

# Conflicts of Interest in Legal Representation: Should the Appearance of Impropriety Rule Be Eliminated in New Jersey—Or Revived Everywhere Else?

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## INTRODUCTION

Sixty-five years ago, an American Bar Association (ABA) committee interpreting the Canons of Professional Ethics (Canons)<sup>1</sup> concluded that it would be professionally improper for a part-time prosecutor to agree to defend an individual in a civil action while simultaneously prosecuting him on felony charges.<sup>2</sup> The committee acknowledged that the representation of conflicting interests is ordinarily proper with the respective clients' consent. But it said that client consent does not suffice in a case involving a public officer, who has a duty "to be and remain above all suspicion, even at personal financial sacrifice."<sup>3</sup> It concluded that such "[a]n attorney should not only avoid all impropriety but should likewise avoid the appearance of impropriety."<sup>4</sup>

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<sup>1</sup> ABA CANONS OF PROFESSIONAL ETHICS (1908).

<sup>2</sup> See ABA Comm. on Professional Ethics and Grievances, Formal Op. 77 (1932).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* This approach was presaged by ABA Comm. on Professional Ethics and Grievances, Formal Op. 30 (1931) in which the Committee determined that a public prosecutor may not defend a person accused of a crime in another state. It reasoned:

It is a well-known fact that prosecutors are granted courtesies and assistance by the police departments, as well as the prosecuting authorities, of other cities and counties throughout the country. The practice is of great benefit to the administration of criminal justice. If prosecutors indulged in the practice of defending criminals in states other than their own, this helpful cooperation might easily and quickly be withdrawn. Other evils, detrimental to the proper enforcement of criminal laws, are not difficult to conceive, were prosecutors also acting as defenders of those accused of crime. Subjectively, the effect of

The opinion was unremarkable but for the biblically resonant exhortation to "avoid the appearance of impropriety."<sup>5</sup> The phrase, capturing the principle that lawyers in public life, like judges,<sup>6</sup> should err on the side of caution, was invoked by courts only rarely over the next thirty-five years.<sup>7</sup> Nonetheless, in 1969, when the ABA replaced the Canons with the Model Code of Professional Responsibility (Model Code or Code),<sup>8</sup> the moral obligation to "avoid the appearance of impropriety" was incorporated in the title of a disciplinary rule whose provisions addressed the integrity of judicial and public decision making;<sup>9</sup> in a "canon" (an "axiomatic norm" from

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such a practice upon the prosecutor himself must, in our opinion, be harmful to the interest of the public, whose service is the prosecutor's first and foremost duty.

*Id.*

<sup>5</sup> Compare this with 1 *Thessalonians* 5:22, exhorting to "abstain from all appearance of evil," as quoted in *United States v. Trafficante*, 328 F.2d 117, 120 (5th Cir. 1964).

<sup>6</sup> At that time, the ABA Canons of Judicial Conduct called for judges' conduct to "be free from impropriety and the appearance of impropriety." *State ex rel. Hannah v. Armijo*, 28 P.2d 511, 512-13 (N.M. 1933) (quoting canons). See Peter W. Morgan, *The Appearance of Propriety: Ethics Reform and the Blifil Paradoxes*, 44 *STAN. L. REV.* 593, 595-98 (1992) (discussing origination of judicial canon in 1919 Black Sox affair). The injunction is preserved in the current ABA Model Code of Judicial Conduct, Canon 2 (1990), which states: "A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities." The accompanying commentary explains: "The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." MODEL CODE OF JUDICIAL CONDUCT Canon 2.

<sup>7</sup> See, e.g., *State ex rel. Neb. State Bar Ass'n v. Richards*, 84 N.W.2d 136, 145 (Neb. 1957); *State v. Rosengard*, 89 N.J. Super. 28, 33, 213 A.2d 262, 265 (Law Div. 1965); *People v. Peck*, 263 N.Y.S.2d 622 (App. Div. 1965); N.J. Advisory Comm. on Professional Ethics, Op. 8 (1963).

<sup>8</sup> MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969).

<sup>9</sup> See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-101 (1969), which provided as follows:

Avoiding Even the Appearance of Impropriety.

(A) A lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity.

(B) A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

(C) A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official.

*Id.* Under the Model Code, the Disciplinary Rules are "mandatory in character. [They] state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement.

which disciplinary rules were derived);<sup>10</sup> and in several "ethical considerations" (aspirational principles).<sup>11</sup> Within a few years, every state, with the exception of California, adopted a version of the Model Code recognizing this obligation.<sup>12</sup>

To the ABA drafters, the injunction to avoid the appearance of impropriety was meant to serve as an aspirational principle to guide lawyers in the exercise of their independent judgment, and perhaps as a principle of interpretation, calling for restrictive readings of the disciplinary rules in areas of uncertainty. It was not intended to serve as a disciplinary standard or a disqualification rule.<sup>13</sup> Courts, disciplinary bodies, and ethics committees soon discovered, however, that the Code's disciplinary rules did not adequately address the full spectrum of lawyers' questionable conduct. Some seized upon the appearance of impropriety language as a catch-all to address the Code's perceived shortcomings. As a result, these institutions soon began to rely on the appearance of impropriety standard in evaluating the propriety of lawyers' conduct.<sup>14</sup> Further, they came to use it not only in opinions addressing government lawyers' conflicts of interest, but also in addressing privately retained lawyers' conflicts of interest.<sup>15</sup>

In response, a number of courts and commentators, together with the ABA's ethics committee, took the view that it was inappro-

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<sup>10</sup> See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 ("A Lawyer Should Avoid Even the Appearance of Professional Impropriety"). In the Model Code, Canons are "statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. They embody the general concepts from which the Ethical Considerations and the Disciplinary Rules are derived." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement.

<sup>11</sup> See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 9-3 ("After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists."); *Id.* at EC 9-6 ("Every lawyer owes a solemn duty . . . to strive to avoid not only professional impropriety but also the appearance of impropriety."). In the Model Code, ethical considerations "are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations." *Id.* at Preliminary Statement.

<sup>12</sup> See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 56-57 (1983).

<sup>13</sup> See AMERICAN BAR FOUNDATION, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 398-99 (Maru ed., 1979).

<sup>14</sup> See *id.* at 400-16.

<sup>15</sup> See, e.g., *Emle Indus., Inc. v. Patentex, Inc.*, 478 F.2d 562, 564-65, 571 (2d Cir. 1973); *General Elec. Co. v. Valeron Corp.*, 428 F. Supp. 68, 75 (E.D. Mich. 1977); *Estep v. Johnson*, 383 F. Supp. 1323, 1326 (D. Conn. 1974).

priate to employ so vague a standard<sup>16</sup> for anything other than lawyers' individual guidance.<sup>17</sup> Their conviction that more precise and objective measures were needed for disciplinary and disqualification purposes carried the day in 1983 when the ABA, in replacing the Model Code with the Model Rules of Professional Conduct (Model Rules),<sup>18</sup> pointedly eliminated the appearance of impropriety standard.<sup>19</sup> In the succeeding years, the overwhelming majority of states adopted provisions based on the ABA Model Rules and all but one, in doing so, followed the ABA's lead.<sup>20</sup>

New Jersey, the maverick, went in the opposite direction when it revised its ethical rules in 1984 in response to the new ABA model. Contrary to recommendations of the committee it had appointed to review the ABA's work product, the New Jersey Supreme Court adopted several provisions that specifically preserved the appearance of impropriety standard to address purported conflicts of interest.<sup>21</sup> The result was that, while concerns about appearances of impropri-

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<sup>16</sup> For an interesting discussion of the various levels of generality and specificity of ethical provisions, see Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223 (1993).

<sup>17</sup> See, e.g., *International Elec. Corp. v. Flanzer*, 527 F.2d 1288, 1295 (2d Cir. 1975) (observing that Canon 9 "should not be used promiscuously as a convenient tool for disqualification when the facts simply do not fit within the rubric of other specific ethical and disciplinary rules"); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 n.17 (1975); *infra* notes 86-87 and accompanying text. See generally WOLFRAM, *supra* note 12, at 322 & nn.46 & 47 (citing authority).

<sup>18</sup> See MODEL RULES OF PROFESSIONAL CONDUCT (1983).

<sup>19</sup> See *id.* Rule 1.9 cmt.:

The other rubric formerly used for dealing with disqualification is the appearance of impropriety proscribed in Canon 9 of the ABA Model Code of Professional Responsibility. This rubric has a two fold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term appearance of impropriety is question-begging. It therefore has to be recognized that the problem of disqualification cannot be properly resolved . . . by the very general concept of appearance of impropriety.

*Id.*

<sup>20</sup> See Carol M. Rice, *The Superior Defense in Legal Ethics: Sending the Wrong Message to Young Lawyers*, 32 WAKE FOREST L. REV. 887, 938 (1997) (noting that "[a]s of the fall of 1995, 38 states and the District of Columbia had adopted all, or significant portions, of the Model Rules").

<sup>21</sup> See *infra* Part I.C.

ety diminished in importance elsewhere,<sup>22</sup> they remained central to conflict-of-interest determinations in New Jersey.<sup>23</sup>

Recently, both the ABA and the New Jersey Supreme Court began reexamining their respective ethical codes. The New Jersey Supreme Court appointed a committee, chaired by retired Supreme Court Justice Robert L. Clifford, to reexamine its state's Rules of Professional Conduct. Several New Jersey law firms have prepared a joint submission to the committee recommending that the appearance of impropriety rules be eliminated or substantially reduced in scope.<sup>24</sup> Meanwhile, the ABA appointed an "Ethics 2000" committee to undertake a comprehensive review of the Model Rules.<sup>25</sup> At least one member of this ABA committee is already on record as criticizing the existing conflict-of-interest provisions for not being sufficiently restrictive<sup>26</sup>—a problem that could conceivably be cured by reintroducing the appearance of impropriety standard. Hence, the question: Should the appearance of impropriety rule be eliminated in New Jersey—or revived everywhere else?

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<sup>22</sup> See ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 152, 165-66, 181-83 (3d ed. 1996).

<sup>23</sup> See *infra* Parts II.A & III.A.

<sup>24</sup> See Stephen Gillers, *Report to Clifford Committee on Rules of Professional Conduct* 14 (July 23, 1997) (concluding that the appearance of impropriety language "is unnecessary but . . . creates the dangers of misuse and excessive self-restraint" and should therefore be deleted); Bruce A. Green, *Report to Clifford Committee on Rules of Professional Conduct* 31-32 (Undated) (concluding that "the 'appearance of impropriety' test, if employed at all, should be reserved for cases especially implicating the public interest"); Geoffrey C. Hazard, Jr., *Report to Clifford Committee on Rules of Professional Conduct* 1 (June 24, 1997) (opining that the rule "perpetuates an unnecessary and mischievously ambiguous basis of disqualification and ought to be repealed" and replaced by "additional specific rules" addressing "types of lawyer relationships or conduct [that] are regarded as improper"); Raymond R. Trombadore, *Report to Clifford Committee on Rules of Professional Conduct* 2 (July 7, 1997) (opining that the appearance of impropriety rule should be repealed because "[w]e no longer need the added comfort of a redundant rule which serves only to generate mischief").

<sup>25</sup> See 13 ABA/BNA, *LAWYERS' MANUAL ON PROFESSIONAL CONDUCT* 140 (May 28, 1997).

<sup>26</sup> See Lawrence J. Fox, *Letters—Seeking Clarity on Ethics*, AM. LAW., Sept. 1997, at 33. Mr. Fox explained:

[T]he great downside of the switch from the Model Code to the Model Rules has been the too-clever-by-half attempts by lawyers to simply treat the conflict rules as impediments in the road, to be avoided by simply fast maneuvering and adept steering. Lost in the "gamesmanship" is the concept of loyalty that is the value-laden well-spring from which the rules are derived, a concept we [had] better recapture before we lose the edge our own ethics rules lend to us in terms of being something more than crass businessmen—yes, of being professionals.

*Id.*

In reply, this Article demonstrates that both the meaning and the utility of the appearance of impropriety rule depend on the context in which it is used. Focusing on how the rule has developed and been applied in New Jersey, the Article identifies the virtues of the rule in contexts involving alleged conflicts of interest on the part of lawyers for public entities and in related contexts where the public as a party has a direct stake. These are, not surprisingly, the contexts in which the rule originated. In contrast, the Article argues that the rule has nothing to commend it in contexts involving lawyers for private parties in which the public has no stake.

By way of background, Part I of this Article traces the development of New Jersey's appearance of impropriety rule. Part II discusses how the doctrine is presently applied in cases involving the public interest and suggests that, in this realm, the rule performs a useful function, albeit one that would be better served by more specific rules. Finally, using a recent New Jersey ethics opinion as an illustration, Part III identifies the deficiencies of the rule in cases involving exclusively private interests.

#### I. BACKGROUND: DEVELOPMENT OF THE APPEARANCE OF IMPROPRIETY RULE IN NEW JERSEY

##### A. *Opinions Under the Canons of Professional Ethics*

The New Jersey Supreme Court created the Advisory Committee on Professional Ethics (Advisory Committee or Committee) in 1962 to furnish advisory opinions concerning lawyers' professional conduct under the then-applicable rules governing lawyers' practice, the Canons of Professional Ethics. Since 1976, the Committee's opinions have been reviewable by the New Jersey Supreme Court.<sup>27</sup> Together with the applicable rules themselves, the Advisory Committee's opinions are meant to provide guidance to New Jersey lawyers, supplementing the comparatively few published opinions of the New Jersey courts definitively interpreting the standards of professional conduct.

From the start, a substantial portion of the Committee's work responded to conflict-of-interest questions involving government lawyers. Setting a pattern followed in its later decisions, the Committee's earliest opinion, *Opinion 4*,<sup>28</sup> was published in June 1963 and

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<sup>27</sup> See *Higgins v. Advisory Comm. on Prof'l Ethics*, 73 N.J. 123, 127, 373 A.2d 372, 374 (1976).

<sup>28</sup> N.J. Advisory Comm. on Professional Ethics, Op. 4 (1963).

implicitly employed the appearance of impropriety standard in concluding that a lawyer representing a municipality may not represent private clients before the municipality's board of adjustment. The Committee reasoned:

In a broad sense an attorney representing a municipality or any of its agencies has as his "client" the entire municipality, and he should avoid any retainers from others which may place him in a position where he appears to be either seeking relief or favor from the municipality or its agencies for a private client or to oppose action by the municipality or its agencies on behalf of a private client. If he did so, it would be inevitable that, if he were successful, the losing litigant, or the public in general, would be troubled by suspicion that his success in the matter was attributable to improprieties and that his position or influence as a municipal attorney might have furthered the cause of the private client.<sup>29</sup>

Further, the Committee concluded that, while an attorney representing private clients under similar circumstances may sometimes undertake the representation with the clients' consent, "consent is generally unavailable where the public interest is involved."<sup>30</sup>

Later that year, in *Opinion 8*,<sup>31</sup> the Advisory Committee relied explicitly on the appearance of impropriety standard to conclude that a part-time municipal prosecutor may not appear against the municipality in defense of a private client. Echoing the 1932 ABA opinion, the Committee explained: "An attorney should not only avoid all impropriety, but should likewise avoid the appearance of impropriety."<sup>32</sup>

The appearance of impropriety standard had its genesis not only in the early ABA opinion but also in New Jersey judicial decisions requiring public officials generally to refrain from conduct that would call their integrity into question. For example, in 1961, a New Jersey Superior Court condemned public officials for accepting a gift from someone with whom they had official dealings, explaining:

Natural public suspicion of official wrongdoing, born of the rightful publicity showered upon those who occasionally deviate from their oath of office, demands that the legislator and administrator, as the judge, take all essential steps not only to maintain

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> N.J. Advisory Comm. on Professional Ethics, Op. 8 (1963).

<sup>32</sup> *Id.*

his conduct free of impropriety, but also to avoid scrupulously even the appearance of impropriety.<sup>33</sup>

Thus, the Advisory Committee's recognition that municipal attorneys must refrain from engagements that would cause the public to suspect them of improprieties was inextricably tied to the fact that these attorneys were public officials. The propriety of the public lawyer's representation would be viewed from the public's perspective, because the public is, in a sense, the ultimate client. Further, the public lawyer must scrupulously avoid conflicting engagements in order to ensure public confidence in the impartiality of government decision making.

Contemporaneously, the New Jersey Supreme Court joined in the view that municipal lawyers, as public officials, should hold themselves to a more restrictive standard than lawyers in private practice. In a *Notice to the Bar* in 1963,<sup>34</sup> the chief justice announced that a lawyer could not represent a municipality or other public agency and also represent private clients whose interests would come before, or be affected by, the public agency.<sup>35</sup> "Where the public interest is involved," the notice concluded, the lawyer may not represent the conflicting interests even with the respective clients' consent.<sup>36</sup> Two years later, relying on this principle, the court held that a municipal lawyer could not represent a developer operating in the municipality.<sup>37</sup> A concurring opinion underscored that "[p]ublic officials are obligated to perform their duties not only with honesty, faithfulness and ability but also with exclusive fidelity. By so doing, an attorney not only will avoid all impropriety, but will avoid appearance of impropriety."<sup>38</sup>

By November 1970, according to the Advisory Committee, fully one-third of its opinions—66 out of almost 200—had "involved questions arising out of the relationship between lawyers and law firms and governmental agencies in which the lawyer or a member of his firm occupied an official position, either elective or appointive."<sup>39</sup>

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<sup>33</sup> *La Rue v. Township of East Brunswick*, 68 N.J. Super 435, 444-45, 172 A.2d 691, 696 (App. Div. 1961).

<sup>34</sup> Joseph Weintraub, *Notice to the Bar*, 86 N.J.L.J. 713 (1963) (later quoted in *Matter of A. & B.*, 44 N.J. 331, 333-34, 209 A.2d 101, 102 (1965)).

<sup>35</sup> *See id.*

<sup>36</sup> *Id.*

<sup>37</sup> *See Matter of A. & B.*, 44 N.J. at 334, 209 A.2d at 103.

<sup>38</sup> *Id.* at 337, 209 A.2d at 105 (Scettino, J., concurring); *see also* *State v. Rosengard*, 89 N.J. Super. 28, 33, 213 A.2d 262, 265 (Law Div. 1965) (citing N.J. Advisory Comm. on Professional Ethics, Ops. 4 & 8).

<sup>39</sup> N.J. Advisory Comm. on Professional Ethics, Op. 189 (1970).



The Committee's touchstone was whether the representation would give rise to an appearance of impropriety.

In contrast, only a handful of ethics opinions arising under the Canons addressed conflicts of interest in contexts involving exclusively private interests. In these cases, the Advisory Committee sometimes adverted to the appearance of impropriety, but in a very different sense from how this consideration was employed in the cases involving public officials. One of the Committee's earliest opinions, *Opinion 6*,<sup>40</sup> is illustrative of this point. The question presented in that case was whether a lawyer who had previously represented the purchaser of equipment could later represent the vendor in litigation against the purchaser for defaulting under the sales agreement. The Committee concluded, not surprisingly, that the lawyer could not properly switch sides in this manner. It reasoned that

[s]uch representation might well require the attorney to assert an interpretation of, or a claim under the agreement which he approved for the purchaser. An attorney should not attempt to nullify his own work . . . . Even if the attorney were not required to urge such a construction, he may not make such a change in allegiance. Such conduct would tend to impair the confidence which a client has the right to repose in his attorney and would thus tend to destroy one of the essentials of the professional relationship . . . . Irrespective of any actual detriment the purchaser might suffer, he might naturally feel that he had in some way been wronged when confronted by an action against him by the same attorney whom he had employed to advise him concerning the same agreement. To maintain public confidence in the bar, it is necessary not only to avoid actual wrongdoing, but even the appearance of wrongdoing.<sup>41</sup>

In contexts involving exclusively private interests, the appearance of impropriety standard was not meant to preserve public confidence in public lawyers and the operation of public agencies. Rather, the standard primarily preserved the private client's confidence in his lawyer and in the bar generally. At the same time, the phrase evoked the concept that so-called potential, as well as actual, conflicts were proscribed. In certain situations involving conflicts of interest, the representation is forbidden even if there would be no actual wrongdoing—that is, even if the lawyer would not violate confidences, serve incompetently or disloyally, or otherwise act to harm the client or former client. The lawyer must avoid the possibility (or,

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<sup>40</sup> N.J. Advisory Comm. on Professional Ethics, Op. 6 (1963).

<sup>41</sup> *Id.* (citations omitted).

from the private client's perspective, the perception) that the lawyer will, or did, act wrongfully.

*B. Adoption and Application of the New Jersey Code of Professional Responsibility*

In 1971, the New Jersey Supreme Court adopted the New Jersey Code of Professional Responsibility (New Jersey Code), based on the Model Code, in place of the Canons of Professional Ethics. None of the disciplinary rules expressly incorporated the appearance of impropriety standard to determine whether a particular representation would be permissible.

Disciplinary Rules (DRs) 5-101 through 5-107 addressed conflicts of interest. The most generally applicable conflict-of-interest provision, DR 5-101(A), provided:

Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.<sup>42</sup>

With respect to the representation of multiple clients, DR 5-105 required a lawyer to decline or withdraw from the representation "if the exercise of his independent professional judgment on behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment," unless the lawyer "believes that he can adequately represent the interests of each and if each consents to the representation after full disclosure . . . ."<sup>43</sup> This rule further provided that if the lawyer was required to decline or to withdraw from employment to avoid a conflict of interest, other members of the lawyer's firm were required to do so as well.<sup>44</sup>

These provisions also specifically addressed, among other things, the problem that arises when a lawyer might be both an advocate and a witness in the same proceeding,<sup>45</sup> lawyers' business relations with their clients,<sup>46</sup> and the influence of third parties who compensate the lawyer to provide services for the client.<sup>47</sup> Of these rules, only DR 5-107(A) explicitly took account of the public interest. This provision allowed a lawyer to accept compensation from someone

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<sup>42</sup> N.J. CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(A) (1971)

<sup>43</sup> *Id.* at DR 5-105.

<sup>44</sup> *See id.*

<sup>45</sup> *See id.* at DR 5-101(B), 5-102.

<sup>46</sup> *See id.* at DR 5-104.

<sup>47</sup> *See id.* at DR 5-107(A).

other than his client "with the consent of his client and *provided the public interest is not adversely affected.*"<sup>48</sup>

Another relevant provision, DR 9-101, was titled, "Avoiding Even the Appearance of Impropriety."<sup>49</sup> It restricted a lawyer from accepting private employment that would involve a matter he had overseen as a judge or for which he had been responsible as a public employee. It also prohibited a lawyer from stating or implying that he could improperly influence a court, legislative body, or public official. Notwithstanding the rule's title, the provisions of DR 9-101 made no reference to appearances of impropriety. Rather, the rule announced the applicable standard of professional conduct in more objective and precise terms.

Although the New Jersey Code contained no disciplinary provision that assessed the propriety of a lawyer's conduct based on whether or not it engendered an "appearance of impropriety," both Advisory Committee opinions and judicial decisions, over the course of the twelve years following adoption of the code, employed this standard. In this regard, New Jersey was not alone.<sup>50</sup> As discussed below, the overwhelming majority of New Jersey opinions employing this standard concerned lawyers in public employ, and of those involving the interests of private clients, the majority invoked the standard to compensate for the absence of a directly applicable provision of the code.

### 1. Cases Involving the Public Interest

For the most part, the Advisory Committee used the appearance of impropriety standard (very often tacitly) to resolve the kinds of problems for which this standard had originally been developed: problems involving lawyers who were presently or formerly in public

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<sup>48</sup> *Id.* (emphasis added).

<sup>49</sup> The rule provided as follows:

Avoiding Even the Appearance of Impropriety

(A) A lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity.

(B) A lawyer shall not accept private employment in a matter in which he had a substantial responsibility while he was a public employee.

(C) A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official.

N.J. CODE OF PROFESSIONAL RESPONSIBILITY DR 9-101(A) (1971).

<sup>50</sup> See *supra* note 14 and accompanying text.

employ. For example, in *Opinion 467*,<sup>51</sup> the Committee considered whether a member of the Attorney General's staff could accept a position in the Department of Public Advocate, which was a party, possible party, or amicus curiae in three matters in which the lawyer had participated while in the Attorney General's office. Although DR 9-101(B) addressed a lawyer's movement from public to private employment, it did not address movement from one public office to another. The Committee therefore addressed the question under the appearance of impropriety standard. It explained:

DR 9-101 is derived from Canon 9: "A Lawyer Should Avoid Even the Appearance of Impropriety." This precept is the policy consideration behind that rule. It is raised when it appears that an attorney is "switching sides" for personal benefit. We invoke it where there is an adequate basis for a belief by members of the public reasonably familiar with governmental affairs that these relationships create a high risk of impropriety.<sup>52</sup>

The Committee concluded that, as long as the lawyer was screened from the litigations in which he had previously participated, "there is no risk that the public may view the employment change as creating a high risk of impropriety."<sup>53</sup>

By May 1983, the Advisory Committee had published more than 300 additional opinions, of which a high percentage continued to deal with "relationships between lawyers and governmental agencies in which a lawyer or his office associates occupied positions."<sup>54</sup> By way of example, during the two-month period from November 16, 1978, to January 11, 1979, the Committee published seven opinions, numbered 409 through 415, all of which addressed conflicts of interest concerning a present or former lawyer for a public or quasi-public entity.<sup>55</sup>

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<sup>51</sup> N.J. Advisory Comm. on Professional Ethics, Op. 467 (1981).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> N.J. Advisory Comm. on Professional Ethics, Op. 516 (1983).

<sup>55</sup> See N.J. Advisory Comm. on Professional Ethics, Op. 409 (1978) (finding conflict in developer's hiring of former assistant township attorney); N.J. Advisory Comm. on Professional Ethics, Op. 410 (1978) (conflict created by municipal prosecutor prosecuting police officer); N.J. Advisory Comm. on Professional Ethics, Op. 411 (1978) (finding that defense of cases by the attorney for the Patrolmen's Benevolent Association in which policemen were plaintiffs may raise the appearance of impropriety); N.J. Advisory Comm. on Professional Ethics, Op. 412 (1978) (finding no conflict where municipal attorney would defend suit brought by a former mayor); N.J. Advisory Comm. on Professional Ethics, Op. 413 (1978) (finding that attorney whose partners represented landlords should disqualify himself from drafting rent control ordinances); N.J. Advisory Comm. on Professional Ethics, Op. 414 (1979) (concerning whether a municipal attorney had to comply with dislo-

In *Higgins v. Advisory Committee on Professional Ethics*,<sup>56</sup> the New Jersey Supreme Court endorsed the Advisory Committee's continued reliance on the appearance of impropriety standard to deal with lawyers in government service. Further, in *Higgins* and other opinions, the court itself employed this standard to deal with lawyers' professional conduct that implicated the public interest. These included not only cases involving government lawyers but also criminal cases, in which the appearance of impropriety test promoted "[p]ublic confidence in the integrity of our criminal justice process."<sup>57</sup> The appearance of impropriety test was used in any of at least four ways in the supreme court's decisions.

First, the appearance of impropriety test was used to address concerns that were not adequately addressed by the conflict-of-interest rules. For example, in *Higgins*, the court concluded that a lawyer may not represent a criminal defendant in the same county in which the lawyer serves as freeholder. It rejected the argument that the appearance of impropriety standard "is vague, subjective and demeaning to the bar," but at the same time stressed that there must be a "reasonable basis," which, in the context of the opinion, meant a genuine harm threatened by the representation.<sup>58</sup> Because of the freeholder's influence over financial expenditures by the prosecutor's office, the court found, there was a "potential for undue influence" when the lawyer-freeholder "negotiates with the prosecutor's office with regard to downgrading a criminal charge, plea or sentence."<sup>59</sup> Further, even if the lawyer did not in fact attempt to obtain "more favorable consideration for the client because of the attorney's official position," there would be an appearance that he had sought and/or obtained such favorable treatment.<sup>60</sup>

Second, in some opinions, the appearance of impropriety test was used not as an independent basis of assessing the representation, but rather as a justification for a highly restrictive interpretation of a specific disciplinary rule that addressed the conduct in question. For

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sure requirements that would require naming previous clients); N.J. Advisory Comm. on Professional Ethics, Op. 415 (1979) (finding that a partnership or shared office arrangement between a municipal attorney and an attorney for the county in which that municipality is located is improper).

<sup>56</sup> 73 N.J. 123, 128-29, 373 A.2d 372, 374-75 (1977).

<sup>57</sup> *State v. Rizzo*, 69 N.J. 28, 29, 350 A.2d 225, 225-26 (1975) (determining that lawyers could not represent criminal defendants after having served as county prosecutors during the investigation that led to the indictment).

<sup>58</sup> *Higgins*, 73 N.J. at 128-129, 373 A.2d at 375.

<sup>59</sup> *Id.* at 128, 130, 373 A.2d at 374, 376.

<sup>60</sup> *Id.* at 129-30, 373 A.2d at 375-76.

example, in *In re Advisory Opinion on Professional Ethics No. 361*,<sup>61</sup> the court invoked this concern to justify a restrictive interpretation of DR 9-101(B), which barred a lawyer from “accept[ing] private employment in a matter in which he had substantial responsibility while he was a public employee.”<sup>62</sup> The court read “substantial responsibility” to mean virtually any responsibility for or knowledge of the matter. The court made the point that even if the lawyer would not misuse information acquired in his official capacity—misconduct against which the disciplinary rule was meant to protect—the lawyer was obliged to “avoid even the appearance of impropriety . . . for the sake of public confidence in the probity of the administration of [criminal] justice.”<sup>63</sup>

Third, the identification of an appearance of impropriety was sometimes used as an alternative reason to condemn conduct that was, in any event, improper under a straightforward interpretation of specifically applicable rules. An example is *In re Garber*,<sup>64</sup> where a lawyer was disciplined for representing both a long-time social and business acquaintance who was accused of a “gangland style” murder and, at the same time, the eyewitness to the murder. The court found that the simultaneous representation violated both DR 5-105(A) and 5-101(A), and that under those rules, the representation could not have been undertaken even with the informed consent of both clients (which was lacking) because a lawyer could not reasonably believe that he could represent both clients adequately.<sup>65</sup> Nevertheless, the court went on to address the conduct under an appearance of impropriety standard, concluding that “in addition to clear violations of DR 5-105(A) and DR 5-101(A), predicated upon an actual conflict of interest, respondent also fostered the appearance of such a conflict.”<sup>66</sup>

Finally, and most problematically, the court sometimes employed the appearance of impropriety standard to substitute for specific conflict-of-interest rules that addressed both the conduct in question and the potential harms to which that conduct might give rise. An example is *In re Opinion No. 415*,<sup>67</sup> which concluded that lawyers in a partnership or association may not represent both a county

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<sup>61</sup> 77 N.J. 199, 390 A.2d 118 (1978).

<sup>62</sup> *Id.* at 202, 390 A.2d at 119.

<sup>63</sup> *Id.* at 206, 390 A.2d at 121.

<sup>64</sup> 95 N.J. 597, 472 A.2d 566 (1984).

<sup>65</sup> *See id.* at 609, 472 A.2d at 573.

<sup>66</sup> *Id.* at 609-11, 472 A.2d at 573-74.

<sup>67</sup> 81 N.J. 318, 407 A.2d 1197 (1979).

and a municipality within the county. The problem posed in this case was the joint representation of two clients with possibly conflicting interests. But neither the court's opinion nor the Advisory Committee opinion cited DR 5-105, a rule specifically addressing joint representation and dealing with the precise harm with which both the court and the Committee were concerned. In part, this might have been explained by the court's observation that "[w]hen representation of public bodies is involved, the appearance of impropriety assumes an added dimension. Positions of public trust call for even more circumspect conduct."<sup>68</sup> The implication was that, in cases involving government lawyers, a more restrictive standard applied. Thus, the appearance of impropriety standard superseded DR 5-105, which would presumably be reserved for lawyers representing private clients.

## 2. Cases Involving Exclusively Private Interests

The appearance of impropriety standard was also employed, however, in non-criminal cases involving lawyers for private parties. One use was to address perceived errors and omissions in the New Jersey Code provisions that dealt specifically with conflicts of interest. For example, the New Jersey Code lacked a provision addressing a lawyer's representation adverse to a former client. Therefore, as it had in the earlier *Opinion 6*,<sup>69</sup> the Advisory Committee continued to rely on the concern for avoiding appearances of impropriety to justify restricting this practice.<sup>70</sup> The New Jersey Supreme Court did so as well.<sup>71</sup>

Similarly, DR 5-101(A), unlike DR 5-105, failed to take account of cases where a conflict of interest was so likely to undermine the representation that a lawyer should not undertake the representation even with the client's consent. The Advisory Committee dealt with this apparent oversight by adverting to the concern for appearances of impropriety. In *Opinion 495*,<sup>72</sup> the Committee concluded that a lawyer is categorically forbidden from representing the pur-

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<sup>68</sup> *Id.* at 324, 407 A.2d at 1200.

<sup>69</sup> See *supra* notes 40-41 and accompanying text for a discussion of this opinion.

<sup>70</sup> See, e.g., N.J. Advisory Comm. on Professional Ethics, Op. 507 (1982); cf. N.J. Advisory Comm. on Professional Ethics, Op. 356 (1976) (citing N.J. CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B)(3), 5-105(A), (D) (1971) and finding that law firm may not represent husband on appeal in matrimonial action where wife previously had conferred with a member of the firm).

<sup>71</sup> See, e.g., *Reardon v. Marlayne, Inc.*, 83 N.J. 460, 416 A.2d 852 (1980); *In re Cipriano*, 68 N.J. 398, 346 A.2d 393 (1975).

<sup>72</sup> N.J. Advisory Comm. on Professional Ethics, Op. 495 (1982).

chaser of real estate and, at the same time, representing the mortgage-lender. It reasoned: "The situation is . . . inherently creative of an appearance of impropriety such that it cannot be permitted even if disclosure is made to all parties."<sup>73</sup>

In ordinary cases, however, the conflict-of-interest rules might have seemed adequate to resolve questions concerning the multiple representation of private clients and other questions involving conflicts of interest. These rules were drafted with consideration for the public perception of lawyers' conduct and drew lines based, in part, on that consideration. Use of an appearance of impropriety standard in such situations would have the effect of supplanting rules that provided a familiar analytic framework with a vague standard that was not even contained in a disciplinary rule. At times, the Advisory Committee, accordingly, relied exclusively on the specific rules.<sup>74</sup>

The supreme court had not made explicit, however, that the appearance of impropriety standard was inapplicable in the garden-variety case and was to be reserved for either cases involving the public interest or other cases that were inadequately addressed by the conflict-of-interest rules. Further, broad pronouncements in some of the court's decisions implied that the test was universally applicable, because an underlying concern—present in every representation—was the public's (as distinguished from the client's) confi-

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<sup>73</sup> *Id.*; cf. N.J. Advisory Comm. on Professional Ethics, Op. 513 (1983) (concluding that with client consent, a lawyer may obtain title insurance for a client from a local title abstract company in which the lawyer owns a minority interest because it is "unlikely that a perception of impropriety will be generated"). In contrast, this omission was addressed by the New York State Bar Committee on Professional Ethics by reading into DR 5-101 the same limitation contained explicitly in DR 5-105. See, e.g., N.Y. State Bar Comm. on Professional Ethics, Op. 635 (1992) (citing prior opinions).

<sup>74</sup> See, e.g., N.J. Advisory Comm. on Professional Ethics, Op. 502 (1982) (stating that joint representation of insured plaintiff and insurance carrier may not be undertaken under DR 5-105(C) where a question of coverage is in issue); N.J. Advisory Comm. on Professional Ethics, Op. 486 (1981) (holding that lawyer may not jointly represent mother and minor as defendants in automobile negligence action because "possibilities of conflict may arise" and the minor cannot consent under DR 5-105(C)); N.J. Advisory Comm. on Professional Ethics, Op. 421 (1979) (finding that DR 5-102(A) does not invariably require the lawyer immediately to withdraw from representation before trial when he expects to be called as a witness); N.J. Advisory Comm. on Professional Ethics, Op. 419 (1979) (stating that under DR 5-101(B), law firm B may represent decedent in workmen's compensation action against law firm A, notwithstanding that lawyer in firm B was formerly employed by firm A); N.J. Advisory Comm. on Professional Ethics, Op. 357 (1976) (finding that lawyer may generally represent insured plaintiff and plaintiff's insurance carrier with informed consent under DR 5-105(C)).



dence in the legal profession. For example, the court declared that “[w]e must view the conduct as an informed and concerned private citizen and judge whether the reputation of the Bar would be lowered if the conduct were permitted,”<sup>75</sup> and, to like effect, that “[t]o maintain public confidence in the bar it is necessary that the appearance of, as well as actual, wrongdoing be avoided.”<sup>76</sup> Even more significant was a 1975 opinion dealing with another situation inadequately addressed by the New Jersey Code: a lawyer’s involvement in a real estate transaction in which he took unfair advantage of individuals who had placed their trust in him (albeit, not in the context of a lawyer-client relationship).<sup>77</sup> The court found that the lawyer’s exploitative conduct “ran afoul of DR 9-101 entitled ‘Avoiding Even the Appearance of Impropriety.’”<sup>78</sup> Rejecting the suggestion that a lawyer could be sanctioned only on the basis of the specific disciplinary provisions of DR 9-101, the court endorsed the view that the appearance of impropriety standard is “all-inclusive.”<sup>79</sup>

Consistent with the New Jersey courts’ broad pronouncements, in a number of non-criminal cases involving the representation of private clients—including non-litigation contexts—the Advisory Committee invoked an appearance of impropriety as a consideration, rather than relying solely on the conflict-of-interest rules that were clearly designed to address the situation. For example, in *Opinion 495*,<sup>80</sup> the Committee concluded that a lawyer may not represent both the purchaser of real estate and the purchaser’s mortgage lender. The opinion acknowledged DRs 5-101, 5-105, and 5-107(A)(2), which might have justified this result. But the Committee, advertent to an opinion that pre-dated the New Jersey Code, characterized the question as whether there was a “real or potential” conflict of interest and whether an appearance of impropriety existed.<sup>81</sup> The Committee concluded that “[t]he situation presented is basically contrary to the professional standards required and inherently creative of an appearance of impropriety such that it cannot be permitted even if disclosure is made to all parties.”<sup>82</sup>

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<sup>75</sup> *In re* Opinion No. 415, 81 N.J. 318, 325, 407 A.2d 1197, 1200 (1979).

<sup>76</sup> *In re Cipriano*, 68 N.J. at 403, 346 A.2d at 395.

<sup>77</sup> See *In re Hurd*, 69 N.J. 316, 354 A.2d 78 (1975).

<sup>78</sup> *Id.* at 330, 354 A.2d at 85.

<sup>79</sup> See *id.* (quoting *In re Lanza*, 65 N.J. 347, 354, 322 A.2d 445, 449 (1974) (Pashman, J., dissenting)).

<sup>80</sup> N.J. Advisory Comm. on Professional Ethics, Op. 495 (1982).

<sup>81</sup> See *id.* (citing *In re Kamp*, 40 N.J. 588, 194 A.2d 236 (1963)).

<sup>82</sup> *Id.*

C. *Adoption of the New Jersey Rules of Professional Conduct*

1. The ABA Model Rules

In 1977, the ABA appointed the Kutak Commission to study the Model Code. The commission was formed in response to severe criticisms of the Code, one being that some jurisdictions had invoked Canon 9, dealing with the "appearance of impropriety," as a disciplinary standard. In part, jurisdictions (including New Jersey) had done so in reaction to omissions in the Code. For example, a number of jurisdictions (New Jersey among them) had invoked this standard to address the matter of representation adverse to a former client.<sup>83</sup> However, jurisdictions had also invoked the appearance of impropriety standard to supersede specific conflict-of-interest provisions such as DR 5-105, with the result that representation permitted under the specific rule might be forbidden as creating an appearance of impropriety.<sup>84</sup>

By the time of the Kutak Commission's work, commentary on the subject was predominantly critical of the appearance of impropriety standard. One criticism was that use of the phrase "appearance of impropriety" obscures the process by which lawyers and authorities ought to determine whether there is an impermissible conflict of interest.<sup>85</sup> Another was that it leads to results that are inconsistent with the specific conflict-of-interest provisions, thereby "present[ing] lawyers with very strongly conflicting inclinations."<sup>86</sup> In either case, it was suggested, erroneous decisions resulted.<sup>87</sup>

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<sup>83</sup> See Geoffrey C. Hazard, Jr., *Rules of Legal Ethics: The Drafting Task*, in 36 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 77, 89-90 (1981).

<sup>84</sup> See AMERICAN BAR FOUNDATION, *supra* note 13, at 407-09.

<sup>85</sup> See, e.g., ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342, at n.17 (1975) ("had [the appearance of impropriety test] been included as an element in the disciplinary rule [Rule 9-101(B)] it is likely that the determination of whether particular conduct violated the rule would have degenerated from a determination of the fact issues specified by the rule into a determination on an instinctive, ad hoc or even *ad hominem* basis").

<sup>86</sup> Geoffrey C. Hazard, Jr., *Legal Ethics: Legal Rules and Professional Aspirations*, 30 CLEV. ST. L. REV. 571, 574 (1982).

<sup>87</sup> See, e.g., Victor H. Kramer, *The Appearance of Impropriety under Canon 9: A Study of the Federal Judicial Process Applied to Lawyers*, 65 MINN. L. REV. 243, 264 (1981) ("Canon 9 of the ABA Code has developed into a source of unpredictable, post hoc rule making regarding the standards of professional conduct."); Neil D. O'Toole, *Canon 9 and the Code of Professional Responsibility: An Elusive Ethical Guideline*, 62 MARQ. L. REV. 313, 344 (1979) ("Canon 9 has generated more problems for the adjudicative process than it has solved"). For more recent criticisms, see Morgan, *supra* note 6, at 615-21; Beth Nolan, *Public Interest, Private Income: Conflicts and Control Limits on the Outside Income of Government Officials*, 87 Nw. U. L. Rev. 57, 77-78 (1992)

The work of the Kutak Commission led to the ABA's adoption of the Model Rules of Professional Conduct (Model Rules) in 1983. The general framework for addressing possible conflicts of interest is set forth in Rule 1.7(b). The lawyer must begin by determining whether "the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests."<sup>88</sup> If so, the lawyer must refrain from the representation unless "the lawyer reasonably believes that representation will not be adversely affected," in which event the lawyer may undertake the representation only if "the client consents after consultation."<sup>89</sup> The Model Rules also included provisions dealing with specific concerns.

Further, with respect to conflicts of interest, the Model Rules addressed perceived omissions in the Code. For example, Rule 1.9 specifically addressed the matter of representation adverse to a former client. In accordance with the "substantial relationship" rule developed in disqualification decisions over the course of the prior quarter-century, it provided:

A lawyer who has formerly represented a client in a matter shall not represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.<sup>90</sup>

Model Rule 1.7(b), the general rule governing conflicts of interest, provided that in all cases, not only those involving joint representation, client consent would not cure the problem unless "the lawyer reasonably believes the representation will not be adversely affected."<sup>91</sup>

At the same time, the Model Rules eliminated any reference to "appearances of impropriety" as a possible standard by which to judge whether a lawyer may represent a particular client.<sup>92</sup> This reflected a plain intention "to abandon it as an independently operating standard."<sup>93</sup>

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(appearance standard should not be used to judge or sanction individual conduct but "has continued vitality in constructing categorical rules to promote public confidence in government.").

<sup>88</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1983).

<sup>89</sup> *Id.*

<sup>90</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (1983).

<sup>91</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b).

<sup>92</sup> See *supra* note 19.

<sup>93</sup> WOLFRAM, *supra* note 12, at 322.

## 2. Report of the Debevoise Committee

In July 1982, the New Jersey Supreme Court appointed a committee on the Model Rules of Professional Conduct (known as the "Debevoise Committee" after its chairman, now-United States District Judge Dickinson R. Debevoise) for the purpose of reviewing the ABA's proposed Model Rules. The committee was comprised of judges, academics, prominent members of the New Jersey bar, and two prominent non-lawyer members.<sup>94</sup> Its report, dated June 24, 1983, endorsed the general substance and format of the ABA Model Rules and recommended that they be adopted with suggested modifications.<sup>95</sup>

The first and most extensive section of the report addressed conflicts of interest.<sup>96</sup> Its principal recommendation was that "New Jersey's 'appearance of impropriety' standard should be abandoned."<sup>97</sup> The report focused on the use of this test to justify restrictions on government lawyers and former government lawyers. One concern was that the test failed to provide fair notice. Another was that it had been used to justify undue restrictions out of line with those identified in other jurisdictions. The report explained:

New Jersey nonetheless has continued after the adoption of the DR's to construe the rules as prohibiting any representation that the public might perceive as inappropriate because it somehow could create the appearance of something unseemly. In that construction New Jersey has stood almost alone. The Code of Professional Responsibility was drafted for the avowed purpose of expressing in black letter rules precisely what conduct or what omission would subject a lawyer to discipline, much as criminal statutes are intended to give fair warning in advance as to what specific conduct may result in penal sanctions.

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... The present New Jersey approach unduly limits lawyers' representation of clients where no actual conflict exists and it unduly limits clients' selection of lawyers where no actual conflict exists. It imposes upon attorneys a disciplinary rule that is vague and undefined. The rule's contours are defined in retrospect on a case-by-case method, which is not a satisfactory procedure when

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<sup>94</sup> See Leslie C. Levin, *Testing the Radical Experiment*, 47 RUTGERS L. REV. 81, 92 & n.40 (1994).

<sup>95</sup> See NEW JERSEY SUPREME COURT COMMITTEE ON THE MODEL RULES OF PROFESSIONAL CONDUCT, REPORT (1983).

<sup>96</sup> See *id.*

<sup>97</sup> *Id.*

dealing with rules of conduct. The proposed Model Rules carefully define the situations in which representation is proper and provide safeguards to ensure against improper representation. The waiver provisions of Rules 1.7, 1.9 and 1.10 and Rules 1.11 and 1.12 provide a framework for responsible decisions.<sup>98</sup>

### 3. Adoption of Rule 1.7(c)(2)

In adopting the New Jersey Rules of Professional Conduct (New Jersey Rules) in 1984,<sup>99</sup> the New Jersey Supreme Court rejected the Debevoise Committee's recommendation that it eliminate the appearance of impropriety rule. Instead, the court included, as Rule 1.7(c)(2), a provision explicitly preserving the effect of case law and ethics opinions applying this test.<sup>100</sup> Additionally, Rule 1.9 incorpo-

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<sup>98</sup> *Id.*

<sup>99</sup> New Jersey was the first state to adopt the Model Rules. See GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* app. 4 (2d ed. Supp. 1994) (observing that, as of January 1, 1994, 37 states had adopted a version of the Model Rules).

<sup>100</sup> Rule 1.7 of the New Jersey Rules of Professional Conduct provides as follows:

RPC 1.7 Conflict of Interest: General Rule

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client unless:

- (1) the lawyer reasonably believes that representation will not adversely affect the relationship with the other client; and
- (2) each client consents after a full disclosure of the circumstances and consultation with the client, except that a public entity cannot consent to any such representation.

(b) A lawyer shall not represent a client if the representation of the client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes that the representation will not be adversely affected; and
- (2) the client consents after a full disclosure of the circumstances and consultation with the client, except that a public entity cannot consent to any such representation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

(c) This rule shall not alter the effect of case law or ethics opinions to the effect that:

- (1) in certain cases or categories of cases involving conflicts or apparent conflicts, consent to continued representation is immaterial; and
- (2) in certain cases or situations creating an appearance of impropriety rather than an actual conflict, multiple representation is not permissible, that is, in those situations in which an ordinary knowledgeable citizen acquainted with the facts would

rated 1.7(c) by reference,<sup>101</sup> and Rule 1.11 specifically preserved the appearance of impropriety standard.<sup>102</sup> The preservation of the appearance of impropriety test was one of a number of respects in which the New Jersey Rules departed from the ABA model.<sup>105</sup>

## II. THE APPEARANCE OF IMPROPRIETY STANDARD IN CONTEXTS INVOLVING THE "PUBLIC INTEREST"

### A. *The Virtues of the Standard*

Since the New Jersey Rules were adopted, the appearance of impropriety test under Rule 1.7(c)(2) has been employed predominantly in the context in which the test was originally developed: in situations "pos[ing] substantial risk of disservice to . . . the public interest."<sup>104</sup> The most common cases of this type continue to be those involving government lawyers or former government lawyers. This is in accord with one of the most often stated purposes ascribed to the rule: "[T]o maintain public confidence . . . in our system of government."<sup>105</sup> The test has also been used in criminal cases, in which

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conclude that the multiple representation poses substantial risk of disservice to either the public interest or the interest of one of the clients.

N.J. RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1995).

<sup>101</sup> See N.J. RULES OF PROFESSIONAL CONDUCT Rule 1.9(b) (1995), dealing with representation adverse to a former client, which provides as follows: "The provisions of RPC 1.7(c) are applicable as well to situations covered by this rule." *Id.*

<sup>102</sup> See N.J. RULES OF PROFESSIONAL CONDUCT Rule 1.11(b) (1995), dealing with successive government and private employment, which provides as follows:

An appearance of impropriety may arise from a lawyer representing a private client in connection with a matter that relates to the lawyer's former employment as a public officer or employee even if the lawyer did not personally and substantially participate in it, have actual knowledge of it, or substantial responsibility for it. In such an event, the lawyer may not represent a private client, but a firm with which that lawyer is associated may undertake or continue representation if: (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom, and (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

*Id.*

<sup>105</sup> See Michael P. Ambrosio, *The "New" New Jersey Rules of Professional Conduct: Reordered Priorities for Public Accountability*, 11 SETON HALL LEGIS. J. 121 (1987); Levin, *supra* note 94, at 94-95 (observing that New Jersey adopted the most far-reaching disclosure obligation of any state).

<sup>104</sup> N.J. RULES OF PROFESSIONAL CONDUCT Rule 1.7(c)(2).

<sup>105</sup> *In re Prof'l Ethics Op.* 452, 87 N.J. 45, 50, 432 A.2d 829, 832 (1981).

the public is, in a sense, a party and in which the strong public interest in the proper administration of criminal justice is at stake.<sup>106</sup>

On its face, the appearance of impropriety test would seem to provide little meaningful guidance in resolving possible conflicts of interest in such cases. Lifting a phrase from Rule 1.7(c)(2), the New Jersey Supreme Court stated: "The critical guideline is whether an appearance of impropriety would arise in the mind of an 'ordinary knowledgeable citizen acquainted with the facts.'"<sup>107</sup> This guideline would seem to invite—indeed, require—disciplinary bodies, the Advisory Committee, and the courts to make impressionistic, ad hoc decisions, drawing on empirically unfounded, highly personal judgments about how the hypothetical "ordinary knowledgeable citizen" would perceive particular scenarios involving lawyers. In the traditional context involving public lawyers, however—and *only* in this context—the test has several possible redeeming qualities.

### 1. Close Scrutiny

The appearance of impropriety test calls for scrutinizing representation by government lawyers especially closely and under a more restrictive standard than the standard applied to lawyers representing private clients. The result is that representation sometimes may not be undertaken by the government lawyer, even though it might permissibly be undertaken by a lawyer for a private client in an analogous situation.<sup>108</sup>

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<sup>106</sup> See, e.g., *In re Milita*, 99 N.J. 336, 342, 492 A.2d 380, 383-84 (1985) ("We have always emphasized that not only impropriety but 'even the appearance of impropriety' that casts doubt upon the integrity of the criminal process must be avoided."); *In re Garber*, 95 N.J. 597, 614, 472 A.2d 566, 575 (1983). The *Garber* court observed:

In the context of the criminal proceedings in this case . . . , the interests that are implicated transcend those of the immediate parties or their attorneys. The public itself has the greatest stake in the propriety of the legal relationships that are created to properly administer criminal justice. . . . Clearly, the public interest in the administration of criminal justice in the circumstances of this case compelled the unbiased and unstinted representation of [the eyewitness].

*Id.*

<sup>107</sup> *In re Tenure Hearing of Onoverole*, 103 N.J. 548, 562, 511 A.2d 1171, 1178 (1986).

<sup>108</sup> See, e.g., *In re Opinion No. 653*, 132 N.J. 124, 130, 623 A.2d 241, 244 (1993) ("Positions of public trust call for even more circumspect conduct.") (quoting *In re Opinion 415*, 81 N.J. 318, 407 A.2d 1197 (1979)); *In re Inquiry to the Advisory Comm.*, No. 58-91(B), 130 N.J. 431, 435, 616 A.2d 1290, 1291-92 (1992) ("The appearance of impropriety has special relevance for attorneys invested with the public trust, such as a government attorney or, as here, an attorney who is a full-time police officer."); *In re Petition for Review of Opinion No. 569*, 103 N.J. 325, 330, 511 A.2d

The court's decision in *Ross v. Canino*,<sup>109</sup> although decided shortly before the Rules of Professional Conduct took effect, is nevertheless illustrative. The question was whether the law firm of a former Attorney General (AG) could represent plaintiffs in a civil suit involving matters that had been investigated by divisions of the Department of Law and Public Safety during the former AG's term. While holding that the law firm could continue the representation, the court also held that the former AG himself was required to be screened from participation:

Government attorneys, in whom the public reposes special confidence, are subject to even closer scrutiny than private attorneys. . . . Our duty to maintain that confidence is especially acute when the government attorney has been the chief law enforcement officer in the State. Under some circumstances, former government attorneys ought not to participate personally in lawsuits even if no independent grounds for disqualification exist. Here, one relevant circumstance is that the private lawsuit relates, albeit indirectly, to the regulation of casinos, an issue that has stimulated heightened judicial sensitivity to maintaining public confidence in government officials.<sup>110</sup>

## 2. Consideration of Specific Harms Against Which the Conflict-of-Interest Rules Do Not Protect.

In cases involving government lawyers, the appearance of impropriety test also enables authorities to consider whether the lawyer's representation threatens particular harms that the conflict-of-interest rules do not otherwise take into account, including, most significantly, the distortion of public decision making. This is most evident in cases in which part-time government lawyers represent private clients before courts or other public bodies. The principal concern of Rule 1.7(b), namely, whether the lawyer will act disloyally to a client or otherwise disadvantage a client in the matter in which

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119, 122 (1986) ("When representation of public bodies is involved, this Court has also recognized that 'the appearance of impropriety assumes an added dimension.' Precisely because government attorneys are invested with the public trust and because they are more visible to the public, their conduct must be even more circumspect than the private attorney.") (citations omitted); *Petition for Review of Opinion 552*, 102 N.J. 194, 203, 507 A.2d 233, 238 (1986) ("Due to the sensitivity of their roles, attorneys for governmental bodies are subject to closer scrutiny under the appearance-of-impropriety standard than non-governmental attorneys."); *cf. In re Opinion No. 653*, 132 N.J. 124, 130, 623 A.2d 241, 244 (1993) ("Avoiding the appearance of impropriety is especially important when the representation of governmental entities is involved.").

<sup>109</sup> 93 N.J. 402, 409, 461 A.2d 585, 589 (1983).

<sup>110</sup> *Id.* at 409-10, 461 A.2d at 589.



the lawyer represents that client, is not what primarily is at stake in this situation. As reflected in *Opinion 4*,<sup>111</sup> the principal concern is that the public decisionmaker will inappropriately favor the lawyer's private client. This is as much a problem of government ethics as of lawyer ethics.

The supreme court's discussion in *In re Advisory Committee on Professional Ethics Opinion 621*<sup>112</sup> reflects this consideration. In the course of determining whether a part-time legislative aid may represent private clients, the court adverted to prior opinions dealing with public lawyers.<sup>113</sup> It observed that, where a part-time municipal attorney represents a private party before an agency of the municipality, the public may perceive that the decisionmaker will be unduly swayed and the private client will obtain an unfair advantage. Similarly, a part-time municipal attorney is forbidden from prosecuting disciplinary actions against police officers in the municipality to avoid chilling the municipal attorney's relationship with police officers with whom he works in the investigation and enforcement of criminal matters.

In some cases involving public lawyers, however, concerns about the integrity of government or judicial decision making are not raised. In such cases, the general conflict-of-interest rules provide a more precise framework. Illustrative is the court's decision in *Petition for Review of Opinion 552*,<sup>114</sup> where the question was whether a lawyer could jointly represent a government entity and a government official in a civil rights action. Employing the framework of Rules 1.7(a) and (b), the court focused on whether the respective clients' interests were likely to conflict. It concluded:

[W]e rule that in a [section] 1983 action, a government attorney is precluded from representing co-defendant government officers or employees only where the allegations or the facts present an actual conflict of interests or the realistic possibility of such a conflict. If no such conflict is presented, then a government attorney may simultaneously represent as co-defendants governmental officers or employees and the government entity.<sup>115</sup>

The approach appeared to reflect the court's recognition that the specific conflict rules provided the appropriate framework for analysis and an appearance of impropriety standard would add little

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<sup>111</sup> See *supra* notes 28-30 and accompanying text.

<sup>112</sup> 128 N.J. 577, 608 A.2d 880 (1992).

<sup>113</sup> See *id.* at 593-95, 608 A.2d at 888-89.

<sup>114</sup> 102 N.J. 194, 507 A.2d 233 (1986).

<sup>115</sup> *Id.* at 208-09, 507 A.2d at 240-41.

because the only threatened harms were those that Rules 1.7(a) and (b) adequately took into account.

### 3. Consideration of Prior Opinions

Additionally, the test obligates public lawyers to draw on both the results and the reasoning of more than twenty years of decisions pre-dating the adoption of the New Jersey Rules and authorizes decisionmakers to continue to develop law in a common-law fashion. *In re Advisory Committee on Professional Ethics Opinion 621*<sup>116</sup> provides one example.<sup>117</sup> Another is the court's opinion in *Flamma v. Atlantic City Fire Department*,<sup>118</sup> which held that counsel for the fire fighters' union was not disqualified from representing a union member in a disciplinary proceeding in which another union member would testify. The court distinguished an earlier decision, *State v. Galati*,<sup>119</sup> which held that a lawyer who regularly represented the State Policemen's Benevolent Association (PBA) could not represent a police officer in a criminal proceeding at which another PBA member would testify, because otherwise there would be suspicion that the witness's testimony was unduly influenced. The court emphasized that, unlike the PBA, the fire fighters' union

is not an organization of law-enforcement officials, nor does it have the "quasi-official status" and close relationship to the administration of justice that the PBA has. Although a union attorney may have a "bridge of confidentiality and trust" with local union members, absent a special relationship between the union and the administration of justice, there is no significant risk of detriment to public confidence in the justice system requiring the attorney's disqualification for an "appearance of impropriety."<sup>120</sup>

### 4. Categorical Rule making

Finally, the appearance of impropriety test signifies that categorical prohibitions on dual representation are most likely to be appropriate in cases involving government lawyers. The purpose of such *per se* rules is to protect against harms that generally inhere in such categories of cases. As the supreme court has recognized:

Whether *per se* rules or standards to be applied on a case-by-case basis are used in connection with the enforcement of the RPC's

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<sup>116</sup> 128 N.J. 577, 608 A.2d 880 (1992).

<sup>117</sup> See *supra* notes 112-113 and accompanying text.

<sup>118</sup> 118 N.J. 583, 573 A.2d 158 (1990).

<sup>119</sup> 64 N.J. 572, 319 A.2d 220 (1974).

<sup>120</sup> *Flamma*, 118 N.J. at 587-88, 573 A.2d at 160.

and with the ethics principles and applications flowing from our many cases, depends on the nature of the problem, the nature of the rule, and our own good judgment. We assume that bright line *per se* rules will be found more often in cases affecting public employment and public employees than in those cases limited strictly to private practices.<sup>121</sup>

All of this might seem to suggest that New Jersey should retain its appearance of impropriety rule in contexts involving the public interest. It seems clear that the New Jersey Supreme Court, in its supervisory authority over the state bar, is generally satisfied with the three decades of decisions that it and the Advisory Committee have developed in these contexts. Essentially, the regulation of conflicts of interest in contexts affecting the public interest has become the work of the "common law." The courts and the Advisory Committee use the appearance of impropriety rule as a basis for "making it up as they go along," guided by considerations that apply uniquely where the public has a stake in the quality of the representation. There is justification for doing so,<sup>122</sup> as long as lawyers are not punished based on rulings that they could not anticipate. And, for the most part, in this context, they are not. Lawyers in public employ—those to whom the appearance of impropriety rule chiefly applies—are rarely, if ever, the subject of disciplinary proceedings or malpractice actions brought by public agency clients based on conflicts of interest. At the same time, to repeal the rule altogether, without substituting rules codifying the prior decisions, might well be understood to mean that the principles underlying the rule no longer hold sway.<sup>123</sup>

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<sup>121</sup> *In re* Advisory Comm. on Prof'l Ethics Opinion 621, 128 N.J. 577, 602, 608 A.2d 880, 892 (1992) (citations omitted).

<sup>122</sup> See Bruce A. Green, *Doe v. Federal Grievance Committee: On the Interpretation of Ethical Rules*, 55 BROOK. L. REV. 485, 557-58 (1989) (arguing that interpreting ethical rules in "common law" fashion is preferable to interpreting them—as if they were statutes—in light of the drafters' intent).

<sup>123</sup> In some states that shifted to the Model Rules, public confidence in the integrity of public decision making ceased to be weighed as heavily in assessing lawyers' conduct, with the result that the conflict-of-interest rules came to apply essentially the same way to lawyers in the public employ as to privately retained lawyers. For example, a 1993 Arizona ethics opinion concluded, under Rule 1.7(b), that a state legislator is not categorically barred from engaging in lobbying activities before the legislature on behalf of private clients. See *Ariz. Comm. on Ethics, Op. 93-09* (1993). Whether or not the lawyer-legislator may lobby on behalf of a particular client depends on a case-by-case determination on whether the representation would be affected by his or her responsibilities to the public or to his or her constituency. This was a situation in which, under the appearance of impropriety standard, the legislator might have been categorically forbidden from lobbying on behalf of private clients because of the need to protect public confidence in the integrity of the legislature. But the Committee underscored that this consideration

B. *Why the Rule is Unnecessary Elsewhere*

While New Jersey may be justified in retaining the appearance of impropriety rule in contexts involving the public interest, this does not mean that the ABA should revive the rule and urge it upon the states that previously eliminated it pursuant to the example set by the Model Rules. Outside New Jersey, even without the rule, courts and ethics committees have remained free to interpret the conflict-of-interest rules and other disciplinary provisions in light of the principles that the appearance of impropriety standard embodies: that, in this category of cases, lawyers should be held to a particularly high standard, that the public's confidence in the integrity of public decision making should be promoted, that earlier opinions under the appearance of impropriety standard remain authoritative, and that categorical rules may be appropriate. Departing from the strict language of the disciplinary rules, courts and ethics committees have shown that they can reach the same results as would have been reached under the appearance of impropriety test.<sup>124</sup>

For example, a 1993 Alabama ethics opinion, holding that a lawyer who serves as a hearing officer for a state agency may not represent private clients before that same agency, relied on a rule forbidding a lawyer from "[s]tat[ing] or imply[ing] an ability to influence improperly a government agency or official."<sup>125</sup> The ethics committee relied on an earlier opinion of a neighboring state's ethics committee applying the now-discarded appearance of impropriety standard in a similar case, gave weight to the need to avoid "[t]he

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would no longer be weighed. The committee explained:

Our analysis must be limited to the effect on the representation of the client as regulated by the lawyer ethical rules, not by whether there is an appearance of impropriety from the perspective of the public or the legislator's constituency. That ethical tenet, like the provisions imposing ethical restrictions on public officers and officials, is no longer part of the ethical code governing the conduct of Arizona attorneys. Thus, under the existing ethical rules, it is for the legislature, not the State Bar, to address any perceived appearance of impropriety arising out of a lawyer-legislator lobbying situation.

*Id.* Other opinions of the same committee have indicated, however, that concern about the appearance of impropriety retains some significance in evaluating the conduct of lawyers in public employ, even if its significance has been reduced. See Ariz. Comm. on Ethics and Professional Responsibility, Op. 93-07 (1993); Ariz. Comm. on Ethics, Op. 93-08 (1993).

<sup>124</sup> See generally Richard H. Underwood, *Part-Time Prosecutors and Conflicts of Interest: A Survey and Some Proposals*, 81 KY. L. REV. 1, 20 (1992-93) ("[M]ost of the case law and opinions that seem to be propped up by the 'appearances' rationale are still good law because they are, on closer examination, supported by more substantial stuff.").

<sup>125</sup> Ala. Comm. on Ethics and Professional Responsibility, Op. 93-12 (1993).

possible perception of favoritism or influence," and, in light of these considerations, announced a categorical, broadly sweeping prohibition.<sup>126</sup> This approach was adopted notwithstanding the committee's acknowledgment, in a different context involving the representation of private clients, that the appearance of impropriety standard no longer applies.<sup>127</sup> Indeed, another state bar's ethics committee has explicitly acknowledged that, notwithstanding the elimination of the appearance of impropriety standard, the standard survives as an interpretive principle in cases involving the public interest.<sup>128</sup>

Thus, outside New Jersey, an appearance of impropriety rule would mark a break from precedent that is unnecessary, because, in cases where the public has a stake, the interpretive principles embodied by the rule can be employed even in the rule's absence. This is not to say, however, that the Model Rules should not give greater recognition to the particular need for probity on the part of lawyers in public employ (with the possible exception of prosecutors, who are already subject to a distinct rule). But given its checkered past, reintroducing the appearance of impropriety rule is not the optimal way to do so. Rather, as Charles Wolfram has suggested, the principles previously developed under the appearance of impropriety standard should be employed in standards and rules "that are focused, relatively precise, and much less likely to lead to ad hoc results than would a general-appearances test."<sup>129</sup>

### III. THE APPEARANCE OF IMPROPRIETY STANDARD IN CASES INVOLVING THE INTERESTS OF PRIVATE CLIENTS

#### A. *The Expansion of the Rule in New Jersey*

The Debevoise Committee addressed the appearance of impropriety test exclusively as it had been applied to government lawyers and did not acknowledge the comparatively few cases in which the test was applied to lawyers representing private clients in matters of private concern. This may have been because, prior to the adoption

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<sup>126</sup> *See id.*

<sup>127</sup> Ala. Comm. on Ethics and Professional Responsibility, Op. 94-13 (1994).

<sup>128</sup> *See* Conn. Comm. on Ethics and Professional Responsibility, Informal Op. 95-10 (1995); *see also* Conn. Comm. on Ethics and Professional Responsibility, Informal Op. 96-17 (1996).

<sup>129</sup> WOLFRAM, *supra* note 12, at 322; Nolan, *supra* note 87, at 77-78. For an argument that specific, contextual rules of ethics should be favored over general, universal ones, see Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?*, 64 GEO. WASH. L. REV. 460 (1996).

of the Rules of Professional Conduct, the appearance of impropriety test was generally perceived as a test to be used in cases involving government lawyers, although, as noted above, it had been employed in some cases involving the representation of private clients as well.<sup>150</sup> This may also have been because, if the Model Rules were adopted as proposed, there would be no need to use the test to compensate for the two obvious deficiencies in the Code as it applied to conflicts of interest in private representation.<sup>151</sup>

In rejecting the Debevoise Committee's recommendation, however, the New Jersey Supreme Court adopted a provision that was not limited to cases involving the public interest. On the contrary, Rule 1.7(c)(2) preserved "the effect of case law or ethics opinions to the effect that . . . multiple representation is not permissible . . . in those situations in which an ordinary knowledgeable citizen acquainted with the facts would conclude that the multiple representation poses substantial risk of disservice to either the public interest *or the interest of one of the clients.*"<sup>152</sup>

On its face, the rule placed two significant limits on the use of the appearance of impropriety test, but both came to be ignored. Although by its plain terms Rule 1.7(c)(2) applied only in cases involving "multiple representation," the rule has been invoked to address other conflicts of interest.<sup>153</sup> Furthermore, although the rule did no more than preserve "the effect of case law and ethics opinions" applying the appearance of impropriety test to "certain cases or situations," the rule has been thought to preserve not only the holdings of prior case law, but the appearance of impropriety test itself. As presently conceived, the overriding concern of the appearance of impropriety test has evolved from its original focus on confidence in government to the more nebulous concept of confidence in the bar.<sup>154</sup> This has led to the unnecessary reliance upon an ad hoc ap-

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<sup>150</sup> See, e.g., *Perillo v. Advisory Comm. on Prof'l Ethics*, 83 N.J. 366, 374 n.1, 416 A.2d 801, 805 n.1 (1980) (quoting NEW JERSEY STATE BAR ASSOCIATION, SPECIAL COMMITTEE'S REPORT that "recommended further explication 'with respect to conflicts of interest on the part of lawyers representing governmental agencies[,] noting that '[i]n such situations, the term appearance of impropriety might be more appropriately considered an ethical consideration than a 'rubric''").

<sup>151</sup> See *supra* note 90 and accompanying text.

<sup>152</sup> N.J. RULES OF PROFESSIONAL CONDUCT Rule 1.7(c)(2) (1995) (emphasis added).

<sup>153</sup> See, e.g., *In re Tenure Hearing*, 103 N.J. 548, 511 A.2d 1171 (1986).

<sup>154</sup> See, e.g., *In re Inquiry to the Advisory Comm.*, No. 58-91(B), 130 N.J. 431, 434, 616 A.2d 1290, 1291 (1992) ("Our overriding concern is for maintaining public confidence in the integrity of the legal profession."); *In re Petition for Review of Opinion No. 569*, 103 N.J. 325, 330, 511 A.2d 119, 121 (1986) ("The 'appearance'

pearance of impropriety analysis, even in those cases that might be decided by other, more precise, and less restrictive rules.

Two successive opinions dealing with a lawyer's representation of opposing counsel are illustrative. The question before the Advisory Committee was whether Lawyer A may represent Lawyer B in a personal injury matter while, with the consent of the respective clients, the two lawyers, or their law firms, represent opposing sides in an unrelated contract matter. In *Opinion 678*,<sup>155</sup> the Committee acknowledged that the representation would be permissible under Rule 1.7(b), as other ethics tribunals had previously found. The Committee concluded, however, that the inquiry "should be analyzed under RPC 1.7(c)(2), which pertains to situations creating 'an appearance of impropriety.'"<sup>156</sup> Under this standard, it found that the representation was categorically forbidden.

In reaching this conclusion, *Opinion 678* first strung together quotations from prior advisory opinions and judicial decisions applying the appearance of impropriety standard to lawyers for public entities and in other cases involving the public interest. The principal import of these quotations was that (a) the doctrine applies even in some cases where no actual harm would occur, (b) the doctrine promotes public confidence in the integrity of the legal profession, and (c) the doctrine calls for viewing the proposed representation from the perspective of the public, not the client.

The Committee next identified possible harms that might appear to occur as a result of the representation. On one hand, the lawyer representing opposing counsel might litigate less zealously in the contract action out of sympathy for the other lawyer, who is a client in the personal injury action. On the other hand, the lawyer-client might litigate less zealously in the contract action out of similar regard for his counterpart.

Finally, the Committee noted that it had dealt with a similar question in an earlier opinion dealing with a lawyer's representation of a prosecutor. The Committee held that the earlier opinion was

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doctrine is intended not to prevent any actual conflicts of interest but to bolster the public's confidence in the integrity of the legal profession."); *In re Weinroth*, 100 N.J. 343, 349, 495 A.2d 417, 421 (1985) (stating:

Our precedent has always emphasized that not only impropriety but 'even the appearance of impropriety' that casts doubt upon the integrity of the legal process must be avoided . . . . Thus, when it is evident that an informed and concerned person would find the attorney's relationship improper, an attorney must avoid the conduct that creates such an impression.).

<sup>155</sup> N.J. Advisory Comm. on Professional Ethics, Op. 678 (1994).

<sup>156</sup> *Id.*

indistinguishable, even though the assistant prosecutor was a public employee and his employer was a public entity that, under conflict-of-interest doctrine, could not consent to the proposed representation.

Thereafter, in *Opinion 679*,<sup>137</sup> the Advisory Committee issued a new opinion that superseded *Opinion 678*. Again, the Committee began by acknowledging that the representation was permissible under Rule 1.7(b). The Committee found that, even though the inquiring lawyer's representation of a party to the contract action could be "materially limited" by his representation of the opposing lawyer in an unrelated personal injury action, the lawyer "reasonably believe[d] that representation will not be adversely affected."<sup>138</sup> Further, both clients were said to have consented after full disclosure and consultation—the requirements of which were elaborated in the opinion. Again, however, the Committee found that this "does not end the inquiry," because "[u]nder RPC 1.7(c), it is necessary to weigh the perceptions of 'ordinary knowledgeable citizens' as to whether there is an 'appearance of impropriety.'"<sup>139</sup> The opinion supported this proposition with a string of citations to seven prior supreme court decisions, some calling for "a case-by-case, fact-sensitive analysis," and some upholding per se rules—but all dealing with lawyers for public agencies.<sup>140</sup>

The Committee concluded—without explanation and contrary to its previous opinion—that the circumstances called for a case-by-case, rather than *per se*, approach. This said, the Committee identified what it believed to be "the key factors which an attorney must weigh in light of the particular facts, in determining what an ordinary knowledgeable citizen would conclude."<sup>141</sup> These seven factors were (1) the non-lawyer client's level of sophistication, (2) whether the non-lawyer client received independent legal advice in determining whether to consent, (3) whether the lawyer-client was represented first or had a prior relationship with the lawyer representing him, (4) whether the lawyer-client was represented in a highly specialized matter, (5) whether the representation of the non-lawyer client had just begun or was near conclusion, (6) whether the two representations were by the same lawyer or by different lawyers in the

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<sup>137</sup> N.J. Advisory Comm. on Professional Ethics, Op. 679 (1995).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* (citations omitted).

<sup>141</sup> *Id.*



same firm, and (7) whether one of the parties is a public entity.<sup>142</sup> The opinion provided no guidance as to the relative weight or significance of these factors, but simply concluded that "if evaluation of the various applicable factors leave counsel with doubt as to proceeding with the new representation of adversary counsel, such representation must be declined."<sup>143</sup>

*B. The Superiority of Less Vague Rules*

The specific conflict-of-interest rules provide significantly more guidance, and more appropriate guidance, than the appearance of impropriety test. A comparison of how these rules would apply to the situation in *Opinions 678* and *679* serves as an illustration. As discussed above, the question before the Advisory Committee was essentially the following: If Lawyer A represents Lawyer B in a matter, may these lawyers or their firms represent opposing parties in unrelated litigation? The Committee's response to this question in *Opinion 678* represented a false start. Its response in *Opinion 679* was more extensive than most of its opinions dealing with conflicts of interest, as well as, evidently, the product of considered reflection. Thus, *Opinion 679* might fairly be viewed as an exemplar of the use of the appearance of impropriety standard.

As the Advisory Committee recognized, the specifically applicable conflict rule was Rule 1.7(b). Its framework is consistent with the counterpart provisions of the Code of Professional Responsibility as well as with contemporary understandings within the legal profession nationally.<sup>144</sup> Rule 1.7(b) identifies three categories of cases. In the first, there are no restrictions because, objectively, it is not a situation in which "the representation of the client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests."<sup>145</sup> In the second category of cases, where in theory there is a risk that the representation will be affected, but as a practical matter "the lawyer reasonably believes that the representation will not be adversely affected," the lawyer may undertake the representation as long as "the client consents after a full disclosure of the circumstances and consultation."<sup>146</sup> Finally, in the most serious cases, where, as an objective matter, it would not be

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<sup>142</sup> *See id.*

<sup>143</sup> N.J. Advisory Comm. on Professional Ethics, Op. 679 (1995).

<sup>144</sup> *See, e.g.*, RESTATEMENT OF THE LAW, THE LAW GOVERNING LAWYERS § 201 (Proposed Final Draft No. 1, 1996) [hereinafter RESTATEMENT].

<sup>145</sup> N.J. RULES OF PROFESSIONAL CONDUCT RULE 1.7(b) (1995).

<sup>146</sup> *Id.*

reasonable for the lawyer to believe that the representation will not be adversely affected or where the lawyer does not personally hold this belief, the lawyer may not undertake the representation even with client consent.

The framework of Rule 1.7(b), although general, provides a reasonable amount of guidance by requiring a lawyer objectively to identify precisely how the lawyer's responsibilities to one client or the lawyer's own interests would tend to harm the representation of another client, how significant the harm would be, and how probable it is that the harm will occur. Further, the framework is analytically sound. It draws appropriate distinctions in light of competing considerations. While the interest in protecting clients and ensuring that they are served with undivided loyalty might favor the most restrictive approach, other considerations argue against restrictions in cases where, despite a theoretical problem, one can say with a reasonable degree of confidence that the client will be properly served.<sup>147</sup>

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<sup>147</sup> See RESTATEMENT, *supra* note 144, § 201 cmt., stating that avoiding conflicts of interest can impose significant costs on lawyers and clients. Prohibition of conflicts of interest should therefore be no broader than necessary. First, conflict avoidance can make representation more expensive. To the extent that conflict of interest rules prevent multiple clients from being represented by a single lawyer, one or both clients will be required to find other lawyers. That might entail uncertainty concerning the successor lawyers' qualifications, usually additional cost, and the inconvenience of separate representation. In matters in which individual claims are small, representation of multiple claimants might be required if the claims are to be considered at all. Second, limitations imposed by conflict rules can interfere with client expectations. At the very least, one of the clients might be deprived of the services of a lawyer whom the client had a particular reason to retain, perhaps on the basis of a long-time association with the lawyer. In some communities or fields of practice there might be no lawyer who is perfectly conflict-free. Third, obtaining informed consent to conflicted representation might compromise important interests. . . . [C]onsent to a conflict of interest requires that each affected client give consent based on adequate information. The process of obtaining informed consent is not only potentially time-consuming; it might also be impractical because it would require the disclosure of information that the clients would prefer not to have disclosed, for example, the subject matter about which they have consulted the lawyer. Fourth, conflicts prohibitions interfere with lawyers' own freedom to practice according to their own best judgment of appropriate professional behavior. It is appropriate to give significant weight to the freedom and professionalism of lawyers in the formulation of legal rules governing conflicts.

Finally, Rule 1.7(b) fully takes account of those aspects of the appearance of impropriety standard that would be relevant in cases involving private matters. The first is the distinction between so-called actual and potential conflicts.<sup>148</sup> Rule 1.7(b) in effect proscribes potential as well as actual conflicts—its reach is not limited to cases in which a lawyer *necessarily* will serve the client disloyally. Second, the rule recognizes that lawyers may not assess the propriety of the representation based exclusively on their subjective judgment about whether they will be able to render adequate representation. It requires that the lawyer's assessment be objectively reasonable. Thus, the rule in effect employs the perspective of an objective and knowledgeable onlooker. Third, Rule 1.7(b) makes distinctions that take account of the interest in preserving public confidence in the legal profession, while also giving weight to competing interests. Finally, the rule allows for categorical prohibitions in situations in which there is an unacceptable risk that the lawyer will serve with divided loyalty or otherwise render inadequate representation. Outside New Jersey, authorities have imposed such restrictions under Rule 1.7 or its predecessor, Rule 5-105, in many situations where it would be unreasonable to conclude that the representation will be unimpaired.<sup>149</sup>

Under Rule 1.7(b) (or its predecessor, DR 5-105 of the Model Code), one would begin by assessing the likelihood that, when opposing lawyers (or other members of their firms) are in a lawyer-client relationship, one of the opposing lawyers will “pull his punches” in the litigation in order to avoid offending the other lawyer. Because the likelihood this impropriety will occur depends on the circumstances, one would attempt to identify factors that would make this occurrence more or less likely. Depending on the likelihood, a lawyer either may undertake the representation without dis-

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<sup>148</sup> As Monroe Freedman has noted:

[I]t is a mistake to talk about conflicts of interest as “actual” and “potential.” Properly understood, conflicts of interest are always potential. The purposes of rules against them is preventive—to forestall the occurrence of substantive improprieties, such as a breach of confidentiality or some other act of disloyalty to a client. Thus, a lawyer has a conflict whenever there is a reasonable possibility that the lawyer's loyalty to one client might be impaired sometime down the line by the lawyer's obligations to another client or by the lawyer's personal interests.

Monroe Freedman, *You CAN Do It, But You Shouldn't*, LEGAL TIMES, Dec. 1992, at 43.

<sup>149</sup> See, e.g., Association of the Bar of the City of N.Y., Op. 619 (1991); N.Y. State Comm. on Ethics, Op. 595 (1988).

closure, may do so with consent after consultation, or may not do so at all.

An illustration of this approach is *Opinion 1996-3* of the Association of the Bar of the City of New York.<sup>150</sup> This opinion recognizes that the critical question is whether one of the lawyers will serve less zealously to avoid offending the opposing counsel and that the answer depends on the facts. Among other things, it provides both an example of where consent should not be required, because "it is inconceivable that the independent professional judgment" of the lawyer will be diminished, and an example of where the representation should be improper even with consent because it is difficult to see how the lawyer's independent judgment would not be affected.<sup>151</sup> The opinion also provides factors to assist the lawyer in determining where in the spectrum a particular case falls. More recently, the ABA's ethics committee adopted a similar analysis.<sup>152</sup>

In contrast, *Opinion 679* lists various factors of doubtful relevance to the question of whether one of the lawyers is likely to disserve his client.<sup>153</sup> For example, the first two factors are "the level of sophistication of the non-lawyer client who gave consent to the dual representation" and "whether the non-lawyer client received independent legal advice in determining whether to consent."<sup>154</sup> While these considerations are relevant to whether the client's consent is voluntary and adequately informed, they have little, if any, bearing on whether the lawyer will serve less zealously out of regard for opposing counsel.

The fourth factor—"whether the attorney client is seeking representation in a highly specialized matter, for which the pool of experienced New Jersey attorneys is quite small"<sup>155</sup>—seems equally irrelevant. The Committee's apparent premise is that, as a matter of policy, the rule ought to be applied less restrictively in this situation, because otherwise lawyers who need legal assistance will have diffi-

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<sup>150</sup> Association of the Bar of the City of N.Y., Op. 1996-3 (1996).

<sup>151</sup> *See id.*

<sup>152</sup> *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 97-406 (1997).

<sup>153</sup> A different set of criticisms of this opinion is contained in Elisabeth E. Boyan, *Reconsidering (Again) Conflict of Interest Arising From Lawyers Representing Lawyers in New Jersey*, 9 GEO. J. LEGAL ETHICS 1377 (1996). The author contends that most of the seven factors identified in *Opinion 679* are flawed, the opinion provides no guidance as to the relevant weight of the factors, and the opinion is unduly restrictive in requiring a lawyer to refuse the representation if there is any doubt whether an appearance of impropriety exists.

<sup>154</sup> N.J. Advisory Comm. on Professional Ethics, Op. 679 (1995).

<sup>155</sup> *Id.*

culty obtaining it. Yet, if one focuses on the risk to Lawyer B's client, this factor cuts the other way. If it would be especially difficult for Lawyer B to find other counsel, he will be especially careful to avoid offending Lawyer A.

On the other hand, if the question is one of policy, this factor fails to take account of the broader interests in encouraging lawyers to seek counsel outside their own law firms and in enabling lawyers to retain counsel of choice. To give just one example: a lawyer who serves in a fiduciary capacity—e.g., as the administrator of an estate—must often retain a lawyer to represent him in that capacity. The contemporary literature recognizes that conflicts of interest are more likely to arise when the lawyer-fiduciary (e.g., the administrator of an estate) retains a lawyer within his own law firm to represent him or represents himself.<sup>156</sup> *Opinion 679*, however, encourages the lawyer to do precisely that.

At the same time, because it focused on the appearance, rather than the likelihood, of impropriety, *Opinion 679* failed to identify factors that *are* important. The New York City opinion gives several obvious examples, including the nature of the work being performed by the lawyers for their respective clients and the relative importance of the representations to the respective lawyers or firms. The opinion gives an extreme example illustrating the importance of these factors: Lawyer P represents Lawyer Q and receives approximately ten percent of his income from that representation; Lawyer P is then retained by a litigant who has discharged prior counsel for refusing to seek personal sanctions against the opposing lawyer, Lawyer Q. Here, the Committee concluded, Lawyer P's representation is so likely to be influenced by concerns for Lawyer Q that the new client should not be represented even with client consent.

### C. *Deficiencies of the Appearance of Impropriety Test*

As discussed below, *Opinion 679* illustrates two additional problems with the appearance of impropriety test when it is applied outside the traditional contexts implicating the public interest. First, the rule is unduly vague and therefore provides insufficient guidance. Second, the rule is both incoherent standing alone and, when

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<sup>156</sup> See Edward D. Spurgeon & Mary Jane Ciccarello, *The Lawyer in Other Fiduciary Roles: Policy and Ethical Considerations*, 62 *FORDHAM L. REV.* 1357, 1386-98 (1994); see also *Recommendations of the Conference on Ethical Issues in Representing Older Clients*, 62 *FORDHAM L. REV.* 989, 999 (1994) (noting that conflicts may arise when the lawyer-fiduciary hires his or her firm or serves in the additional role as his or her own lawyer).

included with conflict rules taking a different approach, makes New Jersey's conflict-of-interest law as a whole incoherent.

### 1. The Appearance of Impropriety Test is Unduly Vague

Rules of professional conduct are meant to provide guidance to lawyers about the propriety of their proposed conduct in the countless situations in which no advisory opinion or judicial decision addresses the precise situation. Thus, it is important for the rules to provide clear guidance—not leave lawyers confused. The appearance of impropriety standard, however, provides inadequate guidance in contexts involving the representation of private parties because it is so vague.

In cases in which other rules, such as Rules 1.7(b) or 1.9(a)(1), are applicable, the appearance of impropriety test simply substitutes an unfocused approach for a focused analytic framework that is already available. The impressionistic nature of the standard is captured in the following characterization:

Whether a conflict creates an appearance of impropriety depends on the facts of each case . . . . An appearance of impropriety 'must be something more than a fanciful possibility. It must have some reasonable basis.' . . . Sometimes the line between conduct that appears to be proper or improper is hazy. Where there is no conflict in fact, an appearance can sometimes shade into the illusion of a conflict.<sup>157</sup>

Under this test, as thus characterized, lawyers and decisionmakers are called on to draw a line, on a case-by-case basis, between cases involving an appearance of impropriety and those involving a mere illusion of a conflict.

The test embodies no limiting principles. Nothing in the test suggests where to draw the line, for example, between representations that are permissible with client consent and those that are forbidden even with client consent. Likewise, nothing in the test indicates when a per se rule should be employed and when an ad hoc test is preferable. *Opinions 678* and *679* reflected both infirmities. In the first opinion, the Committee held that even if all clients consented after disclosure and consultation, a lawyer could never represent opposing counsel. In the second opinion, the Committee held that sometimes consent would suffice and sometimes it would not, but the opinion could do little more than list factors of questionable

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<sup>157</sup> Ross v. Canino, 93 N.J. 402, 409, 461 A.2d 585, 589 (1983) (quoting *In re Prof'l Ethics Opinion 452*, 87 N.J. 45, 50, 432 A.2d 829, 832 (1981)).

significance to guide the lawyer in deciding where to draw the line in a given case.

Further, the notion of adopting the perspective of "an ordinary knowledgeable citizen acquainted with the facts" adds nothing of substance to the analysis, other than serving as a metaphor for the requirement that the situation be viewed objectively. The hypothetical ordinary knowledgeable citizen is a fiction. As the court recognized in *In re Advisory Committee on Professional Ethics Opinion 621*,<sup>158</sup> there is no empirical basis for imputing any particular perception to the public.<sup>159</sup> One applying the appearance of impropriety standard must, therefore, draw on his or her own imagination to determine whether the knowledgeable citizen would perceive an "appearance of impropriety," on one hand, or a mere "illusion of a conflict," on the other.

Even in cases in which specific rules, such as Rules 1.7(b) and 1.9(a)(1), may seem inadequate to address the situation, invoking the appearance of impropriety test is less desirable than either adopting a restrictive interpretation of the existing conflict-of-interest rules or developing a more precise alternative approach. For example, in *Dewey v. R.J. Reynolds*,<sup>160</sup> the court invoked the appearance of impropriety test to address whether a lawyer who had moved from the defendant's law firm to the plaintiff's law firm had formerly represented the defendant. That the lawyer had done so would have been a foregone conclusion under any test, since he had billed time to the client, performed legal research, and discussed the case with others.<sup>161</sup> The appearance of impropriety test added nothing. It had

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<sup>158</sup> 128 N.J. 577, 608 A.2d 880 (1992).

<sup>159</sup> In *In re Opinion 621*, the question was whether a part-time legislative aide may represent private clients before government agencies other than those connected with the legislative branch. The Advisory Committee's reasoning, as described by the court, was that "whether the State is in fact the legislative aid's client, a knowledgeable member of the public might reasonably think it is, simply because the legislative aide is a lawyer working for the State." *Id.* at 597, 608 A.2d at 890. The court rejected this reasoning, finding that

[i]t depends completely on the assertion of a factual proposition not evident: that the public would view a part-time legislative aide as a lawyer hired by the State to provide legal representation for the State, its client; and further, that the public would perceive this part-time legislative aide as having not just the agency or board or bureau with which he or she is connected, but the entire State government, as his or her client.

*Id.* at 597-98, 608 A.2d at 890. But, of course, this lack of evidence exists in every case.

<sup>160</sup> 109 N.J. 201, 536 A.2d 243 (1988).

<sup>161</sup> See *id.* at 216, 536 A.2d at 250.

the effect, however, of discouraging the court from offering an explanation providing more substantial guidance to the decision of future cases.

By using this vague test, rather than a more precise one, several unfortunate consequences result. As noted, New Jersey lawyers receive less guidance from the Rules of Professional Conduct and authorities interpreting them. Additionally, in situations in which New Jersey opinions do not completely resolve the question, New Jersey lawyers cannot, with sufficient confidence, turn for guidance to authorities outside the state. This is a problem, in part, because lawyers in private practice have traditionally been more likely targets of disciplinary proceedings than lawyers in public employ. Even if disciplinary authorities could be counted on to exercise discretion in contexts where the appropriate standard of conduct is unclear, adversaries and disgruntled former clients cannot be expected to do the same. In litigation, the vagueness of the standard invites parties to file disqualification motions for tactical reasons. The burden on the lawyer who allegedly failed to "avoid an appearance of impropriety" will, in part, be shared by the court, which will have to inquire into the lawyer's conduct. Even in cases where there is clearly no reason to believe that a lawyer will act disloyally or breach client confidences, the court will have to ascertain whether there would be an appearance of impropriety or whether a possible concern is merely illusory.<sup>162</sup> Even more ominously, conduct that is improper under the appearance of impropriety standard might be advanced by a dissatisfied litigant as the basis of a malpractice action. Even though the underlying harm is that the conduct "looked bad" from the perspective of a hypothetical observer, a former client who was dissatisfied with the result of the representation may argue that the lawyer's apparently improper conduct was to blame.

## 2. The Incoherence of the Rules and Opinions

Employing the appearance of impropriety standard in contexts involving the representation of private parties makes the New Jersey opinions, as well as the rules themselves, appear to be incoherent in three respects.

First, the applicable doctrine appears to be incoherent insofar as it is to be applied to cases involving exclusively private interests in

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<sup>162</sup> In a prior article, I argued that disqualification orders should be issued only to remedy concrete harms, and that otherwise, personal sanctions are the appropriate response to violations of the applicable conflict rules. See Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 *FORDHAM L. REV.* 71 (1996).



the same manner as it is applied to cases involving public interests. As discussed above, the appearance of impropriety test calls for scrutinizing representation by government lawyers especially closely and under a more restrictive standard than the one applied to other lawyers. It makes no sense to say that government lawyers will be subject to greater restrictions under an appearance of impropriety test, but then to judge lawyers for private clients under the same test. This is precisely what the Advisory Committee seemed to do, however, in *Opinion 678*, first in reciting general pronouncements from opinions dealing with government lawyers and then in holding that the situation in a prior opinion dealing with government lawyers was indistinguishable from the situation before it. The Committee seemed to do the same in *Opinion 679*, which cited four prior opinions dealing with lawyers for public entities to illustrate the “case-by-case, fact-sensitive analysis” that it elected to undertake instead of a per se approach (which it illustrated with three prior opinions, also dealing with lawyers for private entities).

Second, the Rules of Professional Conduct themselves appear to be internally inconsistent insofar as both Rule 1.7(b) and the more restrictive appearance of impropriety test simultaneously apply in the same class of cases. As noted, Rule 1.7(b) explicitly provides that representation may be undertaken with client consent in cases in which, at least as understood by the Advisory Committee, the representation would nevertheless involve an “appearance of impropriety.” *Advisory Opinions 678* and *679* illustrate the point. In these opinions, the Committee acknowledged that, under Rule 1.7(b), a lawyer may represent opposing counsel with client consent. Nonetheless, the Committee held that a lawyer was forbidden from undertaking the representation—categorically in the first opinion, potentially in the second opinion—under Rule 1.7(c). In future cases, not addressed by the Advisory Committee, a lawyer seeking guidance about the propriety of a professional representation will encounter inconsistent rules.

Finally, the appearance of impropriety doctrine, insofar as it is read (as the Advisory Committee reads it) to be more restrictive than Rule 1.7(b), is internally incoherent. The premise is that, in some situations where the representation is proper under Rule 1.7(b), a reasonably informed member of the public would nevertheless perceive an impropriety. Further, the impropriety in cases involving private matters would be that the lawyer would fail adequately to fulfill his responsibilities to his client. It is hard to see how an informed member of the public might perceive this impropriety at the same time that the lawyer complies with Rule 1.7(b). Suppose that, fully in

accordance with the applicable rules of professional conduct, a lawyer undertakes to represent a client after concluding objectively that this is not a situation in which "the representation of the client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests."<sup>163</sup> Or, suppose that, fully in accordance with the applicable rules of professional conduct, a lawyer undertakes to represent a client after concluding objectively that "the representation will not be adversely affected" and obtaining the consent of the client after full disclosure and consultation.<sup>164</sup> In these situations, it would be unreasonable for an informed member of the public to perceive any impropriety in allowing a competent client to select counsel with full awareness of the theoretical, objectively minimal risk that the lawyer's representation will be compromised. Further, the rules should not be structured to satisfy unreasonable hypothetical observers.

As long as the lawyer complies with the conflict-of-interest rules and these rules are reasonable—as Rules 1.7(b) and 1.9(a)(1) happen to be—the ordinary informed member of the public should be satisfied with the integrity of the profession. There is certainly nothing to suggest otherwise in the experience of the jurisdictions that employ Rules 1.7 and 1.9 without the appearance of impropriety test. Indeed, it might be argued that New Jersey's more restrictive approach simply encourages the public to lack confidence in the integrity of the bar. The premise of this test is, after all, that the public is entitled to mistrust lawyers who act in conformity with the conflict-of-interest rules applicable in every other state, and that a more restrictive approach is therefore necessary. Yet, essential to the very concept of law as a profession rather than a business is that lawyers, as professionals, can be trusted to serve their clients loyally and zealously and to turn down clients where they are unable to meet these obligations. Thus, as noted in the draft *Restatement*, "[i]t is appropriate to give significant weight to the . . . professionalism of lawyers in the formulation of legal rules governing conflicts."<sup>165</sup>

#### IV. CONCLUSION

Early in its life in the law, the principle that lawyers should avoid the appearance of impropriety was simply an exhortation in an otherwise undistinguished bar association ethics opinion directed spe-

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<sup>163</sup> NEW JERSEY RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1984).

<sup>164</sup> *Id.*

<sup>165</sup> RESTATEMENT, *supra* note 144, § 201 cmt.

cifically at lawyers in public employ. It was intended as a moral or prudential principle, not a legally enforceable norm. Indeed, the opinion containing this exhortation interpreted provisions of the ABA Canons that were themselves intended to serve, not as enforceable law, but as general guides to lawyers in the exercise of their individual discretion. From this humble beginning developed a rule applicable in New Jersey to all lawyers in all aspects of professional representation that may be enforced by disciplinary bodies and courts.

There is nothing to justify preserving the appearance of impropriety test in New Jersey (or reviving it elsewhere) insofar as it applies to lawyers representing private clients with respect to civil matters. Specific conflict-of-interest rules such as Rule 1.7(b), standing alone, appropriately address conflicts of interest in this context. To the extent that new problems are identified that are not adequately addressed by this and the other rules, new rules may be added to fill the gap or courts may issue ad hoc pronouncements toward this end. An appearance of impropriety test is a poor alternative. Standing alone, it provides little direction. Together with other, more specific rules, it makes ethics law incoherent.

It is tempting to attack the appearance of impropriety test wholesale, as critics did before the Model Rules eliminated it. But it is important to recognize, as some have,<sup>166</sup> the virtues of the rule in

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<sup>166</sup> See, e.g., Conn. Comm. on Ethics and Professional Responsibility, Formal Op. 37 (1995):

In emphasizing, to the extent we do, the appearance of conflicting interests as an important consideration, we are not unmindful of the subjectivity of—and frequent unfairness resulting from application of—a standard that ignores intent and purity of motives in favor of perceptions often born of misinformation or insufficient information. In private law situations, we would be reluctant to find conflict, if the only reason for doing so were the appearance of a conflict.

We deal here, however, with that aspect of a lawyer's life most open to the public and therefore most susceptible to popular judgment: the lawyer as public official. In that context, we do not write on a clean slate. Connecticut case law, at least since [1948], has been unequivocal in its insistence that public officials must not only be free of impropriety, but of the appearance of impropriety as well. This insistence upon satisfying public perceptions is based upon the premise that public confidence in the integrity and disinterestedness of public officials upon which all democratic governments must ultimately depend. Thus, in the area of the lawyer as public official, the dictates and counsel of the Code of Professional Responsibility are reinforced by the significant body of common law applying to public officials generally.

*Id.*; see also Conn. Comm. on Ethics and Professional Responsibility, Informal Op.

contexts especially implicating the public interest—that is, cases involving public employment, public employees, or criminal proceedings. In this context, where the appearance of impropriety test originated and has most fully been elaborated, the test stands for the propositions that lawyers for public agencies should be regulated more strictly than others, that categorical rules are more likely to be warranted in cases involving public lawyers, and that the integrity of government operations and of the criminal process should be considered in applying conflict-of-interest rules in this context. These propositions are appropriate ones, and the ABA ought to draft model provisions giving them effect. At least until it does so, New Jersey might plausibly retain the appearance of impropriety test in this limited context, rather than eliminate it altogether, in order to preserve as “common law” more than 200 published opinions to date that have applied the test to lawyers in public employ and in other contexts where the public has a direct stake.

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96-17 (1996) (“The appearance of impropriety standard had little useful application to lawyers engaged in the private sector.”); Conn. Comm. on Ethics and Professional Responsibility, Informal Op. 95-10 (1995) (quoting Conn. Comm. on Ethics and Professional Responsibility, Formal Op. 37).