

Avoiding the appearance of impropriety: With great power comes great responsibility

Judges must demonstrate their commitment to maintaining public confidence in the integrity and impartiality of their decisions by considering how the public might reasonably view their conduct.

by CYNTHIA GRAY

If a judge tells a police officer who stopped him for a traffic offense that his arrest is unnecessary because “we need each other,” the judge clearly violates the proscription on using the prestige of judicial office to advance the judge’s private interests.¹ But is it a violation if a judge simply shows the officer a judicial identification card instead of a driver’s license without expressly asking for or demanding favorable treatment?² A judge’s call advising an assistant prosecutor to be more emotional in front of the jury in a sexual assault trial is an obvious, prohibited *ex parte* communication.³ But if a judge meets privately with some attorneys in chambers just before they are to appear in his court, is it reasonable to assume *ex parte* communications took place?⁴

To hold judges to the highest standards of ethical conduct, a code of judicial conduct must cover not just the clear and obvious improprieties but indirect, disguised, or careless conduct that looks like an impropriety to an observer who is neither overly suspicious nor unusually gullible. Thus, Canon 2 of the American Bar Association Model Code of Judicial Conduct provides that “a judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities,” defining an “appearance of impropriety” as conduct that “would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.”

Some critics have argued that the appearance of impropriety standard

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1. When the officer was not deterred, the judge warned the officer to “watch out from here on in.” *In the Matter of Winkworth*, Determination (New York Commission on Judicial Conduct September 23, 1992) (admonition for this misconduct and driving while impaired), www.scjc.state.ny.us.

2. *See, e.g., In the Matter of Werner*, Determination (New York State Commission on Judicial Conduct October 1, 2002) (admonition pursuant to agreement for handing over license and court identification card when stopped by officer for speeding), www.scjc.state.ny.us.

3. *In the Matter of Starcher*, 457 S.E.2d 147 (West Virginia 1995) (reprimand). The judge also advised the prosecutor to have supporters present in the courtroom during closing argument and to use the term “serial rapist” frequently. A law firm associate who was sitting in a room adjoining Judge Starcher’s chambers overheard the telephone conversation between the judge and the assistant prosecuting attorney about a criminal trial in which the defendant was accused of sexually assaulting several female university students. The judge admitted that the conversation occurred.

4. *Kennick v. Commission on Judicial Performance*, 787 P.2d 591 (California 1990).

is at best merely aspirational and at worst unconstitutionally vague and in either case out of place in a code used as the basis for disciplinary sanctions of judges. The ABA has been asked to eliminate the standard from the model code in its current revision process.⁵ In an initial draft, the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct appeared to waiver in its commitment to the standard, but was persuaded by “a majority of commentators on the subject, citing to judicial discipline cases decided over a three-decade period, [who] urged that the concept be retained” in its preliminary report.⁶

Canon 2 is a vital component of the code of judicial conduct both as a rule that can be the basis for sanctions and as a hortatory, aspirational standard.

Appearance of impropriety as a disciplinary standard

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. Subtle but still manifest attempts to gain an improper advantage from the judicial office represent the largest number of cases finding an appearance of impropriety. These cases reflect the reasonable person’s understanding that much of human communication is unspoken, between-the-lines with winks and nods, and depends on what goes without saying. Gratuitous references to the judicial office, for example, have been held to impliedly but obviously and inappropriately invoke the prestige of the office even absent an express request for favorable treatment.

For example, in *In the Matter of Colleston*,⁷ the New Jersey Supreme Court considered a judge who, stopped on suspicion of driving while intoxicated, told the trooper that he was a superior court judge when asked for his driving credentials and repeated the statement during the field sobriety tests. The court found that the judge’s “references

to his judicial status gave the impression that he was entitled to some special preference.’ He thus clearly used the prestige and weight of his judicial office to try to gain some personal advantage.”⁸ The judge was arrested anyway, indicating that proof that the judge’s attempt actually resulted in inappropriate influence is not necessary to prove an appearance of influence.

The use of judicial letterhead also inherently and inevitably creates the appearance of a misuse of the prestige of office. The judge in *In the Matter of Mosley*⁹ sent two letters on court letterhead to his son’s school asking that the school prohibit his ex-girlfriend (his son’s mother) from visiting the boy at school. The judge argued that he did not misuse the prestige of office because the school principals already knew he was a judge and did not provide special treatment to him. Rejecting that argument, the Nevada Supreme Court concluded that an objective, reasonable person could conclude that the judge used his judicial letterhead in an attempt to gain a personal advantage.¹⁰

Similarly, while few cases find proof of actual favoritism by judges in exercising the power of appointment, several hold that a combination of factors produced the appearance that a judge made an appointment based on something

other than the appointee’s qualifications. For example, in *In the Matter of Feinberg*, the New York Court of Appeals found an appearance of favoritism when a judge appointed a friend as counsel to the public administrator and then, over more than five years in 475 proceedings, awarded over \$8 million in fees to that friend without applying statutory standards and without requiring substantiation.¹¹ After his election, the judge, without any search or interview process, had appointed Louis Rosenthal to replace the firm that had for several decades served as counsel to the public administrator.¹² Rosenthal was the judge’s friend and law school classmate and had helped to raise funds for the judge’s election campaign. Rosenthal had limited experience in surrogate’s court.

The court found that the judge awarded Rosenthal eight percent of an estate’s value without attention to the actual work done. The judge did not individually review the files and never rejected or reduced a fee request, never questioned a request or sought additional information, never required Rosenthal to submit an affidavit of legal services, and never considered the statutory factors specified in the Surrogate’s Court Procedure Act. The court stated, “while appointment of a friend does not itself convey an

5. See Letter from Ronald C. Minkoff, Secretary, Association of Professional Responsibility Lawyers, to ABA Joint Commission to Evaluate the Model Code of Judicial Conduct (June 30, 2004), www.abanet.org/judicialethics/resources/comm_rules_minkoff_063004.pdf; Memorandum from Charles E. McCallum, Chair, ABA Standing Committee on Ethics and Professional Responsibility, to Mark I. Harrison, Chair, ABA Commission on Evaluation of the Model Code of Judicial Conduct (April 12, 2005), www.abanet.org/judicialethics/resources/comm_rules_aba_ethics%20committee_41205_dtd.pdf.

In September 2003, the ABA appointed a Joint Commission to Evaluate the Model Code of Judicial Conduct to review the ABA’s 1990 model code of judicial conduct and to recommend revisions for possible adoption by the House of Delegates. The Commission held public hearings across the country in 2004-2005 and released several drafts. A preliminary report was released for comment in June 2005, and a final report will be considered by the ABA House of Delegates in February 2006. See www.abanet.org/judicialethics/preliminaryreport.html.

6. *Report of the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct* (June 30, 2005),

www.abanet.org/judicialethics/preliminaryreport.html.

7. 599 A.2d 1275 (New Jersey 1992).

8. *Id.* at 1278. The judge was suspended for two months without pay for his second DWI violation as well as informing the arresting officer that he was a judge and falsely stating that he was responding to an emergency at the courthouse.

9. 102 P.3d 555 (Nevada 2004).

10. *Id.* at 559. The judge had been awarded custody of the boy after a bitter battle with his ex-girlfriend. The judge was censured and fined \$5,000 for this and other misconduct.

11. *In the Matter of Feinberg* (June 29, 2005).

12. The public administrator administers the estates of decedents who die without a will or where there is no qualified individual who has petitioned to administer the estate. Counsel’s duties include petitioning for letters of administration, marshaling the estate assets, searching for heirs, conducting kinship hearings, disposing of real property, filing tax returns, and generally representing the interests of the public administrator in all aspects of administration of estates. Counsel is paid from the assets of the estate and approved by the surrogate.

appearance of impropriety, when, as here, that appointment is coupled with the unsubstantiated award of several million dollars in fees from estates that, by definition, lack adversarial parties to challenge the practice, the taint of favoritism is strong.”¹³

The test

In a literal approach to the appearance of impropriety standard, judicial discipline cases often start with the improprieties defined in the code and then proceed if an actual violation is not proven to consider whether the judge created the appearance of a violation. In other words, an appearance of impropriety is found if “notwithstanding the absence of proof of any actual or intended impropriety,” the judge’s conduct “inescapably created a circumstantial appearance of impropriety.”¹⁴ Similar pronouncements of the rule provide that an appearance of impropriety is established if a reasonable person would be justified in suspecting that the judge violated the code,¹⁵ in having an “undispelled suspicion” of actual impropriety,¹⁶ or in believing that “an impropriety is afoot.”¹⁷

For example, an actual impropriety in *Kennick v. Commission on Judicial Performance*¹⁸ would have been proven if one of the attorneys with

whom the judge met alone in chambers admitted that they had had ex parte communications about the case in which they were appearing that day on the judge’s calendar. Even absent that direct evidence, however, the California Supreme Court found that the judge’s practice of having social visits with two favored attorneys on days when they were appearing in his court gave rise to an appearance of impropriety, in other words, an appearance of ex parte communications.¹⁹

A crucial element of the appearance of impropriety standard is the consideration of whether the conduct was readily avoidable,²⁰ in other words, whether there were reasonable precautions the judge could have taken to avoid creating the appearance of impropriety.²¹ An appearance of impropriety could have easily been avoided, for example, if Judge Feinberg had read and followed (not just “skimmed”) the Surrogate’s Court Procedure Act or if Judge Mosley had used personal stationery in his letter to his son’s school.

Cases have described the reasonable person as “a reasonably intelligent and informed member of the public,”²² an objective observer,²³ and the average person encountered in society.²⁴ Other formulations emphasize what a reasonable person is not:

not the judge himself or herself,²⁵ not a well-trained lawyer,²⁶ not a highly sophisticated observer of public affairs,²⁷ and not a cynic skeptical of the government and the courts.²⁸ Perhaps the most evocative variation characterizes the reasonable person as “neither excessively indulgent, nor excessively jaundiced.”²⁹

Further, the reasonable person would not be “uninformed or misinformed,”³⁰ and the perception of an impropriety must be based on more than vague conjectures and subtle innuendo.³¹ Realistically, however, a reasonable person could not know “every conceivably relevant fact”³² but would know “all available information,”³³ “all the relevant circumstances that a reasonable inquiry would disclose,”³⁴ or the “totality of circumstances.”³⁵

One factor the reasonable person could not be presumed to know is the judge’s subjective motive or state of mind.³⁶ Thus, “whatever [the judge’s] motive, it is no cure for conduct that creates an appearance of impropriety.”³⁷ A judge’s explanation for his conduct “may shed light on his after-the-fact, subjective belief,” but it does nothing to eliminate the appearance arising from the objective record.³⁸

Moreover, if a judge’s conduct is not public, suspicions are more reasonable and an appearance of impropriety more likely because what actually happened cannot be known by the reasonable person and the absence of misconduct would have to be taken on faith. For example, because the conversations took place in private, whether Judge Kennick was actually discussing cases with the attorneys in his chambers would be inherently unknowable by the reasonable person and, therefore, irrelevant to the question whether there was an appearance of impropriety.

Criticism of the standard

The primary attack on the appearance of impropriety standard is that the language is unconstitu-

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13. *In the Matter of Feinberg* (June 29, 2005). The judge was removed from office.

14. *In the Matter of Spector*, 392 N.E.2d 552, 555 (New York 1979).

15. *In re Chaisson*, 549 So. 2d 259, 263 (Louisiana 1989).

16. *In the Matter of Johnstone*, 2 P.3d 1226, 1237 n.38 (Alaska 2000).

17. *In re Inquiry Concerning a Judge*, 788 P.2d 716, 723 (Alaska 1990). The most expansive definition of the standard explains: “Because conduct that necessitates a full-scale inquiry to allay public suspicion itself suggests impropriety, an impermissible appearance also might be found—regardless of whether an investigation eventually dispelled suspicion of actual misconduct—if readily avoidable conduct foreseeably caused reasonably intelligent and informed members of the public to demand a full inquiry into suspected impropriety.” *In the Matter of Johnstone*, 2 P.3d 1226, 1237 n.38 (Alaska 2000).

18. 787 P.2d 591 (California 1990).

19. *Id.* at 614.

20. *In the Matter of Johnstone*, 2 P.3d 1226, 1237 n.38 (Alaska 2000).

21. *In re Inquiry Concerning a Judge*, 788 P.2d 716, 723 (Alaska 1990).

22. *In the Matter of Johnstone*, 2 P.3d 1226, 1237 n.38 (Alaska 2000).

23. *Adams v. Commission on Judicial Performance*, 897 P.2d 544, 548 (California 1995).

24. *Inquiry Concerning a Judge*, 822 P.2d 1333, 1340 (Alaska 1991).

25. *In re Snow*, 674 A.2d 573, 577 (New Hampshire 1996), quoting *Blaisdell v. City of Rochester*, 609 A.2d 388, 390 (New Hampshire 1992).

26. *Inquiry Concerning a Judge*, 822 P.2d 1333, 1340 (Alaska 1991).

27. *Id.*

28. *Id.*

29. *In the Matter of Larsen*, 616 A.2d 529, 584 (Pennsylvania 1992).

30. *Id.* at 582.

31. *Id.* at 584.

32. *Inquiry Concerning a Judge*, 822 P.2d 1333, 1340 (Alaska 1991).

33. *In the Matter of Johnstone*, 2 P.3d 1226, 1237 n.38 (Alaska 2000).

34. Delaware Code of Judicial Conduct, Commentary to Canon 2A.

35. *In the Matter of Larsen*, 616 A.2d 529, 584 (Pennsylvania 1992).

36. *In the Matter of Blackman*, 591 A.2d 1339, 1341 (New Jersey 1991).

37. *In re Snow*, 674 A.2d 573, 578 (New Hampshire 1996).

38. *In the Matter of Johnstone*, 2 P.3d 1226, 1237 (Alaska 2000).

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tionally vague and overbroad. However, rules setting guidelines for members of a profession, such as lawyers and judges, “need not meet the precise standards of clarity that might be required of rules of conduct for laymen.”³⁹ The rule defining attorney misconduct to include “conduct prejudicial to the administrative of justice”⁴⁰—a phrase no more precise than “the appearance of impropriety”—has been held to meet due process requirements.⁴¹ Moreover, other necessarily general provisions of the code of judicial conduct have withstood vagueness challenges.⁴²

Further, judges are not without guidance in determining what creates an appearance of impropriety. Judges can and should turn to their colleagues, family, and friends for advice like most people do. Judges can also refer to existing caselaw and advisory opinions for guidance about

what the reasonable person might think. Finally, there are judicial ethics advisory committees in most states and for federal judges that will advise a judge, either informally or in writing, whether the judge’s contemplated conduct is an impropriety or creates an appearance of impropriety. These opinions do not necessarily bind the judicial discipline authorities, but asking provides the judge with the perspective of the objective, reasonable persons who make up the committee, and compliance with an opinion provides a good faith defense in disciplinary proceedings.

An aspirational standard

Moreover, the code of judicial conduct is not simply a penal provision, threatening judges with the possibility of disciplinary sanction, but an important reminder to them of the ethical foundations of their role in a free society. The appearance of impropriety standard is “peculiar to the judiciary”⁴³ because judges have a peculiar position in the American system.

Moreover, incorporating those values in the code of judicial conduct—which is adopted by state supreme courts—announces to citizens that judges are willing to hold themselves to very demanding ethical standards in light of the power they are given over others’ lives. All public officials are as a practical matter held to an appearance of impropriety standard by the press and public if not by a code of conduct; a Google News search produces 245 hits for the

phrase over 30 days. Reflecting that unofficial gauge, Canon 2 reminds judges to think carefully about what they say and do and to consider the perspective of a reasonable person who does not know them well. That is not bad advice for everyone, and it is a critical factor in maintaining public confidence in an individual judge and the judiciary in general.

At a time when judges are accused of being unaccountable, the judiciary must be answerable to the public’s ethical expectations. To counteract accusations of arrogance, judges must be humble in ethical matters and eschew any claims of entitlement. At a time when judges are defending their freedom to make decisions regardless of clamor by the public or pressure from politicians, judges must demonstrate their commitment to maintaining public confidence in the integrity and impartiality of those decisions by considering how the public might reasonably view their conduct. The appearance of impropriety standard, both as a symbol and an enforcement tool, is an essential component of that effort and perfectly comprehensible by a thoughtful judge and readily embraced by an upright judge. ☛

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39. *In the Matter of Keiler*, 380 A.2d 119, 126 (D.C. Court of Appeals 1977).

40. Rule 8.4(d), American Bar Association, Model Rules of Professional Conduct.

41. *In re Charges Against NP*, 361 N.W.2d 386, 395 (Minnesota 1985); *In the Matter of Keiler*, 380 A.2d 119, 126 (D.C. Court of Appeals 1977); *Committee on Legal Ethics of the West Virginia State Bar v. Douglas*, 370 S.E.2d 325, 328 (West Virginia 1988); *Howell v. State Bar of Texas*, 843 F.2d 205, 208 (5th Circuit 1988); *In re Stanbury*, 561 N.W.2d 507, 512 (Minnesota 1997).

42. For example, the requirements in Canon 2A that a judge “respect and comply with the law” and “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary” were upheld in *In re Hill*, 8 S.W. 3d 578 (Missouri 2000) and *In re Harper*, 673 N.E.2d 1253 (Ohio 1996).

43. *In the Matter of Spector*, 392 N.E.2d 552, 553 (New York 1979).