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Section: PERSPECTIVE

## **In judging, if it looks bad, it is bad: THE MORALIST**

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Born in Puerto Rico, Roberto Rivera-Soto is a graduate of the elite Haverford College in Pennsylvania. He attended Cornell Law School, another elite institution, before enjoying a distinguished career as an attorney. In 2004, Gov. James E. McGreevey made Rivera-Soto New Jersey's first Hispanic Supreme Court justice.

Justice Rivera-Soto got a little too involved last year when his teenage son's lip was busted playing football. Rivera-Soto threw his weight around trying to persuade school officials, police and the courts to act expeditiously against a player he suspected of head-butting his son.

For this misconduct, Rivera-Soto was brought up on ethics charges. On July 20, the Advisory Committee on Judicial Conduct censured the fledgling, untenured justice for violating duties of office, including one that leaves people scratching their heads: "A judge should avoid impropriety and the appearance of impropriety in all activities."

Yes, judges in New Jersey and around the country actually have an ethical duty to avoid "the appearance of impropriety." Conduct that's shady, edgy, off-color, close-to-the-line, ambiguous, pushing-it, controversial, eccentric - judges beware. In personal life and in professional life, judges should walk a straight and narrow path, steering clear of anything that could create the reasonable impression that they are acting out of bounds.

Is this "appearance of impropriety" rule fair and workable?

Twenty years ago authors Peter Morgan and Glenn Reynolds wrote a book questioning the point of ethics rules, but especially the ones that set out to dictate appearances. In "The Appearance of Impropriety: How the Ethics Wars Have Undermined American Government, Business, and Society," Morgan and Reynolds argued that ethics entered U.S. life in a new way after the Watergate break-in and cover-up scandal that led to the resignation of President Richard Nixon.

After Watergate, hopeful Americans were convinced that better professional ethics would cure greed, deception and power-grabbing. Since the mid-1970s, waves of ethics rules have poured from every conceivable government and industry source. Indeed, a great new wave of ethic rules and training crashed ashore in response to the Enron, WorldCom and Abu Ghraib. The flood of ethics rules may drown out calls for genuine personal integrity.

Ethics are often the product of politics and tools of politicians. Ethics rules may function politically, as ethical cover for industries facing harsh public scrutiny and government regulation. In some companies, ethics have little to do with character; being ethical boils down to whether a lawyer will certify compliance with a statute. Ethics rules are treated cynically, as bureaucratic annoyances, games to be gamed.

We ought to be a nation of saints by now, given all the publicly funded character education for kids; all the university ethics institutes, curricula and programs in place; all the ethics think tanks and consultants.

Yet some folks just can't seem to get the basics down. Cheating in professional basketball, baseball and cycling shows the depth of the problem. And why did former Mayor Sharpe James, lately the target of a major federal corruption probe, ever think it was okay to charge dinner-and-a-movie outings to the people of Newark? With more than a million dollars saved up in his Essex County College retirement account, he didn't have \$30 of his own to spend at Applebees?

The nationwide profusion of ethical guidelines has not been a panacea. Yet, for the real and symbolic good they do, we still need professional ethics. Admittedly, some ethics regimes are expensive and coercive. The Sarbanes-Oxley law is a dirty word in some quarters, because its accountability rules for corporate managers and accountants dictate strict compliance with complex federal rules. Lawyers do not have it easy, either. Many states require that new lawyers pass a professional responsibility examination, in addition to the regular bar exam, and that all lawyers sit through an annual ethics course.

But unlike judges, lawyers do not have to worry about appearances of impropriety. Is the "appearance of impropriety" rule fair? Shouldn't we judge people based on realities, not appearances? How is anyone suppose to know what "appears" improper? Would it be improper for a judge to quote the Bible in the courtroom? Go to a topless bar for drinks? Have a child out of wedlock? Couldn't what appears proper to one person appear improper to another?

Just recently the American Bar Association considered getting rid of the "appearance of impropriety" canon. The people who pushed for its demise argued that the guideline was too vague. They argued that the prohibitions judges face by virtue of their offices need to be spelled out, so that ethical wrongdoing can be addressed effectively with an even, secure hand. The ABA's current test for the "appearance of impropriety" rule 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." But reasonable minds disagree, especially in political realms where some people have a vested interest in other people's longevity in public office. Bill Clinton's affair with Monica Lewinsky spoke volumes - to his Republican opponents - about the quality of his judgment and fitness for leadership.

Judges make mistakes. In 2005, New Jersey Superior Court Judge Stephen W. Thompson was convicted of traveling to Russia for sex with a young boy and making a video of the event. The judge owned thousands of pornographic photographs and tapes involving children, discovered when the police searched his homes and chambers in the Camden County Hall of Justice. Thompson's defense team argued that he was insanely fixated on young boys as a result of injuries suffered while he was serving in the Vietnam War.

Clearly Rivera-Soto's misconduct was not, by a mile, the worst New Jersey has seen in a judge in recent times. A broken-hearted Rivera-Soto lost his sense of impartiality. His son was hurt. But it was, in fact, unethical for Rivera-Soto to undercut confidence in the judiciary, seek to use the prestige of his office to advance private interests and potentially bring to his court into disrepute.

In the end, the ABA did not vote to eliminate the "appearance of impropriety" canon from its Model Rules of Judicial Conduct, and I am glad. This is not a canon that supplants real ethics with appearances. It is a canon that demands conformity by judges to an especially high standard of real ethics.

Judges resolve our conflicts; they apply and evaluate our public laws. They need to be above reproach. The "appearance of impropriety" canon and its enforcement is a unique ethical requirement for a profession that serves a unique public function.