

Summer 1998

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### Recommended Citation

Roberta K. Flowers, *What You See Is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors*, 63 MO. L. REV. (1998)

Available at: <https://scholarship.law.missouri.edu/mlr/vol63/iss3/3>

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# What You See Is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors

Roberta K. Flowers\*

*Appearances to the mind are of four kinds. Things either are what they appear to be; or they neither are, nor appear to be; or they are, and do not appear to be; or they are not, and yet appear to be. To hit the mark in all these cases is the wise man's task.<sup>1</sup>*

## I. INTRODUCTION

The appearance of justice has been deemed as important as justice itself.<sup>2</sup> Justice Frankfurter once observed that “[t]he appearance of impartiality is an essential manifestation of its reality.”<sup>3</sup> Others have theorized that legal and

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1. Epictetus, *The Discourses*, in DISCOURSES AND ENCHIRIDION 1, 68 (Thomas Wentworth Higginson trans., 1944).

2. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 161 n.3 (1994) (Scalia, J., dissenting) (“Wise observers have long understood that the appearance of justice is as important as its reality.”); see also Roberta K. Flowers, *Does It Cost Too Much? A ‘Difference’ Look at J.E.B. v. Alabama*, 64 *FORDHAM L. REV.* 491, 500 (1995) (suggesting that a primary purpose of peremptory challenges is to increase the litigant’s perception of the fairness of the jury verdict); Jerold H. Israel, *Cornerstones of Judicial Process*, *KAN. J. L. & PUB. POL’Y*, Spring 1993, at 5, 20 (suggesting that “[t]he fact that criminal justice procedures are fair is not sufficient: the procedures must also be perceived as fair (and as fairly administered) by both its participants and the public”); Wallace D. Loh, *The Evidence and Trial Procedure: The Law, Social Policy, and Psychological Research*, in *THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE* 13, 16 (Saul M. Kassin & Lawrence S. Wrightsman eds., 1985) (observing that the rules of evidence contribute not only to the reliability of evidence but also to the perceived fairness of the trial, and noting that litigants are more likely to accept the outcome if they believe the process was impartial); cf. David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 *ARIZ. L. REV.* 785, 786 (1993) (proposing that “[t]he appearance of justice, accurate or not, may be more important than justice itself”); Patrick E. Longan, *Civil Trial Reform and the Appearance of Fairness*, 79 *MARQ. L. REV.* 295, 296-97 (1995) (advocating reforms in trial procedure with an eye toward the appearance of those procedures as fair).

3. *Dennis v. United States*, 339 U.S. 162, 182 (1950) (Frankfurter, J., dissenting). Cf. *Offutt v. United States*, 348 U.S. 11, 14 (1954) (“[J]ustice must satisfy the appearance of justice.”).

political systems cannot function effectively without the support of the governed, and that such support will only occur if a system is perceived as fair and just.<sup>4</sup> Professor Abramson suggests that “[w]ithout the appearance as well as the fact of justice, respect for the law vanishes in a democracy.”<sup>5</sup>

The need for trust in government extends to the criminal justice system.<sup>6</sup> “[B]oth the ability of courts to influence the structure of law and the ability of the police and other government officials to enforce the law depend upon public satisfaction with, confidence in, and trust of legal authorities.”<sup>7</sup> Therefore, the appearance of fairness is an essential consideration in evaluating the quality of any justice system.<sup>8</sup>

One could assume that public perception is most directly affected by the outcome of encounters with the system.<sup>9</sup> However, several studies demonstrate that perceived procedural fairness has a substantial effect on a participant’s assessment of the system.<sup>10</sup> For example, one study of defendants charged with

4. See Longan, *supra* note 2, at 296-97; Tom R. Tyler, *The Role of Perceived Injustice in Defendants’ Evaluations of Their Courtroom Experience*, 18 L. & SOC’Y REV. 51, 52 (1984).

5. Leslie W. Abramson, *Canon 2 of the Code of Judicial Conduct*, 79 MARQ. L. REV. 949, 962-63 (1996) (citations omitted).

6. See Israel, *supra* note 2, at 19-20 (noting that respecting the dignity of the individual and maintaining the appearance of fairness helps to promote acceptance and respect for the criminal justice system). Justice Kennedy observed that “[a] court’s judgments will be given no serious consideration, no examination at all, if the public is not confident that its judges remain committed to neutral and principled rules for the conduct of their office.” Anthony M. Kennedy, *Judicial Ethics and the Rule of Law*, 40 ST. LOUIS U. L.J. 1067, 1067 (1996).

7. Tyler, *supra* note 4, at 51 (citation omitted). One commentator observed that “the appearance that the justice system distributes justice fairly has much to do with the public’s acceptance of the judicial system and the public’s perception of its legitimacy.” Kerri L. Klover, “Order Opinions” - *The Public’s Perception of Injustice*, 21 WM. MITCHELL L. REV. 1225, 1226 (1996).

8. Longan, *supra* note 2, at 296-97.

9. See Tyler, *supra* note 4, at 53.

10. See Tyler, *supra* note 4, at 56; see also Roger B. Parks, *Police Response to Victimization: Effects on Citizen Attitudes and Perceptions*, in SAMPLE SURVEYS OF THE VICTIMS OF CRIME 89, 101 (Wesley G. Skogan ed., 1976) (concluding that police response to victims of domestic violence affects the victims’ perceptions of the police and speculating that victims may consequently increase their attention to police matters in the future); Tom R. Tyler & Robert Folger, *Distributional and Procedural Aspects of Satisfaction with Citizen-Police Encounters*, in BASIC AND APPLIED SOC. PSYCHOL. 281, 288-91 (1990) (finding that in individual encounters with the police, the “process perceived as governing the attainment of a desired end-state is in fact attained,” i.e., the perception of fairness affected the overall evaluation of police performance independent of whether the desired result was obtained). See generally JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975) (studying cases that proceeded to trial and concluding that satisfaction with the resolution of the dispute

minor offenses suggests the outcome of the case does not directly affect a defendant's perception of the fairness of the proceeding.<sup>11</sup> The study concluded that defendants charged with minor offenses who fare "poorly at trial will not denigrate the judge or the system so long as they believe their outcomes were reached by fair procedures."<sup>12</sup> Therefore, to be successful, a justice system must appear to be fair and just to the public.

Public perception of the justice system and of lawyers has declined in recent years.<sup>13</sup> Similarly, research reveals the government has also failed to

is not entirely determined by the outcome received).

11. See Tyler, *supra* note 4, at 69-70.

12. Tyler, *supra* note 4, at 70.

13. The modern attorney has often been referred to as the client's "hired gun." See J. ALEXANDER TANFORD, *THE TRIAL PROCESS: LAW, TACTICS AND ETHICS* 5-6 (1993) (noting that many attorneys take the position of "my client: right or wrong"); Marvin L. Karp, *Some Reflections on Change—and Professionalism*, THE BRIEF, Summer 1995, at 9, 10 (noting that, for some lawyers, "litigation has become synonymous with all-out war," and attorneys act accordingly). Furthermore, the attorney is often told to either play hardball or be replaced by an attorney who will. See Karp, *supra*, at 11. One observer noted that "the public, and perhaps the profession itself, seem increasingly convinced that lawyers are simply a plague on society." Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1240 (1991).

Commentators and scholars have lamented that the "legal profession is devolving into the business of law," resulting in lawyers being less inclined to prohibit strategic litigation and to refuse the pursuit of frivolous lawsuits. Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 869 (1990). As suggested by the American Bar Association: "[T]oday it may be asked: Has our profession abandoned principle for profit, professionalism for commercialism?" American Bar Ass'n Comm'n on Professionalism, *In the Spirit of Public Service: A Blue Print for the Rekindling of Lawyer Professionalism*, 112 F.R.D. 243, 251 (1986); see also Marvin E. Aspen, *The Judiciary—New Issues and New Visions: Promoting Civility in Litigation*, 40 FED. B. NEWS & J., 496, 496-97 (1993) (defining the crisis in the law as "an erosion of professionalism," noting the perception that the practice of law has changed "from an occupation characterized by congenial professional relationships to one of abrasive confrontations," and observing that the "general honorableness" of the profession is compromised now that the practice of law has become a business); William T. Braithwaite, *Hearts and Minds: Can Professionalism Be Taught?*, A.B.A. J., Sept. 1990, at 70, 72 (observing that the law has become "a profession moving away from its traditional self-conception as a noble and learned profession toward, on the one hand, the model of commerce, and on the other, the model of partisan politics").

Vic Gold, in his passionate 1985 article *Take This Profession and Shove It*, described the transformation of the law after his graduation from law school to the time of the Burger Court, which he claims will be remembered as the "ethical descent of the legal profession to the level of a Baghdad flea market." Vic Gold, *Take This Profession and Shove It*, S.F. CHRON., June 30, 1985, at 20. He noted that most young attorneys graduating law school in the 1950s carried forth the idea that they were "officers of the court," commissioned with the responsibility of aiding in the administration of justice." For those who did not embrace or understand that concept, Gold observed: "That's why

maintain the public's trust.<sup>14</sup> This perception of the criminal justice system is constantly under attack. This is because the system requires the police, the prosecutors, and the court to impose restraints on citizens.<sup>15</sup> Additionally, the system produces distress because the outcomes in criminal cases are seldom favorable to all parties.<sup>16</sup> Therefore, it is critical that the process is fair and that the participants' conduct is perceived to be just.<sup>17</sup>

Assuming acceptance of the justice system is based primarily on the public's view of fairness and justness of proceedings, those interested in increasing acceptance of the system must consider the system's appearance. Participants in the criminal justice system must be concerned themselves not

the Bar Association had an ethics committee." *Id.* While describing American law as changing "from the status of a profession to that of a hustler's trade," Gold remarked:

A few years ago the ABA had a canon of ethics that said members of the bar should avoid even "the appearance of impropriety" in their daily practice. But that was too restrictive for the modern breed of relevant, responsive lawyers. They lobbied until the canon was dropped from the code of professional conduct. As a guardian of legal [sic] ethics the ABA today is a bladeless knife.

*Id.* Finally, in discussing his license to practice law, Gold noted: "[O]nce it represented membership in a profession with high ethical standards. Those who violated those standards fell into disgrace. Now the American bar itself is a disgrace." *Id.* Gold went on to say, "Consider me an ex-lawyer. And while you're at it, change that old joke. Journalism isn't the second oldest profession. Not while there's a legal profession around." *Id.* As Geoffrey C. Hazard opined, "there is no doubt that professionalism in the bar is sorely in need of repair." Geoffrey C. Hazard, Jr., *Civility Code May Lead to Less Civility*, NAT'L L.J., Feb. 26, 1990, at 13, 13; see Interim Report of the Comm. on Civility of the Seventh Fed. Judicial Circuit, 143 F.R.D. 371, 375 (1991) (surveying Seventh Circuit judges and lawyers and finding "there is widespread dissatisfaction . . . at the gradual changing of the practice of law from an occupation characterized by congenial professional relationships to one of abrasive confrontations"); see also Marvin E. Aspen, *A Specification of Civility Expectations and Comments: Excerpts from the Seventh Circuit's Interim Report of the Committee on Civility*, 39 FED. B. NEWS & J. 304, 304-09 (1992) (highlighting portions of the Seventh Circuit's interim report); Jill Nicholson, *Promoting Professionalism: ABA Committee is Catalyst For Goal Five Proposals*, A.B.A. J., Oct. 1, 1988, at 146, 146 (discussing various programs implemented by the ABA and other bar associations focused on improving lawyer professionalism).

14. See Phillip Shaver, *The Public Distrust*, PSYCHOL. TODAY, Oct. 1980, at 44 (noting that, from 1966 through 1980, "the public's confidence in the leadership of almost every major institution has declined"); Tyler, *supra* note 4, at 52.

15. See Tyler, *supra* note 4, at 52.

16. See Tyler & Folger, *supra* note 10, at 282.

17. See James D. Wright, *Political Disaffection*, in THE HANDBOOK OF POLITICAL BEHAVIOR 12-13 (Samuel L. Long ed., 1981) (concluding that democracy continues because it is able to "help members to accept or tolerate outputs to which they are opposed").

only with the propriety and fairness of their actions, but also with the appearance of their actions.<sup>18</sup> This applies to an even greater extent to the prosecutor.

The prosecutor plays a unique role in the criminal justice system.<sup>19</sup> This role allows her to affect the public's judgment of fairness.<sup>20</sup> She<sup>21</sup> acts not only as an advocate, but also as a minister of justice.<sup>22</sup> Her role is both functional and symbolic.<sup>23</sup> She represents the government and therefore acts as an advocate. However, as a representative of the sovereign, she epitomizes the government itself.<sup>24</sup> Therefore, the public's perception of the prosecutor affects their perception of the criminal justice system as a whole.<sup>25</sup>

Because the prosecutor's actions affect not only the individual criminal case but also the system as a whole, the prosecutor must be concerned with both the propriety of her actions and the appearance of those actions. The current ethics codes<sup>26</sup> do not mandate that a prosecutor consider the appearance of her actions.<sup>27</sup> The *Model Rules of Professional Conduct* do not require such an inquiry or consideration. However, the Rules do require a prosecutor to act as a minister of justice; in that role, the prosecutor must consider the effect of the appearance of her actions on the public perception of the system.<sup>28</sup>

In contrast to the Model Rules, the *Judicial Code of Conduct* requires a judge to consider not only the propriety of his actions, but also the appearance of his actions.<sup>29</sup> The same policy considerations apply to the prosecutor. The prosecutor's role has been described as a quasi-judicial role. This role places the prosecutor in the position of both advocating and considering procedural fairness.<sup>30</sup> Just as the judge's actions can affect perception of the system, the prosecutor's actions, as the representative of the government, influence the public's acceptance of the system as fair.<sup>31</sup>

This article addresses the application of the Appearance of Impropriety Standard to the criminal prosecutor. Section Two discusses the history of the

18. See *infra* text accompanying notes 241-48.

19. See *infra* text accompanying notes 216-22.

20. See *infra* text accompanying notes 235-40.

21. For purposes of clarity, the prosecutor will be referred to as female. Other lawyers and judges will be referred to as male.

22. See *infra* text accompanying notes 216-22.

23. See *infra* text accompanying notes 235-40.

24. See *infra* text accompanying notes 216-22.

25. See *infra* text accompanying notes 216-22.

26. For purposes of this Article, I refer to ethics codes as those regulations codified in the states by law or supreme court rule and enforceable in disciplinary proceedings. This Article will distinguish ethical codes from standards which are not enforceable.

27. See *infra* text accompanying notes 131-36.

28. See *infra* text accompanying notes 241-48.

29. See *infra* text accompanying notes 172-96.

30. See *infra* text accompanying notes 216-22.

31. See *infra* text accompanying notes 235-40.

Appearance of Impropriety Standard. This section discusses the history of that standard as a part of the *Code of Professional Responsibility* and its later exclusion from the *Model Rules of Professional Conduct*. Section Three discusses the *Judicial Code of Ethics*, which continues to contain an Appearance of Impropriety Standard. This section also emphasizes the need for such a standard based on the perceived role the judge plays in the justice system. Section Four considers the quasi-judicial role of the prosecutor. This section also discusses the need to include the Appearance of Impropriety Standard in Rule 3.8 of the *Model Rules of Professional Conduct*, as a further delineation of the role of minister of justice. Section Five applies this standard to difficult issues which arise in defining the appropriate behavior of prosecutors in preparing witnesses for trial. This section concludes that applying this standard to the prosecutor's pre-trial witness preparation gives the prosecutor guidance which currently does not exist. Its application also requires the prosecutor to consider the impact of her actions not only on individual cases, but also on the system as a whole.

## II. THE APPEARANCE OF IMPROPRIETY STANDARD

### A. History of Ethics Codes

Prior to the 18th century, the legal profession was loosely defined, poorly trained, and generally not well-received.<sup>32</sup> In early colonial America, lawyers were degraded openly and even prohibited from the courtroom.<sup>33</sup> Several

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32. See David R. Papke, *The Legal Profession and its Ethical Responsibilities: A History*, in *ETHICS AND THE LEGAL PROFESSION* 29, 30 (Michael Davis & Frederick A. Elliston eds., 1986); see also ERWIN GRISWOLD, *LAW AND LAWYERS IN THE UNITED STATES* 7 (1964) (noting that the early colonists had little use for the laws of England or for lawyers). But see ANTON-HERMAN CHROUST, *THE RISE OF THE AMERICAN LEGAL PROFESSION IN AMERICA* 7 (1965) (noting conflict in historical accounts of the acceptance of lawyers).

33. In Connecticut and Massachusetts Bay, for example, the courts prohibited paid lawyers. Papke, *supra* note 32, at 30; see Lawrence Friedman, *A History of American Law*, in *THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION* 22, 22 (Geoffrey C. Hazard, Jr. & Deborah L. Rhode eds., 3d ed. 1994) [hereinafter *THE LEGAL PROFESSION*]. "A 1645 act of the Virginia House of Burgesses ordered all attorneys practicing for a fee to be expelled from office. The penalty for violating this act was five thousand pounds of tobacco." See Papke, *supra* note 32, at 30. Additionally, the CAROLINAS' *FUNDAMENTAL CONST.* (1669) stated that it was "a base and vile thing to plead for money or reward." Friedman, *supra*, at 22. The basis for mistrust of lawyers was varied. As Lawrence Friedman reported in his essay, *A History of American Law*:

The Puritan leaders of Massachusetts Bay had an image of the ideal state. Revolutionary or Utopian regimes tend to be hostile to lawyers, at least at first. Lawyers of the old regime have to be controlled or removed; a new, revolutionary commonwealth must start with new law and new habits. Some

colonial community leaders considered lawyers to be troublesome encouragers of needless legal suits.<sup>34</sup> Furthermore, many colonists resented lawyers and blamed the legal profession for the oppression from which they had escaped in England.<sup>35</sup> Additionally, many of the individuals who acted as lawyers were incompetent and even unscrupulous.<sup>36</sup> Although some lawyers were trained in England, there were no formal training requirements.<sup>37</sup> Law schools did not exist in America before 1784.<sup>38</sup> The bar lacked mechanisms to enforce standards because most bar associations were voluntary prior to the American Revolution.<sup>39</sup>

The lawyer's skill became a necessary evil as towns grew in size and culture, and as the law became increasingly complex.<sup>40</sup> The practice of law flourished immediately before the American Revolution.<sup>41</sup> Many of the colonial

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colonists, oppressed in England, carried with them a strong dislike for all servants of government. Merchants and planters wished to run their affairs, without intermediaries. The theocratic colonies believed in a certain kind of social order, closely directed from the top. The legal profession, with its special privileges and principles, its private, esoteric language, seemed an obstacle to efficient or godly government. The Quakers of the Middle Atlantic were opposed to the adversary system in principle. They wanted harmony and peace. Their ideal was the "Common Peacemaker," and simple, nontechnical justice. They looked on lawyers as sharp, contentious—and unnecessary—people. For all these reasons, the lawyer was unloved in the 17th century.

Friedman, *supra*, at 22.

34. See Papke, *supra* note 32, at 30.

35. See CHROUST, *supra* note 32, at 27.

36. See CHROUST, *supra* note 32, at 27.

37. See CHROUST, *supra* note 32, at 27; GRISWOLD, *supra* note 32, at 8; Papke, *supra* note 32, at 31.

38. See CHROUST, *supra* note 32, at 29. During the colonial period, there were five avenues by which a colonist could prepare to practice law: (1) read the scarce legal information available; (2) work for the clerk of the court; (3) work as an apprentice in a law firm; (4) travel to England to study; or (5) attend college. See Friedman, *supra* note 33, at 24-25.

39. See Papke, *supra* note 32, at 32.

40. See Papke, *supra* note 32, at 32. In the seventeenth century, "[r]oyal nullification of anti-lawyer legislation . . . was partly responsible for Virginia's reluctant acceptance" of its lawyers. See Papke, *supra* note 32, at 32. Additionally, colonial leaders began taking steps to "ethically train" lawyers. See Papke, *supra* note 32, at 30 (emphasis added). In 1710, for instance, a prominent New England minister bade lawyers to "'shun all those indirect ways of making haste to be rich, in which a man cannot be innocent' . . . [and to] 'abhor . . . to appear in a dirty cause.'" Papke, *supra* note 32, at 31 (quoting Puritan minister Cotton Mather). By the late 1750s, every major community contained "a competent, professional bar, dominated by brilliant and successful lawyers . . . despite all bias and opposition." Friedman, *supra* note 33, at 24.

41. See GRISWOLD, *supra* note 32, at 11; Papke, *supra* note 32, at 32.



lawyers were considered to be at the top of the colonial gentry.<sup>42</sup> As a class, however, American lawyers lacked legal training and organization.<sup>43</sup>

In the years between the American Revolution and the American Civil War there was a general deterioration of the legal profession.<sup>44</sup> Although the legislature and the courts mandated legal training and bar requirements, the period was one of "deprofessionalism."<sup>45</sup> Legislation allowed non-lawyers to appear in court on behalf of others.<sup>46</sup> Practice and training requirements often were minimalized rather than increased due to the growing demand for service and a belief in social mobility.<sup>47</sup>

In Dean Griswold's opinion, 1870 was the low point for the legal profession.<sup>48</sup> Prior to that time, bar associations were loosely formed and lacked the ability to enforce ethical standards.<sup>49</sup> However, after fading away during the middle of the century, bar associations reappeared and increased in organizational stability after 1870.<sup>50</sup> The American Bar Association (ABA) was founded in 1878 and various state and local bars began to subsequently associate with it.<sup>51</sup> The organization of lawyers created a demand for "improved professional ethics and greater surveillance of lawyers' conduct."<sup>52</sup>

42. See CHROUST, *supra* note 32, at 52. With the increase in the number and status of lawyers, their influence began to increase as well. See GRISWOLD, *supra* note 32, at 9.

43. See GRISWOLD, *supra* note 32, at 9, 20.

44. See GRISWOLD, *supra* note 32, at 12-15. Although Dean Roscoe Pound called the first half of the nineteenth century "the Golden Age of American Law," the Revolutionary War created a mistrust of anything English, including English law. See GRISWOLD, *supra* note 32, at 12.

45. See GRISWOLD, *supra* note 32, at 15.

46. See GRISWOLD, *supra* note 32, at 15. Griswold identifies several reasons for the deprofessionalism. He notes that the influence of Jacksonian Democracy, the belief in self-sufficiency, and the advancement of natural law all contributed to a sense that the gentry lawyer was un-American. See GRISWOLD, *supra* note 32, at 16; *see also* CHROUST, *supra* note 32, at 286.

47. See Papke, *supra* note 32, at 34. Several states, by statute, eliminated educational qualifications. See GRISWOLD, *supra* note 32, at 16.

48. See GRISWOLD, *supra* note 32, at 20.

49. See GRISWOLD, *supra* note 32, at 20; *see also* James W. Hurst, *Professional Associations and Professional Ethics*, in *THE LEGAL PROFESSION*, *supra* note 33, at 98, 98 (noting that most of the bar associations during this period disappeared or became merely social).

50. See Papke, *supra* note 32, at 36.

51. See Papke, *supra* note 32, at 36.

52. Papke, *supra* note 32, at 37. *See also* Hurst, *supra* note 49, at 98.

The first "ethical" code originated in Alabama in 1887.<sup>53</sup> It was heavily influenced by Judge George Sharswood's ethical ideals.<sup>54</sup> Twenty state bar associations then adopted formal rules of conduct during the final decade of the century.<sup>55</sup> Concurrently, the president of the ABA appointed a committee to consider a nationwide code of ethics.<sup>56</sup> At the annual ABA meeting in 1905, ABA President, Henry St. George Tucker, echoed President Theodore Roosevelt's criticism of the legal profession's lack of standards. He repeated the president's concerns that "'many of the most influential and most highly remunerated members of the Bar' . . . were bringing the law and the profession into disrepute by advising their clients how 'to evade the laws which are made to regulate in the public interest . . .'"<sup>57</sup> Tucker warned that the president's criticism forced the bar to question whether the ethics of the legal profession rose to the "'high standard which its position of influence in the country demands.'"<sup>58</sup> By 1907, the association accepted the proposed draft of the *Canons of Professional Ethics*.<sup>59</sup> This draft originally consisted of thirty-two

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53. See ORLE L. PHILLIPS & PHILBRICK MCCOY, CONDUCT OF JUDGES & LAWYERS 11 (1952). Alabama's formal code was entitled "Rules for Governing the Conduct of Attorneys." See Richard A. Zitrin & Carol M. Langford, *Legal Ethics*, in THE PRACTICE OF LAW 5 (1995).

54. Judge George Sharswood, while a trial court judge in Pennsylvania, wrote an *Essay on Professional Ethics*. See PHILLIPS & MCCOY, *supra* note 53, at 4; Papke, *supra* note 32, at 37. In 1854, Judge Sharswood published his lectures, given at the University of Pennsylvania, in *A Compend of Lectures on the Aims and Duties of the Profession of Law*, in which he concluded that professional morality was entirely compatible with arguing any and every case. See PHILLIPS & MCCOY, *supra* note 53, at 4; Papke, *supra* note 32, at 37-38. Additionally, Sharswood wrote that "[t]he dignity and importance of the Profession of the Law, in a public point of view, can hardly be over-estimated. It is in relation to society at large that it is proposed to consider it." GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL LEGAL ETHICS 9 (5th ed. 1884). Few doubt that Sharswood's work "set forth the standards of conduct of the profession in the nineteenth century" and influenced the creation of the formal codes of the twentieth century. PHILLIPS & MCCOY, *supra* note 53, at 4. See GEOFFREY C. HAZARD & DEBORAH RHODE, THE LEGAL PROFESSION, *supra* note 33, at 108; Papke, *supra* note 32, at 37-39.

55. See Papke, *supra* note 32, at 37.

56. See Papke, *supra* note 32, at 37. The Committee on Legal Education of the American Bar Association wrote:

Your Committee has under consideration the desirability of instruction in the legal and moral duties of lawyers; in other words, whether a need exists for some special training in the ethics of the law, training which is systematic and to be had in course, instead of being accidental and incidental.

PHILLIPS & MCCOY, *supra* note 53, at 11 (quoting 20 A.B.A. REP. 377 (1897)).

57. PHILLIPS & MCCOY, *supra* note 53, at 11; see also Zitrin & Langford, *supra* note 53, at 5.

58. PHILLIPS & MCCOY, *supra* note 53, at 11 (quoting 1905 A.B.A. President Henry St. George Tucker).

59. See Zitrin & Langford, *supra* note 53, at 5. Simeon E. Baldwin stated:

canons.<sup>60</sup> Some of these were of "strictly moral tones,"<sup>61</sup> while others provided "specific regulatory principles."<sup>62</sup> By 1920, all but thirteen states had adopted the Canons.<sup>63</sup> In 1923, a special committee reexamined the Canons. As a result, several Canons were added and others revised at the annual meeting in 1928.<sup>64</sup> Gradually, the number of ABA Canons increased to forty-seven.<sup>65</sup>

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If this code is accepted by the Bar Associations of every State, as a fair general statement of the main duties of members of the legal profession, a great purpose will be well accomplished. An authoritative criterion will be supplied, by which every lawyer can be safely guided, when he is in doubt as to the conduct he should pursue in respect to any of the questions which oftenest [sic] prove a source of perplexity. The law student will have a mentor, always at hand. The courts will hesitate less in enforcing the discipline of the bar, since professional misconduct will be, more than ever before, a sinning against the light.

Simeon E. Baldwin, *The New American Code of Legal Ethics*, 8 COLUM. L. REV. 541, 546-47 (1908).

60. Professor Papke comments that the adoption of the Canons would have brought about "protests during the colonial or antebellum period given the visions of communal unity or open-ended individual enterprise." Papke, *supra* note 32, at 37. However, in the context of the early twentieth century, the boldness of the legal profession in managing its own affairs was only natural. Papke, *supra* note 32, at 37.

61. Zitrin & Langford, *supra* note 53, at 5. For example, Canon 15 declared: Nothing operates more certainly to create or foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.

THOMAS D. MORGAN & RONALD D. ROTUNDA, *SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY* 611 (1997). Canon 32, entitled "The Lawyer's Duty in its Last Analysis," stated:

No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public.

*Id.* at 615-16.

62. Zitrin & Langford, *supra* note 53, at 5. For example, Canon 13 provided that "[a] contract for a contingent fee, where sanctioned by law, should be reasonable under all circumstances of the case." MORGAN & ROTUNDA, *supra* note 61, at 610. Canon 9 prohibited a lawyer from communicating "upon the subject of the controversy with a party represented by counsel." MORGAN & ROTUNDA, *supra* note 61, at 609.

63. See HAZARD & RHODE, *supra* note 54, at 117.

64. See PHILLIPS & MCCOY, *supra* note 53, at 12.

65. See HAZARD & RHODE, *supra* note 54, at 117.

In 1964, a committee was formed to develop a new set of standards.<sup>66</sup> The result was the passage of the *Model Code of Professional Responsibility* in 1969.<sup>67</sup> Noticeably, the forty-seven Canons had been reduced to nine.<sup>68</sup> The Code was structured into three sections: (1) the Canons, (2) the Disciplinary Rules, and (3) the Ethical Considerations.<sup>69</sup> Each Canon contained a general principle. The disciplinary rules and ethical considerations interpreted and enforced the broad principle.<sup>70</sup>

Most states voluntarily adopted at least part of the Code within a few years.<sup>71</sup> By 1980, even the federal courts used the Code to regulate lawyers<sup>72</sup> and as evidence for juries in attorney malpractice cases.<sup>73</sup>

Although the Code was rapidly accepted by state and federal courts, the ABA began a revision just seven years after its adoption.<sup>74</sup> The revision was motivated, in part, by a desire to eliminate the Code's vague standards and

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66. Former ABA president and future Supreme Court Justice Lewis F. Powell formed the committee to develop the new set of standards. See Zitrin & Langford, *supra* note 53, at 5.

67. See Zitrin & Langford, *supra* note 53, at 5.

68. See generally MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969).

69. The preliminary statement explained:

The 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 Disciplinary Rules are derived.

The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive.

The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules 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 2 (1969).

70. See Zitrin & Langford, *supra* note 53, at 6.

71. See Zitrin & Langford, *supra* note 53, at 5. Some states made word and sentence changes in the Model Code; however, the changes were minimal and usually did not effect the content of the rule. The one exception was California, which rejected or substantially changed many of the disciplinary rules and deleted all of the ethical considerations. See STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS: STATUTES AND STANDARDS xxii (1997); HAZARD & RHODE, *supra* note 54, at 118.

72. See Woodruff v. Tomlin, 616 F.2d 924, 936 (6th Cir.), cert. denied, 449 U.S. 888 (1980).

73. See *id.* at 935; Mark H. Aultman, *A Moral Vision Refuses to Die*, 8 J. LEGAL PROF. 31, 32 (1983); Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1251 (1991). See generally J. Randolph Evans & Anthony Morris, *Legal Ethics*, 47 MERCER L. REV. 197 (1995).

74. See Hazard, *supra* note 73, at 1251.

replace them with legally binding rules.<sup>75</sup> The Code was considered unenforceable.<sup>76</sup> Therefore, it was useless in combating dissatisfaction with the legal profession.<sup>77</sup> Others noted that the revision was due to “tremendous changes . . . in the profession.”<sup>78</sup>

The social climate mandating improvements in ethical standards arose in the wake of the Watergate scandal. As a result of Watergate, the public became aware of questionable professional practices.<sup>79</sup> The public began to question whether the legal profession could regulate itself. Opinion polls revealed attorneys rated poorly with the public.<sup>80</sup> Leading legal scholars questioned the profession’s ethical underpinnings.<sup>81</sup> Because of problems with the Code and public perception of the profession, the ABA formed another commission to reconsider the established standards.

75. See Hazard, *supra* note 73, at 1251. Professor Hazard argues that the radical change toward binding legal ethics rules occurred with the adoption of the *Code of Professional Conduct*, which contained black letter disciplinary rules. See Hazard, *supra* note 73, at 1251.

76. See HAZARD & RHODE, *supra* note 54, at 118; Aultman, *supra* note 73, at 32 (asserting that the Code was unconstitutionally vague).

77. Professors Hazard and Rhode observed that “the disparity between what [the Code’s] Ethical Considerations exhorted and what its Disciplinary Rules required was fostering cynicism about the bar’s aspirational norms.” HAZARD & RHODE, *supra* note 54, at 118.

78. Walter P. Armstrong, Jr., *The Kutak Commission Report: Retrospect and Prospect*, 11 CAP. U. L. REV. 475, 488 (1982) (quoting ABA President S. Shepard Tate).

79. See MICHAEL DAVIS & FREDERICK ELLISON, *ETHICS IN THE LEGAL PROFESSION* 11 (Micheal Davis & Frederick A. Ellison eds., 1986); see also Sarah J. Cox, *Prosecutorial Discretion: An Overview*, 13 AM. CRIM. L. REV. 383, 383 (1976) (“Watergate served to sharpen [the people’s] focus on and justified [their] concerns about the system.”); Peter W. Morgan, *The Appearance of Propriety: Ethics Reform and the Blifil Paradoxes*, 44 STAN. L. REV. 593, 598-601 (1992) (observing that, shortly after Watergate, there occurred an explosion of articles and judicial decisions on judicial ethics and the application of the Appearance of Impropriety Standard). In response, the ABA mandated in 1974 that all law schools “provide and require for all student candidates for a professional degree . . . instruction in the duties and responsibilities of the legal profession.” ABA APPROVAL OF LAW SCHOOLS: ABA STANDARDS AND RULES OF PROCEDURE § 302(a)(iii) (1979). See also DAVIS & ELLISON, *supra*, at 11 (explaining that the most popular way of meeting this mandate was through a course entitled “Professional Responsibility” or “Legal Ethics”).

80. See DAVIS & ELLISON, *supra* note 79, at 11. A poll taken in 1977 revealed that only 26% of the people polled rated attorneys’ ethical standards as high. See DAVIS & ELLISON, *supra* note 79, at 11. On the other end of the spectrum, 26% rated attorneys’ ethics as low. See DAVIS & ELLISON, *supra* note 79, at 11.

81. See DAVIS & ELLISON, *supra* note 79, at 11, (pointing to criticisms by Monroe Freedman and Chief Justice Warren Burger).

The new committee was directed to create standards consisting of more "black letter" law.<sup>82</sup> This commission was headed by Robert Kutak and was known as the "Kutak Commission." Most of the Commission's work occurred under "public scrutiny."<sup>83</sup> The Commission published drafts of its rules which were debated by both lawyers and the general public.<sup>84</sup> There are at least four drafts in existence; however, the Kutak Commission published only three drafts of its proposed rules.<sup>85</sup> After much debate, the ABA House of Delegates approved the final draft of the *Model Rules of Professional Conduct* on August 2, 1983.<sup>86</sup> The Rules are divided into brief rules followed by longer comment sections. The rules are authoritative, while the comments are intended as interpretational guides.<sup>87</sup>

Many states, having recently adopted the Code, were hesitant to adopt another set of Rules which had an entirely different organizational scheme.<sup>88</sup> However, tables cross-referencing the Code Canons helped to market the new Rules.<sup>89</sup> By 1994, forty-four states and the District of Columbia had adopted the Model Rules in some form.<sup>90</sup> The Model Rules have survived as the ABA

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82. Elisabeth E. Boyan, *Reconsidering (Again) Conflict of Interest Arising From Lawyers Representing Lawyers in New Jersey*, 9 GEO. J. LEGAL ETHICS 1377, 1383 (1996) (quoting the Kutak Commission's goal to "produce rules of professional conduct that preserve fundamental values while providing realistic, useful guidance for lawyer conduct").

83. Zitrin & Langford, *supra* note 53, at 7; *see also* Hazard, *supra* note 73, at 1253.

84. *See* Zitrin & Langford, *supra* note 53, at 6. Professor Hazard opined that the method of drafting and adoption of the Model Rules reflected the increased "legalization" of lawyers' regulation. Hazard, *supra* note 73, at 1251.

85. The drafts included (1) The Working Draft, summer 1979, (2) the Discussion Draft, June 30, 1980, (3) the Proposed Final Draft, May 30, 1981, and (4) the Proposed Final Draft, June 30, 1982. *See* Aultman, *supra* note 73, at 34-35. The drafts differ significantly. The original draft was very discipline laden, but, gradually, many of the obligatory regulations were weeded out in favor of discretionary ones, usually accomplished by the insertion of the word "may." *See* Aultman, *supra* note 73, at 35. In addition, there was an Alternative Draft, dated May 30, 1981, which purported to retain the format of the disciplinary rules and ethical considerations; however, this draft has been called more of a "political than substantive maneuver." Aultman, *supra* note 73, at 34.

86. *See* GILLERS & SIMON, *supra* note 71, at xxii; HAZARD & RHODE, *supra* note 54, at 118; Joseph T. McLaughlin et al., *Disqualification of Attorneys and Judges*, C380 ALI-ABA 651, 704 (1989).

87. *See* MODEL RULES OF PROFESSIONAL CONDUCT Scope 7-9 (1997).

88. *See* Zitrin & Langford, *supra* note 53, at 7.

89. *See* Zitrin & Langford, *supra* note 53, at 7.

90. Five states, including Illinois, New York, North Carolina, Oregon, and Virginia, incorporated the Model Rules in their governing standards. *See* GILLERS & SIMON, *supra* note 71, at xxii. California has never adopted either the Rules or the Code. *See* GILLERS & SIMON, *supra* note 71, at xxii; Zitrin & Langford, *supra* note 53, at 7.

standards governing attorney conduct for fourteen years. However, the profession's ethics continue to come under fire from attorneys and the public.<sup>91</sup>

### *B. Canon 9 of the Code of Professional Responsibility*

Canon 9, including its prohibition against the appearance of impropriety, emerged as a new addition to the *Model Code of Professional Responsibility*, adopted in 1969.<sup>92</sup> Canon 9's substance had never been overtly expressed.<sup>93</sup> However, its prohibition was implied throughout the old preamble,<sup>94</sup> and in Canons 29<sup>95</sup> and 32.<sup>96</sup> Several pre-1969 ABA opinions warned against the appearance of impropriety.<sup>97</sup> Additionally, prior to the Model Code, courts had

91. See *supra* note 13 for a discussion of the negative perception of lawyers.

92. Canon 9 stated: "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1969).

93. See RAYMOND L. WISE, LEGAL ETHICS 125 (2d ed. 1970). Ethical Consideration 9-6 contained the principles of old Canons 1, 3, 6, 11, 15, 16, 22, 29, 32, 36, 37, and 41. *Id.* at 125 n.9.

94. The preamble to the Canons of Professional Ethics provided:

In America, where the stability of courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing Justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. The future of the Republic, to a great extent, depends upon our maintenance of Justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.

CANONS OF PROFESSIONAL ETHICS Preamble (1908). See WISE, *supra* note 93, at 125.

95. Canon 29, entitled "Upholding the Honor of the Profession," provided in part: "[An attorney] should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of Justice." CANONS OF PROFESSIONAL ETHICS Canon 29 (1908). See WISE, *supra* note 93, at 125.

96. Canon 32 provided: "Above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen." CANONS OF PROFESSIONAL ETHICS Canon 32 (1908). See WISE, *supra* note 93, at 125.

97. WISE, *supra* note 93, at 125. For instance, in Opinion 134, the ABA warned that a former state attorney could not defend a person he had previously prosecuted because the public would "naturally infer" that the attorney would take advantage of his prior connections with the prosecutor's office. See ABA Comm. on Professional Ethics and Grievances, Formal Op. 134 (1935), *reprinted in* OPINIONS OF THE COMM. ON PROF'L ETHICS 399, 400 (1967) [hereinafter OPINIONS]. Another formal opinion explained: "If the profession is to occupy that position in public esteem which will enable it to be of the greatest usefulness, it must avoid not only all evil but must likewise avoid the appearance of evil." ABA Comm. on Professional Ethics and Grievances, Formal Op. 49 (1931), *reprinted in* OPINIONS, *supra*, at 290, 292 (emphasis added). See Victor H. Kramer, *The Appearance of Impropriety Under Canon 9: A Study of the Federal Judicial Process*

disqualified attorneys based upon the “appearance of evil” standard, even though the record may have been free of any evidence of wrongdoing.<sup>98</sup> These courts based their rulings on a concern for keeping the public and private segments of the profession above suspicion.<sup>99</sup>

With the adoption of Canon 9, the “appearance” principal was applicable to all aspects of an attorney’s professional life. It related to “the entire spectrum of an attorney’s conduct.”<sup>100</sup> One court noted that an attorney should act in a manner which would gain “at least the confidence normally reposed in the parish priest.”<sup>101</sup> Clearly, the Canon was designed to protect and encourage public confidence in the legal system.<sup>102</sup>

As the term “appearance” suggests, professional conduct under Canon 9 was evaluated from “the eye of the beholder.”<sup>103</sup> Canon 9 expressed the concern that “ethical conduct may appear unethical to a layman. This perception may erode public confidence in the legal system.”<sup>104</sup> To illustrate, Robert H. Aronson

*Applied to Lawyers*, 65 MINN. L. REV. 243, 245 (1980).

98. See, e.g., *United States v. Trafficante*, 328 F.2d 117, 120 (5th Cir. 1964) (finding “no exceptions to the exhortation to abstain from all appearance of evil”); *W.E. Bassett Co. v. H.C. Cook Co.*, 201 F. Supp. 821, 825 (D. Conn. 1961), *aff’d*, 302 F.2d 268 (2d Cir. 1962). See generally Michael W. McConnell, *The Appealability of Orders Denying Motions for Disqualification of Counsel in Federal Courts*, 45 U. CHI. L. REV. 450 (1978).

99. *State v. Burns*, 322 S.W.2d 736, 742 (Mo. 1959) (stating that “prosecuting officials, like Caesar’s wife, ought to be above suspicion”). See generally, Annotation, *What Circumstances Justify Disqualification of Prosecutor in Federal Criminal Cases*, 110 A.L.R. Fed. 523 (1992 & Supp. 1997).

100. *Weber v. Shell Oil Co.*, 566 F.2d 602, 609 (8th Cir. 1977), *overruled in part on other grounds by In re Multi-Piece Rim Prods. Liab. Litig.*, 612 F.2d 377 (8th Cir. 1980).

101. *Arkansas v. Dean Foods Prods. Co.*, 605 F.2d 380, 386 (8th Cir. 1979), *overruled in part on other grounds by In re Multi-Piece Rim Prod. Liab. Litig.*, 612 F.2d 377 (8th Cir. 1980). A commentator later noted that meeting the “parish priest” standard would not be difficult given the unsavory publicized activities of prominent religious leaders within the Eighth Circuit. Donald R. McMinn, *ABA Formal Opinion 88-356: New Justification for Increased Use of Screening Devices to Avert Attorney Disqualification*, 65 N.Y.U. L. REV. 1231, 1275 n.324 (1990).

102. *Dean Foods*, 605 F.2d at 386 n.5 (noting that one or two appearances of ethical blindness can tar the entire profession).

103. *Weber*, 566 F.2d at 609. The test was whether a “member of the public, or of the bar, [sees] an impropriety” in the attorney’s conduct. *Id.*

104. See *Woods v. Covington County Bank*, 537 F.2d 804, 813 (5th Cir. 1976). The Code states as follows:

Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion ethical conduct of a lawyer may appear to laymen to be unethical . . . . When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system



stated that "because the appearance of impropriety can be just as damaging as actual impropriety to public respect for the law and clients' belief in their attorneys' loyalty, attorneys must ensure that their conduct does not reasonably appear to have been influenced by conflicting interests."<sup>105</sup> Aronson further warned the boundary between ethical and unethical behavior is not clearly defined; consequently, "a good rule-of-thumb" for attorneys to follow was, "when in doubt, don't."<sup>106</sup>

Following the adoption of the Code, a sharp division developed among the courts concerning the proper handling of cases involving the Appearance of Impropriety Standard. Some courts used Canon 9 as the basis for disqualifying attorneys.<sup>107</sup> They explained that disqualification was an ethical, rather than legal, matter<sup>108</sup> and that it was in the public's and client's interest.<sup>109</sup> For example, the Eighth Circuit, in *Arkansas v. Dean Foods Products Co.*, reversed a district court's refusal to disqualify an attorney based on Canon 9.<sup>110</sup> In *Dean Foods*, the court found that Canon 9 was "inextricably wedded" to Canon 4, which admonished the lawyer to preserve his client's confidences and secrets.<sup>111</sup> The attorney-client relationship requires that a client believe his lawyer will keep his confidences. In a conflict situation, the client may fear that his secrets will not be kept. In order to preserve the relationship, courts have disqualified

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and legal profession.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 9-2 (1981); *see also* *Ohio v. Cooper*, 409 N.E.2d 1070, 1073 (Ohio 1980) (noting that disqualification is necessary to "ensure the faith of the people in the efficacy of the judicial system").

105. Robert H. Aronson, *Conflict of Interest*, 52 WASH. L. REV. 807, 810 (1977).

106. *Id.* at 811.

107. *See* *General Motors Corp. v. City of New York*, 501 F.2d 639, 641 (2d Cir. 1974) (discussing the need for disqualification even though the record was free of wrongdoing as necessary to keep the profession above suspicion); *see also* *Kramer, supra* note 97, at 250-64 (discussing at length the cases which applied Canon 9 alone as the basis for disqualification).

108. *See* *Arkansas v. Dean Foods Prods. Co.*, 605 F.2d 380, 384 (8th Cir. 1979), *overruled in part on other grounds by In re Multi-Piece Rim Prods. Liab. Litig.*, 612 F.2d 377 (8th Cir. 1980); *American Can Co. v. Citrus Feed Co.*, 436 F.2d 1125, 1127 (5th Cir. 1971).

109. *See* *Dean Foods*, 605 F.2d at 384.

110. *Id.* *See* *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 721 (7th Cir. 1982).

111. *Id.* at 385. *See also* *Pantry Pride, Inc. (In re Eastern Sugar Antitrust Litig.) v. Finley, Kumble, Wagner, Heine, Underberg & Casey*, 697 F.2d 524, 530-31 (3d Cir. 1982); *Hannon v. State*, 266 So. 2d 825, 830 (Ala. Crim. App. 1972) (discussing the defendant's concern that confidential information he gave to the prosecuting attorney when that attorney previously represented the defendant might be divulged to other prosecutors).

attorneys based on the appearance standard. For this reason, Canon 9 could be a basis for disqualification when Canon 4 was unavailable.<sup>112</sup>

In *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*,<sup>113</sup> the Ninth Circuit justified reliance on Canon 9 as the sole basis for disqualification of an attorney. The court noted that “[i]f Canon 9 were not separately enforceable, it would be stripped of its meaning and significance. This suggests that it must be a sufficient ground for disqualification in itself.”<sup>114</sup> Additionally, the Second Circuit found that Canon 9 dictated that all doubts be resolved in favor of disqualification.<sup>115</sup> The Third Circuit, in *Kramer v. Scientific Control Corp.*,<sup>116</sup> noted that “the appearance of conduct associated with institutions of the law [is] as important as the conduct itself.”<sup>117</sup> Furthermore, another court opined that preserving public trust sufficiently justified the standard even where a party could not show a reasonable possibility that an identifiable impropriety occurred.<sup>118</sup>

However, most courts which addressed Canon 9 emphasized that there must be “at least a reasonable possibility that some specifically identifiable impropriety did in fact occur,” even though no wrongdoing was required for action under the Canon.<sup>119</sup> Consequently, a two-prong test evolved for determining the disqualification of an attorney under Canon 9.<sup>120</sup> The first prong required that a reasonable possibility of wrongdoing existed. The second prong

112. See *Dean Foods*, 605 F.2d at 385.

113. 658 F.2d 1355, 1360 (9th Cir. 1981), *cert. denied*, 455 U.S. 990 (1982).

114. *Id.* (citation omitted).

115. See *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 757 (2d Cir. 1975); see also *Banton v. State*, 475 N.E.2d 1160, 1164 (Ind. Ct. App. 1985) (“The public trust in the integrity of the judicial process requires us to resolve any serious doubt in favor of disqualification.”) (quoting *State v. Tippecanoe County Court*, 432 N.E.2d 1377, 1379 (Ind. 1982)).

116. 534 F.2d 1085 (3d Cir. 1976).

117. *Id.* at 1088.

118. *Hallmark Cards, Inc. v. Hallmark Dodge, Inc.*, 616 F. Supp. 516, 520 n.3 (W.D. Mo. 1985) (rejecting the two part test as undermining the concerns of Canon 9 regarding the public’s perception). See *General Motors Corp. v. United States* 573 F.2d 936, 942 (6th Cir. 1977) (finding an appearance of impropriety where an IRS attorney was appointed to conduct a grand jury investigation when the IRS attorney had been involved in a previous tax return investigation of the defendant); *State v. Latigue*, 502 P.2d 1340, 1342 (Ariz. 1972) (disqualifying a prosecuting attorney’s office because the chief deputy county attorney had previously represented the defendant, even though no actual misconduct was found).

119. *Woods v. Covington County Bank*, 537 F.2d 804, 813 (5th Cir. 1976). See *State v. Rizzo*, 350 A.2d 225, 226 (N.J. 1975).

120. See *United States v. Hobson*, 672 F.2d 825, 828 (11th Cir.), *cert. denied*, 459 U.S. 906 (1982); *Woods*, 537 F.2d at 813 n.12; *Petroleum Wholesale v. Marshall*, 751 S.W.2d 295, 300 (Tex. Ct. App. 1988).

balanced public suspicion against the social interests which would be served by the attorney's continued participation in the case.<sup>121</sup>

Several courts strongly criticized Canon 9. The Fifth Circuit, in *Woods v. Covington County Bank*, warned that an "overly broad application of Canon Nine . . . would ultimately be self-defeating."<sup>122</sup> The Second Circuit, in *Board of Education v. Nyquist*,<sup>123</sup> refused to disqualify an attorney finding that "appearance of impropriety is simply too slender a reed on which to rest a disqualification order."<sup>124</sup> Judge Mansfield's concurrence in *Nyquist* warned that an appearance of impropriety was insufficient grounds to justify a court's disqualification of an attorney.<sup>125</sup> Judge Mansfield opined that a disqualification order must be supported by a reasonable basis to believe such appearance may affect the outcome.<sup>126</sup> Furthermore, in an *en banc* decision, the Seventh Circuit warned that the disqualification of attorneys is a "drastic measure which courts should hesitate to impose except when absolutely necessary."<sup>127</sup>

Scholars have also rejected the use of the Appearance of Impropriety Standard. A 1978 *Chicago Law Review* article argued that although many courts speak of avoiding the appearance of impropriety, disqualification should not be employed absent actual misconduct.<sup>128</sup> Additionally, Victor Kramer criticized Canon 9 cases as turning upon judges' perceptions of public feeling on a specific ethical issue.<sup>129</sup> Further, he noted, "[w]hat lay persons sometimes perceive as impropriety is frequently in the highest tradition of the bar: for example, representing unpopular clients, defending the guilty, and being courteous to opposing counsel during the course of a trial."<sup>130</sup>

121. See *Norton v. Tallahassee Mem'l Hosp.*, 689 F.2d 938, 941 (11th Cir. 1982); *Hobson*, 672 F.2d at 828; *Kraft, Inc. (In re Corrugated Container Antitrust Litig.) v. Alton Box Bldg. Co.*, 659 F.2d 1341, 1345 (5th Cir. 1981).

122. 537 F.2d at 813. *Woods* held that an attorney's conduct should not be governed by the standards which could be imputed to the "most cynical members of the public." *Id.* The court stated that motions for disqualification are sometimes merely tactical moves, and as such, the delay or disadvantage caused by unnecessary disqualifications under the Appearance of Impropriety Doctrine could cause even more public suspicion of the bar and the judiciary than the original hint of possible impropriety. See *id.*

123. 590 F.2d 1241 (2d Cir. 1979).

124. *Nyquist*, 590 F.2d at 1247 (Mansfield, J., concurring).

125. See *id.* (noting the importance of a client's right to choose his own lawyer).

126. See *id.*

127. *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 721 (7th Cir. 1982) (stating that the disqualification of counsel deprives the client of his chosen representation and should therefore be viewed with extreme caution).

128. See *McConnell*, *supra* note 98, at 459-60.

129. See *Kramer*, *supra* note 97, at 264.

130. *Kramer*, *supra* note 97, at 265.

The new *Model Rules of Professional Conduct*, adopted in 1983, omitted the Appearance of Impropriety Standard, noting a two-fold problem.<sup>131</sup> First, the Commission explained that the standard could apply to any attorney-client relationship which made a former client uncomfortable.<sup>132</sup> This resulted in a question of the client's subjective judgment.<sup>133</sup> Second, the Commission found that the standard was "question-begging" because the term "impropriety" was undefined.<sup>134</sup> One commentator noted the application of the appearance standard gave "rise to some of the most broad and uncertain rules under the code."<sup>135</sup> The ABA feared that inclusion of this standard would cause disciplinary proceedings to degenerate "from the determination of fact issues specified by the rule into a determination on an instinctive, *ad hoc*, or even *ad hominem* basis."<sup>136</sup>

Prior to the adoption of the *Model Rules of Professional Conduct*, and despite the controversy surrounding Canon 9, the courts continued to examine cases involving the appearance of impropriety. The Third Circuit, in responding to the final proposed draft of the Model Rules, which omitted Canon 9 as overbroad and question-begging, noted the ethical duties arising under Canon 9 proceeded on "a case-by-case basis, involving careful sifting and weighing of relevant circumstances and facts."<sup>137</sup> Asserting that the Appearance of

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131. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 cmt. (1983).

132. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 cmt. (1983); Boyan, *supra* note 82, at 1395 n.42; Kramer, *supra* note 97, at 265 n.131.

133. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 cmt. (1983); Kramer, *supra* note 97, at 265.

134. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 cmt. (1983). See *Gabianelli v. Azar*, 777 P.2d 1167, 1168 (Alaska 1989); Lee E. Hejmanowski, *An Ethical Treatment of Attorneys' Personal Conflicts of Interest*, 66 S. CAL. L. REV. 881, 897 (1993) (noting that "courts and legal conduct rules renounced the standard on the grounds that, standing alone it was inherently vague"); Kramer, *supra* note 97, at 265.

135. CHARLES E. WOLFRAM, *MODERN LEGAL ETHICS* 315 (1986).

136. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 n.17 (1985). Although the Committee rejected the Appearance of Impropriety Standard due to its vagueness, Rule 8.4 included an equally vague standard. See John F. Sutton, Jr., *How Vulnerable is the Code of Professional Responsibility?*, 57 N.C. L. REV. 497, 502 n.13 (1979) (criticizing the proscription against conduct prejudicial to the administration of justice as providing insufficient notice to lawyers). Although Rule 8.4 prohibits conduct that is "prejudicial to the administration of justice," this concept is undefined. See Donald T. Weckstein, *Maintaining the Integrity and Competence of the Legal Profession*, 48 TEX. L. REV. 267, 275-76 (1970). The application of this standard requires the same case-by-case analysis as the Appearance of Impropriety Standard which was respected by the writers of the *Model Rules of Professional Conduct*. See WOLFRAM, *supra* note 135, at 315; Martha Elizabeth Johnston, Comment, *ABA Code of Professional Responsibility: Void for Vagueness?*, 57 N.C. L. REV. 671, 684-85 (1979) (finding the prohibition leaves open the possibility that lawyers will be disciplined because of unorthodox or politically unpopular conduct or views).

137. *Pantry Pride, Inc. (In re Eastern Sugar Antitrust Litig.) v. Finley, Kumble,*

Impropriety Standard was necessarily vague, the court looked to other provisions of the ABA Code for guidance to mark its precise contour.<sup>138</sup>

### *C. The Appearance of Impropriety Standard After the Adoption of the Model Rules*

The trend following the adoption of the Model Rules was "away from disqualification based solely on an appearance of impropriety."<sup>139</sup> However, the appearance of impropriety as a standard persisted in post-Model Rules cases.<sup>140</sup> Courts continued to employ the Appearance of Impropriety Standard, even though the rationale for the ethics regulation had been continually criticized in scholarly studies and eliminated from bar-created codes of conduct.<sup>141</sup> Courts also continued to stress the importance of the "public's trust in the legal profession and the judicial process."<sup>142</sup> For example, in *Analytica, Inc. v. NPD Research, Inc.*,<sup>143</sup> the court held the appearance of impropriety to be a factor in side-switching cases.<sup>144</sup> The court stated that "[w]hile 'appearance of

Wagner, Heine, Underberg & Casey, 697 F.2d 524, 530 (3d Cir. 1982).

138. *See id.*

139. *Sherrod v. Berry*, 589 F. Supp. 433, 436 (N.D. Ill. 1984). *See Teletronics Proprietary v. Medtronic, Inc.*, 836 F.2d 1332, 1338 (U.S. Ct. App. 1988).

140. *See Hejmanowski, supra* note 133, at 897. *See generally* Herwig v. Marine Shale Processors, No. 92-2753, 1994 U.S. Dist. Lexis 231 (E.D. La. Jan. 11, 1994); *Petroleum Wholesale, Inc. v. Marshall*, 751 S.W.2d 295, 297-98 (Tex. Ct. App. 1988); *Boyan, supra* note 82, at 1377-80 (discussing the continued use of the Appearance of Impropriety Standard in New Jersey).

141. *See WOLFRAM, supra* note 135, at § 7.1.4; Fred C. Zacharias, *Who Can Best Regulate the Ethics of Federal Prosecutors, or, Who Should Regulate the Regulators?: Response to Little*, 65 *FORDHAM L. REV.* 429, 453-54 (1996).

142. *Contant v. Kawasaki Motors Corp.*, 826 F. Supp. 427, 428 (M.D. Fla. 1993) (stressing the role of the court in maintaining the integrity of the legal system). *But see* *Bowman v. Bank of Delaware*, No. 87-44-CMW, 1988 W.L. 54669 (D. Del. May 24, 1988) (refusing to apply appearance standard); *Clay v. Doherty*, 608 F. Supp. 295 (N.D. Ill. 1985).

143. 708 F.2d 1263 (7th Cir. 1983).

144. *See id.* at 1269; *see also In re Inquiry to the Adversary Comm. on Prof'l Ethics*, 616 A.2d 1290, 1291 (N.J. 1992) (finding an appearance of impropriety where a full-time police officer associated with a criminal defense firm). Side-switching refers to those cases where an attorney has previously represented the party in opposition to her current client. Such conduct implicates several ethical rules in addition to the Appearance of Impropriety Standard. The MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1997) prohibits representation of a client when that representation will be directly adverse to the representation of another current client. Rule 1.9 prohibits representations in certain situation when the current representation is adverse to a client the attorney has formerly represented. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (1997). Finally, Rule 1.11 addresses this conflict of interest specifically for government employees. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11 (1997).

impropriety' as a principle of professional ethics invites and maybe has undergone uncritical expansion because of its vague and open-ended character, in this case it has meaning and weight."<sup>145</sup> The court noted that "when a law firm switches sides the 'unsavory appearance' is difficult to dispel in the 'eyes of the lay public.'"<sup>146</sup>

Although recognizing the exact language of Canon 9 was not included in the *Model Rules of Professional Conduct*, courts continued to require attorneys to avoid the appearance of impropriety.<sup>147</sup> In *First American Carriers, Inc. v. Kroger Co.*, the Arkansas Supreme Court noted that although "Canon 9 is not expressly adopted by the Model Rules, the principle applies because its meaning pervades the Rules and embodies their spirit."<sup>148</sup> The court further stated that the Appearance of Impropriety Standard was included in "what the preamble to the Rules refers to as 'moral and ethical considerations' that should guide lawyers, who have a 'special responsibility for the quality of justice.'"<sup>149</sup> In 1990, the Arizona Court of Appeals recognized that, although reliance on the Appearance of Impropriety Standard in evaluating attorney conduct has been weakened by the new *Model Rules of Professional Conduct*, "the appearance of impropriety . . . still has a definite place in the balancing test the trial court must apply in resolving the question of disqualification."<sup>150</sup> In 1996, a New Jersey court relied upon the appearance of impropriety as the basis for disqualification in a side-switching case.<sup>151</sup> The court noted the "much maligned" Appearance of Impropriety Standard still exists to "engender, protect, and preserve the trust and confidence of clients."<sup>152</sup>

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145. *Analytica*, 708 F.2d at 1269.

146. *Id.* See also *supra* note 144 and accompanying text.

147. See *In re Starr*, 986 F. Supp. 1144, 1154 n.12 (E.D. Ark. 1997) (holding that the Appearance of Impropriety Standard is "implicit in the Model Rules"); *First Am. Carriers, Inc. v. Kroger Co.*, 787 S.W.2d 669, 671 (Ark. 1990).

148. *Kroger Co.*, 787 S.W.2d at 672.

149. *Id.*

150. *Turbin v. Superior Court* 797 P.2d 734, 738 (Ariz. Ct. App. 1990). See *Gomez v. Superior Court*, 717 P.2d 902, 904 (Ariz. 1986).

151. *Cardona v. General Motors Corp.*, 942 F. Supp. 968, 975 (D.N.J. 1996); ABA/BNA Lawyer's Manual of Professional Conduct, *Current Reports*, Sept. 18, 1996.

152. *Cardona*, 942 F. Supp. at 975.

### III. CANON 2: THE APPEARANCE OF IMPROPRIETY WITHIN THE JUDICIARY

#### A. Code History

The judicial equivalent to the *Model Rules of Professional Conduct* is the *Model Code of Judicial Conduct*.<sup>153</sup> An ethics code for judges first appeared in 1924 when the ABA set forth the *Canons of Judicial Ethics*, consisting of thirty-four canons.<sup>154</sup> Supreme Court Justice William Howard Taft headed the drafting committee for the Canons, which were intended to be an aspirational behavioral guide rather than a mandate.<sup>155</sup> The 1924 Canons reflected a traditional view of the judge as one who dispensed justice in a blind, mechanical way.<sup>156</sup> Accordingly, the Canons emphasized the need for impartial and consistent results.<sup>157</sup> Over the next fifty years, a number of states adopted the Canons either

153. See generally MODEL CODE OF JUDICIAL CONDUCT (1990).

154. See Robert J. Martineau, *Enforcement of the Code of Judicial Conduct*, 1972 UTAH L. REV. 410, 410; Jeffrey M. Shaman, *The Impartial Judge: Detachment or Passion?*, 45 DEPAUL L. REV. 605, 605 (1996).

155. See Shaman, *supra* note 154, at 605. The preamble to the Canons stated: [T]he American Bar Association, mindful that the character and conduct of a Judge should never be objects of indifference, and that declared ethical standards tend to become habits of life, deems it desirable to set forth its views respecting those principles which should govern the personal practice of members of the Judiciary in the administration of their office. The Association accordingly adopts the following Canons, the spirit of which it suggests as a proper guide and reminder for judges, and as indicating what the people have a right to expect from them.

CANONS OF JUDICIAL ETHICS Preamble (1924). See also Brain Holland, *The Code of Judicial Conduct and the Model Rules of Professional Conduct: A Comparison of Ethical Codes For Judges and Lawyers*, 2 GEO. J. LEGAL ETHICS 725, 726 (1989) (indicating that the implication from the phrase "a proper guide and reminder to judges" was that the Canons were not intended to be binding).

156. See Shaman, *supra* note 154, at 605.

157. For example, Canon 20 provided that a judge's duty is to apply general law to specific factual issues, stating:

[O]urs is a government of law and not of men, and that he violates his duty as a minister of justice under such a system if he seeks to do what he may personally consider substantial justice in a particular case and disregards the general law as he knows it to be binding on him. He should administer his office with a due regard to the integrity of the system of the law itself, remembering that he is not a depositary of arbitrary power, but a judge under the sanction of the law.

CANONS OF JUDICIAL ETHICS Canon 20 (1924). The next Canon, entitled "Idiosyncrasies and Inconsistencies," stated: "Justice should not be molded by the individual idiosyncrasies of those who administer it. A judge should adopt the usual and expected method of doing justice, and not seek to be extreme or peculiar in his judgments, or

verbatim or in an amended version. The Canons were seen as mere guidelines in some states.<sup>158</sup> However, they were enforced as binding regulations of judicial conduct in others.<sup>159</sup>

In 1969, the president of the American Bar Association appointed California Supreme Court Chief Justice Roger Traynor to chair the Special Committee on Standards of Judicial Conduct to reexamine the Canons. For three years, the committee revised, reorganized, rewrote, and even renamed the Canons to establish "higher and more explicit standards of judicial conduct."<sup>160</sup> At the 1972 annual meeting, the ABA House of Delegates adopted the *Model Code of Judicial Conduct*.<sup>161</sup> This version began: "[I]n the judgment of the [American Bar] Association this Code, consisting of statements of norms, denominated Canons, the accompanying text setting forth specific rules, and the commentary, states the standards that judges should observe. The Canons and text establish mandatory standards unless otherwise indicated."<sup>162</sup>

Seventeen years later, in 1989, the ABA's Standing Committee on Ethics and Professional Responsibility published a final draft of a revised *Model Code of Judicial Conduct*. This was adopted by the ABA House of Delegates in 1990. This version was similar to the 1972 model; however, it attempted to answer several questions concerning whether the Code was optional or obligatory.<sup>163</sup> This was done, in part, by substituting the word "shall" for the word "should."<sup>164</sup>

spectacular or sensational in the conduct of the court." CANONS OF JUDICIAL ETHICS Canon 21 (1924).

158. See Martineau, *supra* note 154, at 410-11 (commenting that based on the suggestive rather than regulatory nature of the Canons, the ABA intended mere guidelines for judicial conduct); Shaman, *supra* note 154, at 605 (noting that the Code was rarely enforced).

159. *In re Kohn*, 568 S.W.2d 255, 257 (Mo. 1978) (concluding "that evidence of judicial conduct in violation of the Canons or Code may be considered in determining whether particular acts complained of rise to the level of misconduct"); *Mahoning County Bar Ass'n v. Franko*, 151 N.E.2d 17, 21 (Ohio 1958), *cert. denied*, 358 U.S. 932 (1959) (holding that "the Canons of Judicial Ethics . . . provide the basis for the disciplining of members of the legal profession who hold judicial positions"); *Jenkins v. Oregon State Bar*, 405 P.2d 525, 527-28 (Or. 1965) ("The rules promulgated by this court concerning professional and judicial ethics are not merely pious exhortations."). See generally Robert A. Brazener, Annotation, *Power of Court to Remove or Suspend Judge*, 53 A.L.R. 3d 882 (1996).

160. Abramson, *supra* note 5, at 949 n.1. See Shaman, *supra* note 154, at 607.

161. See Shaman, *supra* note 154, at 607.

162. MODEL CODE OF JUDICIAL CONDUCT Preamble (1990).

163. For instance, the term "should" was replaced with "shall." Abramson, *supra* note 5, at 949 n.1. Additionally, the 1990 Code is written in gender-neutral language. See Abramson, *supra* note 5, at 949 n.1.

164. The preamble clarifies as follows:

When the text uses "shall" or "shall not," it is intended to impose binding obligations the violation of which can result in disciplinary action. When



The Code also added a preamble and a terminology section.<sup>165</sup> The preamble emphasized that the Code was not a complete set of rules.<sup>166</sup> However, it made clear the Code was not just aspirational, but was binding on judges.<sup>167</sup>

Today, almost every state has adopted a code of judicial conduct.<sup>168</sup> Most of those Codes are modeled after either the 1972 Model Code or the more recent 1990 Code.<sup>169</sup> The United States Judicial Conference has adopted a new *Code of Judicial Conduct*,<sup>170</sup> which also includes provisions from the Model Code.<sup>171</sup>

### B. The Appearance of Impropriety Standard

The Appearance of Impropriety Standard persisted in the Judicial Code despite being excluded from the *Model Rules of Professional Conduct*. Canon 2 of the 1990 *Model Code of Judicial Conduct* states: "A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities."<sup>172</sup> The Commentary to Canon 2(A) offers guidance to judges as to the meaning of Canon 2(A)'s terms.<sup>173</sup> Specifically, the Commentary makes clear the standard applies to both the judge's personal and professional

"should" or "should not" is used, the text is intended as hortatory and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined.

MODEL CODE OF JUDICIAL CONDUCT Preamble 2 (1990).

165. See Abramson, *supra* note 5, at 949 n.1.

166. "The Code of Judicial Conduct is not intended as an exhaustive guide for the conduct of judges. They should also be governed in their judicial and personal conduct by general ethical standards." MODEL CODE OF JUDICIAL CONDUCT Preamble 6 (1990).

167. See Holland, *supra* note 155, at 726. The preamble provides: "The Code is intended, however, to state basic standards which should govern the conduct of all judges and to provide guidance to assist judges in establishing high standards of judicial and personal conduct." MODEL CODE OF JUDICIAL CONDUCT Preamble 6 (1990).

168. See GILLERS & SIMON, *supra* note 71, at 550; Kennedy, *supra* note 6, at 1073 (noting that 47 of 50 states adopted codes based on the ABA model, while the other three states adopted their own sets of rules).

169. As of May 1996, 20 states had adopted the 1990 Model Code, including Arizona, Arkansas, California, Florida, Hawaii, Indiana, Kansas, Maine, Minnesota, Nebraska, Nevada, New Mexico, New York, North Dakota, Rhode Island, South Dakota, Utah, West Virginia, Wyoming, and the District of Columbia. See GILLERS & SIMON, *supra* note 71, at 550. Additionally, 17 other jurisdictions have adopted portions of the Model Code, including Colorado, Connecticut, Delaware, Georgia, Idaho, Illinois, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Missouri, New Jersey, Ohio, Texas, Washington, and Wisconsin. See GILLERS & SIMON, *supra* note 71, at 550.

170. The Code adopted by the United States Judicial Conference is advisory only. See Kennedy, *supra* note 6, at 1073.

171. See Kennedy, *supra* note 6, at 1073.

172. MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1990).

173. See Abramson, *supra* note 5, at 953.

behavior.<sup>174</sup> Additionally, it defends the necessity of using general terms.<sup>175</sup> Finally, the Commentary states the test for applying the Appearance of Impropriety Standard “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.”<sup>176</sup>

The focus of Canon 2(A) is on the need for public trust in the independence and impartiality of the judiciary.<sup>177</sup> In order for a judge to possess the confidence of the community, “justice must not only be done, it must be seen to be done.”<sup>178</sup> For this reason, judges are subject to discipline under Canon 2(A) for both personal and professional behavior.<sup>179</sup> The sanctioned behavior does not need to be either criminal or tortious to be a violation of Canon 2(A).<sup>180</sup> The

174. “The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of the judge.” MODEL CODE OF JUDICIAL CONDUCT Canon 2(A) cmt. [2] (1990).

175. The commentary states:

Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules or other specific provisions of this Code.

MODEL CODE OF JUDICIAL CONDUCT Canon 2(A) cmt. [2] (1990). *See* Napolitano v. Ward, 457 F.2d 279, 284 (7th Cir.) (“[C]onduct which does not constitute a criminal offense may be sufficiently violative of the Judicial Canons to warrant removal for cause.”), *cert. denied*, 409 U.S. 1037 (1972); Abramson, *supra* note 5, at 953 (observing that the general language of Canon 2 has withstood constitutional attack); *see also* Shaman, *supra* note 154, at 582 (concluding that the general nature of the Appearance of Impropriety Standard allows it to be applied to a variety of situations).

176. MODEL CODE OF JUDICIAL CONDUCT Canon 2(A) cmt. [2] (1990). The ABA rejected several alternative ideas, including (1) acts which violated a “clear and accepted community standard,” and (2) a list of examples that were not “per se violations but nonetheless would taint the judiciary.” Abramson, *supra* note 5, at 953 n.15 (citing MODEL CODE OF JUDICIAL CONDUCT 7-8 (Discussion Draft 1989)).

177. *See* Holland, *supra* note 155, at 732; Irving R. Kaufman, *Lions and Jackals: The Function of a Code of Judicial Ethics*, 35 LAW & CONTEMP. PROBS. 3, 4 (1970).

178. *In re Del Rio*, 256 N.W.2d 727, 753 (Mich. 1977) (citations omitted). *See also* Tumey v. Ohio, 273 U.S. 510, 532 (1927) (“[T]o perform its high function in the best way, justice must satisfy the appearance of justice.”); Brian T. Fitzgerald, *Sealed v. Sealed: A Public Court System Going Secretly Private*, 6 J.L. & POL. 381, 398 (1990) (concluding that “one of the most important policies underlying open courts [is] the maintenance of public confidence in the judicial process”).

179. *See* Kaufman, *supra* note 177, at 5.

180. *See* Liteky v. United States, 510 U.S. 540, 555-56 (1994) (finding that expressions of impatience, dissatisfaction, annoyance or anger do not establish bias or prejudice); Napolitano v. Ward, 457 F.2d 279, 284 (7th Cir.) (explaining that “separation of the behavior of a judge while off the bench from his conduct in the courtroom is impossible”), *cert. denied*, 409 U.S. 1037 (1972); *In re Whitaker*, 463 So. 2d 1291, 1304

Canon looks to prohibit that judicial conduct which "malign[s] the public's confidence in the judiciary."<sup>181</sup>

The persistence of the Appearance of Impropriety Standard in the Judicial Code can, in part, be explained by ideological differences between the Judicial Code and the lawyers' ethics code. As Judge Kaufman stated: "To a significant degree, our concept of a code of judicial ethics is shaped by our notion of the role it regulates."<sup>182</sup> In order to function, the judiciary must receive the respect and support which comes from being seen as independent.<sup>183</sup> A judge's independence can be tainted not only by his activities on the bench, but also by his conduct outside the courtroom. Therefore, the judge's role includes both professional and nonprofessional behavior.<sup>184</sup> On the other hand, the lawyer's role is generally restricted to interaction with the judicial system.<sup>185</sup> His conduct outside his relationship with clients has very little effect on his ability to represent clients.

In keeping with these fundamental differences, the codes which direct each profession are tailored differently. The Judicial Code places heavy emphasis on a judge's off-the-bench behavior. In comparison, the Model Rules stress an attorney's role within the system by emphasizing the importance of his "official" or "professional" behavior.<sup>186</sup> Notably, only Chapter 8 of the Model Rules deals with the conduct of lawyers outside their official roles. By contrast, only Canon 3 of the Judicial Code deals solely with a judge's official responsibilities.<sup>187</sup>

The Appearance of Impropriety Standard is an integral part of the Judicial Code because of the differing roles played by lawyer and judge.<sup>188</sup> Professor

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(La. 1985) (suspending a judge for associating with drug users and prostitutes); *Mississippi Comm'n v. Milling*, 651 So. 2d 531, 539-40 (Miss. 1995) (removing a judge for living with a fugitive from another state and for dismissing the fugitive warrant against him); *In re Blackman*, 591 A.2d 1339, 1344 (N.J. 1991) (reprimanding judge for attending a picnic hosted by a convicted criminal); *In re Larsen*, 616 A.2d 529, 579 (Pa. 1992) (stating that the Code "forbids or requires acts neither forbidden nor required by ordinary citizens, or even attorneys subject to other ethical restrictions"); Abramson, *supra* note 5, at 954. See generally Frank Wozniak, Annotation, *Consorting With or Maintaining Social Relations With Criminal Figure As Grounds for Disciplinary Action Against Judge*, 15 A.L.R. 5th 923 (1996).

181. Abramson, *supra* note 5, at 963.

182. Kaufman, *supra* note 177, at 3.

183. Judge Kaufman noted that "[p]ossessed of neither the purse nor the sword, it depends primarily on the willingness of members of society to follow its mandates." Kaufman, *supra* note 177, at 3.

184. See *Napolitano v. Ward*, 457 F.2d 279, 284 (7th Cir.) (observing the difficulty in separating a judge's behavior on the bench from his actions outside the courtroom), *cert. denied*, 409 U.S. 1037 (1972).

185. See Holland, *supra* note 155, at 732.

186. MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1997).

187. See Holland, *supra* note 155, at 733.

188. See Andrew L. Kaufman, *Judicial Ethics: The Less-Often Asked Questions*,

Holland characterized the lawyer's role as primarily a functional role; that is, he is a conduit between the individual and the system.<sup>189</sup> Accordingly, the Model Rules regulate the relationship between the attorney and the client.<sup>190</sup> By contrast, Professor Holland notes that the judge serves both a functional and symbolic role.<sup>191</sup> For example, judges have the duty to act as neutral decision-makers in our adversary system.<sup>192</sup> Additionally, "judges are the embodiment of the judicial system."<sup>193</sup> As symbols of the system, their conduct is "more likely to effect public perception of the whole justice system."<sup>194</sup> As the Judicial Code recognizes, "[p]ublic confidence in the judiciary is eroded by irresponsible or improper conduct by judges."<sup>195</sup> In sum, the Appearance of Impropriety Standard requires judges to consider the effect of both their conduct and their perceived conduct on the public's impression of the system.<sup>196</sup>

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64 WASH. L. REV. 851, 854 (1989) (concluding that the Appearance of Impropriety Standard is the "basic rule of the Code of Conduct, the one to which all other rules are mere commentary").

189. See Holland, *supra* note 155, at 733.

190. See Hazard, *supra* note 73, at 1246 (noting that the three ideals enforced in the Model Rules are confidentiality, loyalty and candor to the tribunal).

191. See Holland, *supra* note 155, at 733. The preamble to the *Model Code of Judicial Conduct* describes judges as the "symbol of government under the rule of law." See Harris, *supra* note 2, at 792 (citing MODEL CODE OF JUDICIAL CONDUCT Preamble (1990)).

192. An essential element of the adversary system is a neutral, passive tribunal. See Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice*, 44 VAND. L. REV. 45, 85 (1991). The underlying assumption of the system is that the two sides to a controversy will present their case to a fact finder who has no demonstrable bias or knowledge of the facts. See Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes to Include the Non-Adversarial Roles of Federal Prosecutors*, 37 B.C. L. REV. 923, 942 (1996). In order to ensure this impartiality, the judge takes no initiative to define the issues, to elicit evidence or to investigate unchartered defenses. See *id.*; see also Howard T. Markey, *Professionalism in the Practice of Law: A Symposium on Civility and Judicial Ethics in the 1990s: A Need for Continuing Education in Judicial Ethics*, 28 VAL. U. L. REV. 647, 648 n.4 (1994) (concluding that within our adversary system the court should be able to rely on the lawyers to present the issues and the applicable law fairly and fully).

193. Holland, *supra* note 155, at 733. See Harris, *supra* note 2, at 792 (characterizing judges as the "embodiment of the process").

194. Harris, *supra* note 2, at 792. See generally Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1108 (1995) (discussing the need for courts to consider the appearance of the system before overruling precedent).

195. MODEL CODE OF JUDICIAL CONDUCT Canon 2(A) cmt. [1] (1990).

196. See Stephen M. Simon & Maury S. Landman, *Judicial Ethics Simulation Based Training*, 58 LAW & CONTEMP. PROBS. 323, 329 (1996) (noting that even when a judge's action can be justified as in the interest of judicial efficiency or as an action in good faith, the courts conclude that an appearance of impropriety may result in a "diminution of public confidence").

### C. *The Courts Apply the Standard to Judges*

The standard applied by most courts is whether, in the given circumstances, a reasonable person would perceive the act or conduct with suspicion. The Judicial Code requires that the court consider "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."<sup>197</sup> The term "appearance" is to be viewed from the standpoint of a reasonable person rather than from the standpoint of parties or witnesses to the misconduct.<sup>198</sup> This objective standard is preferable to a subjective standard for several reasons. First, the use of an objective standard attempts to weed out insignificant risks of impropriety. Judge Easterbrook observed: "Because some people see goblins behind every tree, a subjective approach would approximate automatic disqualification. A reasonable observer is unconcerned about trivial risks; there is always some risk . . ."<sup>199</sup> For this reason, Judge Easterbrook concluded the search was for the possibility of impropriety which was "substantially out of the ordinary."<sup>200</sup> Additionally, the reasonable person standard has long been used in the legal context and is therefore a familiar standard to judges.<sup>201</sup> Finally, this standard reflects the public's view. This is consistent with the purpose of the rule, which is to protect the public's perception.<sup>202</sup>

Courts consider all the circumstances in determining whether the conduct would cause suspicion in the reasonable person.<sup>203</sup> Accordingly, courts have rejected an "uninformed or misinformed person standard."<sup>204</sup> Additionally, the ABA rejected as part of the 1990 commentary to Canon 2(A) the notion that "[i]n exercising discretion in his or her personal conduct, a judge should consider the conduct from the perspective of a person who knows only what is

197. MODEL CODE OF JUDICIAL CONDUCT Canon 2(A) cmt. [2] (1990).

198. *In re Foster*, 318 A.2d 523, 533-34 (Md. 1974).

199. *In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990); *See Abramson, supra* note 5, at 954 n.24.

200. *In re Mason*, 916 F.2d at 386.

201. *See Martineau, supra* note 154, at 243.

202. *See Abramson, supra* note 5, at 954 n.24; Martineau, *supra* note 154, at 243 (concluding that such a standard is important in "maintaining public confidence in and respect for the judicial system"); *cf. In re Cunningham*, 456 N.Y.S.2d 36, 38 (1982) (noting that "to the extent that . . . [the] misconduct consisted of creating the appearance of impropriety, it is of some moment that the possible perception of this improper conduct was limited to the eyes of one person only").

203. *See, e.g., In re Greenberg*, 318 A.2d 740, 741 (Pa. 1974) (stating that "it is our duty to consider the totality of all the circumstances when determining questions pertaining to professional and judicial discipline").

204. *See In re Larsen*, 616 A.2d 529, 582-83 (Pa. 1992); *see also In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990) (characterizing the standard as how things appear to the "well-informed thoughtful observer").

apparent.”<sup>205</sup> As Justice Rehnquist observed, such a standard would “cut [too] broadly.”<sup>206</sup> Furthermore, a standard that did not require consideration of all the circumstances could lead to “false appearances of impropriety [being] manufactured with ease by anyone with personal or political *animus* toward a judge.”<sup>207</sup> Because misinformed or uninformed persons may assign guilt where none exists, courts have required the appearance of impropriety to be judged based on the totality of the circumstances.<sup>208</sup>

The Appearance of Impropriety Standard requires judges who are attempting to comply with the standard, as well as those who are attempting to enforce the standard, to define what is improper. Justice Arthur Goldberg observed that the Canon is “unbelievably ambiguous.”<sup>209</sup> Courts have attempted to focus inquiries on whether the conduct in question legitimately reflects the judge’s ability to act in his official capacity.<sup>210</sup> As Professor Lubet suggested, “the proper inquiry is not whether the act is moral or immoral . . . . Rather, we must ask how the act reflects upon the central components of the judge’s ability to do the job for which he or she has been empowered: fairness, independence, and respect for the public.”<sup>211</sup> The courts have been careful to limit the application of this standard to actions which reflect the jurist’s professional integrity.<sup>212</sup> Although this standard is necessarily vague, it clearly rejects both

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205. Abramson, *supra* note 5, at 956 n.24.

206. William H. Rehnquist, *Sense and Nonsense About Judicial Ethics*, 28 THE REC. OF THE ASS’N OF THE BAR OF THE CITY OF N.Y. 694, 701 (1973). Justice Rehnquist suggests that if an appearance of impropriety embraced a situation where the facts were partially known by the reasonable person, “a judge named Jones [would be prevented] from presiding at a trial of a defendant named Jones, even though they were totally unrelated, since it would be possible from simply reading the docket entries to conclude that they were related to one another.” *Id.*

207. *In re Larsen*, 616 A.2d at 583.

208. *See In re Cunningham*, 538 A.2d 473, 480 (Pa. 1988); Abramson, *supra* note 5, at 954 n.24.

209. *See* Abramson, *supra* note 5, at 954 n.23; Steven Lubet, *Judicial Impropriety: Love, Friendship, Free Speech, and Other Intemperate Conduct*, 1986 ARIZ. ST. L.J. 379, 399 (lamenting the lack of guidance to judges in this standard).

210. *See In re Hendrix*, 701 P.2d 841, 845 (Ariz. 1985) (censuring a judge for entering *ex parte* order which appeared to favor his courtroom clerk); *In re Hocking*, 546 N.W.2d 234, 245-46 (Mich. 1996) (suspending a judge for caustic comments and personal attacks toward an attorney in a divorce hearing); *In re Laster*, 274 N.W.2d 742, 745 (Mich. 1979) (publicly reprimanding judge due to appearance of favoritism in granting *ex parte* a bail bondsman’s petition to set aside forfeiture in 58 cases).

211. Lubet, *supra* note 209, at 386. *See In re Larsen*, 616 A.2d 529, 581 (Pa. 1992).

212. *See In re Glancey*, 542 A.2d 1350, 1353 (Pa. 1988); *In re Cunningham*, 538 A.2d at 480.

the "overly permissive standard of mere legality [and] the rigid approach of strict moralism."<sup>213</sup>

Although the standard has been criticized as being vague and ambiguous, it has remained a viable part of the Judicial Code. Its perseverance reflects the continued belief that courts cannot operate without the confidence and trust of the public. The same considerations that underlie the standard in the Judicial Code apply to the prosecuting attorney.<sup>214</sup>

#### IV. THE APPEARANCE OF IMPROPRIETY STANDARD AND PROSECUTORS

##### A. *The Quasi-Judicial Role of the Prosecutor*

The trial process has been referred to as a battle of adversaries in which lawyers meet to fight for the rights of their clients.<sup>215</sup> However, within the criminal arena, the prosecutor serves a vastly different function than does the defense attorney.<sup>216</sup> Whereas the private attorney's primary obligation is to protect a client's interest,<sup>217</sup> the prosecutor faces a dual role—that of advocate

213. Steven Lubet, *Judicial Ethics and Private Lives*, 79 NW. U. L. REV. 983, 995 (1985). See also *In re Larsen*, 616 A.2d at 582 (rejecting the "opposite extremes of subjective propriety and mere legality") (citations omitted).

214. See Boyan, *supra* note 82, at 1385; Kaufman, *supra* note 177, at 5 (concluding that the term "appearance of impropriety" applies to government lawyers and judges because of their responsibility to the public).

215. James J. Tomkovicz, *An Adversary System Defense of the Rights to Counsel Against Informants: Truth, Fair Play, and the Messiah Doctrine*, 22 U.C. DAVIS L. REV. 1, 65 (1988); see also WOLFRAM, *supra* note 135, at 567 (indicating that "battlelike characteristics that have survived in trials are atavistic emergences of the human qualities that the social arrangement of trials was meant to displace"). Judge Frankel maintains that during trials the "pervasive air of combat" surrounds the judge, forcing him into the role of "combatant with a shifting but seemingly endless series of opponents." MARVIN E. FRANKEL, *PARTISAN JUSTICE* 46-47 (1980).

216. See *Young v. United States ex. rel. Vuitton ET FILS. S.A.*, 481 U.S. 787, 826 (1987) (Powell, J., concurring in part and dissenting in part) ("A prosecutor occupies a unique role in our criminal justice system."); Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1218 (1958) ("The public prosecutor cannot take as a guide for the conduct of his office the standards of an attorney appearing on behalf of an individual client."); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1557 (1981) (observing that certain accepted practices of defense counsel are impermissible for prosecutors); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 12 (1975) (asserting that the behavior of a criminal defense attorney is "amoral" and distinguishable from the role of other lawyers).

217. The defense attorney's central role is to serve as an advocate for his client. One commentator stated: "The legal profession's basic narrative . . . pictures the lawyer

for the government and administrator of justice.<sup>218</sup> The prosecutor serves a role in between that of the private attorney and the judge. She is required to zealously represent her client, the government, and the public<sup>219</sup>—a role closely akin to that of the defense attorney. On the other hand, she must “put ahead of partisan success [the] observance of the law.”<sup>220</sup> She must protect society’s values by prosecuting and convicting criminals while attempting to ensure that

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as a partisan agent acting with the sanction of the Constitution to defend a private party against the government.” Hazard, *supra* note 73, at 1244. Lord Brougham, in his defense of Queen Caroline before the House of Lords in 1820, eloquently articulated the defense attorney’s role:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expédients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.

2 TRIAL OF QUEEN CAROLINE 8 (J. Nightingale ed., 1821), *quoted in* Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1060 n.1 (1976).

Other commentators have argued that Lord Brougham’s definition of the defense counsel’s role is too narrow. *See generally* William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703 (1993). Judge Marvin Frankel lamented that “Lord Brougham was wrong; we should be less willing to fight the world and . . . more concerned to save our own souls.” *Quoted in* *In re Hawaiian Flour Mills, Inc.*, 868 P.2d 419, 437 (Haw. 1994) (Levinson J., concurring) (urging all attorneys to be more “positively concerned . . . with the pursuit of truth”).

218. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 cmt. (1997); *see also* STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE § 3-1.I(b), .1(c) (2d ed. 1980) [hereinafter STANDARDS] (stating that the duty of the prosecutor is “to seek justice, not merely to convict”); John S. Edwards, *Professional Responsibilities of the Federal Prosecutor*, 17 U. RICH. L. REV. 511, 511 (1983) (describing the prosecutor’s dual role as a zealous advocate who “must temper his zeal with a recognition that his broader responsibilities are to seek justice”); George T. Frampton, Jr., *Some Practical and Ethical Problems of Prosecuting Public Officials*, 36 MD. L. REV. 5, 7 (1976) (noting that the prosecutor “is both an advocate in the criminal justice system and also an administrator of that system”); Fuller & Randall, *supra* note 216, at 1218; Vorenberg, *supra* note 216, at 1557 (observing that prosecutors within the adversary system are “expected to be more (or is it less?) than an adversary”).

219. *Young v. United States ex. rel. Vuitton ET FILS. S.A.*, 481 U.S. 787, 805 (1987) (recognizing the need for a prosecutor to be a zealous advocate).

220. *Blair v. Armontrout*, 916 F.2d 1310, 1352 (8th Cir. 1990). *Cf.* Stephen A. Saltzburg, *Lawyers, Clients, and the Adversary System*, 37 MERCER L. REV. 647, 656 (1986) (arguing that trial prosecutor should present the “strongest argument” for conviction); H. Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 MICH. L. REV. 1145, 1159 (1973) (urging that prosecutors act primarily as zealous advocates).



no innocent person is wrongly convicted.<sup>221</sup> This dual mission has prompted several commentators and courts to refer to the prosecutor's role as quasi-judicial.<sup>222</sup> As the Louisiana Supreme Court wrote: "The district attorney is a quasi-judicial officer. He represents the State, and the State demands no victims. It seeks justice only, equal and impartial justice, and it is as much the duty of the district attorney to see that no innocent man suffers as it is to see that no guilty man escapes."<sup>223</sup>

In keeping with her quasi-judicial position, the prosecutor owes allegiance to a broad set of societal values.<sup>224</sup> She must avoid the role of a "partisan eager to convict, and must deal fairly with the accused and other participants in the trial."<sup>225</sup> Further, she must also recognize that no single individual or constituency is her client.<sup>226</sup> For example, "[c]onsider the constituencies that the

221. See WOLFRAM, *supra* note 135, at 759; Fuller & Randall, *supra* note 216, at 1218 ("The freedom elsewhere wisely granted to partisan advocacy must be severely curtailed if the prosecutor's duties are to be properly discharged.").

222. See WOLFRAM, *supra* note 135, at 759 (asserting that a "prosecutor's role is much nearer that of a judicial officer than that of partisan advocate"); John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 544 (1994); Zacharias, *supra* note 192, at 56-65 (discussing the ethical duty of prosecutors to do justice); Andrew Sidman, Comment, *The Outmoded Concept of Private Prosecution*, 25 AM. U. L. REV. 754, 792 n.193 (1976) (citing several cases where prosecutors have been described as "quasi-judicial"); see also *Imbler v. Pachtman*, 424 U.S. 409, 423 n.20 (1976) ("It is the functional comparability of their judgments to those of the judge that has resulted in both grand jurors and prosecutors being referred to as 'quasi-judicial' officers, and their immunities being termed 'quasi-judicial' as well."); *State v. Chambers*, 524 P.2d 999, 1002 (N.M. Ct. App. 1974) (stating that a "district attorney is a part of the judicial system of the state and is a quasi-judicial officer"); *State v. Moss*, 376 S.E. 2d 569, 574 (W. Va. 1988).

223. *State v. Tate*, 171 So. 108, 112 (La. 1936) (upholding the recusal of a prosecutor because he had an interest in the case).

224. See Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 218-20 (1988).

225. *Moss*, 376 S.E.2d at 574 (observing that the prosecutor's duty to avoid overzealousness is especially important in cases involving serious offenses where the jury is apt to be predisposed against the defendant). See *Chambers*, 524 P.2d at 1001 (recognizing the prosecutor's duty to see that the defendant is afforded a fair trial).

226. See, e.g., *Town of Newton v. Rumery*, 480 U.S. 386, 395 (1987) (holding that the prosecutor represents the public and not the police); see also *Burns v. Reed*, 500 U.S. 478, 485-87 (1991) (denying the prosecutor absolute immunity for advice given to police). See generally James Harvey III, *Loyalty in Government Litigation: Department of Justice Representation of Agency Clients*, 37 WM. & MARY L. REV. 1569, 1569 (1996) (recognizing the potential clients of the Department of Justice to include (1) the public interest, (2) the government as a whole, (3) agency officials, (4) the agency itself, (5) the President, and (6) the Attorney General); Robert P. Lawry, *Confidences and the Government Lawyer*, 57 N.C. L. REV. 625 (1979) (discussing the identity of possible clients for the prosecutor); E. Michael McCann, *Opposing Capital Punishment: A*

prosecutor must appease: the crime victims, law enforcement agencies, the prosecutor's political office, and the elusive concepts of 'truth' and 'justice.'"<sup>227</sup> Additionally, at times, the prosecutor must protect not only her own case, but her opponent's as well.<sup>228</sup>

As the government's spokesperson, the prosecutor brandishes tremendous authority and discretion in directing investigations,<sup>229</sup> defining the crimes to be charged,<sup>230</sup> affecting punishment, and deciding whether or not to prosecute at all.<sup>231</sup> She possesses virtually unquestioned, discretionary power.<sup>232</sup> In fact, the prosecutor has been described as "the single most powerful figure in the administration of criminal justice."<sup>233</sup> One commentator noted that centralization

*Prosecutor's Prospective*, 79 MARQ. L. REV. 649, 663 (1996) (describing the relationship between prosecutors and police); Note, *Developments in the Law: Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1414 (1981) (listing entities that the government lawyer must consider, including (1) her supervisor, (2) the governmental office, (3) the government, and (4) the public interest).

227. Flowers, *supra* note 192, at 931.

228. Flowers, *supra* note 192, at 931. See also Zacharias, *supra* note 192, at 66-74 (discussing the prosecutor's responsibility to "do justice" when opposing counsel is ineffective). As noted in *Blair v. Armontrout*, "[i]n criminal cases, the government must wear two hats. The prosecutor must act as an advocate, although he or she is repeatedly cautioned to put ahead of partisan success the observance of the law." 916 F.2d 1310, 1352 (8th Cir. 1990).

229. See generally *United States v. Martinez*, 785 F.2d 663, 670 (9th Cir. 1986) (reversing the district court's dismissal of the indictment), *rev'd*, 855 F.2d 621 (9th Cir. 1988); Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393 (1992) (discussing the trend of prosecutors becoming increasingly more involved in investigations).

230. See *Ball v. United States*, 470 U.S. 856, 859 (1985) (recognizing the long standing rule that prosecutor's have broad discretion in charging decisions); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir.) (stating that a court cannot interfere with a prosecutor's decision to bring charges), *cert. denied*, 381 U.S. 935 (1965); see also Gershman, *supra* note 229, at 409 (arguing that the most extreme example of the prosecutor's discretion is in the area of charging decisions in capital cases). See generally Charles J. Yeager & Lee Hargrave, *The Power of the Attorney General to Supersede a District Attorney: Substance, Procedure & Ethics*, 51 LA. L. REV. 733, 742 (1991).

231. See Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 718 (1996).

232. See Wayne A. Logan, *A Proposed Check on the Charging Discretion of Wisconsin Prosecutors*, 1990 WIS. L. REV. 1695, 1695; Catherine Lowe, Project, *Twenty-Second Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1991-1992*, 81 GEO. L.J. 853, 1029-32 (1993).

233. Charles P. Bubany & Frank F. Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making*, 12 AM. CRIM. L. REV. 473, 477 (1976). See also Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 672. Other areas of prosecutorial discretion include the discretion to arrest, grant immunity, plea bargain, and make bail and sentencing recommendations.

of power into the prosecutor's office made the prosecutor the "preeminent actor in the system."<sup>234</sup>

The prosecutor acts not only in a powerful functional role, but also in a symbolic role, much like a judge. One court defined the objective of the prosecutor to be like that of the court—to seek simple justice.<sup>235</sup> She enjoys a position supported by the awesome power of the government.<sup>236</sup> In *Berger v. United States*,<sup>237</sup> the Supreme Court characterized prosecutors, not as ordinary parties to a controversy, but as representatives of a sovereignty.<sup>238</sup> The prosecutor exemplifies the government as a whole, as its representative. She therefore can affect the public's perception of the government and of the criminal justice system.

As a representative of governmental law enforcement, the prosecutor is the symbol of how the system works. Professor Alschuler has noted that when "lawless enforcement of the law is perpetrated by the officials most definitely responsible for law observance, the natural result is public resentment of the entire legal process."<sup>239</sup> The prosecutor thus symbolizes law enforcement and the criminal justice system in this country. Therefore, "[w]here the prosecutor is recreant to the trust implicit in his office, he undermines confidence, not only in his profession, but in government and the very ideal of justice itself."<sup>240</sup>

### B. The Appearance of Fair Dealing

As a quasi-judicial officer and a minister of justice, the prosecutor affects public confidence in the legal system. As noted by the New Jersey Supreme Court, "[c]onfidence in government depends to a large extent on confidence in the honesty and integrity of its employees."<sup>241</sup> This court observed: "[B]ecause

234. Misner, *supra* note 231, at 718.

235. See *O'Neill v. State*, 207 N.W. 280, 281 (Wis. 1926).

236. See WOLFRAM, *supra* note 135, at 460 (noting that prosecutors "have available a terrible array of coercive methods to obtain information").

237. 295 U.S. 78 (1935). For a discussion of *Berger*, see Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 635-36 (1972).

238. See *Berger*, 295 U.S. at 88. As representatives of the government, the court noted that the United States Attorney's "obligation to govern impartially is as compelling as its obligation to govern at all." *Id.* The court further stated that the government's interest in a criminal case was not to win, but to see that justice was done. *Id.*

239. Alschuler, *supra* note 237, at 633.

240. Fuller & Randall, *supra* note 216, at 1218.

241. *In re* Petition for Review of Opinion No. 569 of the Advisory Comm. on Prof'l Ethics, 511 A.2d 119, 122 (N.J. 1986). See also Boyan, *supra* note 82, at 1386 (observing that although the Appearance of Impropriety Standard should not be applied to private lawyers, the application of this standard to public lawyers would increase "the public's faith in the judicial system").

government attorneys are invested with the public trust . . . their conduct must be even more circumspect than the private attorney.”<sup>242</sup> As noted in a *Harvard Law Review* Study on Conflicts of Interest:

[P]otentially improper conduct on the part of a government employee is more likely to be scrutinized by the public than that of a private attorney. This is not surprising, since the public is most concerned with the potential misuse of information and power gained when the public itself, rather than a private party, is suffering the consequences.<sup>243</sup>

To ensure and maintain public confidence in the integrity of the government, public officials, including prosecutors, must act impartially and responsibly.<sup>244</sup> Government officials must be held to high ethical standards to make certain their activities are conducted in the public’s interest.<sup>245</sup> Furthermore, “[g]overnments have a responsibility to the public to avoid even the appearance of impropriety and to act to reduce the opportunities and incentives for unethical behavior by their officials and employees.”<sup>246</sup> This is true of the prosecuting attorney because “an appearance of impropriety on the part of a government attorney will inevitably harm not only the individual attorney, but also the entire system of government that allows such improprieties to take place. A perceived impropriety by the former is inevitably seen as a fault of both.”<sup>247</sup> The requirement of an appearance of fairness standard rests on the premise that “seeing is believing.” That is, if the public sees the process as unjust or unfair, it will believe it so and lose confidence in the governmental system. According to David Harris:

The appearance of justice will affect public perception of the system’s legitimacy. A system consistently seen as unjust will eventually lose the allegiance of its citizens. If people perceive the courts as less than fair decision makers, the moral force courts depend on to ensure compliance with decisions they make diminishes.<sup>248</sup>

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242. *In re Opinion No. 569*, 511 A.2d at 122.

243. Note, *supra* note 226, at 1416. See *In re Opinion No. 569*, 511 A.2d at 122.

244. See Deborah L. Markowitz, *A Crisis in Confidence: Municipal Officials Under Fire*, 16 VT. L. REV. 579, 580 (1992).

245. *Id.* See also James Gerstenzang, *Bush Promises to Name Special Ethics Counsel*, L.A. TIMES, July 27, 1988, at 1 (quoting Vice President George Bush, who stated: “No one, no institution, no body of government should be above the law. This is not the American Way.”).

246. Markowitz, *supra* note 244, at 580.

247. Note, *supra* note 226, at 1416.

248. Harris, *supra* note 2, at 790.

### C. *The Need for an Ethical Provision*

Unfortunately, prosecutorial misconduct, which undermines the public perception that the system is fair, is not a rarity. As noted by one commentator, "[c]ourts and commentators have expressed frustration and concern over the frequent occurrence of prosecutorial misconduct."<sup>249</sup> The cause of increased prosecutorial misconduct has been debated by commentators. Professor Earle noted that "institutional and political pressures combine to create tremendous incentives for the prosecutor to overlook her quasi-judicial obligation."<sup>250</sup> As E. Michael McCann, the District Attorney for Milwaukee County, explained: "[P]ressures on the government . . . to 'do something,' can overwhelm even those of good conscience . . . ."<sup>251</sup> Institutional pressures include the fear that supervisors will gauge an attorney's performance based on her conviction record.<sup>252</sup> Additionally, the prosecutor must constantly guard against a "working assumption of guilt."<sup>253</sup> This mindset results from both spending considerable time with victims and witnesses, most of whom suggest the defendant's guilt rather than innocence; and a perception that the defendant is given advantages which send the prosecution into battle with a blunted sword.<sup>254</sup>

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249. Michael T. Fisher, Note, *Harmless Error, Prosecutorial Misconduct, and Due Process: There's More to Due Process than the Bottom Line*, 88 COLUM. L. REV. 1298, 1322 (1988) (arguing that the way to protect defendant's due process rights is to reverse convictions for prosecutorial misconduct).

250. Elizabeth L. Earle, *Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism*, 92 COLUM. L. REV. 1212, 1219 (1992) (noting that political pressures can cause justice to "take a backseat"). See also *Dick v. Scroggy*, 882 F.2d 192, 196 (6th Cir. 1989) (observing that "politically ambitious prosecutors" are not "uncommon"); J. Lyndal Hagemeyer, Note, *Statements by Prosecuting Attorneys to Juries Which Demand Improper Considerations for Verdict or Punishment*, 39 VA. L. REV. 85, 86 (1953) (noting that pressures on the prosecutors can lead to calculated improper statements to the jury).

251. McCann, *supra* note 226, at 675 (quoting *Wainwright v. Witt*, 469 U.S. 412, 459 (1985) (Brennan, J., dissenting)).

252. See Welsh S. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 445 (1971) (quoting a trial prosecutor's assessment that a prosecution's willingness to take a weak case to trial depends "on his position in the office at the time of trial"). See generally Kenneth Bresler, "I Never Lost a Trial": *When Prosecutors Keep Score of Criminal Convictions*, 9 GEO J. LEGAL ETHICS 537 (1996) (discussing problems with the use of convictions records in performance evaluations); Earle, *supra* note 250; Donald Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 43 n.39;

253. Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 64 n.42 (1968). One commentator called this a "conviction psychology." Earle, *supra* note 250, at 1219.

254. Earle, *supra* note 250, at 1219.

Although standards for the conduct of prosecutors exist, they have failed to diminish prosecutor misconduct.<sup>255</sup> Richard Rosen found that the research reveals that disciplinary charges have been “brought infrequently under the applicable rules and that meaningful sanctions have been applied only rarely.”<sup>256</sup> Bennett L. Gershman reported that he reviewed “[l]iterally hundreds of truly egregious instances of prosecutorial misconduct,”<sup>257</sup> and that none of these instances resulted in punishment of the prosecutor by either his superiors or the bar.<sup>258</sup>

Several factors may contribute to the lack of formal discipline of prosecutors. One commentator suggests the lack of discipline may stem from the prosecutor’s “standing, prestige, political power and close affiliation with the bar.”<sup>259</sup> Other reasons asserted for the lack of discipline include the following: a hostile attitude on the part of the judiciary toward claims of prosecutorial misconduct, based on the relationship between the judiciary and the prosecutor’s office;<sup>260</sup> difficulty in obtaining evidence to successfully pursue violations; and lack of expertise in the criminal law area which causes disciplinary bodies to be reluctant to judge prosecutorial conduct.<sup>261</sup> However, one explanation for the

<sup>255</sup>. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 cmt. (1997). See *Generally STANDARDS*, *supra* note 218; NATIONAL DISTRICT ATTORNEY ASSOCIATION STANDARDS (Nat’l Dist. Attorney Assoc. 2d ed. 1991)

<sup>256</sup>. Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 693 (1987).

<sup>257</sup>. BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT 13-2 n.4 (6th ed. 1991).

<sup>258</sup>. See *id.* (stating that attorney disciplinary sanctions are so rarely imposed as to make their “use virtually a nullity”); JOSEPH F. LAWLESS JR., PROSECUTORIAL MISCONDUCT § 13.15, at 599 (1985) (disciplinary sanctions against prosecuting attorneys are the exception, not the rule); Alschuler, *supra* note 237, at 673 (“[C]ourts have sometimes exhibited a strange hesitancy to subject prosecutors to the rules that are applicable to other lawyers.”). Professor Rory Little undertook a “entirely unscientific and possibly incomplete” search of roughly 600,000 reported state disciplinary decisions since 1963 and found only 18 decisions involving the discipline of prosecutors in their official capacity. Joan Rogers, *Conference Report*, 66 U.S. L. WKLY. 2014, 2014 (1997).

Additionally, commentators have noted that on the rare occasions when prosecutors are disciplined, the sanctions imposed amount to little more than a “slap on the wrist.” Rosen, *supra* note 256, at 693; see also Misner, *supra* note 231, at 736 (noting the court’s “hands off” policy in sanctioning prosecutors). See generally Walter Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 SW. L.J. 965 (1981).

<sup>259</sup>. GERSHMAN, *supra* note 257, at ix.

<sup>260</sup>. See GERSHMAN, *supra* note 257, § 12.4, at 12-13, 12-14 (describing the close relationship prosecutors enjoy with the judiciary).

<sup>261</sup>. See Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69, 70 (1995). Professor Wolfram suggests that the reluctance of the disciplinary agencies may stem from a concern that complaints against prosecutors may be motivated by politics or resentment

lack of discipline may be that many of the actions of prosecutors do not violate ethical requirements. These same actions, however, appear to be improper; thus, they negatively impact the system by appearing to be unfair.

To encourage prosecutors to consider whether their actions appear proper, the Appearance of Impropriety Standard should be included in Rule 3.8 of the *Model Rules of Professional Conduct*.<sup>262</sup> The standard should appear not only in the rule, but also in the comment section. If the standard is included in the rule, it can be used as a basis for discipline.<sup>263</sup> Additionally, the standard should be explained in the comment section to clarify the standard.

A suggested section follows:<sup>264</sup>

#### RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

*(h) refrain from conduct that has the appearance of impropriety.*

#### COMMENT:

[1] prosecutor has the responsibility of a minister of justice and not simply that of an advocate. *A prosecutor as a minister of justice must seek to maintain the integrity of the criminal justice system by refraining from not only impropriety in his professional life, but also the appearance of impropriety. The prosecutor's professional conduct will be judged by determining whether his actions would create in reasonable minds<sup>265</sup> a doubt that the prosecutor is acting fairly, competently, and justly in light of the knowledge of all relevant circumstances that a reasonable inquiry would disclose.*<sup>266</sup>

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resulting from convictions. See WOLFRAM, *supra* note 135, § 13.10.2, at 761.

262. See Zacharias, *supra* note 192, at 49-50 (suggesting the need for specific ethical directives).

263. Professor DiPippa argued that a "complete code would not omit either enforcement of the minimum duties or the encouragement of high ideals." John M. A. DiPippa, *Lon Fuller, the Model Code, and the Model Rules*, 37 S. TEX. L. REV. 303, 335 (1996).

264. The sections in italics are the proposed additions to the existing rule.

265. MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1990).

266. The Delaware and Florida Codes of Judicial Conduct include this language. See Abramson, *supra* note 5, at 953 n.15.

Opponents to the application of the Appearance of Impropriety Standard to prosecutors may assert that, because a "prosecutor's sole duty is to do justice," she has no financial incentives to commit unethical acts.<sup>267</sup> Others opine that municipal codes of conduct for public officials are not necessary because the "political process will oust officials whose conduct is less than exemplary."<sup>268</sup> However, relying on public pressure and the lack of financial incentives will not ensure that the prosecutor acts either fairly or appears to act fairly. Furthermore, due to the prosecutor's extreme power<sup>269</sup> over the criminal justice system, her conduct must be gauged more carefully than that of a private attorney. An ethical provision will provide the mechanism to enforce the Appearance of Impropriety Standard and will encourage self-reflection.

An ethical rule delineating the Appearance of Impropriety Standard would allow courts to sanction, and disciplinary bodies to punish, prosecutorial conduct which appears to be improper. Prosecutorial conduct often falls outside the rules of ethics because the rules were drafted and primarily developed to address and regulate the attorney-client relationship.<sup>270</sup> At the heart of the Model Rules is the assumption "that the world is composed of two groups, clients and non-clients."<sup>271</sup> The prosecutor does not have a client. Therefore, her actions are not usually addressed by current ethical codes.<sup>272</sup> However, her actions may still appear to be improper as failing to seek justice and truth. Such conduct could be corrected by the presence of a rule which would make that reproach possible.

In addition to using the rule to discipline or sanction, the rule could also provide a mechanism for the necessary soul-searching and self-regulation required of prosecutors.<sup>273</sup> Professor Zacharias stressed that the promotion of introspection is one of the most important purposes of a professional ethics

267. *Arizona ex rel. Romley v. Superior Court*, 908 P.2d 37, 43 (Ariz. Ct. App. 1995) (holding that a screening mechanism will prevent disqualification of an entire prosecution's office because there is no "financial incentive to obtain prohibited information"); *see also State v. Pennington*, 851 P.2d 494, 498 (N.M. Ct. App. 1993) (finding that prosecutors have no financial incentives to violate a court order separating them from a case); Earle, *supra* note 250, at 1219.

268. Markowitz, *supra* note 244, at 596. *See* Earle, *supra* note 250, at 1219.

269. *Young v. United States ex. rel. Vuitton ET FILS. S.A.*, 481 U.S. 787, 813 (1987) (observing that the "citizen's primary adversary . . . is armed with expansive powers and wide-ranging discretion").

270. *See* Flowers, *supra* note 192, at 952-74 (discussing the adversarial nature of the ethics codes and their lack of application to prosecutors during the investigation of the criminal case).

271. Lawry, *supra* note 226, at 629.

272. *See* Flowers, *supra* note 192, at 965; Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657, 666 (1994) (observing that there are fundamental differences among lawyers which "flourish beneath a deceptively cohesive surface").

273. *See* Fred C. Zacharias, *Specificity in Professional Codes: Theory, Practice, and the Paradigm of Professional Ethics*, 69 NOTRE DAME L. REV. 223, 259 (1993).



code.<sup>274</sup> The role of professional lawyer requires introspection.<sup>275</sup> One commentator noted that “[t]rue ethical decisions allow for an individual to weigh the multitude of factors that go into moral decision making.”<sup>276</sup> To this end, the ethics codes encourage self-inspection. The Preamble to the *Model Rules of Professional Conduct* states: “[A] lawyer is also guided by personal conscience.”<sup>277</sup> Similarly, the *Code of Professional Responsibility*’s Preamble declares that “each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards.”<sup>278</sup> Introspection is essential in those areas where the likelihood of detection or discipline are negligible,<sup>279</sup> and where it promotes the appearance of justice.<sup>280</sup> Self-regulation and reflection are imperative because prosecutors are allowed enormous discretion to make decisions that are unreviewable.<sup>281</sup> The

274. *Id.*

275. See John J. Flynn, *Professional Ethics and the Lawyer's Duty to Self*, 1976 WASH. U. L. Q. 429, 436-40 (lamenting that the ethics codes fail to recognize the lawyer's duty to himself); cf. William Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1083-84 (1988) (arguing that lawyers must exercise reflective judgment in deciding whether to assert a claim).

276. DiPippa, *supra* note 263, at 308.

277. MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1997).

278. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble (1981).

279. See Fisher, *supra* note 224, at 197 (distinguishing the role of the prosecutor at trial when the adversary system works as a guard against excess from other prosecutorial behavior which is not controlled by the adversary system).

280. See Deborah L. Rhodes, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 707 (observing that ethics codes “promote the appearance and reality of justice, which both ultimately redound to the benefit of the profession”). See generally Gifford, *supra* note 252.

281. See text accompanying notes 203-08; see also Misner, *supra* note 231, at 741-63. Robert Misner identified three trends which have promoted the historical discretion and authority of the prosecutor: (1) criminal codes with overlapping crimes, (2) increase in crime reporting that has led to the need to rely on plea bargaining, and (3) sentencing guidelines which have eliminated the judge's sentencing discretion and placed sentencing in the hands of the prosecutor. Misner, *supra* note 231, at 741-63. Some of the reasons often cited for the prosecutor's extensive discretion in charging decisions are: (1) the separation of powers doctrine, (2) limited resources, (3) the impossibility of enforcing all the laws, (4) prosecutorial expertise in many areas that surpasses the court's, and (5) the need for individualized case analysis and consideration of particular needs of leniency. See LAWLESS, *supra* note 258, at 139-40. The Supreme Court has often reaffirmed the doctrine underlying the prosecutor's discretionary powers. See *Garrett v. United States*, 471 U.S. 773, 791 (1985) (holding the government, and not the courts, is responsible for initiating a criminal prosecution, unless the prosecution based its decision on race, religion, or other arbitrary classifications); *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977) (noting that there is no constitutional right to plea bargain); *Olyer v. Boles*, 368 U.S. 448, 456 (1962) (finding no equal protection claim based on selective prosecution); see also Gifford, *supra* note 252, at 53 (distinguishing plea bargaining from other

prosecutor must be provided with guidance on how to exercise that discretion in a proper way. Justice Brietel framed the challenge as, “not how to eliminate or reduce discretion, but how to control it so as to avoid the unequal, the arbitrary, the discriminatory, and the oppressive.”<sup>282</sup> An Appearance of Impropriety Standard would provide the necessary guidance.

## V. APPLYING THE APPEARANCE OF IMPROPRIETY STANDARD TO WITNESS PREPARATION

The application of the Appearance of Impropriety Standard is particularly helpful in situations which occur outside the courtroom. Within the courtroom, the prosecutor’s actions can be monitored and guided by judges, the adversary system, and substantive and ethics laws.<sup>283</sup> However, outside the courtroom, *e.g.*, in the police station, or the witness interview room, the prosecutor must conduct herself professionally by relying on her own internal compass. The prosecutor makes many of her contacts with the public outside the courtroom. Thus, her actions can create a positive or negative impression of the legal system. In her office, the prosecutor exercises her considerable discretion almost unfettered by judicial oversight<sup>284</sup> or client control.<sup>285</sup> Therefore, the Appearance of Impropriety Standard is most applicable and useful when considering the prosecutor’s actions outside the courtroom. Witness preparation is one of those areas.

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negotiations because of the prosecution’s total discretion). *See generally* Cox, *supra* note 79; Uviller, *supra* note 220.

282. Charles D. Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427, 427 (1960). *See also* State v. Karpinski, 285 N.W.2d 729, 735 (Wis. 1979) (recognizing both the need for prosecutorial discretion to achieve flexibility and sensitivity and the need to avoid arbitrary, discriminatory, or oppressive results).

283. *See* Fisher, *supra* note 224, at 225 (recognizing that the presence of adversarial safeguards allows the prosecutor to act more like an advocate and less like an impartial minister of justice).

284. *See supra* notes 229-34 and accompanying text.

285. In some respects, the prosecuting attorney is both the advocate and the client. *See* People v. Kelly, 142 Cal. Rptr. 457, 466 (Ct. App. 1978) (observing “in practical effect, the public prosecutor functions in dual capacity as both agent and principal, as both attorney and client”); STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 393 (3d ed. 1992). In pursuing the goals of a criminal case, the prosecuting attorney need not consult with any private individual. As one commentator noted, “the only mind the prosecutor must make up is his own.” Edwards, *supra* note 218, at 513 (discussing that prosecutors make decisions normally reserved for the client). For a discussion of other interests the prosecutor must consider, *see supra* notes 225-28 and accompanying text.

*A. Witness Preparation: The Profession's Dirty Little Secret*<sup>286</sup>

Witness preparation<sup>287</sup> is considered by many to be an essential part of pretrial preparation. Most American lawyers would scoff at the suggestion that witness preparation should be prohibited.<sup>288</sup> However, this pretrial preparation is not internationally recognized. In many countries, the trial attorney never speaks to or prepares any witnesses.<sup>289</sup> By contrast, American lawyers assert that

286. See J. KESTLER, QUESTIONING TECHNIQUES AND TACTICS § 9.04, at 494 (2d ed. 1992) (reminding his readers that "there is nothing dirty about witness preparation," but pointing out that convincing a witness that there is nothing dirty about the procedure is the lawyer's first task in preparation); John S. Applegate, *Witness Preparation*, 68 TEX. L. REV. 277, 279 (1989) (calling witness preparation "one of the dark secrets of the legal profession").

287. Here, witness preparation refers to the method used by a lawyer to discuss the witness's actual testimony prior to trial. Some practitioners call this process "house shedding" or "wood shedding," referring to the historical use of carriage houses behind the courthouse for last minute witness preparation. See JAMES W. MCELHANEY, TRIAL NOTEBOOK 50 (3d ed. 1994). This Article deals with witness preparation generally and not the specific preparation of expert witnesses. In many ways, witness preparation does not differ between experts and lay witnesses. However, because the rules governing expert witness opinions differ from those governing lay witnesses, there are some rules of preparation which are unique to experts. For a discussion of expert witness preparation, see Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1136.

Witness preparation is distinguished from investigation and discovery. During the investigation and discovery stage of the case, the lawyer is gathering facts and determining the strategy of the case. By the time the lawyer is at the pre-trial witness preparation stage, he should know all the facts of the case better than all the witnesses and should have determined his trial strategy and theory. See MCELHANEY, *supra*, at 50; ROBERTO ARON & JONATHAN L. ROSNER, HOW TO PREPARE WITNESSES FOR TRIAL § 12.01, at 212-13 (1985) (dividing the preparation into three stages: (1) the preliminary interview, (2) preparation session, and (3) the rehearsal session). The witness preparation discussed herein deals with preparing for the testimony of the witness on the stand. Roberto Aron and Jonathan Rosner have suggested that, in addition to witness preparation for trial testimony, the advocate should prepare their clients and criminal defendants to engage in testimony from the counsel table. *Id.* § 24.09, at 213-18 (Supp. 1997). The authors suggest a "client's silent participatory theory" in which the client has a non-verbal conversation with individual jurors, relaying the client's impressions of the testimony. *Id.* The authors advocate this method to be ethical and professional even though it is not subject to cross-examination, part of the trial record, nor even made known to the judge or opposing counsel. *Id.* This Article does not discuss the preparation of witnesses for this type of "testimony."

288. See *Riboni v. District Court*, 586 P.2d 9, 11 (Colo. 1978) (recognizing that our system of justice encourages witness preparation); Gross, *supra* note 287, at 1136 ("[O]ur system of presenting evidence at trial presupposes advance preparation.").

289. See William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT'L L. 37, 43 (1996) (contrasting American witness preparation with the system in Germany, where the

witness preparation is a part of their “fundamental duty of representation and a basic element of effective advocacy.”<sup>290</sup>

The ABA *Model Rules of Professional Conduct* define competent representation to include “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”<sup>291</sup> The rule, however, does not refine the definition to include preparation of witnesses. It merely requires the “use of methods and procedures meeting the standards of competent practitioners.”<sup>292</sup>

Witness preparation helps the lawyer present his case in a clear and coherent manner.<sup>293</sup> For example, the trial lawyer can use witness preparation

“shaping of witness testimony” is considered unethical). In discussing the English system of witness preparation, Barrister Michael Hill states that the reason for the English rule prohibiting barristers from preparing witnesses before trial is to ensure that the witness’s testimony is the “testimony of the witness and not the result of the advocate’s interrogation of the witness in circumstances in which the witness is liable to seek to adopt the advocate’s perception of the events rather than his own recollection.” Michael Hill, *Rules of Conduct for Counsel and Judges: A Panel Discussion on English and American Practices*, 7 GEO. J. LEGAL ETHICS 865, 869 (1994). See generally DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988) (contrasting the German system which discourages contact between the witness and attorney).

290. Applegate, *supra* note 286, at 279; see Riboni, 596 P.2d at 11 (acknowledging the prosecution’s duty to prepare witnesses).

291. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1997).

292. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 cmt. (1997).

293. Professor Wydick suggests several legitimate reasons an advocate engages in witness preparation:

- to investigate the facts; that is, to find out about the events in question;
- to find out what the witness perceived and can testify to from personal knowledge;
- to determine how accurately the witness perceived the events and what conditions may have hindered or assisted his perception;
- to test the witness’s memory about what he perceived;
- to discover how certain the witness is about what he remembers;
- to determine adverse or favorable conditions that may have affected the witness’s memory;
- to refresh the witness’s memory of events he once remembered but has since forgotten;
- to find out whether exposure to relevant documents, other items of tangible or testimonial evidence, or some non-evidentiary stimulus will help refresh the witness’s memory;
- to test the witness’s ability to communicate his recollections accurately;
- to find out what the witness means by words or expressions used in his story;
- to test the witness’s truthfulness;
- to warn the witness that his credibility may be attacked and that his past acts may be exposed in open court;
- to ascertain whether the witness has a good or bad character for truthfulness;

to relieve some of the anxiety of the witness, allowing them to answer questions in a manner which is understandable to the jury.<sup>294</sup> Additionally, the lawyer can assist the witness in understanding the evidence that is relevant and admissible as well as evidence which will be excluded. Also, the lawyer can help a witness recall details that are forgotten due to the passage of time. In sum, most successful lawyers would not put a significant witness on the stand unless he had spent at least some time preparing that witness.<sup>295</sup>

On the other hand, some scholars have noted that witness preparation is one of the dark secrets of trial work.<sup>296</sup> Professor David Luban observed: "[T]he interviewing and preparation of witnesses . . . is a practice that, more than almost

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- to find out whether the witness has previously been convicted of a crime that could be used to impeach his credibility;
  - to uncover instances of non-criminal conduct that could be used to impeach the witness's credibility;
  - to discover whether the witness's story has been influenced by bias or prejudice;
  - to discover whether the witness's story has been influenced, properly or improperly, by the statements or conduct of some other person;
  - to find out whether the witness has previously made statements that are either consistent or inconsistent with his present story;
  - to test the witness's demeanor in response to various stimuli he may encounter when he testifies (for example, the witness's likely response to harsh questioning by a cross-examiner);
  - to explain the role of a witness, the obligations imposed by the oath, and the formality of court proceedings;
  - to inform the witness about the physical surroundings in which he will testify, the persons who will be present, and the logistical details of being a witness;
  - to explain to the witness why he should listen to questions carefully, not guess, not volunteer information that has not been asked for, be alert to objections, and the like; to advise the witness about the appropriate attire and physical appearance in court, distracting mannerisms, inappropriate language and demeanor, and the effective delivery of testimony.

Richard C. Wydick, *The Ethics of Witness Coaching*, 17 CARDOZO L. REV. 1, 17-18 (1995).

294. See KESTLER, *supra* note 286, § 9.02, at 492. "The real goal of witness preparation should be viewed not only as the protection of the witness but as the destruction of the opponent's cross-examination." KESTLER, *supra* note 286, § 9.01, at 491.

295. See ARON & ROSNER, *supra* note 287, § 7.02, at 82 (asserting "witness preparation as the most important aspect of trial advocacy"); FRED LANE, GOLDSTEIN TRIAL TECHNIQUE § 11.02, at 7 (1995) (advocating that "[e]very witness, whether lay or expert, should be interviewed for the purpose of preparing him to be a 'good' witness"); STEVEN LUBET, MODERN TRIAL ADVOCACY, ANALYSIS AND PRACTICE 46 (1993).

296. See Applegate, *supra* note 286, at 279.

anything else, gives trial lawyers their reputation as purveyors of falsehoods."<sup>297</sup> This is largely because witness preparation routinely takes place in private. Therefore, many of the ethical issues that might arise within the context of witness preparation are seldom litigated. Witness manipulation and intimidation are rarely disciplined or even detected.<sup>298</sup> In fact, the majority of cases dealing with witness preparation deal with overt attempts to suborn perjury.<sup>299</sup>

Although American lawyers believe that witness preparation is fundamental<sup>300</sup> to their job, it is rarely taught in law school, is not directly regulated by ethics codes, and is seldom an issue in training attorneys.<sup>301</sup> The *Model Rules of Professional Conduct* do not specifically address witness preparation. The Rules, however, prohibit certain behavior that could manifest itself during witness preparation. For example, the Rules strictly prohibit the lawyer from knowingly offering false or perjurious testimony.<sup>302</sup> The Model Rules require that if a lawyer subsequently discovers that information offered to a tribunal is false, he must correct the false information.<sup>303</sup> Additionally, the Model Rules prohibit "conduct that is prejudicial to the administration of justice."<sup>304</sup> However, the Rules do not speak directly to the responsibility of the lawyer to prevent the witness from using false testimony. As one commentator explained, "attorneys now have essentially unlimited license to do almost anything in the process of preparing witnesses short of buying witnesses or

297. LUBAN, *supra* note 289, at 96. See Applegate, *supra* note 286, at 279.

298. See Michael Higgins, *Fine Line*, A.B.A. J., May 1998, at 52, 53 (quoting Stephen Gillers' observation that "changes of unethical witness coaching and suborning of perjury are extraordinarily difficult to prove").

299. See Joseph D. Piorkowski, Jr., *Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of "Coaching,"* 1 GEO. J. LEGAL ETHICS 389, 393 (1987).

300. One commentator called witness preparation a "science." See ROBERTO ARON ET AL., TRIAL COMMUNICATION § 19.06, at 233 (2d ed. 1996).

301. See Applegate, *supra* note 286, at 279.

302. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4) (1997) (stating that "[a] lawyer shall not knowingly offer evidence that the lawyer knows to be false"); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(b) (1997) (stating that "[a] lawyer shall not falsify evidence, counsel or assist a witness to testify falsely."); MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(c) (1997) (explaining that "[i]t is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation").

303. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4) (1997) (requiring that "[i]f a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures"). This provision to correct the admission of false testimony applies even if the lawyer's knowledge of the falsity of the information came from his client and therefore would be confidential under the rules. MODEL RULES OF PROFESSIONAL CONDUCT RULE 3.3(b) (1997).

304. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(d) (1997).

suborning perjury.”<sup>305</sup> The lack of special rules, standards,<sup>306</sup> or even discussion about the ethics of witness preparation have resulted in a significant uncertainty about the boundaries between permissible witness preparation and impermissible witness “coaching.”<sup>307</sup>

Courts rarely have attempted to define witness coaching. The Supreme Court, in *Geders v. United States*,<sup>308</sup> recognized that the lawyer must refrain from improperly influencing a witness’s testimony but failed to define what constitutes improper “coaching.”<sup>309</sup> In *Geders*, the Court held that prohibiting a defendant from consulting his counsel during an overnight recess violated the defendant’s Sixth Amendment right to effective assistance of counsel.<sup>310</sup> During the course of its discussion, the Court found that the rules of witness sequestration were adopted, in part, to prevent “improper attempts to influence the testimony in light of the testimony already given.”<sup>311</sup> However, the Court found that improper influence was defined by the disciplinary rules which govern false testimony.<sup>312</sup>

By contrast, some courts have defined proper witness preparation to require more than merely refraining from encouraging or aiding in perjurious testimony. For example, the court in *State v. McCormick*<sup>313</sup> defined proper witness preparation as the method of “preparing the witness to give the witness’ [sic] testimony at trial and not the testimony that the attorney has placed in the witness’ [sic] mouth.”<sup>314</sup> In addition, the Eleventh Circuit defined improper witness coaching as attempts to direct “a witness’s testimony in such a way as to have it conform with, conflict with, or supplement the testimony of other witnesses.”<sup>315</sup>

305. Gross, *supra* note 287, at 1137.

306. Neither the ABA Standards for Criminal Justice and the National District Attorney Association’s National Standards for Prosecutors address witness preparation.

307. See Higgins, *supra* note 298, at 53 (noting that “the line where legitimate witness preparation crosses into unethical coaching is fuzzy”); Robert S. Thompson, *Recission, Disciplined Inferences and the Adversary Process*, 13 CARDOZO L. REV. 725, 770 (1991) (finding the line between witness preparation and witness coaching both “fuzzy and shifting”).

308. 425 U.S. 80 (1976).

309. *Id.* at 80.

310. See *id.* at 91.

311. *Id.* at 87.

312. See *id.* at 90 n.3.

313. 259 S.E.2d 880 (N.C. 1979).

314. *Id.* at 882.

315. Crutchfield v. Wainwright, 803 F.2d 1103, 1110 (11th Cir. 1986).

*B. Methods of Witness Preparation*

Prior to the witness's testimony, the lawyer may prepare the witness through several methods. These methods of witness preparation can be divided into the following three categories: preparing the form of the testimony, which includes imparting general and case-specific information to the witness; preparing the content of the testimony, which includes gathering information about the testimony; and refreshing the witness's memory.

## 1. Preparing the Form of the Testimony

*a. Giving General Information*

An important part of preparing witnesses is imparting general information about testifying. The lawyer explains the court proceedings to the witness.<sup>316</sup> The attorney may also describe the courtroom and where everyone will be seated during the proceedings, including the judge, the parties, and the witnesses.<sup>317</sup> The witness may also be taken to observe the layout of the courtroom.<sup>318</sup> Additionally, the lawyer may explain the procedure regarding direct examination, cross-examination, and objections.<sup>319</sup> For example, the lawyer could explain terms the witness may not understand.<sup>320</sup> The literature is

316. See THOMAS A. MAUET, TRIAL TECHNIQUES 476 (4th ed. 1996) (instructing the lawyer to "prepare the witness for the procedural and evidentiary rules that govern his testimony"); TANFORD, *supra* note 13, at 261 (suggesting that making the witness familiar with the courtroom assists the witness in communicating effectively with the jury). Lane advises the attorney to describe the characteristics of the judge and opposing counsel for the witness; for example, the attorney should tell the witness if the judge is a "stickler" on demeanor and decorum in her courtroom. LANE, *supra* note 295, § 11.19, at 23.

317. In a criminal case, the prosecutor must consider whether the witness should be informed of the location of the defendant in the courtroom. One court assumed that informing the witness of the defendant's location was suggestive, but upheld the defendant's conviction, finding that the identification was reliable under all the circumstances. See *United States v. Oreto*, 37 F.3d 739, 745 (1st Cir. 1994); see also *People v. Roybal*, 775 P.2d 67, 71 (Colo. Ct. App. 1989) (finding no prosecutorial misconduct where the prosecutor explained to the victim prior to trial that the defendant did not have a tattoo on his arm, although the victim had previously described her attacker as having a tattoo); *State v. Hensley*, 608 So. 2d 664, 669 (La. Ct. App. 1992) (finding mistrial unnecessary when prosecution showed a single picture of defendant just prior to the trial). See generally Evan J. Mandery, *Due Process Considerations of In-Court Identifications*, 60 ALB. L. REV. 389 (1996).

318. See TANFORD, *supra* note 13, at 261.

319. See MAUET, *supra* note 316, at 475; TANFORD, *supra* note 13, at 261 (suggesting that a witness be informed of the order of questioning and the need to refrain from answering a question when an objection is asserted).

320. See ARON & ROSNER, *supra* note 287, § 11.29, at 295 (listing legal terms that



abundant with lists of information that should be given to witnesses.<sup>321</sup> This information can be given orally during the preparation conference, or in writing to the witness, prior to testimony at trial.<sup>322</sup>

In addition, instructions given to witnesses may include general behavioral suggestions.<sup>323</sup> For example, the witness may be instructed on how to dress.<sup>324</sup> Further, he may be advised to avoid exhibiting annoying habits and distracting mannerisms.<sup>325</sup> The witness could be told to use language that is understandable and acceptable to the jury.<sup>326</sup> The lawyer may also discuss with the witness his or her demeanor while testifying.<sup>327</sup> Most lawyers agree that the most important

may need to be explained).

321. See JOSEPH KELNER & FRANCIS E. MCGOVERN, *SUCCESSFUL LITIGATION TECHNIQUES: STUDENT EDITION* § 8.03, at 8-16 to 8-18 (1981); Applegate, *supra* note 286, at 298 n.95.

322. See RONALD L. CARLSON & EDWARD J. IMWINKELRIED, *DYNAMICS OF TRIAL PRACTICE* § 9.4, at 182 (2d ed. 1995); see also MCELHANEY, *supra* note 287, at 50 (suggesting that taperecording the basic information may be an effective and efficient way of conveying this information). The National District Attorney Association's National Prosecution Standards recommend a formal orientation program for all victims and witnesses. Standard 27.1 cmt. (1993).

323. See DAVID BALL, *THEATER TIPS AND STRATEGIES FOR JURY TRIALS* 28-30 (1994); MCELHANEY, *supra* note 287, at 51-54; TANFORD, *supra* note 13, at 261-62; Applegate, *supra* note 286, at 299.

324. See BALL, *supra* note 323, at 28 (advising that witnesses should dress in clothes they have previously worn even if that requires having them wear the clothes to a dress rehearsal); LANE, *supra* note 295, § 11.06, at 12 (explaining that jurors are offended by witnesses who overdress and may be suspicious of witnesses who dress "offbeat," and that witnesses should therefore be advised to avoid extremes); MAUET, *supra* note 316, at 475 (instructing lawyers to ensure that their witnesses dress in clothes which are appropriate to their background); MCELHANEY, *supra* note 287, at 51 (explaining that the most important rule is that the witness be clean and neat); TANFORD, *supra* note 13, at 262 (suggesting that the lawyer tactfully give advice on how to dress).

325. Many witnesses have mannerisms which could distract the jury from their testimony. See MCELHANEY, *supra* note 287, at 51-52. Witness preparation includes detecting these mannerisms and attempting to eliminate them. See MCELHANEY, *supra* note 287, at 51-52. Nevertheless, most commentators caution that a lawyer must be aware that a witness comes to the trial with certain natural attributes that the lawyer must work with instead of attempting to eliminate. See MCELHANEY, *supra* note 287, at 51 ("The basic principle is to behave naturally."). On the other hand, one author suggests that through repetition and rehearsal many habits can be eliminated from the witness's testimony. See Diane R. Follingstad, *Preparing the Witness for Courtroom Testimony*, TRIAL, Jan. 1994, at 50, 50.

326. See KELNER & MCGOVERN, *supra* note 321, § 8.02, at 8-6 (advising that witnesses should be instructed to use terms that the jury can "relate to and comprehend").

327. The discussion of demeanor may take many different forms. Some commentators suggest discussing eye contact and posture with the witness. See BALL, *supra* note 323, at 28-29; TANFORD, *supra* note 13, at 263. Others discuss the need to

advice they can give witnesses is to tell the truth.<sup>328</sup> Most general discussions with the witness about the method of testifying involve little risk of prompting the witness to distort or falsify evidence.<sup>329</sup>

### *b. Divulging Case-Specific Information*

Lawyers also impart case-specific information during witness preparation. For example, the lawyer may explain his theory of the case and how the witness's testimony fits into the theory.<sup>330</sup> Additionally, the lawyer may discuss the elements of the claim or charge and facts that tend to prove these elements.<sup>331</sup> Furthermore, some commentators suggest that lawyers discuss the relevant burden of proof.<sup>332</sup> In sum, this method of witness preparation helps the witness understand the importance of information that the witness may have thought unimportant or irrelevant.<sup>333</sup>

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advise the witness in more general terms about looking confident during testimony. See Applegate, *supra* note 286, at 299. Professor Applegate asserts that some suggested changes in demeanor can be problematic if they are intended to produce a false representation of the witness. Applegate, *supra* note 286, at 299. Professor Kestler suggests that witnesses must not only tell the truth, but appear to be telling the truth. See KESTLER, *supra* note 286, § 9.31, at 568. He emphasizes that jurors look to the witness's demeanor to determine if they are in fact telling the truth. See KESTLER, *supra* note 286, § 9.31, at 568.

328. Professor Kestler suggests that a witness preparation session should begin with the lawyer explaining that the witness's greatest weapon is to tell the truth. See KESTLER, *supra* note 286, § 9.31, at 567; see also LANE, *supra* note 295, § 11.13, at 16 (suggesting that witnesses be told not to guess or exaggerate, as such methods are obvious to the jurors); KELNER & MCGOVERN, *supra* note 321, at 8-12 (advising lawyers to complement any vigorous mock cross-examination with vigorous instructions on telling the truth). Telling the witness to tell the truth is also used as a tactical advantage. Most lawyers prepare their witnesses for the cross examination question: "What did the lawyer tell you to say?" The prepared witness simply and sweetly answers: "To tell the truth."

329. See Applegate, *supra* note 286, at 298.

330. See KESTLER, *supra* note 286, § 9.33, at 569; see also ARON & ROSNER, *supra* note 287, at 229-30 (indicating that, in order to maximize "comprehension and collaboration," the witness must understand the entire case).

331. See KESTLER, *supra* note 286, § 9.33, at 569.

332. See LANE, *supra* note 295, § 11.18, at 18.

333. Kestler advises that "[w]itness preparation has the effect of shaping the testimony, focusing on the significant, dropping the irrelevant, emphasizing helpful points, and structuring the presentation to minimize the damage caused by adverse information." KESTLER, *supra* note 286, § 9.33, at 569. Lubet uses the following hypothetical to exemplify the need to explain to the witness the elements of the case: "[A] client complaining of a defective product would probably place greatest emphasis on the way that it malfunctioned; he might not think it important that the salesperson helped him select it." LUBET, *supra* note 295, at 46.

In addition, the lawyer may inform the witness of other evidence and other witnesses' testimony during witness preparation. One legitimate purpose of this method of preparation is to explain how the testimony and evidence fit into the theory of the case.<sup>334</sup> Additionally, the witness and the lawyer may discuss testimony in order to prepare explanations for any inconsistencies.<sup>335</sup> Finally, informing the witness of other testimony may refresh the witness's own memory.<sup>336</sup>

In contrast to general advice, the disclosure of case-specific information has the potential to influence the witness to testify falsely. To illustrate, most lawyers are familiar with the scene from *Anatomy of a Murder*,<sup>337</sup> in which a criminal defense lawyer, while defending a man charged with murdering his wife's rapist, explains the significance of the time lapse between the rape and the murder. The defendant subsequently adapts his story to fit the legal theory.<sup>338</sup> Describing the law, theory, and other evidence can encourage the witness to mold his testimony to fit other aspects of the trial.<sup>339</sup> Additionally, discussing the necessary burden of proof can "encourage the witness to assert a degree of certainty that is not otherwise justified."<sup>340</sup> Furthermore, supplying information regarding other evidence and testimony can affect the witness's assessment of his recollection. For example, the witness may begin to incorporate other

334. See Applegate, *supra* note 286, at 304.

335. See MAUET, *supra* note 312, at 475; see also MCELHANEY, *supra* note 287, at 55 (emphasizing that pre-trial witness preparation, not trial, is the time to discover inconsistencies).

336. See *infra* text accompanying notes 392-402.

337. ROBERT TRAVER, *ANATOMY OF A MURDER* (1958). See Wydick, *supra* note 293, at 25 (citing the legal ethics books which discuss the movie scene).

338. Traver explains to the reader the reason for the lecture:

The Lecture is an ancient device that lawyers use to coach their clients so that the client won't quite know he has been coached and his lawyer can still preserve the face-saving illusion that he hasn't done any coaching. For coaching clients, like robbing them, is not only frowned upon, it is downright unethical . . . . Hence the Lecture, an artful device as old as the law itself, and one used constantly by some of the nicest and most ethical lawyers in the land. "Who me? I didn't tell him what to say," the lawyer can later comfort himself "I merely explained the law, see." It is a good practice to scowl and shrug here and add virtuously: "That's my duty, isn't it?"

TRAVER, *supra* note 337, at 70.

339. Professor Lubet, using the same hypothetical discussed in note 333, *supra*, condemns the following conversation with a client, if it occurred after the client has indicated he picked out the defective products: "You cannot win this case unless you testify that the seller assured you a specific level of performance. You need to tell me exactly how the salesperson induced you to buy, and how you were promised that the product would meet your needs." LUBET, *supra* note 295, at 47 n.13.

340. Applegate, *supra* note 286, at 302. See also Piorkowski, *supra* note 299, at 404 (discussing the effect of changing the witness's demeanor on the jury's perception as to the witness's confidence in his or her identification).

witnesses' testimony as his own and therefore violate evidentiary rules regarding hearsay and personal knowledge.<sup>341</sup> Additionally, the imparting of other testimony could cause a witness to become more confident in his testimony than memory or observations would warrant.<sup>342</sup>

Although imparting information, both general and case-specific, raises ethical concerns, the ethical rules only deal with lawyers who knowingly encourage, aid, or use false testimony.<sup>343</sup> The definition of "knowingly" in the *Model Rules of Professional Conduct* requires "actual knowledge of the fact in question."<sup>344</sup> Professor Freedman argued that because litigants unavoidably recreate the event, the advocate should construct a theory of what occurred which is in the client's best interests.<sup>345</sup> The ethical distinction lies in whether the lawyer assists the witness in developing the facts, or in creating them; the former being permitted, the latter prohibited.<sup>346</sup> Therefore, lawyers who unintentionally or unknowingly encourage false testimony are not directly regulated by the ethical rules.<sup>347</sup>

## 2. Preparing the Content of the Testimony

In addition to conveying information, witness preparation entails obtaining information from the witness and preparing the content of the testimony. The New York Court of Appeals in, *In re Eldridge*,<sup>348</sup> observed that the lawyer's duty in witness preparation is "to extract the facts from the witness not pour them into him; to learn what the witness does know, not to teach him what he ought to know."<sup>349</sup> Witness preparation includes discussion of the actual content of the testimony. Preparation of actual testimony ranges from very general discussion of the subject matter of the testimony to very precise discussion, including the choice of words the witness should use in her testimony.

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341. See Applegate, *supra* note 286, at 307.

342. See Piorkowski, *supra* note 299, at 404.

343. See Piorkowski, *supra* note 299, at 404; see also *supra* text accompanying notes 305-07.

344. MODEL RULES OF PROFESSIONAL CONDUCT Rule 12.8.6 (1997).

345. See MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 59-77 (1975); Applegate, *supra* note 286, at 303.

346. See Applegate, *supra* note 286, at 303.

347. Professor Lubet suggests that the answer to any witness preparation dilemma is essentially the intent of the lawyer. See LUBET, *supra* note 295, at 47.

348. 82 N.Y. 196 (1880).

349. *Id.* at 206.

*a. General Discussion of Subject Matters*

The most basic reason for witness preparation is that it allows a lawyer to determine what the witness knows about an event.<sup>350</sup> The lawyer can accomplish this through a general discussion with the witness regarding his perceptions and recollections of the events. Some commentators believe that a discussion of the general topics to be included in the testimony, and the organization of the questions to be presented, is a sufficient and preferable method of witness preparation.<sup>351</sup> Herbert Stern suggested the best way to prepare a witness for testimony is to assure that he is present during a concise and well-organized opening statement.<sup>352</sup> Mr. Stern asserted that "automatic back and forth from a

350. See Applegate, *supra* note 286, at 308.

351. See ARON & ROSNER, *supra* note 287, § 12.08, at 229-30 (advocating that the lawyer should give a witness a copy of his or her outline of the direct examination); HERBERT J. STERN, TRYING CASES TO WIN 168 (1991).

352. See STERN, *supra* note 351, at 168. The law on permitting witnesses to hear opening statements is in conflict. See Lane, *supra*, note 295, § 11.28, at 30; compare State v. Arroyo, 539 A.2d 581, 585 (Conn. App. Ct. 1988) (holding that the sequestration rule is unambiguous and can exclude any witness during any portion of the trial "in which he is not testifying"), and Hampton v. Kroger Co., 618 F.2d 498, 499 (8th Cir. 1980) (holding that no error resulted from district court excluding the plaintiff's expert witness from opening statements), with United States v. West, 607 F.2d 300, 306 (9th Cir. 1979) (limiting the sequestration rule to evidentiary hearings), and United States v. Brown, 547 F.2d 36, 37 (3d Cir. 1976) ("We do not dispute that a party may request as of right that witness[es] be excluded prior to the time that any opportunity exists for them to hear the testimony of other witnesses. We do not, however, construe a party's request for the exclusion of witnesses prior to opposing counsel's opening statement to be within the purview of Rule 615. Rule 615 relates exclusively to the time testimony is being given by other witnesses. It is therefore not appropriate during the reading of pleadings or the opening address of counsel."). FED. R. EVID. 615 speaks to excluding witnesses during another witness's testimony. Rule 615 states: "At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses. FED. R. EVID. 615. Some of the enumerated purposes for this rule are (1) to assure witnesses testify from their own knowledge, (2) to prevent the testimony of one witness influencing others, and (3) to strengthen the role of cross-examination in testing the testimony. See Bumblauskas v. South Suburban Safeway Lines, 249 N.E.2d 143, 146 (Ill. Ct. App. 1969). Dean Wigmore stated that the exclusionary privilege is "one of the greatest engines that the skill of man has ever invented for the detection of liars in a court of justice." *Id.* (citing 6 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1838 (3d ed. 1940). Typically, however, a motion for sequestration, or as it is sometimes referred to, a motion to invoke "the rule," occurs at the beginning of trial, perhaps even prior to the jury selection, as part of the preliminary matters. See LANE, *supra* note 295, § 11.28, at 30.

FED. R. EVID. 615 does not apply to three categories of witnesses. The court cannot exclude (1) parties who are natural persons, (2) an officer employee of a party who is not a natural person designated as its representative, and (3) a person whose presence is essential to the presentation of the evidence. FED. R. EVID. 615. Category three usually

prepared script does not achieve any of the desired purposes of the direct [examination] (to make testimony clear, memorable, convincing and invulnerable to cross examination).”<sup>353</sup>

Even practitioners who advocate merely discussing the testimony and not rehearsing it, suggest that the witness must be assisted in breaking down his conclusions into specific facts.<sup>354</sup> Additionally, some commentators suggest that during the general discussion, the lawyer should prepare the witness for clues that the lawyer will give the witness.<sup>355</sup> For example, if the witness has forgotten an item in a list of evidence seized during a search, the lawyer will ask the witness: “Was there anything else seized?” This question will give the witness a clue that he or she has forgotten an item.<sup>356</sup> Some advocates believe that mere discussion of the witness’s testimony is not sufficient and that rehearsal of the testimony is imperative.<sup>357</sup>

### *b. Rehearsal of Testimony*

The rehearsal of testimony requires that the lawyer and the witness actually go through the testimony as it will be conducted in the courtroom. This method

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refers to expert and advisory witnesses such as law enforcement officers who are designated as lead investigators. See LANE, *supra* note 295, § 11.28, at 30. Arkansas includes crime victims as parties and therefore prohibits their sequestration. See *Stephens v. State*, 720 S.W.2d 301, 302 (Ark. 1986).

353. STERN, *supra* note 351, at 168.

354. See TANFORD, *supra* note 13, at 259.

355. See KESTLER, *supra* note 286, at 334; TANFORD, *supra* note 13, at 264. But see MCELHANEY *supra* note 287, at 58 (suggesting that, to prevent the witness from watching the advocate during the cross-examination, the witness should be expressly told that the lawyer will not provide him any clues).

356. See TANFORD, *supra* note 13, at 264. I suggest to my students that the question should be asked: “Do you remember anything else that was seized during the search?” If the witness responds in the negative, then the witness’s memory can be refreshed. Additionally, under FED. R. EVID. 803(7), the proponent may be allowed to introduce a document that contains a list of seized items as a past recollection recorded, because the witness has no present memory. Asking the question, without reference to the witness’s memory, could foreclose the use of the document, because the witness will have testified not that he or she cannot remember, but rather that nothing else was in fact seized in the search. See LANE, *supra* note 295, § 11.17, at 18.

357. See ARON & ROSNER, *supra* note 287, § 14.01, at 262 (“The rehearsal is an integral part of process.”); CARLSON & IMWINKELRIED, *supra* note 322, § 9.4, at 182 (stating that rehearsal of direct and cross-examinations is vital for first-time witnesses); LANE, *supra* note 295, § 11.10, at 14 (advocating that an exact recounting of the questions to be asked and the answers to be given is fundamental to witness preparation); MAUET, *supra* note 316, at 475 (suggesting that the only way to prepare a witness is to practice the actual examination).

of witness preparation is helpful in relaxing the witness,<sup>358</sup> resolving inconsistencies in the testimony, and preventing surprises.<sup>359</sup> Furthermore, it may refresh the witness's memory, assuring that nothing is forgotten or overlooked;<sup>360</sup> improve the witness's narrative;<sup>361</sup> and help eliminate bad habits.<sup>362</sup> The amount of rehearsal required may depend on the kind of testimony and characteristics of the witness.<sup>363</sup> Those commentators who advise rehearsal assert that the rehearsal should be under the same conditions as those under which the testimony will be given.<sup>364</sup> Additionally, some practitioners advise that witness rehearsal be videotaped.<sup>365</sup> The videotape can then be used to go over the testimony and pinpoint problems, including the use or absence of key words or phrases.<sup>366</sup>

Some tactical problems arise from the actual rehearsal of testimony. For example, the testimony can become rote and appear incredible, unemotional, and unpersuasive.<sup>367</sup> In addition, the rehearsal of testimony can eliminate the spontaneity that a conversation has and make the testimony boring.<sup>368</sup> Furthermore, a witness who has rehearsed testimony may become confused

358. See ARON & ROSNER, *supra* note 287, § 14.01, at 263 (noting that the "best prescription . . . against anxiety and nervousness" is rehearsal); KELNER & MCGOVERN, *supra* note 321, § 8.02, at 8-4.

359. See LANE, *supra* note 295, § 11.10, at 14.

360. See ARON & ROSNER, *supra* note 287, § 14.01, at 262.

361. See Applegate, *supra* note 286, at 322.

362. See TANFORD, *supra* note 13, at 263.

363. See CARLSON & IMWINKELRIED, *supra* note 322, at 182; KESTLER, *supra* note 286, § 9.37, at 572 (suggesting that lay witnesses require more rehearsal than experts); LANE, *supra* note 295, § 11.03, at 7.

364. See ARON & ROSNER, *supra* note 287, § 14.02, at 263 (suggesting use of same lighting, clothing and physical evidence); BALL, *supra* note 323, at 30-31 ("No doughnuts and coffee and no jeans."); LANE, *supra* note 295, § 11.10, at 14.

365. See CARLSON & IMWINKELRIED, *supra* note 322, § 9.4, at 183; KESTLER, *supra* note 286, § 9.37, at 573. The question arises whether the tape recording must be provided to the opposing counsel in those jurisdictions where the witness's statements must be given to the opposing side. See Applegate, *supra* note 286, at 337-38, 352; compare *United States v. Jones*, 542 F.2d 186, 209 (4th Cir. 1976) (noting that counsel is entitled to interview non-client witnesses in private), with *United States v. Townsley*, 843 F.2d 1070, 1086 (8th Cir.) (holding communications not privileged when the lawyer encouraged several witnesses to present "a uniform, knowingly untruthful story"), *aff'd in part and vacated in part on other grounds en banc*, 856 F.2d 1189 (8th Cir. 1988), and *United States v. Gordon-Nikkar*, 518 F.2d 972, 975 (5th Cir. 1975) (holding that conversations dealing with "plans to commit perjury" are admissible);

366. See *infra* text accompanying notes 372-77.

367. See CARLSON & IMWINKELRIED, *supra* note 322, § 9.4, at 182. But see BALL, *supra* note 323, at 31 (explaining that rehearsed does not mean memorized).

368. See MCELHANEY, *supra* note 287, at 55 (explaining that a direct examination containing a little "awkward spontaneity is better than one that appears rehearsed"); TANFORD, *supra* note 13, at 264 (stating that rehearsal interferes with spontaneity).

during the testimony if the wording or order of the questions changes.<sup>369</sup> Finally, studies have shown that repeated questioning of witnesses may unduly increase the level of confidence in their testimony.<sup>370</sup> This increased confidence level may be misleading to the jury. Therefore, repeated rehearsal is a questionable practice.

Rehearsal as a witness preparation method is considered by many to be an essential part of pretrial preparation.<sup>371</sup> However, some attorneys use the rehearsal not only to discuss particular facts to be covered in testimony, but also to discuss the use of specific terminology. This method of preparation is the most troublesome.

### *c. Suggesting the Use of Specific Words and Phrases*

Rehearsal and videotaping can lead the lawyer to suggest the use of specific words and phrases to the witness. Clearly, there are two areas in which lawyers may permissibly tell witnesses what words to use. First, a lawyer may discourage a witness from using prefatory phrases,<sup>372</sup> such as "I think" or "to the best of my knowledge."<sup>373</sup> Such language adds nothing to the fact-finding mission. Furthermore, exclusion of these phrases does not affect the content of the testimony. Second, a lawyer may safely instruct the witness not to use technical language<sup>374</sup> or jargon.<sup>375</sup> The witness should be instructed to use

369. See CARLSON & IMWINKELRIED, *supra* note 322, § 9.04, at 182 (advising the advocate not to use exact wording of the questions in order to avoid confusing the witness).

367. See John S. Shaw, III & Kimberly A. McClure, *Repeated Postevent Questioning Can Lead to Elevated Levels of Eyewitness Confidence*, 20 LAW & HUM. BEHAV. 629, 630 (1996) (suggesting the research shows that repeated police questioning may increase the confidence of the witness but not necessarily the accuracy).

371. See Applegate, *supra* note 286, at 322.

372. See Piorkowski, *supra* note 299, at 399.

373. Early in my career as a state prosecutor, I prosecuted a traffic case in which my only witness was a Colorado State Highway patrolman. When I asked him to state his name, he replied: "To the best of my knowledge it is Jim Smith." (I have changed the name to protect the innocent highway patrolman). I then asked him what his occupation was, and he replied: "To the best of my knowledge, I am a highway patrolman." The testimony continued to go from there with the witness prefacing every answer with the phrase "to the best of my knowledge." Obviously, he had been misinformed that he could not be tripped up by the cross-examination if he was only testifying to the best of his knowledge. As a young prosecutor it was an important lesson in the need to warn the witness against the use of prefatory phrases.

374. See KELNER & MCGOVERN, *supra* note 321, § 8.02, at 8-6; Piorkowski, *supra* note 299, at 400.

375. The famous police jargon that prosecutors always regret hearing is a police officer's testimony that he "exited his unit" instead of getting out of his car.



language which the jurors can understand.<sup>376</sup> In addition, the witness may be instructed on how to analogize to experiences which jurors can understand.<sup>377</sup>

However, this area becomes troublesome when lawyers suggest the use of specific words and phrases to increase the persuasiveness of testimony, or which fit the attorney's theory of the case. One commentator suggests that a witness should be helped with word choices to maximize the "vividness and persuasive effect of the testimony."<sup>378</sup> Professor Tanford, however, suggests the witness be given a list of alternative words to choose from, in order to avoid the testimony appearing incredible or unnatural.<sup>379</sup> A famous example of the tactical problem with giving a witness the words to use is the testimony of a young immigrant girl named Kate Alterman in the Triangle Shirtwaist fire case in New York.<sup>380</sup>

Kate Alterman testified for the State in a criminal prosecution against a company that owned a factory in Greenwich Village.<sup>381</sup> The prosecution stemmed from a fire which killed hundreds of immigrant workers.<sup>382</sup> On direct examination, it became clear that the words and images used by Kate were not those of an immigrant seamstress.<sup>383</sup> On cross-examination, the defense counsel, Max Steuer, asked the witness to repeat the story over and over again.<sup>384</sup> She sounded like a recording using the same words and phrases, in the same order.<sup>385</sup> Her incongruent use of high flown imagery and crude grammar was a signal that the account was not her own recollection, but a touched-up version of what she remembered.<sup>386</sup> Professor McElhaney concluded from this story that "too much time in the shed, and the testimony is bound to smell just a little like a horse."<sup>387</sup>

In addition to tactical problems, the lawyer may encounter ethical problems when discussing word changes with a witness. Obviously, if the word changes suggested by the lawyer alter the substantive evidence and make the testimony false, there is an ethical violation.<sup>388</sup> However, the more problematic practice is the suggested use of words that change the impact, not the substance, of the testimony.<sup>389</sup> The word suggested may have the same definition as the word

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376. See ARON & ROSNER, *supra* note 287, § 11.09, at 190.

377. See TANFORD, *supra* note 13, at 260 (suggesting, for example, that witnesses describe the pain they suffered by analogizing it, for example, to hitting one's head on a cabinet, burning one's fingers on a hot stove, or hitting one's elbow).

378. MCELHANEY, *supra* note 287, at 59-60.

379. See TANFORD, *supra* note 13, at 260.

380. See MCELHANEY, *supra* note 287, at 59-60.

381. See MCELHANEY, *supra* note 287, at 59-60.

382. See MCELHANEY, *supra* note 287, at 59-60.

383. See MCELHANEY, *supra* note 287, at 59-60.

384. See MCELHANEY, *supra* note 287, at 59-60.

385. See MCELHANEY, *supra* note 287, at 59-60.

386. See MCELHANEY, *supra* note 287, at 60.

387. MCELHANEY, *supra* note 287, at 60.

388. See *supra* notes 296-99 and accompanying text.

389. See Piorkowski, *supra* note 299, at 400.

used by the witness, but may not have the same connotation. The line between definitional changes and changes that merely affect the persuasive quality of the testimony is not easily ascertained. For example, suppose a witness uses the word “look” when describing what the defendant did prior to approaching her, and the prosecutor suggests the use of the words “stare,” “glare,” or “leer.” Plainly, the prosecutor’s words have a more stirring effect. “Stare” connotes a longer, more continuous activity than look; “glare” infers more menacing behavior; and “leer” adds a sexual connotation to the testimony. Arguably, however, none of these words changes the content of the testimony.

The only authoritative source that attempts to deal with this issue is a 1979 District of Columbia Bar opinion. The opinion approved the use of detailed substantive witness preparation as an accepted part of the trial process.<sup>390</sup> The opinion also found that a lawyer could suggest the use of specific words and phrases as long as the ultimate testimony remained true and not misleading.<sup>391</sup> Under that argument, the prosecutor could suggest the more graphic words described above.

### 3. Refreshing the Witness’s Memory

Finally, an important part of witness preparation is refreshing of the witness’s memory.<sup>392</sup> The lawyer can refresh a witness’s memory by different methods, such as the use of documents and evidence. Also, he can use other witnesses or witnesses’ statements to help jog the memory in preparation for the witness’s testimony.

#### *a. Use of Documents and Evidence*

Most lawyers suggest beginning any witness preparation by showing the witness all of the witness’s statements, documents, and evidence.<sup>393</sup> By showing the witness her statements, the lawyer can review what the witness has said in the past and refresh her recollection of the events. Furthermore, this method protects the witness from being surprised at trial by documents or evidence that

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390. See Applegate, *supra* note 286, at 279; District of Columbia Bar Legal Ethics Comm., Opinion No. 79 (1979).

391. See Applegate, *supra* note 286, at 279.

392. Attorneys disagree about how much a witness can actually remember and how much is reconstructed during witness preparation. The amount remembered varies depending on characteristics of the witness, their ability to perceive at the time of the event, and the personal impact of the event. See ROGER & JOHN SONSTENG, *ADVOCACY, PLANNING TO WIN: EFFECTIVE PREPARATION* § 1.28, at 19 (1994).

393. See CARLSON & IMWINKELRIED, *supra* note 322, at 182; KELNER & MCGOVERN, *supra* note 321, § 8.02, at 8-4 (recommending that the witness’s memory be refreshed before any practice session or simulation); MAUET, *supra* note 316, at 475.

she has not reviewed.<sup>394</sup> Additionally, this method bolsters the witness's confidence in her ability to remember.<sup>395</sup> Finally, this method prevents inconsistencies between the witness's prior testimony and trial testimony.<sup>396</sup>

Although very few ethical dilemmas arise from refreshing a witness's memory by utilizing her own statements, there are some tactical considerations. Most jurisdictions require that any item that is used to refresh a witness's memory be provided to opposing counsel.<sup>397</sup> Therefore, a lawyer using documents that are not otherwise discoverable should refrain from using those documents to refresh the witness's recollection.<sup>398</sup>

### *b. Utilizing Other Witnesses or Their Statements*

The lawyer can also use other witnesses' statements to refresh the memory of the witness who is being prepared for trial. In addition to the benefits discussed above, this method of preparation assists in recognizing and reconciling inconsistencies in the testimony.<sup>399</sup> However, the lawyer must be cognizant of the inherent problems with this method of refreshing. The witness may infer from the lawyer's reference to other witnesses' statements that he should change his testimony. The lawyer may be suggesting to the witness that he bring his testimony in line with other witnesses' testimony.<sup>400</sup>

A more controversial method of witness preparation is group preparation. During a group preparation, all the witnesses to a specific event are prepared together. This method is considered almost routine in many criminal cases where prosecutors interview all law enforcement personnel together.

This form of preparation has several advantages. Perhaps the most obvious is that it saves time. Additionally, this method allows the witnesses to get a clear

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394. See ARON & ROSNER, *supra* note 287, § 10.13, at 171; KESTLER, *supra* note 286, § 9.38, at 573.

395. See KELNER & MCGOVERN, *supra* note 321, § 8.02, at 8-4.

396. See KELNER & MCGOVERN, *supra* note 321, § 8.02, at 8-4 (suggesting that the witness be instructed at time of trial to remember what he observed, not what he previously said, by referring back to incident and not to the making of the statement).

397. FED. R. EVID. 612 requires that, if the court determines it is necessary and in the interest of justice, any evidence shown to a witness during or before trial in order to refresh their recollection must be provided to the opposing counsel. Some courts have found that the use of a document to refresh recollection may waive any claims to the attorney-client privilege. See KESTLER, *supra* note 286, at 321-22; MCELHANEY, *supra* note 287, at 54-55; Applegate, *supra* note 286, at 313.

398. One commentator suggests using summaries prepared by counsel to refresh recollection and then turning over these summaries to opposing counsel. See CARLSON & IMWINKELRIED, *supra* note 322, § 9.4, at 182.

399. See MAUET, *supra* note 316, at 475; MCELHANEY, *supra* note 287, at 37.

400. See *supra* text accompanying notes 334-35.

picture of the entire case.<sup>401</sup> This method is also touted as “the best way to avoid contradictions among witnesses for the same party.”<sup>402</sup>

The ethical pitfalls in this method are plentiful. The lawyer may tell the witnesses to testify falsely so their testimony is consistent with that of other witnesses. In *United States v. Ebens*,<sup>403</sup> the Sixth Circuit dealt with a group meeting between several of the witnesses.<sup>404</sup> The defendants in *Ebens* were charged with civil rights violations based on the death of an individual of Chinese ancestry.<sup>405</sup> The witnesses were brought together by a civil rights activist—a lawyer who was not connected to the prosecution.<sup>406</sup> The meeting occurred after the State prosecution had resulted in a guilty verdict,<sup>407</sup> but before the case had been tried in federal court.<sup>408</sup> During the course of the meeting, the activist suggested that the witnesses had been brought together to “help each other remember exactly what happened, how it happened, when it happened, and all the minor details.”<sup>409</sup> During the meeting, which was taped, one of the witnesses was persuaded that he had heard racial slurs when he originally had denied hearing slurs.<sup>410</sup> The Sixth Circuit held that the trial court erred in not allowing the defendants to introduce the recording of the meeting in their trial.<sup>411</sup>

Even in cases where the lawyer makes it clear that the witness must tell the truth, pressure to conform testimony to eliminate contradiction is enormous.<sup>412</sup> Unlike the use of statements to refresh, preparing witnesses together can cause witnesses to be pressured or influenced by other witnesses. One commentator described a successful use of the group preparation.<sup>413</sup> Three identification witnesses were interviewed separately before the group session. Two of the witnesses identified the suspect as having gray hair; one of the witnesses described the hair as blond. Although the witnesses had been interviewed separately prior to the group session, during the session the witnesses were able to convince the third witness that the suspect’s hair was gray with no prompting

401. See ARON & ROSNER, *supra* note 287, § 14.03, at 263-64.

402. See ARON & ROSNER, *supra* note 287, § 14.03, at 264.

403. 800 F.2d 1422 (6th Cir. 1986).

404. *Id.* at 1430.

405. *Id.* at 1425.

406. *Id.* at 1430.

404. Because of the public outcry over the leniency of the plea bargain, the Department of Justice instituted the federal charges. *Id.* at 1425.

408. *Id.* at 1425, 1430.

409. *Id.* at 1431 n.1.

410. *Id.*

411. *Id.* See also *United States v. Townsley*, 843 F.2d 1070, 1086 (8th Cir. 1988) (finding group preparation session not privileged).

409. See Applegate, *supra* note 286, at 351 (concluding that “group preparation poses extraordinary dangers of collusion, influence and fabrications”).

413. See KESTLER, *supra* note 286, § 9.42, at 580.

from the lawyer.<sup>414</sup> The use of this technique is controversial and dangerous from a lawyer's perspective.

### C. *The Prosecutor's Role in Witness Preparation*

The ethical issues surrounding witness preparation are especially delicate for the prosecutor who attempts to balance her role as a zealous advocate with her roles as a minister of justice and a quasi-judicial official. More than any other area of the prosecutor's work, witness preparation highlights the possible conflict between these roles.<sup>415</sup> As a zealous advocate, the prosecutor, during witness preparation, acts in her role as a partisan representative. In that role, she wishes to maximize her chances of winning by preparing the victim to put on the strongest case possible for conviction.<sup>416</sup> For the partisan representative within an adversary system, witness preparation is part of adversarial fact development. Accordingly, each side to the dispute is responsible for presenting his case in the best light.<sup>417</sup> The zealous adversary is not concerned with an even-handed presentation of facts; he seeks to present facts beneficial to his client while avoiding those which are adverse.<sup>418</sup> The zealous advocate seeks to "put his best foot forward."<sup>419</sup> To accomplish that end, he must prepare witnesses to present evidence in a light most favorable to his side of the case.<sup>420</sup>

414. See KESTLER, *supra* note 286, § 9.42, at 580.

412. See Piorkowski, *supra* note 299, at 389 (describing the conflict that most practitioners face in witness preparation between their duty to zealously represent their client and to serve as an officer of the court).

416. See KESTLER, *supra* note 286, § 9.33, at 569 (explaining that it is not the lawyer's job to "bring all the facts to the attention of the jury," nor is it her "duty to play an impartial role").

417. See KESTLER, *supra* note 286, § 9.33, at 569 ("Your emphasis in witness preparation should be designed to present facts in the light most favorable to your side."); LANE, *supra* note 295, § 11.01, at 6 ("It is principally through the direct examination of their witnesses, that parties truly present and emphasize their cause of action or defense.").

418. See Robert J. Kutak, *The Adversary System and the Practice of Law*, in *THE GOOD LAWYER* 170, 174 (David Luban ed., 1983) [hereinafter *THE GOOD LAWYER*] (concluding that "[a] fundamental premise of the adversary system of jurisprudence is that a competitive rather than a cooperative presentation and analysis of the facts underlying a dispute will produce a greater number of correct results"); see also Bruce A. Green, *The Ethical Prosecutor and the Adversary System*, 24 *CRIM. L. BULL.* 126, 130 (1988) (suggesting that the adversary system presupposes that each side bears the obligation not only to present evidence supporting its case but also ferret out all evidence supporting his case and contradicting his opponent's case).

419. Murray L. Schwartz, *The Zeal of the Civil Advocate*, in *THE GOOD LAWYER*, *supra* note 418, at 150, 153.

420. See KELNER & MCGOVERN, *supra* note 321, § 8.01, at 8-1 (stating that "[i]t is the role of the advocate in our legal system to present the client's case in the most

Although she is called on to be a zealous advocate, the prosecutor must act within the bounds of the law.<sup>421</sup> She must not overtly<sup>422</sup> or covertly attempt to falsify evidence or suborn perjury.<sup>423</sup> She is prohibited from utilizing false testimony by the rules of professional conduct and by the Constitution.<sup>424</sup> The Supreme Court has consistently held that the knowing use of false testimony violates due process.<sup>425</sup>

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favorable manner within the bounds of the law and the code of ethics”).

421. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. (1997) (“A lawyer should act with commitment and dedication to the interests of the client and with zeal.”).

422. Professor Wydick classifies three grades of witness coaching. He defines grade one as overt, intentional inducing of witnesses to testify falsely. See Wydick, *supra* note 293, at 3. Grade two is defined as coaching in which the lawyer covertly, but still intentionally attempts to encourage the witness to testify falsely. See Wydick, *supra* note 293, at 3. According to Professor Wydick, both of these forms of coaching are prohibited. His grade three coaching involves where the lawyer unintentionally induces a witness to testify falsely. See Wydick, *supra* note 293, at 3-4. This Article suggests applying the Appearance of Impropriety Standard to the action of the prosecutor might constitute grade three witness coaching. There is no need to apply this standard to blatantly incorrect behavior that not only appears improper, but is improper. Professor Lubet suggests that lawyers “must explicitly and implicitly prepare their witness to give his or her own testimony and not the testimony that the lawyer would favor or prefer.” LUBET, *supra* note 295, at 47.

423. Utilization of the Appearance of Impropriety Standard does not eliminate the need for the prosecutor to analyze his behavior and motivations to determine whether they are improper. One commentator laments that, in stressing the Appearance of Impropriety Standard, government officials may concern themselves merely with covering up actions so that they appear to be correct. See Morgan, *supra* note 79, at 611. Professor Morgan’s concern is that concentrating on the “appearance ethic is problematic because it distracts our attention from its primary referent, motive.” See Morgan, *supra* note 79, at 619. However, this article suggests that the Appearance of Impropriety Standard should be applied in addition to considerations of motive and intent.

424. See U.S. CONST. amend. 14 (requiring due process); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4 (1997) (prohibiting fraud in dealing with opposing counsel); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.5 (1997) (prohibiting use of false testimony or evidence); MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4 (1997) (prohibiting conduct involving dishonesty, fraud, deceit, and misrepresentation).

425. The cases involving the disclosure of false testimony are part of the body of rules which have been established over the last fifty years concerning the prosecution’s duty to disclose evidence to the defense. See GERSHMAN, *supra* note 257, § 5.1, at 5-2 (release #11 9/96). The leading case in this area is *Brady v. Maryland*, 373 U.S. 83 (1963). The disclosure rules are sometimes referred to as *Brady* rules, and include three specific situations: (1) the use of false testimony, (2) the nondisclosure of materially favorable evidence upon the request of the defendant, and (3) the nondisclosure of favorable evidence without a request from the defendant. See GERSHMAN, *supra* note 257, § 5.1, at 5-2, 5-3. *Brady* dealt with the requirement that the prosecutor disclose any exculpatory evidence requested by the defendant. Specifically, the Court held that “the

Sixty years ago, in *Mooney v. Holohan*,<sup>426</sup> the Supreme Court held that the “deliberate deception of court and jury by the presentation of testimony known to be perjured” is inconsistent with “the rudimentary demands of justice.”<sup>427</sup> The Supreme Court reaffirmed this principle in *Pyle v. Kansas*,<sup>428</sup> holding that allegations of the use of perjured testimony by the prosecution were sufficient to support a claim for release of a state prisoner pursuant to a writ of *habeas corpus*.<sup>429</sup> The Court has expanded the principles of *Mooney* to include the prosecutor’s use of false evidence regarding witness credibility.<sup>430</sup>

Additionally, as a minister of justice, the prosecutor must seek not only a proper verdict but also procedural justice.<sup>431</sup> She is held to a higher standard in this regard.<sup>432</sup> Accordingly, when preparing a witness, she must consider the effects of her actions on the ends of justice. Unlike other lawyers, whose sole goal is to defeat their opponents, the prosecutor must strive for justice and fairness.<sup>433</sup> This role requires the prosecutor to put the observance of the law ahead of partisan success.<sup>434</sup> Therefore, the prosecutor must not only be concerned with her intent in witness preparation but also with whether the resulting behavior of the witness is proper.

The Supreme Court, in *Alcorta v. Texas*,<sup>435</sup> expanded prosecutorial misconduct to include testimony elicited by the prosecution which taken as a

suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment.” *Brady*, 373 U.S. at 87. Subsequent cases have defined what is favorable and material. See, e.g., *Kyles v. Whitley*, 514 U.S. 419, 437 (1994) (requiring the prosecutor to determine whether the cumulative effect of all the undisclosed evidence is material); *United States v. Bagley*, 473 U.S. 667, 675 (1985).

426. 294 U.S. 103 (1935).

427. *Id.* at 112. See also *United States v. Agurs*, 427 U.S. 97, 103 (1976) (stating that if a prosecutor uses testimony he should have known was perjured it is fundamentally unfair to the defendant).

428. 317 U.S. 213 (1942).

429. *Id.* at 216.

430. See *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

431. Zacharias, *supra* note 192, at 60. Professor Zacharias calls this “adversarial justice,” referring to the need for prosecutors to refrain from “the use of techniques that tilt trials toward convictions in an unfair way.” Zacharias, *supra* note 192, at 60.

432. One commentator stressed that “[i]t is important for the courts, scholars, bar associations and the press to keep reminding prosecutors that they must comply with an entirely different set of standards than those applicable to the defense bar.” LAWLESS, *supra* note 258, at xv.

433. Alschuler, *supra* note 237, at 636 (stressing the need for a double standard, where the prosecutor refrains from appealing to the emotions of the jury and the defense attorney uses all lawful tools available to him).

434. See *supra* text accompanying notes 220-23.

435. 355 U.S. 28 (1957).

whole may give a false impression.<sup>436</sup> In *Alcorta*, the defendant claimed that he had killed his wife in a heat of passion after coming upon his wife kissing a man named Natividad Castilleja.<sup>437</sup> Castilleja told the prosecutor prior to trial that he had engaged in sexual intercourse on five or six occasions with the defendant's wife.<sup>438</sup> The prosecutor told the witness not to volunteer that information, but that, if asked, he would need to testify truthfully.<sup>439</sup> During direct examination of the witness, the prosecutor did not ask about sexual relations but asked several questions which implied there was merely a casual friendship between the wife and the witness.<sup>440</sup> The Court held that the prosecutor's actions violated the principles set forth in *Mooney* and violated the defendant's due process rights.<sup>441</sup>

The prosecutor's duty to be a minister of justice requires that she correct false testimony even if she did not elicit that testimony.<sup>442</sup> For example, in *Napue v. Illinois*, the Supreme Court held that a prosecutor must correct false evidence that was elicited on cross-examination.<sup>443</sup> The witness in *Napue* testified on cross-examination that he did not receive promises from the prosecution in exchange for his testimony.<sup>444</sup> However, the prosecutor knew he had agreed to speak on the witness's behalf in exchange for the witness's testimony against Napue.<sup>445</sup> The Court held the prosecutor's duty not to rely on

436. *Id.* at 31.

437. *Id.* at 29.

438. *Id.* at 30-31.

439. *Id.* at 31.

440. The following is a partial transcript of the direct examination:

Q: Natividad [Castilleja], were you in love with Herlinda [the defendant's wife]?

A: No.

Q: Was she in love with you?

A: No.

Q: Had you ever talked about love?

A: No.

Q: Had you ever had any dates with her other than to take her home?

A: No. Well, just when I brought her from there.

Q: Just when you brought her from work?

A: Yes.

*Id.* at 30.

441. *Id.* at 31.

442. See *Napue v. Illinois*, 360 U.S. 264, 270 (1959); *Brown v. Borg*, 951 F.2d 1011, 1015 (9th Cir. 1991) (declaring that "when exculpatory evidence is withheld, attention focuses on its effect on the defendant's right to due process; the prosecutor's intentions are irrelevant").

443. *Napue*, 360 U.S. at 270.

444. *Id.* at 265.

445. *Id.* at 266.



false testimony applies "when the [s]tate, although not soliciting false evidence, allows it to go uncorrected when it appears."<sup>446</sup>

The Supreme Court has imposed a duty on the prosecutor with regard to false testimony that goes beyond that which is applied to the defense counsel. In *Giglio v. United States*,<sup>447</sup> the Court held a prosecutor responsible for false information elicited at trial which he did not personally know was false.<sup>448</sup> In *Giglio*, a witness testified falsely about the plea bargain he had made with another prosecutor.<sup>449</sup> The prosecutor who conducted the trial was unaware of the previous agreement.<sup>450</sup> The Court reversed the conviction, holding the government responsible for the false testimony.<sup>451</sup> The Court held: "The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government."<sup>452</sup> Accordingly, the prosecutor's duty regarding the admission of false testimony is the same, "irrespective of the good or bad faith of the prosecution."<sup>453</sup>

The prosecutor's duty as a quasi-judicial official, however, goes further than prohibitions against the use of false testimony. The prosecutor represents the criminal justice system to the public, including witnesses and those observing the case. As previously noted, the legal profession is judged by the perceptions of citizens who have contact with the system. Witnesses are often exposed for the first time to the criminal justice system when they are contacted by the prosecutor to prepare testimony for trial. The prosecutor's actions in attempting to prepare his case for trial can affect how that witness feels about the

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446. *Id.* at 269.

447. 405 U.S. 150 (1972).

448. *Id.* at 154. See also *United States v. Wallach*, 935 F.2d 445, 456-57 (2d Cir. 1991) (explaining that "[w]here the prosecution knew or should have known of the perjury, the conviction must be set aside"), *remanded to* 788 F. Supp. 739 (S.D.N.Y. 1992); cf. *United States v. Agurs*, 427 U.S. 97, 110 (1976) (noting that "[i]f evidence highly probative of innocence is in [the prosecutor's] file, he should be presumed to recognize its significance even if he has actually overlooked it").

449. See *Giglio v. United States*, 405 U.S. 150, 151-52 (1972).

450. *Id.* at 152.

451. *Id.* at 154.

452. *Id.*

453. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). One lower court has interpreted the prosecutorial requirement to be "when it should be obvious to the Government that the witness's answer, although made in good faith, is untrue, the Government's obligation to correct the statement is as compelling as it is in a situation where the Government knows that the witness is intentionally committing perjury." *United States v. Harris*, 498 F.2d 1164, 1169 (3d Cir.), *cert. denied*, 419 U.S. 1069 (1974). In *Sanders v. Sullivan*, 863 F.2d 218, 226 (2d Cir. 1988), the court held that the state's failure to correct false testimony violates due process regardless of the prosecutor's participation in the false testimony.

system's fairness and honesty. This, in turn, affects the perception of the criminal justice system by the public as a whole.

Unlike defense attorneys, the prosecutor must be concerned about the public's perception of fairness as well as fairness itself. The prosecutor, as a member of the government, must consider both the systemic effects of her actions as well as their impact on individual cases. Abuses of witness preparation by the prosecutor can negatively affect the criminal justice system. Therefore, the prosecutor's role in witness preparation must go beyond partisan advocacy. It must go beyond a concern merely not to use false testimony. The prosecutor's duty requires consideration of the appearance as well as the results of her actions.

#### *D. The Appearance of Impropriety as the Guide*

An Appearance of Impropriety Standard would create a guide to the prosecutor who is attempting to balance her roles as an advocate, a minister of justice, and a quasi-judicial official. The professional prosecutor must, of course, first consider her intentions in utilizing a certain method of witness preparation. If the prosecutor's conscious intent is to induce false or perjurious testimony or evidence, the analysis need go no further. The prosecutor clearly must refrain from violating those provisions of the *Model Rules of Professional Conduct* which prohibit the admission or use of false evidence.

Additionally, she must be alert to actions she may take which would inadvertently encourage the witness to testify falsely. A prosecutor is prohibited from inadvertently and unintentionally using false testimony. The rights of the defendant to due process and the duties of the prosecutor "to do justice"<sup>454</sup> require the prosecutor to avoid techniques that unintentionally result in false testimony. However, the prosecutor, in analyzing her behavior, must go further. Even if the conduct is neither undertaken with an improper intent nor results in false testimony, the prosecutor must consider whether the method would appear improper. For example, the prosecutor must consider whether a reasonable person observing the prosecutor's actions would believe that the prosecutor is failing to simultaneously conduct herself as a zealous advocate, a minister of justice, and a quasi-judicial official. A reasonable person would believe that all three of these roles involve truth-seeking as the ultimate goal. Therefore, if a prosecutor's actions, when viewed by a reasonable layperson, appear to be circumventing truth, the actions are improper even though the prosecutor lacked improper motive. This is true even if the witness was not influenced to testify

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454. See *Berger v. United States*, 295 U.S. 78, 88 (1935) ("[A] criminal prosecution is not that [the prosecutor] shall win a case, but that justice shall be done . . ."); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 cmt. (1997) (the prosecution's "responsibility carries with it specific obligations to see that the defendant is accorded procedural justice"); Zacharias, *supra* note 192, at 60.

falsely. It is helpful to look at three of the methods discussed earlier to ascertain how this standard would apply to the preparation of witnesses. In applying this standard, I will discuss the disclosure of case-specific information to the witness about other evidence, the rehearsal of testimony, and group preparation of witnesses.

### 1. Discussing Other Witnesses' Testimony

If one considers only the intent of the prosecutor and the effect on the witness, the prosecutor may discuss with the witness the total theory of the case and how that witness's testimony fits into the total picture. As discussed above, this is helpful in assisting the witness to understand the importance of his testimony and may assist the prosecutor by alerting the witness to the relevance and importance of information. The witness, after understanding the relationship of his testimony to the entire case, may bring information to the attention of the prosecutor that he may not have otherwise.

However, if the prosecutor discusses other evidence with the witness, the Appearance of Impropriety Standard may be violated. A reasonable person watching this exchange might perceive this method to be an attempt by the prosecution to mold the witness's testimony to that of other witnesses or to physical evidence. Additionally, the prosecutor could be perceived as attempting to bolster the witness's testimony by reassuring him that the testimony is correct. For example, an identification witness will appear much more confident in her in-court identification of the defendant if she has been told that other evidence, in addition to her testimony, identifies the defendant. The Appearances of Impropriety Standard would prohibit the prosecutor from doing this, although it would not be prohibited by either the current rules of ethics or constitutional law. The standard would prohibit this method of witness preparation because it casts doubt on the honesty of the prosecutor and the integrity of the system. The prosecutor applying this standard would not discuss with the witness how her testimony fits in with other testimony and clearly would not discuss other witnesses' testimony.

### 2. Rehearsal of the Testimony

Many lawyers rehearse testimony with the witness prior to trial. Most commentators agree this is a permissible method of witness preparation.<sup>455</sup> Assuming the prosecutor does not intend to influence nor, in fact, does influence the witness to perjure herself, this seems to be a permissible method of witness preparation.

However, the prosecutor must analyze this method not only from the perspective of whether she intends to aid or encourage a witness to testify

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455. See *supra* note 351 and accompanying text.

falsely, but also whether this method would appear to be an attempt to subvert the truth. The pure rehearsal of the direct examination, during which the witness answers questions by the trial lawyer, does not appear to be an attempt to use false testimony. The prosecutor appears, by such a method, to properly attempt to prepare the witness to testify in a clear and coherent manner.<sup>456</sup> This method appears to assist the trier of fact in its "search for the truth"<sup>457</sup> by helping the witness testify in an understandable manner.

### 3. Group Witness Preparation

Finally, in analyzing the method of preparing witnesses as a group, the prosecutor may be struck by the clear appearance of impropriety. Some prosecutors may insist that the preparation of a group of witnesses is not intended to encourage or aid witnesses to mold their testimony to that of the other witnesses. Furthermore, some might suggest that this method is merely an attempt to assist witnesses in refreshing their memories by the use of other witnesses. The argument is that a witness's memory may be refreshed by other witnesses' statements. Therefore, bringing all the witnesses together is just an expedient way of accomplishing the same legitimate end.

This method could pass the intent test and maybe even the witness result test. That is, the prosecutor may not intend to encourage false testimony, and her methods may not, in fact, cause witnesses to testify falsely. However, if the prosecutor applies the Appearance of Impropriety Standard to this method, it is clear this method should be avoided. In seeking to balance her roles as zealous advocate, minister of justice, and quasi-judicial official, the prosecutor must analyze how such an action appears to the witnesses themselves and to the general public. The method sends the distinct message to witnesses that the prosecutor wishes them to get their "stories straight." This method clearly appears to a witness to be an attempt to mold the testimony of all the witnesses into a consistent story. The prosecutor appears not to want the witnesses to merely speak the truth, but to tell a compatible story.

Additionally, the public perception of such a method undermines the integrity of the entire system. A reasonable person observing such a method

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456. See Gross, *supra* note 287, at 1137 (justifying witness preparation as a method to help the witness not "ramble" or become incoherent during their testimony).

457. Applegate, *supra* note 286, at 352 n.247. See also *Nix v. Whiteside*, 475 U.S. 157, 166 (1986) (limiting a lawyer's duty to "conduct compatible with the very nature of a trial as a search for truth"); *In re Michael*, 326 U.S. 224, 227 (1945) (concluding that a judgment based on false testimony defeats the "sole ultimate objective of a trial"); Robert H. Jackson, *The Federal Prosecutor*, Address at the Second Annual Conference of United States Attorneys (April 1, 1940), reprinted in *ETHICAL CONSIDERATIONS IN PROSECUTION: ROLES AND FUNCTIONS OF THE PROSECUTOR 2* (John J. Douglass ed., 1977) (observing that "[a] citizen's safety lies in a prosecutor who seeks truth and not victims").

would also assume the prosecutor is not attempting to obtain the true facts, but rather to create a version of the facts that will be persuasive in its congruity. The appearance of such a procedure undermines the public's confidence in the prosecutor's position as a minister of justice. It therefore undermines the public's confidence in the process as a whole. Under an Appearance of Impropriety Standard, this method would be prohibited.

## VI. CONCLUSION

The Appearance of Impropriety Standard was excluded from the *Model Rules of Professional Conduct* because it was considered to be a vague standard that was inapplicable to lawyers. The standard remains in the Judicial Code, reflecting a concern that judges represent the system as a whole and must be both right-acting and right-appearing. Prosecutors, in many ways, hold his same distinction as representatives of the system. Therefore, prosecutors must be concerned, not only with the rightness of their actions, but also with the appearance of their actions. This standard must be incorporated into the *Model Rules of Professional Conduct* as a special responsibility of the prosecutor. This standard would require prosecutors to consider, not only their roles as advocates in individual cases, but also the effect of their actions on the perception and acceptance of the criminal justice system.

The application of this standard to certain methods utilized by the prosecution in witness preparation would prohibit some methods due to the appearance of impropriety. Although witness rehearsal of the evidence would be permitted even under a more strict Appearance of Impropriety Standard, group witness preparation and discussing other witnesses evidence would be prohibited. Criminal prosecutors wield great powers over the lives of others.<sup>458</sup> As one court recognized: "Powers so great impose responsibilities correspondingly grave. They demand character incorruptible, reputation unsullied, a high standard of professional ethics, and sound judgment of no mean order."<sup>459</sup>

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458. As Justice Robert Jackson noted: "The prosecutor has more control over life, liberty and reputation than any person in America. His discretion is tremendous." Jackson, *supra* note 457, at 2.

459. Attorney General v. Tufts, 132 N.E.2d 322, 326 (Mass. 1921).