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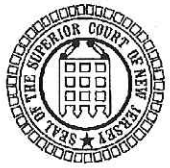
SUPERIOR COURT OF NEW JERSEY

ROBERT L. POLIFRONI, P.J.Cv.
CIVIL DIVISION



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May 5, 2016

Chief Justice Stuart Rabner
New Jersey Supreme Court
Richard Hughes Justice Complex
25 West Market Street
P.O. Box 023
Trenton, NJ 08625

RE: Proposed Revised Code of Judicial Conduct

Dear Chief Justice Rabner:

I humbly request you consider this belated comment on the proposed revised Code of Judicial Conduct, with my apologies for not submitting same during the timeframe recommended by the Director.

By way of early disclosure, I am not a proponent of the "appearance of propriety" standard, as I think it sabotages the goals it is designed to achieve. When engaged in the issues raised by the standard, it has been my experience the average person is left with the impression judges are easily corruptible and unduly influenced by personal factors. They remain skeptical of the ideal pursued, noting "where there's smoke, there's fire." I abstained from earlier comment, thinking same would not be productive.

However, I continue to be distracted by thoughts of the unintended consequences of the utilization of the standard set forth in Comment 3 to Rule 2.1:

> [3] With regard to the judicial conduct of a judge, the appearance of impropriety is conduct that would create in **ordinary knowledgeable persons** acquainted with the facts of a **perception** that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament or fitness to serve as a judge. (Emphasis added.)

In my view, this comment improperly displaces judicial responsibilities for the evaluation of judicial conduct, with adoption of a public opinion standard. The new litmus test for judicial conduct will be internet opinion polls, or social media comments. Litigation will become more

complicated and expensive, as advocates will seek to pursue a "voir dire" of judges handling their cases. Decisions regarding the status of the judge will become fertile grounds for appeal.

If this "ordinary person" standard regarding perceptions of impartiality is adopted, will a judge need to respond to inquiries about his/her sexual orientation when handling a same sex rights case? Does a judge need to disclose his/her religious affiliation to help ordinary people evaluate if he/she can impartially rule on cases involving termination of pregnancy or gender equality? Does the judge need to reveal if he/she follows a conservative, moderate, or liberal religious view? Is that information important for an ordinary person to evaluating a perception of impartiality? Does a judge handling a "puppy mill" case need to disclose if he/she owns a pet?

The following is a partial list of situations in the Civil Division the "ordinary person" would find problematic when it comes to the perception of a trial judge's impartiality, in no particular order:

- Sheriff Officer cases – We often adjudicate officers suing superiors, county, and the general public in cases involving their work or private activity. These officers have the primary responsibility for judges' security. Will the adversary party be treated fairly by the judge who depends on the same officers for personal security in the courthouse?

- Involvement of family members of colleagues who appear as attorneys/advocates – Would the "ordinary person" think there is a perception the trial/motion judge would favor the husband of a Supreme Court justice, the son of an Appellate Division judge, or the daughter of a colleague on the trial level in the same vicinage?

- Elected officials – State senators who are influential in the careers of judges are lawyers who appear in court, or control law firms who handle a volume of cases in the Civil Division. Other elected officials are parties to lawsuits. Does the ordinary person think they can be treated fairly if they are adverse parties? Last term I managed a civil matter between the elected County Executive and the former County Executive. Does the ordinary person have the perception I could not be fair because the reasonable assumption is I voted for one of them?

Judges live in society. They pay taxes, own/lease cars, have mortgages and other financial obligations, maintain home and car insurance, and are consumers. We have discount cards to chain drugstores and supermarkets. Yet we adjudicate cases that probably have more impact on our personal financial lives than the ownership of a "single share of stock." Most judges are in the Horizon health insurance system, and there is litigation challenging the new "tiered-system" created to "reduce costs to the consumer." Does the ordinary person think we should search to find a judge not in the Horizon system, i.e. a judge not paying 1/3 of the premium for the coverage? The Prudential Insurance Company is responsible for pension/deferred compensation programs at the Judiciary. When major litigation involves Prudential, does an ordinary person conclude we need to search to find a judge **not** in the retirement program, so as to avoid the perception of a lack of impartiality?

We have already seen personal interest challenges by lawyers and litigants to judges hearing cases, including a banking relationship (the judge had a line of credit at the bank); automobile ownership (Lemon Law case should not be handled by a judge who owns a German car); and the fan of a sports team. In the latter case, the law firm produced an internet poll establishing public opinion that the judge who is a Giants fan ought not to handle a case against the Giants. The movant produced a psychologist's report discussing the lack of objectivity of a sports fan. There was no internet poll as to whether the case should be assigned to a Jets, Eagles or Cowboys fan who – using the same logic – "hates" the Giants. Should we search for a judge who "hates" football?

The ordinary person is not one who should be making these evaluations, and a judicial review panel ought not be dependent upon an ordinary person's judgment of a perception.

In conclusion, my fear is the proposed standard will distract from the critical need to focus on the "robe" and not the person wearing it. See Rule 2.2. Our system depends on the integrity of the judge who is in the best position to determine if he/she can be fair and impartial, with input and support from judges in positions of management. When we lose that focus, and concentrate on the individual judge handling an individual case, we shake the foundation of trust necessary to the system.

Our ethics rules are often ambiguous and inconsistent. We come off as haughty when we disrespect family members who invite us to a reception after we swear in a family member as a municipal judge, because elected town officials will be present. Yet we sit through state legislators' speeches at judicial functions discussing salary and pension issues, and then see them at the reception after the swearing-in. People will lose respect for a system which does not comport with common sense.

For judges to earn respect, we need to be free to do the right thing, without looking over our shoulder, every day. And the concept we will be judged on an ordinary person's assessment of a perception of impropriety rather than on a knowledgeable judicial standard is difficult to accept.

Very truly yours,

Robert L. Polifroni, P.J.Cv.

RLP/len
cc: Hon. Glenn A. Grant, Acting Director, AOC
Hon. Bonnie J. Mizdol, A.J.S.C.