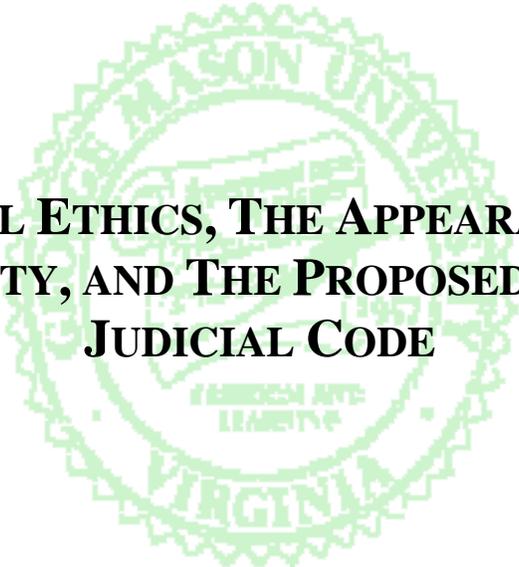


GEORGE MASON UNIVERSITY SCHOOL OF LAW



JUDICIAL ETHICS, THE APPEARANCE OF IMPROPRIETY, AND THE PROPOSED NEW ABA JUDICIAL CODE

Ronald D. Rotunda

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JUDICIAL ETHICS, THE APPEARANCE OF IMPROPRIETY, AND THE PROPOSED NEW ABA JUDICIAL CODE

*Ronald D. Rotunda**

I am delighted to present the 2005-2006 Howard Lichtenstein Lecture in Ethics, named after Howard Lichtenstein, a prominent senior partner in Proskauer Rose (formerly Proskauer Rose Goetz and Mendelsohn). He worked hard as a lawyer but also found time to become a community leader, who strongly supported the teaching of, and increased scholarship in, legal ethics.¹

I am also honored because Hofstra is host to two of the giants in Legal Ethics. Roy Simon is the Howard Lichtenstein Distinguished Professor of Legal Ethics, as well as the director of Hofstra's Institute for the Study of Legal Ethics. Roy, of course, succeeds the other giant, Professor Monroe H. Freedman as the Lichtenstein Professor, who had held the position since its establishment in 1989.² If we had to pick the one person who first created modern legal ethics as a serious academic specialty, it would be Monroe. Although he has never hesitated to criticize the American Bar Association when it has confused legal ethics with trade barriers³ or with corporate fraud,⁴ it speaks well of the ABA that it awarded him its highest award for

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1. It is a small world: Many years ago, I interviewed with Proskauer Rose, but, at the time, the lure of Washington, D.C. was too strong.

2. See generally Ralph J. Temple, *Monroe Freedman and Legal Ethics: A Prophet in His Own Time*, 13 J. LEGAL PROF. 233 (1988). This article lists many of Professor Freedman's major publications through 1988. If Monroe had stopped there, he would be one of the most productive faculty members of any law faculty, but, in the nearly two decades since that time, he has not stopped, or even slowed down. His prolific scholarly contributions continue.

3. *Id.* at 234.

4. E.g., Monroe H. Freedman, *The "Corporate Watch Dogs" that Can't Bark: How the New ABA Ethical Rules Protect Corporate Fraud*, 8 UDC/DCSL L. REV. 225 (2004).

*professionalism, in recognition of a “lifetime of original and influential scholarship in the field of lawyers’ ethics.”*⁵

Monroe and Roy have made Hofstra the Mecca for Legal Ethics. All of us who labor in this area will make many pilgrimages to this place. And, like true pilgrims, we do it because we want to do it, not because we must.

I. INTRODUCTION

In any presentation on legal ethics, it is common for the speaker to argue that we need more ethics. As the Duchess of Windsor (and others) once said, one can never be too thin or too rich. So also, many people think that one can never be “too ethical.” But neither saying is correct. Paris Hilton is proof that one can be too rich, and any anorexic is proof that one can be too thin. One can also be too ethical.

We sometimes think, loosely, that ethics is good and that therefore more is better than less. But more is not better than less, if the “more” exacts higher costs, measured in terms of vague rules that impose unnecessary and excessive burdens. Overly-vague ethics rules impose costs on the judicial system and the litigants,⁶ which we should consider when determining whether to impose ill-defined and indefinite ethics prohibitions on judges.

Unnecessarily imprecise ethics rules allow and tempt critics, with minimum effort, to levy a plausible and serious charge that the judge has violated the ethics rules.⁷ Overuse not only invites abuse with frivolous charges that have the patina of legitimacy, but also may eventually demean the seriousness of a charge of being unethical.⁸

Compare, for example, the position of the B’nai B’rith, which

5. ABA Michael Franck Award Citation 1998: Monroe H. Freedman, http://www.Hofstra.edu/pdf/law_mfreeman_franck_award.pdf.

6. See *Simonson v. General Motors Corp.*, 425 F. Supp. 574, 578 (E.D. Pa. 1976) (noting that there is an obligation *not to recuse* without valid reasons because of the burden that recusals place on colleagues). See also *Blizard v. Frechette*, 601 F.2d 1217, 1221 (1st Cir. 1979) (arguing that a judge has an obligation *not to recuse* himself when no probative evidence reasonably gives rise to doubt as to his impartiality, and in this sense, the court said, there is a “duty to sit” unless there is a duty to disqualify).

7. See Letter from Ronald C. Minkoff and Ronald E. Mallen, Assoc. of Prof’l Responsibility Lawyers (“APRL”), to ABA Commission on the Model Code of Judicial Conduct (June 30, 2004), at 6, available at http://www.abanet.org/judicialethics/resources/comm_rules_minkoff_063004.pdf, [hereinafter APRL Letter].

8. See *id.*

rightly objects to those who use the term “Holocaust” lightly.⁹ A sniper who kills a dozen people horrifies us, but it is wrong to call that evil deed the “Holocaust,” because there is nothing like the Holocaust except the Holocaust. Some people are strong believers in vegetarianism, but meat eaters are not like the Nazis, and it is wrong for PETA (People for the Ethical Treatment of Animals) to use Holocaust imagery in their advertising campaigns, and compare the treatment of farm animals to the victims of the Nazi concentration camps.¹⁰ We demean the term “Holocaust” when we use it flippantly.¹¹

I think that charging someone with an ethics violation is also serious business. We will eventually demean the term and its importance when we routinely throw around the charge. Oliver Wendell Holmes once said that an allegation that a law violates equal protection “is the usual last resort of constitutional arguments,” because anyone can make it.¹² All laws make distinctions and so the lawyer can always allege that the distinction violated equal protection. The Court responded to the problem by defining equal protection with care, and creating types of equal protection. Lawyers can still make the argument of an equal protection violation but they will typically lose, unless they show that the classification requires higher scrutiny than mere rational basis.

What is true of equal protection is not true of judicial ethics. Today, any lawyer or member of the media can flippantly accuse a judge of violating the “the appearance of impropriety” in either his or her private or official capacity because the title of Canon 2 of the ABA Model Code of Judicial Conduct boldly tells us that the judge must avoid such appearances.¹³

Courts and commentators routinely treat this title of Canon 2, forbidding the “appearance of impropriety” as a rule, violation of which subjects the judge to discipline and disqualification. However, this rule does not appear in Canon 3, which is the rule regulating judicial qualification. On that issue, the ABA Model Judicial Code tells us that a judge must disqualify herself where her “impartiality might reasonably

9. See Press Release, B’nai B’rith Int’l, B’nai B’rith Condemns Evangelist’s Statement on Stem Cell Research as “Outrageous and Irresponsible” (Aug. 9, 2005), http://bnaibrith.org/pubs/pr/050810_condemnStem.cfm.

10. See Anti-Defamation League, Holocaust Imagery and Animal Rights (Aug. 2, 2005), http://adl.org/anti_semitism/holocaust_imagery.asp. PETA eventually apologized for its exhibit. *Id.*

11. See, e.g., B’nai B’rith Int’l, *supra* note 9.

12. *Buck v. Bell*, 274 U.S. 200, 208 (1927). See also *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 539-40 (1942).

13. MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1990).

be questioned.”¹⁴ Then, it lists various specific instances requiring disqualification. These specific instances are fairly clear and reasonably defined. The broader, catch-all rule—“impartiality might reasonably be questioned”—is much more vague, but it is crystal clear compared to “appearances of impropriety.”

Unlike the Court’s treatment of equal protection, the ABA has not defined the “appearance of impropriety” with any precision. In this Article, I will focus on “appearance of impropriety” because it is even more vague than “impartiality might reasonably be questioned.” The test, “impartiality might reasonably be questioned,” vague as it is, does not forbid “appearances” of impartiality. Moreover, it specifically requires that any allegation of bias must be “reasonable.”¹⁵ Finally, the Code actually attempts to define “impartiality” in the terminology section. Something is “impartial” when there is an “absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge.”¹⁶ That definition, compared to “appearances of impropriety,” exhibits surgical precision.

I do not mean to suggest that we should embrace with gay abandon the language of “impartiality might reasonably be questioned.” That phrase can be an excuse for careless and sloppy draftsmanship. We expect lawyers and judges to be good draftsmen, particularly when they are drafting in an area where they are unusually knowledgeable—the law governing judging.

An example of poor drafting is found in the official Comment to Canon 3E(1). It tells us “if a judge were in the process of negotiating for employment with a law firm, the judge would be disqualified from any matters in which that law firm appeared, unless the disqualification was waived by the parties after disclosure by the judge.”¹⁷ One wonders why the drafters did not simply add that example (the only one it gives) in the list of specific instances where the judge must disqualify herself.¹⁸ If there are no exceptions to the prohibition (and the phrasing of the example suggests none), then it really is a specific prohibition (like the

14. MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1) (1990).

15. However, the use of “might” invites a broad interpretation of “reasonably.” See the discussion in MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS’ ETHICS §§ 9.05-9.07, 239-45 (3d ed. 2004). Professors Freedman and Smith present a forceful argument in favor of the “appearance of impropriety rule.” On that issue, we disagree.

16. MODEL CODE OF JUDICIAL CONDUCT Terminology (2004).

17. MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1) cmt. (1990).

18. See Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge’s Impartiality “Might Reasonably Be Questioned”*, 14 GEO. J. LEGAL ETHICS 55, 60-61 (2000).

other ones listed in this Canon), and should be listed there. It certainly is easier for a judge to know what the rule is by looking at specific prohibitions rather than a Comment, which the ABA warns us does *not* create additional rules.¹⁹ We simply do not know why the ABA chose to place the restriction on seeking private law firm employment in the Comment rather than in the rule.

Still, for all its problems, the test of “impartiality might reasonably be questioned” is not as troublesome as is the even more formless, “appearance of impropriety.” And, because the duty of the judge to avoid an appearance of impropriety is a separate rule,²⁰ its invocation is not limited to charges requiring disqualification. Instead, it adds a new arrow to the quiver of anyone attacking a judge, for if there is an “appearance of impropriety”—if the judge has done something that is wrong, or appears wrong—that is yet an additional reason to disqualify a judge, because she is hearing a case in violation of Canon 2.

Hurling the charge of “appearance of impropriety” (if I may mix metaphors) is like using a blunderbuss. Nowadays, we might describe a blunderbuss as a weapon of terror. It was not a very precise weapon, and marksmen never used it. Instead, it was good for crowd control, when the goal was to shoot multiple balls simultaneously in the hope of hitting something. The ABA has chosen to arm any lawyer or any pundit with the equivalent of a blunderbuss to attack a judge by giving its imprimatur to a charge of violating the “appearances of impropriety.” The attack on the judge’s ethics seldom results in discipline or disqualification, but it does serve to besmirch and tarnish a judge’s reputation.

I do not blame lawyers who use the appearances rule when it helps their clients. We train lawyers to do exactly that. Judges and lawyers created the prohibition on avoiding the appearances of impropriety and we should expect lawyers to use it if it may benefit their clients. It is useless to urge lawyers not to use the charge because they, like countries, are loath to engage in unilateral disarmament. If some lawyers can use the charge when it might benefit their clients, then other lawyers will use it in order not to suffer a competitive disadvantage.

Nor can I hold responsible laypeople who—after piling supposition on top of innuendo and allegation—charge that the judge who ruled against them must have been biased because of what she did or did not do, and if the judge did not commit an impropriety, at least, there was

19. See MODEL CODE OF JUDICIAL CONDUCT pmbl. (1990).

20. MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1990).

the “appearance” of one. The typical dictionary defines “impropriety,” as “improper” or “unsuitable.”²¹ The thesaurus treats “impropriety” as a synonym for “rudeness,” “unseemliness,” “bad taste,” “faux pas,” “gaffe,” or “inelegance.”²² Laypeople read the rule and think that it means what it says, judges must not only avoid “impropriety”—a much more open-ended term than “wrongful conduct” or “partiality”—but also they must avoid something that is *not* improper at all, but “appears” to be improper.

Instead, I lay the responsibility for the problem directly with those people who created and lobbied for Canon 2. They share equal billing with those members of the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct²³ who are now drafting a revised Judicial Code that will make the “appearances” rule even broader and more expansive. The proposed ABA Judicial Code will move the “appearances” language from the title of Canon 2 (where the ABA has argued the language is hortatory and aspirational)²⁴ to a new black letter prohibitory rule, Rule 1.02: “A judge shall avoid impropriety and the appearance of impropriety.”²⁵

I am sure that the drafters meant well (we all do). But they were wrong. They were wrong when they added the prohibition in the 1990 Judicial Code and they are wrong to retain and strengthen it in the proposed new ABA Judicial Code. They believed that a rule prohibiting the “appearances of impropriety” will make the world think better of judges, but that belief is inconsistent with the evidence. The world will not think less well of judges if anyone can launch a plausible claim that any judge engaged in an act or omission that was *not* improper but might *appear* to be improper.

Accompanying the advancement of civilization has been the rule of law. As we have become more civilized, there has been a shift from judgments made on an *ad hoc* basis by the King or his representatives to relatively uniform rules enacted by a law-making body. The vague and

21. See, e.g., WEBSTER’S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1252 (2d ed. 1959).

22. See, for example, “impropriety” in the built-in thesaurus in Microsoft Word; or Impropriety, Thesaurus.com, <http://thesaurus.reference.com/search?q=impropriety>.

23. See ABA, About the Commission, <http://www.abanet.org/judicialethics/about.html> (last visited June 17, 2006).

24. ABA, ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 4 (2004) (“Two of the Canons are aspirational (Canons 1 and 2) . . .”). See discussion *infra* note 178 and accompanying text.

25. ABA JOINT COMM’N TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, FINAL DRAFT REPORT, Canon 1, Dec. 14, 2005, available at <http://www.abanet.org/judicialethics/Canon1Final.pdf> [hereinafter FINAL DRAFT REPORT, Canon 1].

indefinite term, “appearance of impropriety,” is a step backward in that journey. Instead of rules, we have the conclusory prohibition of a vague term that invites *ad hoc* and *ex post facto* judgments. That is the reason why one federal court held that the “appearance of impropriety” standard in the New York Code²⁶ governing judges is unconstitutional and void for vagueness, a decision that the Second Circuit reversed on procedural grounds.²⁷

Other courts have expressed similar concerns about the vagueness of it all:

Propriety however, is often in the eye of the beholder. A given individual will find conduct to be within or beyond the bounds of propriety to the extent the conduct comports with that individual’s own highly subjective views of propriety. . . . [D]isciplinary rules expressed in terms of “propriety” risk mercurial existence rising and falling with the temper of the moment. Such rules place *ipse dixit* powers, antithetical to rule of law, in the hands of disciplinary boards and courts applying such rules.²⁸

I offer a simple solution to the problem—the ABA should *not* adopt its proposed Rule 1.02, which provides: “A judge shall avoid impropriety and the appearance of impropriety.”²⁹ Similarly, the ABA should repeal the associated commentary. I am not arguing that the rules governing judges should be made weaker. Instead, I am arguing that they should be made more specific.³⁰ The late Justice Goldberg was

26. N.Y. COMP. CODES R. & REGS. tit. 22, § 100.2 (2004) provides: “A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.”

27. *See Spargo v. New York State Comm’n on Judicial Conduct*, 244 F. Supp. 2d 72, 91 (N.D.N.Y. 2003), *rev’d on other grounds*, 351 F.3d 65 (2d Cir. 2003), *cert. denied*, 541 U.S. 1085 (2004) (federal abstention). The trial court added that the Judicial Commission’s enforcement of § 100.2A “must be arbitrary and subjective, for lack of any specific, objective standards to apply.” *Id.*

28. *In re Larsen*, 616 A.2d 529, 580-81 (Pa. 1992) (per curiam).

29. FINAL DRAFT REPORT, Canon 1, *supra* note 25, at R. 1.02.

30. *See, e.g.*, Editorial, *Weakening the Rules for Judges*, N.Y. TIMES, May 22, 2004, at A16.

The proposed change was apparently driven largely by an overblown concern about the “vagueness” of the appearance-of-impropriety standard. Judges interpret similar terms every day, and there now exists a substantial body of case law and ethics opinions construing the type of behavior that gives rise to an appearance of impropriety. *The proper way to address any undue murkiness, in any event, is for the commission to provide further guidance, not to dilute expectations.*

Id. (emphasis added). *See also* the statement of Mark I. Harrison, Chairman, ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, responding: “One change proposed in our partial draft of revisions to the American Bar Association Model Code of Judicial Conduct is to strengthen—not weaken—the standard requiring judges to avoid even the appearance of impropriety, by moving a prohibition to a more prominent place in the rule.” Mark I. Harrison,

correct when he called the “appearances” rule “unbelievably ambiguous.”³¹ We can do better. The ABA should replace the vague “appearances” rule with specific restrictions. It can codify what the case law decides³² and replace the indefinite “appearances” with less nebulous rules that tell us what constitutes the “appearance” of impropriety when it is not an “impropriety.”

II. “APPEARANCE OF IMPROPRIETY” UNDER THE ABA’S MODEL CODE FOR LAWYERS

If a rule prohibiting the “appearance of impropriety” is a good one, we would expect that the ABA would apply it to lawyers as well. Surely no one would recommend that lawyers engage in the appearance of impropriety. If someone gave a young lawyer fatherly advice, it would include the injunction to avoid the appearance of impropriety. Yet, it is one thing to believe in the concept and another to create an enforceable rule.

The “appearances of impropriety,” as an ethical prohibition, is a useful weapon to attack lawyers. Would the ABA give this weapon to laypeople to attack lawyers? To attack us? The answer is no. We lawyers write the rules and we are safe, for we will not be governed under a standard that threatens to take away our license if we engage in the “appearance of impropriety,” because we do not know what it means. But what is not good enough for the goose is good enough for the gander.

The ABA briefly flirted with the “appearances of impropriety” standard for lawyers but never adopted it as an enforceable rule. The ABA first adopted ethics rules for lawyers in 1908, when it approved thirty-two “Canons of Professional Ethics” at its thirty-first annual

Letter to the Editor, N.Y. TIMES, May 29, 2004, at A14.

Note that the Editorial invited the ABA to codify what “appearances” actually means. The ABA Commission declined that invitation.

31. *Nonjudicial Activities of Supreme Court Justices and Other Federal Judges: Hearings on S. 1097 and S. 2109 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 91st Cong. (1969) (testimony of Justice Arthur Goldberg), quoted in Cynthia Gray, *Avoiding the Appearance of Impropriety: With Great Power Comes Great Responsibility*, 28 U. ARK. LITTLE ROCK L. REV. 63, 93 n.187 (2005).

32. The proposals of the Association of Professional Responsibility Lawyers offers well-drafted language that codifies what “appearances” should really mean. See APLR Letter, *supra* note 7, at 6-13.

Commentators have already tried to make sense of the case law. The ABA can also build on their analyses. See generally Leslie W. Abramson, *Canon 2 of the Code of Judicial Conduct*, 79 MARQUETTE L. REV. 949 (1996).

meeting at Seattle, Washington.³³ Eventually, amendments and additions led to ABA approval of fifteen additional Canons.³⁴ Some principles or Canons were quite specific—for example, “[w]hen a member of the firm, on becoming a judge, is precluded from practicing law, his name should not be continued in the firm name.”³⁵ Others were quite vague and sound more like Law-Day speeches—for example, “above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.”³⁶ But none of these principles required the lawyer to avoid the “appearance of impropriety.”³⁷

That phrase does not appear until the ABA Model Code of Professional Responsibility of 1970.³⁸ Canon 9’s title reads: “A Lawyer *Should* Avoid Even the Appearance of Professional Impropriety.”³⁹ The ABA never intended the Canons (which are merely the titles to rules) to be enforceable rules of discipline. They are more like chapter headings. The “Preliminary Statement” to the Model Code made that point explicitly:

The Canons are statements of *axiomatic norms*, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. They embody the *general concepts* from which the

33. The ABA used these Canons, as amended, until the adoption of the Model Code in 1970. See THOMAS D. MORGAN & RONALD D. ROTUNDA, MODEL RULES OF PROFESSIONAL CONDUCT AND OTHER SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 688 n.* (2006) [hereinafter MORGAN & ROTUNDA (2006)].

34. CANONS OF PROF’L ETHICS (1908), *reprinted in* MORGAN & ROTUNDA (2006), *supra* note 33, at 697-700 (Canons 33-47).

35. *Id.* at 697 (Canon 33, “Partnership-Names”).

36. *Id.* (Canon 32, “The Lawyer’s Duty in Its Last Analysis”).

37. The “appearance of impropriety” standard “did not receive overt expression until the promulgation of the Code in 1970,” but we can find case law that said that there was an “appearance of evil” concept that was “implicit in several of the old Canons of Professional Ethics . . .” *Woods v. Covington County Bank*, 537 F.2d 804, 813 (5th Cir. 1976) (quotations omitted). Older ABA ethics opinions also referred to “an appearance of evil.” *Id.*

38. The ABA House of Delegates adopted the Model Code of Professional Responsibility on August 12, 1969. It was scheduled to take effect in 1970. Later, motivated by antitrust concerns, the ABA changed the name to “Model Code,” and no longer listed an “effective date.” The House amended the Model Code in February 1970, February 1974, February 1975, August 1976, August 1977, August 1978, February 1979, February 1980, and August 1980. For a copy of the latest version of the ABA Model Code, see MORGAN & ROTUNDA (2006), *supra* note 33, at 269-366. The ABA replaced the Model Code with the Model Rules in 1983.

39. MODEL CODE OF PROF’L RESPONSIBILITY Canon 9 (1981), *reprinted in* MORGAN & ROTUNDA (2006), *supra* note 33, at 343 (emphasis added).

Ethical Considerations and the Disciplinary Rules are derived.⁴⁰

In other words, the “appearance of impropriety” was itself never a rule—it is a *reason* why we have some rules that are as strict as they are.⁴¹ There is nothing wrong with using “appearances” as the rationale to create a rule that may seem stricter than it otherwise would have to be.

The problem with “appearances” as a “rule” is that it is not a test, for it offers no reasonably clear guidelines. In contrast, a clear rule is neither fuzzy nor an invitation to *ex post facto* analysis, even if the motivation for the strict rule derives from a concern about appearances.

For example, in the context of the law governing the ethics of lawyers, it is because of appearances that we usually impute to all lawyers in a firm the conflicts that any one of them might have under Rules 1.7 and 1.9.⁴² The “appearances of impropriety” is a reason for the imputation, but “appearances” is not a rule itself. Likewise, when we turn to judicial ethics, it is because of appearances and the need for a bright line that the federal judicial code requires a judge to disqualify herself in any case involving Ford Motor Company if she owns even one share of Ford stock.⁴³

Similarly, it is the general rule that a judge should disqualify herself if a close relative is on the brief. The mere fact that the relative is a member of the firm is not enough to require disqualification.⁴⁴ However,

40. MODEL CODE OF PROF'L RESPONSIBILITY Prelim. Stmt. (1981), reprinted in MORGAN & ROTUNDA (2006), *supra* note 33, at 270 (emphasis added).

41. See, e.g., Roy Simon, *Chinese Wall Fends Off Disqualification in First Department*, N.Y. PROF'L RESP. REP. (NYPRR, Roy D. Simon ed., New York, NY) Sept. 1998, at 6-7, reprinted in Roy Simon, *Conflicts of Interest and Legal Malpractice*, in 1 LEGAL MALPRACTICE: TECHNIQUES TO AVOID LIABILITY 17, 45 (PLI Litigation & Administrative Practice Series, Course Handbook Series No. H-608, 1999) (illustrating the basis of the New York rule that disqualifies a firm from opposing “a former client in a substantially related matter” in order to “avoid the appearance of impropriety”).

42. But Rule 1.10(a) does not impute Rule 1.8. MODEL RULES OF PROF'L CONDUCT R. 1.10(a) (2004).

43. See U.S.C. § 455(b)(4) (2000) (requiring a judge to disqualify herself if she has a “financial interest” in the subject matter); *id.* § 255(d)(4) (defining “financial interest” as “ownership of a legal or equitable interest, however small”). See also Fed. Comm. on Codes of Conduct, Advisory Op. 20 (revised 1998), available at <http://www.uscourts.gov/guide/vol2/20.html> (construing the facially similar text of Canon 3 of the Code of Conduct for United States Judges to require similar disqualification by judges).

44. See MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1)(d)(ii) (1990) (suggesting that disqualification is appropriate if the lawyer-relative “is acting as a lawyer in the proceeding”). The associated Commentary makes clear, “[t]he fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge.” *Id.* The federal rule is the same. 28 U.S.C. § 455(b)(5)(ii) (2000). See also JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS 120 (1990) (explaining that disqualification is only required if the relative-attorney is actually representing the party in a case before the judge).

because of appearances, most of the U.S. Supreme Court Justices announced they would abide by a different rule: they would disqualify themselves not only when the relative was actually “acting as a lawyer in the proceeding,” but also when the relative, though no longer directly involved in the matter, had been “lead counsel” at an earlier stage of the case.⁴⁵

I have no problem with this stricter rule for the Supreme Court. My objections to the “appearances” test relate to vagueness, unpredictability, and unfairness. These objections do not apply when one decides to draw a bright line, although one can certainly argue that the line should be drawn differently.⁴⁶ In other words, a concern of appearances may be a good rationale for a bright line rule, but a concern for appearances offers too little guidance to be a rule itself.⁴⁷

When the ABA drafted the Model Code of Professional Responsibility, it intended that the “appearance” standard for lawyers would simply embody a general foundation that the drafters of the Model Code would use when they created specific Disciplinary Rules (“DRs”). Only the DRs are written in the style of a statute, and the Model Code makes clear that it only intends DRs to be enforceable.⁴⁸ The “appearance of impropriety” does not appear in any DR, although it does appear as the title to DR 9-101 (“Avoiding Even the Appearance of Impropriety”).⁴⁹ The actual DR 9-101 merely imposes a few very specific limits on lawyers accepting private employment in matters where they had acted as a judge or public employee. It also prohibits lawyers from stating or implying that they can influence any government official on corrupt grounds.⁵⁰

45. *Supreme Court Justices Adopt Recusal Policy*, JUD. CONDUCT REP., Fall 1993, at 6. The seven participating Justices were William H. Rehnquist, John Paul Stevens, Sandra Day O'Connor, Antonin Scalia, Anthony M. Kennedy, Clarence Thomas, and Ruth Bader Ginsburg. *Id.*

46. See discussion in Steven Lubet, *Disqualification of Supreme Court Justices: The Certiorari Conundrum*, 80 MINN. L. REV. 657, 660-61, 676 (1996).

47. See generally Robert C. Hacker & Ronald D. Rotunda, *Officers, Directors, and Their Professional Advisers: Rights, Duties, and Liabilities*, 3 CORP. L. REV. 82 (1980); Ronald D. Rotunda, *Sister Act: Conflicts of Interest with Sister Corporations*, 1 J. INST. STUDY LEGAL ETHICS 215 (1996).

48. See MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(1) (1981), reprinted in MORGAN & ROTUNDA (2006), *supra* note 33, at 274 (advising that a lawyer may not “[v]iolate a Disciplinary Rule”); MODEL CODE OF PROF'L RESPONSIBILITY Prelim. Stmt. (1981), reprinted in MORGAN & ROTUNDA (2006), *supra* note 33, at 271 (“The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.”).

49. MODEL CODE OF PROF'L RESPONSIBILITY DR 9-101 (1981), reprinted in MORGAN & ROTUNDA (2006), *supra* note 33, at 345.

50. *Id.*

The phrase “appearance of impropriety” also appears in a few Ethical Considerations (“ECs”).⁵¹ The drafters of the Model Code equally made explicit that the ECs are *not* enforceable. They are only “*aspirational* in character and represent the objectives toward which every member of the profession should strive.”⁵²

The Model Code of Professional Responsibility combined two goals that are not inconsistent but also not congruent. The part that is written in statutory form tells lawyers what they must not do; the part written like grandfatherly advice tells lawyers things that they should keep in mind, like avoiding the appearance of impropriety.

Nonetheless, the use of the “appearances” language in the title to Canon 9 and the references in a few of the ECs create a beguiling test, and it should have been expected that lawyers would seek to use that language to attack their opponents, particularly in disqualification cases. There is a long body of case law, ethics opinions, and commentators cautioning against this open-ended charge.⁵³ For example, an ABA Ethics Opinion warned, if the “appearance of impropriety” language were a disciplinary rule, “it is likely that the determination of whether particular conduct violated the rule would have degenerated . . . into a determination on an instinctive, *ad hoc* or even *ad hominem* basis.”⁵⁴ Commentators, such as Professor Geoffrey C. Hazard, Jr., the reporter for the original ABA Model Rules, referred to the old “appearance of impropriety” standard as “garbage.”⁵⁵

The Second Circuit,⁵⁶ reflecting the case law,⁵⁷ generally advised,

51. See, e.g., MODEL CODE OF PROF'L RESPONSIBILITY EC 5-6, 9-3, 9-5, 9-6 (1981), reprinted in MORGAN & ROTUNDA (2006), *supra* note 33, at 308, 344.

52. MODEL CODE OF PROF'L RESPONSIBILITY Prelim. Stmt. (1981), reprinted in MORGAN & ROTUNDA (2006), *supra*, note 33, at 270 (emphasis added).

53. See Ronald D. Rotunda, *Alleged Conflicts of Interest Because of the “Appearance of Impropriety”*, 33 HOFSTRA L. REV. 1141 (2005).

54. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 342 n.17 (1975), discussed in RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY 33 (7th ed. 2004). This Formal Opinion said: “It is *obvious*, however, that the ‘appearance of professional impropriety’ is *not a standard, test or element* embodied in DR 9-101(B).” Formal Op. 342, *supra* (emphasis added).

55. *Pros and Cons of Restatement Are Debated at D.C. Conference*, 13 ABA/BNA LAWS. MAN. ON PROF. CONDUCT 29, 31-32 (Feb. 19, 1997).

56. See *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225 (2d Cir. 1977).

57. See, e.g., *Bd. of Educ. v. Nyquist*, 590 F.2d 1241, 1247 (2d Cir. 1979) (“[A]pppearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest cases.”); *Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602, 609 (8th Cir. 1977) (refusing to disqualify under “appearance of impropriety” standard that existed in the legal ethics rules at the time because the “appearance of impropriety” is an “eye of the beholder” standard that gives no way to determine what “a member of the public, or of the bar” would consider improper); *Woods v. Covington County Bank*, 537 F.2d 804, 813 (5th Cir. 1976) (“It does not follow . . . that an attorney’s conduct must be governed by [appearance of impropriety] standards which can be imputed only to the most

over a quarter of a century ago:

“When dealing with ethical principles . . . we cannot paint with broad strokes. The lines are fine and must be so marked. . . . [T]he conclusion in a particular case can be reached only after painstaking analysis of the facts and the precise application of precedent.”⁵⁸

When the ABA reevaluated the old Model Code and drafted its new Model Rules in 1983, it not only eliminated the “appearance” standard, but also harshly criticized its use as too subjective and undefined:

[The appearance of impropriety] has a two fold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since “impropriety” is undefined, the term “appearance of impropriety” is question-begging. It therefore has to be recognized that the problem of disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.⁵⁹

cynical members of the public.”); *Sherrod v. Berry*, 589 F. Supp. 433, 437-38 (N.D. Ill. 1984) (no disqualification based on mere appearance of impropriety); *In re Powell*, 533 N.E.2d 831, 836 (Ill. 1998), *cert. denied*, 491 U.S. 907 (1989) (holding that the canon on avoiding even the appearance of impropriety is not an independent basis to impose discipline on a lawyer); *State v. Davis*, 840 A.2d 279, 287 (N.J. Super. Ct. App. Div. 2004) (“The appearance of impropriety provisions in the RPCs seek to reduce the risk of improper conflicts. Because of their vagueness and ambiguity, those provisions, however, are not appropriate as ethics standards. . . .”) (quoting the report of the N.J. Court Commission on the Rules of Professional Conduct).

58. *Fund of Funds, Ltd.*, 567 F.2d at 227 (quoting *United States v. Standard Oil Co.*, 136 F. Supp. 345, 367 (S.D.N.Y. 1955), and citing *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 753 (2d Cir. 1975)).

59. MODEL RULES OF PROF'L CONDUCT R. 1.9 cmt. 5 (2001), *reprinted in* MORGAN & ROTUNDA (2006), *supra* note 33, at 200. *See also, e.g.*, *Golias v. King*, No. 09-95-157 CV, 1995 WL 517222, at *5 (Tex. Ct. App. Aug. 31, 1995) (“Appearance of impropriety was eliminated from the new Disciplinary Rules of Professional Conduct because of vagueness.”).

There was one instance where the drafters of the 2002 Model Rules thought of “appearances,” but it never made it into the final version. A draft version would have “permit[ted] screening without client consent in the case of lawyers moving between firms, to avoid disqualification of an entire firm where a lateral hire previously worked on a matter.” Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 456 (2002). The ABA Commission had decided that, if the Rules would permit screening in such cases, there still was a difference between litigation and transactional practice, but the members then concluded that this difference should only be “a factor that courts may consider in disqualification motions, where there is a concern about the appearance of impropriety.” *Id.* at 456 n.28. The ABA House of Delegates simply deleted the entire section. *Id.* at 456.

When the ABA reevaluated its Model Rules and adopted many changes in 2002 and 2003, it never returned to the old “appearances” language.⁶⁰

The Third Restatement of the Law Governing Lawyers agreed with the ABA decision to remove “appearance of impropriety” in its entirety. This vague charge, the drafters concluded, does not give “fair warning” to a lawyer.⁶¹ It invited a disciplinary panel or court to engage in “subjective and idiosyncratic considerations” and it was correct for the ABA to eliminate that formless and amorphous standard.⁶²

Commentators and courts have sought to justify why lawyers dropped the appearances language from the lawyers’ ethics codes but chose to retain it in the judicial codes.⁶³ The rationales are apt to be vague, such as: people expect more from judges and appearances are important,⁶⁴ or judges are the “symbol of government under the rule of law,”⁶⁵ or judges have different roles than lawyers.⁶⁶ All those

60. The 2002 revisions to the ABA Model Rules eliminated this language as no longer necessary. See M. Peter Moser, *Chinese Walls: A Means of Avoiding Law Firm Disqualification When a Personally Disqualified Lawyer Joins the Firm*, 3 GEO. J. LEGAL ETHICS 399, 406 n.12 (1990) (“This concept [the ‘Appearance of Professional Impropriety’] is expressly rejected in the Model Rules.”).

However, one can find cases that refer to the “appearances of impropriety” in disqualifying a lawyer, even in a jurisdiction that has adopted the Model Rules, which explicitly reject the appearances test. Old habits die hard. See, e.g., *State ex rel. Cosenza v. Hill*, 607 S.E.2d 811, 817-18 (W. Va. 2004).

61. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 5 cmt. c (1998) (citation omitted).

62. *Id.*

63. See, e.g., *Commonwealth v. Goodman*, 311 A.2d 652, 654 (Pa. 1973) (“[T]he appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of either of these elements.”); *In re Dean*, 717 A.2d 176, 184 (Conn. 1998) (“Avoiding the appearance of impropriety is as important to developing public confidence in the judiciary as avoiding impropriety itself.”).

64. Andrew L. Kaufman, *Judicial Ethics: The Less-often Asked Questions*, 64 WASH. L. REV. 851, 854 (1989) (arguing that the “appearance of impropriety” rule is the “basic rule of the Code of Conduct, the one to which all other rules are mere commentary . . .”).

65. David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785, 792 (1993) (quoting MODEL CODE OF JUDICIAL CONDUCT pmbl. (1990)). One appreciates how malleable the concept of “appearances” is when the same author who embraces the “appearances” rule for judges argues for the benefits of Court TV. *Id.* at 826-27. The 1972 ABA Judicial Code, which first adopted the explicit “appearances” rule, also prohibited televised trials. CODE OF JUDICIAL CONDUCT Canon 3A(7) (1972).

66. See Gray, *supra* note 31, at 66 (“The appearance of impropriety standard is ‘peculiar to the judiciary’ because judges have a peculiar position in the American system; they are required to make decisions that sometimes many members of the public will challenge and at all times at least one party will dispute.”) (footnote omitted). See also Roberta K. Flowers, *What You See Is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors*, 63 MO. L. REV. 699,

arguments tend to be conclusory, and, even if accepted at face value, only justify different rules for judges than for lawyers. They do not explain why those different rules must be *vague*. The rationales used to justify the appearances rule do not follow the rigors of Euclidian geometry.

III. THE ABA JUDICIAL CODES AND THE “APPEARANCES OF IMPROPRIETY”

Initially, the ABA did not impose any rule that threatened judges with discipline, removal, or disqualification because of the “appearances of impropriety.” Instead, the ABA moved from fatherly advice to aspirations to stronger cautions to the present proposal that the ABA Commission is now advocating. This progression did not have the inevitable pull of gravity. Instead, it just happened, as if we lawyers and judges are anxious to convince the public that we are more ethical than the prior generation.

Let us start with 1924, when the ABA House of Delegates promulgated the first Judicial Code of ethics, called the *Canons of Judicial Ethics*.⁶⁷ An important catalyst to the 1924 Canons of Judicial Ethics was the revelation, in the early 1920s, that Kenesaw Mountain Landis, a federal judge, was supplementing his federal salary of \$7500 by engaging in private employment with a substantially more generous yearly salary of \$42,500 as a Major League Baseball commissioner.⁶⁸ The ABA adopted a resolution censuring the judge.⁶⁹

Many states viewed the 1924 Judicial Canons as essentially advisory, with their “curious mixture of generalized, hortatory

724 (1998) (arguing that “[a] judge’s independence can be tainted not only by his activities on the bench, but also by his conduct outside the courtroom”). That is true enough, and it justifies why some rules apply to the judge even when she is not acting in a judicial capacity. But it does not explain why we have an “appearances” rule.

67. The ABA considered resolutions for judicial canons in 1909 and 1917, but did not approve a Commission to draft rules until 1922. See ABA, About the Commission, Background Paper, ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, <http://www.abanet.org/judicialethics/about/background.html> (last visited June 17, 2006) [hereinafter Background Paper]. Chief Justice Taft was chairman of the ABA Commission that drafted the 1924 Judicial Canons. *Id.* To see the product of this Commission, see CANONS OF JUDICIAL ETHICS (1924), reprinted in LISA L. MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 131-43 (1992).

68. See Background Paper, *supra* note 67; Walter P. Armstrong, Jr., *The Code of Judicial Conduct*, 26 SW. L.J. 708, 709 n.9 (1972); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 965 n.72 (West Pub. Co. Practitioner’s ed. 1986).

69. See Armstrong, *supra* note 68, at 709.

admonitions and specific rules or standards of proscribed conduct.”⁷⁰ This Judicial Code, like the original Canons of Professional Ethics, was more sermonizing than statutory.⁷¹

The title of Canon 4 of the 1924 Canons of Judicial Ethics was “Avoidance of Impropriety.”⁷² This Canon provided, in part, that “[a] judge’s official conduct should be free from impropriety and the appearance of impropriety”⁷³ This Canon also advised that the judge, in his everyday life should be “beyond reproach.”⁷⁴ Such vague language was advice, not a statutory command, but it was the precursor of things to come.

Nearly a half century later, the ABA House of Delegates replaced these Canons with the 1972 Code of Judicial Conduct.⁷⁵ Many states widely adopted the 1972 Code (subject, of course, to various nonuniform amendments). The drafters wrote the 1972 Code in more conventional statutory form, and its preface (which many jurisdictions did not adopt) intended that it be enforceable.⁷⁶

70. John F. Sutton, Jr., *A Comparison of the Code of Professional Responsibility with the Code of Judicial Conduct*, 1972 UTAH L. REV. 355, 355-56. See also Robert B. McKay, *Judges, the Code of Judicial Conduct, and Nonjudicial Activities*, 1972 UTAH L. REV. 391, (1972).

71. The Preamble of the 1924 Code indicated that the Code was a “guide and reminder for judges . . . indicating what the people have a right to expect from them.” CANONS OF JUDICIAL ETHICS, *supra* note 67, at 132.

72. *Id.*

73. *Id.*

74. *Id.* at 133. Courts sometimes quoted this language in the course of judicial discipline. In one case, the Supreme Court of Ohio said of the judge:

Respondent admitted that he, while still married to, but separated from, his first wife, took his “girlfriend” (now his second wife) with him, at his expense, on the trip to Majorca and on the two trips to Mexico, but he testified that they did not occupy the same room on any of the trips. Such conduct is not behavior beyond reproach within the meaning of Canon 4.

Cincinnati Bar Ass’n v. Heitzler, 291 N.E.2d 477, 482 (Ohio 1972). The case involved a disciplinary proceeding against an attorney who was also a judge. The Ohio Supreme Court affirmed the findings of the Board of Commissioners on Grievances and Discipline, which had ruled that the respondent had violated various Canons of Judicial Ethics. *Id.* at 488. The court indefinitely suspended the respondent from the practice of law. *Id.*

75. This Judicial Code was a reaction, at least in part, to the events “that led to Justice Fortas’s resignation from the Supreme Court and the financial and other disclosures that came about when the U.S. Senate rejected President Nixon’s nomination of Federal Circuit Judge Haynsworth, and then Circuit Judge Carswell.” RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *LEGAL ETHICS: THE LAWYER’S DESKBOOK ON PROFESSIONAL RESPONSIBILITY 2005-2006* § 10.0-2 (2005).

76. The Preface to the 1972 Judicial Code said: “The canons and text establish mandatory standards unless otherwise indicated.” CODE OF JUDICIAL CONDUCT Preface (1972), *quoted in* CTR. FOR PROF’L RESPONSIBILITY & JUDICIAL DIV., ABA, ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 4 (2004) [hereinafter ABA, ANNOTATED MODEL CODE]; E. WAYNE THODE, *REPORTER’S NOTES TO CODE OF JUDICIAL CONDUCT* 5 (1973). Many jurisdictions did not reprint the preface when they adopted the 1972 Code.

Nonetheless, the 1972 Judicial Code used the term “*should*” instead of the more statutory “*shall*.” Thus, the title to Canon 2 said: “A Judge *Should* Avoid Impropriety and the Appearance of Impropriety in All His Activities.”⁷⁷ The Reporter’s Notes advised that “[t]he black-letter statement of Canon 2 is very broad in its terms and perhaps the nearest to being hortatory of any provision in the *Code*.”⁷⁸

The road to mandatory rules rather than aspirational guidelines continued with the 1990 version of the ABA Code of Judicial Conduct. A “significant minority of commentators” warned the ABA Committee drafting the new Code that the “appearances” language in the 1972 Judicial Code was simply too vague.⁷⁹ But the drafting Committee responded by changing “*should*” to “*shall*” and *expanding* its reach to include the judge’s activities even when she is off the bench and not acting in her capacity as a judge.⁸⁰ Thus, the title of Canon 2 of the 1990 Code provides: “A Judge *Shall* Avoid Impropriety and the Appearance of Impropriety in All of the Judge’s Activities.”⁸¹ However, the requirement was still the *title* to Canon 2 rather than one of the rules under Canon 2.

This language certainly looks like a prohibition, and the accompanying commentary does not suggest that the requirement is merely aspirational. Nonetheless, the legislative history advised that the purpose of this expanded rule is “to *caution* judges to avoid certain prospective conduct even if the conduct only appears suspect, and to proscribe any act that is harmful even if it not specifically prohibited in the Code.”⁸²

Perhaps because of this reference to “*caution[ing]*” the judge, or for some other reason, the ABA’s Annotated Model Code of Judicial Conduct simply announces: “*Two of the Canons are aspirational (Canons 1 and 2) . . .*”⁸³ The ABA does not explain its significant assertion that these two Canons are supposed to be merely aspirational,

77. THODE, *supra* note 76, at 8 (emphasis added).

78. *Id.* at 49.

79. MILORD, *supra* note 67, at 13.

80. In addition, the 1990 Code adopted various changes in the details and organization.

81. MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1990) (emphasis added). The 1990 Judicial Code made clear that “an appearance of impropriety” exists “even in the absence of an actual impropriety . . .” MILORD, *supra* note 67, at 13.

82. MILORD, *supra* note 67, at 13 (emphasis added).

83. ABA, ANNOTATED MODEL CODE, *supra* note 76, at 4 (emphasis added). The full sentence says: “Two of the Canons are aspirational (Canons 1 and 2), and the other three address specific types of judicial conduct: conduct when carrying out adjudicative and administrative duties (Canon 3), conduct in various extrajudicial activities (Canon 4), and conduct in campaigning for judicial office (Canon 5).” *Id.*

not mandatory, and so we should not read it as an official gloss on the language. I think that many courts would find this statement astonishing, for they use this “appearances” language to discipline judges, not simply to “caution” them. As a typical case, *Joachim v. Chambers*,⁸⁴ stated:

Canon 2 in the 1990 Model Code has been amended to use “shall” instead of “should”. *This provision is now mandatory*, inasmuch as the preamble to the Model Code provides: “When the text uses ‘shall’ or ‘shall not,’ it is intended to impose binding obligations the violation of which can result in disciplinary action. When ‘should’ or ‘should not’ is used, the text is intended as hortatory and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined.”⁸⁵

The ABA’s Annotated Model Code of Judicial Conduct actually cites *Joachim* twice, once on the very same page that it declares Canon 2 to be merely aspirational, and elsewhere, but both times it is for another proposition.⁸⁶

In addition to the “appearances” command of Canon 2, there are also a few official Comments that refer to “appearance of impropriety,” or similar language.⁸⁷ This Commentary does not create new rules, but does offer explanations.⁸⁸ Case law concurs.⁸⁹ Hence, a review of the Comments may offer insight to what the “appearances” requirement actually means. Unfortunately, in this case, when one reads all these Comments, it is fair to say that they do not explain the definition of “appearance of impropriety,” although they are sometimes redundant.⁹⁰

84. 815 S.W.2d 234 (Tex. 1991).

85. *Id.* at 239 n.9 (emphasis added and citation omitted).

86. The Annotated Model Code cites *Joachim* for the proposition that a retired judge who continues to serve as a judicial officer by assignment may not testify as an expert witness in a legal malpractice case, ABA, ANNOTATED MODEL CODE, *supra* note 76, at 75, and for the proposition that the 1990 Code, unlike the 1972 Code, uses “shall” to express a mandatory obligation. *Id.* at 4. The rationale for the declaration of the Annotated Model Code that Canon 2 is merely aspirational remains a mystery.

87. *See infra* note 90.

88. *See* MODEL CODE OF JUDICIAL CONDUCT pmb. ¶ 2 (1990), *reprinted in* MORGAN & ROTUNDA (2006), *supra* note 33, at 604. *See also* ABA, ANNOTATED MODEL CODE, *supra* note 76, at 4.

89. *People for Ethical Treatment of Animals v. Bobby Berosini, Ltd.*, 894 P.2d 337, 340 n.5 (Nev. 1995) (“The Canons and the Sections are authoritative. The Commentary provides guidance to the purpose and meaning of the Canons and Rules by explanation and example; it is not a statement of additional rules.”).

90. For example, the Commentary on Canon 2A states:

A judge must avoid all impropriety and appearance of impropriety. . . .

The prohibition against behaving with impropriety or the appearance of

IV. THE PROPOSED NEW ABA JUDICIAL CODE AND THE “APPEARANCES OF IMPROPRIETY”

Since 2003, the American Bar Association has been in the process

impropriety applies to both the professional and personal conduct of a judge. . . . The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.

MODEL CODE OF JUDICIAL CONDUCT Canon 2A cmt. (1990).

The Commentary to Canon 2C reads as follows:

[A] judge’s membership in an organization that engages in any discriminatory membership practices *prohibited by the law of the jurisdiction* also violates Canon 2 and Section 2A and gives the appearance of impropriety. . . . Moreover, public manifestation by a judge of the judge’s knowing approval of invidious discrimination on any basis gives the appearance of impropriety under Canon 2 and diminishes public confidence in the integrity and impartiality of the judiciary, in violation of Section 2A.

MODEL CODE OF JUDICIAL CONDUCT Canon 2C cmt. (1990) (emphasis added). Note that this Comment merely prohibits that which other law already prohibits (“prohibited by the law of the jurisdiction”).

The Commentary to Canon 3B(5) states:

A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. *Facial expression and body language, in addition to oral communication*, can give to parties or lawyers in the proceeding, jurors, the media and others *an appearance of judicial bias*.

MODEL CODE OF JUDICIAL CONDUCT Canon 3B(5) cmt. (1990) (emphasis added). This Comment is actually clear. It does not define “appearance,” but rather it imposes a new restriction and provides useful advice by telling the judge not to manifest prejudice towards a party orally or by other means, such as facial and body language.

The Commentary on Canon 4D(1) is redundant; it simply tells us that violating the rules governing financial and business dealings also raises an appearance of impropriety:

Participation by a judge in financial and business dealings is subject to the general prohibitions in Section 4A against activities that tend to reflect adversely on impartiality, demean the judicial office, or interfere with the proper performance of judicial duties. Such participation is *also subject* to the general prohibition in Canon 2 against activities involving impropriety or the appearance of impropriety and the prohibition in Section 2B against the misuse of the prestige of judicial office.

MODEL CODE OF JUDICIAL CONDUCT Canon 4D(1) cmt. (1990) (emphasis added).

The Commentary preceding Canon 4H only tells us that the appearance of impropriety furnishes the reason for the reporting requirements in Canon 6 of the 1972 Judicial Code and Canon 4H of the 1990 Judicial Code: “Canon 6, new in the 1972 Code, reflected concerns about conflicts of interest and appearances of impropriety arising from compensation for off-the-bench activities.”

MODEL CODE OF JUDICIAL CONDUCT Canon 4H introductory cmt. (1990).

Canon 4H(1) tells us that the compensation and reimbursement of extra-judicial activities that the Judicial Code allows should not be excessive, and the source of the funds should not give “the appearance of influencing the judge’s performance of judicial duties or otherwise give the appearance of impropriety.” MODEL CODE OF JUDICIAL CONDUCT Canon 4H(1) (1990). This rule does not raise the same questions that Canon 2 creates because it is not open-ended. Litigants before the judge should not be funding the judge’s speaking opportunities. When an individual or an entity does pay for the judge’s time (for example, when he or she gives a lecture), the pay should be reasonable, and should not “exceed what a person who is not a judge would receive for the same activity.” MODEL CODE OF JUDICIAL CONDUCT Canon 4H(1)(a) (1990).

of revising its judicial ethics rules. Recall that the ABA's Model Code of Professional Responsibility never intended that the "appearance of impropriety" would be used as a rule to impose discipline, and its newer Model Rules of Professional Conduct use that phrase only to criticize it.⁹¹ Not so with the proposed judicial revisions. Last year, after a great deal of deliberation and public criticism,⁹² the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct decided to retain its prohibition against an "appearance of impropriety,"⁹³ and to *expand* it by using it not only as the title to Canon 1, but also as a special, separate rule under that Canon, Rule 1.02.⁹⁴

A great deal of commentary and controversy has accompanied this issue. Many of the opponents were—as any legal realist might guess—lawyers who represent judges and judicial candidates in judicial discipline proceedings.⁹⁵ The opponents did not persuade the Commission, which continues the "appearance of impropriety" standard:

The Commission heard presentations and received numerous written communications on the question, identified by the Commission itself as an important one at the beginning of the project, of whether the "appearance of impropriety" concept contained in the present Code should be retained. A majority of commentators on the subject, citing to judicial discipline cases decided over a three-decade period, urged that the concept be retained. . . . The Commission was persuaded [so that] the Preliminary Draft places the admonishment that judges avoid not only impropriety but also its appearance in two places: in the text of Canon 1 and in Rule 1.03. The explicating Comment language relating to impropriety and its appearance are substantially as they appear in the present Code.⁹⁶

The Final Draft of the Commission Report provides, in the title of Canon 1, that "[a] judge . . . shall avoid impropriety and the appearance of impropriety in all of the judge's activities."⁹⁷ Later, Rule 1.02, which

91. See *supra* Part II.

92. See, e.g., *Weakening the Rules for Judges*, *supra* note 30, at A16; Harrison, *supra* note 30, at A14 (responding).

93. The title of Canon 1 reads, "A judge shall . . . avoid impropriety and the appearance of impropriety in all of the judge's activities." FINAL DRAFT REPORT Canon 1, *supra* note 25 (emphasis added).

94. Rule 1.02 is entitled "Impropriety and Its Appearance." *Id.* R. 1.02.

95. See, e.g., APLR Letter, *supra* note 7, at 6-13.

96. ABA JOINT COMM'N TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, PRELIMINARY DRAFT, INTRODUCTORY REPORT, June 30, 2005, at 4, available at <http://www.abanet.org/judicialethics/IntroductoryReport.pdf>.

97. FINAL DRAFT REPORT, Canon 1, *supra* note 25.

is titled “Impropriety and Its Appearance,” provides that “[a] judge shall avoid impropriety and the appearance of impropriety.”⁹⁸

The new proposed Rules attempts to define “impropriety” in its “Terminology” section. It tells us that “impropriety” is “conduct that compromises the ability of a judge to carry out judicial responsibilities with independence, integrity, and impartiality, or otherwise demeans the judicial office. See Canon 1 and Rule 1.02.”⁹⁹ Do you find that clear?

If it is clear enough, then why bother to draft the rest of the Judicial Code? All those other provisions exist only to prohibit any conduct that “compromises the ability of a judge to carry out judicial responsibilities with independence, integrity, and impartiality, or otherwise demeans the judicial office.”¹⁰⁰

A Comment to Rule 1 tries to elaborate on this definition in two different sentences. I will quote the language exactly because I want you to know that I am not making this up. This is the first sentence:

The test for impropriety is whether the conduct compromises the ability of the judge to carry out judicial responsibilities with independence, integrity, impartiality, and competence.¹⁰¹

The first sentence merely *repeats* the language in the Terminology section. Repetition adds nothing to our understanding of the concept. That sentence serves neither to define the term nor to explain its rationale.

The second sentence states:

Examples of actual improprieties under this Rule include violations of law, court rules, or other specific provisions of this Code.¹⁰²

The first part of this sentence tells that that it is improper to violate the ethics rules—something that we had already suspected. In that sense, it is not too helpful for two reasons. First, it is too broad because it tells us that an impropriety *is* a violation of any law, court rules, or other specific provisions of the Judicial Code. That rule is clear but it is much too broad. The violation of court rules (other than violations of the Judicial Code) or the violation of a law should have some functional relationship to the business of judging. Lawyers are subject to discipline

98. *Id.* R. 1.02.

99. ABA JOINT COMM’N TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, FINAL DRAFT REPORT, Terminology, Dec. 14, 2005, at 3, *available at* <http://www.abanet.org/judicialethics/TerminologyFinal.pdf>.

100. *Id.*

101. FINAL DRAFT REPORT, Canon 1, *supra* note 25, R. 1.02 cmt. 2.

102. *Id.*

for committing crimes “that reflect[] adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”¹⁰³ Lawyers are also disciplinable if they engage in any conduct that involves “dishonesty, fraud, deceit or misrepresentation.”¹⁰⁴ If a lawyer engages in this conduct, even if the lawyer is not acting as a lawyer at the time, the conduct has a functional relationship to the practice of law.

In contrast, the proposed Judicial Code would subject a judge to discipline or removal or some other remedy if he breaks a law, no matter how unrelated it is to the practice of law.¹⁰⁵ It is unclear why a violation of any law, *no matter how minor* (not putting enough money in the parking meter, crossing the fog line on a highway, driving 56 m.p.h. in an 55 m.p.h. zone) really merits judicial discipline. Granted, this part of the proposed rule is clear, but its rationale is not. One would think that the violation should have some functional relationship to what judges do. Violating the Judicial Code has a functional relationship to the business of judging; violating a parking ordinance does not.

There is a second reason why this sentence is unhelpful: It is also too vague. If this sentence of the Comment had said that an impropriety *is* a violation of a law, court rules, or other specific provisions of the Judicial Code, then that would have been quite clear, although too broad. But the Comment advises that those violations of law (even minor law for which there is no criminal penalty) are *merely examples* of what is an impropriety.¹⁰⁶ The language does not use the boilerplate, “include[d] but not limited to,” but the Comments are written in a less formal tone than the black letter rules, so one should not make too much of this fact, because “include” often means a partial list.¹⁰⁷ The Comment, in the end, gives us no real test to determine what constitutes an “impropriety.”

The failure of this Comment to give us a real test has consequences far beyond the ABA. The ABA draft of the Judicial Code, like its predecessors, becomes real law (in the same way that rules of procedure or rules of evidence are real law) when a court adopts it.¹⁰⁸ This “model”

103. MODEL RULES OF PROF’L CONDUCT R. 8.4(b) (2003).

104. *Id.* R. 8.4(c).

105. See FINAL DRAFT REPORT, Canon 1, *supra* note 25, R. 1.02 cmt. 2.

106. *Id.*

107. See BLACK’S LAW DICTIONARY 777-78 (8th ed. 2004) (defining “include” as follows: “To contain as a part of something. The participle including typically indicates a partial list <the plaintiff asserted five tort claims, including slander and libel>. But some drafters use phrases such as including without limitation and including but not limited to—which mean the same thing.”).

108. Because the Model Judicial Code, if adopted as a rule of the court, becomes real law, one wonders why the drafters refer to “violations of law, court rules, or other specific provisions of this Code.” FINAL DRAFT REPORT, Canon 1, *supra* note 25, R. 1.02 cmt. 2. One would think that the drafters would refer to “violations of *other* law, such as statutes or other court rules.”

code thus has significant consequences, particularly because whatever the ABA recommends comes with a presumption of authority, and state and federal courts are likely to adopt it. Even when a court has not adopted the ABA model codes it often cites them (as well as the ABA ethics opinions) as evidence of the law.¹⁰⁹

Compare this proposed ABA Comment to a litmus test. In a litmus test, we dip the paper (created from lichens and absorbed into filter paper) in the solution, and we know if the solution is acidic or basic when the paper turns red (acid solutions) or blue (alkaline solutions). A test that tells us that the solution is *sometimes* acidic if the paper turns red, or that it is *sometimes* basic if the paper turns blue would not be much of a test at all.

The test for “impropriety” found in the latest draft of the ABA proposed Judicial Code is as useful as litmus paper that *sometimes* turns blue even if the solution is acidic. The proposed revision of the ABA Judicial Code—the latest draft, the product of several years of effort and countless lawyer-hours—tells us that there is an impropriety if the judge (at a minimum) commits a violation “of law, court rules, or other specific provisions of this Code.”¹¹⁰ That definition, if it were complete, only makes the term redundant, a characteristic that would cause little harm. Granted, redundancy is not an attribute of good legislative drafting, but there are worse sins. No, this self-proclaimed “test” is more than redundant. Instead, it is inconclusive and indecisive, for it gives these violations as mere examples. The real test is “whether the conduct compromises the ability of the judge to carry out judicial responsibilities with independence, integrity, impartiality, and competence.”¹¹¹

The ABA “test” for “impropriety” explicitly provides that “impropriety” is *more than* a violation of these ethics rules, or any other rules of the court, or any other law. How much more? How do we know *when* conduct “compromises the ability of the judge to carry out judicial responsibilities with independence, integrity, impartiality, and competence”? The proposed Judicial Code is silent.

Now that the proposed Judicial Code has told us how to determine what constitutes an impropriety, we need to know what constitutes an “appearance of impropriety.” As a matter of logic, “appearance” must be something broader than an impropriety itself, for there would be no need

109. See *Ex parte* Masonite Corp., 681 So. 2d 1068, 1070 (Ala. 1996); *Frye v. Tenderloin Housing Clinic, Inc.*, 129 P.3d 408, 426 n.12 (Cal. 2006); *Nationwide Mut. Fire Ins. Co. v. Bournlon*, 617 S.E.2d 40, 57 (N.C. Ct. App. 2005).

110. FINAL DRAFT REPORT, Canon 1, *supra* note 25, R. 1.02 cmt. 2.

111. *Id.*

to mention it if it were already included in the concept of an “impropriety.” Oddly enough, there is no definition in the Terminology section for “appearance,” although this term appears multiple times: in the title of Canon 1, the title of Rule 1.02, and in Rule 1.02 itself.¹¹²

However, we find an attempt at a definition and a test in Comment 2 of Rule 1.02:

The test for an appearance of impropriety is whether the conduct of the judge would be perceived by a reasonable person *with knowledge of the circumstances* to impair the judge’s ability to carry out judicial responsibilities with independence, integrity, impartiality, and competence.¹¹³

This test is remarkably similar to the test to determine what constitutes an impropriety. Recall, the proposed Judicial Code tells us that “the test for impropriety is whether the conduct compromises the ability of the judge to carry out judicial responsibilities with independence, integrity, impartiality, and competence.”¹¹⁴

So what is an “appearance”? Apparently it is something that is not itself an impropriety but appears to be so to “a reasonable person with knowledge of the circumstances.” But if this reasonable person *knows what is going on*—the person has “knowledge of the circumstances”—then one would think that he or she would already know whether it really is an impropriety or not. And, if it is not an impropriety, how can it look like an impropriety, how can it become the appearance of an impropriety, to a *reasonable* person who really knows what is going on (“a reasonable person with knowledge of the circumstances”)?

If this reasonable person, who knows what both the law and facts are, decides that the judge’s action would “impair the judge’s ability to carry out judicial responsibilities with independence, integrity, impartiality, and competence,” then that action is an impropriety, which gets us right back to square one.

But an “appearance” is supposed to be more than a mere impropriety,¹¹⁵ so we are a further step removed from the litmus paper test that turns red, *sometimes*, when the solution is acidic. Remember, we are talking about drafting a law. Lawyers should be good at drafting;

112. *Id.*

113. *Id.* (emphasis added). See also, e.g., *State v. Ross*, 974 P.2d 11, 20 (Haw. 1998) (holding that “the test for disqualification due to the ‘appearance of impropriety’ is an objective one, based not on the beliefs of the petitioner or the judge, but on the assessment of a reasonable impartial onlooker *apprised of all the facts*”) (emphasis added).

114. FINAL DRAFT REPORT, Canon 1, *supra* note 25, R. 1.02 cmt. 2.

115. See MILORD, *supra* note 67, at 13.

they should be particularly good at drafting language dealing with the practice of judging, because that is their training. The ABA is telling us that one cannot get more precise than this.

Granted, not all tests have the precision of a real litmus test, where a single factor is decisive. Law is more an art than a science. While it is an art, it is not black magic. There is a rhyme and reason when the law must use tests that are imprecise. Consider a common rule in driving, “driving too fast for conditions.” We know that if the weather is bad, ice is on the road, visibility is dreadful, and traffic is congested, one drives “too fast for conditions” even if one stays within the speed limit. Yet we cannot make this rule more precise, such as “you must stay five miles under the posted limit when it rains a lot,” because it would not solve the problem of driving “too fast” based on all the conditions.

We tolerate vagueness in driving law because the risks are high (highway accidents kill people), we cannot think of another way to draft the language, and we all have a good sense of what it means to drive too fast for conditions, so that the limited ambiguity is inherent.

We accept vagueness in that circumstance while we would not accept a law that forbade “walking too fast for conditions.”¹¹⁶ As for “walking too fast,” the risks are small, we do not have a good sense of what that means, and we have other laws that can take care of truly boorish conduct (for example, laws against public drunkenness and assault and battery).

Now compare “driving too fast for conditions” to the “appearance of impropriety,” which can, on occasion, lead to a judge being removed from the bench or suspended. More likely, it leads to the judge losing his or her reputation, which is to a lawyer what gold is to a goldsmith; it represents what we are and it is our stock in trade. Think of this another way: If you were nominated for a federal judgeship, would you rather have the Senators reject you because you are not smart enough, or because you are unethical? We all would choose the first alternative. Yet the ABA has armed every disgruntled litigant with the means to tear down a judge’s reputation by arguing that, “even if what you did was not wrong, it appeared wrong to me, and so you violated the appearance of impropriety.”

116. See 4 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 20.9, at 274 (3d ed. 1999).

V. THE CASE LAW AND ETHICS OPINIONS REQUIRING JUDGES TO AVOID THE “APPEARANCE OF IMPROPRIETY”

The cases and ethics opinions that refer to the “appearance of impropriety” are numerous. In their judicial opinions, they treat it as the gold standard, something to which we should all strive.¹¹⁷ We have now had over thirty-three years of experience, a third of a century, under the present Canon 2: “A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge’s Activities,” or its predecessor, the 1972 version, which was identical except that it used “should” instead of “shall.”¹¹⁸

That should be enough time for the case law to give us enough examples of what this prohibition is trying to accomplish. The ABA ought to study the case law, make judgments, and choose what conduct it concludes that law should prohibit, and then draft specific rules to prohibit that bad conduct. The ABA will have plenty of help, for others have already analyzed the case law and have come up with proposed specific rules.¹¹⁹

When we look at the case law, we find that courts often use the “appearance of impropriety” as a make-weight, to label an activity that other provisions of the Model Code already forbid. Removing “appearances” from the Judicial Code will not affect judicial actions in any way. When a specific rule already prohibits certain conduct, there is no need to pile on the “appearance of impropriety.”¹²⁰

In some other circumstances, even when the court only uses the “appearances” language, it is easy to codify what the case law decides and replace the general language of “appearance” with more specific rules that tell us what constitutes the appearance of impropriety.¹²¹ For

117. One wonders why striving for “appearance” is considered so noble. The proposed Model Judicial Code suggests that the appearance is at least as important as the reality. The novelist Henry Fielding has other views when he warned us that “[t]he most formal appearance of virtue, when it is only an appearance,” is “rather less commendable than virtue itself,” even though it will “be always more commended.” HENRY FIELDING, *THE HISTORY OF TOM JONES, A FOUNDLING* 615 (Modern Library ed., Random House, Inc. 1994) (1749), available at <http://www.literaturepage.com/read/tom-jones-557.html>.

118. MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1972).

119. See, e.g., Abramson, *supra* note 32, at 958-67; APLR Letter, *supra* note 7, at 7, 11.

120. *Disciplinary Counsel v. Lisotto*, 761 N.E.2d 1037, 1038 (Ohio 2002) (per curiam) (holding that a judge’s acceptance of tickets to sporting events from the lawyer who appeared before him, and to whom he once referred a potential client, together with his failure to include receipt of tickets on his original financial statements, violated Canons prohibiting (1) a judge’s acceptance of gifts from a person who has come or is likely to come before him or her, (2) filing of complete and timely financial disclosure statements, and (3) requiring avoidance of appearance of impropriety).

121. See analysis of case law in, e.g., Abramson, *supra* note 32, at 958-67. See also Gray,

example, Canon 4D(1)(b) advises the judge not to engage in business relations with lawyers who appear before him.¹²² Canon 4D(5) also tells the judge not to accept a loan “from anyone,” subject to a few exceptions.¹²³ The judge may accept a loan from a lending institution in its regular course of business on the same terms available from people who are not judges. A few cases cite the “appearance of impropriety” as a reason for a judge not to accept loans from lawyers who regularly appear before him, yet one does not need that vague term to reach the common-sense result.¹²⁴

A. *Stock Ownership and the “Appearance of Impropriety”*

Consider the situation where a judge owns stock in an entity that appears before him. Those were the facts of *Huffman v. Arkansas Judicial Discipline and Disability Commission*.¹²⁵ In this case, the judge and his wife then owned 12,000 shares of Wal-Mart stock worth about \$700,000.¹²⁶ The judge argued that the amount was “de minimis,” and so the court avoided that issue by holding that the judge’s ownership of the retailer’s stock created an appearance of impropriety in ruling on Wal-Mart’s motion for a temporary restraining order.¹²⁷ Maybe it was de minimis to the judge, for we do not know what his net worth was, and perhaps it is the case that nothing he decided in that case could have moved the stock in any direction. We do not have the facts to make the

supra note 31, at 67 (“Although in most judicial discipline cases, a judge is charged with violating a specific canon such as the prohibition on ex parte communications, there are cases based on findings of an appearance of a violation. Most appearance cases fall into several categories.”). Note however that this author favors the present “appearances” language. *See also* APLR Letter, *supra* note 7, at 7, 11.

122. MODEL CODE OF JUDICIAL CONDUCT Canon 4D(1)(b) (1990).

123. MODEL CODE OF JUDICIAL CONDUCT Canon 4D(5) (1990).

124. *In re Topper*, 553 N.E.2d 306, 311-12, 316 (Ill. 1990) (disciplining a lawyer for lending money to the judge presiding over client’s case—it was irrelevant that the judge did not rule in the client’s favor; similarly irrelevant was the claim that the judge extorted the money from the lawyer); *In re Corboy*, 528 N.E.2d 694, 698, 700-01, 703 (Ill. 1988) (concluding that six \$1,000 loans to a judge, by six lawyers, regardless of their alleged charitable intent, raised the appearance of impropriety—surprisingly, in this case, the court said that it would not censure the lawyers for violating any disciplinary rule, because “they [had] acted without guidance of any precedent or settled opinion”); *In re Litman*, 272 N.W.2d 264, 266 (Minn. 1978) (“[R]egardless of a lawyer’s innocent intentions or the existence of a long-established friendship and personal relationship with a judge or the judge’s urgent need for financial help, making a loan to a judge before whom a lawyer practices as [sic] the ineluctable appearance of tampering with judicial impartiality. As Canon 9, Code of Professional Responsibility, emphasizes, ‘A Lawyer Should Avoid Even the Appearance of Professional Impropriety.’”).

125. 42 S.W.3d 386 (Ark. 2001).

126. *See id.* at 391.

127. *See id.* at 390, 393-94.

decision.

The 1990 ABA Model Code provides that the judge (subject to various exceptions not applicable here) must disqualify himself in any case where he or his spouse have “a more than de minimis interest that could be substantially affected by the proceeding.”¹²⁸ What is “de minimis”? The Model Code tells us that it is “an insignificant interest that could not raise reasonable questions as to a judge’s impartiality.”¹²⁹ The ABA Model Judicial Code loves ambiguity even when precision is easily attainable.

In contrast, the federal statute¹³⁰ and the Model Code of 1972¹³¹ are clear-cut on this issue. If you own even one share of Wal-Mart, you must disqualify yourself because any interest is a financial interest. There should be little hardship on the judge or the parties because, under the 1972 Code, the parties could waive the disqualification.¹³²

Under this bright-line test, the law gave the judge fair warning, and he or she (and the litigants) knew exactly what the judge must do. The judge did not have to decide whether fifty shares of Wal-Mart stock is de minimis in some absolute sense. The fifty shares might be worth \$1200, which is not chicken feed. Or, it may be de minimis in some comparative sense. The judge may have a net worth of \$10 million, so even if his decision would reduce the value of the company by 10% in one day (and that is a huge drop to be attributed to one judicial decision), and the judge owns 500 shares of stock worth \$22,000, that still amounts to only .22% of his net worth, hardly a ripple.

128. MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1)(d)(iii) (1990).

129. MODEL CODE OF JUDICIAL CONDUCT Terminology (1990).

130. 28 U.S.C. § 455(b)(4) provides:

He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, *has a financial interest* in the subject matter in controversy or *in a party* to the proceeding, *or any other interest* that could be substantially affected by the outcome of the proceeding.

28 U.S.C. § 455(b)(4) (2001) (emphasis added).

The statute then defines “financial interest” as the “ownership of a legal or equitable interest, *however small*,” subject to various exceptions that are not applicable here. *Id.* § 455(d)(4) (emphasis added). See also Fed. Comm. on Codes of Conduct, Advisory Op. 20 (revised 1998), available at <http://www.uscourts.gov/guide/vol2/20.html>.

131. Canon 3C(1)(c) of the 1972 Model Judicial Code provided that the judge should disqualify himself if “he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in . . . a party to the proceeding” CODE OF JUDICIAL CONDUCT Canon 3C(1)(c) (1972), reprinted in THOMAS D. MORGAN & RONALD D. ROTUNDA, 1989 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 335 (1989) [hereinafter MORGAN & ROTUNDA (1989)]. There was no de minimis test.

132. See CODE OF JUDICIAL CONDUCT Canon 3D (1972), MORGAN & ROTUNDA (1989), *supra* note 131, at 336 (allowing parties to waive disqualification, outside the presence of the judge, in writing).

The modern ABA approach, including the proposed new ABA Judicial Code, invites the litigants to inquire of the judge's net worth. A simpler solution—and one that has worked in federal court for decades—is for the judge to disqualify himself if he owns even one share of stock. Or, the judge can avoid this problem by simply investing in mutual funds.¹³³

B. Ethics Opinions and the “Appearance of Impropriety”

The range of activities that might “appear” improper is even greater when one turns to the ethics opinions. In some cases, they rely on the “appearance of impropriety,” when it may be unlikely that a court would ever enact a specific rule prohibiting the conduct. One can find many ethics opinions that worry about any relationship between the practicing bar and judges.¹³⁴ These ethics opinions are advisory, and so they share the problem that is inherent in advisory opinions: The authors talk about issues and not concrete cases, and it is simpler to inveigh against “appearances” in a vacuum.

For example, a Kansas ethics opinion warned associations of lawyers that awarding a “Judge of the Year” to honor a trial judge would raise the appearance of impropriety.¹³⁵ The ABA has similarly advised that “[a] bar association whose members customarily represent the same side of cases in litigation involving a certain area of the law may not

133. The 1990 ABA Model Code defines “economic interest” to exclude an interest in a mutual fund unless the judge participates in the management of the fund or the proceeding could substantially affect his investment. MODEL CODE OF JUDICIAL CONDUCT Terminology (1990). Both conditions are most unlikely. If a judge owns, for example, \$20,000 in Fidelity Magellan Fund, or Vanguard Equity Income Fund, it is hard to conceive a judicial ruling that could substantially affect the value of that investment. And, it is most unlikely that the judge will participate in the management of the fund, given that a main benefit of a mutual fund is that professional money managers run the fund.

134. See *infra* notes 135-36 and accompanying text.

135. Kan. Ethics Op. 81-24 (1981), cited in ABA/BNA LAWS. MAN. ON PROF. CONDUCT 801:3807 (1984). See also Kan. Judicial Ethics Advisory Panel Op. JE-7 (Sept. 11, 1984), available at <http://www.kscourts.org/clerkct/JE609.pdf> (opining that a judge's receipt of an award from a special interest bar association may or may not be proper). This opinion had some qualifiers:

For example, if the award is given upon the judge's retirement in honor of the judge's years of service, knowledge of the law, and integrity on the bench, the award is entirely proper.

On the other hand, if the award is given by a special interest bar association group under circumstances which tend to create the impression that the judge is committed to a particular legal philosophy in accordance with that of the special interest group, then acceptance of the award is violative of Canon 2.

Id. These qualifiers (“under circumstances which tend to create the impression that the judge is committed to a particular legal philosophy”) only serve to make the prohibition more vague.

establish a judicial award program to honor particular judges since it would be improper for a judge to accept an award from such an association.”¹³⁶

One would support this rule if you thought you could corrupt a judge by giving him a statute of brass and a certificate. But most people hope that it is not that easy to buy a judge. We are talking about bona fide organizations. Over the years, many special interest organizations not open to all members of the bar have routinely honored judges as “Judge of the Year”—organizations whose members are primarily plaintiff’s lawyers, or defense lawyers, or civil trial lawyers. It is the same with non-bar special interests organizations like Mothers Against Drunk Driving.

This prohibition found in some ethics opinions would surprise the various special interest bar association groups and similar organizations that have honored judges over the years by calling them “Judge of the Year,” all blissfully unaware of an ethics opinion that cited no case law or other authority.¹³⁷ One might argue that the American Judicature

136. ABA Comm. on Ethics and Prof’l Responsibility, Informal Op. 86-1516 (1986).

137. For example, Texas Attorney General Greg Abbot, when he was a Texas judge, received various awards including: “Jurist of the Year” from the Texas Review of Law & Politics; “Trial Judge of the Year” from the Texas Association of Civil Trial and Appellate Specialists; and “Appellate Judge of the Year” from the Texas Chapter of the American Board of Trial Advocates. Attorney General of Texas Greg Abbott Homepage, http://www.oag.state.tx.us/agency/agga_bio.shtml (last visited June 18, 2006).

The Monterey County Chapter of the American Civil Liberties Union annually presents the Atkinson Award, named for the distinguished civil rights advocate Ralph B. Atkinson, to a local advocate for civil liberties. In 2002, the winner was Judge Richard Silver. ACLU Monterey County, Ralph B. Atkinson Award Winners, http://www.aclumontereycounty.org/about_atkinson.html (last visited June 18, 2006).

Washington State Court of Appeals Judge Faye C. Kennedy was one of the first women at the appellate level in Washington state. In 2004, Judge Kennedy received the Judge of the Year Award from King County Washington Women Lawyers, another special interest bar association. Washington State Bar Association, Bar News (Nov. 2005), <http://www.wsba.org/media/publications/barnews/fyi-nov05.htm> (last visited June 18, 2006).

Chief Judge Kenneth H. Kato, in 1998, was honored as Judge of the Year by the Asian Bar Association of Washington. He was one of the recipients of National Asian Pacific American Bar Association’s Trailblazer Award in 2000, both special bar associations. Washington Courts, Court of Appeals: Members, http://www.courts.wa.gov/appellate_trial_courts/bios/?fa=atc_bios.display&folderid=div3&fileID=kato (last visited June 18, 2006).

Justice Bobbe J. Bridge, also of Washington state, has also been honored by multiple special bar associations and special interest groups. She was honored by the Soroptimist International of Kent as a Woman Helping Women in 1999. In 1998, she was awarded the Women Making a Difference Award by YouthCare. She received the Mothers Against Violence In America’s Community Catalyst Award in 1997, and the Hannah G. Solomon Award from the National Council of Jewish Women in 1996. The Washington Women Lawyers honored her as Judge of the Year in 1996. In 1982, she was awarded the American Jewish Committee’s Edward F. Stern Human Relations Award. Washington Courts, Supreme Court Members,

Society has a special interest in that it supports merit selection of judges over popular election. Yet even that Society, which ought to know something about judicial ethics, gives out an annual “Dwight D. Opperman Award for Judicial Excellence.”¹³⁸ Still, judicial ethics

http://www.courts.wa.gov/appellate_trial_courts/supreme/bios/?fa=scbios.display_file&fileID=bridge (last visited June 18, 2006).

Justice Randy J. Holland of the Delaware Supreme Court received the 1992 Judge of the Year Award from the National Child Support Enforcement Association, another organization whose members tend to be on the same side in litigation involving child support. Vanderbilt University Law School, Affiliated Faculty, <http://law.vanderbilt.edu/faculty/adjuncts.html> (last visited June 18, 2006).

In November 2005, the Washington chapter of the American Board of Trial Advocates, a special interest bar (to be a full member one has to have tried at least twenty-five civil jury trials to conclusion) presented King County Superior Court Judge Mary Yu its “Judge of the Year Award.” Maureen O’Hagan, *A Special Ruling: Judge Of The Year*, SEATTLE TIMES, Nov. 26, 2005, at B2, available at http://seattletimes.nwsourc.com/html/localnews/2002647450_yu26m.html. The newspaper story shows a photograph of the judge, with a bright smile. She also must be unaware of what the ethics committee of Kansas or the ABA thinks.

The different local chapters of the American Board of Trial Advocates give out annual awards for various types of judicial excellence. See Robert J. Moss, Orange County, CA THE PRESIDENT’S REPORT, AM. BOARD OF TRIAL ADVOC. Nov.-Dec. 1999, at 3, available at http://www.abota.org/_images/mediacenter/PR1999v14.pdf (“Last but not least, we presented our annual Judge of the Year award to the Honorable Robert Jameson.”).

In 1998, Judge Anthony Romano received the Judge of the Year Award from *Mothers Against Drunk Driving*, yet another special interest organization. “That year he discovered the municipalities in the Kansas City Metropolitan Area had no city ordinances enforcing the ignition interlock program initiated by state statute. ‘I was shocked,’ he said.” Sheila Thiele, *Judge Plans to Continue Making a Difference After Retirement*, DAILY RECORD & KANSAS CITY DAILY NEWS-PRESS, July 10, 2002, available at http://www.findarticles.com/p/articles/mi_qn4181/is_20020710/ai_n10065659.

In July 2005, the National Council of Juvenile and Family Court Judges, another special interest organization, during its 68th Annual Conference held in Pittsburgh, named Judge Jeremiah S. Jeremiah, Jr., Chief Judge of the Rhode Island Family Court in Providence, as “Judge of the Year.” Press Release, Nat’l Council of Juvenile and Family Court Judges, NCJFCJ Names Judge Jeremiah S. Jeremiah, Jr., “Judge of the Year” (July 22, 2005), available at <http://www.ncjfcj.org/content/view/468/379/>.

In California, the Sacramento Lawyer, a bar publication, proudly reported that Sacramento County Bar Association (a bar not seeking membership from all California lawyers) awarded the “Judge of the Year” in 2001 to Sacramento Superior Court Judge Richard K. Park. Charity Kenyon, *Richard K. Park: Judge of the Year*, SACRAMENTO LAWYER, June 2001, available at http://www.sacbar.org/members/saclawyer/jun01/cover_story.html.

The Wisconsin State Bar, one that is not special interest, proclaimed the fact that Barron County Circuit Court Branch II Judge Edward Brunner received the 2005 Lifetime Jurist Achievement Award, and that Milwaukee County Circuit Court Chief Judge Kitty K. Brennan received the 2005 Judge of the Year Award. The Bench and Bar Committee presented both awards at the Annual Convention in May. State Bar of Wisconsin, News, <http://www.wisbar.org/AM/Template.cfm?Section=News&Template=/CM/ContentDisplay.cfm&ContentID=56204> (last visited June 18, 2006).

138. See, e.g., The Second Annual Dwight D. Opperman Award for Judicial Excellence, Honorable Ruth V. McGregor, AJS, (Sept. 19, 2005), <http://www.ajs.org/ajs/awards/opperman/AJSopperman05-final.pdf>.

opinions like the ABA or Kansas ethics opinions, which have no legal force, are always in the background waiting for someone to use them to attack a judge.¹³⁹

The Florida Committee on Standards of Conduct Governing Judges has advised that there is the “appearance of impropriety” when a judge runs for a bar association office.¹⁴⁰ The rationale: people might question whether the judge is exerting subtle pressure on lawyers who must litigate before the judge, creating at least the appearance of impropriety.¹⁴¹

If that is a good rule, one does not have to interpret “appearance of impropriety.” One simply has to create a bright-line rule that forbids the judge to run for a bar office, even though the bar association members are not always on the same side in litigation, and even though the balloting is secret. But, if one were to propose a clear rule, there would be debate. People would wonder why should there be such a prohibition, when we routinely allow the bar to rate judges. We publish these ratings and there is no concern that judges will exert “subtle pressure” on lawyers for favorable ratings. If there is pressure, it must be too subtle, because some judges routinely earn negative ratings.

If there were a proposal for a bright-line rule, other members of the bar might wonder why judges should not be able to run in elections with secret ballots. If the judge runs for an office and loses, that judge will not know who voted against him or her—unless the votes were unanimous. And, in that situation, the entire world should know that the entire practicing bar thinks so little of the judge.

Instead, the judicial ethics committee can avoid those pesky things that often accompany a proposed rule when it simply relies on “appearances” and announces the judicial ethics opinion as a *fait accompli*.

In another class of cases, we find ethics opinions refer to the “appearance of impropriety” when neither that phrase nor anything else in the opinion offers any real advice. Here is a complete quotation from an Ohio ethics opinion:

A judge whose spouse is a county court judge may serve on the court

139. The Kansas Judicial Ethics Advisory Panel acknowledges that its opinions are purely advisory and not binding on anyone. See Kan. Judicial Ethics Advisory Panel, *supra* note 135. Indeed, court rules explicitly provide that these ethics opinions are not “binding on the Commission . . . or the [Kansas] Supreme Court . . .” KAN. SUP. CT. R. 650(f) (2005).

140. Fla. Judicial Ethics Advisory Comm. Op. 94-44 (1994), *discussed in May a Judge Serve as a Bar Association Officer?*, JUD. CONDUCT REP., Winter, 1997, at 2.

141. See *id.*

of common pleas within the same county so long as both judges avoid any appearances of impropriety and do not allow their relationship to influence their judicial conduct or judgment.¹⁴²

This analysis is about as helpful as John Wayne's advice: "A man's gotta do what a man's gotta do."¹⁴³

VI. APPEARANCE OF IMPROPRIETY AND PUBLIC UNDERSTANDING OF THE ROLE OF JUDGES

One of the recurrent arguments in favor of a rule banning the "appearance of impropriety" is that "[a]voiding the appearance of impropriety is as important to developing public confidence in the judiciary as avoiding impropriety itself."¹⁴⁴ On the contrary, there are many examples where the existence of this vague prohibition has led to *reducing public confidence in the judiciary*, because it arms its critics with the ability to attack a judge's integrity using the vague standard, the "appearance of impropriety." Even if the action is not itself wrong, even if the action is not an "impropriety," there may be an appearance of wrongdoing based on conjecture, supposition, insinuation and innuendo. These issues never reach the status of a judicial opinion or even an advisory ethics opinion. Instead, their forum is the public press. Let us turn to a few recent examples.

Recently, the Senate confirmed Judge Samuel Alito of the Third Circuit to the U.S. Supreme Court. Not only did Judge Alito testify at his confirmation hearings—a practice that is relatively recent in the history of confirmation hearings¹⁴⁵—but other judges testified as well: Two current judges and five retired judges testified in person or via videotape.¹⁴⁶ All the judges favored his nomination, even though a few said that they held political views decidedly different from Judge Alito. The Judicial Code does not prohibit this testimony by fellow judges.¹⁴⁷

142. Ohio Ethics Opinion 89-20 (1989), as cited in ABA/BNA LAWS. MAN. ON PROF'L CONDUCT 901:6851 (1991).

143. See Colbert I. King, *A Test for Tolerance*, WASH. POST, Jan. 1, 2005, at A23 (quoting John Wayne) available at <http://www.washingtonpost.com/wp-dyn/articles/A40034-2004Dec31.html>.

144. *In re Dean*, 717 A.2d 176, 184 (Conn. 1998).

145. Ronald D. Rotunda, *The Confirmation Process for Supreme Court Justices in the Modern Era*, 37 EMORY L.J. 559, 560-61 (1988).

146. Tony Mauro, *Judges Turn Witnesses for Alito: Unusual Endorsement Sparks Worries About Politicization of Bench, Possible Recusals*, LEGAL TIMES, Jan. 16, 2006, at 13.

147. The ABA Model Judicial Code provides "a fair endorsement of recent nominees' practice of making themselves available to the Senate Judiciary Committee. The confirmation testimony is an appearance before a legislative body in order to speak about the law." Steven Lubet, *Advice and*

First, the Model Code of Judicial Conduct, Canon 4C specifically authorizes judges to testify at legislative hearings about the law, the legal system, or the administration of justice.¹⁴⁸ Moreover, the judges were testifying as fact witnesses, about what they saw and heard.¹⁴⁹

Judges testifying about other judges at confirmation hearings is a practice with extensive historical precedent.¹⁵⁰ And, this testimony can be very useful.¹⁵¹ For example, if the testimony had been to the

Consent: Questions and Answers, 84 NW. U. L. REV. 879, 881 (1990). Professor Lubet, who was no supporter of Judge Alito, even accused some of those who opposed Alito of “wast[ing] time on specious charges of bigotry and unethical conduct . . .” Steven Lubet, *The Alito Confirmation: How Democrats Lost the Political Battle*, SAN DIEGO UNION-TRIBUNE, Feb. 1, 2006, at B7, available at 2006 WLNR 1918446.

148. See MODEL CODE OF JUDICIAL CONDUCT Canon 4C(1) (1990). Another provision advises judges not to testify at trials as character witnesses unless they are subpoenaed. See MODEL CODE OF JUDICIAL CONDUCT Canon 2B (1990). But congressional hearings are not trials, and the character witness rule does not even apply to testimony about facts, even in a trial. The character witness rule in any event does not give judges any immunity from testifying; it only says that they should be subpoenaed if testifying as a character witness, as a way to reduce the number of times that lawyers will be cross-examining the judges before whom they appear. MODEL CODE OF JUDICIAL CONDUCT Canon 2B cmt. (1990). This circumstance does not even apply when appearing before the Senate Judiciary Committee.

149. One judge testified:

I can tell you with confidence that at no time during the 15 years that Judge Alito has served with me on our court—and the countless number of times that we have sat together in private conference after hearing oral argument—has he ever expressed anything that could be described as an “agenda.” Nor has he ever expressed any personal predilections about a case or an issue or a principle that would affect his decisions.

Nomination of Judge Samuel Alito to the U.S. Supreme Court: Hearings Before the S. Comm. on the Judiciary, 109th Cong. (2006) [hereinafter *Alito Nomination Hearings*] (testimony of J. Leonard Garth, Senior Judge, 3d Circuit), available at 2006 WLNR 733253.

Another told the Senate Committee: “In hundreds of conferences, I have never once heard Sam raise his voice, express anger or sarcasm, or try to proselytize.” *Alito Nomination Hearings*, *supra* (testimony of Edward Becker, former Judge, 3d Circuit), available at 2006 WLNR 733249.

150. For example, in 1987, former Chief Justice Warren Burger testified in favor of Judge Robert Bork during his confirmation hearings when he was nominated to the U.S. Supreme Court. Bob Egelko, *Questions Raised About Having Judges Testify*, SAN FRANCISCO CHRON., Jan. 13, 2006, at A7. Various other federal judges appeared as witnesses for William Rehnquist in 1971, Sandra Day O’Connor in 1981 and Clarence Thomas in 1991. *Id.* While the Senate Judiciary Committee was conducting its hearings on Sam Alito, other judges were testifying at hearings involving state judges. The confirmation hearing for California Supreme Court nominee Carol Corrigan “included supporting testimony from three former judicial colleagues, including a current federal judge, Martin Jenkins, and a state Supreme Court justice, Ming Chin.” *Id.* Corrigan had invited all three to testify. Like all the judicial nominees (except for Robert Bork), she was confirmed. *Id.*

151. Judge Timothy Lewis, now a Washington, D.C. lawyer, described himself as unapologetically pro-choice and a civil rights activist. He said that Judge Alito, whether in the courtroom or behind closed doors, never exhibited anything resembling an ideological bent. “I cannot recall one instance when he exhibited anything remotely resembling an ideological bent.” *Id.*; see also Charles Babington and Jo Becker, *Alito Likely to Become a Justice*, WASH. POST, Jan.

contrary, if a judge had said that the nominee occasionally lost his temper and got angry during judicial conferences, or made sexist remarks, that surely is useful information that the Senators should know before the confirmation vote.

Nonetheless, one can always raise a question about the appearance of impropriety, and some people did so, wondering if the Third Circuit judges were acting unethically by testifying. Some people argued that Alito perhaps should recuse himself in cases where he would review their decisions as a Supreme Court Justice, because the lower court judges could be seen as currying favor through their testimony.¹⁵²

Would it raise *at least* the “appearance” of impropriety if Justice Alito decided a case by affirming a lower court judge who had testified in his behalf? That is an argument that one can always make, but its logic is a bit strained.

First, it assumes that judges treat reversal and affirmance rates the way a baseball player treats his batting average, as something personal to himself. But judges, unlike the litigants, have no personal interest in the case. If they did, they could not be judges. Judges have even disagreed with themselves, when they decide to reverse a precedent that they originally joined,¹⁵³ or vote as a judge in a way contrary to their view as an author¹⁵⁴ or as an executive branch official.¹⁵⁵

13, 2006, at A1, *available at* 2006 WLNR 685733; Senate Judiciary Committee Debates the Alito Nomination, <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/24/AR2006012400563.html> (last visited June 18, 2006), *also available at* 2006 WLNR 1464775.

152. *See* Mauro, *supra* note 146, at 13; Egelko, *supra* note 150, at A7.

153. The examples are numerous. *See* Justice Blackmun’s opinion in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 530, 546-47, 556-557 (1985), (reversing *Nat’l League of Cities v. Usery*, 426 U.S. 833, 856 (1976), in which Blackmun had concurred). *See also* *United States v. Gooding*, 25 U.S. (12 Wheat.) 460, 478 (1827) (Justice Story explaining his rejection of his own former opinion: “My own error, however, can furnish no ground for its being adopted by this Court, in whose name I speak on the present occasion.”).

154. *Compare* Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 953 (1965) (arguing that convictions should not be reversed when the “worst that can be said is that a policeman placed a bit too much credence on the reliability of an informer”), *with* *Williams v. Adams*, 436 F.2d 30, 35, 38-39 (2d Cir. 1970) (Friendly, J., dissenting) (arguing that a writ of habeas corpus should have been granted to the defendant when an officer’s cause to stop a car was based solely on what an unnamed informer had said). Judge Friendly (the Judge, not the author) was vindicated when the Second Circuit, *en banc*, reversed the panel decision, in *Williams v. Adams*, 441 F.2d 394, 394 (2d Cir. 1971) (per curiam). But the U.S. Supreme Court agreed with Henry Friendly, the author, and not Henry Friendly, the judge, and it reversed the Second Circuit. *Adams v. Williams*, 407 U.S. 143, 149 (1972).

155. For example, Justice Jackson concurred in *McGrath v. Kristensen*, 340 U.S. 162, 176 (1950), even though the view he took in that case was contrary to his opinion as Attorney General. *Registration of Aliens Under Selective Training and Service Act*, 39 Op. Att’y Gen. 504, 505 (1940).

Second, if we assume that a judge should recuse himself from reviewing cases decided by other judges because those judges said nice things about him, then surely he should recuse himself from hearing any cases about lawyers who said nice things about him. Lawyers, unlike judges, really do have an interest in their cases. Their won-lost record is important.

And, if lawyers who say nice things can cause a judge's recusal, then lawyers who say bad things about a judge should definitely cause his recusal. Yet, if that were the rule, any lawyer can create a permanent preemptory challenge against a judge simply by testifying against him at the confirmation hearing (or saying nasty things about him during an election campaign).

The lawyer who decides to create this right to recuse a judge whom he does not like will also create a niche practice, for other lawyers can hire this lawyer when they decide that they want to prevent this particular judge from being on the panel.

Now, this is not the law. If the powers that be want to create such a recusal rule, it is easy to write one, but, for the logical and policy reasons I have suggested, that is unlikely. Still, the media or pundits can always raise a question of impropriety, which serves to tarnish the judge even if no higher court will order a recusal.

Recently, ABC News breathlessly criticized Justice Scalia for violating the "appearance of impropriety" because "Scalia attended a cocktail reception, sponsored in part by the same lobbying and law firm where convicted lobbyist Jack Abramoff [a convicted influence peddler] once worked."¹⁵⁶ No one who has ever played, "this is the house that Jack built," can ever doubt this reasoning. Lobbyist Jack Abramoff, in early January, pled guilty to conspiracy, fraud, and tax evasion charges in a major corruption case, and agreed to cooperate with prosecutors investigating whether members of Congress took bribes from him in exchange for favors.¹⁵⁷ Abramoff once worked for a law firm, and that law firm later became one of the hosts for a reception, and Justice Scalia went to that reception.¹⁵⁸ Nowadays, we call this line of attack the "appearance of impropriety," but in the old days, we would call it "guilt

156. Brian Ross, *Exclusive: Supreme Ethics Problem? What Was Supreme Court Justice Antonin Scalia Doing on Day of Supreme Court Swearing-In?*, ABC NEWS, Jan. 23, 2006, <http://abcnews.go.com/Nightline/Investigation/story?id=1534260>.

157. See Susan Schmidt & James V. Grimaldi, *Abramoff Pleads Guilty to Three Counts*, WASH. POST, Jan. 4, 2006, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/03/AR2006010300474.html>.

158. See Ross, *supra* note 156.

by association.” And people think this is progress, a forward move, in the endeavor to be more ethical!

ABC News also complained that Justice Scalia was absent when Roberts was sworn in as Chief Justice, because of his previously-scheduled commitment to teach a law course in Colorado. This absence was a “snub” and, ABC News said, may have violated the appearances of impropriety.¹⁵⁹ A short time later, Justice O’Connor missed the swearing-in of Justice Alito, because of her previously-scheduled commitment to teach a course in Arizona.¹⁶⁰ But those who criticized Scalia for “snubbing” Chief Justice Roberts had no criticism of O’Connor “snubbing” Justice Alito. One of the nice things about charging “appearances of impropriety” is that one does not have to be consistent, because “appearances” require weighing and considering each case as unique, so there is no precedent, and any layperson can make a judgment call.¹⁶¹ But law is not supposed to be like that. We no longer measure justice “by the length of the chancellor’s foot”—so said because in medieval England, the chancellors often had no formal legal training, and precedent was not binding.

Loose charges of a violation of “appearances” are not limited to Supreme Court Justices, who are simply at the top of the food chain and so attract more attention. All judges are targets. As I was researching for this Article, I ran across an interesting, albeit not atypical, news item. A developer sued the Winged Foot Golf Club and several others after the Club denied him membership. New York Supreme Court Justice Kenneth W. Rudolph granted the defense motions to dismiss the various

159. “Not only did Scalia’s absence appear to be a snub of the new chief justice, but according to some legal ethics experts, it also raised questions about the propriety of what critics call judicial junkets.” *Id.*

160. O’Connor “was in Arizona Tuesday teaching a class at the University of Arizona law school,” during Alito’s swearing-in. NPR.org, Legal Affairs: Senate Confirms Alito as Supreme Court Justice, Jan. 31, 2006, <http://www.npr.org/templates/story/story.php?storyId=5180411>.

161. Scalia spoke at a previously-accepted lecture series sponsored by the Federalist Society, a nonpartisan think-tank in Washington, D.C., which takes no positions on any legal issues or policy issues, does not engage in other forms of political advocacy, and files no amicus briefs, although it often sponsors debates on legal issues between liberals, conservatives, and libertarians. The Federalist Society, Frequently Asked Questions, <http://www.fed-soc.org/Press/FAQs.htm>. The Federalist Society invited all of its members to attend the seminar on separation of powers. One who becomes a member has no obligation to ascribe to any particular beliefs.

In contrast, O’Connor spoke at the University of Arizona, which does file amicus briefs. *See, e.g.*, Brief of the University of Pittsburgh, Temple University, Wayne State University, and the University of Arizona as Amici Curiae Supporting Respondents, *Gutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 399066. The University also takes positions on legal issues. *See, e.g.*, *Associated Students of Univ. of Ariz. v. Ariz. Bd. of Regents*, 584 P.2d 564 (Ariz. Ct. App. 1978), *cert. denied*, 440 U.S. 913 (1979).

causes of action.¹⁶² The plaintiff then moved to recuse the judge, not because Justice Rudolph “exhibited actual bias,” but rather that the circumstances gave “rise to the appearance of a bias and impropriety.”¹⁶³ And what was the “appearance”?

The plaintiff, Corey A. Kupersmith, had engaged in other litigation with a golf club on Martha’s Vineyard. Years earlier, the judge’s daughter used to work for a company that Mr. Kupersmith now says was one of his business rivals. She was an employee at will and never had any equity interest.¹⁶⁴ Plaintiff’s motion asserted: “Your Honor’s daughter, Kelly Mooney, is a former competitor of the plaintiff’s with GEM Communications. . . . This information should have been known to the Court, and disclosed prior to submission of the motion.”¹⁶⁵ Granted, the motion does not explain how GEM Communications was a competitor of the plaintiff, or how the judge should have known that.¹⁶⁶ But surely, some people will argue, it would not have hurt the judge to make this disclosure. Is not the failure to disclose an “appearance of impropriety,” even though it is not an actual impropriety? The proposed ABA Judicial Code invites this line of argument.

But that is not all. “Counsel affirms on personal knowledge that the children of this jurist played golf at Winged Foot,” and met with members of the Club, who “stood to be damaged financially should the plaintiff’s action be allowed to proceed.”¹⁶⁷ The motion did not identify who these people were and the judge said that he did not know when and where his emancipated children played golf.

There is more. The judge’s daughter was getting married, and her fiancée is a member of the defendant Winged Foot Golf Club. “As such, Your Honor’s daughter stands to be directly negatively monetarily effected by a continuation of [this] action.”¹⁶⁸ The judge protested: “[T]he daughter of this jurist is not by marriage a member of Winged Foot Golf Club, Inc. and is not by extension of her marriage affected by the determination of this litigation.”¹⁶⁹

The judge, to put it mildly, was quite upset with the plaintiff’s

162. Kupersmith v. Winged Foot Golf Club, Inc., 9 Misc. 3d 1123(A), (N.Y. Sup. Ct. 2005).

163. Mark Fass, *Judge Spurns Recusal From Suit to Join Club: Blasts Lawyer for ‘Intrusion’ Into His Personal Life*, N.Y.L.J., Mar. 6, 2006, at 2.

164. *Id.*

165. *Id.*

166. *Id.*

167. Kupersmith v. Winged Foot Golf Club Inc., N.Y.L.J., Mar. 9, 2006, at 22 (N.Y. Sup. Ct. Feb. 21, 2006).

168. Fass, *supra* note 163, at 2.

169. *Id.*

lawyer. The judge said that Mr. Kupersmith's attorney (Mr. Herman), "at the time of the preparation of the submission, was aware that spouses of Winged Foot members are not members as evidenced by Herman's original submissions in opposition."¹⁷⁰ The judge was also none to happy with the plaintiff, who had hired a private investigator to probe possible connections between the judge's family and the defendants.¹⁷¹

The judge said: "This unwarranted intrusion into the personal life of the jurist and my family can only be intended to intimidate the Court in the administration of justice," and "cannot be tolerated in the civil practice of law, and the ethics of same must be determined by those charged with the review of professional responsibilities of attorneys who practice before the bar."¹⁷² That last sentence is a little complex, but it appears that the judge is suggesting discipline against the lawyer.¹⁷³

That leads to a new issue: If the judge is that upset, should he recuse himself in any further case involving the plaintiff or this particular lawyer? I am not arguing that the judge should recuse, only that it would hardly be surprising for a lawyer or other critic to point out that further action by the judge may raise the "appearance of impropriety."

VII. CONCLUSION.

Surely, judges sometimes do violate clear ethics rules, and it is proper to criticize them when they do.¹⁷⁴ Nor is there a problem criticizing judges for the substance of their decisions, even when the commentators are harsh.¹⁷⁵ We are merely criticizing the judges'

170. *Id.*

171. *See id.* at 1.

172. *Id.*

173. The judge is clearer in another sentence: "Thus the conclusions of counsel as set forth in paragraph 11c. are baseless, insulting and undignified and degrading to the Court in violation of DR 7-106(c)(6)." Unpublished opinion, on file with the author.

174. *See, e.g.,* Richard Carelli, AP, *Ginsberg Reportedly Heard Cases Involving Firms in Which Husband Had Stock*, BUFFALO NEWS, July 11, 1997, at A6. ("Supreme Court Justice Ruth Bader Ginsburg may have violated a federal law 21 times since 1995 by participating in cases involving companies in which her husband owned stock. . . . Responding to queries by The Associated Press, Martin D. Ginsburg . . . said he has ordered his broker to sell all his stock in the eight companies."). Here we have a clear federal rule, Justice Ginsburg made a mistake and so she responded by correcting the problem. *See also* Tony Mauro, *Judicial Ethics Draw Increased Scrutiny*, LEGAL TIMES, Jan. 30, 2006, at 12, (noting reports that "10th Circuit appeals court nominee James Payne participated in 18 cases involving companies whose stock he held while serving as a federal district court judge in Oklahoma"). The judge later withdrew his name for consideration.

175. Monroe H. Freedman, *The Threat to Judicial Independence by Criticism of Judges—A Proposed Solution to the Real Problem*, 25 HOFSTRA L. REV. 729, 729 (1997) ("[C]riticism of

reasoning, and—whether we are right or wrong—we are not criticizing their ethics and dressing our accusations in the appearance of impropriety.

Proponents of a rule that forbids judges from engaging in the “appearances of impropriety,” and then does not define the term, argue that the rule promotes, in the view of the lay public, the integrity of the judges. On the contrary, the power to unfairly criticize a judge as violating the appearances of impropriety serves to bring the judiciary into disrepute. If the judge has violated an ethics rule more precise than “avoiding the appearances of impropriety,” then, by all means, one should make the charge. That is how we improve the judiciary’s ethics. If the judge has done something that should be unlawful but is not, then enact a rule to forbid it. But the ABA proposed Judicial Code should not give its imprimatur to us to engage in criticism that too easily becomes an *ex post facto*, *ad hoc*, or *ad hominem* attack. These fallacious methods of argument are so old and tired that we use Latin, a language long-dead, to describe them.

The 1990 ABA Judicial Code titled its Canon 2: “A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.”¹⁷⁶ Granted, the language used the command, “shall,” but the Code also said that the Canons are intended to be “broad statements.”¹⁷⁷

judges by lawyers is both constitutionally protected and desirable in a democratic society.”). See also Justice Thomas:

As judges, we must expect that our opinions will be dissected not only by the parties, but by scholars, journalists, students, politicians, and the bar. Such scrutiny can even be useful, at times. It can force judges to be self-reflective. Judges do not get everything right; as Justice Jackson has said, we are not final because we are infallible, we are infallible because we are final. Judges can benefit from constructive criticism to improve the quality of their work, just as anyone can.

. . . .

Now, I have some experience with criticism myself. Early in my service on the Court, I was painted by the New York Times as the “youngest, cruelest” justice for a dissent that I had written about the proper interpretation of the Eighth Amendment. Especially now that the gray in my hair has become ever more apparent, I appreciate the “youngest” part of that statement. At that time, no person or outside groups jumped to my defense, nor did I expect or want anyone to do so. . . . I am willing to let my opinions speak for themselves, and it is part of my judicial duty to accept outside criticism, however, incorrect or unjust, to go by unanswered.

Justice Clarence Thomas, Address at the Federalist Society National Lawyers Convention: On Judicial Independence (Nov. 12, 1999), available at <http://fed-soc.org/Publications/Transcripts/justicethomas.htm>.

176. ABA MODEL JUDICIAL CODE Canon 2 (1990).

177. ABA MODEL JUDICIAL CODE Pmbl., ¶2.

The ABA Annotated Model Judicial Code, which the ABA itself publishes, said that this Canon is “aspirational,”¹⁷⁸ although, as we have seen, many courts act as if this Canon is a mandatory command and not aspirational advice.

The ABA’s proposed Judicial Code goes beyond the present ABA standards by making “appearances” a rule, not merely a title. While the title of Rule 1.02 refers to “appearances,” the proposed Rule 1.02 is much clearer: “A judge shall avoid impropriety and the appearance of impropriety.”¹⁷⁹ The ABA Commission has specifically taken language from the 1990 Commentary and lifted it into a formal rule.

The whole point of prohibiting (1) an impropriety *and* (2) the *appearance* of impropriety is to broaden the first prohibition, not weaken it. The result: The ABA will arm judicial critics with an especially powerful weapon that justifies any criticism of a judge by simply referring to the “appearance” that something might be improper even when the actual act is not improper.

Ill-defined and fuzzy ethics rules give detractors a green light to hurl too easily the accusation of ethics violations, and, over time, this overuse will demean the seriousness of the charge of an ethics violation, or it will demean the judiciary itself. Granted, not all rules can be written with crystal clarity, but many can be. The phrase, “appearance of impropriety” certainly offers a reason why the framers drafted some rules as broadly as they did. But it is too vague to be a rule. We can do better.

178. ABA, ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 4 (2004) (emphasis added). The full sentence says: “Two of the Canons are aspirational (Canons 1 and 2), and the other three address specific types of judicial conduct: conduct when carrying out adjudicative and administrative duties (Canon 3), conduct in various extrajudicial activities (Canon 4), and conduct in campaigning for judicial office (Canon 5).” *Id.*

179. FINAL DRAFT REPORT, Canon 1, *supra* note 25.