

NOTICE TO THE BAR

SUPREME COURT OF NEW JERSEY

ADMINISTRATIVE DETERMINATION of the Supreme Court of New Jersey
Re: E-82-98 In re: Administrative Hearing on RPC 1.7(c)(2)
[Appearance of Impropriety]

In April 1997, a group of eight New Jersey law firms submitted a proposal to the Supreme Court's Professional Responsibility Rules Committee (PRRC) that would eliminate the "appearance of impropriety" standard contained in RPC 1.7(c)(2). On August 22, 1997, the group supplemented its submission with a position paper containing the reports of several experts in the field of attorney ethics. Thereafter, on April 24, 1998, the PRRC held a public hearing during which it heard comments from representatives of the original inquiring group, as well as from several other interested parties.

In December 1998, the PRRC submitted a report to the Court in which it recommended the elimination of the "appearance of impropriety" standard contained in RPC 1.7(c)(2), at least in respect of private civil litigation. The Court invited representatives of the original group and others to address the PRRC's recommendations during an administrative hearing that was held on November 29, 1999.

At the hearing, the Court considered the arguments in favor of modification of the Rule and in opposition to modification of the Rule.

Among the factors that the Court considered in its deliberations subsequent to the hearing were the concerns expressed that attorneys are currently taking advantage of uncertainty concerning the interpretive issues that the Rule raises, resulting in "tactical abuse" and expenditure of time and money on "often bogus" disqualification issues; that the proposers of the Rule change had not sought or intended to address the application of the Rule in the setting of public-sector representation; that public-sector attorneys and private-sector attorneys are often involved in the same litigation or transaction; that jurisdictions that do not include the Appearance of impropriety@ standard in their rules of professional conduct nonetheless apply the standard in determining when an impermissible conflict in representation may occur; and that the Court must soon undertake a complete review of its ethics-disciplinary rules in light of anticipated revisions to be recommended by the ABA's Commission on Evaluation of the Rules of Professional Conduct, known as the Ethics 2000 Commission. See John Gibeaut, Ethics 2000 Work Continues, 85-OCT A.B.A.J. 91 (1999) (observing that A[c]onfidentiality and conflicts of interest are among the most difficult types of professional conduct issues for lawyers to sort out@). That review will necessarily require that the Court consider the application of the appearance of impropriety in both the public and private sectors and the effect of any change in the Rule on the substantive law derived therefrom.

Because of the anticipated need to revisit the entire matter in the context of issues affecting public-sector as well as private-sector attorneys, the Court has determined that it will not now undertake to modify the existing form of the Rule. It acknowledges that the Rule in its current form may generate uncertainty about its application to novel conflict-of-interest questions, but the Rule has not been a trap for the unwary that has resulted in the imposition of discipline without fair notice.

In the interim, the Court encourages trial and appellate courts to resolve swiftly and summarily any frivolous or "bogus" attempts to seek tactical advantage under the Rule. The Court has always emphasized that in determining whether certain conduct could generate an appearance of impropriety, there must be "some reasonable basis" for such a perception based on the perspective of "a reasonable and informed citizen." In re Opinion No. 653, 132 N.J. 124, 132-33 (1993) (citing In re Opinion 415, 81 N.J. 318, 325 (1979)). The Court reemphasizes that the appearance of impropriety must be "more than a fanciful possibility."

Id. at 132 (quoting *Higgins v. Advisory Comm. on Prof'l Ethics*, 73 N.J. 123, 129 (1977)).

The Court thanks those who made written or oral presentations. Their efforts will be valued in any process that the Court undertakes in the future.

Dated: February 15, 2000

Chief Justice Poritz and Associate Justices O'Hern, Garibaldi, Stein, Coleman, Long, and Verniero participated in the Court's Administrative Determination.

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