go outside of your office, your courthouse, whatever, and report that person to someone, to a body, you know, a disciplinary body, which is horrible to do, and certainly even to go to a judicial-assistance program and ask for that kind of help. And if a judge takes that step, they should be off the hook from a disciplinary standpoint.

And so the notion of taking corrective action addresses that directly; and to use the word "appropriate," has the risk that somebody down the road is going to say to that reporting judge, "You didn't do enough. You should have reported them to a disciplinary authority. Going to a judicial-assistance program isn't enough." And given that we're changing the code here by adding this provision to have a reporting requirement that is not linked to a code violation. So that now you're having people report judges and in situations where no code violation has happened yet, at the very least, we should be sure that we're not going to have a reporting judge get in trouble for not doing enough,

now that have to report a judge just if they have personal knowledge.

And again, that's why we wanted to changed the words that the reporting requirement may be

satisfied; instead of using the words "may include," that it may be satisfied by a -- the referral to the judicial assistance program. So that, again, there isn't this chance that somebody's going to say, "You haven't done enough." If you've made the report, it should be enough.

Now, I don't know, Mark, whether you want me to go on to the next thing or get questions on this one or --

CHAIRMAN HARRISON: Why don't you just go ahead, Ron, unless people have questions at this point. Otherwise, we'll save them for the end.

MR. MINKOFF: Okay, fine.

The second question that we've addressed

is a question that some of our members brought to our attention, which is the problem of, "When can a judge call a lawyer up to get legal advice?" Is this an improper communication under your Proposed Canon 2.09? And you know, the way we tried to address this in our report was to give three hypotheticals. One was a fairly innocuous situation where a judge with no case before them gets a call about speaking at a

political dinner or speaking at a charitable event.

I don't think anybody in this room has any doubt that under the current code or any other proposed code, that lawyer -- that judge should be allowed to call up a lawyer and get legal advice as to whether or not that violates the code. Doesn't have to disclose it to anybody. That's a fairly

innocuous situation.

But then we have -- And then we have another situation which is where -- and we've seen this in the Southern District of New York, where I practice -- where judges get -- somebody makes a motion in a case to recuse a judge for -- maybe because a family member owns stock in a company, as happened to Judge Pollock in the Drexel Burnham situation many years ago or that judge appeared at a seminar sponsored by one of the litigants in the case, as happened to Judge Rykoff more recently. In that situation, the question becomes should that judge be able to call a lawyer and ask for advice as to what to do, what -- what if -- because now they're at

risk. There's a question about their own integrity, their own adherence to the code, and they have to be able to address that and

they want to be able to address that.

So the way we analyzed this was to say that this is something that falls under, this kind of communication with a lawyer under these circumstances is something that falls under the ex parte communication rule of Canon 2.09. It's not an ex parte communication in the strictest sense of the word. But the rule goes beyond that, you know. It talks about communications that have to do with the case. Let me get the exact language here. It's "communication outside the presence of the parties concerning a pending or impending proceeding," and it is clearly covered by the rule. So now the question is if the judge calls up this lawyer to get this legal advice, and the judge's own interests are implicated, what happens?, given that a motion has been made, there's a motion pending in front of the court, and what can the judge do?

Now, under the current rule and the proposed rule, you know, the judge call a disinterested expert to find out about this, about what to do, and you have your provisions for that and dealing with that. But as our letter points out, disinterested experts have their drawbacks. They're not always as disinterested as they appear and they're not always as expert as they appear. And if a lawyer -- if a judge can call up a disinterested expert, they should be able to call up an expert lawyer to get advice as well, so it should be permitted.

But this was a heavily-debated question within our group. We ultimately came down that the judge does have to disclose the substance of any advice they receive from the lawyer they consult, to the parties, if the issue has been raised and it's the subject of a motion; that we felt that the due-process

considerations overrode the need for confidentiality in this situation.

We recognized, though, as a group, that that is not a simple question. There were many of our members who felt that if a judge,

even with a motion pending calls up a lawyer to find out, you know, "What are the implications of this for me? You know, do I have any disciplinary risk here whatever ruling that I make?", et cetera, that that is something that should not necessarily have to be disclosed to the parties. But again, our group as whole came to the conclusion that it should.

Mark, I can see that questioning look.

CHAIRMAN HARRISON: Well, I'm wondering a couple of things. First of all, did your group discuss the fact that in most jurisdictions there is a judicial-ethics

advisory committee which judges look to? And I recognize the timing problems involved in soliciting advice from them.

And secondly, the analog in the Model Rules is much narrower.

COMMISSIONER ROSNER: It is.

CHAIRMAN HARRISON: The exception that was added was 1.6-B(4), simply enables the lawyer to consult another lawyer with respect to matters relating to compliance with these rules.

MR. MINKOFF: Okay.

CHAIRMAN HARRISON: And your formulation in your letter seems to me to be a lot broader that, and I just wondered why you expanded, expanded it beyond the scope of the comparable rules of professional conduct.

MR. MINKOFF: Well, let me answer the second one first because that may have been

-- And I didn't -- I don't think we intended to expand it beyond the scope of the rule. I mean all of the questions that I'm addressing here are questions that I believe are within the canons. You know, the issue of disqualification, the issue of, you know, political affiliations, I mean the various hypotheticals that we posed, I intended to address issues that came up under the canons.

CHAIRMAN HARRISON: So basically what you're saying is that you expected this to be limited to the judge's compliance with the Code of Judicial Conduct.

MR. MINKOFF: Correct.

CHAIRMAN HARRISON: Okay.

MR. MINKOFF: Correct. Now, your first question again?

CHAIRMAN HARRISON: The first part was at least on an intuitive level, it seems to

be preferable to have the judge talking to someone --

MR. MINKOFF: Right.

CHAIRMAN HARRISON: -- in a wholly-neutral advisory position rather than consulting outside counsel because I don't know whether things the judge is hearing may be confidential or, you know, all that sort of thing.

MR. MINKOFF: Absolutely there's no question that if the judge has that service available, they can make use of it.

Sometimes, obviously, human beings being what they are, they're not as comfortable telling this body their problem as they would be if they were talking to a lawyer. That's why the third hypothetical was so carefully crafted to address this very question. You know, there's a situation where there's no pending motion, the judge comes up. The judge has a question about a lawyer who is a politically-connected lawyer in the area who is coming before the judge periodically on

cases, who apparently has a substance abuse problem. And the judge wants to know what his obligations are to report this person, and the judge may be reluctant to go to the local judicial-assistance program or even the state judicial-assistance program because of concerns that, you know, confidential though it might appear, that this politically-connected person, word that there's some complaint about this politically-connected person might leak out. And so the judge -- the judge then wants to consult with a lawyer. Can the judge do it? And it's not clear under the current code whether the judge can, and our members have reported some problems in figuring that out.

We believe that it's something that is covered by the code, that it does again implicate an ex parte communication under the

proposed Canon 2.09, because again not only is it a communication outside the presence of the parties, but, in our view and in the view of some commentators, concerns a pending or impending proceeding. Those words, given the notion that the judge might appear, that this

lawyer -- I'm sorry -- might appear in front of the judge again because he has appeared in front of the judge several times and, you know, another matter is bound to come down the pike in this small city where they were, in our view, implicates that language, "a pending or impending proceeding," and we've seen that language applied by commentators in situations like an upcoming case, you know, that might be coming down.

(Brief inaudible conversation between Ms. Alston and Mr. Minkoff)

MR. MINKOFF: Beth wants to address the

question that you raised, Mark.

MS. ALSTON: Mark, surely you don't think that having a question aired before a committee, as competent or as wonderful or as diverse as it might be, is better or comparable to having the advice of legal counsel who has your best interests in heart and mind, and but -- And that may be a rhetorical question, but also --

CHAIRMAN HARRISON: It is a rhetorical question, but that's okay.

MS. ALSTON: But also we see -- you

know, I have colleagues and have served on advisory committees. Advisory committees have certain parameters within which they function. For example, the lawyers ethics advisory committee in Louisiana cannot comment on things you've already done. They can only comment on things that you might

want to do. Committees, because of their nature and their jurisdictional boundaries are not always in a position to answer the type of questions that a judge might want to counsel with a lawyer that they believe is competent and indeed expert in the field.

CHAIRMAN HARRISON: Well, my -- and I will open the floor up. I was troubled by this proposal because I'm not sure how easy it is to distinguish between situations where the parties' interests are directly implicated in the advice the judge is seeking. And if the parties' interests are implicated and if the parties are going to file and your proposed rule takes into consideration the idea that in a lot of these situations the parties may have filed a motion to disqualify or whatever, your

proposed rule, it seems to me, raises a lot

of concerns because you say at that point the judge has to disclose the substance of the advice. I'm not sure what that means and I'm not sure that that would satisfy parties who feel disadvantaged by whatever the judge decides to do on the basis of that advice.

Anyhow, that -- that was my initial concern.

MR. MINKOFF: Well, look. You know, we're reacting to a rule that currently exists and the proposal that currently exists: that they should be able to consult disinterested experts, and if they -- Now, so what we were trying to do is say, "If you can consult a disinterested expert," which, you know, we have our doubts about but it's there -- "If you can consult a disinterested expert, you should be able to consult a lawyer," under the same rules, under the same conditions --

CHAIRMAN HARRISON: But I --

MR. MINKOFF: -- and that was the intent of what we were saying.

25 CHAIRMAN HARRISON: I think -- and I

1 don't want to be debating this you, but it
2 seems to me that the consultation that we
3 contemplated related to the merits of the
4 matter pending before the judge, and, in that
5 event, would have to be fully disclosed to
6 the parties.
7 MR. MINKOFF: Well, and that's what
8 we're saying here.
9 CHAIRMAN HARRISON: Well, not quite,
10 because only if the parties have filed a
11 motion --
12 COMMISSIONER ROSNER: Exactly.
13 CHAIRMAN HARRISON: -- do you have to
14 disclose the fact of the contact and the
15 nature and substance of what was discussed.
16 MR. MINKOFF: Correct.
17 CHAIRMAN HARRISON: Anyhow, I want to
18 open the floor up.

MR. MINKOFF: Right.

But let just react to that, Seth, before. You know, one of the things I was thinking about when trying to put this together was the situation where a judge isn't sure whether to disclose something to the parties.

And, now, you and I would probably agree that if the judge is in a position where they feel like consulting with a lawyer, that means they should probably consult a -- they should probably disclose to the parties whatever's on the judge's mind. But let's say that we don't have a judge as sophisticated as that and they want to consult with a lawyer before disclosing their potential conflict, for whatever reason, and, you know, it could be a million reason. That was why I -- that was why we drafted it the

way that you are -- you know, that's why we drafted it this way.

We drafted it this way because we wanted to deal with situa- -- we wanted to allow the judge the penumbra of confidentiality if they -- if there's some issue that they don't want to disclose to the parties, that a lawyer that they consult with believes they don't have to disclose to the parties.

It's only when the issue is on the table in front of the court and that it's going to influence the decision on a pending motion, that we feel that it needs to be disclosed to

the parties. So that was the -- that was the distinction in situations that I was trying to deal with.

And again, the point of this whole exercise is to raise a question that we don't see as having been raised by commentators.

You know, I've read the articles on ex parte communications, every one I could find; none of the articles raised this question, and yet we have to deal with it as lawyers who get calls from judges and have to figure out what to do, and, often, we just don't know.

CHAIRMAN HARRISON: Well, I'm not diminishing the importance of the question because I've actually -- and I suspect lots of people around the -- lots of the lawyers around the table who practice in this area have -- like I receive telephone calls from judges --

MR. MINKOFF: Seth --

CHAIRMAN HARRISON: -- saying, "I've got this case pending in front of me. What do you think I ought to do?"

COMMISSIONER ROSNER: Uh-huh.

CHAIRMAN HARRISON: And I don't know

whether to say, "Jane," or "Joe, I really don't know whether I should be talking to you about this or whether I should answer the question. So I mean I don't think it's a frivolous question. I'm just not sure I'm happy with the proposed answer.

MR. MINKOFF: Well --

CHAIRMAN HARRISON: Seth?

COMMISSIONER ROSNER: You mostly answered my question by your extended answer to Mark, but let me ask you this: There's no motion, there's nothing pending in the pending action relating to the issue that the judge -- that impels the judge to call his or her expert friend, but clearly the judge anticipates that there might be such a motion.

MR. MINKOFF: Correct.

COMMISSIONER ROSNER: Otherwise, there'd be no telephone call.

MR. MINKOFF: Right.

COMMISSIONER ROSNER: The judge makes the call, gets the independent advice. Now

the motion is made. Should the judge be required to disclose that communications?

MR. MINKOFF: Well, my view is that if the judge gets advice that says you don't have to disclose this, that this is not an issue, whatever; then my answer would be and I believe our group's answer would be no.

COMMISSIONER ROSNER: Really.

MR. MINKOFF: Yeah. Really.

COMMISSIONER ROSNER: Now you're --

MR. MINKOFF: It was -- it was bad enough --

COMMISSIONER ROSNER: Now you're a --

MR. MINKOFF: -- to get us to say that you had to disclose --

COMMISSIONER ROSNER: Now you're the party --

MR. MINKOFF: -- the stuff on the pending motion, Seth.

COMMISSIONER ROSNER: Now you're the party who made the motion, Ron.

MR. MINKOFF: What?

COMMISSIONER ROSNER: Now you're the party who made the recusal motion.

MR. MINKOFF: Well, if there's a pending motion.

COMMISSIONER ROSNER: No, no, no.

MR. MINKOFF: Did I miss --

COMMISSIONER ROSNER: No, no, no, no. No, no, no, no.

MR. MINKOFF: I'm sorry, I missed the question.

COMMISSIONER ROSNER: The judge gets the advice.

MR. MINKOFF: Right.

COMMISSIONER ROSNER: Now you're the lawyer for the party who makes the recusal motion.

MR. MINKOFF: Uh-huh.

COMMISSIONER ROSNER: Don't you want to know that the judge has had independent advice --

MR. MINKOFF: Well, I --

COMMISSIONER ROSNER: -- no more protected --

MR. MINKOFF: I might want to know it. I'm just not -- I mean as a party? Yes, I'd want to know it.

COMMISSIONER ROSNER: Don't you feel unfairly --? If you learned about it six months after the conclusion of the trial, don't you think you would have been -- you'd

have a feeling that you were treated unfairly?

MR. MINKOFF: No, no. And I'll tell you why, I'll tell you why: Because if that judge calls up that judicial-assistance-

program person up in, you know, the state capitol, then he's going to get that advice. I'm never going to find out about that. I'm never going to find out about that as a litigant. And so that's permitted under the code. And if that's permissible, then, in my view, calling up an equally-expert lawyer and getting advice should also be permissible.

And Seth, I have to apologize. I didn't mention that you were a former president of our organization also, and I want to remedy that.

So the --

CHAIRMAN HARRISON: Other questions or comments about this part of APRL's --

MR. MINKOFF: Judge Wynn.

COMMISSIONER WYNN: I want to -- and maybe this is where Seth is going with this, but this real -- the example you've given, the sample is the Blakely case just come

down. And nobody knows what it means and you got some institute or some expert out there who circulates a memo advisingly to the judges on what this means. Is that something that needs to be disclosed when a Blakely motion is made?

MR. MINKOFF: Well, again, Blakely wouldn't be an issue arising under the canons so I'm not sure this is the type of advice you're talking about.

COMMISSIONER WYNN: I guess I've taken it more to the ex parte communication.

MR. MINKOFF: Well --

COMMISSIONER WYNN: -- which does arise under the canon.

MR. MINKOFF: -- you know, that goes to the issue that -- that has been the subject of a lot of discussion, which is sort of the outside-information issue, you know, like the judge going on the internet to find that expert's memo or, you know, or it gets circulated.

COMMISSIONER WYNN: No, no, no. Let me try to make this clearer.

MR. MINKOFF: Okay.

COMMISSIONER WYNN: It is circulated directly to the judges with the intent to educate the judges on what this decision means and to give advice in terms of how to rule on it. Should the judge disclose it?

MR. MINKOFF: I believe that, yes.

COMMISSIONER WYNN: Is it, you know, a "should?" Or "Must he disclose it?" is a better question, --

MR. MINKOFF: I believe --

COMMISSIONER WYNN: -- he has looked at this memo. And again, once he discloses it, what is then -- then it takes the form of them having -- allowing a response?

MR. MINKOFF: Right. I believe that I mean it's sort of an unsoli- -- You're

talking about an unsolicited memo by some criminal lawyer out there who decides to send this to the judge, right?

COMMISSIONER WYNN: No, no.

MR. MINKOFF: Well, who sends it?

COMMISSIONER WYNN: I'm talking about something that comes --

MR. MINKOFF: From?

COMMISSIONER WYNN: -- either through

official channels or --

MR. MINKOFF: Okay.

COMMISSIONER WYNN: -- some professor decides to do it and or the court decides to distribute, or it's an institute that is of the parties. It could come from the attorney general's office; whoever.

MR. MINKOFF: I think it should absolutely be disclosed to the litigants. I think it absolutely should be disclosed to

the litigants. I think it's a source of research that the judge might use to influence the decision, and the parties should be aware. The parties should be aware of it.

COMMISSIONER WYNN: Of course, the example I gave is not prohibited in North Carolina. In other words, that can happen; you can get that.

CHAIRMAN HARRISON: I'd like to go on --

MR. MINKOFF: Okay.

CHAIRMAN HARRISON: -- to your last recommendation, since I think that may generate --

MR. MINKOFF: You think?

CHAIRMAN HARRISON: -- perhaps even more discussion.

MR. MINKOFF: You think? I'm stunned to hear that Larry Fox and I are going in the

same direction.

CHAIRMAN HARRISON: I told Larry that I almost collapsed when I discovered that you were both independently making similar recommendations but --

MR. MINKOFF: What's scaring me is that as the years pass, Larry and I agree on more and more things, so I don't know, but --

COMMISSIONER ROSNER: Is it scaring you for you or for Larry?

MR. MINKOFF: Probably for him.

MR. MINKOFF: The way I want to start by talking about the appearance of impropriety is to talk about one of those rare cases where the appearance of impropriety was used as an exclusive basis for discipline, and it's a case called In Re: Blackman, out of New Jersey, 591 A.2d 339; and it does illustrate the outer edge of the appearance-of-impropriety rule and it's one of those fun cases that lawyers can discuss over a beer or

whatever substance that you're not abusing.

What happened with Judge Blackman was that he was a judge in a town in New Jersey and one of the town supervisors in a shocking development was indicted and convicted of a felony, and every year this town supervisor gave a picnic for two hundred of his nearest and dearest friends in the town, including people in town government, and this judge, Judge Blackman, came to the picnic every year.

And so after the judge was convicted, he was supposed to go to jail on September -- he was due to go to jail to serve his sentence on September 5th.

CHAIRMAN HARRISON: Who was convicted? The commission or the judge?

MR. MINKOFF: The commissioner. The town commissioner was set to go to jail on September 5th, so he threw his annual Labor Day picnic on September 2nd and two hundred

people came including the judge.

Somebody saw him there at the picnic, and there apparently was an issue about whether the picnic was sort of a going-away

party for this guy or not.

But the judge was at the picnic as he had been for, you know, the last eighteen years or something like that, and the disciplinary authorities in New Jersey brought a disciplinary complaint against him, claiming that this was -- that he violated the appearance of impropriety standard, or the New Jersey equivalent. I don't remember the exact terms but it's definitely the New Jersey equivalent. And they found that yes, he did.

Now, I looked at that case and I said to myself, you know, when I teach Professional Responsibility, on the first day, I give the

class five problems which are the kinds of problems that can be answered, you know, yes or no would both be right answers. And usually the class splits right down the middle on those answers, and then I say, "Well, that's why you have to know the rules."

This is one of those problems that if you ask ten ethics lawyers, "If that judge called up and said, 'I want to know whether I

can go to that picnic,'" I bet you'd get five ethics lawyers saying yes and five ethics lawyers saying no. But nevertheless, the appearance of impropriety standard was used to discipline the judge.

And you know, when we were talking about this yesterday, we were saying, "Well, okay. Who becomes untouchable under this standard? Did the town supervisor have to be convicted

of a felony for it to be the appearance of impropriety or would a misdemeanor conviction have been enough? What if he was just disbarred? Would that, going to a social event given by a disbarred lawyer, be enough to render you subject to the appearance of impropriety standard? So yes, this is one case, but it shows the problems. It illustrates the problems of the appearance of impropriety standard from our viewpoint.

And another case that's of interest in this area is a case called O'Bier, 833 A.2d 950, which is out of Delaware; and here the judge is disciplined for a couple of things, but one of the things he was disciplined for was that he was back in his chambers. He's

the kind of judge who carried a firearm. We all know those judges. They're out there. And this judge carries a firearm and he was

telling a story, an anecdote, and in the middle of the anecdote he suddenly whipped out the gun and then put it back in his holster. Well, the court officers who were sitting there listening to the story, or the secretary or whatever were frightened, they said, by this -- I probably can't blame them for being frightened -- and reported the judge and he was sanctioned for violating the Delaware equivalent of the appearance of impropriety standard, for doing that.

Now, if the judge had thought to ask for that advice about whether he should whip out the gun while telling the story, probably you would have told him, "No," but not because it would violate the appearance of impropriety standard. And if you talk about Chuck's "Three I's," I'm not sure which of those Three I's whipping out that gun would fall under. But nevertheless, he was, you know, sanctioned for it.

MS. ALSTON: Three months.

MR. MINKOFF: What was it?

MS. ALSTON: Three-month suspension.

MR. MINKOFF: A three-month suspension.

Now, there were some other things. There were some other things that involved he was working nights and apparently he was having sort of behavioral problems because he had switched his schedule and wasn't getting a lot of sleep. But there's no question that the court sanctioned him specifically for taking out the gun under the appearance of impropriety standard.

The point of this is again, you know, speaking for our clients. I mean we represent the Judge Blackmans, the Judge O'Bier, the people who get caught up in the disciplinary net sometimes because of things that nobody could predict that they would. And as you were pointing out before, this is not -- it's not an insignificant event in

somebody's life. It may seem silly, we can laugh about these stories; but they happen to people and people get in trouble.

We also recognize, and we made a point of this in our presentation, that the

appearance of impropriety standard has a long history, maybe even an honored history under the code, and that it services a purpose, a hortatory purpose, a purpose of -- you know, a purpose of raising the bar for judges to a very high place, and that's important. But you know, the bottom line is that this standard, that what's in that code is going to be used by disciplinary prosecutors. And at the end of the day -- whatever the purpose of the code is that have hortatory standards, at the end of the day, disciplinary prosecutors are going to use that language that's in the code and use it against people.

And so the question is, you know, is this a good thing to have in the code? And you know, we talked in our presentation about all of the problems with the appearance of impropriety standard, that it's not how it's been rejected outright in the lawyer code, admittedly in the conflicts area. But conflicts area is a much narrower area than the way appearance of impropriety is used in the Code of Judicial Conduct. It covers a wide range of conduct, it's been applied in a

wide range of conduct, much wider than the conflicts area. But it's been specifically rejected over and over again by courts, in the lawyer code, and we have a little trouble understanding why a concept that has been so thoroughly discredited on the lawyer side is still hanging around on the judicial side.

It's been criticized over and over again

for the last 30 years by everybody from Justice Goldberg to former Attorney General Clark to the Spargo judge, to the dissent in the Specter case, just -- and commentators far and wide. It has been questioned.

And we have the problem of, you know, even when it is applied, it's a very vague standard; you know, it's a reasonable-person standard based on what an observer of the system would consider reasonable conduct and it's supposed to look at whether that observer would say that the judge was not acting with integrity, impartiality and competence. Two I's and a C is what the comment says about the appearance of impropriety.

But again, when it came time to use

those provisions for the Blackman and O'Bier situations, nobody was analyzing the

commentary language and they were applying it to situations that I suggest really don't go to those questions of integrity, impartiality and competence, so -- or at least arguably don't.

The first thing we did of course was -- I'm going to get there -- many states, the first thing we did was analyze your suggestion, in Canon 1, of saying that the appearance of impropriety ordinarily will not be used as the sole basis for discipline, and you put that in the comment, in Comment 2 to the new revised Canon 1.

Now, we had two problems with that. One of them was articulated in Naples by Bill Hodes, who's another member of our group, which is sort of a drafting problem: that the appearance of impropriety sort of shows up in the commentary but it doesn't show up in the canon itself, in the -- in Canon 1.0.

And so if you have this concept that kind of appears in the commentary and then you say ordinarily it won't be used as a

basis for discipline; but it's not in the Canon 1.0 as it's drafted now, so it kind of creates an issue about what could be used as a basis of discipline -- whether the commentary language should be or the comment itself.

But the other problem which Beth was just pointing out to me is that many states don't adopt the comments at all. So putting this provision in the comments isn't going to do a hell of a lot of good in those states because they're never going to even see the commentary. The commentary's not going to be part of their code.

And our third problem with it is the word "ordinarily." "Ordinarily" is the current state of the law. Ordinarily, the appearance of impropriety is not used as the sole basis for discipline, but it does

happen, and -- and even when it's not, as Chuck Kettlewell was saying just before, it creates a lever for the disciplinary prosecutor that is very difficult to deal with from the defense side because you can deal with all of the specific violations,

maybe you can; but that vague one that's floating out there is harder. And any time you have a I-know-it-when-I-see-it kind of standard, you know, you're -- you're -- from the standpoint of discipline, you're running the risk that personal biases, political biases, all of those things are going to interfere. So --

MS. ALSTON: And in terms of --

MR. MINKOFF: Right.

And it's a due process question, which is, you know, Do you know that this kind of conduct, in advance -- do you know in advance

that a certain kind of conduct is going to violate the rule?

So we -- facing this conundrum, we tried to come up with a solution, and the way we did it was as analytically as we could do it, which was we looked at two sources. First we looked at the case law under appearance of impropriety and we saw the range of cases that is out there, and they -- but they fall into categories, believe it or not. It's not like every kind of situation you can think of. There are categories of cases.

One category of cases -- and it's just amazing to me that the appearance of impropriety is used, has to be used in this situation -- are the misrepresentation, fraud and deceit situations: judges who lie on their passport applications, judges who lie when testifying in some unrelated proceeding

to their work, judges who lie on an affidavit submitted in their personal lawsuit. Situations like that have been prosecuted under the appearance of impropriety.

The other group of cases are the obstruction-of-justice cases, the ones where the judge has an affair with a fugitive and helps the fugitive escape justice. There's one in New York pending now that I know Bob's been dealing with which involves a judge who got angry that a detective had lied to her, and the judge told the fugitive that the detective was about to arrest, to go out the side door of the courtroom so that the detective wouldn't be able to exercise the arrest, to serve the arrest warrant. Those kind of cases have been prosecuted under the appearance of impropriety, and there's a

variety of those. And then, you know, there

are other cases where the judges have just disregarded the law in various ways, have taken a straw poll in the courtroom of the spectators as to whether they find somebody guilty or not guilty.

So there are a bunch of categories of cases, and what we looked at was to try and find better rules that will apply the appearance -- how the appearance-of-impropriety concept has been used over the years, and have better, more clear rules so that judges will be on better, on clearer notice of these kinds of problems.

And so we made the suggestions that we made on pages 11 and 12 and on to 13 of our report. And really, we talked about three things, three different changes to the rules.

The first one was a change to Canon 2.03, which was related to competence in the law, and we used that provision to talk about conduct that is prejudicial to, interferes with or obstructs the administration of justice or which engages in conduct which

involves or appears to involve repeated or

flagrant disregard of established applicable law, to deal with those situations where judges either are blatantly misapplying the law or are appearing to do so by their cavalier attitude towards the law. And we felt that that language is stronger and clearer language as to what is prohibited than what is in the commission's current Canon 2.03, because in the current Canon 2.03 it's just adherence to the law or that the judge shall demonstrate competence in the law, I think it is; and we are concerned that that language could be interpreted in a way that if a judge makes an unpopular decision or is just plain wrong once, that that could somehow lead to discipline or at least that will be a concern that judges have when they read the rules. It's certainly been a

concern that some judges have articulated to me. So we tried to make it a clearer rule as to what will lead to discipline in this area.

In Canons 2.04 and 2.05, we tried to deal with sort of those core appearance-of-impropriety kinds of issues which had to do with appearance of bias, prejudice,

unfairness, favoritism. The Spector case in New York, which was one of the seminal appearance of impropriety cases, where two judges in a county, each one was appointing the other's son, who was a lawyer, to every appointment they could come up with. This seemed to give an appearance of favoritism, so we use those words instead of appearance of impropriety.

When the judge meets in chambers for hours with one of the parties without telling the other side, that's an appearance of

favoritism, partiality, what-have-you.

But it's much clearer language and it puts the judge on much clearer notice than the language of appearance of impropriety.

And finally, we propose a new canon, which we didn't know where you'd want to fit it in so we just kind of left the number blank, but which talks about the other appearance-of- impropriety type problems: acts that would commit a crime, things that reflect adversely on a judge's honesty, integrity, impartiality and trustworthiness; engage in conduct involving dishonesty,

fraud, deceit or misrepresentation. These are concepts very similar to Rule 8.4, Model Rule 8.4; and yes, we borrowed from that rule, but we felt that they had a place in the Code of Judicial Conduct. They're pretty clear language, and it's pretty surprising in

a way, that it's not in there, so we thought we would raise that and put it in.

And I think that you have pretty much covered the waterfront. And yes, there are situations that we can't predict that, you know, might come up that, you know, might not be covered. We wonder if those situations are in the Blackman/O'Bier vein, that if that happens, then -- and it doesn't fall under these rules, then we wonder whether or not somebody should be prosecuting it anyway. So that's our -- that's our view.

CHAIRMAN HARRISON: Judge Amon and then Loretta Argrett.

JUDGE AMON: I would just point out that we do have one provision that covers this, which is 1.02, which is Complying with the Law.

CHAIRMAN HARRISON: Right.

JUDGE AMON: It says a judge shall respect and comply with the law, which, you know, would cover some of the things that you've talked about, which is committing crimes or fraud or those kinds of things. So that concept is in there, and that's difference from incompetence in the law. That's in the first section.

CHAIRMAN HARRISON: Okay. Loretta?

COMMISSIONER ARGRETT: Well, actually I think Carol Amon has sort of muted the question that I was going to raise, but let me just raise it anyway, but I think it's probably covered by just what you said.

I actually was intrigued by your formulations that you had, and the only thing that I immediately thought that was missing is what about the judge who gets repeated speeding tickets like I guess it was a former governor out west somewhere.

MR. MINKOFF: Oh. You mean in North Dakota?

COMMISSIONER ARGRETT: Yes.

MR. MINKOFF: I think that was DWI, wasn't it? Yeah, so that would be under my

current.

COMMISSIONER ARGRETT: No, no, no.

VOICE: He killed somebody.

COMMISSIONER ARGRETT: No.

I'm talking about that in the past he had gotten repeated speeding tickets. So my question is, I don't think that repeated speeding tickets would be covered within your formulation, but I need to look at one. It would probably be covered under there, so perhaps we're okay.

CHAIRMAN HARRISON: Bob and then Pete.

MR. TEMBECKJIAN: Just a couple of historical notes and then I'm going to have a question for Ron.

In Spector -- and I've circulated actually to the members of the Joint

Commission here, the actual Spector charges. Spector was charged with about seven or eight different code provisions including favoritism, making appointments on a basis other than merit. The New York Court of Appeals chose in its disciplinary decision to couch the discipline in terms of appearance of impropriety was not something that was

predictable or within the control of the disciplinary agency. The actual charges were far more specific than what the Court ultimately chose to discipline Judge Spector for, and that tends to be if not a pattern, then something that's not unusual, where judges for whatever reason are reluctant to say that one of their colleagues committed an actual impropriety. And so even though it might have been proved, certainly it was charged. When it gets to the court, they

soften it for whatever reason.

Second historical note is that in Spargo, although it is true that Federal District Court Judge Heard knocked out Canon 2, he also knocked out significant portions of Canon 5 which were also charged against Judge Spargo. They were charged in tandem. He wasn't only saying that Canon 2 was vague and unenforceable against him, he was also saying that Canon 5 was vague and unenforceable against him, and that ultimately remains to be seen.

My question is in terms of applying the appearance of impropriety standard to

specific factual situations, given that there are specific subsections to Canon 2 that are usually if not always charged, why is that any more difficult than asking a judge, which we do in family court every single day, to

make a custody determination based on nothing more than, quote, "the best interests of the child," unquote, which in the statutes is about as vague and as unenforceable a concept, I would argue, as the appearance of impropriety; or asking a judge to determine if in an employment case there was justification to fire someone for cause, period, end of sentence.

Judges apply experience, facts, history, precedent, to constructing these kinds of statutes every day. Is it any different than a disciplinary entity or a court with experience and precedent trying to determine whether a specific set of facts constituted an appearance of impropriety.

MR. MINKOFF: To use what Beth just said to me, it's a predictability issue. Let's take both of your examples. In the cause area, that's something that I actually do

occasionally so I know something about it, and, you know, the definition of "cause" which usually is intentional misconduct or criminal misconduct or something along those lines is usually pretty clear; it's not just for cause. There's a definition, a legal definition that's very clear. Appearance of impropriety is not defined anywhere nearly as clearly as that.

And in terms of custody disputes, you're talking about a whole different context. You're talking about a judge sitting in a courtroom, having expert testimony presented by both sides, briefing, careful consideration, et cetera, et cetera. Here we're talking about a wide variety of situations that even if the judge stops and thinks, they wouldn't be able to come up with the answer. Even if the judge consults, as I said, an ethics lawyer about what appearance of impropriety is, they might not be able to come up with the answer.

So what I'm saying is, look. Understand what we're saying. We are not saying the appearance-of-impropriety concept as it's

been applied is a bad one. What we're saying is that you can make the code better. You can make it clearer without changing any of the standards. And the notion that, you know, the appearance of impropriety has become some kind of political football that needs to be kicked over the goal post is, you know, is troubling to us because, you know, your charge is to try and make the best possible code, and there's a way to do it. There's a way to do it without getting -- without throwing the baby out with the bath water, and that's the point that we want to make.

MR. TEMBECKJIAN: In any of the cases where a judge was disciplined solely

for the appearance of impropriety, regardless of whether there were different charges and the court only chose to comment on those, are there any of those cases where you think there should not have been public discipline?

MR. MINKOFF: Blackman is one that I frankly think there shouldn't have been public discipline.

MR. TEMBECKJIAN: I think --

MR. MINKOFF: O'Bier, too. I --

MR. TEMBECKJIAN: I think reasonable people disagree on that.

MR. MINKOFF: Well, I understand that, Bob, but, you know, getting disciplined is a big deal. This isn't like, you know, it's okay, you know. Reasonable -- If it's an act that reasonable people can disagree on as to whether or not this vague standard applies, then that person is not -- there was not

sufficient due-process notice for that person to know that their conduct is going to violate the rule.

JUDGE BOWIE: I just had a quick question and that is could you give me those cites again for Blackman and O'Bier?

MR. MINKOFF: Sure. Blackman is 591 A 2d 1339 and O'Bier is 833 A 2d 950.

CHAIRMAN HARRISON: Elizabeth?

MS. ALSTON: I just wanted to say that when judges in my state talk about the Code of Judicial Conduct, the biggest complaint they have is that they do not know what they can and cannot do with any degree of predictability or specificity. And so it's

not just -- I mean Ron has emphasized the discipline angle, but let's also talk about the prevention angle, the -- you know, the judge who wants to do the right thing but

can't -- doesn't have any way to figure out whether his notion of what appears to be improper is the same as the Supreme Court's notion or the Special Counsel for the Judiciary Commission's notion. And I just wanted to add that.

CHAIRMAN HARRISON: Other questions or comments?

COMMISSIONER OLDHAM: Ron, you mentioned that Murray Abowitz was on your study commission. Did he also sign off on the comments?

MR. MINKOFF: What?

COMMISSIONER OLDHAM: You mentioned that Murray Abowitz was also on your study commission. Did he sign off on the comments?

MR. MINKOFF: He did.

MS. ALSTON: Also the entire board.

MR. MINKOFF: Well, the entire -- Well, obviously, once after the committee approved it, it was approved by the APRL Board of

Directors as well.

COMMISSIONER WYNN: I wanted to see, can we go back to the 2.19 comment that he made earlier --

MR. MINKOFF: Sure.

COMMISSIONER WYNN: -- on the corrective action? I've been sort of turning that over in my mind. First, when I heard it, I was wondering what you were correcting: Are you correcting an impairment or are you correcting something else?

But you know, when I really think about it, are you suggesting adding the word "corrective," "appropriate corrective action" or just "corrective action?"

MR. MINKOFF: Just "corrective action."

MS. ALSTON: Taking "appropriate" out.

MR. MINKOFF: Taking "appropriate" out because of our concern about Monday-morning quarterbacking about whether that reporting, that act of reporting is sufficient. Because

if somebody decides later that it's not appropriate that -- that further action would have been more appropriate, that it would have been more appropriate to go to the

disciplinary committee instead of to the Judicial Assistance Committee and thereby, the judge who takes the action didn't go far enough, thereby would be violating 2.19 as you guys have written it. So that's why we thought the word "corrective" would be better here, because I don't know that you intended -- maybe you did intend -- but I don't know that you intended that if a judge takes the step of reporting, that they may still get disciplined because they didn't go far enough, and that's what we want to remove. That's what we are suggesting and respectfully recommending be removed from the code, from the proposals.

CHAIRMAN HARRISON: Loretta?

COMMISSIONER ARGRETT: I just have one final question and I want to be sure I understand what you're saying, because you-all are the defense counsel. I'm looking at it as a former prosecutor, and you know how you have the whole range of charges that you can charge from -- you know, say a misdemeanor to a felony. And I would have thought that it might be helpful to the

defense bar to have a charge which is not in the eyes of the public, one that is so bad, that to the extent when you get to plea, you have something that you could plea to, even if there is some other charge, arguably, that the judge may be -- I don't want to use the word "guilty," but, you know, may have violated some other rule. But the judge is one who you don't want to take off the bench

and you want to send a message. So I guess I'm trying to understand, because if this one is taken away completely -- and I don't think you are suggesting that, necessarily -- then what you really have are all of -- you know, violations which are pretty onerous, I mean if the judge violates them. And I guess I wanted to have some comment from you on that.

MR. MINKOFF: I think that's an excellent point and it's one that we've debated, actually. It's not -- there were some of us who made that very point. They made a point on two grounds: first of all, that -- as you said, that, you know, gives us something to plead to. Some of us come from states where the pleading process, certainly

in the lawyer discipline side doesn't even exist, so it's a little hard to tie -- I'm not as well-versed on the judicial process in

my state, but there are states obviously where you can plead out, quote/unquote, and this does provide a vehicle for doing that. But, you know, some of these catch-all provisions that we've put in here are not much different than that but are just clearer, the language is clearer.

The other argument that was made, which I found a little harder to understand, was that having the appearance-of-impropriety standard actually gives you as a defense lawyer more room to work, because it's so vague, you can argue just about anything in response to it. And you know, one of the problems with being an ethics person and an ethics professional is that, you know, you tend to become kind of rules-oriented and -- you know, and maybe as a group, you know, we have that little bias. But you know, it seems to me that we are better off with a system of clearer rules than a system of less clear rules.

And you know, the notion that Bob suggested before, you know, that judges can use appearance of impropriety to kind of soften the blow on judges, you know, it's a double-edge sword. Yes, that can happen; and everybody wink-wink-nod-nod knows what really took place. But at the same time, you know, the system is better served by having the standards clear so that the public knows, the judges know, the disciplinary prosecutors know and the defense lawyers know exactly what it is that they can and can't do, or as close to exactly as we can get with in the wide penumbra of human behavior that we're trying to address.

CHAIRMAN HARRISON: Last comment.

MS. ALSTON: Last comment. I question whether the system is really benefited by having a lesser charge that a court can pin on a judge or a judge can plead to if they

have in fact violated one of the other canons. Is it really a benefit to the system to have that lesser category available?

CHAIRMAN HARRISON: I want to thank you very much because it's obvious from your work

product, that you spent a lot of time and gave a lot of effort to this. And we appreciate it; we really do.

MR. MINKOFF: Well, we want to thank the Commission and George and Eileen for the help that they've given us and the cooperation they've given us as well.

CHAIRMAN HARRISON: Well, that's great.

Before the two of you are the last speakers, who I'm aware of here today, but there are other people in the room, and I don't want -- before we recess, I want to make sure anybody who's here has a chance to speak. Anybody sitting around the perimeter

who wants to say anything? Otherwise, I've just got some housekeeping things to discuss. They're not -- I mean anybody can stick around, but I want to makes sure that before the reporter finishes her work, we've gotten comments from anybody who wishes to make comments.

Going once? Going twice? Okay.

We have one final person.

MS. MARIA SALZMAN: Hello, everybody. My name's Maria Salzman and I'm not with --

I'm not affiliated with the law, however I have a great interest in it. I come from Poland, so that's where my accent is from. And I would like to extend my greatest thanks and how privileged I feel to actually take part in it and witness it. And I would like to tell everybody, lawyers and all of the judges, that really, people outside America

put a lot of hope on what you do. And knowing from Poland and eastern Europe, that people really look up to. And I was thinking about only in English, judges have in front of the name, "Honorable." I mean people really bestow honor on people who have the courage to stand up for justice. And sometimes as I could see, many times when people get caught up in the little small things, but keep in mind, please, the greater -- greater goal and greater role that you play. Thank you very much.

CHAIRMAN HARRISON: Thank you. Even though my name is "Harrison," all of my ancestors come from Poland.

(Whereupon, the hearing was adjourned)

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CERTIFICATE

STATE OF GEORGIA]

COUNTY OF FULTON]

I, Theresa Bretch, Certified Court Reporter in and for the State of Georgia at large, do hereby certify that the above and foregoing, consisting of pages 1 through 184, inclusive, is a true and complete transcription of my stenographic notes taken at the hereinabove set out time and place and was reduced to typewriting by me personally.

Witness my hand and official seal the 20th day of August, 2004.

_____

Theresa Bretch, C.C.R.

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