

The Appearance of Appearances

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ABSTRACT

The Framers argued judicial independence was necessary to the success of the American democratic experiment. Independence required judges possess and act with integrity. One aspect of judicial integrity was impartiality. Impartial judging was believed crucial to public confidence that the decisions issued by American courts followed the rule of law. Public confidence in judicial decision making promoted faith and belief in an independent judiciary. The greater the belief in the independent judiciary, the greater the chance of continued success of the republic. During the nineteenth century, state constitutions, courts, and legislatures slowly expanded the instances in which a judge was deemed partial, and thus ineligible to act. One such instance was actual bias: a judge was to avoid favoring one party or disfavoring another. Close behind the duty to avoid actual bias was the duty of judges to avoid creating a suspicion of unfairness or bias. Public suspicion that a judge was biased, even if untrue, lowered public confidence in judicial integrity and thus, judicial independence. The American Bar Association adopted that understanding in its 1924 Canons of Judicial Ethics. Canon 4 challenged judges to avoid both “impropriety and the appearance of impropriety.” The difficulty of applying an appearance of impropriety standard was found in the very making of the Canons. One proposed canon was modified before ABA approval even though it was an excellent example of why judges should avoid an appearance of impropriety. The Canons were premised on the ideal that a judge was to act honorably; avoiding improper appearances maintained the judge’s honor. The Canons served as guidelines for judges, as standards subjectively interpreted by them and applied to their personal and

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professional lives. They were not intended to serve as rules to sanction or discipline judges for actual or perceived misconduct. For the next half-century, the Canons largely served this limited purpose. In 1972, the ABA adopted a Code of Judicial Conduct, supplanting the Canons. Most states adopted the Code as law. The duty to avoid creating an appearance of impropriety was part of the 1972 Code, and its importance rose. Both supervising courts and newly-created judicial conduct commissions often assessed charges of judicial misconduct through the lens of the appearance standard. The ABA's 1990 Model Code altered its 1972 iteration by emphasizing the positivist aspect of the Code: any Canon or Section (rule) written in terms of "shall" was mandatory. The duty to avoid an appearance of impropriety was found in Canon 2 of the 1990 Model Code. Judges were regularly disciplined for violating Canon 2. In the ABA's 2007 reformation of the Model Code of Judicial Conduct, commenters debated the efficacy of "appearance of impropriety." The ABA joint commission reforming the Code went back and forth before deciding to split the baby: Canon 1 declared as an aspirational goal the avoidance of an appearance of impropriety, but no judge was subject to discipline for failing to do so. This approach was strongly opposed, and the ABA hastily reversed course. It amended Rule 1.2 to declare that a judge "shall avoid . . . the appearance of impropriety." Nearly all states have adopted some appearance of impropriety standard. For a half-century, failing to avoid the appearance of impropriety has been central to disqualifying and disciplining judges. This paper investigates the origins of the "appearance of impropriety" standard, its modest development, and its vigorous use since the rise of modern judicial ethics.

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I. INTRODUCTION

On February 7, 2007, less than a week before the American Bar Association (ABA) House of Delegates was to vote on the revision of its Model Code of Judicial Ethics, the Conference of Chief Justices (CCJ) adopted a resolution opposing the proposed revision.¹ The CCJ is composed of the “highest judicial officer” of the states, commonwealths, territories, and district of the United States.² The CCJ resolved that it “opposes any revised version of the Model Code of Judicial Conduct that does not include a provision requiring avoidance of impropriety and the appearance of impropriety both as an aspirational goal for judges and as a basis for disciplinary enforcement.”³ Canon 1 of the proposed 2007 Model Code stated, in part, a judge “shall avoid impropriety and the appearance of impropriety.” As proposed, the Code lacked a disciplinary rule adding some teeth to this aspirational goal. The ABA Joint Commission had gone back and forth on the value of making a judge subject to discipline for an appearance of impropriety.⁴ The CCJ’s opposition, however, threatened to crater the Joint Commission’s work.⁵ Few states would likely adopt the Model Code in the face of such

1. The Professionalism and Competence of the Bar Comm. of the Conf. of Chief Justs., Resol. 3, *Opposing the Report of the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct in Light of its Failure to Provide for Enforceability of the Canon on “Appearance of Impropriety”* (Feb. 7, 2007), https://ccj.ncsc.org/_data/assets/pdf_file/0013/23710/02072007-opposing-report-aba-joint-commission-judicial-conduct-provide-enforceability.pdf [https://perma.cc/F52K-G64V] [hereinafter Resol. 3]; Nancy J. Moore, *Is the Appearance of Impropriety Standard an Appropriate Standard for Disciplining Judges in the Twenty-First Century?*, 41 *LOY. U. CHI. L.J.* 285, 286–87 (2010); THE CENTER FOR JUDICIAL ETHICS OF THE NATIONAL CENTER FOR STATE COURTS, *Model Code Anniversary, JUD. ETHICS & DISCIPLINE* (Mar. 21, 2017), <https://ncscjudicialethicsblog.org/2017/03/21/model-code-anniversary/> [https://perma.cc/6GH2-AHYT] (noting the objection of the Conference of Chief Justices).

2. CONFERENCE OF CHIEF JUSTICES, <https://ccj.ncsc.org/> [https://perma.cc/R7C3-X8P2] (last visited Mar. 3, 2022).

3. Resol. 3, *supra* note 1.

4. *Proceedings of the Sixty-Eighth Midyear Meeting of the House of Delegates*, 132:1 A.B.A. ANN. REP. 27–28 (2007) (recounting part of the history); see *infra* Section IV.A (noting indecision regarding appearance of impropriety); CHARLES [G.] GEYH & W. WILLIAM HODES, REPORTERS’ NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT 4 (2009) (“[T]he Commission ultimately agreed to an amendment proposed on the floor of the House of Delegates creating a Rule directing judges to avoid impropriety and the appearance of impropriety.”). If this is in conflict, I lean to the version found in the *Proceedings*.

5. See Charles G. Geyh, *Why Judicial Disqualification Matters. Again.*, 30 *REV. LITIG.* 671, 695 n.97 (2011) (citing Editorial, *The A.B.A.’s Judicial Ethics Mess*, N.Y. TIMES (Feb. 9, 2007), <https://www.nytimes.com/2007/02/09/opinion/09fri3.html> [https://perma.cc/H25D-25C6] (fulminating about the absence of a rule regarding avoiding an appearance of impropriety apparently also had some impact).

opposition.⁶

The ABA quickly caved. The Joint Commission altered proposed Rule 1.2 to read: “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.”⁷ In the House of Delegates, an effort was made to amend this version of Rule 1.2 to its pre-CCJ resolution language.⁸ It failed. The House of Delegates then adopted the Model Code of Judicial Conduct, as altered, to meet CCJ approval.⁹

This Article investigates the history of the idea that American judges should avoid both impropriety and its appearance from the late eighteenth century to the early twentieth century. The proscription against the appearance of impropriety was at the core of the ABA’s 1924 Canons of Judicial Ethics (1924 Canons). This Article then explains why the duty to avoid creating an appearance of impropriety was rarely enforced by judicial sanction, judicial disqualification, or reversal of judgment until the 1970s. Since then, courts and newly-created state judicial conduct commissions—governmental bodies that regulate judicial conduct—regularly note the appearance of impropriety as a reason for disciplining judges.

The ABA has issued versions of the Code of Judicial Conduct in 1972, 1990, and 2007.¹⁰ Each has required judges to avoid an appearance of impropriety, though only in 2007 was this the subject of significant division. Additionally, each version has been written in ever-greater legal phrasing. States have relied heavily on the ABA’s Codes in crafting enforceable judicial conduct standards and the vast majority have adopted either the 1990 or 2007 Code editions.

The appearance of appearances in Canon 2 of the 1990 Model Code helped trigger the later controversy: did the appearance of impropriety standard remain a valuable touchstone in matters of judicial discipline? The appearance of impropriety standard has been regularly used as a source of judicial discipline since the CCJ’s successful effort in 2007, but

6. Moore, *supra* note 1, at 287 n.10.

7. MODEL CODE OF JUD. CONDUCT r. 1.2 (AM. BAR ASS’N 2010).

8. *Proceedings of the Sixty-Eighth Midyear Meeting of the House of Delegates*, 132:1 A.B.A ANN. REP. 27–28 (2007).

9. *Id.* at 29.

10. Some modest amendments were adopted in 2010. See MODEL CODE OF JUD. CONDUCT (AM. BAR ASS’N 2010), https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/ [https://perma.cc/5J7J-LQYN].

its necessity to discipline judges remains unproven.

II. THE APPEARANCE OF APPEARANCE OF IMPROPRIETY

A. American Origins of the Appearance of Judicial Bias or Impropriety

“No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time”¹¹ James Madison’s declaration in *The Federalist Papers* repeated a long-held belief in Western legal thought. By noting the judge’s interest “would certainly bias his judgment,” and “not improbably, corrupt his integrity,” Madison made a broader point: Human beings are not angels, but biased and corruptible when judging their own interests. Implicitly, Madison argued the certainty of bias and probability of corruption of one’s integrity needed to be checked if the American democratic experiment was to succeed. Judicial integrity promotes public confidence in the American judicial system. One aspect of judicial integrity is judicial impartiality. A partial judge, one biased or corrupt, lessens public confidence in the judicial system. The judge’s duty to sit impartially has deep roots.¹²

What did it mean to serve as an impartial magistrate in the new United States? In the early national period, and continuing through the early twentieth century, courts and legislatures slowly broadened the understanding of partial judging. A 1792 Act of Congress required a district court judge to remove himself, if requested by either party, from a case when it appeared that “the judge of such court is, any ways, concerned in interest, or has been of counsel for either party.”¹³ Nearly

11. THE FEDERALIST NO. 10, at 47 (James Madison) (Am. B. Ass’n ed., 2009).

12. See, e.g., *Oakley v. Aspinwall*, 3 N.Y. 549, 549–50 (1850):

The first idea in the administration of justice is that a judge must necessarily be free from all bias and partiality. He can not be both judge and party, arbiter and advocate in the same cause. Mankind are so agreed in this principle, that any departure from it shocks their common sense and sentiment of justice.

See also *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 428–29 (1995) (citing several Western authorities, including Blaise Pascal and William Blackstone).

13. Act of May 8, 1792, ch. 36, § 11, 1 Stat. 275, 278–79:

That in all suits and actions in any district court of the United States, in which it shall appear that the judge of such court is, any ways, concerned in interest, or has been of counsel for either party, it shall be the duty of the judge on application of either party, to

thirty years later, Congress broadened the instances in which the judge was declared partial by adding, “or is so related to, or connected with, either party, as to render it improper for him, in his opinion, to sit on the trial of such suit or action.”¹⁴ This 1821 amendment made it clear that it was the judge’s sole decision to recuse himself, and the crux of the matter was whether a judge who found himself in such a situation believed it “improper” to preside.

States wrestled with the question of the propriety of a judge presiding in a case in which a party was “related to, or connected with,” the judge. After some debate, New York courts concluded that a judgment in favor of the party related to the judge should be reversed.¹⁵ As declared in a mid-nineteenth century New Hampshire case:

It is so obvious a principle of justice, that all persons who are to act as judges, should be impartial, without any interest of their own in the matter in controversy, and without any such connexion with the parties in interest, as would be likely, improperly, to influence their judgment, that it is hardly possible to doubt that such impartiality was required by the Common Law.¹⁶

When New York revised its statutes in 1829, it expanded the instances in which a judge was deemed to lack impartiality: “No judge of any court can sit as such, in any cause to which he is a party, or in which he is interested, or in which he would be excluded from being a juror by reason of consanguinity or affinity to either of the parties”¹⁷ The degree of kinship between the judge and the party triggering the judge’s

cause the fact to be entered on the minutes of the court

14. Act of Mar. 3, 1821, ch. 51, 3 Stat. 643, 643:

That in all suits and actions in any district court of the United States, in which it shall appear that the judge of such court is any ways concerned in interest, or has been of counsel for either party, or is so related to, or connected with, either party, as to render it improper for him, in his opinion, to sit on the trial of such suit or action, it shall be the duty of such judge, on application of either party, to cause the fact to be entered on the records of the court

See also *Liteky v. United States*, 510 U.S. 540, 543–44 (1994) (recounting the history of the statute).

15. *Compare* *Pierce v. Sheldon*, 13 Johns. 191, 191 (N.Y. App. Div. 1813) (“Whether the justice was legally *disqualified*, on the ground that the plaintiff below was his son-in-law, is, perhaps, questionable; but the gross indecency of an exercise of his judicial power, in such a case, should induce this Court to scrutinize his proceedings with a jealous eye.”) *with* *Bellows & Hopkins v. Pearson*, 19 Johns. 172, 172 (N.Y. App. Div. 1821) (“That the Justice, who admitted that he was the son-in-law of the plaintiff, insisted on retaining jurisdiction, was, of itself, evidence, that the trial was not fair and impartial. The judgment, ought, therefore, to be reversed.”).

16. *Sanborn v. Fellows*, 2 Fost. 473, 481 (N.H. 1851).

17. An Act Concerning Courts and Ministers of Justice, and Proceedings in Civil Cases, 2 N.Y. REV. STATS. 204, Pt. III, ch. III, title 1, § 2 (1829).

ineligibility to sit broadened over time. A New York court later justified the policy undergirding this statutory provision: “Its design, spirit and object was to prevent corruption and favor in our courts of justice, and to free them entirely from even a suspicion of bias or partiality.”¹⁸ In subsequent sections of this statute, the New York legislature limited the authority of appellate judges to act when a claim of partiality arose, largely prevented a judge from acting as counsel in his court, and banned the judge’s law partner from representing one of the parties in the court where the judge presided.¹⁹

In *Carrington v. Andrews*, the judge’s prior representation of a party as counsel in the case impaired the public’s trust in the judicial system. The court approvingly recited an 1847 New York law, which stated in part, “no judge of any court shall have a voice in the decision of any cause in which he has been counsel, attorney, or solicitor, or in the subject-matter of which he is interested.”²⁰ The *Carrington* court noted the sentiments of the statute agreed with the common law. It concluded:

[F]or a magistrate to partici pate [sic] unnecessarily in the decision of a cause in which he had acted as counsel or attorney, would be deemed such evidence of bias or partiality, and so far calculated to impair public confidence in the administration of justice, as to require the reversal of the judgment.²¹

One of the cases positively cited in *Carrington* was the 1836 case of *People ex rel. Roe & Roe v. The Suffolk Common Pleas*.²² In *Roe*, the losing defendant asked the justice who presided at trial, an attorney at law, to prepare affidavits needed to request a writ of certiorari.²³ The affidavits had to allege some error, and the justice who presided was required to answer all the facts alleged in the affidavits. He agreed, and did so. When the plaintiff complained about the judge’s twofold role, the court held certiorari should be quashed.²⁴ In circumstances such as these:

[T]he act complained of was calculated to impair the confidence of the opposite party in the impartiality of the officer, which is of itself an evil

18. *Schoonmaker v. Clearwater & Wood*, 41 Barb. 200, 206 (N.Y. Gen. Term 1863).

19. 2 N.Y. REV. STATS. 204, at §§ 3–5.

20. *Carrington v. Andrews*, 12 Abb. Pr. 348, 348 (Cnty. Ct. N.Y. 1861).

21. *Id.*

22. 18 Wend. 550 (N.Y. Sup. Ct. 1836).

23. *Id.* at 550.

24. *Id.* at 551, 553.

which should be carefully avoided. Next in importance to the duty of rendering a righteous judgment, is that of doing it in such a manner as will beget no suspicion of the fairness and integrity of the judge.²⁵

A second case cited in *Carrington* was *Oakley v. Aspinwall*.²⁶ In *Oakley*, the New York Court of Appeals explained why the judge's responsibility went beyond the duty to serve impartially. The design of the New York legal system was intended "to maintain the purity and impartiality of the courts."²⁷ Impartial judging gave the public confidence that the decisions rendered by the courts followed the law.²⁸ Thus, for society to thrive, it was necessary that judicial "decisions should be free from all bias."²⁹ There existed, in addition, another duty. Once courts demonstrated the "wisdom and impartiality in their judgments, it [was] of great importance that the courts should be free from reproach or the suspicion of unfairness."³⁰

Both cited cases argued a close connection between actual bias and the "suspicion of unfairness."³¹ Both were often cited favorably by courts in other states evaluating charges of judicial bias. In 1887, the Supreme Court of Indiana wrote that judges avoided any suspicion of bias or unfairness to maintain the "general interests of justice, by preserving the purity and impartiality of the courts, and the respect and confidence of the people for their decisions. No judgment is worthy to become a precedent which is tainted with a suspicion of unfairness."³² Two decades later, the court noted suspicion of judicial decisions was a human reaction to human frailty:

Judges are by no means free from the infirmities of human nature, and, therefore, it seems to us, that a proper respect for the high positions they are called upon to fill should induce them to avoid even a cause

25. *Id.* at 552.

26. 3 N.Y. 547 (N.Y. 1850).

27. *Id.* at 553.

28. *Id.* at 552.

29. *Id.*

30. *Id.*; see also *In re Dodge & Stevenson Mfg. Co.*, 77 N.Y. 101, 110 (N.Y. 1879) (noting the law "carefully guards not only against actual abuses, but even against the appearance of evil, from which doubt can justly be cast upon the impartiality of judges, or respect for their decisions may be impaired"). Appearance of evil was used more to refer to the behavior of juries or referees than to judicial behavior. See, e.g., *Dorlon v. Lewis*, 9 How. Pr. 1, 5 (N.Y. App. Div. 1851) (calling on referee "to avoid all improper influences, but even 'the appearance of evil'").

31. *Oakley*, 3 N.Y. at 552; see *Roe*, 18 Wend. at 551–52.

32. *Carr v. Duhme*, 78 N.E. 322, 323 (Ind. 1906); see also *Hall v. Thayer*, 105 Mass. 219 (Mass. 1870).

for suspicion of bias or prejudice, in the discharge of their judicial duties.³³

The *Oakley* court was more focused on actual bias than the suspicion of bias, which was where most of the action took place during the latter half of the nineteenth century—actual bias and corruption in the judiciary. The successful impeachment (or resignation) of New York City-based Supreme Court Justices George Barnard, Albert Cardozo, and John McCunn in 1872 highlighted the primary concern of reformers—some judges were wholly corrupt.³⁴

Despite the expansion of judicial disqualification through the early twentieth century, concerns regarding judicial misconduct were regularly voiced. Judges were the subject of substantial criticism from the late 1890s through much of the 1910s.³⁵ Judicial critics rarely discussed the suspicion or appearance of bias or impropriety; their energy was spent on decrying corrupt behavior. One exception was a 1904 law magazine article.³⁶ The unnamed correspondent promoted the creation of an “independent” federal circuit court of appeals for the western United States. The author criticized federal circuit judges for deciding appeals of cases decided by fellow circuit judges in their capacity as trial judges. Such behavior, the note concluded, generated an “appearance of bias.”³⁷ A second exception was a 1909 article in the *Chicago Legal News* on *The Ethics of the Bench*.³⁸ It listed several proposed rules of proper conduct for judges. One stated, “[t]he judge may question the lawyer in the course of his argument; at the same time the court must avoid all appearance of bias.”³⁹

In 1908, the ABA adopted its Canons of Professional Ethics for

33. *Joyce v. Whitney*, 57 Ind. 550, 554 (1877); *Heilbron v. Campbell*, 23 P. 122, 123 (Cal. 1889):

It should be the duty and desire of every judge to avoid the very appearance of bias, prejudice, or partiality; and to this end he should decline to sit, or, if he does not, should be prohibited from sitting, in any case in which his interest in the subject-matter of the action is such as would naturally influence him either one way or the other.

34. See MICHAEL S. ARIENS, *THE LAWYER’S CONSCIENCE: A HISTORY OF AMERICAN LAWYER ETHICS* (forthcoming 2022).

35. See WILLIAM G. ROSS, *A MUTED FURY* 1 (1994).

36. 8 LAW NOTES 321, 322–23 (Edward Thompson Co. 1904) reprinted in *Federal Courts*, 49 OHIO L. BULL. 467 (1904).

37. *Id.*

38. *The Ethics of the Bench*, CHI. LEGAL NEWS, June 5, 1909, at 360.

39. *Id.*

lawyers.⁴⁰ It avoided the topic of judicial ethics but encouraged state and local bar associations to adopt the Canons. The Pennsylvania Bar Association created a special committee to assess whether to do so. Committee members disagreed. A majority favored its own approach—a list of 102 rules of ethical conduct. Rules 90 through 102 concerned rules of judicial conduct.⁴¹ Rule 99 was written quite similarly to the proposal made in the *Chicago Legal News* the year before: It permitted a judge to ask questions of counsel during argument, so long as the judge managed to “avoid all appearance of bias.”⁴² The Special Committee’s effort was rejected by the Association, which instead wholly adopted the ABA Canons.⁴³ The Pennsylvania Bar Association did invite proposals for canons of judicial ethics, and in 1911, the Special Committee proposed two statements relevant to appearances: First, a judge shall “guide and guard his life that it shall furnish no just ground for suspicion of either his impartiality or of his integrity.”⁴⁴ Second, “[i]n interrogating counsel he should avoid any appearance of bias.”⁴⁵ The Association agreed to the Special Committee’s proposals.⁴⁶

That same year, two New York lawyers interested in improving the legal profession and the administration of justice, Charles A. Boston and Everett V. Abbot, wrote *The Judiciary and the Administration of the Law*.⁴⁷ The authors sent a questionnaire to lawyers and others across the United States asking whether the public (and they, the recipients) were satisfied with the administration of justice in their community.⁴⁸ After digesting the results (showing some satisfaction but significant dissatisfaction), the authors concluded, “a dangerous unrest and distrust pervade[s] the country” regarding judicial administration.⁴⁹ Dissatisfaction with the judiciary was “a problem of the gravest

40. *Transactions of the Thirty-First Annual Meeting of the American Bar Association Held at Seattle, Washington*, 33 A.B.A. ANN. REP. 3, 55–86 (1908).

41. *Report of the Special Committee on Legal Ethics*, REP. 16TH ANN. MEETING PA. B. ASS’N 156, 169–70 (1910).

42. *Id.* at 170.

43. *Id.* at 328–29.

44. *Report of the Special Committee on Legal Ethics*, REP. 17TH ANN. MEETING PA. B. ASS’N 142, 143 (1911).

45. *Id.* at 144.

46. *Id.* at 203.

47. Everett V. Abbot & Charles A. Boston, *The Judiciary and the Administration of the Law*, 45 AM. L. REV. 481, 507 (1911).

48. *Id.* at 490 (reprinting questions).

49. *Id.*

character.”⁵⁰

One “preliminary” solution was to craft “a full and cogent statement of the moral principles which should guide the judiciary.”⁵¹ These “canons of judicial ethics” should declare the judge’s duty to act impartially, efficiently, and most importantly, honorably. Honorable conduct included the judge’s duty to be “scrupulous to free himself from all improper influences and from all appearance of being improperly or corruptly influenced.”⁵²

Charles Boston spoke at the ABA’s annual meeting in summer 1912.⁵³ His general topic was ideal behavior in the legal profession. Near its end, he focused on the duty of judges to meet those high ideals. Boston reiterated most of the conclusions of his co-authored 1911 article.⁵⁴ Like several earlier proposals, Boston discussed the duty of judges to avoid the appearance of bias in asking questions of a lawyer: “In interrogating counsel [the judge] should avoid any appearance of bias.”⁵⁵

Reform-minded lawyers remained unhappy with judicial administration of the law, which led to the creation of the American Judicature Society (AJS) in 1913.⁵⁶ That same year, the ABA created a Judicial Section.⁵⁷ The focus of the AJS was structural reform of the judiciary, not judicial ethics.⁵⁸ The focus of the ABA’s Judicial Section was less clear. Judges were encouraged to gather and exchange ideas, but an ABA Section had extraordinary autonomy in choosing its goals.⁵⁹ The summaries of the Judicial Section’s annual proceedings in its first years indicate little was attempted—and much less accomplished. In

50. *Id.* at 505.

51. *Id.* at 506.

52. *Id.* at 507.

53. Charles A. Boston, *The Recent Movement toward the Realization of High Ideals in the Legal Profession*, 37 A.B.A. ANN. REP. 761 (1912).

54. *See supra* note 47.

55. *Id.* at 812.

56. A Circular Letter from Herbert Harley Concerning the Administration of Justice (Oct. 7, 1912), <https://digitalcollections.stcl.edu/digital/collection/p16035coll7/id/160/rec/1> [<https://perma.cc/9YMR-U959>]; Herbert Harley, *The American Judicature Society: An Interpretation*, 62 U. PA. L. REV. 340 (1914) (discussing reasons for creating AJS).

57. *Transactions of the Thirty-Sixth Annual Meeting of the American Bar Association Held at Montreal, P. Q., Canada*, 38 A.B.A. ANN. REP. 1, 70 (1913).

58. *See generally* MICHAL R. BELKNAP, *TO IMPROVE THE ADMINISTRATION OF JUSTICE: A HISTORY OF THE AMERICAN JUDICATURE SOCIETY* (1992).

59. JOHN AUSTIN MATZKO, *THE BEST MEN OF THE BAR: THE EARLY YEARS OF THE AMERICAN BAR ASSOCIATION* 53 (2019).

1917, the ABA Committee on Legal Ethics urged the Judicial Section to consider drafting canons of judicial ethics.⁶⁰ The Section ignored the suggestion.

None of the several suggestions that judges avoid the appearance or suspicion of bias or impropriety was championed by either the AJS or the ABA's Judicial Section. In law magazines and journals, the topic was largely unnoticed. The duty of a judge to avoid both bias and its appearance was not promoted as an ethical principle until the ABA responded to a judicial "scandal" in 1920–21.

B. The Appearance of Impropriety and the 1924 Canons of Judicial Ethics

In fall 1919, the heavily-favored American League champion Chicago White Sox lost the World Series to the National League's Cincinnati Reds. Rumors of a fix floated around, but it took nearly a year before the public learned that a number of White Sox players had been bribed to lose. The so-called "Black Sox Scandal" threatened the continued existence of major league baseball.⁶¹

The solution devised by the owners of Major League Baseball teams annoyed the ABA. Major League Baseball hired Kenesaw Mountain Landis, a Chicago-based federal district court judge, to restore and protect the integrity of the game.⁶² Landis, who called his position "commissioner," consented to serve only if the owners agreed he could remain a federal judge. They did. The owners agreed to pay Landis an annual salary of \$42,500 and provide an annual expense account of \$7,500. This was in addition to his judicial salary of \$7,500. As it did with most substantive issues regarding judging, the Judicial Section avoided discussing the propriety of Landis's decision to serve as both

60. *Summary of the Report of the Committee on Professional Ethics*, 42 A.B.A. ANN. REP. 363, 364 (1917).

61. GENE CARNEY, *BURYING THE BLACK SOX: HOW BASEBALL'S COVER-UP OF THE 1919 WORLD SERIES FIX ALMOST SUCCEEDED* ch. 4 (2007); ELIOT ASINOF, *EIGHT MEN OUT: THE BLACK SOX AND THE 1919 WORLD SERIES* 168–69 (1987) (1963); G. EDWARD WHITE, *CREATING THE NATIONAL PASTIME: BASEBALL TRANSFORMS ITSELF, 1903–1953*, at 101 (1996); DAVID PIETRUSZA, *JUDGE AND JURY: THE LIFE AND TIMES OF KENESAW MOUNTAIN LANDIS* ch. 12 (1998) (discussing whether the eight White Sox players who were banned for life from major league baseball actually agreed to throw the World Series for money).

62. *Id.*

commissioner and federal judge.⁶³

The proceedings of the Judicial Section's 1921 annual meeting also reported nothing, for the fourth consecutive year, about a code of judicial ethics. The frustrated ABA Committee on Professional Ethics and Grievances voiced its exasperation.⁶⁴ Its report to the members reminded them of the Judicial Section's lassitude. Ethics Committee Chairman, Edward A. Harriman, also noted the Committee's limited jurisdiction. For example, it was prohibited from drafting a code of judicial ethics.⁶⁵

The Judicial Section's failure to confront the Landis issue was irrelevant to the ABA's powerful executive committee. Landis's compensation from Major League Baseball owners was widely reported by the press; ABA leadership found it excessive and offensive. The Executive Committee proposed the membership adopt a resolution stating, in part, "the conduct of Kenesaw M. Landis in engaging in private employment and accepting private emolument while holding the position of a federal judge and receiving a salary from the federal government, meets with our unqualified condemnation."⁶⁶ The Executive Committee argued Landis had "ethically failed" by succumbing to the "temptations of avarice and private gain."⁶⁷ Landis's behavior was "undermining public confidence in the independence of the judiciary."⁶⁸ Landis's supporters failed to halt the resolution's momentum, and the members approved it. Landis was the only person condemned by the ABA in its first half-century.⁶⁹

On September 24, 1921, less than a month after the ABA's condemnation of Landis, Charles A. Boston wrote to the Executive Committee.⁷⁰ He reminded ABA leaders that the subject of judicial

63. PIETRUSZA, *supra* note 61, at chs. 11, 13.

64. *Report of the Committee on Professional Ethics and Grievances*, 46 A.B.A. ANN. REP. 302, 305 (1921).

65. *Id.*

66. *Transactions of the Forty-Fourth Annual Meeting of the American Bar Association*, 46 A.B.A. ANN. REP. 19, 61 (1921) (stating resolution); *see also* PIETRUSZA, *supra* note 61, at ch. 13 (discussing events).

67. *Transactions of the Forty-Fourth Annual Meeting of the American Bar Association*, 46 A.B.A. ANN. REP. 19, 61 (1921).

68. *Id.*

69. *Id.* at 62–67.

70. Letter from Charles A. Boston to the A.B.A. Executive Committee (Sept. 24, 1921) in WILLIAM H. TAFT PAPERS: SERIES 3, SEPT. 24–OCT. 20, 1921, https://www.loc.gov/resource/mss42234.mss42234-234_0020_1185/?sp=8 [<https://perma.cc/RHE6-63JD>] [hereinafter Boston Letter]; *see also* John P. MacKenzie, *The Appearance of Justice* 182–83 (1974) (noting letter).

ethics was ignored when the ABA crafted its 1908 Canons of Professional Ethics. That decision was intended to blunt the “agitation for a recall of the judiciary and for the recall of judicial decisions,”⁷¹ a threat that no longer existed. Boston offered several examples justifying a statement of “general principles of proper judicial conduct,” a project that would benefit the judiciary and the public alike.⁷² He concluded, “the time is now ripe for the American Bar Association to formulate and promulgate Canons of proper judicial conduct.”⁷³ The Executive Committee dug around and found a 1909 resolution giving it the authority to create a committee to work on canons of judicial ethics.⁷⁴ In early 1922, the committee was formed.⁷⁵ It consisted of five members: three judges and two practicing lawyers. Former President William Howard Taft, who had been confirmed as Chief Justice in mid-1921, was named the committee’s chairman.⁷⁶ Charles Boston was appointed secretary and served as the principal drafter of the canons. After a May 1922 meeting, Boston drafted an initial version of “proposed Canons of Judicial Ethics.”⁷⁷

The first draft did not number the proposed canons. However, the fourth-listed canon was titled: *Avoidance of Suspicion of Impropriety*.⁷⁸ It immediately followed a canon enjoining judges to “abstain . . . from all acts of oppression and unfairness.”⁷⁹ The fourth Canon began, “[b]ut beyond this,” the judge “should alike be free from the suspicion of impropriety.”⁸⁰ Another proposed canon, *Business Promotions and Solicitations for Charity*, concluded a judge should avoid both improper conduct and the suspicion of improper conduct in order not “to create the

71. Boston Letter, *supra* note 70, at 1; *see also* Edward J. Schoenbaum, *A Historical Look at Judicial Discipline*, 54 CHI.-KENT L. REV. 1, 8 (1977) (noting adoption of judicial recall in Oregon in 1908, California in 1911, and Arizona, Colorado, and Nevada in 1912); MATZKO, *supra* note 59, at 221–25 (discussing ABA worry regarding judicial recall); ROSS, *supra* note 35, at chs. 5, 6 (noting judicial recall and judicial referendum efforts).

72. Boston Letter, *supra* note 70, at 3.

73. *Id.*

74. *Transactions of the Thirty-Second Annual Meeting of the American Bar Association*, 34 A.B.A. ANN. REP. 3, 88 (1909).

75. *Special Committees 1922–1923*, 47 A.B.A. ANN. REP. 159, 160 (1922).

76. *Id.*

77. Letter from Charles A. Boston to Members of the Committee on Judicial Ethics (June 5, 1922) in WILLIAM H. TAFT PAPERS: SERIES 3, MAY 14–JUNE 13, 1922; COMMITTEE ON JUDICIAL ETHICS, CANONS OF JUDICIAL ETHICS (1922), https://www.loc.gov/resource/mss42234.mss42234-242_0020_1170/?sp=1037&r=-0.516,0.044,2.031,0.984,0 [<https://perma.cc/GV9T-DCD5>].

78. COMMITTEE ON JUDICIAL ETHICS, *supra* note 77, at 2.

79. *Id.*

80. *Id.*

impression” that the judge’s marketing efforts affected or interfered with the judge’s official duties.⁸¹ A third proposed canon, *Habitual Improprieties*, noted they were also to be avoided.⁸² Avoiding such bad habits included the duty of a judge to “avoid the appearance of doing any thing [sic] which would naturally or reasonably incite the reflection that he has formed [improper] habits.”⁸³ Other proposed canons urged judges to avoid suspicions of bias or impropriety.⁸⁴

In August 1922, Leslie Cornish, a member of the Committee and the Chief Justice of the Maine Supreme Judicial Court, sent the other members a redraft of Boston’s initial efforts. He retained the proposed *Avoidance of Suspicion of Impropriety* Canon.⁸⁵ After a late 1922 committee meeting, a revised and printed January 1923 draft numbered the proposed Canons. Canon 5 was retitled: *Avoidance of Appearance of Impropriety*. The text of proposed Canon 5 was rephrased from the original, but its substance and thrust remained constant: “A judge’s official conduct should be free from the appearance of impropriety.”⁸⁶ Why Boston or the Committee substituted the anodyne “appearance” for “suspicion” is unknown.

Taft made several editorial changes to this draft, though none to proposed Canon 5. As edited, it was published in the February 1923 issue of the *American Bar Association Journal* for comment.⁸⁷ The Committee incorporated a few of the many suggested proposals. The Committee’s final report was published in the July issue of the *ABA Journal*.⁸⁸ The Canon urging judges to avoid an appearance of

81. *Id.* at 7–8.

82. *Id.* at 10.

83. *Id.*

84. *See id.* at 11–12 (avoid relationships that “normally tend to arouse the suspicion that such relations warp or bias his judgment”); *id.* at 12 (“avoid such action as may reasonably tend to awaken the suspicion that his social or business relations” may affect his judicial determinations); *id.* at 22–23 (accepting a retainer after retirement may “create the suspicion that his decision was influenced by his expectation” of a retainer after retirement).

85. Leslie C. Cornish, Tentative Redraft, Canons of Judicial Ethics (September 1922) in WILLIAM H. TAFT PAPERS: SERIES 3, AUG. 9–OCT. 1, 1922, at 2, https://www.loc.gov/resource/mss42234.mss42234-245_0020_1180/?sp=9 [<https://perma.cc/PU58-S9CP>].

86. Report and Proposed Canons of Judicial Ethics (galley proof) (January 1923) in WILLIAM H. TAFT PAPERS: SERIES 3, DEC. 3–28, 1922, at 5, https://www.loc.gov/resource/mss42234.mss42234-248_0020_1197/?sp=698 [<https://perma.cc/LE2E-TETU>].

87. *The Proposed Canons of Judicial Ethics*, 9 A.B.A. J. 71, 73–76 (1923) [hereinafter Proposed Canons].

88. *Final Report and Proposed Canons of Judicial Ethics*, 9 A.B.A. J. 449 (1923) [hereinafter

impropriety returned to the fourth-listed Canon. Canon 4 was broadened to read: “A judge’s official conduct should be free from impropriety and the appearance of impropriety.”⁸⁹

The goals of the Committee on Judicial Ethics were declared in its *Preamble* to the February 1923 proposed Canons: They represented the ABA’s view regarding “those principles which should govern the personal practice of members of the judiciary in the administration of their office.”⁹⁰ Relatedly, the Canons were designed to impress upon judges the duty to use those principles “as a proper guide and reminder . . . indicating what the people have a right to expect from them.”⁹¹ Taft’s introductory letter provided even clearer insight into the Ethics Committee’s goals: Though some critics contended the Canons would be “inefficacious without a sanction,” the Committee concluded the Code was “not intended to have the force of law.”⁹² The proposed Canons were to enlighten judges by guiding them to act, and appear to act, in a responsible, honorable manner.⁹³

The Committee’s proposal that the ABA adopt the Canons of Judicial Ethics was not acted on at the ABA’s annual meeting in Minneapolis. By waiting until its next Annual Meeting in 1924, the ABA gave the heretofore uninterested Judicial Section an opportunity to voice its opinion.⁹⁴ When it finally roused itself to act, the Judicial Section made just one recommendation: Amend Canon 13. Titled *Kinship or Influence*, it stated in part, “if such a course can reasonably be avoided, [the judge] should not sit in litigation where a near relative appears before him as counsel.”⁹⁵ This appeared a modest extension of several rules created in the nineteenth century, as discussed above. First, a judge was not permitted to hear a case when one of the parties was related to the judge. Second, a judge lacked the legal authority to hear a case when he previously represented a party in the case. Third, in New

1923 Final Report]; it was subsequently printed in Final Report of the Committee on Judicial Ethics Committee Report, 48 A.B.A. ANN. REP. 452, 454 (1923).

89. 1923 Final Report, *supra* note 88, at 450.

90. Proposed Canons, *supra* note 87, at 73 (Preamble).

91. 1923 Final Report, *supra* note 88, at 450.

92. *Id.* at 449.

93. Boston had made the same arguments regarding the goals of a statement of ethical behavior as an outside commentator on the Canons of Professional Ethics. See Charles A. Boston, *A Code of Legal Ethics*, 20 GREEN BAG 221, 224 (1908).

94. Transactions of the Forty-Sixth Annual Meeting of the American Bar Association, 48 A.B.A. ANN. REP. 73, 74–76 (1923).

95. 1923 Final Report, *supra* note 88, at 450.

York, a judge's law partner was not permitted to practice in the judge's court.⁹⁶ All three were designed to avoid both impropriety and its appearance. Canon 13 was premised on the same policy.

Boston's initial 1922 draft included a variation of what became proposed Canon 13. It cautioned judges against hearing cases "in which a near relative appears as counsel, or as a party."⁹⁷ That language was left unchanged by Cornish and Taft. More broadly, Boston included language in Canon 13 that the court should not give the impression that any lawyer was "dominant over" the judge.⁹⁸ As amended for clarity, it remained in the proposed final draft.

Massachusetts Supreme Judicial Court Chief Justice Arthur P. Rugg spoke to Taft of his court's disapproval of proposed Canon 13 at a meeting of the new American Law Institute.⁹⁹ He followed up with a letter to Taft. Rugg noted six judges on the Massachusetts Supreme Judicial Court—including Rugg himself—violated proposed Canon 13's prohibition against judges hearing and deciding cases in which a near relative (usually son or brother) was acting as counsel.¹⁰⁰ Rugg informed Taft no justice of that court had ever recused himself in such a case because they did not believe doing so was necessary to maintain the court's integrity. He also noted that none had written the court's opinion when a relative represented a client before the Supreme Judicial Court. Taft agreed; this was not an issue of unethical behavior. He wrote Boston and other committee members of his "great deal of doubt" regarding proposed Canon 13. As he wrote in a letter to Rugg (a copy of which he attached to a letter sent to committee members), it seemed unnecessary because it focused on "a few abuses."¹⁰¹ Boston alone

96. See text accompanying notes 13–33.

97. Canons of Judicial Ethics, Kinship of Parties and Counsel: Influence of Attorneys (June 1923) in WILLIAM H. TAFT PAPERS: SERIES 3, MAY 14–JUNE 13, 1922, at 11, https://www.loc.gov/resource/mss42234.mss42234-242_0020_1170/?sp=1044&r=0.001,0.003,1.052,0.51,0 [<https://perma.cc/5WQW-UT5C>].

98. *Id.*

99. Letter from Arthur P. Rugg to William Howard Taft (May 8, 1924), in WILLIAM H. TAFT PAPERS: SERIES 3, APR. 18–MAY 18, 1924, https://www.loc.gov/resource/mss42234.mss42234-264_0020_1135/?sp=769 [<https://perma.cc/5ANB-P23X>]; see also MacKenzie, *supra* note 70, at 186–87.

100. Letter from Arthur P. Rugg to William Howard Taft (May 8, 1924), in WILLIAM H. TAFT PAPERS: SERIES 3, APR. 18–MAY 18, 1924, https://www.loc.gov/resource/mss42234.mss42234-264_0020_1135/?sp=769 [<https://perma.cc/5ANB-P23X>].

101. Letter from William Howard Taft to Charles A. Boston (May 12, 1924), in WILLIAM H. TAFT PAPERS: SERIES 3, APR. 18–MAY 18, 1924, https://www.loc.gov/resource/mss42234.mss42234-264_0020_1135/?sp=849&r=0.348,0.201,1.542,0.747,0 [<https://perma.cc/WD5L-QFK9>]; Letter from William Howard Taft to

disagreed.¹⁰²

Taft scheduled a meeting of the Committee immediately before the ABA's 1924 Annual Meeting to iron out the issue of Canon 13.¹⁰³ Illness left Taft unable to travel and attend the meeting. A committee of the Judicial Section met in Boston's room joined by two Judicial Ethics Committee members: Pennsylvania Supreme Court Chief Justice Robert von Moschzisker and Cornish. As von Moschzisker wrote Taft recounting the meeting: "Our friend Boston died a little hard, but die he did, and we have eliminated the part that you thought should go out."¹⁰⁴ Cornish and von Moschzisker asked Boston to speak regarding the newly-edited proposed Canons in Taft's absence. Boston eventually agreed. Boston's address included explaining the Committee's acquiescence to Rugg's and the Judicial Section's amendment.

Boston told ABA members that the Committee had learned state courts disagreed on the propriety of a judge sitting in a case when a near relative served as counsel.¹⁰⁵ Although there existed a "reprehensible" practice of some trial judges hearing cases in such a situation, it was "not widespread."¹⁰⁶ Thus, Boston concluded, the suggested amendment to Canon 13 "does not call for very much difference of opinion."¹⁰⁷ Even as amended, Boston said, Canon 13 denounced the practice without using

Arthur Rugg (May 12, 1924), in WILLIAM H. TAFT PAPERS: SERIES 3, APR. 18–MAY 18, 1924, https://www.loc.gov/resource/mss42234.mss42234-264_0020_1135/?sp=880&r=-0.343,0.195,1.84,0.891,0 [<https://perma.cc/HNB8-G2TX>].

102. Letter from Charles A. Boston to William Howard Taft (May 12, 1924), in WILLIAM H. TAFT PAPERS: SERIES 3, APR. 18–MAY 18, 1924, https://www.loc.gov/resource/mss42234.mss42234-264_0020_1135/?sp=932 [<https://perma.cc/WD5L-QFK9>]; Letter from Leslie Cornish to William Howard Taft (May 12, 1924), in WILLIAM H. TAFT PAPERS: SERIES 3, APR. 18–MAY 18, 1924, https://www.loc.gov/resource/mss42234.mss42234-264_0020_1135/?sp=937&r=-0.475,0.082,1.684,0.816,0 [<https://perma.cc/2VMY-CM2Q>]; Letter from Robert von Moschzisker to William Howard Taft (May 13, 1924), in WILLIAM H. TAFT PAPERS: SERIES 3, APR. 18–MAY 18, 1924, https://www.loc.gov/resource/mss42234.mss42234-264_0020_1135/?sp=916&r=-0.374,0.12,1.965,0.952,0 [<https://perma.cc/HG2A-7BL4>].

103. Letter from William Howard Taft to Charles A. Boston (May 16, 1924), in WILLIAM H. TAFT PAPERS: SERIES 3, APR. 18–MAY 18, 1924, https://www.loc.gov/resource/mss42234.mss42234-264_0020_1135/?sp=1027&r=-0.447,0.211,1.856,0.899,0 [<https://perma.cc/26KL-WK6B>].

104. Letter from Robert von Moschzisker to William Howard Taft (July 10, 1924), in WILLIAM H. TAFT PAPERS: SERIES 3, JUNE 18–AUG. 11, 1924, https://www.loc.gov/resource/mss42234.mss42234-266_0020_1209/?sp=478&r=-0.345,0.289,1.774,0.859,0 [<https://perma.cc/Y9QL-52QG>].

105. *Transactions of the Forty-Seventh Meeting of the American Bar Association*, 49 A.B.A. ANN. REP. 65, 65–71 (1924).

106. *Id.* at 66.

107. *Id.*

“the particular words.”¹⁰⁸ The first sentence of Canon 13 was rephrased to inform the judge he should not act when a near relative was a party. This rule was largely accepted by states. The text— related to avoiding sitting in a case in which a near relative was counsel—was deleted. Finally, Canon 13 declared, the judge “should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor, or that he is affected by the kinship, rank, position or influence of any party or other person.”¹⁰⁹ If read very closely, “other person” included counsel as well as witnesses and members of the jury. The ABA adopted the Canons of Judicial Ethics, including amended Canon 13, in their entirety.¹¹⁰

The Canons of Judicial Ethics existed to educate judges, not chastise them. In Boston’s view, judges were akin to military officers, whose behavior was judged based on a standard of honor. A judge should view his “position as honorable of itself and honorably to be maintained.”¹¹¹ What the Canons offered was the opportunity for judges with spotless reputations to avoid unwittingly engaging in conduct which created an appearance of impropriety, such as fundraising for a charitable organization. This was Boston’s example in his 1921 letter urging the ABA to form a committee to formulate judicial ethics canons.¹¹² Both the final Canon of Judicial Ethics (Canon 34) and the last Canon of Professional Ethics (Canon 32) provided a summary of proper professional behavior. For a judge, this meant acting “above reproach.”¹¹³

C. Fits and Starts: The Slow Development of the Appearance of Impropriety

“The Judicial Canons had little immediate impact.”¹¹⁴ Georgia adopted the Canons in 1925; the State Bar of California followed suit in

108. *Id.* at 66–67.

109. *Id.* at 67.

110. *Id.* at 71.

111. Abbot & Boston, *supra* note 47, at 507.

112. Letter from Charles Boston to ABA Exec. Comm. (Sept. 24, 1921), in WILLIAM H. TAFT PAPERS: SERIES 3, SEPT. 24–OCT. 20, 1921, at 3, https://www.loc.gov/resource/mss42234.mss42234-234_0020_1185/?sp=9&r=-0.487,-0.08,1.498,0.725,0 [<https://perma.cc/DQG9-U3ML>].

113. *Transactions of the Forty-Seventh Meeting of the American Bar Association*, 49 A.B.A. ANN. REP. 760, 769 (1924).

114. Susan A. Henderson, *The Origin and Adoption of the American Bar Association’s Canons of Judicial Ethics*, 52 JUDICATURE 387, 387 (1969).

1928.¹¹⁵ A year later, the California Bar learned it lacked the authority to do so. By late 1937, only three bar associations had adopted the Canons. By 1945, eleven had done so.¹¹⁶

More particularly, the appearance of impropriety standard was rarely raised to challenge a judge's behavior. The Canons were neither statements of law nor statements of judicial discipline in any state. A judge could be disqualified from a case for failing to avoid an appearance of impropriety only if a state created such a standard by law or constitutional measure. Such occasions were rare.

One notable instance of the use of the appearance standard was a 1933 New Mexico Supreme Court case, *Tharp v. Massengill*.¹¹⁷ *Tharp* raised the kinship issue that was the subject of Canon 13. *Tharp* successfully sued *Massengill* for breach of contract. *Tharp* alleged he and *Massengill* created a joint venture to purchase real property as equal partners. *Tharp* found the properties and *Massengill* financed their purchase. *Tharp* alleged *Massengill* secretly purchased real property that *Tharp* found for the joint venture. On appeal, *Massengill* claimed the trial judge, Harry Patton, should have been disqualified because his son, Perkins, was one of *Tharp*'s lawyers, and Perkins was compensated on a contingent fee basis.¹¹⁸ This, *Massengill* contended, violated the New Mexico Constitution, which forbade a judge from presiding in a case in which a relative was a party.¹¹⁹ *Massengill* argued Perkins's contingent compensation effectively made him a party.¹²⁰ The New Mexico Supreme Court agreed, though only after noting "a maze of divergent views" caused it to "become lost in a labyrinth of authorities and sink in a quandary of doubt as to the correct rule to be laid down."¹²¹ After evaluating these divergent views, the New Mexico Supreme Court sided with those states which broadly interpreted "parties" to include anyone with a pecuniary interest in the case.¹²² It did so, in part, to "give full

115. *Id.*

116. *Id.* at 387–88.

117. 28 P.2d 502 (N.M. 1933).

118. *Id.* at 504–05.

119. *Id.* at 506.

120. *Id.* (quoting N.M. Const. Art. 6 § 18):

No judge of any court nor justice of the peace shall, except by consent of all parties, sit in the trial of any cause in which either of the parties shall be related to him by affinity or consanguinity within the degree of first cousin, or in which he was counsel, or in the trial of which he presided in any inferior court, or in which he has an interest.

121. *Id.*

122. *Id.* at 506–09.

force and effect to the high ideals of an impartial and unbiased judiciary.”¹²³ The goals of the constitutional prohibition were, in order, giving litigants “a fair and impartial trial by an impartial and unbiased tribunal,” and ensuring judgment was rendered “in such manner as will beget no suspicion of the fairness or integrity of the judge.”¹²⁴ The court quoted its decision from two months earlier, which in turn approvingly quoted Canon 4: “[A] judge’s official conduct should be free from impropriety and the appearance of impropriety.”¹²⁵

As made clear in *Tharp*, lawyers looked for legal relief in the state’s constitution and then in any statutory prohibitions. They did not refer to the Canons of Judicial Ethics. Even so, the Canons found increasing favor in the American legal profession during the quarter-century between the end of World War II in 1945 and the late 1960s. Approximately thirty additional state bar associations or courts adopted the Canons of Judicial Ethics during that period.¹²⁶ The most important aspect of the Canons remained their educative value. A few courts either adopted or positively referred to the Canons in disqualification proceedings.¹²⁷ They were not, however, used to impose discipline on judges. As for the appearance of impropriety standard found in the Canons, its use was exceedingly modest during this period.¹²⁸

One example of this modesty is *In re Filipiak*, a 1953 decision of the Supreme Court of Indiana.¹²⁹ Filipiak was a juvenile court judge. The Indiana Disciplinary Commission charged him with acting corruptly and dishonestly in his judicial capacity and asked the court to disbar him. In an opaque opinion, the court held the charges were not proved. The facts were found only in the concurring and dissenting opinions.¹³⁰

The concurring opinion begins with some detail: Filipiak “was charged, in substance, with having entered into a conspiracy with Blaz A. Lucas and Bryan Narcowich, attorneys of this bar and state, to free one Joseph Kaczka from serving a sentence in the Indiana State Farm for six

123. *Id.* at 509.

124. *Id.* at 508.

125. *Id.* (quoting State *ex rel.* Hanna v. Armijo, 28 P.2d 511, 512–13 (N.M. 1933)).

126. Henderson, *supra* note 114, at 388; *see generally* Robert J. Martineau, *Enforcement of the Code of Judicial Conduct*, 1972 UTAH L. REV. 410, 411 (noting various ways in which states “adopted” the Canons).

127. *See, e.g.*, Franks v. Franks, 150 N.W.2d 252, 256 (Neb. 1967).

128. *Id.*

129. 113 N.E.2d 282 (Ind. 1953).

130. *Id.*

months, for a financial consideration in the sum of \$600.”¹³¹ On April 6, 1950, Kaczka was sentenced by Filipiak to six months at the Indiana State Farm for contributing to the delinquency of a minor. Fifteen days later, Blaz Lucas, another prosecutor in the office that prosecuted Kaczka, and who claimed to represent Kaczka,¹³² called Filipiak to request a new trial for Kaczka.¹³³ Based on the judicial minutes Filipiak himself wrote, he immediately granted the motion over the phone.¹³⁴ When Kaczka came before him a week later for the formal hearing on this motion, Filipiak suspended Kaczka’s six-month sentence and accompanying fine, contrary to Indiana law. The prosecutor’s office was not represented at the hearing. The evidence showed that Filipiak received none of the \$600 paid to the lawyers as alleged by the Disciplinary Commission.

The concurring opinion found Filipiak’s “judicial conduct falls very short of the proper standards laid down by the Canons of Judicial Ethics.” It found applicable Canon 4, avoiding the appearance of impropriety, and Canon 17, which cautioned against private efforts to influence the judge’s actions.¹³⁵ But violating those unenforceable standards did not subject Filipiak to disbarment, merely derision:

What was proved was judicial stupidity of a high order. When a judge in a criminal matter acts without jurisdiction to set aside a judgment of imprisonment and then enters a suspended sentence he invites suspicion that he has acted corruptly. There were violations of some of the Canons of Judicial Ethics of the American Bar Association, and because these canons were violated it is proper to note them by an opinion.¹³⁶

Courts applied the appearance of impropriety standard to two types of instances between 1953 and 1972. First, and most often, the standard was used to determine whether the judge’s actions at trial created such unfairness as to reverse the judgment.¹³⁷ Second, the standard was

131. *Id.* at 283 (Emmert, J., concurring).

132. The concurring opinion indicates it was Kaczka himself who told Lucas his role as a prosecutor disqualified him from representing Kaczka. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 284–85.

136. *Id.* at 283.

137. *State v. Lawrence*, 123 N.E.2d 271, 273 (Ohio 1954) (Lamneck, J., concurring) (“A judge’s official actions upon the bench should be free from impropriety or the appearance of impropriety.”); *Franks v. Franks*, 150 N.W.2d 252, 256 (Neb. 1967):

The Canons of Judicial Ethics provide, in essence, that a judge should be impartial, that

applied to decide whether particular judicial misconduct was subject to some disciplinary sanction.¹³⁸ Most opinions made conclusory statements regarding why the appearance of impropriety standard was applicable; none relied solely on that standard to discipline a judge.

Both the broad issue of judicial ethics and the narrower appearance of impropriety standard were increasingly topics of debate and concern in the late 1960s. The ABA responded by revising its Canons of Judicial Ethics for the first time in half a century. States responded by initiating disciplinary cases against judges who engaged in misconduct. This transformation continued into the modern era of judicial ethics.

III. MODERN JUDICIAL ETHICS

A. Introduction

Lame-duck President Lyndon Baines Johnson nominated Associate Justice Abe Fortas to the position of Chief Justice in June 1968.¹³⁹ This ended disastrously for both men. After Fortas was confirmed to the Supreme Court in 1965, he agreed to serve as a consultant to a family foundation of a former client, Louis Wolfson.¹⁴⁰ In his ill-defined role as consultant, Fortas was to be paid \$20,000 annually for life.¹⁴¹ This sum would be paid to his widow after his death.¹⁴² The pay of a Supreme Court Justice was \$39,500,¹⁴³ significantly less than Fortas earned in the private practice of law.¹⁴⁴ In December 1966, Fortas returned the first

his official conduct should be free from even the appearance of impropriety, and that his undue interference in a trial may tend to prevent the proper presentation of the cause and the ascertainment of the truth in respect thereto.

138. *Napolitano v. Ward*, 457 F.2d 279, 281–82, 284 (7th Cir. 1972) (accepting Illinois Courts Commission’s removal of judge based on statements made after receiving transactional immunity from prosecution and referencing Canon 4 and its applicability to both professional and personal actions); *Matter of Schweitzer*, 409 N.Y.S.2d 964, 970 (N.Y. Ct. Jud. 1971) (noting judge violated Canon 4, among other Canons of Judicial Ethics); *In re Greenberg*, 280 A.2d 370, 372 (Pa. 1971) (referring briefly to Canon 4); *Cincinnati Bar Association v. Heitzler*, 291 N.E.2d 477, 482, 484 (Ohio 1972) (agreeing judge’s personal behavior was not “above reproach” and in violation of Canon 4); *Matter of DeSaulnier*, 279 N.E.2d 296, 309–10 (Mass. 1972) (holding possession of real estate broker’s license violates appearance of impropriety standard of Canon 4); *In re Robson*, 500 P.2d 657, 660 n.7 (Alaska 1972) (listing violation of Canon 4 and other Canons).

139. LAURA KALMAN, ABE FORTAS: A BIOGRAPHY 328 (1990).

140. ROBERT SHOGAN, A QUESTION OF JUDGMENT 192–96 (1972).

141. *Id.* at 195.

142. *Id.*

143. Pub. L. 88-426, 78 Stat. 400, 434 § 403(a) (Aug. 14, 1964) (increasing salary of associate justice to \$39,500 from \$35,000).

144. SHOGAN, *supra* note 140, at 192.

payment from the Foundation, which he'd received in January.¹⁴⁵ Fortas's return occurred after Wolfson was indicted.¹⁴⁶ Though the Wolfson consultancy did not violate any federal law, it was unseemly for a Justice of the Supreme Court to appear to be doing work for a private entity. Wolfson's indictment made Fortas's arrangement with the Wolfson Foundation politically untenable.

In 1967, American University agreed to pay Fortas \$15,000 to teach a summer course in its law school.¹⁴⁷ This was an eye-opening amount. The \$15,000 was raised by Paul Porter, Fortas's former partner, from outside donors—largely former clients and friends of Fortas.¹⁴⁸ The news of Fortas's summer course pay became public shortly after Johnson nominated Fortas for Chief Justice. Though no evidence existed that Fortas was aware of the donors' identity, its disclosure helped quash his nomination.¹⁴⁹

Fortas's nomination as Chief Justice was withdrawn in fall 1968; in May 1969, he resigned from the Court after his ethical conduct was questioned in a story in the mass-market *Life* magazine.¹⁵⁰ The story disclosed the consulting arrangement between Fortas and the Wolfson Family Foundation, and it raised the issue whether Fortas had created an appearance of impropriety, in part due to the amount Fortas was to receive annually.¹⁵¹ Less than a week after his resignation, the ABA's Standing Committee on Professional Ethics issued its second Formal Opinion in nine months.¹⁵² It did not name Fortas but was clearly directed at him. The Committee declared, in all capital letters:

ALL JUDGES, OF THE LOWEST AS WELL AS THE HIGHEST COURTS, MUST IN ALL THEIR PERSONAL BUSINESS AND SOCIAL INTERCOURSE ACT NOT ONLY IN A MANNER THAT IS LAWFUL AND PROPER BUT ONE WHICH GIVES THE IMPRESSION AND APPEARANCE TO THE PUBLIC THAT IT IS PROPER. APPEARANCE OF IMPROPRIETY IS TO BE DETERMINED FROM ALL FACTS AND CIRCUMSTANCES AND

145. KALMAN, *supra* note 139, at 325.

146. SHOGAN, *supra* note 140, at 209.

147. *Id.* at 178–79.

148. KALMAN, *supra* note 139, at 326.

149. SHOGAN, *supra* note 140, at 178–81, 192–212.

150. William Lambert, *Fortas of the Supreme Court: A Question of Ethics, The Justice . . . and the Stock Manipulator*, LIFE, May 9, 1969, at 32.

151. *Id.* at 35 (suggesting possible “impropriety” in Wolfson-Fortas relationship).

152. ABA Formal Op. 322 (May 18, 1969), *Opinions of the ABA Committee on Professional Ethics*, 55 A.B.A. J. 666, 666 (1969).

WILL VARY DEPENDING ON ALL FACTS, INCLUDING MATTERS BEYOND THE JUDGE'S CONTROL. A JUDGE MUST ORDER HIS LIFE SO AS TO AVOID THE APPEARANCE OF IMPROPRIETY.¹⁵³

In August 1969, President Richard Nixon nominated Federal Court of Appeals Judge Clement Haynsworth to the seat vacated by Fortas.¹⁵⁴ Haynsworth was opposed by both civil rights organizations and labor unions.¹⁵⁵ Some senators eventually were willing to oppose his nomination on substantive grounds, but Haynsworth's opponents also offered arguments of ethical lapses.¹⁵⁶ The alleged ethical lapses were that Haynsworth, like Fortas, had created an appearance of impropriety. The charge alleged two instances in which Haynsworth had failed to recuse himself from matters in which he had a financial interest. In 1963, Haynsworth had voted in favor of a corporation (and against a union). He did not own any of its stock but did own a significant amount of stock in a company that regularly engaged in transactions with the party-corporation.¹⁵⁷ After an anonymous complaint was made that Haynsworth may have been bribed in relation to the case, he requested an investigation and was cleared of any impropriety.¹⁵⁸ The second instance was from late 1967. Haynsworth purchased stock in Brunswick Corporation after a unanimous three-member court decided a case in its favor.¹⁵⁹ Haynsworth did not write an opinion. The purchase occurred after the court informally decided the case and before its decision was publicly released.¹⁶⁰

In late September 1969, published reports noted Haynsworth had years earlier invested with the disgraced (and by then imprisoned) Washington "fixer" Bobby Baker.¹⁶¹ No rule of judicial ethics was

153. *Id.*

154. JOHN P. FRANK, CLEMENT HAYNSWORTH, THE SENATE, AND THE SUPREME COURT 26 (1991).

155. Edward N. Beiser, *The Haynsworth Affair Reconsidered: The Significance of Conflicting Perceptions of the Judicial Role*, 23 VAND. L. REV. 263, 264 (1970).

156. *Id.* at 270–72.

157. FRANK, *supra* note 154, at 21–22, 32; *see also* Stephen L. Wasby & Joel B. Grossman, *Judge Clement E. Haynsworth, Jr.: New Perspective on His Nomination to the Supreme Court*, 1990 DUKE L.J. 74, 79–80 (1990) (discussing investigation and its conclusion).

158. *Id.* at 79–80.

159. FRANK, *supra* note 154, at 45.

160. *Id.*

161. Bruce H. Kalk, *The Making of "Mr. Justice Haynsworth"? The Rise, Fall, and Revival of Judge Clement F. Haynsworth Jr.*, 117 S.C. HIST. MAG., Jan. 2016, at 4, 21; FRANK, *supra* note 154, at 64 ("Haynsworth and Baker had participated in a cemetery investment in 1958 without either

violated. But some argued the mere association with Baker stained Haynsworth's reputation such that he should not be confirmed. He wasn't. The Fortas case spurred the ABA to create a special committee to update the 1924 Canons, and the revelations regarding Haynsworth made it imperative that the Committee work as quickly as possible.

B. The Creation of Judicial Conduct Commissions

Nearly all states constitutionally permitted the removal of judges from office by impeachment in the state legislature. Some allowed removal by legislative address, and—as briefly discussed above—several states allowed removal of judges by a vote of the people, known as judicial recall. As noted irregularly in legal journals, states rarely removed judges from office through any of these methods, even when it was clear the judge was no longer able or fit to serve.¹⁶²

In a 1960 *American Bar Association Journal* article, the author listed six states that had created another tool to remove or discipline judges.¹⁶³ None had accomplished much. Likely due to publishing deadlines, the author did not note California's constitutional amendment that year. The amendment, which ushered in a new approach soon copied by most states, created a commission on judicial qualifications, more broadly known as a judicial conduct organization.¹⁶⁴ Its initial authority was limited to recommending to the California Supreme Court the removal or retirement of judges in the state.¹⁶⁵ The California Commission was quite active. In its first four years, it “directly” caused the retirement or

knowing that the other was involved, but the name association was enough.”).

162. Burke Shartel, *Retirement and Removal of Judges*, 20 J. AM. JUDICATURE SOC'Y 133, 151 n.86 (1936) (listing five cases in which state judges were removed from office between 1900-1925); Frederic M. Miller, *Discipline of Judges*, 50 MICH. L. REV. 737, 737 (1952) (noting three unsuccessful impeachments of state judges between 1928-1948); George E. Brand, *The Discipline of Judges*, 46 A.B.A. J. 1315, 1315 n.2 (1960) (noting 1960 survey to which forty states replied listed just seventeen states ever using impeachment, in a total of fifty-two cases, with nineteen removals, three resignations, and one unknown outcome); WILLIAM THOMAS BRAITHWAITE, WHO JUDGES THE JUDGES? A STUDY OF PROCEDURES FOR REMOVAL AND RETIREMENT 12–13 (1971) (describing the infrequent use of impeachment, address, and recall as systems to remove judges) [hereinafter WHO JUDGES]; William T. Braithwaite, *Judicial Misconduct and the Evolution of the Illinois Courts Commission 1964-1970*, 1969 U. ILL. L.F. 442, 444 (listing five states using impeachment between 1954-1969).

163. Brand, *supra* note 162, at 1316–17 (listing New York, Virginia, Utah, Ohio, Wisconsin, and Michigan).

164. Jack E. Frankel, *Removal of Judges: California Tackles an Old Problem*, 49 A.B.A. J. 166, 166 (1963); Louis H. Burke, *Judicial Discipline and Removal: The California Story*, 46 J. AM. JUD. SOC'Y 167, 168 (1965); Schoenbaum, *supra* note 71, at 20.

165. Schoenbaum, *supra* note 71, at 20.

resignation of twenty-six judges, and several more were “indirectly” caused to leave the bench.¹⁶⁶ Its official recommendations were much more slowly accepted by the California Supreme Court.¹⁶⁷ A commission recommendation to censure a judge was first adopted by the California Supreme Court in 1970.¹⁶⁸ Three years later, that court first adopted a Commission recommendation to remove a judge.¹⁶⁹

From the mid-1960s through 1971, one-third of the states created judicial conduct commissions; by 1981, the District of Columbia and every state had created or agreed to create a judicial conduct organization.¹⁷⁰ Some states gave judicial conduct organizations relatively narrow powers, as in California’s case. Others gave them broader powers, including the power to impose, not merely recommend, judicial discipline, such as Wisconsin.

The Supreme Court of Wisconsin adopted a Code of Judicial Ethics applicable to all state judges effective January 1, 1968.¹⁷¹ Four years later, it created a judicial commission to implement the Code. Unlike the initial grant of authority in California, the Wisconsin Judicial Commission could “reprimand or censure a judge.”¹⁷² Also unlike in California, Wisconsin judges could be suspended or removed from office only through the constitutionally-permitted measures of impeachment, address, and recall.

A 1969 judicial scandal involving two members of the Illinois Supreme Court may have generated increased support for the creation of judicial conduct commissions among the states.¹⁷³ In 1962, the Illinois

166. Burke, *supra* note 164, at 170.

167. See BRAITHWAITE, WHO JUDGES, *supra* note 162, at 90–93 (discussing early years of California Commission).

168. *In re Chargin*, 471 P.2d 29, 29 (Cal. 1970) (en banc) (per curiam).

169. *Geiler v. Comm’n on Jud. Qualifications*, 515 P.2d 1, 12 (Cal. 1973).

170. See James J. Alfini, Shailey Gupta-Brietzke & James F. McMartin IV, *Dealing with Judicial Misconduct in the States: Judicial Independence, Accountability and Reform*, 48 S. TEX. L. REV. 889, 891–92 nn.6–8 (2007). Arkansas created a commission by statute in 1977, Schoenbaum, *supra* note 71, at 24–27, and did the same by constitutional amendment in 1988, see JUD. DISCIPLINE & DISABILITY COMM’N, *About the Commission*, <https://www.jddc.arkansas.gov/about-the-commission/> [<https://perma.cc/FE6A-XNQ7>] (last visited Mar. 4, 2021).

171. *In re Code of Jud. Ethics*, 153 N.W.2d 873, 874 (Wis. 1967).

172. *In re Promulgation of Code of Jud. Ethics*, 191 N.W.2d 923, 924 (Wis. 1971); see generally Lisa L. Lewis, *Judicial Discipline, Removal, and Retirement*, 1976 WIS. L. REV. 563. The current Judicial Commission has no power to adjudicate cases of judicial discipline. See ST. OF WIS., JUD. COMM’N: ANN. REP. 1 (2020), <https://www.wicourts.gov/courts/committees/judicialcommission/annualreport2020.pdf> [<https://perma.cc/7Y3N-TU6N>].

173. See generally REP. OF THE SPEC. COMM’N OF THE SUPREME CT. OF ILL. NO. 39797 (1969),

Constitution was amended to permit a “commission” consisting of five judges to remove, retire, or suspend judges for cause. The commission was to act based on procedural rules adopted by the Illinois Supreme Court. Two years later, the court completed its rule making, and the Illinois Courts Commission was formed.¹⁷⁴ It then did nothing.

The Illinois Supreme Court decided the Commission could “convene” only when the court commanded it to do so.¹⁷⁵ And it didn’t do so until mid-1967, over three years after its creation.¹⁷⁶ The subject of this meeting was a judge whose unusual bonding practices generated both puzzlement and concern among fellow Cook County (Chicago) judges.¹⁷⁷ Before the Commission could act, the judge resigned. The judge eventually pled guilty to fifteen counts of official misconduct, a lesser crime than the original bribery charges.¹⁷⁸ Similar charges against a second Cook County judge were dismissed by the Commission.¹⁷⁹

The limited authority of the Commission frustrated bar leaders. A joint effort of the Chicago and Illinois State Bar Associations worked to restructure its authority, including giving it limited independence from the Illinois Supreme Court. They succeeded in doing so just as two supreme court justices were accused of “undue influence and appearance of impropriety” in affirming dismissal of criminal charges against a lawyer named Theodore Isaacs.¹⁸⁰ The allegation was the two justices, Associate Justice Ray Klingbeil and Chief Justice Roy Solfisburg, had received stock of a privately-held bank—the Civil Center Bank and Trust Company where Isaacs served as general counsel—during the pendency of the appeal in Isaacs’s case.¹⁸¹

Giving the restructured Illinois Courts Commission the opportunity to investigate Klingbeil and Solfisburg was problematic, not only because Klingbeil was a member of the Commission, but also because

<https://press-pubs.uchicago.edu/manaster/commissionreport.html> [<https://perma.cc/T4WT-HMUT>].

174. See Braithwaite, *Judicial Misconduct*, *supra* note 162, at 452–58 (describing history of Commission).

175. *Id.* at 453.

176. *Id.* at 454.

177. BRAITHWAITE, WHO JUDGES, *supra* note 162, at 102–03.

178. KENNETH A. MANASTER, ILLINOIS JUSTICE: THE SCANDAL OF 1969 AND THE RISE OF JOHN PAUL STEVENS 245 (2001).

179. BRAITHWAITE, WHO JUDGES, *supra* note 162, at 103–05.

180. REP. OF THE SPEC. COMM’N OF THE SUPREME CT. OF ILL., *supra* note 173, ¶ 25; see generally MANASTER, *supra* note 178 (Manaster served as associate counsel to the Special Commission); see also BILL BARNHART & GENE SCHLICKMAN, JOHN PAUL STEVENS: AN INDEPENDENT LIFE 141–44 (2010).

181. MANASTER, *supra* note 178, at 13–15, 119–22, 128–30, 143–47.

the Commission had not proven itself capable of doing the necessary work. The remaining members of the supreme court created a Special Commission to investigate, to which it appointed two of its five members, the presidents of the Chicago and Illinois State Bar Associations.¹⁸²

The Special Commission named lawyer (and future Supreme Court Justice) John Paul Stevens as its general counsel. Over the next seven weeks, the Commission examined twenty-one witnesses and gathered other evidence. In its findings and conclusions, the Special Commission favorably quoted ABA Formal Opinion 322.¹⁸³ Like the unnamed Fortas, Solfisburg and Klingbiel had created an appearance of impropriety by obtaining (either by gift or by payment) stock in a company partly owned and operated by a party in a pending case.¹⁸⁴ The Special Commission decided both Solfisburg and Klingbiel had violated Canon 4, the appearance of impropriety, and had also committed “certain positive acts of impropriety.”¹⁸⁵

C. The Appearance of Impropriety and the 1972 Code of Judicial Conduct

1. *The 1972 Code of Judicial Conduct*

In August 1969, newly-elected ABA President Bernard Segal created a Special Committee to “reformulat[e]” the 1924 Canons.¹⁸⁶ Segal suggested this reformulation was long overdue, and his decision was largely independent of the “unfortunate, highly publicized events of recent months.”¹⁸⁷ He also noted Chief Justice Warren Burger’s approval of an update of judicial ethics rules. Due to “the need to move promptly,” the Special Committee, led by retired California Supreme Court Chief Justice Roger Traynor, issued its initial conclusions less than

182. Those two individually each picked an additional member, and jointly chose the fifth member. REP. OF THE SPEC. COMM’N OF THE SUPREME CT. OF ILL., *supra* note 173, ¶ 4.

183. *Id.* at ¶ 98.

184. *Id.* at ¶ 101; *see also id.* at ¶¶ 104, 112 (noting appearance of impropriety independently of Formal Op. 322).

185. *Id.* at ¶ 112; *see also id.* at ¶¶ 110, 111, 116, 117 (noting violations of appearance of impropriety standard). Isaacs, along with former Illinois Governor Otto Kerner, were subsequently convicted of bribery (failure to provide “honest services”) in federal court. *See United States v. Isaacs*, 493 F.2d 1124, 1166 (7th Cir. 1974), *cert. denied* *Kerner v. United States*, 417 U.S. 976 (1974).

186. Bernard G. Segal, *The President’s Page*, 55 A.B.A. J. 847, 847 (1969).

187. *Id.* Segal, of course, was referring to the Fortas contretemps.

a year later.¹⁸⁸ The fifth of its ten preliminary conclusions stated a judge's personal relations should not "appear to influence his judicial conduct."¹⁸⁹ The eighth conclusion, *Disqualification*, discussed only instances of actual bias or interest, not its appearance.¹⁹⁰

The following year, the Special Committee published a tentative draft. Traynor listed sixteen "highlights." As with its initial conclusions, Traynor noted the appearance of impropriety standard just once, and on the same subject: A judge was not to allow personal relations "to influence or appear to influence the performance of his official duties."¹⁹¹ The ABA House of Delegates discussed the Committee's Proposed Final Draft at its February 1972 midyear meeting, and a final draft was adopted in August.¹⁹²

Unlike the 1924 Canons, the 1972 Code's "canons and text establish[ed] mandatory standards unless otherwise indicated."¹⁹³ These mandatory standards were often, however, vaguely described. For example, Canon 2, *A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities*, listed just two broad admonitions. First, a judge was to comply with the law and act "at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."¹⁹⁴ Second, the judge should not permit third parties to "influence his judicial conduct and judgment."¹⁹⁵ This second admonition also stated a judge "should not testify voluntarily as a character witness."¹⁹⁶ The explanatory *Commentary* offered no assistance to one uncertain about the definition and breadth of the appearance of impropriety standard. It simply and unhelpfully repeated

188. *Rep. of the Special Comm. on Standards of Jud. Conduct*, 95 A.B.A. ANN. REP. 1048, 1048 (1970).

189. *Id.* at 1049–50.

190. *Id.* at 1050.

191. *Rep. of the Special Comm. on Standards of Jud. Conduct*, 96 A.B.A. ANN. REP. 733, 734 (1971).

192. *Rep. of the Special Comm. on Standards of Jud. Conduct*, 97 A.B.A. ANN. REP. 351, 351 (1972) (noting dissemination of proposed final draft of Code of Judicial Conduct); *Rep. of the Special Comm. on Standards of Jud. Conduct*, 97 A.B.A. ANN. REP. 858, 858 (1972) (presenting the final draft); *id.* at 556 (approving Code after adopting two minor amendments).

193. MODEL CODE OF JUD. CONDUCT Preface (AM. BAR ASS'N, Proposed Final Draft 1972) [hereinafter 1972 CODE].

194. *Id.* at Canon 2A.

195. *Id.* at Canon 2B.

196. *Id.* Neither the *Commentary* nor the *Reporter's Notes* mention the most well-known instance: the calling of sitting Supreme Court Justices Felix Frankfurter and Stanley Reed to testify as character witnesses on behalf of Alger Hiss in Hiss's first trial for perjury. See ALLEN WEINSTEIN, PERJURY: THE HISS-CHAMBERS CASE 399–401 (2d ed. 1997).

(substituting “must” for “should”) the title: “A judge must avoid all impropriety and appearance of impropriety.”¹⁹⁷ The published *Reporter’s Notes* regarding Canon 2 began, “[t]he black-letter statement of Canon 2 is very broad in its terms and perhaps the nearest to being hortatory of any provision in the *Code*.”¹⁹⁸ Even so, the Reporter stated the Committee concluded, “despite the generality, an ‘impropriety and the appearance of impropriety’ standard is necessary.”¹⁹⁹ That was all.

As was its practice at this time, the ABA created a Special Committee to assist in implementing the Code of Judicial Conduct as law in the states. At the end of its three-year existence, the Special Committee stated thirty-nine states, the District of Columbia, and the Judicial Conference of the United States (making the Code applicable to all federal judges other than Supreme Court Justices), had adopted it in part or whole. Two others had adopted a small portion, and five of the remaining nine states were engaged in “active studies of the ABA Code.”²⁰⁰ Most also ratified the *Commentary*.²⁰¹

The Reporter’s acknowledgment that Canon 2 was “nearest to being hortatory”²⁰² gave judicial disciplinary bodies an option. Canon 2 could be interpreted just like the other Canons, as creating a “mandatory,” enforceable standard. It might also serve solely as an aspirational goal. Canon 9 of the 1969 ABA Code of Professional Responsibility applicable to lawyers was titled, *A Lawyer Should Avoid Even the Appearance of Professional Impropriety*.²⁰³ The drafters of the lawyer’s Code called the Canons “concise axiomatic statements.”²⁰⁴ The enforceable rules, called Disciplinary Rules (DR), were specific prohibitions based on the broader canonical norms, and “mandatory in character.”²⁰⁵ Based on Canon 9, DR 9-101(A) barred a lawyer from representing a client “in a matter upon the merits of which he has acted

197. 1972 CODE, *supra* note 193, at Canon 2 cmt.

198. E. WAYNE THODE, REPORTER’S NOTES TO CODE OF JUDICIAL CONDUCT 49 (1973).

199. *Id.*

200. *Rep. of the Special Comm. to Obtain Adoption of the Code of Jud. Conduct*, 100 A.B.A. ANN. REP. 859, 859, 860 (1975).

201. Leslie W. Abramson, *Canon 2 of the Code of Judicial Conduct*, 79 MARQ. L. REV. 949, 953 (1996) (noting ten did not) [hereinafter Abramson, *Canon 2*].

202. THODE, *supra* note 198, at 49.

203. CODE OF PRO. RESP. Canon 9 (Am. Bar Ass’n Special Comm. on Evaluation of Ethical Standards) (1969).

204. *Id.* at Preamble.

205. *Id.*

in a judicial capacity.”²⁰⁶ This was simply the converse of the long-held rule that a judge was disqualified from a matter if the judge had previously represented a party as their lawyer. Judicial disciplinary authorities could reasonably point to Canon 9 and the DR 9-101(A) to justify making Canon 2 of the Code of Judicial Conduct a mandatory standard.

Additionally, employees and commissioners of the judicial conduct organizations had an interest in the success and thus continued existence of their organizations. Making Canon 2 mandatory gave those organizations more options to make their mark.²⁰⁷ Despite the “nearly” hortatory nature of Canon 2, courts and judicial conduct organizations took the drafters at their word: Judges were subject to discipline for creating an appearance of impropriety.

In 1978, the ABA adopted model *Standards of Judicial Discipline and Disability Retirement*.²⁰⁸ The *Standards* urged each state (all but four had already done so) to create a commission to regulate judicial conduct, and to do so by state constitutional amendment.²⁰⁹ The *Standards* noted each state’s highest court possessed the “inherent” power to discipline judges short of removing them from office.²¹⁰ The creation of a judicial conduct commission by constitutional amendment was intended to add removal and involuntary retirement as disciplinary tools available to the judicial branch. Standard 3.3, *Grounds*, listed various justifications for discipline. Standard 3.3(d) declared “conduct prejudicial to the administration of justice . . . that brings the judicial office into disrepute” was sufficient, as was any conduct that violated codes of judicial or legal ethics.²¹¹ In the *Commentary*, the drafters wrote, “[t]his standard provides that not only impropriety but also the appearance of impropriety that brings the judicial office into disrepute may be a basis for commission action.”²¹²

206. *Id.* at DR 9-101(A).

207. Cf. Jonathan Abel, *Testing Three Commonsense Intuitions about Judicial Conduct Commissions*, 64 STAN. L. REV. 1021, 1026 (2012) (concluding “[w]ell-funded commissions discipline judges more often than underfunded commissions”).

208. *Rep. of the App. Judges’ Conf. and the Standing Comm. on Pro. Discipline*, 103 A.B.A. ANN. REP. 454, 454–55 (1978) (issuing tentative proposal); *Proceedings of the 1978 Midyear Meeting of the House of Delegates*, 103 A.B.A. ANN. REP. 203, 233–35 (1978) (debating and approving the Standards Relating to Judicial Discipline and Disability Retirement).

209. *Id.* at 457 (Standard 1.4).

210. *Id.* at 456 (Standard 1.1).

211. *Id.* at 461 (Standard 3.3(d)).

212. *Id.* (Standard 3.3 and Commentary).

2. *Judicial Discipline and the Appearance of Impropriety*

And so, courts and judicial conduct organizations began using the appearance of impropriety standard to discipline judges. The most recent iteration of the New York State Commission on Judicial Conduct was created by constitutional amendment in late 1977, and the Commission began its work in April 1978.²¹³ It possessed the authority to determine whether to admonish or to remove from office a judge, subject to review by the New York Court of Appeals.²¹⁴ One of its earliest efforts was to review four charges that Justice Morris Spector had made appointments in violation of New York's Canons of Judicial Ethics, specifically the prohibition of an appearance of impropriety. The New York Canons were based on the ABA's 1972 Code.²¹⁵

Spector v. State Commission on Judicial Conduct is an early and well-known example of judicial discipline for creating an appearance of impropriety.²¹⁶ Three New York trial judges had sons who practiced law. Between March 1968 and November 1974, Justice Spector appointed Stanford Postel, the son of Justice George Postel, on four occasions, and Burton Fine, the son of Justice Sidney Fine, on two occasions. The referee found these appointments were not "free from the appearance of impropriety," though he also found no actual impropriety.²¹⁷ Justice Fine appointed Spector's son eight times and Postel's son ten times. And Justice Postel appointed Spector's son five times.²¹⁸ Spector was aware of his son's appointments during this time. The Commission found no *quid pro quo* but agreed Spector's actions violated the appearance of impropriety standard.²¹⁹ A majority concluded Spector's actions were subject to admonishment.²²⁰ Spector requested review by the Court of Appeals.

In a *per curiam* opinion, the court agreed.²²¹ It concluded Spector's knowledge that his son received appointments from Fine and Postel at

213. N.Y. STATE COMM'N ON JUD. MISCONDUCT, 1979 ANN. REP. 1, 6 [hereinafter 1979 ANN. REP.] (noting history of commission).

214. N.Y. CONST. art. VI, § 22 (amended 2002).

215. 1979 ANN. REP., *supra* note 213, at 77 (App. E) (*Matter of Morris Spector*) (report for 1978 calendar year).

216. 392 N.E.2d 552 (N.Y. 1979).

217. 1979 ANN. REP., *supra* note 213, at 77-78; *Spector*, 392 N.E.2d at 552.

218. *Spector*, 392 N.E.2d at 552-53.

219. 1979 ANN. REP., *supra* note 213, at 78-79.

220. *Spector*, 392 N.E.2d at 552-53.

221. *Id.* at 555.

the time Spector appointed the sons of Fine and Postel “inescapably created a circumstantial appearance of impropriety.”²²²

The dissent by Justice Fuchsberg initially noted no specific rule of judicial conduct applied to this apparent cross-nepotism.²²³ The appointments were made openly and publicly, and no one argued the sons were incompetent lawyers.²²⁴ Next, the appointments were but a few of the thousands made by Spector in his lengthy judicial career, and none generated substantial fees for Fine or Postel.²²⁵ Third, though he began his dissent by suggesting his amenability to applying the appearance of impropriety standard in the right case, Fuchsberg suggested this standard was “beset by legal and moral complexity.”²²⁶ Thus, it should be considered largely “hortatory,” and “not to be freely applied.”²²⁷ “[A]bsent an accompanying substantive breach, a mere appearance of impropriety should not automatically merit condemnation.”²²⁸

Spector was unusual in relying solely on the appearance of impropriety standard to discipline a judge. In most decisions on judicial conduct, organizations or courts found some substantive violation in addition to the appearance of impropriety.²²⁹ For example, in *In re Wait*, Judge Almon Wait presided in six matters in which a relative was a party within the sixth degree of relationship of Judge Wait or his spouse.²³⁰ New York law disqualified a judge in such circumstances.²³¹ The New York State Commission on Judicial Conduct and the New York Court of Appeals both concluded he should be removed from office: “The handling by a judge of a case to which a family member is a party creates an appearance of impropriety as well as a very obvious potential for abuse, and threatens to undermine the public’s confidence in the

222. *Id.*

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

224. *Id.*

225. *Id.*

226. *Id.* at 557.

227. *Id.*

228. *Id.* He also noted the appearance of impropriety standard raised a due process vagueness claim. *See id.*

229. *See, e.g., In re Bonin*, 378 N.E.2d 669, 706 (Mass. 1978); *In re Inquiry Concerning a Judge*, 788 P.2d 716, 723 (Alaska 1990); *In re Inquiry Concerning a Judge*, 822 P.2d 1333, 1342 (Alaska 1991); *In re Alvord*, 847 P.2d 1310, 1314 (Kan. 1993); *Adams v. Comm’n on Jud. Performance*, 897 P.2d 544, 546 (Cal. 1995); *In re Harris*, 713 So. 2d 1138, 1139 (La. 1998); *In re Gerard*, 631 N.W.2d 271, 279–80 (Iowa 2001); *In re Mosley*, 102 P.3d 555, 558 (Nev. 2004).

230. *In re Wait*, 490 N.E.2d 502, 502–03 (N.Y. 1986).

231. N.Y. CODE OF JUD. CONDUCT § 100.3E(1)(d).

impartiality of the judiciary.”²³² In addition to concluding Wait violated Canon 2, both bodies concluded he also violated Canon 1 and Canon 3(C)(1).²³³

The New York Commission’s annual reports do not categorize the types of investigated complaints by the specific canons or code provisions allegedly violated. However, all of the Commission’s determinations are available from *Westlaw* in its New York Commission on Judicial Conduct Disciplinary Opinions file. A Boolean search in that file from 1978–1990 including the terms “appear!” and “improp!” returned thirty-four decisions.²³⁴ The same search for the period 1978–2021 returned 296 decisions.²³⁵ In the Commission’s 1991 Annual Report, recounting the 1990 year, it lists two removal determinations, six determinations of censure, and five of admonition.²³⁶ Even without a search of each annual report, the number of determinations listed suggests the routine use of the appearance of impropriety by the Commission.

A decade after *Spector*, the Louisiana Supreme Court decided a case only on appearance of impropriety grounds.²³⁷ Irvin Carmouche won a large judgment against the State of Louisiana.²³⁸ Carmouche needed the state legislature to pass a bill appropriating funds to pay that judgment.²³⁹ This seemed in some doubt when Carmouche spoke with Judge Joel Chaisson. Chaisson agreed to ask about the state of negotiations when he went to Baton Rouge to testify to the Legislature regarding another

232. *In re Wait*, 490 N.E.2d at 503; *see also In re Snow*, 674 A.2d 573, 574, 577–79 (N.H. 1996) (concluding judge’s call to police officer regarding a ticket the officer gave judge’s brother violated both Canon 1 and Canon 2) and *In re Harned*, 357 N.W.2d 300, 301–02 (Iowa 1984) (holding judge violated both Canon 1 and Canon 2 in attempting to have dismissed a ticket issued to her daughter).

233. *In re Wait*, 490 N.E.2d at 503.

234. N.Y. Comm’n on Jud. Conduct Disciplinary Ops., (“adv: appear! w/2 improp!”), WESTLAW, [https://1.next.westlaw.com/Browse/Home/AdministrativeDecisionsGuidance/NewYorkAdministrativeDecisionsGuidance/NewYorkCommissiononJudicialConductDisciplinaryOpinions?originationContext=typeAhead&transitionType=CategoryPageItem&contextData=\(sc.Default\)](https://1.next.westlaw.com/Browse/Home/AdministrativeDecisionsGuidance/NewYorkAdministrativeDecisionsGuidance/NewYorkCommissiononJudicialConductDisciplinaryOpinions?originationContext=typeAhead&transitionType=CategoryPageItem&contextData=(sc.Default)) [<https://perma.cc/LP7F-T6GV>] (last visited Apr. 9, 2022).

235. *Id.*

236. N.Y. STATE COMM’N ON JUD. MISCONDUCT, ANN. REP., MARCH 1991, at i (1991) (listing determinations in Table of Contents), <https://cjc.ny.gov/Publications/AnnualReports/nyscjc.1991annualreport.pdf> [<https://perma.cc/F9HB-ZUZ5>].

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

238. *Id.* at 261.

239. *Id.*

bill. He did and reported back to Carmouche.²⁴⁰ Later, Carmouche and his lawyers disputed the fee owed. Carmouche asked Chaisson if Chaisson's son Joel II was capable of handling this type of case for Carmouche. Chaisson said he was.²⁴¹ After the fee dispute was resolved in favor of Carmouche and against his former lawyers, the latter complained about Chaisson's conduct.²⁴²

The Louisiana Judiciary Commission found Chaisson had violated Canons 1, 2, 4, and 7 of the Louisiana Code of Judicial Conduct.²⁴³ The Louisiana Supreme Court upheld only the charge that Chaisson had violated Canon 2 by creating an appearance of impropriety in contacting legislators and in speaking with the Assistant Attorney General, who was involved in the negotiations with Carmouche's then-attorneys.²⁴⁴ It concluded Chaisson had not violated any other code provision because "no evidence" existed that Chaisson "actually influenced" the settlement between Carmouche and the State, nor could such influence be "readily inferred from the circumstantial evidence in the record."²⁴⁵ Chaisson had objectively created an appearance of impropriety by "'lend[ing] the prestige of his office to advance the private interest' of Carmouche."²⁴⁶ Chaisson's private pleading and the short time between Chaisson's conversations and the settlement of Carmouche's case gave a reasonable person suspicion of "some improper influence" by Chaisson for Carmouche's benefit.²⁴⁷

In *In re Blackman*, Municipal Court Judge Robert Blackman attended a Labor Day party hosted by a friend of eighteen years, Thomas Heroy.²⁴⁸ Heroy had been convicted of federal racketeering charges and was soon off to prison. Blackman's attendance at the party, along with other notable local public figures, was publicized in the local newspaper.²⁴⁹ The New Jersey Supreme Court held Blackman's

240. *Id.*

241. *Id.* at 261–62.

242. *Id.* at 262. They also complained about a real estate transaction between Carmouche and Chaisson, in which Joel Chaisson II also represented Carmouche. *Id.* at 261. The result was four initial charges.

243. *Id.* at 260.

244. *Id.* at 263.

245. *Id.*

246. *Id.*

247. *Id.*

248. 591 A.2d 1339, 1340 (N.J. 1991).

249. *Id.* at 1340, 1342 ("Subsequent newspaper accounts interpreted respondent's attendance as support for Heroy and characterized the event as a going-away party for Heroy as he was about to begin his prison term.").

attendance at Heroy's annual Labor Day party created an appearance of impropriety.²⁵⁰ Blackman's

conduct could be perceived as evidencing sympathy for the convicted individual or disagreement with the criminal justice system that brought about the conviction. At worst, such conduct may raise questions concerning the judge's allegiance to the judicial system. Those impressions could generate legitimate concern about the judge's attitude toward judicial responsibilities, weakening confidence in the judge and the judiciary.²⁵¹

Blackman was publicly reprimanded.

Finally, in 2000, the Supreme Court of Alaska publicly reprimanded a judge for creating an appearance of impropriety because he hired a coroner.²⁵² The Alaska Commission on Judicial Conduct found no actual impropriety by Judge Johnstone, but concluded that, by creating an appearance of impropriety, Johnstone was subject to discipline.²⁵³

These were the rare cases in which a judge was disciplined only for failing to avoid an appearance of impropriety. In nearly all cases in which a judge was found in violation of the appearance of impropriety standard, the judge was also found to have had violated another, and more substantive, Canon.

3. *Disqualifying Judges for an Appearance of Impropriety*

Canon 3(C)(1) of the 1972 Code declared a judge "should disqualify himself in a proceeding in which his impartiality might reasonably be questioned."²⁵⁴ This Canon would lead to a massive increase in judicial disqualification motions based on an appearance of impropriety.

How was Canon 3(C)(1) to work? The Traynor Committee's Reporter, E. Wayne Thode, explained the link between the Canon 3 disqualification standard and Canon 2 appearance of impropriety standard in his published *Reporter's Notes*: "[A]n impropriety or the appearance of impropriety in violation of Canon 2 that would reasonably lead one to question the judge's impartiality in a given proceeding

250. *Id.* at 1342.

251. *Id.* at 1341–42. A second charge regarding Blackman's law partner's representation of the local police chief was dismissed. *Id.* at 1342–44.

252. *In re Johnstone*, 2 P.3d 1226, 1228 (Alaska 2000).

253. *Id.*

254. CANON 3(C)(1), CODE OF JUD. CONDUCT (1972).

clearly falls within the scope of the general standard.”²⁵⁵ Thus, the appearance of impropriety standard “officially became, and would continue to be, the heart of judicial ethics.”²⁵⁶

When Congress was debating whether to adopt the substance of Canon 3(C)(1) in mid-1973, Thode testified.²⁵⁷ He was asked a hypothetical about the applicability of the appearance of impropriety: Should a judge be disqualified if an attorney for one of the parties was a “distant cousin” whom the judge had not seen in thirty years and to whom he was not close? Canon 3(C)(1)(a)–(d) gave four particular instances when a judge should disqualify herself, all of which had been accepted for over a century-and-a-half: party bias or prejudice, having previously served as a lawyer to one of the parties in the matter, having an interest in the matter (including family members having such an interest), or having a family member (or spouse’s family member) “within the third degree of relationship” who was a party or lawyer.²⁵⁸ Canon 3(C)(3) counted “third degree” through the civil law method. That method, as noted by the accompanying *Commentary* to Canon 3(C)(3), meant a “cousin” was in the fourth-degree of relationship, and thus excepted from this rule.²⁵⁹ Thus, the answer to this question was “no.” But because the introduction to Canon 3(C)(1) ended with, “including but not limited to” those four listed instances, Thode answered, it depends: Recusal was necessary if the judge “decided that his impartiality might reasonably be questioned under those circumstances.”²⁶⁰ The appearance of impropriety standard was to be interpreted by repeating the language of the standard.²⁶¹

This approach opened the gates for lawyers seeking to disqualify judges for creating an appearance of impropriety. Lawyers struggled economically during the 1970s and cleaved tighter to their clients.²⁶² Zealous representation often became overzealous representation, as

255. THODE, *supra* note 198, at 61.

256. Raymond J. McKoski, *Judicial Discipline and the Appearance of Impropriety: What the Public Sees is What the Judge Gets*, 94 MINN. L. REV. 1914, 1930 (2010).

257. Raymond J. McKoski, *Disqualifying Judges When Their Impartiality Might Reasonably be Questioned: Moving Beyond a Failed Standard*, 56 ARIZ. L. REV. 411, 437–38 (2014) [hereinafter *Disqualifying Judges*].

258. See text accompanying footnotes 11–21.

259. THODE, *supra* note 198.

260. *Disqualifying Judges*, *supra* note 257, at 438.

261. *Id.*

262. See Michael Ariens, *The Agony of Modern Legal Ethics, 1970-1985*, 5 ST. MARY’S J. ON LEGAL MALPRACTICE & ETHICS 134, 171–73 (2014) (discussing economic downturn for lawyers during 1970s).

lawyers looked to find any edge favoring their clients, including moving to disqualify the judge. Canon 3(C)(1) assisted the rise in judicial disqualification motions in the 1970s and 1980s.

Motions to disqualify were joined by an increasing sensitivity to appearances by courts. Though the disqualification rule was a “reasonable person” standard, it was interpreted elastically. On occasion, courts urged disqualification even when it was not required. For example, in *Johnson v. Hornbliss*, the New York Appellate Division refused to disqualify the trial judge from hearing post-conviction motions.²⁶³ Justice Jerome Hornbliss was alleged by the district attorney of having an “extra-judicial” involvement in a criminal matter that disqualified him.²⁶⁴ Hornbliss’s orders regarding the confinement of a convicted person had been flouted, and Hornbliss visited the facilities and the convicted defendant to ensure his subsequent orders had been followed.²⁶⁵ Hornbliss was neither biased nor interested, and thus not subject to disqualification under the laws of New York.²⁶⁶

Although the Appellate Division concluded Hornbliss had not abused his discretion in declining to recuse himself, it urged him to do so anyway:

[W]e suggest that the “appearance of justice” might be better served by his recusal. We are confident that he recognizes, as do we, that judicial proceedings should never be conducted save in a manner and under circumstances that reflect complete impartiality. Not only must there be no partiality in fact, even the appearance of partiality is to be avoided.²⁶⁷

In *Smith v. Beckman*, a trial judge was married to a deputy district attorney.²⁶⁸ She was not involved in the criminal case over which her husband was to preside.²⁶⁹ The accused moved to disqualify the judge. The marriage of the deputy district attorney and the judge was insufficient to require recusal under the Colorado rules of criminal procedure.²⁷⁰ Even so, the judge was disqualified from the case based on an appearance of impropriety, solely because he was married to a deputy

263. 461 N.Y.S.2d 277, 279 (N.Y. App. Div. 1983).

264. *Id.* at 278.

265. *Id.*

266. *Id.* at 279 (citing N.Y. Judiciary L. § 14).

267. *Id.*

268. 683 P.2d 1214, 1215 (Colo. App. 1984).

269. *Id.* at 1215–16.

270. *Id.* at 1216.

district attorney. The Colorado Court of Appeals concluded judges needed to act “to enhance the respect of the judiciary in the eyes of the public.”²⁷¹ Thus, “the possibility that the facts alleged may give rise to the appearance of impropriety must always receive the highest consideration in ruling on a motion for disqualification.”²⁷² The fact of marriage was sufficient to create a “possibility” that “may give rise to the appearance of impropriety.”²⁷³ This test went well beyond the reasonable person test. As phrased, the disqualification standard presented was modest indeed.

The 1972 Code wrought extensive changes in the law of judicial disqualification. As noted by a critic (and former judge), the interpretation of Canon 3(C)(1) “constituted an unprecedented expansion of the grounds for judicial recusal.”²⁷⁴ This unprecedented expansion was nationwide, given the 1972 Code’s widespread adoption by states. The appearance of impropriety standard was nearly always a part of a state’s code of judicial conduct.²⁷⁵ State courts regularly applied the appearance standard to disqualification motions after adopting the 1972 Code.²⁷⁶

271. *Id.*

272. *Id.*

273. *Id.* at 1215.

274. *Disqualifying Judges*, *supra* note 257, at 413.

275. A 2005 law review article noted, “all states but Oregon and Montana referred to the appearance of impropriety in their codes of conduct.” Cynthia Gray, *Avoiding the Appearance of Impropriety: With Great Power Comes Great Responsibility*, 28 U. ARK. LITTLE ROCK L. REV. 63, 65 n.10 (2005). Montana adopted the 2007 Model Code in 2009, including the appearance of impropriety Canon and Rule 1.2. See MONT. CODE OF JUD. CONDUCT (2009), https://courts.mt.gov/external/supreme/new_rules/rules/jud-canons.pdf [<https://perma.cc/U4PF-ZUMW>]. North Carolina eliminated the “appearance of impartiality” in 2003. See Order Adopting Amends. to the N.C. CODE OF JUD. CONDUCT (Adopted April 2, 2003), https://www.sog.unc.edu/sites/www.sog.unc.edu/files/course_materials/CodeofJudicialConduct.pdf [<https://perma.cc/TRF8-5UQ9>] (amending North Carolina Code of Judicial Conduct and striking “appearance of impropriety” standard from Canon 2).

276. See, e.g., *King v. State*, 271 S.E.2d 630, 633 (Ga. 1980); *Stephens v. Stephens*, 292 S.E.2d 689, 702–03 (Ga. 1982); *State ex rel. Div. of Fam. Servs. v. Oatsvall*, 612 S.W.2d 447, 452–53 (Mo. Ct. App. 1981); *State ex rel. Ferrell v. Heckemeyer*, 629 S.W.2d 642, 644 (Mo. Ct. App. 1982); *Papa v. New Haven Fed’n of Tchrs.*, 444 A.2d 196, 207 (Conn. 1982); *Commonwealth v. Bryant*, 476 A.2d 422, 426 (Pa. Super. Ct. 1984); *Timm v. Timm*, 487 A.2d 191, 193–94 (Conn. 1985); *Mun. Publ’ns, Inc. v. Ct. of Common Pleas*, 489 A.2d 1286, 1289 (Pa. 1985); *Birt v. State*, 350 S.E.2d 241, 243 (Ga. 1986); *In re Turney*, 533 A.2d 916, 917 (Md. 1987); *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768, 842 (Tex. App. 1987); *Dubaldo v. Dubaldo*, 542 A.2d 750, 751–52 (Conn. 1988); *Bonelli v. Bonelli*, 557 A.2d 559, 561 (Conn. App. Ct. 1989); *Sussel v. Honolulu Civ. Serv. Comm’n*, 784 P.2d 867, 868 (Haw. 1989); *In re Rowe*, 566 A.2d 1001, 1008 (Del. 1989), and cases cited therein; see also Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge’s Impartiality “Might Reasonably be Questioned”*, 14 GEO. J. LEGAL ETHICS 55, 76–102 (2000) (listing by type disqualification cases based on an appearance of impropriety) [hereinafter

State appellate courts routinely referred to the importance of avoiding the appearance of impropriety as essential in promoting public confidence in the judicial branch. Like the *Smith v. Beckman* court, they often made avoiding an appearance of impropriety the “highest consideration” in deciding disqualification motions.²⁷⁷ Many litigants, lawyers, and critics of the judiciary argued courts needed to make quick, efficient, and relatively inexpensive justice the highest consideration of courts. A greater fastidiousness regarding judicial disqualification meant justice delayed. And too often justice delayed was justice denied. This was a practical result of the increased application of a broad appearance of impropriety standard.

D. The Appearance of Impropriety and the 1990 Model Code

The 1990 Model Code of Judicial Conduct intentionally followed the format of the 1972 Code with a few additions. Most importantly, it clarified the phrasing of disciplinary rules for use to discipline judges: “When the text uses ‘shall’ or ‘shall not,’ it is intended to impose binding obligations the violation of which can result in disciplinary action.”²⁷⁸ “Should” was “hortatory,” and “may” gave the judge “permissible discretion.”²⁷⁹

Canon 2 was altered only to replace “should” with “shall,” and “his” with “[a] judge.”²⁸⁰ The two rules of Canon 2 remained, and the 1990 Model Code added a third rule barring a judge from “membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin.”²⁸¹ One addition to the *Commentary* emphasized the test of an appearance of impropriety: “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.”²⁸²

The *Preamble* to the 1990 Model Code stated, “the text of the Canons and the Sections,” or specific rules, were “authoritative.”²⁸³

Abramson, *Appearance*].

277. *Beckman*, 683 P.2d 1214, 1216 (Colo. App. 1984).

278. MODEL CODE OF JUD. CONDUCT Preamble (1990).

279. *Id.*

280. *Id.* at Canon 2.

281. *Id.* at Canon 2C.

282. *Id.* at Canon 2A, cmt.

283. *Id.* at Preamble.

Additionally, though “shall” and “shall not” were “intended to impose binding obligations the violation of which can result in disciplinary action,” the Canons and Sections were also to be interpreted as “rules of reason.”²⁸⁴

Just like the 1972 Code, Canon 2 was followed by Sections (rules) implementing the duty to “avoid impropriety.” A judge avoided impropriety by “respect[ing] and comply[ing] with the law”²⁸⁵ Canon 2B demanded the judge not permit others to “influence the judge’s judicial conduct or judgment.”²⁸⁶ But neither of these nor new Canon 2C implemented the duty of the judge to avoid the appearance of impropriety. As the Reporters for the 2007 Model Code of Judicial Conduct noted, the appearance of impropriety “was the only language from the 1990 Code embedded in a Canon, but not in a more specific underlying section.”²⁸⁷ Yet, they continued, “disciplinary authorities” had alleged judicial misconduct for failing to avoid an appearance of impropriety “in enforcement actions.”²⁸⁸

By early 1996, thirty states and the Judicial Conference had adopted the 1990 Model Code.²⁸⁹ Only Montana had not adopted some version of either the 1972 Code or the 1990 Model Code by 2005.²⁹⁰ Most states adopting the 1990 Code also adopted the *Commentary*.²⁹¹ Under either Code of Judicial Conduct, state courts applied the appearance of impropriety standard in both disciplinary and disqualification matters. And as one perceptive critic noted in 1996, courts “often include Canon 2’s general language about the appearance of impropriety when that standard is not the stated basis for the disciplinary charges against the judge or for the appeal of a civil or criminal judgment.”²⁹²

284. *Id.*

285. *Id.* at Canon 2A.

286. *Id.* at Canon 2B.

287. GEYH & HODES, *supra* note 4, at 3.

288. *Id.*

289. Abramson, *Canon 2 supra* note 201, at 950 n.3; *see also* Gray, *supra* note 275, at 64 n.7 (noting all states other than Montana, as well as the District of Columbia and the federal Judicial Conference, adopted either the 1972 or 1990 Code).

290. Gray, *supra* note 275, at 64 n.7.

291. Abramson, *Canon 2, supra* note 201, at 953 n.13 (listing nine states as adopting none (7) or part (2) of the Commentary).

292. *Id.* at 952.

IV. THE APPEARANCE OF IMPROPRIETY AND THE 2007 MODEL CODE OF JUDICIAL CONDUCT

A. To Keep or Jettison the Appearance of Impropriety Standard

In September 2003, the ABA decided to again evaluate its code of judicial conduct.²⁹³ The Joint Commission reduced the number of Canons from seven to four and organized those Canons more efficiently.²⁹⁴ One result was to move the duty to avoid impropriety and the appearance of impropriety to Canon 1.²⁹⁵

The May 2004 Draft of Canon 1 did not include any rule making it a disciplinary violation for a judge to create an appearance of impropriety.²⁹⁶ In a memorandum contemporaneous with this initial draft, Joint Commission Chair Mark Harrison invited comments, including whether Canon 1's attempt to remind judges of their duty to avoid an appearance of impropriety, "while addressing concerns for vagueness," was sufficient.²⁹⁷

Comments to this initial draft were numerous.²⁹⁸ One was from the Association of Professional Responsibility Lawyers (APRL).²⁹⁹ APRL was an organization some of whose members often defended "judges and lawyers against disciplinary charges."³⁰⁰ It concluded that the

293. *About the Commission*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/policy/judicial_code_revision_project/about/ [https://perma.cc/VY9V-QYYK] (last visited Mar. 13, 2022).

294. MODEL CODE OF JUD. CONDUCT (AM. BAR ASS'N 2007).

295. *Id.* at Canon 1.

296. *See* MODEL CODE OF JUD. CONDUCT, Canon 1 (AM. BAR ASS'N, Draft May 2004). The ABA Joint Commission to Evaluate the Model Code of Judicial Conduct from 2003–2007's drafts and reports are available at https://www.americanbar.org/groups/professional_responsibility/policy/judicial_code_revision_project/drafts/.

297. Memorandum from Mark Harrison, Chair of the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct Chair, to Individuals and Entities Interested in Judicial Ethics, 2 (May 11, 2004), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/judicialethics/memo_canon1_051104.pdf [https://perma.cc/HZ3R-SY4R].

298. *See* Judicial Code Revision Project, *Comments*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/policy/judicial_code_revision_project/comments_rules/#commentsprelim [https://perma.cc/A7ZM-E58J] (last visited Apr. 9, 2022).

299. Letter from Ronald C. Minkoff, APRL Committee on Model Code of Judicial Conduct Chair, to ABA Commission on the Model Code of Judicial Conduct (June 30, 2004), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/judicialethics/resources/comm_rules_minkoff_063004.pdf [https://perma.cc/9MYC-4STV].

300. *Id.* at 7.

appearance of impropriety standard “collides with the standards of basic fairness and due process.”³⁰¹ It “read with interest” the Joint Commission’s initial draft and commended the Commission’s proposal not to include a rule of discipline for an appearance of impropriety. This was “an important first step in limiting the scope of the AOR [appearance of impropriety] Requirement.”³⁰²

The draft language remained a first step because APRL believed the incorporation of the appearance of impropriety in Canon 1 and a reference to it in Comment 2 “creates a drafting imbalance.”³⁰³ Further, states that did not adopt the *Commentary* might still use the appearance of impropriety standard. It was better simply to state, in either Canon 1.01 or in the Preamble, that appearance of impropriety “may not serve as an independent basis for discipline.”³⁰⁴

The ABA Standing Committee on Ethics and Professional Responsibility supported APRL’s view in a memorandum dated April 12, 2005.³⁰⁵ Some committee members believed the appearance of impropriety was “too vague a standard to have value or predictability for the purpose of enforcing discipline.”³⁰⁶ Others believed the standard susceptible of a constitutional challenge.³⁰⁷

In its June 2005 Preliminary Report, the Joint Commission added Rule 1.03, which simply repeated the canonical declaration on impropriety: “A judge shall avoid impropriety and the appearance of impropriety.”³⁰⁸ The Commission’s Introductory Report discussed the tension over the issue of the appearance of impropriety.³⁰⁹ It noted, “[a]

301. *Id.*

302. *Id.* at 11.

303. *Id.*

304. *Id.*

305. See Memorandum from Charles E. McCallum, Chair of the Standing Committee on Ethics and Professional Responsibility to Mark Harrison, Chair of the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct (Apr. 12, 2005) at 2, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/judicialethics/resources/comm_rules_aba_ethics_committee_41205_ddt.pdf [<https://perma.cc/9U4U-NJSD>].

306. *Id.*

307. *Id.*

308. MODEL CODE OF JUD. CONDUCT r. 1.03 (AM. BAR ASS’N, Preliminary Draft 2005), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/judicialethics/Canon1.pdf [<https://perma.cc/P8TF-EF3W>].

309. INTRODUCTORY REPORT, PRELIMINARY REPORT OF THE ABA JOINT COMM’N TO EVALUATE THE MODEL CODE OF JUD. CONDUCT (ABA Joint Comm’n to Evaluate the Model Code of Jud. Conduct), June 30, 2005, at 4, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/judicialethics/IntroductoryReport.pdf [<https://perma.cc/DVK6-AJDR>].

majority of commentators on the subject, citing to judicial discipline cases decided over a three-decade period, urged that the concept be retained.”³¹⁰ The Commission was convinced by the majority and added Rule 1.03 to make it a disciplinary violation to create an appearance of impropriety.³¹¹ Unlike the 1972 Code and the 1990 Model Code, a “Scope” note—adopted in the 2007 Model Code—indicated that a judge was subject to discipline only if the judge violated a rule. The Canons were “overarching principles of judicial ethics.”³¹² Though “cast in mandatory terms,” only the rules “establish independently enforceable standards of judicial conduct.”³¹³ For the “majority” of commenters intent on keeping an “appearance of impropriety” disciplinary standard, the inclusion of a rule was thus necessary.

The Joint Commission’s December 2005 Final Draft Report reaffirmed its decision to include a rule requiring a judge to avoid an appearance of impropriety, though it moved this prohibition to Rule 1.02.³¹⁴ The Joint Commission’s Introductory Report adopted the reasoning (and language) it used in the June 2005 explanation.³¹⁵

Ten months later, the Introductory Report to the Proposed Revised Code repeated (again) the Commission’s view supporting the majority regarding appearance of impropriety. But it excluded the sentence that added a rule of discipline in such cases. Proposed Revised Code Draft Rule 1.02, requiring a judge to avoid impropriety and the appearance of impropriety, was deleted. In the Reporters’ Explanation of Canon 1, the Commission stated it “was persuaded to eliminate the black letter rule, which could prove a lightning rod for court challenge, and to retain ‘Avoidance of Impropriety and the Appearance of Impropriety’ in the Canon.”³¹⁶

310. *Id.*

311. *Id.*

312. MODEL CODE OF JUD. CONDUCT Scope (AM. BAR ASS’N, Preliminary Draft 2005), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/judicialethics/Scope.pdf [<https://perma.cc/WU56-HUHX>].

313. *Id.*

314. INTRODUCTION TO FINAL DRAFT REPORT (ABA Joint Comm’n to Evaluate the Model Code of Jud. Conduct), Dec. 2005, at 4, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/judicialethics/IntroductoryReportFinal.pdf [<https://perma.cc/LZE6-3TZA>].

315. *Id.*

316. *Canon 1: Reporter’s* [sic] *Explanation of Changes*, REP. NOV. 2006 (ABA Joint Comm’n to Evaluate the Model Code of Jud. Conduct) Oct. 31, 2006, at 30, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/judicialethics/report.pdf [<https://perma.cc/2NS7-WNCV>].

Thus, a judge could not be disciplined for an appearance of impropriety, for the “Scope” note distinguished between the aspirational goals of the canons and the mandatory standards of the rules. The Joint Commission to the ABA House of Delegates maintained this approach to the appearance of impropriety in its December 2006 Final Report to the ABA.³¹⁷

That’s where the proposed Code stood until the CCJ adopted Resolution 3 on February 7, 2007. In response to the CCJ’s demand, proposed Rule 1.2 of the Code was amended to read, “[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.” The House of Delegates then approved that revision, voting down an amendment to eliminate “appearance of impropriety” from Rule 1.2.³¹⁸

B. The Appearance of Impropriety and the Discipline of Judges

The worst fears of proponents of the appearance of impropriety standard have not come true: No court has held unconstitutional on vagueness or related grounds broad statements of misconduct, including avoiding the appearance of impropriety. In *Alred v. Commonwealth, Judicial Conduct Commission*, Judge Russell Alred challenged the constitutionality of Canons 1 and 2A of Kentucky’s Code of Judicial Conduct on due process vagueness grounds.³¹⁹ Kentucky’s Code was then borrowed from the 1990 Model Code, including Canon 2A, which required judges to avoid impropriety and the appearance of impropriety.³²⁰ The Supreme Court of Kentucky dismissed Alred’s constitutional argument, holding the Canons were sufficiently clear: “Judge Alred was well aware that he was required to follow the law and that if he chose not to do so, he might be disciplined for engaging in behavior that was detrimental to the public’s perception of the integrity

317. ABA JOINT COMMISSION TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, REPORT 4 (2007), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/judicialethics/house_report.pdf [<https://perma.cc/P2MD-2RVF>].

318. *Proceedings of the 2007 Midyear Meeting of the House of Delegates*, 132:1 A.B.A. ANN. REP. 27–28 (2007) and see text accompanying notes 1–10.

319. 395 S.W.3d 417, 422 (Ky. 2012).

320. In 2018, Kentucky adopted a version of the ABA’s 2007 Model Code, see KY. CODE OF JUD. CONDUCT, <https://kycourts.gov/Courts/Supreme-Court/Supreme%20Court%20Orders/201804.pdf> [<https://perma.cc/6Z3M-KW5B>].

and impartiality of the bench.”³²¹

Courts and judicial conduct commissions continue to discipline judges for an appearance of impropriety. A search for “appearance of impropriety in judicial discipline matters since 2007” in the *Westlaw* federal and state court databases lists over 100 cases.³²² These numbers suggest the utility of appearance of impropriety in judicial discipline matters. More important is whether this standard is necessary to effectively regulate judicial misconduct.

Of all the states, only the judicial conduct codes of Oregon and North Carolina do not include an appearance of impropriety standard. Whether the appearance of impropriety standard is necessary to regulate judicial conduct may be inferred from the record of those two states and comparisons with other states which include such a standard.

Oregon’s records on judicial discipline are spotty.³²³ Records from 2006 through 2020 list an average of three informal dispositions per year, with the numbers trending higher from 2016, averaging 5.2 informal dispositions yearly through 2020. An informal disposition indicates a judge, in the Commission’s view, violated a provision of the Oregon Code of Judicial Conduct. Such violation is sufficiently minor that it requires no public statement, and the letter officially dismisses the matter.³²⁴ The Commission has no authority to issue public reprimands or admonishments, nor to suspend or retire judges.³²⁵ The Commission’s records of formal investigations only exist from 2012 through 2020. They range from zero to three in any given year. Public prosecutions of judges also range from zero to three in any year. From 2006 through 2020, the Oregon Supreme Court decided eight judicial conduct cases. Five resulted in censure, two in suspension (30 days and three years), and one was dismissed at the request of the Oregon Commission.³²⁶

321. *Alred*, 395 S.W.3d at 426. The court cited other state supreme court decisions reaching the same result, including *Judicial Inquiry and Review Comm’n v. Taylor*, 685 S.E.2d 51 (Va. 2009); *In re McGuire*, 685 N.W.2d 748 (N.D. 2004); *In re Hill*, 8 S.W.3d 582 (Mo. 2000); *Miss. Comm’n on Judicial Performance v. Spencer*, 725 So.2d 171 (Miss. 1998). *See also In re Assad*, 185 P.3d 1044, 1052 n.23 (Nev. 2008) (rejecting vagueness challenge and citing cases).

322. A Boolean search on Westlaw (adv: judge AND “appearance #of impropriety” w/s disciplin! AND “judicial conduct” (aft 2006)) returns 183 cases (last searched Mar. 4, 2022).

323. Telephone Conversation with Rachel Mortimer, Executive Director, Oregon Commission on Judicial Fitness and Disability (Dec. 21, 2021). My thanks to Director Mortimer for gathering the date presented.

324. *See* Executive Director Rachel Mortimer, Oregon 2006-2020 CJFD Investigations (2006–2020 Excel spreadsheet) (on file with author).

325. *Id.*

326. *See* Search Results “CJFD,” STATE OF OR. L. LIBR.,

Kentucky's population is slightly greater than Oregon's, which may make it a useful comparator state. In its Annual Report for the fiscal year 2019–2020, Kentucky's Judicial Conduct Commission reported six sanctions: two private admonitions, one private reprimand, two public reprimands, and one retirement.³²⁷ In 2013, it issued two private reprimands and three public reprimands.³²⁸ The Commission's reports from 2013 through 2021 suggest a robust Commission that has privately and publicly reprimanded, suspended, and on occasion, retired judges.³²⁹ The Kentucky Commission has issued more sanctions than Oregon's Commission during the past fifteen years. One important reason is the greater power given to the Kentucky Commission than the Oregon Commission. A second reason may be the resources given the Kentucky Commission, and a third reason may be that it is simply more vigorous in regulating judicial conduct. However, Kentucky and Oregon may be so culturally distinct that comparisons offer little of value.

A search of Kentucky's decisions regulating judicial behavior does not indicate a need for the appearance of impropriety. Several decisions sanctioning judges relied on the judge's failure to maintain the independence and integrity of the judiciary, or failure to act in a way that promotes public confidence in the integrity and impartiality of the judiciary, or failure to be faithful to the law.³³⁰ It does not appear the Kentucky Commission's work would be significantly affected by the disappearance of the appearance of impropriety standard.

North Carolina's experience in regulating judicial misconduct since 1972 may provide something of a natural experiment regarding the necessity of an appearance of impropriety disciplinary standard. North Carolina amended its Constitution in 1972, providing for the creation of

<https://cdm17027.contentdm.oclc.org/digital/search/searchterm/CJFD> [<https://perma.cc/6G7E-7HS2>] (last visited Mar. 4, 2022) (listing fifteen cases since 1998).

327. *Judicial Conduct Commission Annual Report: Fiscal Year 2019-2020* (Ky. Jud. Conduct Comm'n) at 1, <https://kycourts.gov/Courts/JCC%20Documents/JCFY20192020.pdf> [<https://perma.cc/F87L-PHTG>].

328. *Jud. Conduct Comm'n*, KY. CT. OF JUST., <https://kycourts.gov/Courts/Pages/Judicial-Conduct-Commission.aspx> [https://perma.cc/2WWQ-LNCB#ctl00_ctl00_m_g_ce8b1413_e94f_4f74_ba1e_d946ec987e6e_ctl02_AccordionList_ctrl6_Collapse] (last visited Apr. 9, 2022) (under the heading "Judicial Conduct Commission Actions," choose "2013").

329. *Id.*

330. *See, e.g.*, KY. JUD. CONDUCT COMM'N, *In re Roberts*, Agreed Order of Suspension (Jan. 17, 2019), <https://kycourts.gov/Courts/JCC%20Actions%20Documents/2019AgreedOrderRoberts.pdf> [<https://perma.cc/X54V-69EM>].

its Judicial Standards Commission.³³¹ It also adopted the 1972 Code for its judges in 1973. In the Commission's first three years, 1973–1975, several judges resigned during investigation, a handful were privately reprimanded, and in a couple of cases, the Commission recommended public censure.³³² In 1977, four judges either resigned or retired,³³³ and the following year the Commission made its first two recommendations of removal from office.³³⁴ These early years saw a spike in complaints, most of which concerned issues outside of the Commission's jurisdiction. However, it had a steady number of complaints that warranted investigation, which resulted in resignation, retirement, or private reprimand, and recommendations for public censure.

In its Twenty-Fifth Annual Report, the Commission provided information on its work since its inception.³³⁵ It had issued twenty-two reprimands and six censures during the investigative process over those twenty-five years. It initiated fifty-three formal proceedings after investigation.³³⁶ Of those fifty-three proceedings, ten resulted in reprimands, thirty-two resulted in recommendations of censure, and seven led the Commission to recommend removal.³³⁷ Five years later, in its Thirtieth Annual Report, the number of recommended censures had increased from four to twenty-nine, and removals from two to seven.³³⁸

Overall, during its first thirty years, the Judicial Standards Commission issued about one and one-half reprimands and censures during investigation, recommended an average of one public censure a year, and suggested removal about once every three years.

331. See *First Annual Report of the Judicial Standards Commission, State of North Carolina, Calendar Year 1973*, 1973 N.C. 1 (on file with author). My thanks for Carolyn Dubay, Executive Director of the North Carolina Judicial Standards Commission, for providing copies of the annual reports of the Commission.

332. See *id.* at 6; *Second Annual Report of the Judicial Standards Commission, State of North Carolina, Calendar Year 1974*, 1974 N.C. 1, 6 (on file with author); *Third Annual Report of the Judicial Standards Commission, State of North Carolina, Calendar Year 1973*, 1973 N.C. 1, 6–7 (on file with author).

333. *Fifth Annual Report of the Judicial Standards Commission, State of North Carolina, Calendar Year 1977*, 1977 N.C. 1, 8–9 (on file with author).

334. *Sixth Annual Report of the Judicial Standards Commission, State of North Carolina, Calendar Year 1978*, 1978 N.C. 1, 8, 10 (on file with author).

335. *Twenty-Fifth Annual Report of the Judicial Standards Commission, State of North Carolina, Calendar Year 1997*, 1997 N.C. 1, app. C (on file with author).

336. *Id.*

337. *Id.* One case resulted in dismissal, in one the office was vacated, and two more resulted in reprimands. Finally, in six no additional action was taken.

338. *Thirtieth Annual Report of the Judicial Standards Commission, State of North Carolina, Calendar Year 2002*, 2002 N.C. 1, app. C (on file with author).

In 2003, North Carolina amended its judicial conduct code. Among the changes was eliminating the appearance of impropriety standard.³³⁹ It adopted a slight variation of the 1990 Model Code in 2006, though it followed its earlier decision and excluded the appearance of impropriety standard when adopting this Code.³⁴⁰

The North Carolina Judicial Standards Commission's Annual Reports from 2010–2020 are available online.³⁴¹ Included in each report is a “Five-Year Comparative Analysis.”³⁴² In its 2010 Annual Report, the Commission's comparative analysis of the years 2006–2010 showed it issued an average of 10.2 private letters of caution per year, 2.2 public reprimands, a total of thirty-two statements of charges filed, and five recommendations of public discipline.³⁴³ Its 2015 Report, which included a summary of actions from 2011–2015, was similar.³⁴⁴ Beginning in 2014, the Commission was no longer permitted to issue public reprimands.³⁴⁵ Fewer statements of charges (nine) were filed between 2011–2015 than in the previous five years.

The 2020 Annual Report indicated a slightly busier Commission during the years 2016–2020.³⁴⁶ It issued fifty-five private letters of caution (an average of eleven per year), twenty statements of charges authorized, and twelve recommendations for public discipline.³⁴⁷

The workload and decisions of the North Carolina Judicial Standards Commission since the 2003 Amendment to the state's judicial conduct code have not changed in any significant way. Though it is nearly

339. Michael Crowell, *Recusal*, N.C. SUPER. CT. JUDGES' BENCHBOOK, at 3–4 (2015), <https://benchbook.sog.unc.edu/sites/default/files/pdf/Recusal.pdf> [https://perma.cc/5346-39LK].

340. N.C. CODE OF JUD. CONDUCT (2015), <https://www.nccourts.gov/assets/inline-files/NC-Code-of-Judicial-Conduct.pdf> [https://perma.cc/76BM-VHW8].

341. *Judicial Standards Commission Annual Report*, N.C. JUD. BRANCH (June 4, 2021), <https://www.nccourts.gov/documents/publications/judicial-standards-commission-annual-report> [https://perma.cc/U3E8-U93V].

342. *Id.*

343. *N.C. Jud. Standards Comm'n, 2010 Annual Report*, 2010 N.C. 1, 6, https://www.nccourts.gov/assets/documents/publications/NCJSC-AnnualReport2010.pdf?RNI_MBUD814swXrS7ayhzNUDrWriTGu3 [https://perma.cc/6E35-UBLR].

344. *See N.C. Jud. Standards Comm'n, 2015 Annual Report*, 2015 N.C. 1, 9, https://www.nccourts.gov/assets/documents/publications/NCJSC-AnnualReport-2015.pdf?o_NP2qaeEYjiNzpoz1wMNwUb5D8HM00i [https://perma.cc/RWT3-9TBU].

345. *Id.*

346. *See N.C. Jud. Standards Comm'n, 2020 Annual Report*, 2020 N.C. 1, 14, <https://www.nccourts.gov/assets/documents/publications/Judicial-Standards-Commission-Annual-Report-2020.pdf?WyPnwLapmz5hParPiLUMbfARuHFB7dwT> [https://perma.cc/LJ9Q-JH3T].

347. *Id.*

impossible to prove that the absence of an appearance of impropriety standard has not had any negative impact on the regulation of judicial misconduct, the collected information found in the Annual Reports of the Judicial Standards Commission suggests no necessity for that standard.

A second way to assess North Carolina's experience is to compare it with a nearby state similar in size. Georgia's population is slightly larger than North Carolina's. Georgia's Code of Judicial Conduct generally adopted the form of the 2007 Model Code³⁴⁸ and the substance of the 1990 Model Code. Georgia did not include the proscription against impropriety or the appearance of impropriety in its Rule 1.2.³⁴⁹ It did, however, include this proscription in Canon 1 and in Comments [2] and [3] to Rule 1.2,³⁵⁰ as well as in paragraph [2] of the Preamble.³⁵¹ The language in these provisions followed the text of the 1990 Model Code. The Preamble to Georgia's Code of Judicial Conduct also followed the 1990 Model Code by making "the text of the Canons and the Rules . . . authoritative."³⁵² Thus, a Georgia judge alleged to have violated the appearance of impropriety was subject to discipline for violating Canon 1.³⁵³

The Georgia Judicial Qualifications Commission's 2020 Annual Report stated three formal disciplinary charges were filed.³⁵⁴ It issued ten cautions and two "private admonition[s]."³⁵⁵ A datum—not reported by the North Carolina Commission in its recent reports—was resignations during investigation: The Georgia Commission reported nine judges resigned in 2020 during investigation.³⁵⁶

The 2006 Georgia report noted one judge resigned during investigation. The Commission issued three private reprimands and one

348. See GA. CODE OF JUD. CONDUCT (2015), https://www.gasupreme.us/wp-content/uploads/2015/06/georgia_code_judicial_conduct_revised_5-14-15.pdf [<https://perma.cc/RCB7-KC57>].

349. *Id.*

350. GA. CODE OF JUD. CONDUCT r. 1.2 cmt. 2, 3 (2015), https://www.gasupreme.us/wp-content/uploads/2015/06/georgia_code_judicial_conduct_revised_5-14-15.pdf [<https://perma.cc/KWC2-P7BS>].

351. GA. CODE OF JUD. CONDUCT Preamble (2015), https://www.gasupreme.us/wp-content/uploads/2015/06/georgia_code_judicial_conduct_revised_5-14-15.pdf [<https://perma.cc/2MXA-XD6U>].

352. *Id.*

353. *Id.*

354. GA. JUD. QUALIFICATIONS COMM'N, 2020 ANN. REP., at 5, <https://gajqc.gov/wp-content/uploads/sites/13/2021/05/JQC-Annual-Report-2020.pdf> [<https://perma.cc/HN84-BG8W>].

355. *Id.* at 7.

356. *Id.*

public reprimand that year.³⁵⁷ A review of the annual reports from 2005–2020³⁵⁸ shows similar results, in terms of private and public admonishments, formal charges filed, and recommendations for public discipline, in Georgia and North Carolina.

The similarity of results reported by the North Carolina and Georgia Commissions do not suggest a pressing need for the reappearance of the appearance of impropriety standard in the former state. The absence of any significant disparity in action by the North Carolina and Georgia Commissions may also mean the appearance standard has little or no effect on judicial misconduct. Of course, North Carolina's experience does not prove the appearance of impropriety standard has no positive effect on judicial conduct.

The Center for Judicial Ethics of the National Center for State Courts (NCSC) gives an annual overview of judicial discipline in its Winter issue of the *Judicial Conduct Reporter*. The Winter 2021 issue listed a total of 127 public judicial discipline proceedings among the states during 2020.³⁵⁹ Eleven were removed from office, and another thirteen retired or resigned in lieu of discipline.³⁶⁰ Seven were suspended without pay for varying lengths of time, and eighty-five were publicly admonished or reprimanded.³⁶¹ The Winter 2013 issue of *Judicial Conduct Reporter* reported thirteen judges were removed from office (two were former judges), and twenty-four resigned or retired in lieu of discipline in 2012.³⁶² Ten were suspended, and ninety-seven received some public censure or admonition.³⁶³

These national numbers suggest the public discipline of judges is modest. Neither these numbers nor the specific reports from the four states examined indicates a particularly important role for the duty to

357. ANN. REP. OF THE JUD. QUALIFICATIONS COMM'N OF GA.: FISCAL YEAR 2006, at 16–17, <https://gajqc.gov/wp-content/uploads/sites/13/2021/05/Annual-Report-2006.pdf> [<https://perma.cc/HM8L-6YXM>].

358. See *Annual Reports*, THE JUD. QUALIFICATIONS COMM'N OF GA. (last visited Mar. 4, 2022), <https://gajqc.gov/annual-reports/> [<https://perma.cc/K8CD-KAQV>] (reports for 2015 and 2016 are not included).

359. *State Judicial Discipline in 2020*, JUD. CONDUCT RPTR., Winter 2021, at 2, https://www.ncsc.org/__data/assets/pdf_file/0016/60631/JCR_Winter_2021.pdf [<https://perma.cc/D6KL-X2DU>].

360. *Id.*

361. *Id.*

362. *State Judicial Discipline in 2012*, JUD. CONDUCT RPTR., Winter 2013, at 1, https://www.ncsc.org/__data/assets/pdf_file/0017/15524/jcr-winter-2013.pdf [<https://perma.cc/ZJP4-6M4C>].

363. *Id.*

avoid an appearance of impropriety.

V. CONCLUSION

Charles Gardner Geyh, co-reporter of the 2007 Model Code, concluded in a 2007 essay that the appearance of impropriety standard has served as “a means to promote public confidence in the judiciary.”³⁶⁴ ABA Codes of Judicial Conduct, courts, and judicial conduct organizations regularly make this claim. Unfortunately, empirical evidence supporting this assertion does not exist.

Some polling data indicates the public generally trusts the federal judiciary more than the other branches of government. A Gallup Poll assessing the public’s trust of the three branches of the federal government since 1972 indicates broad trust in the federal judiciary.³⁶⁵ Other polling data suggest voters favorably view state judicial branches. For example, a 2019 survey of 1,000 voters for the NCSC found 65% of respondents had a favorable view of state courts, and the same percentage favorably viewed federal courts.³⁶⁶ More specifically, 54% believed state courts were impartial, though just 49% believed courts were unbiased.³⁶⁷ These were “soft” numbers, the polling company GBA wrote in its 2014 Report to NCSC, because “most voters do not think about the courts regularly and do not hold firm opinions of the courts one way or another.”³⁶⁸

The public’s lack of interest may be a sign of good news, much like the case when sports fans talk about the game or match, not the officiating. But this also makes it impossible to learn whether a code of judicial conduct gains or keeps public trust in state courts. Voters who

364. Charles Gardner Geyh, *Preserving Public Confidence in the Courts in an Age of Individual Rights and Public Skepticism*, in BENCH PRESS: THE COLLISION OF COURTS, POLITICS, AND THE MEDIA 21, 39–40 (Keith J. Bybee, ed., 2007).

365. Jeffrey M. Jones, *Trust in Judicial Branch Up, Executive Branch Down*, GALLUP (Sept. 20, 2017), <https://news.gallup.com/poll/219674/trust-judicial-branch-executive-branch-down.aspx> [<https://perma.cc/R855-JCFX>]. The Poll shows significant trust in the judiciary from its initial survey in 1972, which occurred just before the Watergate scandal became widespread knowledge. *Id.*

366. Memorandum from GBAO to National Center for State Courts (Jan. 3, 2020), at 2, https://www.ncsc.org/_data/assets/pdf_file/0018/16731/sosc_2019_survey_analysis_2019.pdf [<https://perma.cc/5LGS-L2M8>].

367. *Id.* at 3.

368. Memorandum from GBA Strategies to National Center for State Courts (Dec. 4, 2014), at 2, https://www.ncsc.org/_data/assets/pdf_file/0020/17804/2014-state-of-state-courts-survey-12042014.pdf [<https://perma.cc/Q9KJ-EHTL>].

rarely think about state courts are quite unlikely to know and consider codes of judicial conduct. And if they know little or nothing about those codes, the importance to public confidence of the particular “appearance of impropriety” standard in those codes is likely unknowable.³⁶⁹

Public ignorance of the ethical duties of judges is unlikely to change. But public confidence in judges may be gained indirectly. The legal profession can assist the public by explaining the value of an appearance of impropriety standard. That requires those supporting the appearance standard to articulate, in a more granular fashion, its reasons for doing so.

The ABA’s decision to retain the standard in 2007, and the decision of nearly all states to keep the appearance standard in their judicial conduct codes, demonstrates continuing support for an appearance standard in the legal profession. But why does the profession still support this standard? The answer surely cannot be because it has existed for a long time. That violates Oliver Wendell Holmes’s injunction.³⁷⁰ One reason may be its facility as a “catch-all”³⁷¹ when substantive disciplinary rules failed to cover a particular case. A catch-all standard closes “loopholes” which a tainted judge might otherwise use to escape disciplinary sanction. But when the CCJ adopted Resolution 3, it offered no explanation for its conclusion. Little evidence exists that miscreant judges have been disciplined only due to the existence of an appearance of impropriety standard. It’s time for supporters of the appearance of impropriety standard to articulate how it remains crucial to public confidence in the courts.

369. See, e.g., Richard E. Flamm, *The History of Judicial Disqualification in America*, 52 JUDGES’ J. 12, 14–15 (2013) (suggesting amendment of Michigan’s judicial disqualification rules to include appearance of impropriety standard “resulted in broad public awareness,” though evidence for this statement is thin).

370. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 468 (1897) (“Most of the things we do, we do for no better reason than that our fathers have done them or that our neighbors do them, and the same is true of a larger part than we suspect of what we think.”).

371. Abramson, *Appearance*, *supra* note 276, at 59.