JUDICIAL CONDUCT BOARD OF PENNSYLVANIA

Newsletter

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Message from the Chair

In this edition of the Judicial Conduct Board Newsletter, Deputy Counsel Elizabeth A. Flaherty, explores the contours of new Canon 1 and Rule 1.2, specifically as it pertains to "impropriety" and the "appearance of impropriety."

That a judge "shall avoid impropriety" is self-evident. More complex is the concept of the "appearance of impropriety", for how can judges be held responsible for the perceptions of others? When one considers the idiosyncrasies of human perception, is this mandate so broad as to place an unreasonable burden on the members of the judiciary?

In this well-researched article, Ms. Flaherty explores the development of this directive in Pennsylvania, as well as a comparative analysis of the interpretation among other states. Pennsylvania is not alone, the ABA, as well as many states have grappled with the issue of the perception of impropriety. This inquiry has resulted in a wide range of pronouncements that serve to identify some parameters of ethical conduct as well as to clearly define conduct which has been found to violate the "appearance" prohibition.

The Judicial Conduct Board receives, on average, 800 complaints each year. The Board investigates every complaint of judicial misconduct. The complaints may be disposed of by dismissal, or the imposition of informal sanctions, or a formal complaint may be filed in the Court of Judicial Discipline. In 2014, formal charges were filed in four matters. The Board's mission is to preserve the honor, dignity, independence and integrity of the Pennsylvania judiciary. Complaints alleging an appearance of impropriety are strictly scrutinized in an analysis not unlike that presented in Ms. Flaherty's article. We hope you find this information helpful as you reflect upon the ethical considerations of those responsible for this great public trust.

It is also my sad duty to advise you of the passing of one of the Board's Members. On May 9, 2015, the Board lost its longest serving Member, the Honorable Samuel J. Magaro. Judge Magaro was originally elected as a Justice of the Peace for Lower Paxton and West Hanover Townships, Dauphin County in 1975. He continued to hold that post until 2002, when he became a Senior MDJ, continuing his service until 2010. In 1992, he was appointed to the Minor Court Rules Committee. In 1994, he was the first District Justice to be appointed to a four year term on the Court of Judicial Discipline. In 2000, he was elected President of the Special Court Judges Association of Pennsylvania. In 2011, he was appointed by the Supreme Court to the Minor Court Education Board, serving until 2014. Sam was appointed by the Supreme Court to the Judicial Conduct Board to three separate terms, first from 2001 until 2005, then from 2007 through 2011, and finally from 2012 until his passing. He is the only Board Member to have served in all of its offices, having been elected by his colleagues as Board Chair (2005-2005), Vice Chair (2011) and

Secretary (2015). His diligence in performing the Board's work and his wise counsel will be sorely missed by those of us who served with him.

Finally, it is my pleasure to introduce our new Board Secretary: Lieutenant Gary S. Scheimer. The Supreme Court appointed Gary to a four-year term on the Board as a non-lawyer elector member for a term commencing October 9, 2012. He was born and raised in Pittsburgh, where he graduated from Mt. Lebanon High School in 1972. In May, 1976, he graduated Magna Cum Laude from Kent State University with a Bachelor's degree in Law Enforcement Administration with a field of concentration in Political Science. While at Kent State University, he was admitted into Alpha Phi Sigma, the National Police Science Honorary, and Pi Sigma Alpha, the National Political Science Honorary in recognition of his academic achievements. In May 1982, Mr. Scheimer graduated first in his class from the Allegheny County Police Academy. He served on the Dormont Police Department in various capacities for 28 years, retiring in 2009 with the rank of Sergeant. During his tenure with the Dormont Police Department, he received the Governor's Highway Safety Award in 1998 and he received citations from both the Pennsylvania House of Representatives and Senate for his role in solving a 2002 homicide investigation. In February, 2003, Mr. Scheimer received the Fraternal Order of Police Lodge 91 Excellence in Law Enforcement Award. He served as President of the Dormont Police Association from 2001-2009. After his retirement from the Dormont Police Department, Mr. Scheimer joined the Carnegie Mellon University Police Department as a Police Lieutenant. He currently serves the CMU Police Department as the Commander of Police Services. While we were sad to lose our friend Judge Magaro, we are pleased to welcome Gary as our new Secretary and member of the Board's Executive Committee.

It is always my hope that you find the Newsletter helpful and enlightening and that you will provide us with feedback on the matters we present to you.

With my best wishes for you and yours for an enjoyable Summer, I am

Very truly yours,

JAYNE

Jayne F. Duncan
Chair
Judicial Conduct Board

Impropriety and the Appearance of Impropriety:
What to Expect in Future Judicial Discipline Cases

By

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With the advent of the New Code of Judicial Conduct (Code) (effective July 1, 2014) and the New Rules Governing Standards of Conduct of Magisterial District Judges (R.G.S.C.M.D.J.) (effective December 1, 2014) comes the enforceable edict that Pennsylvania judges are prohibited from engaging in conduct which is deemed improper or gives the appearance of impropriety. Canon 1, Rule 1.2. The purpose of this article is to help judges recognize when Rule 1.2 is implicated, appreciate the increased level of scrutiny that may be anticipated in future judicial discipline cases, alert them to the potential for discipline for violation of Rule 1.2 and guide them in their efforts to avoid the very conduct prohibited by the rule. Because Canon 1, Rule 1.2 of the R.G.S.C.M.D.J. mirrors the same provision in the Code, this discussion cites to the Code but equally applies to the conduct and discipline of magisterial district judges.

To fully grasp the precepts of impropriety and the appearance of impropriety, a historical review of pertinent decisions in judicial disciplinary cases is essential. Under the Old Code, judges were warned to avoid impropriety and the appearance of impropriety. The title of Old Canon 2 provided:

> Judges *should avoid* impropriety and the appearance of impropriety in all their activities.

Old Code, Canon 2, Title (emphasis added). The word "should' is permissive so Canon 2 recommended, but did not absolutely require, that judges avoid improper conduct and conduct that appeared to be improper. Therefore, the application of Canon 2 to a particular set of facts and circumstances in a judicial discipline case was not always clear or consistent.

Old Canon 2 sustained significant criticism about the concepts of impropriety and the appearance of impropriety which were deemed by some to be overly broad and poorly defined. *Matter of Larsen*, 616 A.2d 529, 579 (Pa. 1992) ("The controversy arises from attempts to translate the broad-brushed hortative admonitions of [Old] Canons 1 and 2 into guides of conduct and rules of discipline standing by themselves"). The *Larsen* Court adopted the view that a judge could be subject to discipline under the appearance of impropriety standard if the conduct "legitimately reflect[ed] upon the jurist's professional integrity." *Id.* at 582 (citing *Matter of Cunningham*, 538 A.2d 473, 480 n. 12 (Pa. 1988)). Additionally, *Larsen* made it clear that the appearance of impropriety is harmful to the judiciary because of its effect on the public's view of the courts. *Larsen*, 616 A.2d at 612 (judge engaged in "improper *ex parte* communication, without apparent improper motive,

which nonetheless gave rise to an appearance of impropriety which could undermine public confidence in the judicial system . . .").

When called upon to review judicial disciplinary cases involving the issues of impropriety and the appearance of impropriety, the Supreme Court has examined the interrelationship of the two concepts. The long established conclusion is that a judge may be disciplined for misconduct that gives the appearance of impropriety without even reaching the issue of the impropriety itself.

For example, Judge Mary Rose Cunningham's conduct of accepting a gift from the Roofers Union, cooperating with the FBI in its investigation of the same union, and continuing to preside over criminal cases produced the appearance of a potential conflict of interest so egregious that the appearance of the impropriety alone was enough to justify the grant of a new trial and the assignment of a new judge. *In the Interest of McFall*, 617 A.2d 707, 712 (Pa. 1992). In its earlier decision in the related judicial discipline case, the Court opined, "A tribunal is either fair or unfair. There is no need to find actual prejudice, but rather, the appearance of prejudice is sufficient to warrant the grant of new proceedings." *In re Cunningham*, 538 A.2d at 480.

In 2000, both Canon 1 and Canon 2 were inexplicably linked to the judicial decision-making process. *In re Cicchetti*, 743 A.2d 431, 441 (2000) (sexual harassment of female probation officer not a violation of Canon 2 because it did not implicate the judicial decision-making process). The Court stated,

> Canon 2 similarly addressed the judicial decision-making process and seeks to avoid the appearance of influence over judicial activities. Appellee is not subject to censure for a violation of Canon 2 based on his conduct toward the victim because it was independent of his decision-making duties.

Id. at 441. In accord, five years later, the Court disapproved the Court of Judicial Discipline's (CJD's) finding that a magisterial district judge violated Canon 2 because her deceptive, criminal conduct was unrelated to her judicial decision-making. *In re Harrington*, 899 A.2d 1120 (Pa. 2006)(MDJ repeatedly placed parking tickets, previously issued to other individuals, on her own vehicle when it was parked illegally). This narrow interpretation of Canon 2 had a chilling effect on the Judicial Conduct Board's decisions to charge judges with violations of Canon 2.

Even when the Board did charge violations of Canon 2, the Court of Judicial Discipline was necessarily constrained by the precedential decisions of *Cicchetti* and *Harrington* which required the dismissal of charges where conduct was unrelated to judicial decision-making. See *In re Carney*, 28 A.3d 253, 268 (Pa.Ct.Jud.Disc. 2011); *In re Stoltzfus*, 29 A.3d 151, 157 (Pa.Ct.Jud.Disc. 2011) (No violation of 2A where magisterial district judge's conduct of distributing condom stuffed acorns to two females while on break from annual MDJ training classes because his "conduct had nothing to do with his decision-making duties."). Because of the precedent of *Cicchetti* and *Harrington*, judges behaving badly escaped discipline or had some

charges dismissed even though their actions deeply undermined the public's confidence in the judiciary.

Seven years later, the Supreme Court re-examined Old Canon 2 and R.G.S.C.M.D.J. No. 2A, overruled *Cicchetti* and *Harrington*, and clarified that the Canon and Rule applied to a judge's conduct both on and off the bench. *In re Carney*, 79 A.3d 490, 507 (Pa. 2013) (judge's illegal conduct of waving gun out window of vehicle during road rage incident "was not a violation of Rule 2A as interpreted at time of incident" but did bring judiciary into disrepute). The Court focused on the "plain and unambiguous language of Canon 2" and determined that a judicial officer's private conduct can indeed adversely impact the integrity of the judiciary.

> A judicial office represents a public trust and the conduct of a judicial officer may bear upon the independence and integrity of the judiciary regardless of whether the conduct implicates the decision-making process. One aspiring to, or holding the office cannot reasonably expect to be a rogue in his or her private life without thereby staining the integrity of the position. Thus we hold that *Cicchetti's* conclusion that Canon 2 applies only to conduct occurring within the judicial decision-making sphere was in in error.

Id. at 506. The Court emphasized that the effect of the errant conduct upon the integrity of the bench was a primary factor in deciding disciplinary cases under Old Canon 2. *Id.* at 507 ("MDJ's may be subject to discipline for illegal conduct which affects the integrity of the office, within the discretion of the CJD, and subject to this Court's review, whether or not the conduct occurred within the judicial decision-making process."). This ruling anticipated the changes incorporated into the New Code at Rule 1.2.

The language in the New Code at Canon 1, Rule 1.2 is similar to but distinguishable from Old Canon 2. Canon 1 requires:

> A judge *shall uphold and promote* the independence, integrity, and impartiality of the judiciary, and *shall avoid* impropriety and the appearance of impropriety.

New Code, Canon 1 (emphasis added). Equally, Rule 1.2 commands:

> 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.

New Code, Canon 1, Rule 1.2 (emphasis added). "Shall" is an absolute term meaning that judges are prohibited from engaging in conduct which is improper or gives the appearance of impropriety. "Shall act at all times" puts judges on notice that their personal as well as professional conduct is subject to scrutiny and must

promote public confidence in the judiciary. The effect of the impropriety and the appearance of impropriety upon the public perception of the independence, integrity and the impartiality of the judiciary is a consistent part of the analysis throughout judicial disciplinary cases.

The Ethics Committee of the Pennsylvania Conference of State Trial Judges recognized the change from the former permissive language of the Old Code to the current required language of the New Code.

> Under the New Code, the overarching principle embodied in Canon 1 is now mandatory. Therefore, as with any inquiry, a judge's analysis of what conduct is or is not prohibited commences with the application of Canon 1 to the conduct.

Formal Opinion 15-1 (2015) (pertaining to the use of official judicial letterhead for letters of reference).

The New Code defines impropriety as a term which "Includes conduct that violates the law, court rules, or provisions of this Code, and conduct that undermines a judge's independence, integrity, or impartiality." New Code, Terminology, Impropriety. But beyond these actual improprieties, judges still need to be mindful of and vigilant about avoiding the appearance of impropriety. The interpretation of that standard can be particularly restrictive.

Comment [5] to Rule 1.2 sets forth the test for appearance of impropriety as "whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament or fitness as a judge." Canon 1, Rule 1.2, cmt. [5]. This new standard means that the appearance of impropriety is determined by whether the public views the conduct as improper, not by whether the judge believes his conduct is free of impropriety.

The underlying premise for the expectation that a judge's conduct shall be beyond reproach is that judges are held to a higher standard of conduct than members of the general public, including attorneys.[1] Although controversial, the appearance of impropriety is retained and enforceable within the New Code which is based upon the revised American Bar Association Model Code of Judicial Conduct.

In 2007, there was an attempt by some members of the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct to eviscerate the appearance of impropriety standard by defining it within the Scope of the revised Model Code as an aspirational, but not enforceable standard. Following a New York Times article about the proposed change, the Conference of Chief Justices voted to oppose any Model Code that diluted the appearance standard and urged the ABA

[1] The appearance of impropriety standard for attorneys set forth in Old Disciplinary Rule 9-101 of the Pennsylvania Code of Professional Responsibility was eliminated from the Pennsylvania Rules of Professional Conduct, enacted April 1, 1988.

House of Delegates to reinstate an enforceable appearance of impropriety provision. Adam Liptak, "A.B.A. Panel Would Weaken Code Governing Judges' Conduct," N.Y. Times, Feb. 6, 2007. As a result, the ABA Commission restored and the House of Delegates approved the appearance of impropriety as an enforceable standard in the new Model Code of Judicial Conduct.

The concept that Pennsylvania judges are held to a higher standard of conduct is made clear at Comment 2: "A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens and must accept the restrictions imposed by the Code." New Canon 1, Rule 1.2, cmt. [2].

More recently, the appearance of impropriety was a central consideration behind the Supreme Court's invocation of its King's Bench jurisdiction to issue an order for interim suspension of an MDJ, sitting in Philadelphia Traffic Court, who faced felony charges of criminal conspiracy, mail fraud, and wire fraud arising from a wide spread scheme of *ex parte* communication and ticket fixing. *In re Bruno*, 101 A.3d 635, 691 (Pa. 2014) ("The appearance of impropriety that would arise from allowing a charged but not yet tried or convicted judge to sit in judgment of others adds a secondary indirect but no less momentous, burden upon the judicial system by undermining the confidence of the bar and ultimately of the public."). Therefore, the appearance of impropriety can be a deciding factor in whether or not allegations of misconduct justify the need for suspension of a judge, with or without pay, pending a trial on the merits in the CJD.

The *Bruno* Court described some specific types of conduct that are improper or give the appearance of impropriety such as *ex parte* communication, improper influence on judicial decisions, *quid pro quo* agreements, bribery, special consideration or the grant of favorable treatment and fixing cases. *In re Bruno*, 101 A.3d at 691. A zero tolerance policy was established for judges who fix cases or engage in *ex parte* communication to "influence a decision." Those judges "ha[ve] no business on the bench." The Court announced, "all judges know what is proper and what is not; and those who stray should expect and accept severe consequences." *Id.*

Some improprieties may be unmistakably clear while others may be less obvious or careless conduct that just looks bad. Other jurisdictions have routinely prosecuted and disciplined judges for impropriety and the appearance of impropriety and provide guidance for what judges may anticipate under the New Code and New R.G.S.C.MD.J.

According to Cynthia Gray, Director of the Center for Judicial Ethics, National Center for State Courts and an expert in the field of judicial ethics, "judicial discipline authorities are not using the [appearance of impropriety] standard as an arbitrary smell test but are applying it in a cautious, reasoned and appropriate manner with no evidence of overly subjective interpretation." Cynthia Gray, *Avoiding the Appearance of Impropriety: With Great Power Comes Great Responsibility*, UALR Law Review Vol. 28:63, 65 (2005). In her article, Ms. Gray divides the appearance of impropriety disciplinary cases into six categories:

1. Use of Influence: Winks and Nods

2. Appointments: No *quid pro quo*

3. Relationships: No Harm, No Foul?

4. Associating with Criminals

5. Statements: Just Kidding

6. Manifestations of Bias

Id. at 67-88. The following cases illustrate each of the categories.

A large percentage of the appearance of impropriety cases involve the use of influence whereby judges attempt to obtain special treatment or an unfair advantage based on their positions as judicial officers. *Id.* at 68. Examples include judges who refer to their judicial office when pulled over for traffic stops and judges who use official judicial stationary for personal business. *See In re Werner*, Determination (N.Y. State Comm'n on Jud. Conduct Oct 1, 2002) (judge admonished for showing official I.D. card to police during traffic stop); *In re Mosley*, 102 P.3d 555 (Nev. 2004) (judge censured and fined for using letterhead for personal gain at son's school).

A judge's power to appoint persons must be carefully executed because even if an individual is qualified for the job, the judge's relationship to that person may give the appearance that the judge provided preferential treatment in the hiring process. *In re Granier*, 906 So.2d 417 (La. 2005)(judge censured for hiring girlfriend, who was qualified for the job, and authorizing payment for her to attend training program because it created the appearance of impropriety). In contrast, the Alaska Supreme Court stated, "an appearance of impropriety is sanctionable only when the appearance could have been avoided by reasonable care." *In the matter of Johnstone*, 2 P.3d 1226, 1237 (Alaska 2000) (public reprimand of judge who hired personal friend of chief justice as coroner and created the appearance of impropriety and favoritism which the judge could have avoided).

A judge's relationship with attorneys can produce a conflict of interest and give the appearance of impropriety that can result in judicial discipline. In New York, a surrogate judge was removed from office for her failure to recuse from multiple legal matters in which three attorneys who represented litigants before the judge were her close friend, personal attorney and campaign manager. *In the matter of Doyle*, 17 N.E.3d 1127 (N.Y. 2014). In response to the judge's belief that recusal was unnecessary and that her conduct did not produce an appearance of impropriety, the Court stated, "her behavior reflects exceedingly poor judgment and an inability to recognize impropriety." *Id.* at 1131.

Romantic relationships also give rise to the appearance of impropriety. In Florida, a judge engaged in a romantic relationship with an attorney who appeared in his courtroom, yet continued to preside over cases where his paramour represented the defendants. *In re Adams*, 932 So.2d 1025 (Fla. 2006). There was no evidence that the judge's decisions to continue or dismiss those cases were influenced by his relationship with the attorney. Nonetheless, the judge's conduct created an appearance of impropriety. *Id.* at 1027-1028 (public reprimand).

Associating with criminals can give the appearance of impropriety and must be avoided. A Louisiana judge was subject to discipline for her affair with a parolee whom the judge had sentenced. The judge's conduct "cause[d] disrespect for the judiciary and f[ell] below the standard the public has a right to expect"). *In re Harris*, 713 So.2d 1138, 1141 (La. 1998). *See also In re Blackman*, 591 A.2d 1339-1342 (N.J. 1991) (judge "conveyed wrong image of judiciary" by his conduct of attending picnic for friend who was sentenced to prison on racketeering charges).

A judge is responsible for the impact of his or her statements, whether from the bench or *ex parte*, and the effect they have on the public's perception of the judiciary. The Washington Commission on Judicial Conduct reprimanded a judge for writing the acronym "NTG," interpreted by some as "Nail This Guy," on judgment and sentencing forms in criminal proceedings because it created an appearance of impropriety. *In re Burns, Stipulation, Agreement, and Order of Reprimand* (Wash. State Comm'n on Jud. Conduct 2004). *See also In re Cummings*, 211 P.3d 1136 (Alaska 2009) (judge suspended without pay for three months for conduct of giving a note to prosecutorial witness during recess in criminal trial which produced appearance of impropriety).

Judges must be vigilant about avoiding the appearance of bias and prejudice. As set forth in the discussion of *McFall* above, conduct that looks prejudicial, even in the absence of actual bias or prejudice can adversely compromise the impartiality and integrity of the judiciary. Poor demeanor and choice of words led to the removal or of an Illinois judge who said to an African American defendant, "when I'm talking to you boy, you look at me." *In re Golniewicz*, Order (Ill. Courts Comm'n Nov. 14, 2004) ("boy" not racist term but its use was offensive). *See also In re Ellender*, 889 So. 2d 225 (La. 2004) (white judge's conduct of attending costume party in "black face" created appearance of impropriety).

Hopefully, the identification of the categories of misconduct and the review of cases from other jurisdictions provide guidance to the Commonwealth's judges in conducting their affairs in order to avoid both actual impropriety and the appearance of impropriety. It may also provide insight into how the CJD, and the Supreme Court on appellate review, may decide the issues of impropriety and appearance of impropriety in the future.

In conclusion, Canon 1, Rule 1.2 contains an enforceable provision which prohibits impropriety and the appearance of impropriety. The strong language of the *Carney* and *Bruno* decisions, coupled with the obligatory wording of Rule 1.2, indicate the likelihood that future judicial discipline cases will once again include charges pertaining to impropriety and the appearance of impropriety. The analysis of those charges and the type of sanctions handed down by the Court of Judicial Discipline are yet to be determined.