The Appearance of Impropriety – Its Continued Viability in Ethics Compliance

Transportation Research Board
Virtual Legal Workshop

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Legal Affairs Seminar

A Brief History

- Concept of Appearance of Impropriety (AOI) was not contained in 1908 ABA Canons of Professional Ethics, although there were several similar concepts – Canon 29 discussing "upholding the honor of the profession" and Canon 32 prohibiting "any service or advice involving disloyalty to the law whose ministers we are."

A Brief History (cont'd)

- Subsequent ABA Opinions in 1931 (Opinion 49), stated that "[a]n attorney should not only avoid impropriety, but should avoid the appearance of impropriety…" As further explanation, "…if the profession is to occupy that position… which will enable it to be of the greatest usefulness, it must avoid not only all evil but must likewise avoid the appearance of evil." ABA Comm. on Prof'l Ethics and Grievances, Formal Opinion 49 at 136.
- ABA Code of Professional Responsibility, Canon 9 and caption to Disciplinary Rule (DR) 9-101, stating that "a lawyer should avoid even the appearance of professional impropriety" and "avoiding even the appearance of impropriety." Canons were not enforceable rules, but rather, like chapter headings. They represented "axiomatic norms."

A Brief History (cont'd)

- Rotunda states "the concern about the appearance of impropriety was the reason that led to the adoption of certain prophylactic rules that banned specific conduct, but the "appearance" standard was not the disciplinary rule itself." §1-2, Legal Ethics, The Lawyer's Deskbook on Professional Responsibility, Rotunda & Dzienkowski (2018-2019 ed.)

A Brief History (cont'd)

- Then in 1982, the AOI concept was omitted from the ABA Model Rules of Professional conduct. Why? ABA expressed fears that the concept could be taken as calling for a subjective judgment about whether a subsequent representation might make a former client anxious (in the context of conflicts and/or protecting confidences). Also, the term "impropriety" was undefined and, therefore, "question-begging." See generally for history of phrase in rules, Brewer, "Some Thoughts on The Process of Making Ethics Rules, Including How to Make the Appearance of Impropriety Disappear," 39 Idaho L. Rev. 321 (2003)

A Brief History (cont'd)

- Revisions to Model Rules in 2002 and 2003 eliminated the AOI concept. The Third Restatement of the Law Governing Lawyers concurred. The "vague charge" did not give "fair warning" to a lawyer and invited a disciplinary board or court to engage in "subjective and idiosyncratic considerations…"
- When the ABA proposed Model Rule of Professional Conduct 1.7, it specifically REMOVED the AOI test because it was deemed "too vague" and presented "severe problems." Professor Geoffrey Hazard, the reporter for the original ABA Model Rules referred to the AOI standard as "garbage." The Restatement of the Law Governing Lawyers similarly rejects the AOI formulation.

How We Were Taught Professional Responsibility

- Concept from an ethics practitioner: conflict between creating a clear definition of acceptable conduct v. creating aspirations for the legal profession.

- See, Rotunda, "Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code," 34 Hofstra L. Rev. 1337, 1338 (2006): "If someone gave a young lawyer fatherly advice, it would include the injunction to avoid the appearance of impropriety. Yet, it is one thing to believe in the concept and another to create an enforceable rule."

A Problem of Definitions

- Is part of the problem simple understanding of the terms? Thesaurus lists synonyms for "impropriety" as "rudeness," "unseemliness," "bad taste," or "gaffe." This vague understanding is further complicated by identifying an act that "appears" to be improper.
- "One cannot define "the appearance of impropriety" unless one first defines "impropriety", but the phrase defines neither word. This phrase is therefore not really a test but an invitation for *ad hoc* or *ad hominem* decision-making.
- Proposed amendments to judicial canons attempted to fix this by stating that "a judge shall avoid impropriety AND the appearance of impropriety." In other words, must there be some actual violation of law in order to be "improper"? Sound familiar???

Enforcement of the AOI

- Notwithstanding the removal of AOI from the MRPC in 1983 and not including AOI in the 2002 revisions, charges of a conflict based on AOI increased from 666 in 1999 to 1698 in 2004 according to the Westlaw database.
- Alleging a conflict of interest based on AOI may be no more than a friendship exists. “Yet, the charge, even if unsubstantial, is serious because any allegation of a conflict of interest attacks the integrity and bona fides of the person charged.” The ABA has cautioned that a charge of a conflict should be viewed with caution because it can be used as a technique of harassment. §1-2(b), Lawyer’s Deskbook.

A Problem of Enforcement

- Confusion arises when courts address the AOI as a "standard" for establishing things like conflicts, but then attempt to define the applicable burden of proof or presumptions. See, e.g., Kala v. Aluminum Smelting & Ref. Co., 688 N.E.2d 258, 266 (Ohio 1998) ("A very strict standard of proof must be applied to the rebuttal of this presumption of shared confidences, however, any doubts as to the existence of an asserted conflict of interest must be resolved in favor of disqualification in order to dispel any appearance of impropriety.")

States Move to Change Enforcement Standard

- New Jersey: example of a state that has rejected the AOI standard, with explanation of rationale:

> "This guideline would seem to invite – indeed require – disciplinary bodies, the Advisory Committee, and courts to make impressionistic, ad hoc decisions, drawing on empirically unfounded, highly personal judgments about how the hypothetical 'ordinary knowledgeable citizen' would perceive particular scenarios involving lawyers." Green, "Conflicts of Interest in Legal Representation: Should the Appearance of Impropriety Rule Be Eliminated in New Jersey or Revived Everyone Else?" 28 Seton Hall L. Rev. 315, 337 (1997)

Current State Rules Still Reflect Wide Disparity

- Even if a lawyer's conduct does not violate ethical rules, the lawyer may still be disqualified if the conduct gives rise to "an appearance of impropriety."
- Notable Division in How Jurisdictions Deal with this Issue
    1. AOI can be the sole basis for disqualification
    2. AOI CANNOT the be sole basis, but can be a factor
    3. AOI CANNOT be sole basis OR a factor
    4. Interpretations are unclear
- The Lawyer Disqualification Blog, "The Appearance of Impropriety," October 19, 2014

Appearance of Impropriety and Ethics Rules

- 16 states have adopted the AOI standard as basis for disqualification; 20 state consider AOI, but not as the sole factor; 8 states reject the AOI standard; 6 states have an unsettled standard as of 2014

AOI and Judicial Conduct

- Don’t assume that the elimination of the AOI standard from the ABA Model Rules of Professional Conduct and the disciplinary rules of many states means that the AOI standard is stagnant, dying out, or a creature of the past.
- Rule 1.2 of the ABA Code of Judicial Conduct (2007), *Promoting Confidence in the* Judiciary, states: A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”

AOI and Judicial Conduct (cont'd)

- Rotunda & Dzienkowski succinctly summarize the dichotomy between judges and lawyers:
  - No longer can one argue that "appearance of impropriety" is merely the rationale for various black letter rules—which is the position that the Model Rules of Professional Conduct adopts for lawyers. Now, the "appearance of impropriety" is an enforceable Rule, violation of which subjects the judge (but not the lawyer) to discipline. §10.1-1.0(e), Lawyer's Deskbook.

AOI and Judicial Conduct (cont'd)

What is the Definition of "Appearance of Impropriety?"

- There is no universally accepted "black letter" definition
- Context is important—definitions vary depending on whether the AOI issue pertains to a Lawyer or to a Judge
- From a recent appellate decision as to whether the prosecutor should be disqualified:

"The appearance of impropriety must be real, reflect an objective public perception rather than the subjective and anxious perceptions of the litigants, and reflect the view of a layperson with a knowledge of all the facts." State v. Askew, 2015 Tenn. Crim. App. LEXIS 1048, 2015 WL 9489549 (Tenn. Crim. App. 2015), perm. app. denied (Tenn. 2016).

Hollywood's Take on the Appearance of Impropriety

- From "A Few Good Men":

  Capt. Ross: Your honor, it is obvious that Lt. Kaffee's intentions are to smear a high ranking Marine officer with the hopes that the mere appearance of impropriety will win him points with the court members. Now, it is my recommendation that Lt. Kaffee be reprimanded for his conduct and that this witness be excused with this court's deepest apologies.

  Judge Randolph: Overruled.

  Capt. Ross: Your honor...

  Judge Randolph: Your objection is noted.

Similarities Between AOI Standard and Other Common Law

- Consider how conflicts of interest color so many other aspects of programs impacting our transit clients and even other unrelated aspects of administrative law practice:
    - Environmental analysis
    - Industry safety reviews and agency oversight
    - Governmental Agency Codes of Conduct and Behavior
    - Medical research
    - Many more…

How Does Ethical Enforcement Happen?

- Viewed differently, are we as a profession comfortable with the concept of enforcement of our ethical obligations being defined as a matter of common law interpretation, based on the specific facts and circumstances of any perceived ethical lapse?

Examples of Relevant Model Rules

- The following ABA Model Rules Of Professional Conduct (MRPC) are implicated by AOI:
  - Rule 1.7. Conflict of Interest: Current Clients
  - Rule 1.9. Duties to Former Clients
  - Rule 1.11. Special Conflict of Interest for Former and Current Government Officers and Employees.

Discussion Points

IS THE "APPEARANCE OF IMPROPRIETY" STANDARD STILL VIABLE?
TRANSPORTATION RESEARCH BOARD
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[VIRTUAL PRESENTATION]

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SUPPLEMENTAL MATERIALS

Rule 1.2 of the Code of Judicial Conduct *Promoting Confidence in the Judiciary*, reads:

> A judge shall act at all times in a manner that promotes public confidence in the independence, integrity and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

Legal Ethics: The Lawyer's Deskbook on Professional Responsibility (Ronald D. Rotunda and John S. Dzienskowski), American Bar Association Center for Professional Responsibility, 2018-2019 ed., discusses the appearance of impropriety as a standard of review in judicial disciplinary matters:

> Because the "appearance of impropriety" is a vague test, the cases disciplining a judge for engaging in an appearance of impropriety typically rely on standards that are more specific. The cases find these standards elsewhere in the Code. But a court, after relying on a more specific section, will often add the violation of this more general standard as a makeweight. The best way to understand how courts interpret the "appearances" standard is to look at a couple of cases. When we do that, we find that courts have been unable to develop any litmus test.
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> Consider *Spruance v. Commission on Judicial Qualifications,* 13 Cal. 3d 778, 119 Cal. Rptr. 841, 532 P.2d 1209 (1975). The judge conducted court in a "bizarre and unjudicial manner" by treating attorneys in a cavalier and rude manner. He subjected an attorney to an improper cross-examination when he took the stand in

support of a motion to disqualify the judge. The judge demeaned the deputy district attorney in open court and placed him under physical restraint because the deputy appealed the judge's disposition of another case. The judge expressed disbelief in the defendant's testimony by creating a sound commonly referred to as a "raspberry," and giving the defendant "the finger" for coming in late in a traffic matter. The Court removed him from judicial office and relied, in part, on the "appearance of impropriety" standard of Canon 2.

School District of Kansas City, Missouri v. Missouri, 438 F. Supp. 830 (W.D. Mo. 1977) involved a different use of the "appearance of impropriety" standard. The trial judge relied on this test in deciding to recuse himself in a case where his former law firm represented the plaintiff. The firm's personnel had changed over the years during which the judge had been on the bench, so the judge correctly denied the defendant's motion for disqualification based on 28 U.S.C.A. §455. However, he then disqualified himself for reasons based in part on Canon 2 principles. The judge believed the overriding consideration favoring recusal was the avoidance of the appearance of impropriety. Therefore, he transferred the case to a judge completely removed from any charge of partiality. Note that this judge recused himself on his own motion; neither federal law nor the ABA Model Code of Judicial Conduct required disqualification.

ABA Formal Opinion 08-452 illustrates the malleability of the "appearance of impropriety" standard. This Opinion concluded that a judge may participate in fundraising activities to raise private money for a court, including a "therapeutic" or "problem-solving" court that needs private funds in addition to public funds in order to function. However, they must ensure that her conduct does not violate, inter alia, Judicial Code Rule 1.2, forbidding the "appearance of impropriety." How do we know when the judge violates this appearance standard? The ABA advises:

> In situations in which a judge learns that either parties or lawyers who come before the judge have made contributions in response to the judge's solicitation [on behalf of a Therapeutic or Problem-Solving Court] the judge *would need to determine,* according to the test for the appearance of impropriety in Model Code Rule 1.2, *whether* she is able to continue to hear the matter in question. Comment [5] posits as the test for an "appearance" problem whether the conduct in question—here, *presiding over the matter –-would "create in reasonable minds a perception that the judge violated [the] Code* or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge." Although in most in most instances, contributions of the sort considered in this opinion would be unlikely to constitute so significant a personal benefit to the judge as to raise the question of an appearance of partiality, a judge would be well-advised to take into account both the size and importance of contributions known by the judge to have been made by lawyers or parties who come before her.

> Does that help? The proposed test defines "appearance of impropriety" by using the term "appearance of impropriety." It is like defining a word, such as "cohesive," by using the word, and saying that "cohesive means having the ability to be cohesive."
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> The only more specific suggestion is that the judge should look at the "size and the importance of contributions known by the judge to have been made by lawyers or parties who come before her." The first part of the test ("size and the importance of contributions") is hardly a bright-line test; and the second part is a bright line: the judge is safe if she is ignorant of the contributions. Lawyer's Deskbook, *infra*, §10.1-1.2(d)(2).

Marcum v. Scarsone (Ky. 2015) abandoned the "appearance of impropriety" standard in Kentucky and held that in order to disqualify a lawyer an actual conflict of interest must be shown. The opinion succinctly discusses the reasons why the AOI standard should be abandoned as to lawyers and why the AOI standard has current validity as to disqualification of judges.

> And this Court has concluded that disqualification based on appearance of impropriety in inappropriate under the existing Rules of Professional Conduct. It is telling that the appearance-of-impropriety standard does not appear in those rules, except in commentary *condemning* its use and noting that it has been deleted from the rules. Although this Court has previously upheld the use of that standard in deciding lawyer disqualification questions…the standard must now be rejected. Disqualification under that standard is "little more than a question of subjective judgment by the former client. In essence, all the former client has to do is claim discomfort with the subsequent representation to create the appearance that something untoward is going on and thus that there is an appearance of impropriety. Moreover, "since 'impropriety' is undefined, the term 'appearance of impropriety' is question-begging." Even if impropriety is the same as an actual conflict, there should be something more substantive than just a *possible* conflict before disqualification takes place.
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> The simple fact is that disqualification is easier to achieve under the appearance-of-impropriety standard. While that is appropriate for judicial recusal questions (see Canon 2—"A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities."), because there is a heightened concern a b out public confidence in the judiciary, that concern is less pressing when dealing with the private lawyer-client relationship. If anything, use of such a low standard in that context creates a "greater…likelihood of public suspicion of both the bar and the judiciary" and "would ultimately be self-defeating," because it creates the impression that courts are ruling based on appearances rather than facts. Before a lawyer is disqualified based on a relationship with a former client or existing clients, the complaining party should be required to show an actual conflict, not just a vague and possibly deceiving appearance of impropriety. And that conflict should be established with facts, not just vague assertions of discomfort with the representation.

> There is no doubt that personal choice of representation is based on a litigant's belief in the competency of chosen counsel, and the confidence placed in counsel. Even though all practicing lawyers are presumed to be competent, common sense dictates that not all lawyers share the same degree of competence. Otherwise, clients would not care who their lawyers were, and there would be little competition among lawyers for business. A litigant has the Reasonable expectation that he will have the best representation he can and is willing to afford, and taking his chosen counsel away based on an "appearance" alone creates the belief that the court is arbitrary or capricious. That undermines faith in the judicial process, which, in turn, clearly affects the orderly administration of just negatively in general and, in that specific case, irreparably. On the other hand, specific findings of an actual conflict refute arbitrariness, and promote faith in the fairness of the proceeding. [internal citations omitted].

"The appearance of impropriety must be real, reflect an objective public perception rather than the subjective and anxious perceptions of the litigants, and reflect the view of a layperson with a knowledge of all the facts." State v. Askew, 2015 Tenn. Crim. App. LEXIS 1048, 2015 WL 9489549 (Tenn. Crim. App. 2015), perm. app. denied (Tenn. 2016).

AMERICAN BAR ASSOCIATION (ABA) MODEL RULES OF PROFESSIONAL CONDUCT

Rule1.7: Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

1. The representation of one client will be directly adverse to another client; or

2. There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of intest under paragraph (a), a lawyer may represent a client if:

(1) The lawyer reasonably believes that the lawyer will be able to to provide competent and diligent representation to each affected client;

(2) The representation is not prohibited by law;

(3) The representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) Each affected client gives informed consent, confirmed in writing.

Rule 1.9: Duties To Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in amatter or whose present of former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Rule 1.11 Special Conflict of Interest For Former and Current Government Officers and Employees

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connetion with a matter in which the lawyer participated personally and substantially as a public officer or employee unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from repesentation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appproiate agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a publilc officer or employee, may not represent a private client whose interest are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise avaialble to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screend from any participation in the matter is an apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as laywer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative offcer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contact claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

ADDITIONAL RESOURCES, LINKS & BIBILIOGRAPHY

Freivogel on Conflicts, www.freivogelonconflicts.com . A comprehensive site that discusses and provides caselaw on over 70 subtopics within the field of conflicts of interest. It is a great resource when researching what does and does not constitute an actual conflict of interest.

Legal Ethics: The Lawyer's Deskbook on Professional Responsibility (Ronald D. Rotunda and John S. Dzienskowski), American Bar Association Center for Professional Responsibility, 2018-2019 ed.

Restatement of the Law (3d) Governing Lawyers. Published by the American Law Insitute and updated annually.

Annotated Model Rules of Professional Conduct, *Ninth Edition* (Ellen J. Bennett and Helen W. Gunnarsson), American Bar Association Center for Professional Responsibility (2019).