions
14 of the appearance of impropriety. A couple of them
15 have been with people in this room. But as we grow
16 old, our vision fades and our memory fades, and so
17 I'm not sure that anyone else in here would remember
18 it. But if I were sitting on the bench, I think I
19 should still be able to do those things in my
20 personal life and on the bench without the risk of
21 discipline. You clearly can draft rules to regulate
22 the judiciary without the necessity of one that is as
23 vague as the appearance of impropriety.

24 And I guess my closing remark is that a
25 standard by which I have tried to work whenever

93

1 drafting or putting together a set of rules for the
2 regulation of attorneys or whatever purpose -- And I
3 do not by this comment mean to belittle what Abraham
4 Lincoln was referring to but I think that it can be
5 expanded far beyond the issue to which he was
6 addressing, but he said, "As I would not be a slave,
7 so I would not be a master." If I would not want to
8 be regulated by such a vague standard, then how could
9 I in good conscience recommend or adopt a rule that
10 would have such a vague standard to regulate my
11 professional colleagues who sit on the bench?

12 Those are my comments.

13 CHAIRMAN HARRISON: Well, in the absence of
14 hands, let me --

15 Don, go ahead.

16 COMMISSIONER HILLIKER: Were you here, Chuck,
17 while Larry Fox was speaking? Did you hear what --

18 COMMISSIONER KETTLEWELL: Yes, but I learned
19 years ago to not listen when Larry Fox was speaking.

20 No. I have a lot of respect for Larry.

21 COMMISSIONER HILLIKER: Well, I just wondered
22 if this idea that he proposed that says, "A judge
23 shall act with diligence, integrity and independence.
24 Moreover, a judge shall avoid engaging in conduct
25 that would provide the appearance that any of these

94

1 required standards had been compromised," tying it to
2 the specific elements of conduct --

3 MR. KETTLEWELL: Well, he --

4 COMMISSIONER HILLIKER: -- rather than just use
5 "the appearance of impropriety."

6 MR. KETTLEWELL: Yeah. Certainly, that's an
7 improvement --

8 COMMISSIONER HILLIKER: Yeah.

9 MR. KETTLEWELL: -- particularly if you tie it
10 to "the three I's," as they're referred to.

11 I think he may have been also arguing that the

12 appearance of bias might have been another one that
13 he would include there. I would certainly disagree
14 with him on that one because I think it's more of a -
15 - I think those are issues that we deal with in
16 motions to disqualify and other purposes under the
17 law, and they can be determined.

18 But do I think that would be a --? If the
19 appearance of impropriety language is going to stay,
20 tying it directly into honesty, et cetera, much like
21 the model rules have done with lawyers would much
22 improve it.

23 CHAIRMAN HARRISON: Well, if I could just
24 pursue that, I'm sure you're pretty familiar with the
25 material that APRL sent to us which in fact makes in

1 general terms the same recommendation as Larry made:
2 tying the notion of appearance to -- You know, to
3 quote the APRL thing, "without the appearance of
4 partiality, unfairness or favoritism," is one
5 suggestion, and, "without the appearance of bias or

6 prejudice." Do you think those recommendations would
7 solve the due-process concerns that are bothering
8 you?

9 MR. KETTLEWELL: They would go a long way to
10 solving it, and I don't think we'll ever know because
11 I don't think anybody will ever challenge it in the
12 future for the same reasons they haven't in the past
13 to any great extent.

14 Would it be an improvement? Sure, because it
15 gives -- it gives -- it's not just saying "engage in
16 conduct unbecoming." It says, "unbecoming as to
17 honesty or integrity." So I don't think my necktie,
18 my Harley hog, you know, and a number of these other
19 things -- I think they would be washed clear out of
20 it. I would like to think they'd just be thrown out
21 as a joke under such circumstances.

22 CHAIRMAN HARRISON: They wouldn't be charged is
23 what you're saying.

24 MR. KETTLEWELL: I won't say they wouldn't be
25 charged because many complaints against judges are

1 politically motivated. Ohio is a state in which
2 judges are elected at all levels, so there is
3 political motivation behind charges. And I do not,
4 by that, mean to imply there are not political
5 motivation behind charges in non-elected-judges'
6 states, either. It's something that's pretty easy to
7 do.

8 MR. TEMBECKJIAN: Question. On the
9 Harley hog and the necktie --

10 MR. KETTLEWELL: I'm sorry. I couldn't hear
11 you.

12 MR. TEMBECKJIAN: On the Harley hog and
13 the necktie examples that you gave, it wasn't clear
14 to me, were those dismissals at the conclusion of an
15 investigation or were those judges formally charged
16 and actually go to trial?

17 MR. KETTLEWELL: They were dismissed after
18 investigation without ever -- You know, no probable
19 cause was found in those cases because -- and I don't
20 remember what other things were packaged in with
21 those but none of them went beyond the appearance
22 issue, and those were the biggest appearance issues.

23 MR. TEMBECKJIAN: Well, I thought in
24 looking at the examples that they were not matters
25 that actually went to adjudication.

97

1 Do you see a value in a disciplinary entity
2 investigating a matter, reaching the conclusion that
3 there's no probable cause to go forward and then
4 communicating to the complainant, "We looked into
5 this matter and we determined for the following
6 reasons that there was no basis to go forward"?
7 Isn't there some salutary value to the large portion
8 of society that makes these complaints to know that
9 there is a disciplinary entity that looks into it,
10 independently concludes there was nothing to it, and
11 then advises the complainant of that fact? Because I
12 gather what you are saying -- at least the logical
13 extrapolation of what you were saying is that these
14 matters should not even have been investigated, there
15 shouldn't even have been an inquiry. And I think
16 that implicit in my question is that there is a value

17 in looking into it and determining no probable cause
18 and letting the world know.

19 MR. KETTLEWELL: Well, let me address two
20 things. One is the first part of your question, I
21 think: Is there a value to the complainant to know
22 that it was investigated and to get a letter that
23 says it's dismissed? My experience in both judicial
24 and lawyer complainants is in most instances, unless
25 you have agreed with what they complained about, they

98

1 don't get a warm and fuzzy feeling when they get a
2 letter back saying, "We have investigated and we've
3 dismissed." They --

4 And secondly, I don't know how many judicial
5 complaints are filed in Ohio per year. I didn't --
6 Well, let's assume there's fifty of them. That would
7 be fifty people out of the entire population of the
8 state of Ohio that might get some decent feeling.

9 And third, if it is an allegation where there's
10 language that says "appearance of impropriety," and

11 basically all that complainant's getting back then is
12 a statement from the investigator saying, "Your
13 thinking about what's the appearance of impropriety
14 and ours are not the same; whereas, if it's that the
15 judge actually did something beyond that, then there
16 would have to be some explanation and could be some
17 explanation in the dismissal letter saying, "We've
18 investigated, and to the extent you thought that they
19 had accepted a bribe, we've looked at these things,
20 and, no, there is not one," and then the person may
21 get some degree of a feeling on it. So I don't think
22 it has much of a therapeutic effect to the public at
23 large to have a dismissal come back in that nature.

24 MR. TEMBECKJIAN: Well, I wasn't
25 speaking, I think, to the therapeutic effect as much

1 as the value to the system: to the judge who has an
2 official disposition that there was no probable
3 cause, to the press who might have been carbon copied
4 on the letter that they'd sent, to the bar

5 association that's later going to evaluate that judge
6 for higher office, for a rating. Isn't there some
7 systemic value to a process where you look into it
8 and you conclude that no probable cause --

9 MR. KETTLEWELL: I really can't address every
10 jurisdiction but I can tell you, in most of them,
11 that letter is not going to go to the local bar
12 association and they're not going to know a thing
13 about that unless somebody breaches a confidence of
14 the proceedings, so it just -- And I will tell you
15 that Franklin County, I don't know, maybe they have
16 20 common pleas court judges. You could have -- you
17 could, you know, absent sex and a politically-
18 motivated complaint, you could have the entire thing
19 investigated and have a hearing and it wouldn't make
20 the paper. Now we're talking about ones that get
21 dismissed. And what I'm telling you is if we are all
22 judges in Franklin County, there's a reasonable
23 chance that if I was investigated and dismissed, not
24 a single one of you on that bench would even know
25 that it had ever happened.

1 I think the better way to get the word across
2 to the public and to the judges is through
3 educational programs, judicial CLE programs where
4 perhaps the disciplinary -- Well, in Ohio, our
5 disciplinary council does do them. I do them with
6 them sometimes. We frequently will appear before
7 magistrates and others, and we'll tell them the sorts
8 of things that are coming down the pike, and we'll
9 try to educate them to them and, well, or we'll try
10 to scare them. I mean let's be real about this:
11 we're trying to educate but we're also trying to
12 scare some of them into watching what they do a
13 little bit, so, you know, I hopefully answered your
14 question.

15 CHAIRMAN HARRISON: Judge Wynn?

16 COMMISSIONER WYNN: Chuck, you started out
17 refuting the notion that judges don't get charged
18 with appearance of impropriety. There seems to be
19 some agreement, though, as Bob has pointed out, that
20 adjudication solely on impropriety is rare or almost
21 never.

22 MR. KETTLEWELL: Right.

23 COMMISSIONER WYNN: I got to agree with you, it
24 is not a good feeling to a judge to be charged in any
25 instance, even if it is solely on an impropriety and

101

1 which is not going to be found to be a basis upon it.
2 Would the solution be more or less to incorporate
3 some type of a rule or understanding that you just
4 don't go forward at all if all you have is an
5 appearance of an impropriety?

6 MR. KETTLEWELL: If I'm understanding, Your
7 Honor, what you're stating, it comes back to the
8 other point I wanted to make here to the prior
9 question. Most disciplinary agencies, to my
10 understanding, apply what we would call a
11 jurisdictional test to a complaint coming in. Is it
12 about a lawyer or a judge?, which sometimes they
13 aren't; and two, would the facts, if proven, be a
14 violation of a judicial code or disciplinary or model
15 rule? And if the answer to either of those two

16 questions is "no," then unless, in my opinion, they
17 are simply trying to build up their numbers, there's
18 no reason to open an investigation of that. A letter
19 should go back to the complainant explaining "This
20 did not rise to that level." So if we had the
21 appearance of impropriety taken out or if we had it
22 with the modifications, then I think many agencies
23 that investigate the complaints, when they would get
24 them in, they would simply say, "There is no
25 jurisdiction on this issue," and write back and say,

102

1 you know, "This doesn't rise to the level of a
2 violation," and would politely address. Public
3 relations is a large part of a disciplinary council's
4 function, and they do a much-improved job. Instead of
5 just writing back and saying, "We dismissed your
6 complaint," many of them now do nice letters
7 explaining what they've done. Improvement. It's a
8 great improvement.
9 But I'm not sure. I think I may have answered

10 your question but I'm not --

11 COMMISSIONER WYNN: I think you did.

12 MR. KETTLEWELL: Okay. Harriet?

13 COMMISSIONER TURNEY: Mark, thanks.

14 Chuck, you've handled some of these cases, and
15 I would just like to know the range of how much you
16 think it might cost a judge to defend on one of these
17 cases you've talked about, the necktie case or the
18 Harley hog case. Because I mean obviously you can't
19 make these rules based on what it might cost a judge,
20 but I know bringing a judge or a lawyer into the
21 system is no minor financial commitment let alone all
22 of the other aspects of it.

23 MR. KETTLEWELL: Yeah. Well, the biggest cost
24 I think is the emotional cost --

25 COMMISSIONER TURNEY: Right.

1 MR. KETTLEWELL: -- of being accused, and that,
2 I can't put a value on. Now, some judges, shall we
3 say, become very arrogant and what-not, and I'm not

4 sure they suffer emotionally at all, but there are
5 very, very few of those. But it is a -- and some
6 lawyers certainly are of the same mind bend when it's
7 a frivolous complaint or very, very minor.

8 But I don't know that I'm in a good position.
9 And number one, I'm talking about Ohio. I could
10 easily see it running \$3,000 to defend to get
11 dismissed. I could easily see it running \$10,000 to
12 get it dismissed if it's packaged around with some
13 other things that have to be investigated. The
14 necktie, the Harley hog should have been very simple.
15 The necktie was a simple one. The Harley hog was
16 packaged with some other things that required some
17 investigatory -- you know, was he really doing some
18 other stuff and what-not, which he was not; and so,
19 you know, you could easily run up to a ten thousand
20 fee.

21 Ohio has recently -- well, five or more years
22 ago. They have insurance policies now for judges.
23 And something you do not want to do is have an
24 insurance policy, in my opinion, that Ohio had, which
25 is they will pay a cost of defense in a disciplinary

1 proceeding of a judge so long as every single charge
2 is dismissed. So you don't know who's going to be
3 paying for it until you get to the end. And if
4 you've throw enough things up against the wall, the
5 judge is really now put into a conflicting position
6 because if they'll admit to one thing, the whole
7 case'll go away and become a public reprimand, but if
8 they admit to the whole thing they have to pay
9 \$10,000 in legal fees, so.

10 But that's not what I'm here for, on the
11 insurance part, but that could be a mess as well. So
12 I don't know. You might ask some of my colleagues
13 from other jurisdictions that are going to be
14 speaking.

15 COMMISSIONER TURNEY: I just wanted to get kind
16 of an idea on this. This particular appearance of
17 impropriety, you know, we've been talking about going
18 into it, how do you know?

19 MR. KETTLEWELL: Right.

20 COMMISSIONER TURNEY: And you're talking about

21 you know, a financial involvement --

22 MR. KETTLEWELL: Yes.

23 COMMISSIONER TURNEY: -- for judges. Well,

24 aside from the worst part, which is the emotional

25 roller-coaster.

105

1 MR. KETTLEWELL: No. Some of them asked us to

2 represent them at no charge because they're judges,

3 of course.

4 COMMISSIONER TURNEY: Right.

5 MR. KETTLEWELL: But you know, I'm kidding.

6 CHAIRMAN HARRISON: All right. Bob Cummins.

7 MR. CUMMINS: Do you think the sole

8 function of this code is to define a benchmark for

9 disciplinary enforcement?

10 MR. KETTLEWELL: Well, you're not talking about

11 the fish sole. You're talking about the sole purpose

12 of a document. And I would like to believe that that

13 document, the model rules, the code of professional

14 responsibility and all others have a first purpose of

15 educating the judiciary as to the types of conduct
16 that are not acceptable and that if engaged in will
17 likely result in some sort of a discipline, if you
18 please, or other sanction. So no, it's certainly not
19 the sole purpose. But to the extent that any portion
20 of that document is setting forth a standard; if we
21 do the parallel to the model rules, if it's in the
22 black letter of the model rules or if it's in the old
23 code as a DR and the DR specifically said, "You fall
24 below this acceptable conduct, you should be
25 disciplined." And the ethical considerations are

106

1 aspirational. And I as I started out, I have no
2 problem with the aspirational objection of avoiding
3 the appearance of impropriety. I have a great
4 problem with it appearing to be a standard for which
5 a judge can be disciplined, given my experience in
6 the area.

7 MR. CUMMINS: And you would agree that
8 it would be impossible to articulate each and every

9 potential form of aberrant conduct a judge could
10 engage in that might result in a disciplinary
11 complaint.

12 MR. KETTLEWELL: Much the same as our criminal
13 statutes created by the legislatures and congress and
14 others; and it is, in my opinion, for those reasons
15 that those legislative bodies that draft such rules
16 are subjected to due-process requirements which I
17 feel that this standard would be so vague that it
18 would not meet.

19 MR. CUMMINS: So the answer is yes,
20 that --

21 MR. KETTLEWELL: No, the answer is as I gave
22 it.

23 MR. CUMMINS: Okay. Then you don't
24 -- you don't -- you do believe that it's possible to
25 articulate a series of "do's" and "don'ts" in a code

1 of this kind?

2 MR. KETTLEWELL: I think that that's what we

3 aspire to do is a set of "do's" and "don'ts."

4 But I would go back to the answer that I just
5 gave. It shouldn't be "do's" or "don'ts" and kind of
6 "maybes" and you can't figure out what this "do" or
7 "don't" is. Otherwise, we could just have a code
8 that says, "Don't do the things for which we will
9 discipline you."

10 MR. CUMMINS: Well, in these cases
11 that you've identified, are you addressing an abuse
12 of the process by errant prosecutors or disciplinary
13 officials as distinguished from problems with the
14 code? I'm trying to understand the predicate for
15 your concern in the cases that you cited.

16 MR. KETTLEWELL: Well, Bob, you're familiar
17 with the jurisdictional issue that I addressed to the
18 judge here, that in most disciplinary agencies, when
19 a matter comes in, if the facts as alleged would not
20 result in a violation of a code if true, then
21 jurisdictionally you don't receive.

22 And can I tell you that there have not been
23 some instances where perhaps the disciplinary
24 enforcement agency was more zealous for some reason
25 than they should have been and maybe should have

1 dismissed one of these back then? I don't know. But
2 the problem is they had been given language that
3 brought that complaint into the disciplinary system
4 because it did not fall outside the parameter or
5 jurisdiction, and, therefore, they either felt they
6 had an obligation to. And they have prosecutorial
7 discretion. I understand that. But they had a
8 phrase there, that they could be -- "they," the
9 disciplinary counsel -- could be viewed as suspect if
10 they didn't conduct an investigation and go down some
11 road.

12 If we had a better standard, then I think in
13 those types of instances you could avoid the extent
14 to which there may be abuse occasionally by the
15 prosecutorial agency. And my experience on that is
16 that it kind of circumnavigates the country and moves
17 from state from time to time as to who abuses and who
18 doesn't, and supreme courts that do that and supreme
19 courts that do that; so I'm not trying to categorize

20 all of them together in that group.

21 MR. CUMMINS: Is it correct that
22 you've never seen a case where the sole allegation
23 was a violation of an appearance-of-impropriety
24 standard?

25 MR. KETTLEWELL: Oh, you mean a published case

109

1 where there was a finding of misconduct.

2 MR. CUMMINS: No, no. No. Where the
3 only charge directed at the judicial officer was
4 solely and exclusively an alleged violation of the
5 appearance-of-impropriety standard articulated in the
6 code.

7 MR. KETTLEWELL: No, I don't believe that's
8 true. I believe that a couple of the ones that I've
9 mentioned here, that was the only rule that anyone
10 was asserting was violated. But I will quickly point
11 out, as I said in my earlier comments, that often
12 this appearance conduct was surrounded by some other
13 allegations, and in my experience, often we could

14 clearly show that none of the other allegations were
15 supported by facts. But the leverage applied against
16 the judge in that situation is go to trial on all
17 these facts or agree that there was an appearance
18 problem which will be so minor that no one will ever
19 care, and it may well not even affect him in the next
20 judicial poll if it comes up. And so that leverage
21 is available against the judge or judges and it is
22 used against the judge or judges, in my experience.

23 CHAIRMAN HARRISON: Loretta?

24 COMMISSIONER ARGRETT: Mr. Kettlewell, I
25 apologize for being late. And what I'm trying to

110

1 understand based on the comments that I have heard,
2 are you more in favor of just a rule-based model code
3 of judicial conduct, moving our present code to
4 basically the same way or similar to our model rules
5 for lawyers?

6 Is that the basic position? I mean that's what
7 I'm gathering from the comments that I've heard, and

8 so I just want to be sure I have an accurate picture
9 of your testimony.

10 MR. KETTLEWELL: I guess I maybe do not
11 appreciate the full significance of your question. I
12 am here -- Because I'm not sure that my position
13 would change either way you'd do it.

14 There ought to be -- if a judge is going to be
15 subjected to discipline, he or she should be able to
16 determine what types of conduct would be viewed as
17 violating that rule, and the different enforcement
18 agencies should likewise be able to make -- I mean
19 there's always some tough some questions, which they
20 should not be left with a vague standard.

21 If in part what you're saying -- and I
22 apologize that I don't know the answer to this -- if
23 it's going to be a rule plus comments, as long as the
24 comments are not the enforceable part, I don't care
25 if they're there or I don't care if they're

2 Professional Responsibility.

3 I just want whatever is highlighted as the rule
4 below which if your conduct falls, you are subject to
5 being disciplined, I wanted it not to be vague or a
6 standard that no one, either the prosecutors or the
7 judges, can know in advance it is being violated.

8 COMMISSIONER ARGRETT: Well, the reason I ask
9 the question is because in many cases you can't put
10 in the rules the complete explanation for everything,
11 and so I guess my question is, There has to be some
12 interpretation somewhere, whether it's --

13 MR. KETTLEWELL: Right.

14 COMMISSIONER ARGRETT: -- in the comments or
15 whether it is developed in case law. And also
16 obviously, then, the question is there may be some
17 aspirational aspect of a body of a code.

18 MR. KETTLEWELL: Right.

19 COMMISSIONER ARGRETT: And so that was really
20 where I'm -- I'm trying to understand whether you're
21 saying that whatever rules we have, they ought to be
22 so clear and limited, that unless it's clear on the
23 face of the document, then, you know, that's just the
24 end of it. I'm not --

25 MR. KETTLEWELL: Yeah.

112

1 COMMISSIONER ARGRETT: -- sure what you said.

2 MR. KETTLEWELL: Well, I'm certainly not trying

3 to take it to the Nth degree. We have "the three

4 I's," the independence -- "The three I's" are

5 escaping me right now.

6 COMMISSIONER ARGRETT: Integrity and

7 impartiality.

8 MR. KETTLEWELL: Integrity and impartiality.

9 No. What does integrity mean to me in view of

10 everybody around this table? We can have some

11 disagreement on that. But we know that the subject

12 matter of the disagreement has to do with integrity

13 and honesty, and so I don't view that as a problem.

14 But if we have a discussion around here as to

15 what does impropriety or the appearance of

16 impropriety mean, I think we can find a lack of a

17 common -- Well, I think it's why we're here debating

18 this and it's why it's been an issue in cases that I

19 have seen and others have seen.

20 I do support -- if you weren't here, it's at
21 the start -- I support having laudatory language to
22 the effect that judges should appear to, you know,
23 avoid the appearance of impropriety and what-not. I
24 have no problem with that being a laudatory-language
25 aspirational goal, whether it's in the comments or

113

1 otherwise.

2 Case law is what has defined "conduct
3 unbecoming of an officer and a gentleman." Case law
4 is what's been used to define other vague standards
5 and it's what we would rely on over the years.

6 If I could use an example from the old Model
7 Code of Professional Responsibility which Ohio is,
8 what, 20-some years after the fact now. I'm on the
9 task force and we're about to get rid of it. Mark
10 Aultman practices law with me. He's my age and
11 experience. And we have a very different position as
12 to whether our clients, lawyer-clients, should admit

13 to the appearance of impropriety, the old
14 1.102(A)(6). Mark views that as a very, very serious
15 omission that should not be made, because it means
16 that there's, you know, the appearance of impropriety
17 in your representation.

18 I view it as it's just an add-on, who cares?,
19 because it's just going to be thrown in there. And
20 as Bob pointed out, there's no possible way in any
21 set of laws or rules that you can enumerate with
22 specificity. We've certainly proved that can't be
23 done in the federal system and other systems, and we
24 can't do it here. But you need a link of some sort.
25 As Larry Fox was pointing out, I guess part of his

1 argument is, If you're going to say appearance of
2 impropriety, at least tie it into appearance of
3 impropriety in relationship to integrity or honesty.

4 That, I might go with. I think I would differ
5 with him if it went so far as the appearance of
6 impropriety as to bias because I think that one, we

7 have rules applying to bias. We don't need the
8 appearance of bias in there, because if I don't like
9 the judge's ruling -- I've read the complaints over
10 the years, I've talked to the people doing the
11 complaints -- they'll guarantee that judge was biased
12 against them.

13 So I apologize. I may not fully appreciate the
14 code distinction that you're making there.

15 Yes, sir.

16 COMMISSIONER ARGRETT: I have one other
17 question.

18 MR. KETTLEWELL: Oh, I'm sorry.

19 COMMISSIONER ARGRETT: I just have one other
20 question.

21 MR. KETTLEWELL: Yes.

22 COMMISSIONER ARGRETT: Right now, at least in
23 the comments it speaks as to actual impropriety,
24 which I don't think there is any debate about it, but
25 I noticed that at least at the end of your testimony

1 there's been comments and discussion. You've talked
2 about integrity, impartiality, independence and
3 honesty. If those were the only four items, that
4 would be a narrowing of what's in the present at
5 least comments, because right now, violations of law,
6 court rules or other specific provisions are actual
7 improprieties which are -- you know, which are a
8 problem.

9 Are you suggesting that we don't have the
10 actual improprieties as sort of a "no-no"?

11 MR. KETTLEWELL: Well, you know, to the extent
12 there's an actual impropriety, then I would hope that
13 violates some other specific rule other than the
14 appearance of impropriety.

15 Illegal conduct; you know, a ticket for
16 jaywalking, I don't think anyone's going to get
17 upset. You know, Indiana, a lawyer or a judge
18 convicted of drunk driving, it will go to discipline.
19 Ohio, it depends on who it is and whether it makes
20 the press. I mean I guess I'm trying to answer your
21 question in that manner.

22 There needs to be guidance to the judges, but
23 the black-letter rule itself should meet a higher

24 standard than the language "appearance of
25 impropriety."

116

1 Actual impropriety? If they violated their
2 integrity, ex parte communications, you know, items
3 of this sort; fine. But then there should be a rule
4 that deals with ex parte communications.

5 COMMISSIONER ARGRETT: I'm not saying I
6 disagree with that.

7 MR. KETTLEWELL: Right.

8 COMMISSIONER ARGRETT: I guess what I -- I
9 think there could actually be some actual
10 improprieties that might not be within any of the
11 other rules. So I'm not even addressing the
12 appearance of impropriety. I'm actually addressing
13 the only -- the point that I thought you were making.

14 MR. KETTLEWELL: Actual impropriety.

15 COMMISSIONER ARGRETT: That's exactly right.

16 MR. KETTLEWELL: Right.

17 MR. TEMBECKJIAN: I'm wondering if in

18 your experience where the appearance of impropriety
19 was alleged and resulted in an investigation such as
20 in the necktie example, was there any or no
21 relationship between the appearance-of-impropriety
22 allegation and black-letter rule already in the code?
23 I mean for example, in the necktie example, whether
24 we agree with the result or not or ultimately
25 conclude that it's a silly matter, could not one say

117

1 that it appeared that the judge was using the
2 prestige of judicial office to advance the private
3 interests of the tie-maker by showing where he got
4 the tie to everybody.

5 MR. KETTLEWELL: Right.

6 MR. TEMBECKJIAN: On the scale of
7 things, it's not removable and it's likely
8 dismissable. But wasn't the appearance connected to
9 something that's already in the code?

10 MR. KETTLEWELL: In that instance, the
11 investigating officers took that position, which I

12 can't argue with. Had I been the disciplinary
13 counsel at that position and felt that I need to go
14 forward with an investigation, I would have looked
15 for a solid link to put it on other than the
16 appearance; and they did just that. And they
17 completed their investigation and they concluded
18 there was no problem with that. But they could very
19 well, had they chosen to, go forward with a charge
20 that there was the appearance of impropriety because
21 he was foolishly flashing the name of a local
22 clothier that made and gave to him neckties. It was
23 -- He shouldn't have done it. I agree he shouldn't
24 have done it, but I don't think he should have been
25 subject to discipline for it under the facts that

118

1 were alleged. And he didn't get disciplined, but the
2 leverage that was used against him was the appearance
3 of impropriety on it, and that's what caused the
4 greater concerns.

5 MR. TEMBECKJIAN: But my question in

6 terms of drafting the code is, In your experience,
7 even in these examples that you gave, which sound
8 rightfully to have been dismissed, wasn't there some
9 correlation between the appearance and the conduct
10 that was already specified in the code? In other
11 words, it wasn't just an appearance of impropriety
12 that had no relationship to what was in the code. It
13 was arguably the appearance of impropriety for
14 something that was already literally there.

15 MR. KETTLEWELL: I don't recall all the facts
16 in the Harley hog case. I mentioned that it came
17 about during the time when MADD was very active. And
18 an additional allegation that was made -- I mean you-
19 all can tell me whether this would have violated a
20 rule had it been proven true -- was that he was soft
21 on drunk drivers.

22 Now, let's assume that his record showed that
23 he reduced more drunk driving cases than any other
24 judge in the state. Would that fact have subjected
25 him to discipline? Political removal, perhaps, by

1 the voters. But to discipline, I don't think so,
2 because there was absolutely nothing that indicated
3 that had that been his track record, that he was
4 doing it for -- you know, he was getting paid off or
5 anything of that sort. He was exercising his
6 independent judicial discretion to decide cases, and
7 that's how he did them. Now, fortunately -- And that
8 case cost a great deal of money because it got into a
9 part of the investigation, which I didn't think it
10 made any difference which way he did on it because no
11 one was alleging there was any bribery or anything of
12 that sort. But he decided to and was able to prove
13 by his records that actually he was above the average
14 in the state of Ohio with the number of reductions as
15 opposed to being at the bottom of it. So I mean
16 that's one I -- you know, obviously my answer is half
17 "yes" and half "no," because they did investigate
18 something else, but that thing that they
19 investigated, in my mind -- and I think you would
20 agree -- didn't violate any other code rule. They
21 were all appearance types of issues.

22 MR. TEMBECKJIAN: True, you know,

23 without having to go into all the details, I can
24 imagine a complaint that might have required inquiry
25 such as the judge is driving that Harley hog in a

120

1 nuisance-like fashion -- speeding, not obeying the
2 law, which obviously would be a violation of 2-A and
3 would require some inquiry.

4 But there are ways that we can frame these
5 things to make a letter to the judge at the very
6 least a compelling investigative act and then you
7 dismiss when you think there's nothing there.

8 MR. KETTLEWELL: Well, you know, I got to make
9 an address to the program in Naples this spring and I
10 did my nice, fuzzy, warm and I-love-everybody address
11 in August a year ago in Atlanta, and as I started the
12 one down there, I said, "This is my raise hell and
13 kick" and what-not because I had some problems with
14 where we've come from when I first met Mark in '77, I
15 believe, or '78.

16 We can be guilty of attempting to over-regulate

17 and forget the common decency and courtesies to one
18 another is the best way to solve a lot of problems.
19 The English bar, much smaller, people will quickly
20 say, but, you know, there's nothing any smaller than
21 twenty lawyers in a town in England or anywhere else,
22 so we could do those sorts of things. They still, in
23 my experience there, are very good at talking to the
24 young lawyer or old lawyer. I hate to have everybody
25 blame everything on the young lawyers because you

121

1 know how they learn to do dumb, stupid things? Yeah.
2 It's from the people they come into practice and
3 practice against and/or with, and I'll take that one
4 to the bank with you. Here's my point: If we have a
5 judge that's doing something dumb, stupid, silly and
6 embarrassing the court, I would like to still think
7 that the chief judge or the fellow judges of that
8 judge would have both the sense of responsibility and
9 the courtesy to say, "Let's go out to lunch. Judge,
10 if you're going to keep driving that stupid Harley

11 hog, at least quit doing wheelies going out of the
12 parking lot. That just looks bad."

13 Now, my experience is that the profession has
14 gone just the opposite direction. We want to reduce
15 everything to rules and regulations and give up some
16 of our personal responsibility to our colleagues, of
17 talking with them and counseling them and advising
18 them, under some guise that somebody else is going to
19 do it for us. And I think -- I don't mean to say
20 that, you know, that I'm going to ring a bell and
21 suddenly everybody will switch back, nor do I think
22 that ten years spent on a professionalism code is
23 going to result in that result, either, but I also
24 don't think that constantly creating new rules -- You
25 know, strike that because I'm starting to address a

122

1 different issue.

2 This code needs to be re-looked at. There's no
3 question about it. And in re-looking at it, one of
4 the things you're doing is looking at, as they did

5 with the McKay Commission and others -- or I'm sorry,
6 the --

7 MS. GRAY: KUTAK.

8 MR. KETTLEWELL: I'm sorry -- KUTAK Commission
9 and others is what rules are not serving a real
10 purpose or could be better served by amendment. And
11 that's the task that you people have undertaken, and
12 it's not -- as I told you right at the start, it's
13 not an easy one, and it's one to which we all owe you
14 a great debt of gratitude for your work and
15 dedication and your disagreements, because if
16 everybody agreed on it, then they would have just
17 appointed Mark, and he would have pronounced what the
18 rules are going to be and the rest of you would never
19 have had the opportunity for all this great travel.

20 CHAIRMAN HARRISON: We have to wrap this up,
21 but before we do, Judge Yoder has had his hand up for
22 awhile. And I wanted to make sure that all the
23 members of the commission who had questions had a
24 chance, but --

25 JUDGE YODER: It was a while back. I

1 was just concerned about a couple of things that had
2 gotten on the table. One was that you can't violate
3 the title of a canon. I have never --

4 CHAIRMAN HARRISON: This was the point that
5 came up during Mr. Fox's testimony?

6 JUDGE YODER: Well, but it relates to what's been
7 said here. I've never understood the canons to be
8 titles. The canons are at the very least hortatory
9 obligations which are often cited in disciplinary
10 pleadings. So I was interested in this witness's
11 view of that observation because it struck me as
12 extraordinary and one that really surprised me: you
13 suggest that judges needn't concern themselves with
14 complying with the quote, "titles" of canons, because
15 that was the first thing.

16 And then the second thing was an earlier
17 reference to "appearance of incompetence" as one of
18 the particulars with respect to appearance. And I
19 must confess that I am at a loss to understand how
20 that could find its way into a standard. If that's
21 anybody's suggestion, I hope that it would be

22 removed.

23 CHAIRMAN HARRISON: You and Mr. Fox seem well-
24 suited to each other. Go talk to him.

25 JUDGE YODER: I'm not sure how to take

124

1 that observation.

2 CHAIRMAN HARRISON: Well I mean you're both
3 able to stand on your own two feet and he's the one
4 who suggested it, so I'm suggesting you go ask him
5 why he suggested it.

6 JUDGE YODER: Well, he was not the only
7 one who mentioned it.

8 CHAIRMAN HARRISON: No. I think he's the only
9 one I heard mention, you know, the appearance of --

10 JUDGE YODER: The record will reflect
11 whether he was the only one to mention it.

12 CHAIRMAN HARRISON: Yes, Your Honor.

13 MR. KETTLEWELL: Well, the record's clearly
14 reflecting that as between the two of you, one of you
15 is giving the appearance of incompetency.

16 CHAIRMAN HARRISON: I'm the chair of this
17 meeting.

18 JUDGE YODER: The other suggestion or
19 question was -- and in some sense, it was dealt with,
20 but the suggestion was that some of these things
21 should really not be disciplinable as distinct from
22 hortatory. And of course the current formulation has
23 canons in terms of "should," and one of the efforts
24 of this body has been to move those to "shalls." And
25 it strikes me that one of the appropriate objects of

125

1 discussion is whether you should make a greater
2 effort to distinguish between those things which
3 should be "shoulds" and those things which should be
4 "shalls" in order to avoid the kind of concern that
5 the witness has.

6 MR. KETTLEWELL: I would certainly second that.
7 And on the appearance of impropriety, Canon 9 of the
8 old code addressed appearance of impropriety, and I
9 agree, Your Honor, that it is cited in multiple

10 disciplinary cases even when not charged.

11 JUDGE YODER: I always thought so.

12 MR. KETTLEWELL: And sometimes the lawyers
13 defending or what-not didn't really care because it
14 made no difference to the ultimate outcome of the
15 case. That allowed bad case law to develop. But the
16 language itself and the preface itself said that the
17 title was not part of the mandatory rules, but that
18 hasn't charged people -- changed -- stopped people
19 from charging it. I'm demonstrating my appearance of
20 incompetency here, so --

21 CHAIRMAN HARRISON: I'm going to put you out of
22 your misery.

23 MR. KETTLEWELL: When you see a bullet coming,
24 it's time to get up.

25 Thank you all very much for your work and for

126

1 your time.

2 CHAIRMAN HARRISON: Thank you, Chuck.

3 I see my friend Ron Minkoff who's here on

4 behalf of APRL. I think you're next up. We did
5 receive a very thoughtful 15-page letter that you
6 sent and I suspect that most if not all of the
7 members of the commission have had a chance to read
8 it, so, and you have with you a list of all that I
9 see?

10 MR. MINKOFF: Yes.

11 CHAIRMAN HARRISON: You brought your lawyer
12 with you?

13 MR. MINKOFF: I did. I did. Not only did I
14 bring one lawyer. I brought I think five lawyers.

15 CHAIRMAN HARRISON: I would appreciate it if
16 you would introduce yourself and all of your lawyers,
17 the whole firm.

18 MR. MINKOFF: I will do so. My name is Ron
19 Minkoff. I keep popping up in front of this body
20 like a bad penny, but today I'm here on behalf of the
21 Association of Professional Responsibility Lawyers.

22 For those of you who don't know about our
23 organization, we are a group of about 300-plus
24 lawyers who work in various areas of professional
25 responsibility law defending lawyers and judges in

1 disciplinary matters, handling malpractice on the
2 defense and plaintiff side; doing ethics opinions,
3 being ethics experts; teaching professional
4 responsibility. And many of us wear many different
5 hats. Chuck Kettlewell, who you just saw, is a
6 former president and the founder of our organization,
7 Mark is a former president of our organization and
8 some of you are members of our organization.

9 And when we heard about the ABA Commission's
10 task of looking at the Model Code of Judicial
11 Conduct, we formed the committee to monitor and
12 review and suggest and work with you on this
13 difficult task, and many members of the committee are
14 here. I'm the chair of that committee.

15 With me is Elizabeth Alston of Louisiana who is
16 also on the committee; Suzanne Westerheim from
17 Dallas, Texas; Dianna Anelli, who was here a minute
18 ago --

19 VOICE: There she is.

20 MR. MINKOFF: -- she's over there having

21 coffee; she's from Ohio -- and Peter Ostermiller from
22 Kentucky are members of the committee who are here.
23 Murray Abowitz of Oklahoma and Warren Lupel of
24 Chicago, Illinois, are not here. Bob Cummins was
25 involved in this process as well, though didn't

128

1 necessarily agree with our conclusions. And we had
2 input from many members of APRL on the process.
3 And what I wanted to point out is, you know, we
4 had to figure out what it was that we as an
5 organization wanted to focus on in looking at the
6 code because there were so many areas that I know
7 that you've been looking into and spending time on.
8 And what we wanted to do was to try and focus on the
9 areas that are of importance both as to us as
10 professional responsibility lawyers who represent
11 judges and to our clients. And that's why we focused
12 on, in looking at the first couple of canons, the
13 three areas that our report focuses on, which are,
14 you know, proposed Canon 2.19, the ex parte

15 communication issue of lawyers; judges seeking legal
16 advice on ethical issues; and finally, the appearance
17 of impropriety.

18 And I want to save the best for last so I'm
19 going to start with Canon 2.19. I just want to
20 review for you for those of you who've not carefully
21 read our 15-page presentation, I just want to present
22 to you, you know, what it is essentially that we're
23 saying. With respect to Canon 2.19, we applaud the
24 efforts of the Commission to revise the code and to
25 add this provision and a provision that allows judges

129

1 to satisfy a reporting obligation by reporting to a
2 judicial assistance program or a lawyers assistance
3 program, lawyers who have substance abuse problems
4 and other fitness problems. Judges -- I'm sorry --
5 that have those kind of problems.

6 We have some minor -- we just think that that
7 is an immeasurable -- that those programs which just
8 serve an immeasurably important purpose of allowing

9 judges to solve their problems without necessarily
10 going through the disciplinary process to do it, and
11 that efforts to help judges rehabilitate themselves
12 and turn their lives around should be noted by the
13 code and implemented in the code.

14 We had some minor tweaks on the language that
15 is in the code. First of all, to the extent that the
16 code -- the proposal of the Commission on 2.19, that
17 there be appropriate -- that the judge take
18 appropriate steps, that the judge shall take
19 appropriate action by making one of these reports,
20 we think the word should be "corrective."

21 One of the problems we have here, one of the
22 concerns that's been expressed not just within my
23 organiza- -- within the Association of Professional
24 Responsibility Lawyers but within other bar
25 organizations that have discussed this provision is a

1 concern that there's going to be Monday-morning
2 quarterbacking by disciplinary authorities as to

3 whether a judge who reports to a judicial-assistance
4 program has taken -- has done enough. Let's take an
5 example of a judge who has a very obvious alcohol
6 problem. And Seth represented a judge who had to be
7 carried off the bench every day by the court
8 officers.

9 MS. ALTMAN: Not every day.

10 MR. MINKOFF: Oh, it's some days.

11 MS. ALTMAN: One.

12 MR. MINKOFF: Just -- Okay; it happened, but it
13 was a bad -- it was a bad thing. And the question
14 is, you know, in a situation like that is, Okay. We
15 could put in a provision that says report them to a
16 judicial assistance program, and that's fine. But is
17 that enough to protect the public? And I know that
18 question has been raised in front of this commission
19 at times.

20 Our view is very simple: that if a judge takes
21 the step of reporting one of his colleagues, one of
22 his or her colleagues, to a judicial-assistance
23 program, that is an extraordinary step. Anybody
24 who's ever worked with a colleague who has a
25 substance abuse problem knows how difficult it is to

