

ALLEGED CONFLICTS OF INTEREST BECAUSE OF THE “APPEARANCE OF IMPROPRIETY”

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I. INTRODUCTION

Criticisms of lawyers for alleged ethical failings have become more frequent over the years. Some of these charges are serious and well-taken, but others claim that there is an alleged conflict of interest because of an “appearance of impropriety.” The charge may be no more substantial than a claim that a lawyer is a friend of someone, and that friendship causes an appearance of impropriety leading to a conflict of interest.

Yet the charge, even if unsubstantial, is serious. Any allegation of a conflict of interest is a very serious matter, for it attacks the integrity and bona fides of the person charged. As the ABA has advised, a charge of a conflict of interest “should be viewed with caution . . . for it can be misused as a technique of harassment.”¹

Consider one of the earliest cases in the modern trend—the case of John Erlenborn. President George H.W. Bush appointed Erlenborn, a former member of Congress to the Board of the Legal Services Corporation (“LSC”).² Erlenborn was also a partner in a major law firm that represented growers in disputes over farm workers’ conditions; the farm workers were often represented by LSC—funded lawyers.³ The

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1. MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 15 (pre-2002 version of the Model Rules), *reprinted in* THOMAS D. MORGAN, & RONALD D. ROTUNDA 2005 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 188 (2005). The post-2002 version does not include this comment, for reasons of style having nothing to do with substance, though many states continue to retain this comment. *See, e.g.*, TEX. DISCIPLINARY R. PROF. CONDUCT R. 1.6 cmt. 17.

2. LEGAL SERVS. CORP., BIOGRAPHY OF JOHN N. ERLNBORN, *available at* http://www.lsc.gov/welcome/wel_bios7.htm.

3. Anne Kornhauser, *Sowing Client Discord, Reaping Political Fallout*, LEGAL TIMES, June 25, 1990, at 1, 15.

American Farm Bureau Federation, a private lobbying group representing agricultural interests, began a campaign to persuade the firm's agricultural clients (the Farm Bureau was not one of the firm's clients) to object to what the Farm Bureau characterized as Erlenborn's conflict of interest, for example, he took a position as an LSC board member, that the Farm Bureau claimed was harmful to farm interests.⁴

Erlenborn offered to recuse himself from any decisions of the LSC board that directly involved reform legislation that the Farm Bureau supported, or that involved agricultural activities that could have an impact on his firm's clients, but the Farm Bureau's objections (including its objection to Erlenborn's proposed congressional testimony on the reform legislation) continued until Erlenborn resigned from the LSC board.⁵ The then ABA President-elect said that there was no conflict of interest that required Erlenborn's resignation.⁶ Rules 6.3 and 6.4 of the ABA Model Rules, dealing with law reform activities that affect private clients, make that clear.⁷ Nothing ethically required Erlenborn to resign from the LSC board; it is understandable that his firm wanted to please some of its clients. The consequence of this charge, too freely made, is that it may have tarred a person's reputation, cost the government the benefit of the former Congressman's advice, and increased the cost of future pro bono work (measured by the attacks one must be willing to suffer).⁸

Charges based on allegations of an "appearance of impropriety" have increased at a rapid rate, as any search through Lexis or Westlaw will demonstrate. For example, in 2003, the phrase appears 922 times in the Westlaw database of "all news plus wires."⁹ In 2004 (the most recent full year), it appears 1698 times.¹⁰ In 2005, the charge could appear over 2300 times if it keeps up at the present rate. It is the buzz phrase of choice.

4. *Id.* at 15.

5. *Id.*

6. *Id.* at 16.

7. MODEL RULES OF PROF'L CONDUCT R. 6.3-6.4 (2005).

8. See John S. Dzienkowski, *Positional Conflicts of Interest*, 71 TEX. L. REV. 457, 533 (1993) ("Such public-interest activities are crucial to the proper functioning of the legislative process: lawyers who specialize in a particular practice area are important sources of information about abuses and needed amendments that in turn serve societal interests.").

9. WESTLAW, ALLNEWSPLUS Database (last searched Aug. 31, 2005), available at WESTLAW:ALLNEWSPLUS/search: "appearance of impropriety" & DA(AFT 12/31/2002 & BEF 1/1/2004).

10. WESTLAW, ALLNEWSPLUS Database (last searched Aug. 31, 2005), available at WESTLAW:ALLNEWSPLUS/search: "appearance of impropriety" & DA(AFT 12/31/2003 & BEF 1/1/2005).

II. "APPEARANCE OF IMPROPRIETY"

Is it really an appearance of impropriety for a lawyer to take a position in one case while having a friendship with a lawyer on the other side, or for the lawyer to take a personal position on a legal issue that is adverse to a position that one of the lawyer's clients favors? May a lawyer, for example, represent a tobacco or alcohol company and still personally oppose smoking or drinking?

There is a fair amount of law on this topic and it does not favor those who loosely bandy about the charge of an "appearance of impropriety."

Consider, for example, the situation where a lawyer openly takes a public position on a controversial issue that is contrary to the views of some or all of that lawyer's clients. The American Law Institute's Restatement (Third) of the Law Governing Lawyers concludes that there is no conflict and that "[c]onsent of the lawyer's clients is not required."¹¹ Lawyers bring to each of their clients "professional detachment."¹² For example, "if tax lawyers advocating positions about tax reform were obliged to advocate only positions that would serve the positions of their present clients, the public would lose the objective contributions to policy making of some persons most able to help."¹³

Perhaps it is bad business for the lawyer to advocate tax reform that may not be consistent with the interests of one or more clients, but that does not make the lawyer's pro bono advocacy unethical. It is one thing for a client to charge that the lawyer is making a mistake; it is quite another for the client to charge that the lawyer is acting unethically. The client can always fire the lawyer, but lawyers are not fungible (at least, good ones are not).

The ALI reflects the long-held view of the ABA, most recently expressed in the ABA's Model Rules of Professional Conduct, Rule 6.4, which provides that the lawyer need not secure client consent to participate in a decision that *hurts* a client, but she should disclose to the legal reform group that the decision will *help* a present client (although she need not identify the name of the private client).¹⁴ Similarly, the fact that a lawyer represents a client, whether pro bono or fee-based, implies nothing about what the lawyer's personal beliefs are.¹⁵

11. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 125 cmt. e (2000).

12. *Id.*

13. *Id.*

14. MODEL RULES OF PROF'L CONDUCT R. 6.4 (2005).

15. *Id.* at R. 1.2(b). Similar sentiments are found in the predecessor to the Model Rules. See MODEL CODE OF PROF'L RESPONSIBILITY EC 7-17, 8-1, 8-2, 8-4 (1983).

Let us assume that the lawyer represents Alpha Corporation in negotiations with the Internal Revenue Service. The lawyer wants the IRS to permit Alpha Corporation to employ accelerated depreciation methods for machinery purchased in a prior tax year. While the lawyer is negotiating, she personally believes that the accelerated depreciation laws for manufacturing equipment are unwise public policy. Because of her beliefs, she is also working with a bar association committee to develop a policy statement *against* the accelerated depreciation allowance. Indeed, let us further assume that the committee chair has requested this lawyer to testify before Congress in support of the report and its proposal to repeal all depreciation allowances. This new legislation, (like typical tax enactments) would apply only for current and future tax years, thus not directly affecting Alpha Corporation's case before the IRS. Even though the proposed legislation is against Alpha's economic interests, the ALI advises that the lawyer, *without Alpha's consent*, may continue to represent Alpha while simultaneously working to repeal the accelerated depreciation allowance.¹⁶

Assume a lawyer works for a government agency, and her boss tells her that she may not attend a public hearing because her views on a policy are contrary to the views of the agency and he is afraid that one of the legislators at the hearing will see her in the audience and call her to testify. The caselaw is still clear. *Johnston v. Koppes* held that the supervisor may not sanction the government lawyer-employee for private-policy positions that she advocates.¹⁷ "Loyalty to a client requires subordination of a lawyer's personal interests *when acting in a professional capacity*. But loyalty to a client does not require extinguishment of a lawyer's deepest convictions" when acting in a private capacity.¹⁸ In this example, the lawyer attended the hearing in her private capacity, making her attendance appropriate.

Any other rule would change the practice of law and the public activities of lawyers dramatically. Practicing lawyers are typically members of the committees that draft new rules of civil or criminal procedure. All of these lawyers would be disqualified because whatever rules they propose will affect their present clients, some adversely.

If there is a conflict in this fact situation, no lawyer who was ever planning to work in the private sector could serve as counsel to, or witness for, a House or Senate tax committee, or testify before the

16. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 125 illus. 6 (2000).

17. See *Johnston v. Koppes*, 850 F.2d 594 (9th Cir. 1988).

18. *Id.* at 596 (emphasis added).

Internal Revenue Service about new laws or regulations affecting taxes. Not only would new tax laws or regulations affect that lawyer's future private clients, the new laws or regulations would also directly affect the taxes that the lawyer himself will have to pay.

One law professor has advocated that senators at judicial confirmation hearings should examine why lawyers accepted certain clients, because "[a] lawyer's decision to take a case that he knows will involve the making of certain kinds of arguments may also be probative of his beliefs."¹⁹ Under this view, senators should seek to intuit how the nominee might vote by taking into account the clients whom the lawyer has represented. Is this not another way of asking whether we should punish nominees because of the clients they have represented? The ethics rules do not support guilt by association.

For many decades, lawyers have argued that we should not judge lawyers by their clients, because of a basic principle of legal ethics—that lawyers have every right (and duty) to defend clients, even members of the Communist Party or the Ku Klux Klan, in spite of the fact that those lawyers strongly disapprove of those organizations or their beliefs. The fact that a lawyer may defend guilty people and secure their acquittal, or the fact that a lawyer is successful in his legal arguments, is not "probative of his beliefs."²⁰ Yet, there are those who argue that we must unlearn all this learning, and—this is the surprise—law professors are leading the charge. In fact, as Model Rule 1.2(b) makes clear, a lawyer's representation of a client, whether pro bono or fee-based, implies nothing about a lawyer's personal beliefs.²¹

The ABA Model Rules, and the state rules that are based on them, give us specific rules that govern real conflicts of interest. A concern about appearances of impropriety to the educated observer is a reason why some of the strict rules prohibit certain conflicts, or allow certain types of representation only after a client's informed consent.²² While the "appearance of impropriety" is a *reason* for some of these specific rules, it is too vague and too *ad hominem* to be a real rule itself.

19. Vikram Amar, *How Do You Think?: Ideology and the Judicial Nominee*, LEGAL TIMES, July 9, 2001, at 50.

20. *Id.*

21. MODEL RULES OF PROF'L CONDUCT R. 1.2(b) (2005).

22. See *supra* notes 14-15 and accompanying text.

III. CONCLUSION

Those who claim that there is some sort of conflict in situations involving friendship or public statements about policy matters do not refer to any rules, regulations, case law, or ethics opinions to support their charge. That is because the law on this subject all points the other way. Consequently, those who raise this charge are left with asserting that something must be wrong, even if they cannot explain why. They rely on the “appearance of impropriety.”

The rules of ethics governing lawyers are an actual body of law, usually adopted by the courts of each jurisdiction. They are just as much law as the Rules of Civil Procedure, or the regulations of the Internal Revenue Service. And because they are law, they do not make an action unethical because someone makes a loose charge and argues that there is a “conflict” if a lawyer could string together a series of events and then conclude that there must be something wrong. If there is no impropriety, some people argue, there must be an *appearance* of impropriety. Yet the courts have concluded otherwise.

However, as the Second Circuit advised over a quarter of a century ago: “When dealing with ethical principles, . . . we cannot paint with broad strokes. The lines are fine and must be so marked. . . . [T]he conclusion in a particular case can be reached only after painstaking analysis of the facts and precise application of precedent.”²³

The ABA Model Rules, prior to the 2002 revisions, specifically rejected the supposed “appearance of impropriety” standard as a non-test, deeming it “question-begging.”²⁴ The 2002 revisions do not repeat that language because the drafters thought it unnecessary. Perhaps the drafters should have looked at how frequently and freely people resort to, and charge, the “appearance of impropriety.”

The ABA has warned that if the “appearance of impropriety” language had been made a disciplinary rule, “it is likely that the determination of whether particular conduct violated the rule would have degenerated . . . into a determination on an instinctive, *ad hoc* or even *ad hominem* basis”²⁵ Professor Geoffrey C. Hazard, Jr., the reporter for the original ABA Model Rules, has referred to the old “appearance of

23. *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225, 227 (2d Cir. 1977).

24. MODEL RULES OF PROF'L CONDUCT R. 1.9 cmt. 5, reprinted in RONALD D. ROTUNDA & THOMAS D. MORGAN, 2005 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 193 (2005).

25. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 342 n.17 (1975), discussed in RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY 2 (7th ed. 2004).

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impropriety” standard “as a ‘garbage’ standard.”²⁶ His choice of words may not be eloquent, but they are certainly unambiguous.

26. ABA/BNA LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT 13:31-32 (1997).