

AVOIDING THE APPEARANCE OF IMPROPRIETY: WITH GREAT POWER COMES GREAT RESPONSIBILITY

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I. INTRODUCTION

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 the 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 the judge simply meets privately with some attorneys in cham-

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1. When the officer was not deterred, the judge warned the officer to “watch out from here on in.” *In re Winkworth*, Determination (N.Y. Comm’n on Jud. Conduct Sept. 23, 1992), at <http://www.scjc.state.ny.us/Determinations/w/winkworth.htm> (admonition for this misconduct and driving while impaired).

2. *In re Werner*, Determination (N.Y. State Comm’n on Jud. Conduct Oct. 1, 2002) at <http://www.scjc.state.ny.us/determinations/w/werner.htm> (admonition pursuant to agreement for handing over license and court identification card when stopped by officer for speeding); *In re Heiple*, Order (Ill. Courts Comm’n Apr. 30, 1997) (censure for four traffic stops in which the justice failed to cooperate with and disobeyed law enforcement officials and volunteered the information that he was a member of the judiciary).

3. *In re Starcher*, 457 S.E.2d 147, 148–49 (W. Va. 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. The telephone call had been overheard by a law firm

bers just before they are to appear in his court and no one overhears the conversation, is it reasonable to assume no ex parte communications took place and there was no violation?⁴ A judge who solicits bribes before improperly disposing of matters unquestionably commits a violation of the code of judicial conduct as well as a crime.⁵ But is there an ethical breach if a judge initiates business transactions with a litigant and gets favorable terms after rendering a large monetary judgment?⁶

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 informed and thoughtful but not prescient or gullible. Thus, much of the American Bar Association Model Code of Judicial Conduct⁷ is based on reasonable assumptions about a judge's impartiality based on the judge's conduct. For example, a judge may be capable of rendering unbiased decisions even if he belongs to a discriminatory organization, but rather than asking the public to take that on faith, judges are prohibited from belonging to organizations that practice invidious discrimination.⁸ Similarly, a judge may be able to render a fair decision even if her nephew is the attorney in the case, but rather than give the parties a basis for questioning the decision, the judge is required to disqualify.⁹

In addition, the code of judicial conduct provides in Canon 2 that "a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities," defining an "appearance of impropriety" in commentary as conduct that "would create in reasonable minds a perception that the

associate who was sitting in a room adjoining Judge Starcher's chambers when she became aware of a 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 students at West Virginia University. The judge admitted that the conversation occurred. *Id.*

4. *Kennick v. Comm'n on Judicial Performance*, 787 P.2d 591 (Cal. 1990). For further discussion of this case, see *infra* accompanying text at notes 146-47.

5. See, e.g., *In re Jenkins*, 465 N.W.2d 317 (Mich. 1991).

6. See *Adams v. Comm'n on Jud. Performance*, 897 P.2d 544 (Cal. 1995) (removal for this and other misconduct). For a further discussion of this case, see *infra* text accompanying notes 80-90.

7. References to the code of judicial conduct and to canons or sections of the code are to the *1990 American Bar Association Model Code of Judicial Conduct*. The 1990 model code retained most of the basic principles of the 1972 ABA model code but made several substantive changes and contains many differences in its details. Although the model code is not binding on judges unless it has been adopted in their jurisdiction, forty-nine states, the United States Judicial Conference, and the District of Columbia have adopted codes of judicial conduct based on either the 1972 or 1990 model codes. (Montana has rules of conduct for judges, but they are not based on either model code.)

8. Canon 2C ("A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin").

9. Canon 3E(1)(d). The parties may waive that disqualification. Canon 3F.

judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."¹⁰ The reasonable person standard is also present in code sections requiring a judge to disqualify himself or herself from a case when the judge's "impartiality might reasonably be questioned,"¹¹ and requiring a judge to conduct all extra-judicial activities so that they do not "cast reasonable doubt on the judge's capacity to act impartially as a judge."¹²

Some critics have argued that the appearance of impropriety standard is at best merely aspirational and at worse unconstitutionally vague and in either case out of place in a code used as the basis for disciplinary sanctions of judges. Several groups, although none comprised solely or even largely of judges, have asked the ABA to eliminate the standard from the model code in its current revision process.¹³

Canon 2, however, is a vital component of the code of judicial conduct. As the case-law analysis in this article will demonstrate, judicial discipline authorities are not using the standard as an arbitrary smell test but are applying it in a cautious, reasoned, and appropriate manner with no evidence of overly subjective interpretation. This article will also examine the criticisms of the standard. The article concludes that the standard is not too vague to follow and that, given their power and prestige, requiring judges to consider

10. All states but Oregon and Montana refer to the appearance of impropriety in their codes of conduct.

11. Canon 3E(1). This article will focus on cases other than those involving disqualification. For a discussion of the application of the appearance of impartiality standard for disqualification, see Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably be Questioned,"* 14 GEO. J. LEGAL ETHICS 55 (Fall 2000).

12. Canon 4A(1).

13. 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), at http://www.abanet.org/judicialethics/resources/comm_rules_minkoff_063004.pdf [hereinafter APRL comments]; 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 (Apr. 12, 2005), at http://www.abanet.org/judicialethics/resources/comm_rules_aba_ethics%20committee_4125_ddt.pdf. In September 2003, the ABA appointed a Joint Commission to Evaluate the Model Code of Judicial Conduct to review the ABA's Model Code and to recommend revisions. The Commission has 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 2006. See <http://www.abanet.org/judicialethics/home.html>. Although in partial drafts, the ABA Joint Commission watered down the "appearance of impropriety" standard, in the preliminary draft, it left the standard essentially unchanged from the 1990 model code, noting that the "[m]ajority of commentators on the subject, citing to judicial discipline decided over a three-decade period, urged that the concept be retained."

the implications of their conduct for public confidence in the judiciary is not too much to ask and, indeed, is a responsibility most judges readily assume.

II. APPEARANCE OF IMPROPRIETY AS AN ASPIRATIONAL STANDARD

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”¹⁴ 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. Although judges must ignore public clamor about the substance of their decisions, they cannot afford a callousness toward public opinion about their integrity and impartiality based on the choices they make about their conduct.

Moreover, incorporating those values in the code of judicial conduct—which is adopted by the 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.

Avoiding the appearance of impropriety is as important to developing public confidence in the judiciary as avoiding impropriety itself. The responsibility of the judge extends not only to the business of the courts in its technical sense, such as the disposition of cases, but also to the business of the judge in an institutional sense, such as the avoidance of any stigma, disrepute, or other element of loss of public esteem and confidence in respect to the court system from the actions of a judge.¹⁵

The appearance of impropriety standard does not unfairly assume that judges lack integrity, but the alternative of asking the public simply to trust that judges are upright despite appearances¹⁶ ignores the public’s suspicions

14. *In re Spector*, 392 N.E.2d 552, 553 (N.Y. 1979).

15. *In re Dean*, 717 A.2d 176, 185 (Conn. 1998).

16. Judge Alex Kozinski, of the United States Court of Appeals for the Ninth Circuit, for example, has argued:

I know there’s a growing tendency to distrust judges—to craft more elaborate ethical rules and restrictions, to expand the scope of what is encompassed within the appearance of impropriety standard, to adopt better methods of intruding into judges’ private lives—all in a misguided effort to promote ethical judicial behavior. But the hard truth is that few of those things really matter. Judicial ethics, where it counts, is often hidden from view, and no rule can possibly ensure ethical judicial conduct. Ultimately, there is no choice but to trust the judges. To my mind, we’d all be better off in a world with fewer rules and a more clear-cut understanding that impartiality and diligence are obligations that permeate every

about public officials in general as well as judges, suspicions that unfortunately have been confirmed and aggravated by scandal after scandal, some of which have involved judges. A reasonable level of cynicism by members of the public is justified; it would be naïve and foolish for citizens to blindly trust any public official, and it would imprudent for judges to assume, assert, or act as if they should be exempt from that skepticism.

All public servants are as a practical matter held to an appearance of impropriety standard by the press and public if not by a code of conduct. 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.

III. APPEARANCE OF IMPROPRIETY AS A DISCIPLINARY STANDARD

The appearance of impropriety standard is necessary and justified even if the code is viewed only from a disciplinary perspective. 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.

A. Use of Influence: Winks and Nods

Invoking the judicial office to cajole or bully a favor is a classic example of judicial misconduct, giving rise to numerous judicial discipline cases.¹⁷ If the pressure is express and the favor is granted, the improper use

aspect of judicial life—obligations that each judge has the unflagging responsibility to police for himself.

Alex Kozinski, *The Appearance of Impropriety*, LEGAL AFFAIRS (Jan.–Feb. 2005), available at http://www.legalaffairs.org/issues/JanuaryFebruary2005/argument_Kozinski_janfeb05.msp. But see M. Margaret McKeown, *Canon Fodder*, LEGAL AFFAIRS (May–June 2005), available at http://www.legalaffairs.org/issues/May-June 2005/letters_mayjun05.msp.

17. See, e.g., *Inquiry Concerning Platt, Decision and Order* (Cal. Comm'n on Jud. Performance Aug. 5, 2002) available at <http://cps.ca.gov/cn%20removals/Platt%208-5-02.rtf> (asking another judge to release on her own recognizance the daughter of a family from the judge's church); *Inquiry Concerning Holloway*, 832 So. 2d 716 (Fla. 2002) (requesting scheduling favor from another judge for family member); *In re Parros*, 847 So. 2d 1178 (La. 2003) (intervening on behalf of niece with prosecuting attorney, presiding judge in her felony theft case, and victim's father); *Comm'n on Jud. Performance v. Brown*, 761 So. 182 (Miss. 2000) (contacting officer who arrested son for DUI and asking judge assigned to son's case for help getting the case dismissed); *In re Bowers, Determination* (N.Y. Comm'n on Jud. Conduct Nov. 12, 2004) available at <http://scjc.state.ny.us> (stating in letter to another judge on judicial stationery about a ticket received by an acquaintance "if you can help out I would

of the prestige of office and the violation of the code of judicial conduct are obvious.¹⁸

More subtle, less bald-faced but still manifest attempts to gain an improper advantage from the judicial office are captured by the appearance of impropriety standard and represent the largest number of cases finding an appearance of impropriety. This application of the appearance standard reflects 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 re Collester*,¹⁹ 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."²⁰

appreciate this, and if not, I will understand"); *In re Canary*, Determination (N. Y. State Comm'n on Jud. Conduct Dec. 26, 2002) *available at* <http://scjc.state.ny.us/determinations> (angrily disputing traffic tickets issued to the judge's son with police officer and his superior; intervening in son's second arrest); *In re Leonard*, Determination (N.Y. State Comm'n on Jud. Conduct Dec. 26, 2002) *available at* <http://scjc.state.ny.us> (acting as advocate with police officer for grandson and asking why she had not been given advance notice of a search); *In re Magill*, Determination (N.Y. State Comm'n on Jud. Conduct Oct. 6, 2004) *available at* <http://scjc.state.ny.us> (interjecting judicial prestige into case in which wife was complaining witness); *In re Martin*, Determination (N.Y. State Comm'n on Jud. Conduct Dec. 26, 2001) *available at* <http://scjc.state.ny.us> (letters seeking special consideration on behalf of defendants awaiting sentencing in other courts on judicial stationery); *In re Williams*, Determination (N.Y. State Comm'n on Jud. Conduct May 17, 2002) (asking another judge to vacate an order of protection entered against friend) *at* <http://www.scjc.state.ny.us>; *In re Berkheimer*, 828 P.2d 19 (Pa. Ct. Jud. Dis. 2003) (calling police officer about driving while intoxicated charge against someone else, leading officer to withdraw charges); *In re Kelly*, 757 A.2d 456 (Pa. Ct. Jud. Dis. June 29, 2000 and August 23, 2000) (contacting another judge about a friend's traffic violation, stating "I would appreciate your help not guilty he is a great guy he can help you, come through me I don't ask to much").

18. Canon 2B provides in part that "a judge shall not lend the prestige of judicial office to advance the private interests of the judge or others."

19. 599 A.2d 1275 (N.J. 1992).

20. *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. *See also* *In re Travis*, Order (Ill. Ct. Comm'n Feb. 21, 2003) (one-month suspension for, in addition to other misconduct, showing badge that said "judge" to police officer and telling officer he was a judge); *In re*

In a different context but with a similar conclusion, the New York State Commission on Judicial Conduct found that, regardless of intent, a judge's repeated, pointed references to his judicial status during a dispute with a snowmobile dealer created the appearance that he was attempting to use his judicial prestige to further his personal interests.²¹ The judge had identified himself as a judge while talking to a salesman, a secretary, the manager, and the proprietor even though his judicial status was irrelevant to whether he was entitled to be reimbursed for repairs to his snowmobile. When refused reimbursement, the judge stated he would take the matter to small claims court and that he knew how "the system" worked. When he did file suit, he left his business card with the clerk of the court and introduced himself to a judge of the court where the case was pending. Finally, he identified himself as a judge when he made a complaint about the dealership to a state agency. The Commission found that the judge's statements "could well be perceived as intimidating, especially in the context of demanding reimbursement for the repairs, threatening a lawsuit and saying that he knew how 'the system' worked."²²

Moreover, in the context of legal proceedings, an attempt to influence is inherent in even a simple inquiry from a judge to an individual such as a police officer, prosecutor, or other judge who is aware of the inquirer's judicial status. Any communication from a judge in that situation may be perceived as "backed by the power and prestige of judicial office"²³ and constitute an implied request for a favor.

In *In re Snow*,²⁴ after his brother was cited for speeding, Judge Snow called the police officer who had issued the summons and remarked that it was funny that the officer had not recognized his brother because the officer

Werner, Determination (N.Y. State Comm'n on Jud. Conduct Oct. 1, 2002) *available at* <http://scjc.state.ny.us> (admonishment pursuant to agreement for showing official identification card when stopped by police for traffic offenses even absent explicit request for special consideration); *In re Cipolla*, Determination (N.Y. State Comm'n on Jud. Conduct Oct. 1, 2002) *available at* <http://scjc.state.ny.us> (censure for, in addition to other misconduct, displaying an identification card and badge that identified him as an acting judge during a dispute with a club doorman when the doorman had not asked for identification); *In re Esposito*, Determination (N.Y. State Comm'n Sept. 19, 2003) *available at* <http://scjc.state.ny.us> (censure pursuant to agreement for, in addition to other misconduct, referring to his judicial office while complaining to tax assessor about the assessment of property owned by the wife of a former colleague with whom he had a contentious relationship); *In re Krauciunas*, Determination (N.Y. State Comm'n on Jud. Conduct Nov. 18, 2002) *available at* <http://scjc.state.ny.us> (admonition for being rude and gratuitously referring to judicial office while dealing with other judge and clerk about daughter's small claims case).

21. *In re Dumar*, Determination *available at* <http://scjc.state.ny.us> (N.Y. State Comm'n on Jud. Conduct May 18, 2004).

22. *Id.* The Commission censured the judge pursuant to an agreement. *Id.*

23. *In re Lonschein*, 408 N.E.2d 901, 902 (N.Y. 1980).

24. 674 A.2d 573 (N.H. 1996).

had helped his brother paint the judge's house the previous summer.²⁵ The officer told the judge that if he had known the driver was the judge's brother, he would probably have only issued a warning.²⁶ Although Judge Snow told the officer that he was not calling to fix the ticket, the ticket was thrown away when the judge's brother, at the judge's direction, brought the summons to the police station.²⁷

Rejecting the judge's argument that he did not engage in serious misconduct because he did not intend to fix his brother's ticket, the New Hampshire Supreme Court concluded that "[t]here is no intent requirement in these canons," and "in fact, it is practically impossible to impose a mens rea element on the 'appearance of impropriety' standard in Canon 2."²⁸ The court stated that "[e]ven assuming that Judge Snow was not subjectively aware of the impropriety of his telephone call at the time that he made it, Judge Snow should have known that his actions would create the appearance of impropriety."²⁹

As *Snow* demonstrates, the appearance of influence is created even if the judge tells the contact that he or she is not seeking favorable treatment. In a similar case, Judge Pennington met with the county district attorney to review a charge against his sons; the charge was dismissed for lack of prosecution, which suggested that the judge's advocacy was successful.³⁰ The judge had told the district attorney that he was there as the defendant's father and not to use his position to ask for any favors, but in discipline proceedings, the judge "acknowledged that the mere fact of his judicial status increased the likelihood that he could not only obtain such a meeting, but get the District Attorney's 'heightened attention' to his concerns about his son's treatment."³¹ The New York Commission concluded the contact was prohibited by "well-established ethical standards" even in the absence of a specific request for special consideration.³²

Proof that the judge's conduct actually resulted in inappropriate influence is not necessary to prove an appearance of influence. In *In re Chaisson*,³³ Judge Chaisson had promised a litigant that "he would check on the status of a settlement" being negotiated for a \$15 million judgment against the state for injuries that had left the litigant a quadriplegic.³⁴ While in the

25. *Id.* at 574–75.

26. *Id.*

27. *Id.*

28. *Id.* at 577 (citation omitted).

29. *Id.* at 578. The court suspended the judge for six months without pay.

30. *In re Pennington*, Determination available at <http://scjc.state.ny.us> (N.Y. State Comm'n on Jud. Conduct Nov. 3, 2003).

31. *Id.*

32. *Id.* The judge was censured pursuant to an agreement for this and other misconduct.

33. 549 So. 2d 259 (La. 1989).

34. *Id.* at 261.

state capitol regarding a judicial salary bill, the judge asked the state officials handling the settlement negotiations about the figures on the table.³⁵ The Louisiana Supreme Court noted that there was no evidence that Judge Chaisson actually influenced the settlement. Therefore, the judge had not used the prestige of his office to advance the litigant's interests.³⁶

The court, however, did not end the inquiry there but proceeded to consider whether the judge's inquiry would raise a reasonable person's suspicions that he had lent the prestige of his office to advance the litigant's interests.³⁷ The court noted "it was highly unlikely that an ordinary citizen claiming to be a friend of [the litigant] would have been made privy to the details of the settlement negotiations."³⁸

[S]ince the matter settled on terms favorable to [the litigant] shortly after Judge Chaisson's involvement, a reasonable person might well suspect that this was the result of some improper influence. This suspicion is made even more reasonable by the fact that the true nature of Judge Chaisson's involvement was not public and thus even more likely to be perceived as wrongdoing. These factors alone are sufficient to establish the appearance of impropriety that weakens "public confidence in the integrity of the judiciary. . . ."³⁹

35. *Id.* at 262.

36. *Id.* at 263. Any settlement would have required a legislative act to appropriate funds for payment.

37. *Id.*

38. *Id.*

39. *Chaisson*, 549 So. 2d at 263. *See also* Inquiry Concerning Simpson, Decision and Order (Cal. Comm'n on Jud. Performance Dec. 9, 2002) *available at* <http://cjp.ca.gov/CNCensureRTF/Simpson%20Decision%202012-9-02.rtf> (censure of retired judge pursuant to agreement for asking a court commissioner question about tickets issued to three friends or relatives of friends; calling a commissioner about a ticket received by a friend; asking a police officer); Inquiry Concerning Block, Decision and Order (Cal. Comm'n on Jud. Performance Dec. 9, 2002) *available at* <http://cjp.ca.gov/CNCensureRTF/Block%20Decision%202012-09-02.rtf> (censure of retired judge pursuant to consent for expressing concern to managing judge about way ticket for friend's daughter had been handled); Inquiry Concerning Platt, Decision and Order (Cal. Comm'n on Jud. Performance Aug. 5, 2002) *available at* [http://cjp.ca.gov/CN%20Removals/Platt%208-5-02.rtf](http://cjp.ca.gov/CN%20Removals/Platt%20208-5-02.rtf) (removal for, in addition to other misconduct, calling a court commissioner to learn how his godfather might go about getting his ticket on the calendar); *In the Inquiry Relating to Alvord*, 847 P.2d 1310 (Kan. 1993) (censure for, in addition to other misconduct, making two unsolicited phone calls on behalf of a clerk to a prosecutor asking if anything could be done about a ticket although there was no actual use of influence attempted by the judge and none was perceived by the prosecutor); *In re Young*, Determination (N.Y. State Comm'n on Jud. Conduct Dec. 29, 2000) *available at* <http://www.scjc.state.ny.us> (censure pursuant to agreement for telling a hearing examiner that a friend's ex-husband was a "hard ass" and was being "unreasonable" by not contributing to the college expenses of one of their children); *In re Whelan*, Determination (N.Y. State Comm'n on Jud. Conduct Dec. 27, 2001) *available at* <http://www.scjc.state.ny.us> (admoni-

The use of judicial letterhead also inherently and inevitably creates the appearance of a misuse of the prestige of office. When a justice of the Alaska Supreme Court sent three letters on chambers stationery to the counsel for a state agency regarding litigation in which the justice was involved as a private citizen, the court found that a reasonably objective person would believe that the justice was attempting “to influence opposing counsel and other viewers of the letters or that it had this effect.”⁴⁰

The court noted that the judge easily could have avoided risking a negative effect on the confidence of the public by using different stationery.⁴¹ The court also concluded that whether the recipients of the letters were influenced by the stationery was irrelevant to the opinions of the thinking public who might see the letters.⁴²

The judge in *In re Mosley*⁴³ 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 had not misused the prestige of office because the school principals already knew he was a judge and did not provide special treatment to him.⁴⁴ 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.⁴⁵

tion pursuant to agreement for urging attorney to convince clients to pay bill related to real estate transaction handled by judge’s spouse); *In re Looper*, 548 S.E.2d 219 (S.C. 2001) (reprimand of former judge pursuant to consent for communicating with another judge to ensure that judge was aware of his personal interest in pending case). *But see* *Inquiry Concerning Holloway*, 832 So. 2d 716 (Fla. 2002) (request to a police detective conducting a criminal investigation of allegations involving a family friend keeping her apprised of developments in the case was “not, in itself, sufficient to conclude that the judge is abusing her office”).

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

41. *Id.* at 1341. Rejecting the justice’s argument that it was not official stationery and the court system had no written policy restricting the use of chambers stationery, the court found that “an objectively reasonable person would not know the difference between the two types of stationery or whether any policy existed” and individual judges have an obligation to follow ethical constraints notwithstanding any court system policy or lack of policy. *Id.* at 1340–41.

42. *Id.* However, rejecting the Commission’s finding, the court concluded that a reasonably objective person would not believe that an impropriety was afoot from the justice’s identification of himself as a “justice” when calling the governor because in the same conversation he stated he was calling on a personal matter. *Id.* at 1341. The justice was privately reprimanded for meeting with the governor and using judicial stationery to communicate with opposing counsel in a private lawsuit. *See id.*

43. 102 P.3d 555 (Nev. 2004).

44. *Id.* at 559.

45. *Id.* 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. *See also* *In re Nesbitt, Determination* (N.Y. Comm’n on Jud. Conduct June 21, 2002) *available at*

The Washington State Commission on Judicial Conduct found that a judge's inquiry to an attorney about a campaign sign endorsing his opponent in front of the attorney's office could reasonably be perceived as an attempt to exert, at least implicitly, influence over the attorney.⁴⁶ The judge inquired why a campaign sign endorsing the judge's opponent was displayed in the yard in front of the attorney's law office and whether the display meant the attorney was supporting the judge's opponent. The conversation was cordial, but it occurred in the judge's courtroom, while the judge was on the bench, wearing his judicial robe and immediately following a hearing in which the attorney participated.⁴⁷

B. Appointments: No *Quid Pro Quo*

The code of judicial conduct prohibits favoritism in appointments, requiring a judge to "exercise the power of appointment impartially and on the basis of merit."⁴⁸ An appearance of favoritism "is no less to be condemned than is the impropriety itself."⁴⁹ While few cases find proof of actual favoritism, several hold that a combination of factors produced the appearance that a judge exercised the power of appointment based on something other than the appointee's qualifications.

<http://www.scjc.state.ny.us> (admonition pursuant to agreement for letter on judicial stationery to school official challenging administrative determination concerning judge's son). *But see* *In re Rosenblum*, Order (Ill. Ct. Comm'n July 29, 1993) (dismissing a complaint alleging that a judge used the prestige of office to advance his personal interests in connection with an apartment building the judge co-owned by identifying himself as a judge in a telephone call to a social worker with the charitable organization that had guaranteed the lease payments, sending letters to the organization using official court stationery, attending several court hearings in a criminal misdemeanor complaint against the tenant filed by the judge's co-owner, and assuming a substantial role in the hearings).

46. *In re Krouse*, Stipulation, Agreement, and Order of Reprimand (Wash. State Comm'n on Jud. Conduct June 10, 2005) at <http://www.cjc.state.wa.us/casematerial/2005/4560%20stipulation.pdf>. *See also* *In re Sobel*, Imposition of Discipline (Nev. Comm'n on Jud. Discipline July 19, 2005) at <http://www.judicial.state.nv.us/decisiononsobel.htm> (a judge told an attorney he was "fucked" because he had not yet contributed to the judge's re-election campaign and asked a second attorney why he had contributed \$3,500 to the judge's opponent's campaign but only \$500 to the judge's campaign).

47. The Washington Commission also concluded that the judge appeared to personally solicit campaign contributions in three e-mails when, during his 2004 judicial campaign, his campaign committee co-chair sent three e-mails from the campaign e-mail accounts (prefixed with "judgekrouse") that requested monetary donations to assist in the judge's campaign. The e-mails were written in the first person and two of the e-mails concluded with "Merle" (the judge's first name) in the typed signature line. The Commission noted the judge had the duty to assure communications from his campaign committee complied with the code of judicial conduct.

48. Canon 3C(4).

49. *In re Spector*, 392 N.E.2d 552, 554 (N.Y. 1979).

For example, in a case from Alaska,⁵⁰ Judge Johnstone appointed an individual he knew was the friend of the chief justice because the chief justice had suggested him. Because of the candidate's connection to the chief justice, the Alaska Supreme Court noted, the judge should have known he had to take special precautions to avoid the appearance of favoritism.⁵¹ Instead, Judge Johnstone went outside the merit selection process he had initiated to appoint the chief justice's friend.⁵² The individual had not applied during the application period, and the appointment was based on criteria that were not part of the stated qualifications and "on terms . . . that were significantly different from those advertised to the general public."⁵³

The court emphasized that the question was not whether the judge's individual actions viewed in isolation would give rise to an appearance of impropriety" but "the cumulative effect" of the actions.⁵⁴ The court concluded that the events "would leave an objectively reasonable person with the indelible impression" that the coroner's hiring involved favoritism.⁵⁵ The court noted that the judge's explanation that he thought the man he hired was the most qualified applicant did not eliminate the appearance arising from the objective record.⁵⁶

Similarly, the Louisiana Supreme Court found an appearance of impropriety when a judge hired his girlfriend to review and summarize medical records in nineteen cases, paying her with taxpayer funds and using taxpayer money to pay for her training to become a certified legal nurse consultant.⁵⁷ No actual favoritism was found as the judge's girlfriend was fully qualified to do the work for which she was hired and did indeed perform the work and her involvement did not affect the judge's adjudicatory function.⁵⁸

50. *In re Johnstone*, 2 P.3d 1226 (Alaska 2000). Because the case involved the chief justice, review was by a special supreme court comprised of members of the court of appeals.

51. *Id.* at 1236.

52. *Id.* Noting that it was undisputed that the judge initially had no duty to follow a merit selection process, the court stated that once he initiated a merit process, it should have been obvious to the judge "that he could not select an individual from outside the process without upsetting the reasonable expectations" of the individuals who had followed established procedures. *Id.*

53. *Id.*

54. *Id.* at 1236-37.

55. *Id.*

56. *Johnstone*, 2 P.3d at 1237. The judge was publicly reprimanded.

57. *In re Granier*, 906 So. 2d 417 (La. 2005).

58. The judge was censured pursuant to the Judiciary Commission's recommendation, to which the judge had consented. The judge was also required to reimburse his court for the amount paid for his girlfriend's tuition to attend a week-long legal nurse consultant course and to cover her travel expenses. The Commission had found that the judge "unwittingly enriched" his girlfriend when he used taxpayer money to enable her to become a certified legal nurse consultant, which gave her a credential she could use for additional services to the legal community.

The timing of a judge's appointments of her accountant as a fiduciary was found to have created an appearance of *quid pro quo* in *In re Lebedeff*.⁵⁹ During four years when Judge Lebedeff was appointing her personal accountant as a fiduciary in three instances and approving more than \$21,000 in compensation, the judge was not paying the accountant for preparing her taxes (a \$1200 benefit) because the accountant was not billing her.⁶⁰ The Commission concluded that, even though it was not alleged that the judge had agreed to appoint the accountant in exchange for free tax preparation services, the judge "had a duty to avoid even the appearance of receiving any financial benefits from her appointee."⁶¹

In *In re 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 several million dollars in fees to that friend without applying statutory standards and without requiring substantiation.⁶² After his election, the judge, without any search or interview process, appointed his friend and law school classmate, Louis Rosenthal, to replace the firm that had for several decades served as counsel to the public administrator.⁶³ Rosenthal had

59. Determination (N.Y. State Comm'n on Jud. Conduct Nov. 5, 2003), at <http://www.scjc.state.ny.us>.

60. *Id.* Alice Krause had been a friend of the judge since around 1978 and had prepared the judge's tax returns since approximately 1980. *Id.* Once in 1993, once in 1996, and once in 1997, the judge appointed Krause as a fiduciary or guardian of the personal needs of an allegedly incapacitated person. *Id.* The judge advised the parties that Krause was her personal accountant, and there were no objections. *Id.* In 1997 the judge twice approved compensation to Krause for her services, \$16,500 in one case and \$5,393 in a second. *Id.* Although Krause had not, as of January 2003, submitted a request for payment in the third case, she had indicated that she intended to do so. *Id.* From 1980 to 1996, as a general practice, Krause prepared and contemporaneously billed the judge for her annual tax preparation services. *Id.* Krause prepared the judge's 1996, 1997, and 1998 federal and state income tax returns but did not bill the judge for those services until July 2001 after she was questioned about her relationship with the judge by the court system's Special Inspector General for Fiduciary Appointments. *Id.*

61. *Id.* The judge was censured pursuant to an agreement. The *New York Daily News* criticized the finding of only an appearance of impropriety: "Here's how that will translate to judges, a breed ever sensitive to precedent: The commission will not bounce a judge unless said judge enters into a bargain with the terms written in neon. You pay me and I'll pay you back. Short of such explicit, and criminal, corruption, the commission will frown on mutual wallet-fattening amid winks among pals." Editorial, *This Watchdog Doesn't Bark or Bite*, NEW YORK DAILY NEWS, Nov. 26, 2003.

62. 833 N.E.2d 1204 (N.Y. 2005).

63. 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 surro-

helped to raise funds for the judge's election campaign but had limited experience in surrogate's court.

The court found that the judge had a pro forma practice of awarding Rosenthal 8% of an estate's value, without attention to the actual work done. The judge did not individually review the files, he never rejected or reduced a fee request, and he never questioned a request or sought additional information. The judge never required Rosenthal to submit an affidavit of legal services before approving a fee request and never considered the statutory factors for fee awards specified in the Surrogate's Court Procedure Act. Between January 1997 and December 2002, the judge awarded Rosenthal \$8,613,009.35 in legal fees.

The court also found that the judge's failure to follow the statute was made more egregious by his appointment, without considering other candidates, of a close personal friend and political supporter. The court stated, "while appointment of a friend does not itself convey an 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."⁶⁴

Also in New York, Judge Ray had appointed two attorneys as guardians in a disproportionate number of cases, bypassing the rotation system through which law guardians were usually assigned by the court clerk.⁶⁵ The judge also routinely certified payments to the attorneys without examining

gate. In re Feinberg, Determination (N.Y. State Comm'n on Jud. Conduct Feb. 10, 2005), available at <http://www.scjc.state.ny.us/Determinations/F/feinberg.htm>

64. In re Feinberg, 833 N.E.2d at 1209. The judge was removed from office. The court found that the judge's "repeated explanation that he 'just read through sections' or 'skimmed' the SCPA, and that his failure—over a period of more than five years—to know of and adhere to the single paragraph requirement of affidavits of legal services and individualized consideration of fee requests was an 'oversight,' demonstrate a shocking disregard for the very law that imbued him with judicial authority." *Id.* at 1208.

65. In re Ray, Determination (N.Y. State Comm'n on Jud. Conduct Apr. 26, 1999), at <http://www.scjc.state.ny.us>. There were approximately ninety attorneys on the panel of law guardians. *Id.* In 1993 the judge gave William Maney 18 % of the law guardian appointments and gave Edward Boncek 6.4 % of the cases; in 1994 the judge gave Maney 17 % of the appointments and Boncek 5.4 %. *Id.* The chief clerk and the deputy chief clerk spoke to the judge about departing from the rotation of assignments and advised the judge that they were receiving complaints from other attorneys that the judge was appointing certain attorneys, particularly Maney and Boncek, to a disproportionately high number of cases. *Id.*

In 1993 the judge awarded Maney \$58,177 and Boncek \$20,253 in fees. *Id.* The average fee for all law guardians assigned by the judge that year was \$4,434. *Id.* In 1994, the judge awarded Maney \$30,660 and Boncek \$13,800; the average fee that year was \$3,354. *Id.* Beginning in the early 1990s, the judge received quarterly statements from the law guardian program that indicated that Maney and Boncek were receiving a disproportionately high number of assignments and a disproportionately high income from their work as law guardians in the family court. *Id.*

the vouchers they had submitted; had the judge reviewed the vouchers, it would have been apparent to him that the attorneys were over-billing.⁶⁶ The appointments were particularly puzzling because one of the attorneys had run against the judge in 1985. Then, in January 1995, after being awarded over \$88,000 in fees by the judge over two years, the attorney announced that he would not oppose the judge for a new ten-year term.⁶⁷

The New York Commission found that “the combination of these factors created the appearance that the lawyers were getting favored treatment from the judge. . . . [S]uch laxity, in view of the political relationship of respondent and [the attorney], creates the appearance that his serious lack of oversight may have been politically motivated.”⁶⁸ The judge was censured pursuant to an agreement.⁶⁹

Because actual favoritism seems clearly proven by the agreed facts (the disproportionate number of appointments, dodging the rotation system, rubber-stamping requests for reimbursement, the political relationship), *In re Ray* demonstrates an additional use of the appearance of impropriety standard—as a lesser included offense that facilitates “plea bargains” in disciplinary proceedings. In an agreed disposition, the appearance of impropriety standard gives the judge a face-saving way to admit with the benefit of hindsight to apparently committing misconduct without having to admit to actually meaning to do anything wrong.

C. Relationships: No Harm, No Foul?

Absence of proof that a judge actually favored an attorney or party does not preclude a finding of misconduct if a reasonable person would assume that the judge would favor the attorney or party, however unconsciously, because of a close, personal relationship. Calling “immaterial” the question whether there was a “detrimental impact” on criminal defendants,

66. *Id.* An audit by the Office of Court Administration revealed that between April 1, 1992, and December 31, 1995, Maney and Boncek had submitted vouchers that grossly overstated the number of hours that they had spent on cases and billed for proceedings that they did not attend or for cases in which they were not assigned. *Id.* Some of the vouchers double-billed for work. *Id.* On a number of occasions, they submitted vouchers in which they billed for more in-court hours than the court was in session. *Id.*

67. *Id.* The other was the judge’s former opponent’s law partner. *Id.* The two attorneys also offered to help the judge obtain the cross endorsement of the Democratic party. *Id.* The judge accepted their offer. *Id.*

68. *Id.*

69. *Id.* See also *In re Goodman*, 649 N.E.2d 115 (Ind. 1995) (a perception that the court’s business was based upon the exchange of favors arose when the judge entered into a contract with a corporation to provide services for a court program where the owner of the corporation was a close personal friend of the court administrator, hired the court administrator’s son-in-law, and the owner hosted an engagement party when the judge became engaged to the corporation’s in-house accountant).

for example, the Iowa Supreme Court stated that “once the public learned” of a judge’s sexual relationship with the state’s attorney who appeared before him daily, “the appearance of bias was very real.”⁷⁰ Thus, the court rejected Judge Gerald’s argument that his misconduct was mitigated because there was no evidence that he had favored the state.⁷¹ Instead, the court found persuasive the analysis of the Commission on Judicial Qualifications:

What is the public to think when they learn the assistant county attorney was having a sexual relationship with a judge before whom she appeared? . . . *More importantly, what is a criminal defendant to think when the judge sentences that defendant or overrules that defendant’s motion to suppress, when the assistant county attorney with whom he is having a sexual relationship was arguing the case on behalf of the State?*⁷²

The court also held that a judge has an affirmative duty to disclose or recuse when circumstances in his life might cause someone to reasonably question his partiality.⁷³ The court noted that it was not the judge’s “right to make these decisions for the affected parties. We agree with the commission that ‘this paternalistic attitude on behalf of the judge is contrary to Iowa law.’”⁷⁴

70. *In re Gerard*, 631 N.W.2d 271, 278 (Iowa 2001).

71. *Id.* Similarly, the New York Commission concluded that a judge’s impartiality was suspect when he presided over ten cases in which mentally disabled, institutionalized patients were represented by an attorney with whom he had a romantic relationship even though in each case his decision was contrary to the attorney’s position. *In re DiBlasi, Determination* (N.Y. State Comm’n on Jud. Conduct Nov. 19, 2001) at <http://scjc.state.ny.us> (censure for this and other misconduct).

72. *Gerard*, 631 N.W.2d at 278.

73. *Id.* at 279.

74. *Id.* at 280. Several of the intimate encounters took place in rooms in the courthouse. *Id.* at 277. The court acknowledged that, although both the judge and the attorney were married to other people, it “normally would be loath to interfere in such personal matters.” *Id.* The court held, however, that a sexual affair is regarded as improper when it involves a subordinate in a professional, highly sensitive public context. *Id.* The court suspended the judge for sixty days without pay for this and being dilatory in filing rulings and in making reports on unfinished rulings as required by a supreme court rule. *See also In re Chrzanowski*, 636 N.W.2d 758, 764 (Mich. 2001) (appearance of partiality arose despite a judge’s “apparently fair disposition” of non-adversarial cases (the prosecutor was not present) in which the attorney with whom she was having an intimate relationship appeared); *In re Simeone, Determination* (N.Y. State Comm’n on Jud. Conduct Oct. 6, 2004) at <http://www.scjc.state.ny.us> (a judge’s romantic involvement with the director of a youth services facility raised a suspicion that his ruling was influenced by personal considerations each time he favored the position she advocated).

When a judge presides over a case involving a close friend, an appearance of partiality arises without any evidence of actual special treatment or even the expectation of special treatment. For example, in *In re Gaddis*,⁷⁵ the judge had accepted Seattle Mariners baseball tickets and a dinner from an attorney who regularly appeared before him in probate cases and depended on his exercise of discretion in approving petitions for fees and other requests.⁷⁶ In addition, the judge and his wife had a personal, social relationship with the executive director and manager of a guardianship agency whose interests were frequently before the judge.⁷⁷ The Washington State Commission on Judicial Conduct found as follows:

While there is no evidence that either individual . . . expected or received preferential treatment from Respondent, by accepting gifts and favors, and privately socializing . . . with persons who appeared (and were likely to continue to appear) before him, the judge created at a minimum an appearance of impropriety: his conduct created a reasonable perception of partiality and legitimate concerns about whether these individuals were in a special position to influence the judge.⁷⁸

75. Stipulation, Agreement and Order (Washington State Comm'n on Jud. Conduct Dec. 10, 2004), *at* <http://www.cjc.state.wa.us/case%20material/2004/3855%20Stipulation.pdf>.

76. *Id.* On two occasions, the judge accepted four Seattle Mariners baseball tickets with the cumulative face value of \$232 without reimbursing the attorney. *Id.* The judge had considered the tickets to be a form of compensation for working on a manual for which the attorney was responsible. *Id.*

77. *Id.* At a dinner scheduled for work-related purposes, the judge also allowed the attorney to purchase dinner for him and another person, the bill for which totaled \$287.27. *Id.* The judge bought a meal for this attorney on at least one occasion. *Id.* According to the judge, he perceived these as professional contacts in the course of preparing continuing education materials or ordinary social interactions. *Id.*

78. *Id.* See also Inquiry Concerning Harris, Decision and Order (Cal. Comm'n on Jud. Performance Mar. 23, 2005) *at* <http://cjp.ca.gov/PubAdmRTF/Harris%20PA%20203-23-05.rtf> (although there was no evidence of actual bias, a judge's conduct in helping an attorney who regularly appeared before him "find dates could raise questions in the mind of an objective observer regarding the judge's impartiality in cases handled by Mr. Schonbrun"); *In re D'Auria*, 334 A.2d 332 (N.J. 1975) (although at no time did anyone expect or receive any preferential treatment, a judge created an obvious appearance of impropriety by frequently eating lunch in public restaurants as a guest of attorneys or representatives of insurance companies in pending matters in the judge's division); *In re Lebedeff*, Determination (N.Y. State Comm'n on Jud. Conduct Mar. 18, 2005) *at* <http://www.scjc.state.ny.us> (because of her personal and professional relationship with a plaintiff, judge's rulings in his favor raise a suspicion that she was influenced by personal considerations; censure for this and other misconduct); *Office of Disciplinary Counsel v. Lisotto*, 761 N.E.2d 1037 (Ohio 2002) (accepting eight tickets to attend Pittsburgh Steelers football games from an attorney who appeared in numerous cases before the judge was misconduct although there was no evidence of any favor, preference, or improper action); *Office of Disciplinary Counsel v. Cox*, 770 N.E.2d 1007 (Ohio 2002) (receiving loans from attorneys who regularly appeared before him was misconduct although there was no evidence that any of the attorneys received any bene-

Moreover, an appearance that a judge is trying “to collect for past deeds”⁷⁹ can arise from actions taken by a judge after a decision is issued. In *Adams v. Commission on Judicial Performance*,⁸⁰ after awarding an automobile dealer \$5 million in a complex civil case against a bank, while the case was pending on appeal, the judge entered into several business transactions with the dealer, for example, buying a used Mercedes for his wife and a used Jeep for his daughter.⁸¹ During his case before Judge Adams, the automobile dealer had been represented by Patrick Frega, and in several of the transactions, the judge relied on Frega who, without the judge’s knowledge, arranged for the judge to receive favorable terms.⁸²

The California Supreme Court concluded that the record did not contain clear and convincing evidence that the judge had initiated the transactions with “the expectation of receiving a financial favor”⁸³ from the dealer. However, the court found that, by actively soliciting the assistance of a litigant to whom he had rendered an exceedingly large monetary judgment and whose interests remained before him, the judge created an appearance of impropriety.⁸⁴

Moreover, regardless whether he had actual knowledge of the favorable terms negotiated by Frega, the court stated, by placing himself in Frega’s hands, the judge “deliberately ignored the strong possibility that Frega ultimately would arrange for the [judge] to pay less than fair market value for the Jeep”⁸⁵ The court concluded that the judge’s “conduct readily could be construed as an attempt to collect for judicial services rendered in the . . . litigation, and otherwise to use his judicial office to advance his personal interests. To an objective observer, petitioner’s integrity and impartiality would appear to have been placed in doubt.”⁸⁶

In addition, Judge Adams had accepted a sweater valued at \$150 from the dealer the same year as the judgment and had attended a dinner hosted by Frega in celebration of the satisfaction of the judgment in the litigation

fit); *In re Looper*, 548 S.E.2d 219 (S.C. 2001) (appearance of impropriety created despite absence of evidence that judge received favorable treatment when, while traffic charges against a defendant were pending in his court, the judge went to a car dealership owned by the defendant’s father, and at which the defendant was employed as a salesman, and negotiated with the defendant the trade-in of his automobile for a new automobile and purchased another new vehicle from the dealership).

79. *Adams v. Comm’n on Jud. Performance*, 897 P.2d 544, 554 (Cal. 1995).

80. *Id.*

81. *Id.* at 553–56.

82. *Id.* at 554–55.

83. *Id.* at 554.

84. *Id.*

85. *Adams*, 897 P.2d at 556.

86. *Id.* at 556–57.

over which the judge had presided.⁸⁷ The court found that, although the judge did not solicit the gift, “under the circumstances it was incumbent upon him to return it . . . to avoid any doubt regarding the judge’s independence or any appearance of impropriety.”⁸⁸ Finally, the court concluded

regardless of the judge’s motives, or of whether he was biased or impartial in the judicial proceedings involving the . . . litigation, his attendance at the dinner given in celebration of the satisfaction of the judgment in the . . . litigation indisputably gave rise to the appearance of partiality in favor of a litigant and his attorney whose very substantial interests had come before him.⁸⁹

D. Associating with Criminals

The Louisiana Supreme Court concluded that a judge’s extra-marital affair with a felon on parole from a prison sentence that the judge had imposed suggested “improper influence, whether or not such exists,” creating an appearance of impropriety.⁹⁰ The relationship had been publicized in a lengthy article in the *Baton Rouge Advocate*. The court concluded

[a]lthough it is not illegal to associate with known criminals, when a judge, who has sworn to uphold the law, enters into an intimate relationship with a convicted felon whom she sentenced in her court, the public’s perception of such a relationship causes disrespect for the judiciary and falls below the standard the public has a right to expect.⁹¹

87. *Id.* at 559–61.

88. *Id.* at 560.

89. *Id.* at 557. Similarly, the New York Court of Appeals found that a judge had created the “damaging impression that his judicial decisions were influenced by personal profit motives” when he directed that nearly a quarter of a million dollars in infants’ funds be deposited in a credit union from which he received preferential treatment on interest, including interest-free loans. *In re Cohen*, 543 N.E.2d 711 (N.Y. 1989). The court removed the judge. *See also* *In re Voetsch*, Determination (N.Y. State Comm’n on Jud. Conduct Aug. 17, 2005), at <http://www.scjc.state.ny.us> (a part-time judge created the appearance that his employment as a real estate broker was a reward for favorable action when he accepted employment from an individual who had recently been a successful litigant in his court and from the family of a defendant to whom he had recently given a lenient sentence).

90. *In re Harris*, 713 So. 2d 1138, 1141 (La. 1998).

91. *Id.* In deciding not to remove the judge, the court emphasized that Judge Harris had not exercised improper control over the treatment of the felon after imposition of sentence or intervened favorably on his behalf in the parole process. *Id.* at 1141 n.7. *See also* *Comm’n on Jud. Performance v. Milling*, 651 So. 2d 531, 536 (Miss. 1995) (“A justice court judge openly living with a fugitive from another state charged with several drug related felonies without a doubt creates an ‘appearance of impropriety.’”); *In re Jones*, 581 N.W.2d 876 (Neb. 1998) (removal for, in addition to other misconduct, having close contacts with people the judge

In New Jersey, Judge Blackman attended a picnic two days before his host, a friend of the judge for eighteen years, was going to begin a two-and-one-half year prison sentence for racketeering.⁹² The picnic was widely publicized and attended by 150 to 200 people. Newspaper accounts interpreted the judge's attendance as support for the felon, a former local official, and characterized the event as a going-away party.⁹³

The New Jersey Supreme Court concluded that the judge's attendance at the picnic "could be perceived as evidencing sympathy for the convicted individual or disagreement with the criminal justice system that brought about the conviction," noting "such conduct may raise questions concerning the judge's allegiance to the judicial system" and "generate legitimate concern about the judge's attitude toward judicial responsibilities, weakening confidence in the judge and the judiciary."⁹⁴ Acknowledging that the judge did not act with an improper motive, the court stated the judge's "presence at the party was the subject of public scrutiny, not his feelings of friendship."⁹⁵

As a judge, respondent had a duty to foresee that his actions might be open to criticism by the press or members of the public. Even if such criticism might be a misinterpretation of his motives, respondent nonetheless had an obligation to avoid any conduct that might lead to such criticism. By putting his personal feelings ahead of his responsibility as a judge and attending the party, respondent conducted himself improperly and exhibited insensitivity and poor judgment. He conveyed the wrong image of the judiciary.⁹⁶

The "going away" party was in 1990, six months after the court had publicly reprimanded two judges for attending the Governor's Inaugural Ball with their spouses, two years after the New Jersey Advisory Committee on Extra-Judicial Activities had issued an opinion warning judges not to attend a dinner to honor a prosecutor on his or her reappointment, and fifteen years after a judge had been sanctioned for frequently being a luncheon guest of attorneys in pending matters. In light of those authorities the court stated, Judge Blackman should have known that "a judge who attends a public or social event will be perceived as endorsing or supporting not only the event itself but also persons associated with the event."⁹⁷

had placed on probation).

92. In re Blackman, 591 A.2d 1339 (N.J. 1991).

93. *Id.* at 1342.

94. *Id.* at 1341-42.

95. *Id.* at 1342.

96. *Id.*

97. *Id.*

E. Statements: "Just Kidding"

The appearance of impropriety standard has been used to foil a judge's attempt to negate the obvious import of a statement that casts doubt on the basis on which the judge reached a decision.

In *In re Best*,⁹⁸ for example, the judge, in a case in which a defendant charged with battery was representing himself, asked the courtroom audience, "If you think I ought to find him not guilty, will you stand up?"⁹⁹ Then, he asked, "If you think I ought to find him guilty, stand up."¹⁰⁰ The judge then found the defendant guilty.¹⁰¹

Conceding that he should not have asked the audience to vote, the judge argued that his conduct was not sanctionable because his guilty verdict was based on the evidence presented at trial and he had only wanted to "involve the public in the judicial process."¹⁰² In fact, no one in the audience had stood up after either request by the judge.¹⁰³ Rejecting the judge's argument, the Louisiana Supreme Court stated

[w]hether or not Judge Best actually based his verdict on the audience's vote does not determine whether or not his conduct is sanctionable. The mere fact that he asked the courtroom audience to vote on the guilt of the defendant gave the impression that Judge Best based his verdict on something other than the evidence presented at trial. This type of behavior destroys the credibility of the judiciary and undermines public confidence in the judicial process.¹⁰⁴

*In re Schiff*¹⁰⁵ also involved statements by a judge that suggested he was making a decision based on something other than the facts or the law. A part-time judge who also practiced law had dismissed traffic charges filed against the driver of a car who had been in an auto accident with Judge Schiff.¹⁰⁶ After learning of the dismissal, Judge Schiff remarked to the arresting officer, "It's a wheel. It goes around and maybe someday I can do the same for him."¹⁰⁷ Judge Schiff also told an attorney he was so angry at the part-time judge that he intended to grant the plaintiff's motion for judg-

98. 719 So. 2d 432 (La. 1998).

99. *Id.* at 434.

100. *Id.*

101. *Id.*

102. *Id.* at 435.

103. *Id.*

104. *Best*, 719 So. 2d at 435-36; *see also* *In re Daniels*, 340 So. 2d 301 (La.1976) (censure for giving the appearance of deciding the guilt or innocence of several defendants by flipping a coin).

105. 635 N.E.2d 286 (N.Y. 1994).

106. *Id.* at 287.

107. *Id.*

ment in a case in which the defendant was represented by the part-time judge's law firm.¹⁰⁸ The judge did grant judgment for the plaintiff but argued in discipline proceedings that he had done so on the merits.¹⁰⁹ The New York Court of Appeals concluded that argument was "largely irrelevant to the charge"¹¹⁰ The court stated that

the harm inured when he indicated he would use his judicial powers to satisfy a personal vendetta, a classic instance in which "an appearance of such impropriety is no less to be condemned than is the impropriety itself." Petitioner created the impression that he was using his judicial office to retaliate, and thus failed to avoid the appearance of impropriety and to conduct himself in a manner that promotes public confidence in the impartiality and integrity of the judiciary.¹¹¹

Similarly, in *In re Cunningham*,¹¹² the New York Court of Appeals censured a county court judge who had told a city court judge in a letter that he would never change a sentence the city court judge had imposed, stating: "You can do whatever you want to whenever you want to & I'll agree with you . . . I take the position that you know the case and as sentencing judge you can do whatever you damn well please."¹¹³

Emphasizing that a judge must view matters on their merits alone without regard to public or professional disapproval, the court stated that a judge must also avoid creating the appearance that he or she "would decide a matter before him in any other manner."¹¹⁴ Noting the record did not indicate that Judge Cunningham "actually abrogated his appellate duty to review matters before him on the basis of their merits alone," the court concluded that, regardless whether Judge Cunningham was influenced by his concern about the other judge's criticism, his letter constituted judicial misconduct because he created "the appearance that he might be prejudging certain matters."¹¹⁵

108. *Id.* at 288.

109. *Id.*

110. *Id.*

111. *Schiff*, 635 N.E.2d. at 288 (quoting *In re Spector*, 392 N.E.2d 552, 554 (N.Y. 1979)). The judge was removed for this and other misconduct.

112. 442 N.E.2d 434 (N.Y. 1982).

113. *Id.* at 435. When Judge Cunningham learned that the city court judge was upset that he had signed an order to show cause in a case, he wrote a second letter stating that "if I catch the appeal, I will affirm, as always, on a judge's discretion." *Id.*

114. *Id.*

115. *Id.* at 436. Judge Cunningham had in fact overturned one of the city judge's sentences on appeal. *Id.* Judge Cunningham was censured. *See also In re Mulroy*, 731 N.E.2d 120, 122–23 (N.Y. 2000) (a judge's statement that Utica was a "fucking black hole" and he wanted to get back to Syracuse because it was "men's night out" created the appearance that he was pressuring the prosecutor to agree to a plea bargain even if it was, as he claimed, "banter;" the judge was removed for this and other misconduct).

After sentencing in a drunk-driving case, a California judge evaluated the deputy district attorney's performance, telling her she had done well but needed to be prepared to adjust her strategy after an unanticipated ruling.¹¹⁶ Referring to his exclusion of the defendant's pre-field sobriety statements, the judge stated that he knew that the statements were admissible but kept them out to see how the young prosecutor would handle herself.¹¹⁷ The California Commission on Judicial Performance found that the judge's statement gave the appearance that he had decided a legal issue to teach a lesson to a new lawyer, noting that the judge failed to appreciate how his choice of words implicitly suggested that his ruling was questionable if not wrong.¹¹⁸

Finally, based on a stipulation and agreement, the Washington Commission reprimanded a judge for writing "NTG" on hundreds of defendants' judgment and sentence forms, generally understood to be an acronym for "Nail This Guy."¹¹⁹ The judge maintained that "NTG" meant "Note This Guy (or Gal)," and that he used the initials as a private method to remind him of which cases he believed deserved closer scrutiny should he be required to review that person's sentence following a reported violation of sentencing condition.

The judge acknowledged, however, that it was widely rumored among court employees and attorneys who practiced in his court that the initials meant "Nail This Guy" and that he contributed to that rumor by making statements to others that would cause them to believe that was what the letters stood. Although the objective evidence did not establish actual bias or prejudice or that the judge prejudged a particular case, the judge acknowledged that some parties, counsel, and staff could have understood that he had prejudged cases and intended to treat some defendants harshly, cruelly, or inappropriately in the future. The agreement stated

[t]he Code of Judicial Conduct deals not only with subjective intent, but also with appearances. Whatever Respondent may have intended "NTG" to mean, his words and conduct led others to believe "NTG" meant "Nail This Guy." By writing "NTG" on some defendants' judgment and sentence forms, generally understood to be an acronym for "Nail This Guy," Respondent created the ap-

116. Inquiry Concerning VonVoorhis, Decision and Order (Cal. Comm'n on Jud. Performance Feb. 27, 2003) at <http://cjp.ca.gov/CN%20removals/VanVoorhis%202-27-03.rtf>.

117. *Id.*

118. *Id.* The Commission removed the judge for this and ten additional instances of improper courtroom demeanor. *Id.* See also In re Smith, Determination (N.Y. State Comm'n on Jud. Conduct June 26, 1998) at <http://www.scjc.state.ny.us/determinations/s/smith,m.htm> (a judge created the appearance of bias against the prosecution by engaging in ill-placed humor, minimizing charges before her, and making remarks concerning the reliability of prosecution witnesses.)

119. In re Burns, Stipulation, Agreement, and Order of Reprimand (Wash. State Comm'n on Jud. Conduct June 8, 2004) at www.cjc.state.wa.us.

pearance he was biased or prejudiced against those individuals he intended to “nail.” Public confidence in the integrity and impartiality of the judiciary is undermined when a judge’s conduct creates the perception that a case has been prejudged or that there is a bias against a party, regardless of whether the perceived bias or prejudice exists. Persons who believed Respondent wrote “Nail This Guy” in code on some defendants’ judgments could reasonably conclude that those defendants received, or would receive, disparate or unfair treatment from the court.

F. Manifestations of Bias

An Illinois judge, during one of several intemperate exchanges, said “when I’m talking to you boy, you look at me,” to an adult African-American defendant in a criminal case.¹²⁰ The judge admitted that this was discourteous but denied that it was a manifestation of bias, arguing he did not say “boy” with any racial intent or to demean the defendant.¹²¹ The judge presented over one hundred letters from people who knew him in his professional capacity stating they had never heard him make a racially biased remark.¹²²

The Illinois Courts Commission acknowledged that the term “boy” directed at an African American was offensive but found that “the term itself is not objectively racist and thus does not necessarily indicate racial bias or prejudice.”¹²³ Therefore, it concluded that the Judicial Inquiry Board had not proved that the judge had manifested bias or prejudice in the exercise of his judicial duties.¹²⁴

In contrast, in *In re Ellender*,¹²⁵ the Louisiana Supreme Court considered whether a white judge’s appearance in black face at a party created an appearance of bias even absent evidence the judge was prejudiced in his decision-making. Judge Ellender had attended a Halloween party at a restaurant dressed in an orange prison jumpsuit and handcuffs, black face, and a black afro wig.¹²⁶ Most of the people at the restaurant were party guests, but there were five or six additional diners; the restaurant remained open for take out, and the staff of the restaurant, including an African-American em-

120. *In re Golniewicz*, Order (Ill. Courts Comm’n Nov. 14, 2004).

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* The Commission removed the judge from office for this instance and two additional instances of intemperate conduct and using his parents’ address to run for office when his permanent abode was outside the sub-circuit in which he was running. *Id.*

125. 889 So. 2d 225 (La. 2004).

126. *Id.* at 227. The choice of costumes was intended to be humorous by implying that the judge’s new wife, who reportedly was young and attractive and was dressed as a police officer, had her husband under her control. *Id.*

ployee, was also present.¹²⁷ Apparently, one of the witnesses reported the incident to the local newspaper, and on November 9, there was an article entitled “Local judge’s masquerade sparks racial concerns.”¹²⁸ Local broadcast media picked up the story, followed by CNN and two New Orleans television stations.¹²⁹ The local office of the NAACP received calls complaining about the judge’s Halloween masquerading.¹³⁰ The Judiciary Commission received six complaints, including complaints filed by the NAACP, the judge’s colleagues on the bench, and one of the justices of the Louisiana Supreme Court.¹³¹

The judge admitted the factual allegations and agreed that he had violated Canons 1 and 2A, which require a judge to uphold the integrity and independence of the judiciary and require that a judge shall respect and comply with the law, but did not agree that that his conduct was demeaning towards African-Americans. The district attorney’s office reviewed the judge’s docket but did not find any disparity in the judge’s sentencing based on race.¹³² Four African-Americans testified before the Commission that Judge Ellender is a good judge whom they consider fair and impartial.¹³³

The Louisiana Supreme Court agreed with the Commission’s finding that the judge’s conduct “called into question his ability to be fair and impartial towards African-Americans who appear before his court as defendants in criminal proceedings, as well as towards any African-American litigant or attorney in any proceeding before him, thereby creating the appearance of impropriety.”¹³⁴ Although agreeing that the judge did not intend to offer an affront to the African-American community, the court concluded that “his behavior exhibits his failure to appreciate the effects of his actions on the community as a whole.”¹³⁵

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 227–28.

131. *Ellender*, 889 So. 2d at 228.

132. *Id.* at 232.

133. *Id.*

134. *Id.* at 229.

135. *Id.* at 233. The court suspended the judge without pay for one year but deferred six months of the suspension on the condition that the judge enroll in a course at one of the local universities that will allow him “to gain insight into the attitude of other racial groups, particularly racial groups where interrelations are marked by antagonism, discrimination and conflict.” *Id.* See also *In re Sardino*, 448 N.E.2d 83 (N.Y. 1983) (referring to defendants as “creatures,” calling one defendant a “maniac,” and similar statements at arraignment “could only create the impression in the mind of the public that [the judge] was predisposed against those defendants who appeared before him if not defendants generally” even if he did not actually harbor any bias); *In re Schenck*, 870 P.2d 185, 198 (Or. 1994) (off-bench statements about a prosecutor such as “she has placed herself in a position for which she has neither the training or experience to perform the duties competently” created the impression that the

IV. THE TEST

The commentary to Canon 2 of the ABA Model Code of Judicial Conduct states that “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.”¹³⁶ Similar iterations are “whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity, impartiality, and competence,”¹³⁷ whether a reasonable person would question the impartiality of the court,¹³⁸ and whether the conduct would “have a negative effect on the confidence of the thinking public in the administration of justice.”¹³⁹ A finding of an appearance of impropriety is often based on a combination of factors and the cumulative effect of the circumstances.¹⁴⁰

In a literal approach to the appearance of impropriety standard, judicial discipline cases often start with the improprieties defined in the code¹⁴¹ and then proceed if an actual violation is not proven to consider whether an appearance of a violation was created. In other words, if “notwithstanding the absence of proof of any actual or intended impropriety,” whether the judge’s conduct “inescapably created a circumstantial appearance of impropriety.”¹⁴² 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,¹⁴³ in having an “undispelled suspi-

judge would be biased in favor of the state in order to make up for the alleged incompetence of the district attorney). *But see* *In re Nakoski*, 742 A.2d 260 (Pa. Ct. Jud. Dis. 1999) (finding a judge did not commit misconduct when, in response to the question “It’s not unlawful or illegal to be a black man, is it?” asked in a continuing education program, the judge said “Yes” and “They’re all in jail. They’re the ones doing all the robberies and burglaries”).

136. Canon 2A (1990). *See, e.g.*, *In re O’Bier*, 833 A.2d 950, 957 (Del. Ct. Jud. 2003) (by displaying a weapon in a way that made two court clerks feel their safety was threatened and persistently carrying his weapon while at work in a way that the weapon was clearly visible to the public and employees, a judge created “the perception that his ability to carry out his judicial responsibilities with integrity, impartiality and competence was impaired”).

137. Cal. Code of Jud. Ethics, Canon 2A. cmt.

138. *In re Snow*, 674 A.2d 573, 577 (N.H. 1996).

139. *In re Bonin*, 378 N.E.2d 669, 683 (Mass. 1978).

140. *See, e.g.*, *supra* discussion of *In re Ray* at text accompanying notes 65–69 and *In re Johnstone* at text accompanying notes 50–56.

141. Commentary to Canon 2A provides that “actual improprieties under this standard include violations of law, court rules or other specific provisions of this Code.”

142. *In re Spector*, 392 N.E.2d 552, 555 (N.Y. 1979).

143. *In re Chaisson*, 549 So. 2d 259, 263 (La. 1989).

cion” of actual impropriety,¹⁴⁴ or in believing that “an impropriety is afoot.”¹⁴⁵

For example, an actual impropriety in *Kennick v. Commission on Judicial Performance*¹⁴⁶ 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 of ex parte communications, 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.¹⁴⁷

A crucial element of the appearance of impropriety standard as interpreted by the judicial discipline authorities is the consideration of whether the conduct was readily avoidable,¹⁴⁸ in other words, whether there were reasonable precautions the judge could have taken to avoid creating the appearance of impropriety.¹⁴⁹ For example, in *In re Bonin*,¹⁵⁰ the Massachusetts Supreme Judicial Court held that the chief justice of a superior court had created an appearance of impropriety by failing to make inquiries about a meeting he was planning to attend at which Gore Vidal would be speaking on “Sex and Politics in Massachusetts.”¹⁵¹ If the judge had made those in-

144. *In re Johnstone*, 2 P.3d 1226, 1237 (Alaska 2000).

145. *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 re Johnstone, 2 P.3d 1226, 1237 n.38 (Alaska 2000).

146. 787 P.2d 591 (Cal. 1990).

147. *Id.* at 609–10. *See also* *In re Slusher*, Stipulation, Agreement, Order of Admonishment (Wash. Comm’n on Jud. Conduct Apr. 1, 1994), at <http://www.cjc.state.wa.us/case%20material/1994/1518%20stipulation.pdf> (finding a violation of code of judicial conduct where a judge engaged in a casual and cordial conversation in the courtroom with one of the parties in a case that the other party observed, while the attorneys for both parties were discussing settlement outside the courtroom even though there was no evidence that the judge discussed the proceeding); *In re Huttner*, Determination (N.Y. State Comm’n on Jud. Conduct July 5, 2005) at <http://www.scjc.state.ny.us> (even if a judge and attorney did not discuss the merits of the case the attorney was handling before the judge during their out-of-court meetings, the appearance of impropriety was inevitable, compounded by the judge’s eleven fiduciary appointments to the attorney).

148. *Johnstone*, 2 P.3d at 1237 n.38.

149. *In re Inquiry Concerning a Judge*, 788 P.2d at 723.

150. 378 N.E.2d 669 (Mass. 1978).

151. *Id.* at 685.

quiries, he would have learned that the meeting was a fund-raiser to benefit defendants in criminal cases, alleging sex acts between men and boys, in the court in which he was chief justice although the cases were not assigned to him.¹⁵²

The court noted that it would be an impropriety for a judge to attend a meeting knowing that the proceeds “were to be used as a defense fund or knowing that pending cases would be the subject of partisan comment.”¹⁵³ Therefore, the court concluded, “it was likewise an impropriety, although a lesser one, for the Chief Justice, in his impatience or rashness, to fail to take heed of information and warnings which would have brought more definite knowledge to him if he had considered or pursued them seriously.”¹⁵⁴ Similarly, an appearance of impropriety could have easily been avoided if Judge Ellender had gone to the Halloween party in a Spiderman costume,¹⁵⁵ if Judge Adams had returned the sweater from the car dealer,¹⁵⁶ if Judge Feinberg had read and followed (not just “skimmed”) the Surrogate’s Court Procedure Act,¹⁵⁷ or if Judge Mosley had used personal stationery in his letter to his son’s school.¹⁵⁸

The model code does not describe the reasonable person who is the subject of the appearance of impropriety test. Cases have described the reasonable person as “a reasonably intelligent and informed member of the public,”¹⁵⁹ “an objective observer,”¹⁶⁰ and “the average person encountered in society.”¹⁶¹ Other formulations emphasize what a reasonable person is not: not the judge himself or herself,¹⁶² not a well-trained lawyer,¹⁶³ not a highly sophisticated observer of public affairs,¹⁶⁴ and not a cynic skeptical of the government and the courts.¹⁶⁵ Perhaps the most evocative variation

152. *Id.* A newspaper had carried a picture of the chief justice at the meeting on the front page with a headline, “Bonin at benefit for sex defendants.” *Id.* at 680. The newspaper had a story and, on page three, a picture of the chief justice with Gore Vidal. *Id.* At the meeting, there was also discussion of the pending cases, the harassment of gay people by the district attorney and the police, and the current “witchhunt” and “show trials.” *Id.* at 679.

153. *Id.* at 682.

154. *Id.* The judge was censured for this and other misconduct. *Id.* at 685.

155. See *supra* discussion of *In re Ellender* at text accompanying notes 125–35.

156. See *supra* discussion of *Adams v. Comm’n on Jud. Performance* at text accompanying notes 80–90.

157. See *supra* discussion of *In re Feinberg* at text accompanying notes 62–64.

158. See *supra* discussion of *In re Mosley* at text accompanying notes 42–43.

159. *Johnstone*, 2 P.3d at 1237 n.38.

160. *Adams*, 897 P.2d at 548.

161. *Inquiry Concerning a Judge*, 822 P.2d at 1340.

162. *Snow*, 674 A.2d at 577 (quoting *Blaisdell v. City of Rochester*, 609 A.2d 388, 390 (N.H. 1992)).

163. *Inquiry Concerning a Judge*, 822 P.2d at 1340.

164. *Id.*

165. *Id.*

characterizes the reasonable person as “neither excessively indulgent, nor excessively jaundiced.”¹⁶⁶

Further, the reasonable person would not be “uninformed or misinformed,”¹⁶⁷ and the perception of an impropriety must be based on more than vague conjectures and subtle innuendo.¹⁶⁸ Realistically, however, a reasonable person could not know “every conceivably relevant fact”¹⁶⁹ but would know “all available information,”¹⁷⁰ “all the relevant circumstances that a reasonable inquiry would disclose,”¹⁷¹ or the “totality of circumstances.”¹⁷²

One factor the reasonable person could not be presumed to know is the judge’s subjective motive or state of mind.¹⁷³ Thus, “whatever [the judge’s] motive, it is no cure for conduct that creates an appearance of impropriety.”¹⁷⁴ A judge’s explanation for his or her conduct “may shed light on his after-the-fact, subjective belief,” but it does nothing to eliminate the appearance arising from the objective record.¹⁷⁵ For example, a reasonable person could not know whether Judge Golniewicz was actually unbiased when he called an African-American defendant “boy,”¹⁷⁶ whether Judge Gerard was actually able to overlook his sexual relationship with the prosecutor when he ruled in her cases,¹⁷⁷ or whether Judge Johnstone actually would have thought the person he chose was the best person for the coroner position even if the chief justice had not suggested the candidate.¹⁷⁸

Similarly, a reasonable person would not know the subjective state of mind of other persons implicated in the judge’s conduct. For example, a reasonable person could not know whether the charges against Judge Pennington’s son would have been dismissed even if the judge had not met with

166. *In re Larsen*, 616 A.2d 529, 584 (Pa. 1992).

167. *Id.* at 582.

168. *Id.* at 584.

169. *Inquiry Concerning a Judge*, 822 P.2d at 1340. *But see* CAL. CODE OF JUD. ETHICS, Canon 2A cmt. (“The test for the appearance of impropriety is whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity, impartiality, and competence”).

170. *Johnstone*, 2 P.3d at 1237 n.38.

171. DEL. CODE OF JUD. CONDUCT, Canon 2A cmt. (“The test for appearance of impropriety is whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.”)

172. *Larsen*, 616 A.2d at 584.

173. *Blackman*, 591 A.2d at 1341.

174. *Snow*, 674 A.2d at 578.

175. *Johnstone*, 2 P.3d at 1237.

176. *See supra* discussion of *In re Golniewicz* at text accompanying notes 120–24.

177. *See supra* discussion of *In re Gerald* at text accompanying notes 70–74.

178. *See supra* discussion of *In re Johnstone* at text accompanying notes 50–56.

the prosecutor¹⁷⁹ or whether the car dealer would have given the same deals he gave to Judge Adams to someone who had not just entered a multi-million dollar judgment in his favor.¹⁸⁰

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 chambers¹⁸¹ or whether Judge Chaisson really pressed for a favorable settlement¹⁸² is inherently unknowable by the reasonable person and, therefore, irrelevant to the question whether there was an appearance of impropriety.

V. CRITICISM OF THE STANDARD

A. Chilling effect

The argument that the appearance of impropriety standard "chills courageous and innovative judicial decision-making"¹⁸³ is contradicted by the case-law. The cases in which a judge has been disciplined for a legal error or abuse of discretion (which are exceptions to the usual rule that mere legal error does not constitute misconduct¹⁸⁴) do not rely on the Canon 2 appearance language. Instead, those cases are based on the Section 2A requirement that a judge "respect and comply with the law," the Section 3B(2) injunction "to be faithful to the law and maintain professional competence in it," or the Section 3B(7) obligation to "accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law." Moreover, as the previous discussion of the case-law demonstrates, none of the cases applying the appearance of impropriety standard are based on the substance of a judge's decision but on surrounding conduct that makes it harder to accept the integrity of that decision.

Furthermore, the element of the test that permits a finding only when the judge did not use reasonable care to prevent an appearance of impropriety ensures that the standard cannot be applied to sanction a judge for the substance of a decision. In cases in which a judge is "duty-bound to take actions or make rulings that will predictably stir public controversy, . . .

179. See *supra* discussion of *In re Pennington* at text accompanying notes 30–32.

180. See *supra* discussion of *In re Adams* at text accompanying notes 79–89.

181. See *supra* discussion of *In re Kennick* at text accompanying notes 146–47.

182. See *supra* discussion of *In re Chaisson* at text accompanying notes 33–39.

183. APRL comments, *supra* note 13.

184. See Cynthia Gray, *The Line Between Legal Error and Judicial Misconduct: Balancing Judicial Independence and Accountability*, 32 HOFSTRA L. REV. 1245 (2004).

duty certainly must prevail over appearance: when duty requires a judge to take controversial action, it would be logically untenable and morally repugnant to suggest that the judge should be sanctioned merely because the action raises a public clamor.”¹⁸⁵

B. Vagueness

The primary attack on the appearance of impropriety standard is that the language is unconstitutionally vague and overbroad.¹⁸⁶ Reservations about the standard expressed before the standard was first adopted in 1972, however, are not persuasive because subsequent experience has disproved their premise.¹⁸⁷ In light of the tests, limits, and definitions applied by the commissions and courts in the discipline cases in the past thirty years, the “appearance of impropriety” language would survive a vagueness challenge.

A “statute or rule is not unconstitutionally vague merely because it does not specifically designate the various different means by which it is violated.”¹⁸⁸ 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.”¹⁸⁹ Application of a vagueness analysis depends on the context, and judges, like lawyers, are

185. *Johnstone*, 2 P.3d at 1237.

186. APRL argues that the standard places “judges at risk of disciplinary action depending upon the whim of judicial disciplinary authorities.” APRL comments, *supra* at note 13. That accusation is grossly unfair to judicial disciplinary authorities, the commissions comprised of experienced attorneys, respected lay community leaders, and judges who are normally accused of being too soft on judges, not capriciously hard. Further, the final authority in state judicial discipline cases (in all but a few states) is the state supreme court, not an arbitrary body subject to fads and quirks. The risk to judges posed by the appearance of impropriety standard is apparently slight as APRL does not cite any cases it considers to be an unfair application of the standard although judges have allegedly been subject to the “whim” of judicial disciplinary authorities since at least 1972. In fact, of the over 30,000 states court judges in the United States, in 2004, for example, only eighteen judges (or former judges) were removed from office (ten additional judges resigned in lieu of discipline pursuant to agreements with judicial commissions that were made public) and only eighty-six additional judges (or former judges) were publicly sanctioned. Most of those cases did not involve findings of an appearance of impropriety but of an actual violation of the different sections of the code. While those statistics do not prove the commissions are ineffective, neither do they give any support for the argument that the commissions and courts are enforcing the appearance of impropriety standard (or indeed any provision of the code) in a capricious or draconian fashion.

187. APRL cites the 1969 comments of former United States Supreme Court Justice Arthur Goldberg that Canon 2 is “unbelievably ambiguous.” *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 Congress* (1969).

188. *In re McGuire*, 685 N.W.2d 748, 762 (N.D. 2004).

189. *In re Keiler*, 380 A.2d 119, 126 (D.C. 1977).

professionals who have the benefit of guidance provided by case law, court rules, the “lore of the profession,”¹⁹⁰ “the traditions of the judicial profession,” and “its established practices.”¹⁹¹

“[N]ecessarily broad standards of professional conduct” are constitutionally permissible if they reflect the fundamental principle of professional responsibility.¹⁹² Under this analysis, the rule defining attorney misconduct to include “conduct prejudicial to the administrative of justice”¹⁹³—a phrase no more precise than “the appearance of impropriety”—has been held to meet due process requirements.¹⁹⁴

Moreover, the necessarily general provisions of the code of judicial conduct¹⁹⁵ have withstood vagueness challenges. In *In re Hill*,¹⁹⁶ for example, the Missouri Supreme Court rejected the judge’s argument that Section 2A and Section 2B did not give adequate notice of proscribed conduct and did not protect against arbitrary enforcement. (Section 2A provides: “A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” Section 2B provides: “A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge.”)

The court noted that the “test for determining whether the Canons are vague is whether they convey to a judge a sufficiently definite warning of the proscribed conduct when measured by common understanding and practice.”¹⁹⁷ The court stated that “neither absolute certainty nor impossible standards of specificity are required,” especially in judicial discipline, where the purpose is “not to punish criminal conduct, but rather to maintain standards of judicial fitness.”¹⁹⁸ The court also concluded that a judge was protected against arbitrary enforcement because violations of the canons were

190. *Howell v. State Bar of Texas*, 843 F.2d 205, 208 (5th Cir. 1988) (quoting *In re Snyder*, 472 U.S. 634, 645 (U.S. 1985)).

191. *Committee on Legal Ethics of the West Virginia State Bar v. Douglas*, 370 S.E.2d 325, 328 (W.V. 1988).

192. *In re Charges Against NP*, 361 N.W.2d 386, 395 (Minn. 1985) (quoting *In re Gillard*, 271 N.W.2d 785, 809 n.7 (Minn. 1978)).

193. Model Rules of Prof’l Conduct R. 8.4(d) (2003).

194. *NP*, 361 N.W.2d at 395; *Keiler*, 380 A.2d at 126 (D.C. 1977); *Douglas*, 370 S.E.2d at 328 (W.V. 1988); *Howell*, 843 F.2d at 208 (5th Cir. 1988); *In re Stanbury*, 561 N.W.2d 507, 512 (Minn. 1997).

195. Commentary to Canon 2 explains that “because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code.”

196. *In re Hill*, 8 S.W. 3d 578 (Mo. 2000).

197. *Id.* at 582.

198. *Id.*

only evidence of misconduct and, ultimately, the court had to find that the judge violated the constitutional standard of misconduct before discipline could be imposed.¹⁹⁹

Similarly, in *In re Complaint Against Harper*,²⁰⁰ the Ohio Supreme Court held that Section 2A and Section 7B(1)(a) “provided reasonable opportunity for regulated persons to know what conduct was prohibited, and were also explicit enough to prevent arbitrary enforcement, they are not subject to attack under the vagueness doctrine.”²⁰¹ (Section 7B(1)(a) states, “An incumbent judge, or a candidate for judicial office should maintain the dignity appropriate to judicial office.”) The court reasoned, “like the military, fire and police departments, and civil service, the judiciary is a specialized community governed by a specific discipline and body of rules.”²⁰² The court also noted that “sanctions like public reprimands, that [sic] are applied for violation of the Canons of Judicial Ethics, are more civil or administrative than criminal.”²⁰³ Finally, the court stated that “fair warning of the prohibited conduct existed” in an advisory opinion, pre-existing case law, custom, and usage.²⁰⁴

199. *Id.* at 583. *See also* McGuire, 685 N.W.2d at 762 (rejecting arguments that Canons 1A, 2 and 3B(4) are unconstitutionally vague); *In re Ritchie*, 870 P.2d 967, 973 (Wash. 1994) (court’s careful reading of Canons 1 and 2 led to rejection of judge’s argument that he did not know that mischaracterizing activities for which he sought reimburse was improper).

A federal district court did hold that the appearance of impropriety provision in Canon 2 as well as the general provisions in Canon 1 were unconstitutional, but that decision was vacated on appeal on abstention grounds. *Spargo v. New York State Comm’n on Jud. Conduct*, 244 F. Supp. 2d 72 (N.D. N.Y. 2003), *vacated*, 351 F.3d 65 (2d Cir. 2003). Even if the decision had not been vacated, the district court’s analysis would be irrelevant; because the conduct at issue involved political activities, the district court applied a much stricter constitutional analysis than would ordinarily apply to a constitutional challenge to Canon 2. Moreover, the district judge’s holding was premised on his belief that only “murder and mayhem, or bribery” “plainly denigrate the integrity and independence of the judiciary,” an unsupportable assertion that indicates his decision that the canons violated due process was as ungrounded as his overturned decision that abstention was not required.

200. 673 N.E.2d 1253 (Ohio 1996).

201. *Id.* at 1264.

202. *Id.*

203. *Id.*

204. *Id.* *In re Hey*, 452 S.E.2d 24 (W.V. 1994), the West Virginia Supreme Court of Appeals held that the state’s interests were sufficiently served by the specific prohibitions on judges’ speech in the code and that the general prohibitions in Canons 1, 2, and 3 may not be used to punish judges for public remarks that do not violate either a specific prohibition or some other law. *Id.* However, the court stated, “This is not to say that Canons 1 and 2 are facially unconstitutional . . .” *Id.* at 33.

C. Difficulty

A review of the cases discussed above suggests that the problem is not that judges believed that a reasonable person would not think their conduct improper, but that they did not even try beforehand to consider a perspective other than their own. However, it has been argued that judges could not know what would violate the appearance of impropriety provision because it requires they, who do not stand outside the system, “imagine how a reasonable, well-informed observer of the judicial system would react.”²⁰⁵ As “a dispenser rather than a recipient or observer of decisions,” this argument maintains, “the judge understands how professional standards and the desire to preserve one’s reputation often enforce the obligation to administer justice impartially, even when an observer might be suspicious.”²⁰⁶ A related argument is that the standard imposes an unfair stress on judges that “tends to undermine their own sense of worth.”²⁰⁷

That argument suggests that judges have been elevated to such a lofty position that they can no longer conceive of the opinion of the reasonable non-judge, reflecting an arrogance that most judges do not share and that corrodes public confidence in the judiciary. The appearance of impropriety standard provides a needed antidote to that arrogance by requiring judges to develop a habit of thought that considers an objective view. The reasonable person standard is familiar to judges from a variety of contexts, and while it may be difficult for them to imagine what a reasonable person might think, they should know that they at least have to try as a necessary corrective to the subjectivity of their own evaluation of their own conduct.

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. Moreover, judges can refer to existing case-law and advisory opinions for guidance about what the reasonable person might think. Given the numerous cases on the topic, for example, no judge could claim surprise that gratuitously referring to the judicial office or using judicial stationery in private business creates an appearance of impropriety.

Moreover, 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

205. APRL comments, *supra* at note 13, quoting *In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990). APRL neglects to quote the remainder of the analysis in which the court appears to credit judges’ ability “to hold in mind that these outside observers are less inclined to credit judges’ impartiality and mental discipline than the judiciary itself will be.” *Id.*

206. *Id.*

207. *Spector*, 392 N.E.2d at 558 (Fuchsberg, J., dissenting).

judicial discipline authorities, but asking provides a 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. When judicial stationery may appropriately be used, what gifts may be accepted, what functions are not appropriate to attend, whether to preside in a case involving an individual with whom a judge has a relationship, and whether to appoint a particular person are precisely the types of questions advisory committees frequently address.²⁰⁸

D. Comparisons to Standards for Lawyers

In 1969 the ABA Model Code of Professional Responsibility used “avoid the appearance of impropriety” as the title of a rule prohibiting a former government lawyer from accepting certain private employment and from stating or implying “that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official.”²⁰⁹ In addition, “avoid the appearance of impropriety” was one of the canons or “axiomatic norms” from which disciplinary rules were derived²¹⁰ and was included in several “ethical considerations” or aspirational principles.²¹¹ Accepting arguments that a more specific rule was needed, the ABA eliminated the appearance of impropriety standard when it replaced the Model Code of Professional Responsibility in 1983 with the Model Rules of Professional Conduct.²¹²

Thus, one of the arguments used to support deleting the appearance of impropriety standard from the model code of judicial conduct is to bring the rules for judges in line with the rules for lawyers.²¹³ The easy and decisive answer to that argument is that judges should be held to higher ethical standards than lawyers. While lawyers may have a hard time balancing the be-

208. See http://www.ajs.org/ethics/eth_advis_comm_links.asp.

209. Model Code of Prof'l Responsibility DR 9-101 (1969).

210. Model Code of Prof'l Responsibility Canon 9 (1969). In the Model Code of Professional Responsibility, 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 Ethical Considerations and the Disciplinary Rules are derived.” *Id.* at Preliminary Statement.

211. Model Code of Prof'l Responsibility EC 9-3, EC 9-6. In the Model Code of Professional Responsibility, ethical considerations “are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations.” *Id.* at Preliminary Statement.

212. See Bruce A. Green, *Conflicts of Interest in Legal Representation: Should the Appearance of Impropriety Rules be Eliminated in New Jersey—Or Revised Everywhere Else?* 28 SETON HALL L. REV. 315 (1977).

213. See APRL comments, *supra* note 13.

liefs of a reasonable person about impropriety with their obligation to be an advocate for a client, judges do not have that conflict because acting with an integrity that promotes public confidence in judicial decisions is their primary ethical responsibility. Moreover, it is a judge's job to apply general laws to specific facts, and it is not unfair to ask judges to aspire to avoid the appearance of impropriety and to sanction judges who fail to do so.

In addition, the reasons for deleting the standard from the Rules of Professional Responsibility do not apply to the code of judicial conduct. Comment 5 to the pre-Ethics 2000 version of Rule 1.9 explained that the appearance of impropriety standard was deleted because, under the standard, "disqualification would become little more than a question of subjective judgment by the former client."²¹⁴ However, the standard in the code of judicial conduct is the reasonable person standard, not a subjective standard. Comment 5 also argued that because "'impropriety' is undefined, the term 'appearance of impropriety' is question-begging."²¹⁵ In contrast, the code of judicial conduct does define impropriety; commentary to Canon 2 states that "[a]ctual improprieties under this standard include violations of law, court rules or other specific provisions of this Code."²¹⁶

Finally, attempts to downgrade the appearance of impropriety language in the code of judicial conduct to only an insignificant, unenforceable title are unconvincing.²¹⁷ Canon 2 is a complete, declaratory sentence in contrast to the sentence fragments that comprise the titles in the Model Rules of Professional Responsibility. "A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities" is not comparable to "Competence," for example, the title of Rule 1.1 of the Model Rules. Moreover, the preamble to the model code makes no reference to "titles" but expressly states that "the text of the Canons . . . is authoritative."

E. The Specter of *Spector*

*In re Spector*²¹⁸ is often cited in discussions of the appearance of impropriety standard, largely on the eloquence of the dissenting opinion. In that case, the New York Court of Appeals considered the conduct of a judge who had appointed the sons of two other judges as guardians ad litem, receivers, and referees while those other judges were appointing his son to

214. *Id.*

215. *Id.*

216. Model Code of Prof'l Responsibility Canon 2.

217. See Eileen C. Gallagher, The ABA Revisits the Model Code of Judicial Conduct 44 NO. 1 Judges' J. 7 (Winter 2005) ("Although the directive to avoid the appearance of impropriety has existed in the Model Code for decades, the provision has only been found in the canon's title, not in its individual sections").

218. 392 N.E.2d 552 (N.Y. 1979).

similar positions.²¹⁹ The State Commission on Judicial Conduct had found that the judge was aware of the appointments of his son being made by the other judges although there was no “*quid pro quo*” understanding.²²⁰

The court stated “nepotism is to be condemned, and disguised nepotism imports an additional component of evil because, implicitly conceding that evident nepotism would be unacceptable, the actor seeks to conceal what he is really accomplishing.”²²¹ The court concluded “participation in the pattern of cross appointments gave an appearance of impropriety, in effect permitting the inference that each of the Judges involved was by this means securing appointments for his own son.”²²² The court stated, “Notwithstanding the absence of proof of any actual or intended impropriety there was thereby inescapably created a circumstantial appearance of impropriety.”²²³

The dissenting justice did not object to the Commission’s enforcement of the appearance of impropriety standard “where appropriate,”²²⁴ although noting “the need to invoke the canon with great restraint.”²²⁵ The dissent stated that “[u]nderstandably, no Judge can respond with less than pride to the flattering proposition that more may be expected of Judges than of ordinary mortals.”²²⁶ The dissent argued, however, that the “‘appearance of impropriety’ concept is beset by legal and moral complexity. The concern is with what can be a very subjective and often faulty public perception.”²²⁷

Indeed, lack of specificity as to what conduct makes a Judge vulnerable to a charge of appearance of impropriety may bear serious due process implications. Leaving the rules expected to be observed unidentified is bound to burden our Judges with uncertainty as to whether what is acceptable today will be deemed aberrant tomorrow. Putting men and women who have to judge the rights of others under such undeserved stress tends to undermine their own sense of worth. Our legal system should treat those who preside over it with more regard.²²⁸

The focus of the dissent’s disagreement with the majority was that there was no specific rule prohibiting judges from appointing other judges’

219. *Id.* Judge Spector had appointed the Judge Fine’s son while Justice Fine appointed Judge Spector’s son eight times. Judge Spector appointed Judge Postel’s son ten times while Justice Postel appointed Judge Spector’s son five times. *Id.* at 552–53.

220. *Id.* at 553.

221. *Id.*

222. *Id.* at 554.

223. *Id.* at 555. The judge was admonished.

224. *Spector*, 392 N.E.2d at 556 (Fuchsberg, J., dissenting).

225. *Id.* at 555 (Fuchsberg, J., dissenting).

226. *Id.* (Fuchsberg, J., dissenting).

227. *Id.* (Fuchsberg, J., dissenting).

228. *Id.* at 557 (Fuchsberg, J., dissenting).

family members, and custom allowed the personal preferences of the appointing judge to govern the selection of referees, guardians ad litem, and others.

To apply a current perception of impropriety retrospectively as the basis for the finding that acts that were once regarded as proper when performed are now to be classified as improper is fundamentally wrong. To do so exacts from the petitioner expiation for the legal community's failure to have articulated and imposed a clearer standard in the past.²²⁹

However, the crux of the majority opinion was not that Judge Spector had appointed the other judges' sons,²³⁰ but that his appointments in combination with their appointments of his son would make reasonable people believe that the three judges had agreed to avoid the restriction on nepotism by a *Strangers on a Train* maneuver.²³¹ Even assuming there was no agreement or unspoken understanding, Judge Spector knew of the other judges' appointments of his son and, therefore, should have known that an appearance of cross nepotism would be created if he appointed their sons. The appearance could easily have been avoided; the judge could simply have appointed other attorneys.

The majority responded to the dissent's arguments:

Reluctance to impose a sanction in this case would be taken as reflecting an attitude of tolerance of judicial misconduct which is all too often popularly attributed to the judiciary. To characterize the canonical injunction against the appearance of impropriety as involving a concern with what could be a very subjective and often faulty public perception would be to fail to comprehend the principle. The community, and surely the Judges themselves, are entitled to insist on a more demanding standard. . . . It would ill befit the courts and the members of the judiciary to suggest that Judges are to be measured against no higher norm of conduct than may at times and in some places unhappily have been perceived as reflecting the mores of a judicial marketplace.²³²

229. *Id.* at 556 (Fuchsberg, J., dissenting).

230. Judges are in fact allowed to appoint other judges' family members in cases. *See* New York Advisory Opinion 03-19, at http://www.nycourts.gov/ip/judicialethics/Opinions/03-119_.htm.

231. In Alfred Hitchcock's classic 1952 movie, Bruno agrees to kill Guy's wife while Guy agrees to kill Bruno's father (at least Bruno thinks Guy agreed to do so). Because Bruno and Guy have no connection with each other, other than the chance encounter on the train, and neither has any connection to the person they plan to kill, Bruno figures each will be rid of a burden without the police being able to tie either to the crimes.

232. *Spector*, 392 N.E.2d at 555. Even if the majority's decision is seen as cynical, that cynicism has been more than borne out in the years after the decision in *Spector* by the

VI. CONCLUSION

Holding judges to the highest standards of conduct is not flattery but their part of the bargain in which the public has granted them independence. 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.