

For Appearance's Sake: An Empirical Study of Public Perceptions of Ethical Dilemmas in the Legal Profession

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How can we restore the public's faith in government institutions, particularly the courts? With the public's opinion of the legal system at an all-time low, the legal profession faces a crisis of confidence. This Article argues that the "appearance of impropriety" standard should be categorically applied to regulate all members of the legal profession to restore the public's faith in the profession. The standard is intended to prevent the public's loss of confidence by disciplining members of the profession who appear to act improperly even if they do not violate specific ethics rules. When applying the standard, courts generally ask whether the conduct in question creates an appearance of impropriety "in the mind of an ordinary knowledgeable citizen." Critics argue that this "vague" test allows judges to levy disciplinary sanctions based on their idiosyncratic views of ordinary citizens. As such, some jurisdictions apply the standard on a selective basis for only judges and government lawyers, based on the assumption that their appearances of impropriety are more damaging to the public's confidence. Using a series of original survey experiments, this Article offers the first empirical evidence that determines which ethical dilemmas consistently undermine the public's confidence in the legal system and thereby provides an empirical grounding for the formerly "vague" standard. Furthermore, this Article finds that the selective application of the standard is misguided. The assumption that judges and government lawyers do greater damage to the public's confidence than private lawyers is empirically unfounded. This Article suggests that, to restore the public's faith in the legal system, the standard should regulate all members of the profession for most ethical dilemmas, even when they do not violate specific ethics rules.

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I. INTRODUCTION

The American Bar Association's ("ABA") *Model Code of Professional Responsibility* (the "*Model Code*") once specified the "appearance of professional impropriety" standard (the "standard" or the "appearance standard") as an adequate basis for disciplinary sanctions.¹ The standard was intended to prevent the public's loss of confidence in the legal profession by disciplining lawyers who appeared to act improperly even if they did not violate a specific ethics rule.² However, many commentators argued that the open-

¹ MODEL CODE OF PRO. RESP. Canon 9 (AM. BAR ASS'N 1980).

² See ANDREW L. KAUFMAN, DAVID B. WILKINS, ELI WALD & KEITH SWISHER, PROBLEMS IN PROFESSIONAL RESPONSIBILITY FOR A CHANGING PROFESSION 203 (6th ed. 2017); John W. Castles III & Laurie E. Foster, *Conflicts and Lawyer Disqualification: Special Litigation Report; The New Model Rules*, NAT'L L.J., Feb. 6, 1984, at 9; W. William Hodes, *Getting Lawyer Disqualification Straight*, 17 GEO. J. LEGAL ETHICS 339, 341 n.6 (2004) (reviewing RICHARD E. FLAMM, *LAWYER DISQUALIFICATION: CONFLICTS OF INTEREST AND OTHER BASES* (2003)).

ended standard was untenable because it did not make clear which conduct the public viewed as improper.³ Therefore, in 1983, the ABA removed the appearance of impropriety standard for private lawyers in the updated *Model Rules of Professional Ethics* (the “*Model Rules*”).⁴

Since the ABA’s promulgation of the *Model Rules*, some jurisdictions revised their rules to remove the appearance of impropriety standard, but most jurisdictions continue to apply the standard to a varying degree.⁵ The jurisdictions that apply the standard generally leave the standard undefined and simply ask whether the lawyer’s conduct creates an appearance of impropriety “in the mind of an ‘ordinary knowledgeable citizen acquainted with the facts.’”⁶ Thus, the continued use of the standard requires judges and disciplinary bodies—who are, by definition, not “ordinary knowledgeable citizens”—to discipline lawyers based on their idiosyncratic, empirically unfounded views about how ordinary knowledgeable citizens will react to the lawyers’ conduct.⁷

Meanwhile, although the *Model Rules* eliminated the standard for private lawyers, the ABA’s *Model Code of Judicial Conduct* and most state ethics rules still consider the appearance of impropriety a pertinent basis for disciplining judges and government lawyers.⁸ Advocates of the selective application of the standard argue that judges and government lawyers assume a greater

³ See KAUFMAN, WILKINS, WALD & SWISHER, *supra* note 2, at 277; Castles & Foster, *supra* note 2; Bruce A. Green, *Conflicts of Interest in Legal Representation: Should the Appearance of Impropriety Rule Be Eliminated in New Jersey—or Revived Everywhere Else?*, 28 SETON HALL L. REV. 315, 337 (1997) (“This guideline would seem to invite—indeed, require—disciplinary bodies, the Advisory Committee, and the courts to make impressionistic, ad hoc decisions, drawing on empirically unfounded, highly personal judgments about how the hypothetical ‘ordinary knowledgeable citizen’ would perceive particular scenarios involving lawyers. In the traditional context involving public lawyers, however—and only in this context—the test has several possible redeeming qualities.”).

⁴ See MODEL RULES OF PRO. CONDUCT r. 1.7 (AM. BAR ASS’N 1983), reprinted in THOMAS D. MORGAN & RONALD D. ROTUNDA, MODEL RULES OF PROFESSIONAL CONDUCT AND OTHER SELECTED STANDARDS INCLUDING CALIFORNIA AND NEW YORK RULES ON PROFESSIONAL RESPONSIBILITY 185 (2005); see also KAUFMAN, WILKINS, WALD & SWISHER, *supra* note 2, at 277.

⁵ See *Analytica, Inc. v. NPDRsch., Inc.*, 708 F.2d 1263, 1269 (7th Cir. 1983); *Steel v. Gen. Motors Corp.*, 912 F. Supp. 724, 740 (D.N.J. 1995); *Ark. Valley State Bank v. Phillips*, 171 P.3d 899, 908 & n.44, 909 n.45 (Okla. 2007) (quoting in part Castles & Foster, *supra* note 2, at 16) (noting that not all jurisdictions dropped the appearance of impropriety standard as a basis for disciplinary sanctions after the drafters of the *Model Rules of Professional Conduct* removed the standard); see also RICHARD E. FLAMM, LAWYER DISQUALIFICATION: CONFLICTS OF INTEREST AND OTHER BASES 351–56 (2003); Keith Swisher, *The Practice and Theory of Lawyer Disqualification*, 27 GEO. J. LEGAL ETHICS 71, 89–90 (2014).

⁶ Green, *supra* note 3, at 337 (quoting *In re Tenure Hearing of Onoverole*, 511 A.2d 1171, 1178 (N.J. 1986)).

⁷ See *id.*

⁸ See MODEL CODE OF JUD. CONDUCT r. 1.2 (AM. BAR ASS’N 2020); N.Y. RULES OF PRO. CONDUCT r. 1.11, 1.12 (N.Y. STATE BAR ASS’N 2018); see also KAUFMAN, WILKINS, WALD & SWISHER, *supra* note 2, at 203, 293.

responsibility towards the public and should, therefore, be subject to a higher ethical standard, even if private lawyers are not.⁹ The reasoning appears to be that because judges and government lawyers hold a public office, their appearances of impropriety will result in the public losing more confidence in the legal system than a private lawyer's appearance of impropriety.¹⁰ However, critics argue that it is unclear what conduct by judges and government lawyers creates an appearance of impropriety from the perspective of ordinary citizens.¹¹ It is also unclear whether appearances of impropriety by judges and government lawyers will, in fact, cause a greater loss of public confidence in the legal system, relative to an analogous appearance of impropriety by private lawyers.

Interestingly, although the standard is based on the public's view of professional responsibility, no study to date has attempted to clarify what conduct the public actually considers to be improper and whether a selective standard for judges and government lawyers is empirically justified.¹² If the legal profession is going to apply a standard that relies on the public's view of impropriety, it is only natural that someone actually asks the public about its view of impropriety and provide an empirical grounding for the continued use of the standard. This Article is the first to do exactly that.

The Article leverages a public opinion survey of 794 respondents to study three questions. First, the Article asks whether the public finds improper various decisions that private lawyers often make when faced with common ethical dilemmas in the legal profession. Second, the Article asks whether the public finds improper various decisions that judges and government lawyers often make when faced with their respective ethical dilemmas. Studying these first two questions provides greater clarity to the vague standard and gives courts and disciplinary bodies better guidance as to what conduct is deserving of disciplinary sanctions under the appearance standard. Third, the Article asks whether an appearance of impropriety by judges and government lawyers is more damaging to the public's faith in the legal system, relative to an analogous appearance of impropriety by private lawyers. Addressing this third question clarifies whether the selective application of the standard is empirically justified by determining if, in fact, the public loses more confidence in the legal system when judges and government lawyers appear to have engaged in impropriety.

Ultimately, the Article provides the first empirical evidence that many decisions that private lawyers, judges, and government lawyers make when faced with common ethical dilemmas consistently undermine the public's faith in the legal system, even if they do not violate specific ethics rules. For instance,

⁹ See KAUFMAN, WILKINS, WALD & SWISHER, *supra* note 2, at 203.

¹⁰ See *id.* at 314.

¹¹ See, e.g., Leslie W. Abramson, *Canon 2 of the Code of Judicial Conduct*, 79 MARQ. L. REV. 949, 956 n.23 (1996); Steven Lubet, *Judicial Impropriety: Love, Friendship, Free Speech, and Other Intemperate Conduct*, 1986 ARIZ. ST. L.J. 379, 399; Gregory C. Pingree, *Where Lies the Emperor's Robe? An Inquiry into the Problem of Judicial Legitimacy*, 86 OR. L. REV. 1095, 1128 (2007).

¹² See, e.g., Swisher, *supra* note 5, at 154.

the public's faith in the legal system is undermined when private lawyers are involved in relatively minor imputed conflicts of interest that do not warrant disqualification under most conflict of interest rules, communication with persons arguably not represented by counsel, and failures to disclose information about a client's fraud. The public's faith is also undermined when judges develop personal relationships with criminals, misuse the prestige of their office, or show favoritism when making fiduciary appointments. Additionally, the public faith is undermined when prosecutors attempt to influence witness testimony using questionable tactics, such as disclosing other incriminating evidence to potential witnesses, rehearsing witness testimony, and allowing witnesses to congregate before the trial to exchange testimony. These results suggest that common ethical dilemmas should be expressly prohibited using new ethics rules, but if they cannot be expressly prohibited due to countervailing interests, the appearance of impropriety standard should be more regularly applied to ensure public confidence in the legal profession. Additionally, this Article provides the first empirical evidence that the public does not lose more confidence in the legal system when judges and government lawyers appear to be improper, relative to when private lawyers appear to be improper. These results suggest that the standard should be reinstated to regulate all members of the legal profession, rather than selectively applied to judges and government lawyers.

This Article proceeds as follows. Part II provides an overview of the appearance of impropriety standard. Part III introduces the research design. Part IV discusses the results and ramifications. Part V discusses the causal mechanisms. Part VI concludes.

II. THEORETICAL FOUNDATION

A. *The Development of the Standard*

Appearance often triumphs over reality. Early courts, therefore, stressed that “[t]o keep the fountain of justice pure and above reproach, the very appearance of evil should be avoided” by all members of the legal profession.¹³ The courts’ admonition, a reference to Saint Paul’s advice to “[a]bstain from all appearance

¹³ *Eastham v. Holt*, 27 S.E. 883, 894 (W. Va. 1897); *see also In re Duncan*, 42 S.E. 433, 441 (S.C. 1902) (warning lawyers to avoid the appearance of evil); *In re Davis*, 15 Haw. 377, 390 (1904) (Galbraith, J., dissenting) (“The law carefully guards not only against actual abuse, but even against the appearance of evil, from which doubt can justly be cast upon the impartiality of judges” (quoting *In re Didge & Stevenson Mfg. Co.*, 77 N.Y. 101, 110 (1879))); *State ex rel. Att’y Gen. v. Lazarus*, 1 So. 361, 376 (La. 1887) (“All those who minister in the temple of justice . . . should be above reproach and suspicion. None should serve at its altar whose conduct is at variance with his obligations.” (citation omitted)); *Dorlon v. Lewis*, 9 How. Pr. 1, 1 (N.Y. Sup. Ct. 1851) (“A referee . . . should not only avoid all improper influences, but even ‘the appearance of evil.’”); Raymond J. McKoski, *Judicial Discipline and the Appearance of Impropriety: What the Public Sees Is What the Judge Gets*, 94 MINN. L. REV. 1914, 1920–21 (2010).

of evil,”¹⁴ subsequently spurred the legal profession to adopt a “beyond reproach” attitude in matters of legal ethics.¹⁵ In 1908, when the ABA passed its *Canons of Professional Ethics*, the drafters too recognized that appearances matter, especially in matters of ethics, and concluded that “[a]n attorney should not only avoid all impropriety but should likewise avoid the appearance of impropriety.”¹⁶ At the time, however, the standard was only an exhortation—a moral or prudential principle—rather than a legally enforceable norm.¹⁷

Decades later, when the ABA passed its updated *Model Code of Professional Responsibility* in 1970, the drafters elaborated on the appearance of impropriety standard in Canon 5 and, more prominently, in Canon 9.¹⁸ First, in Canon 5, outlining the duty of a lawyer to exercise independent professional judgment on behalf of his client, the ABA stated that “[a] lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument. In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety.”¹⁹

In Canon 9, the drafters further expounded that “[l]awyer[s] [s]hould [a]void [e]ven the [a]pppearance of [p]rofessional [i]mpropriety.”²⁰ The drafters specifically addressed judges and former government lawyers, as opposed to private lawyers, by stating that:

(A) A lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity.

(B) A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.²¹

Canons 5 and 9 thus placed restrictions on all members of the legal profession from accepting employment that could create an appearance of impropriety. These provisions, which carried greater weight than the analogous provisions in the 1908 *Canons of Professional Ethics*, were written with an eye toward the “laym[a]n” who might find “unethical” what lawyers find “ethical.”²² The *Model Code*, however, did not further specify what type of

¹⁴ 1 *Thessalonians* 5:22 (King James).

¹⁵ See, e.g., *Gesoff v. IIC Indus. Inc.*, 902 A.2d 1130, 1146 n.101 (Del. Ch. 2006) (“[W]hen Julius Caesar was asked why he chose to divorce his wife after a false accusation of adultery, Caesar’s laconic answer is said to have been that ‘Caesar’s wife must be above suspicion,’ or as it is usually rendered, ‘Caesar’s wife must be above reproach.’” (citing PLUTARCH, *PLUTARCH’S LIVES* 206 (Arthur Hugh Clough ed., John Dryden trans., 2001))).

¹⁶ Green, *supra* note 3, at 315 (quoting CANONS OF PRO. ETHICS (AM. BAR ASS’N 1908)).

¹⁷ Green, *supra* note 3, at 356–57.

¹⁸ See MODEL CODE OF PRO. RESP. EC 5-6, Canon 9 (AM. BAR ASS’N 1980).

¹⁹ *Id.* EC 5-6.

²⁰ *Id.* Canon 9.

²¹ *Id.* DR 9-101.

²² *Id.* EC 9-2.

conduct actually created an appearance of impropriety from the perspective of a layperson.

Nonetheless, within a few years, nearly all states passed a version of the ABA's *Model Code* establishing the appearance of impropriety standard.²³ The courts subsequently applied the standard as an independent test to discipline lawyers even if they did not violate a specific ethics rule.²⁴ At first, many courts applied the standard to conflict of interest cases.²⁵ For instance, Judge Richard Posner, writing for the Seventh Circuit, opined that the standard could be used to discipline a lawyer if the lawyer's conduct created an "unsavory appearance of conflict of interest that is difficult to dispel in the eyes of the lay public."²⁶ Similarly, in a private antitrust suit against IBM, the Third Circuit directed the plaintiff's counsel to withdraw from the case due to an appearance of impropriety despite no actual conflict of interest.²⁷ The Third Circuit reasoned that "[t]he maintenance of public confidence in the propriety of the conduct of those associated with the administration of justice is so important a consideration that we have held that a court may disqualify an attorney for failing to avoid even the appearance of impropriety."²⁸ In a private trademark infringement litigation, the Fifth Circuit disqualified the defendant's counsel because his prior employment with the plaintiff implicated "the principle embodied in Canon 9 [of the *Model Code*]."²⁹ Eventually, the standard evolved to regulate all aspects of private lawyering, not only potential conflicts of interest.³⁰ That is, the courts began to apply the standard to "the entire spectrum" of an attorney's conduct.³¹

²³ See Green, *supra* note 3, at 316–17 (noting that California was the only state not to pass the ABA's appearance of impropriety standard).

²⁴ See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 319, 322 (1986); Green, *supra* note 3, at 333.

²⁵ See, e.g., *Analytica, Inc. v. NPD Rsch., Inc.*, 708 F.2d 1263, 1269 (7th Cir. 1983); *IBM Corp. v. Levin*, 579 F.2d 271, 283 (3rd Cir. 1978); *Brennan's Inc. v. Brennan's Rests., Inc.*, 590 F.2d 168, 172 (5th Cir. 1979); *Reardon v. Marlayne, Inc.*, 416 A.2d 852, 859–60 (N.J. 1980); *In re Cipriano*, 346 A.2d 393, 395 (N.J. 1975).

²⁶ *Analytica*, 708 F.2d at 1269.

²⁷ *IBM Corp.*, 579 F.2d at 283.

²⁸ *Id.*

²⁹ *Brennan's, Inc.*, 590 F.2d at 172.

³⁰ *Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602, 609 (8th Cir. 1977) (finding that Canon 9's broad injunction against the "appearance of impropriety relates to the entire spectrum of [an attorney's] conduct"), *overruled in part on other grounds by In Re Multi-Piece Rim Prods. Liab. Litig.*, 612 F.2d 377 (8th Cir. 1980); see also Roberta K. Flowers, *What You See Is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors*, 63 MO. L. REV. 699, 713 (1998).

³¹ *Weber*, 566 F.2d at 609.

B. *The Case for the Standard*

Proponents of the standard at the time raised strong arguments in its favor. First, the drafters of the *Model Code* themselves reasoned that the standard was necessary because it protected the public's faith in the integrity of the courts.³² Quoting the Supreme Court of Connecticut, the drafters stated that "[i]ntegrity is the very breath of justice. Confidence in our law, our courts, and in the administration of justice is our supreme interest. No practice must be permitted to prevail which invites towards the administration of justice a doubt or distrust of its integrity."³³

Courts and commentators further expounded on why public trust in the legal system was so essential.³⁴ They argued that legal and political systems could not operate effectively without the support of the governed, and such support was possible only when the governed perceived the systems as fair and just.³⁵ If the legal system did not punish members of the legal profession who appeared to act improperly, the public would no longer perceive the legal system as fair and just.³⁶ The appearance of impropriety standard thus ensured that members of the legal profession were punished for conduct that undermined the public's perception of the legal system, even if there was no actual impropriety, and thereby ensured the effective operation of the legal system.³⁷

Others argued that, since the interest in preserving the court's integrity was so crucial to its operation, the standard created a necessary "margin of protection" against potentially improper conduct.³⁸ Finally, guarding against the appearance of impropriety had the added benefit of protecting "the reasonable

³² See MODEL CODE OF PRO. RESP. EC 9-1 (AM. BAR ASS'N 1980).

³³ *Id.* Canon 9 n.1 (quoting *Erwin M. Jennings Co. v. DiGenova*, 141 A. 866, 868 (Conn. 1928)).

³⁴ See, e.g., *In re Dean*, 717 A.2d 176, 184 (Conn. 1998); *In re Greenberg*, 280 A.2d 370, 372 (Pa. 1971) ("Without the appearance as well as the fact of justice, respect for the law vanishes in a democracy."); Flowers, *supra* note 30, at 699-700; Patrick E. Longan, *Civil Trial Reform and the Appearance of Fairness*, 79 MARQ. L. REV. 295, 296-97 (1995); Tom R. Tyler, *The Role of Perceived Injustice in Defendants' Evaluations of Their Courtroom Experience*, 18 LAW & SOC'Y REV. 51, 52 (1984).

³⁵ Flowers, *supra* note 30, at 699-700.

³⁶ See sources cited *supra* note 34.

³⁷ See, e.g., Steven H. Goldberg, *The Former Client's Disqualification Gambit: A Bad Move in Pursuit of an Ethical Anomaly*, 72 MINN. L. REV. 227, 270 (1987) ("Despite the round rejection of an appearances theory, the adversary system does have a legitimate interest in how it appears to the public. The system's continuation depends on public acceptance."); Mark I. Steinberg & Timothy U. Sharpe, *Attorney Conflicts of Interest: The Need for a Coherent Framework*, 66 NOTRE DAME L. REV. 1, 7-8 (1990) ("The impropriety standard also promotes the public's confidence in the integrity of the legal profession. For these reasons, courts should retain the appearance of impropriety standard as an independent basis of assessment."); Swisher, *supra* note 5, at 153-54.

³⁸ See *Glueck v. Jonathan Logan, Inc.*, 512 F. Supp. 223, 228 (S.D.N.Y. 1981), *aff'd*, 653 F.2d 746 (2d Cir. 1981).

expectations of former and present clients,” whose trust in and demand for legal services undergirded the profitability of the legal profession.³⁹

C. *The Case Against the Standard*

On the other hand, critics at the time raised strong arguments against the appearance of impropriety standard as an independent basis for disciplinary sanctions.⁴⁰ Their primary argument rested on the fact that there was no empirical basis for what conduct the public considered to be improper.⁴¹

The standard instead rested on a presiding judge's idiosyncratic views of what he or she thought the public would view as improper.⁴² Although the appearance of impropriety standard was justified on the basis of safeguarding the public's view of the profession, the actual implementation of the rule rested on a particular judge's impressionistic, highly personal perspective of the public's hypothetical view of particular situations.⁴³ Decisions were seemingly made on an ad hoc, or even ad hominem, basis.⁴⁴ A more exacting judge could choose to assume the views of the “most cynical members of the public” and unfairly punish lawyers while other judges did not.⁴⁵

³⁹ See Steinberg & Sharpe, *supra* note 37, at 7–8. See generally Samuel J. Levine, *Taking Ethics Codes Seriously: Broad Ethics Provisions and Unenumerated Ethical Obligations in a Comparative Hermeneutic Framework*, 77 TUL. L. REV. 527 (2003) (providing an overview of additional arguments in support of broad ethical provisions including the appearance of impropriety).

⁴⁰ See, e.g., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 13:31–32 (1997); ABA Comm. on Ethics and Pro. Resp., Formal Op. 342, at 519 n.17 (1975); Ronald D. Rotunda, *Alleged Conflicts of Interest Because of the “Appearance of Impropriety,”* 33 HOFSTRA L. REV. 1141, 1146–47 (2005); Swisher, *supra* note 5, at 155–56.

⁴¹ See Swisher, *supra* note 5, at 154. It should be noted that at the time there was a secondary argument against the standard that was not based on its vague nature. Some critics argued that the public's perception of impropriety should be grounded in the ethics rules and nothing more. To elaborate, their argument was that if a lawyer complied with the ethics rules, then the lawyer did nothing wrong. So, the public should not consider the lawyer's conduct to be improper, and the appearance of impropriety standard should not serve any independent purpose in disciplining lawyers who had complied with all of the ethics rules. See *id.* at 85 & n.46; Green, *supra* note 3, at 355–56. The rebuttal to this view is that it fails to take into consideration a wide variety of conduct that does not implicate specific ethics rules that the standard should nonetheless regulate for undermining the public's confidence in the legal system. See Green, *supra* note 3, at 355–56; Swisher *supra* note 5, at 155.

⁴² See, e.g., Green, *supra* note 3, at 337 (“This guideline would seem to invite—indeed, require—disciplinary bodies, the Advisory Committee, and the courts to make impressionistic, ad hoc decisions, drawing on empirically unfounded, highly personal judgements about how the hypothetical ‘ordinary knowledgeable citizen’ would perceive particular scenarios involving lawyers.”).

⁴³ See *id.*; Victor H. Kramer, *The Appearance of Impropriety Under Canon 9: A Study of the Federal Judicial Process Applied to Lawyers*, 65 MINN. L. REV. 243, 264 (1981).

⁴⁴ See Green, *supra* note 3, at 332 n.85 (quoting ABA Comm. on Ethics & Pro. Resp., Formal Op. 342, at 519 n.17 (1975)).

⁴⁵ Woods v. Covington Cnty. Bank, 537 F.2d 804, 813 (5th Cir. 1976).

Furthermore, because the application of the standard required a fact-sensitive analysis, individual cases provided little guidance for future cases.⁴⁶ Each case required a “careful sifting and weighing of all relevant facts and circumstances” such that any one case had little precedential value to give future lawyers notice about what conduct amounted to an appearance of impropriety.⁴⁷ Thus, lawyers, judges, and disciplinary bodies had to draw a difficult line, on a case-by-case basis, between conduct that created an appearance of impropriety and conduct that did not create an appearance of impropriety.⁴⁸

To make matters worse, commentators argued that there was no empirical data showing that the disqualification of lawyers based on the standard actually protected the public’s view of the legal system.⁴⁹ As the courts began to apply the standard more broadly, disqualification became the most common remedy,⁵⁰ and critics argued that frequent disqualifications using the standard undermined the legal system by imposing disproportionate costs on lawyers and clients.⁵¹ Simply put, the costs of disqualification based on the appearance of impropriety standard were severe.⁵² Disqualified lawyers incurred the short-term financial cost of losing a client and long-term reputational harm.⁵³ Clients were deprived of their lawyers’ services and were required to find a new lawyer who knew nothing about the facts of their case.⁵⁴ Courts also had to pay in terms of lengthy delays in legal proceedings.⁵⁵ Disqualification was, therefore, an extreme

⁴⁶ See, e.g., *Ross v. Canino*, 461 A.2d 585, 589 (N.J. 1983) (quoting *In re Pro. Ethics Op.* 452, 432 A.2d 829, 832 (N.J. 1981)); see also KAUFMAN, WILKINS, WALD & SWISHER, *supra* note 2, at 277. See generally *Castles & Foster*, *supra* note 2.

⁴⁷ *In re E. Sugar Antitrust Litig.*, 697 F.2d 524, 530 (3d Cir. 1982).

⁴⁸ *Green*, *supra* note 3, at 352.

⁴⁹ See, e.g., Swisher, *supra* note 5, at 154; cf. Dmitry Bam, *Making Appearances Matter: Recusal and the Appearance of Bias*, 2011 BYU L. REV. 943, 973 (“[Judicial recusal] fails to foster an appearance of impartiality . . . because the focus on appearances comes too late This means that by the time the recusal decision is ultimately made and publicized, the public has already observed the conduct and the events that negatively affect its perception of the judiciary and formed its own, often negative, opinions about judicial impartiality.”); James L. Gibson & Gregory A. Caldeira, *Campaign Support, Conflicts of Interest, and Judicial Impartiality: Can Recusals Rescue the Legitimacy of Courts?*, 74 J. POL. 18, 32–33 (2012) (noting that judicial recusal does increase public trust in the court, but not to the level of trust that would have existed without any perceived conflict to begin with).

⁵⁰ See Swisher, *supra* note 5, at 115 & n.176 (“Disqualification of a lawyer and those affiliated with the lawyer from further participation in a pending matter has become the most common remedy for conflicts of interest in litigation” (citing RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 6 cmt. i (AM. L. INST. 2000))).

⁵¹ See *id.* at 123.

⁵² See, e.g., RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 6 cmt. i (AM. L. INST. 2000); Swisher, *supra* note 5, at 126–27.

⁵³ See Swisher, *supra* note 5, at 154–55 (arguing that disqualified lawyers suffer financial and reputational harm).

⁵⁴ See *id.* at 123.

⁵⁵ See RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 6 cmt. I (AM. L. INST. 2000).

remedy that was unduly harsh given that the standard was so vague and the misconduct often inadvertent.⁵⁶ As such, critics argued that disproportionate sanctions and delays based on the vague standard undermined the public's view of the legal system rather than protected it.⁵⁷

Critics of the standard instead advocated for alternative ethics rules that were “focused, relatively precise, and much less likely to lead to ad hoc results than would a general-appearances test.”⁵⁸ After considering the criticisms against the standard and the extreme costs of disqualification, the drafters of the model rules eventually agreed that the standard was “question-begging.”⁵⁹ And when the ABA released the *Model Rules* in 1983, the drafters explicitly removed the standard for lawyers.⁶⁰ More recent revisions to the *Model Rules* have not revived the standard.⁶¹

D. *The Continued Relevance of the Standard*

Since 1983, many courts and commentators assumed that jurisdictions would abandon the appearance of impropriety standard.⁶² Despite the removal

⁵⁶ See *Freeman v. Chi. Musical Instrument Co.*, 689 F.2d 715, 721 (7th Cir. 1982) (“[D]isqualification, as a prophylactic device for protecting the attorney-client relationship, is a drastic measure which courts should hesitate to impose except when absolutely necessary.”); *Wyeth v. Abbott Lab’ys*, 692 F. Supp. 2d 453, 457 (D.N.J. 2010) (“Because disqualification during pending litigation is an extreme measure, courts must closely scrutinize the facts of each case to avoid injustice.” (quoting *In re Cendant Corp. Sec. Litig.*, 124 F. Supp. 2d 235, 249 (D.N.J. 2000) (omissions from quotation in original))); *Univ. Pats., Inc. v. Kligman*, 737 F. Supp. 325, 329 (E.D. Pa. 1990) (noting that disqualification is a “draconian” measure”); *In re Nitla S.A. de C.V.*, 92 S.W.3d 419, 422 (Tex. 2002) (finding that disqualification is a “severe remedy” and that “the trial court must strictly adhere to an exacting standard to discourage a party from using the motion as a dilatory trial tactic” (quoting *Spears v. Fourth Ct. of Appeals*, 797 S.W.2d 654, 656 (Tex. 1990))); see also *FLAMM*, *supra* note 5, at 449 (“[M]any [courts] have opined that disqualification may be a harsh, drastic, extreme, extraordinary, and even draconian sanction for what may, in some instances, be an inadvertent rule violation.” (footnotes omitted)); *Swisher*, *supra* note 5, at 156.

⁵⁷ See *Freeman*, 689 F.2d at 721–22.

⁵⁸ *WOLFRAM*, *supra* note 24, at 322; see also Beth Nolan, *Public Interest, Private Income: Conflicts and Control Limits on the Outside Income of Government Officials*, 87 NW. U. L. REV. 57, 78 & n.77 (1992).

⁵⁹ *Rotunda*, *supra* note 40, at 1146; see also RONALD D. ROTUNDA, *BLACK LETTER OUTLINE ON PROFESSIONAL RESPONSIBILITY* 2 (7th ed. 2004).

⁶⁰ See MODEL RULES OF PRO. CONDUCT r. 1.9 cmt. 5 (AM. BAR ASS’N 1983), reprinted in *MORGAN & ROTUNDA*, *supra* note 4, at 193. The subsequent 2002 revision to the *Model Rules* eliminated the drafters’ explanation for removing the appearance of impropriety standard because the drafters thought it was no longer unnecessary. See MODEL RULES OF PRO. CONDUCT r. 1.9 (AM. BAR. ASS’N 2002) reprinted in *MORGAN & ROTUNDA*, *supra* note 4, at 44–47; *Rotunda*, *supra* note 40, at 1146.

⁶¹ See MODEL RULES OF PRO. CONDUCT r. 1.7, 1.9 (AM. BAR. ASS’N 2021).

⁶² See, e.g., Nancy J. Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 TEX.

of the appearance of impropriety standard from the *Model Rules*, however, most jurisdictions continue to apply the standard to a varying degree to regulate the conduct of private lawyers.⁶³

Jurisdictions that continue to rely on the standard do so in two ways.⁶⁴ First, in some states, the appearance of impropriety can be the sole basis for lawyer disqualification, as under the old *Model Code*.⁶⁵ These states, which include Alaska, Arkansas, Hawaii, Idaho, Louisiana, Maine, Minnesota, New Mexico, Pennsylvania, South Dakota, and Tennessee, recognize that protecting the public's confidence in the legal system is so essential to the administration of justice that even the appearance of impropriety justifies lawyer disqualification.⁶⁶

L. REV. 211, 228–29 n.93 (1982) (“Nevertheless, since the reasons for rejecting the appearance of impropriety test in disciplinary actions apply with equal if not greater force in disqualification actions, it is likely that courts will also reject disqualification motions based solely on a potential for improper appearances.”).

⁶³ See, e.g., *Analytica, Inc. v. NPD Rsch., Inc.*, 708 F.2d 1263, 1269 (7th Cir. 1983); *Steel v. Gen. Motors Corp.*, 912 F. Supp. 724, 740 (D.N.J. 1995); cf. *Ark. Valley State Bank v. Phillips*, 171 P.3d 899, 909 & n.45 (Okla. 2007); see also FLAMM, *supra* note 5, at 351–56; Swisher, *supra* note 5, at 144–45.

⁶⁴ See Swisher, *supra* note 5, at 144–53 (categorizing each state's use of the appearance of impropriety standard for lawyer disqualification).

⁶⁵ See, e.g., *Griffith v. Taylor*, 937 P.2d 297, 302 (Alaska 1997) (finding that the standard was an adequate basis for disqualification in Alaska); see also *Sturdivant v. Sturdivant*, 241 S.W.3d 740, 745, 747 (Ark. 2006) (finding that the standard was an adequate basis for disqualification in Arkansas); *Weigel v. Farmers Ins. Co.*, 158 S.W.3d 147, 153 (Ark. 2004); *First Am. Carriers, Inc. v. Kroger Co.*, 787 S.W.2d 669, 671 (Ark. 1990) (“The fact that Canon 9 is not in the Model Rules does not mean that lawyers no longer have to avoid the appearance of impropriety.”); *Chun v. Bd. of Trs. of the Emps.’ Ret. Sys.*, 952 P.2d 1215, 1237–38 (Haw. 1998) (finding that the standard was an adequate basis for disqualification in Hawaii); *Sapienza v. Hayashi*, 554 P.2d 1131, 1136 (Haw. 1976); *Foster v. Traul*, 175 P.3d 186, 194–95 (Idaho 2007) (applying a “four-part test to determine whether an appearance of impropriety alone will give a party standing to interfere with an adverse party's choice of counsel”); *Darby v. Methodist Hosp.*, 447 So. 2d 106, 108 (La. Ct. App. 1984) (finding that the standard was an adequate basis for disqualification in Louisiana); *Adam v. Macdonald Page & Co.*, 644 A.2d 461, 463 n.6, 464 (Me. 1994) (finding that the standard was an adequate basis for disqualification in Maine); *Cox v. Ryan*, No. AP-06-041, 2006 WL 3720197, at *2 (Super. Ct. Me. Nov. 20, 2006); *Lennartson v. Anoka-Hennepin Indep. Sch. Dist. No. 11*, 662 N.W.2d 125, 131, 135 (Minn. 2003) (finding that the standard was an adequate basis for disqualification in Minnesota); *Leon, Ltd. v. Carver*, 715 P.2d 1080, 1082–83 (N.M. 1986) (finding that the standard was an adequate basis for disqualification in New Mexico); *In re Estate of Pedrick*, 482 A.2d 215, 218 n.3 (Pa. 1984) (finding that the standard was an adequate basis for disqualification in Pennsylvania); *Altman v. Rumbolz*, 648 N.W.2d 823, 827–28 (S.D. 2002) (finding that the standard was an adequate basis for disqualification in South Dakota); *Clinard v. Blackwood*, 46 S.W.3d 177, 186 (Tenn. 2001) (finding that the standard was an adequate basis for disqualification in Tennessee). But see *Griffith*, 937 P.2d at 306 n.18 (“We note, however, that the law frowns upon imposing disciplinary action based solely on the appearance of impropriety.”).

⁶⁶ See cases cited *supra* note 65.

Second, in some states, the appearance of impropriety cannot be the sole basis for disqualification, but it can be a factor for the courts to consider.⁶⁷ These states, which include Arizona, California, Connecticut, Georgia, Illinois, Iowa, Massachusetts, North Carolina, Ohio, Rhode Island, Vermont, and Wisconsin, recognize that an appearance of impropriety can contribute to a decision to disqualify a lawyer when it is viewed in conjunction with other evidence of actual misconduct.⁶⁸

On the other hand, some states have yet to clarify whether the appearance of impropriety can serve as a basis for disqualification since the release of the *Model Rules* in 1983.⁶⁹ This means that those states, which include Delaware,

⁶⁷ See, e.g., *Gomez v. Super. Ct.*, 717 P.2d 902, 904 (Ariz. 1986) (noting that the appearance of impropriety is still a relevant factor in Arizona, but it is “simply too slender a reed on which to rest a disqualification order except in the rarest of cases” (internal quotation marks omitted) (quoting *Bd. of Educ. v. Nyquist*, 590 F.2d 1241, 1247 (2d Cir. 1979))); *Sellers v. Super. Ct.*, 742 P.2d 292, 300 (Ariz. Ct. App. 1987); *Addam v. Super. Ct.*, 10 Cal. Rptr. 3d 39, 40, 43 (Cal. Ct. App. 2004) (noting that the appearance of impropriety alone is insufficient to disqualify lawyers but that it could be a factor in California); *Bergeron v. Mackler*, 623 A.2d 489, 494 (Conn. 1993) (“Although considering the appearance of impropriety may be part of the inherent power of the court to regulate the conduct of attorneys, it will not stand alone to disqualify an attorney in the absence of any indication that the attorney’s representation risks violating the Rules of Professional Conduct.”); *Outdoor Advert. Ass’n of Ga., Inc. v. Garden Club of Ga., Inc.*, 527 S.E.2d 856, 862 (Ga. 2000) (noting that the appearance of impropriety alone is insufficient to disqualify lawyers but that it could be a factor in Georgia); *Schwartz v. Cortelloni*, 685 N.E.2d 871, 878 (Ill. 1997) (noting that the appearance of impropriety alone is insufficient to disqualify lawyers but that it could be a factor in Illinois); *Bottoms v. Stapleton*, 706 N.W.2d 411, 416 (Iowa 2005) (noting that the appearance of impropriety alone is insufficient to disqualify lawyers but that it could be a factor in Iowa); *Adoption of Erica*, 686 N.E.2d 967, 973 (Mass. 1997) (noting that the appearance of impropriety alone is insufficient to disqualify lawyers but that it could be a factor in Massachusetts); *Sisk v. Transylvania Cmty. Hosp., Inc.*, 695 S.E.2d 429, 435–37 (N.C. 2010) (noting that the appearance of impropriety alone is insufficient to disqualify lawyers but that it could be a factor in North Carolina); *Kala v. Aluminum Smelting & Refin. Co.*, 688 N.E.2d 258, 268 (Ohio 1998) (noting that the appearance of impropriety alone is insufficient to disqualify lawyers but that it could be a factor in Ohio); *Town of Johnston v. Santilli*, 892 A.2d 123, 132 (R.I. 2006) (noting that the appearance of impropriety alone is insufficient to disqualify lawyers but that it could be a factor in Rhode Island); *Olivier v. Town of Cumberland*, 540 A.2d 23, 27 (R.I. 1988) (same); *Stowell v. Bennett*, 739 A.2d 1210, 1212 (Vt. 1999) (noting that the appearance of impropriety alone is insufficient to disqualify lawyers but that it could be a factor in Vermont); *Foley-Ciccantelli v. Bishop’s Grove Condo. Ass’n, Inc.*, 797 N.W.2d 789, 810 (Wis. 2011) (noting that the appearance of impropriety alone is insufficient to disqualify lawyers but that it could be a factor in Wisconsin).

⁶⁸ See sources cited *supra* note 67.

⁶⁹ See, e.g., *J.E. Rhoads & Sons, Inc. v. Wooters*, No. Civ.A. 14497, 1996 WL 41162, at *5 (Del. Ch. Jan. 26, 1996) (“However, if a conflict between the parties arises which involves the documents from the original transaction, then that law firm best serves the legal system if it heeds Canon 9 and avoids ‘even the appearance of impropriety.’”); *State ex rel. Kirtz v. Del. Cir. Ct. No. 5*, 916 N.E.2d 658, 661 (Ind. 2009) (“[S]ometimes an attorney, guiltless in any actual sense, nevertheless is required to stand aside for the sake of public

Indiana, New York, and Texas, may choose to rely on the standard as a basis for disqualification in the future.⁷⁰ Leaving aside other states that elude classification by adopting contradicting and inconsistent standards,⁷¹ only nine states have explicitly rejected the standard.⁷² These states are Alabama, Colorado, Kansas, Kentucky, Mississippi, Nebraska, New Jersey, Oklahoma, and South Carolina.⁷³ As such, about eighty-five percent of the states have not explicitly followed the ABA's decision to remove the standard for private lawyers.⁷⁴ In the federal court system, approximately 11.6% of cases involving

confidence in the probity of the administration of justice." (internal quotation marks omitted) (quoting *State v. Rizzo*, 350 A.2d 225, 226 (N.J. 1975)); Shira Mizrahi, *Up Against the Wall: A Guide to the Effective Screening of Former Government Attorneys in New York*, 10 CARDOZO PUB. L. POL'Y & ETHICS J. 131, 148, 150 (2011) ("The appearance of impropriety standard as it relates to ethical rules is unique to the New York Rules, as it is not included in the Model Rules It remains unclear how New York judges will interpret this language."). *But see* *Stratagem Dev. Corp. v. Heron Int'l, N.V.*, 756 F. Supp. 789, 792 (S.D.N.Y. 1991) (a federal case in the Southern District of New York relying on the standard as a factor in disqualification); *see also In re EPIC Holdings, Inc.*, 985 S.W.2d 41, 48 (Tex. 1998) (noting that an appearance of impropriety could potentially be a valid factor for lawyer disqualification outside of the disciplinary rules).

⁷⁰ See sources cited *supra* note 69.

⁷¹ Swisher, *supra* note 5, at 150.

⁷² See, e.g., *Ex parte Terminix Int'l Co.*, 736 So. 2d 1092, 1095–96 (Ala. 1998); *Roberts v. Hutchins*, 572 So. 2d 1231, 1233 (Ala. 1990); *Terry v. State*, 424 So. 2d 710, 714–15 (Ala. Crim. App. 1982) (applying a common sense approach and calling for a factual investigation of each case); *see also* *Wade v. Nationwide Mut. Fire Ins. Co.*, 225 F. Supp. 2d 1323, 1331 (S.D. Ala. 2002) (noting the appearance of impropriety standard is not in Alabama's *Rules of Professional Conduct*); *In re Emp. Discrimination Litig. Against Ala.*, 453 F. Supp. 2d 1323, 1331 (M.D. Ala. 2001); *Food Brokers, Inc. v. Great W. Sugar Co.*, 680 P.2d 857, 858–59 (Colo. App. 1984) (refusing to apply the appearance of impropriety standard in Colorado); *State v. Dimaplas*, 978 P.2d 891, 893–94 (Kan. 1999) (refusing to apply the appearance of impropriety standard in Kansas); *Lansing-Delaware Water Dist. v. Oak Lane Park, Inc.*, 808 P.2d 1369, 1375–76 (Kan. 1991); *Marcum v. Scorsone*, 457 S.W.3d 710, 718 (Ky. 2015) (refusing to apply the appearance of impropriety standard in Kentucky); *Wilbourn v. Stennett, Wilkinson & Ward*, 687 So. 2d 1205, 1216–17 (Miss. 1996) (refusing to apply the appearance of impropriety standard in Mississippi); *Aldridge v. State*, 583 So. 2d 203, 205 (Miss. 1991); *Jacob N. Printing Co. v. Mosley*, 779 N.W.2d 596, 600–01 (Neb. 2010) (refusing to apply the appearance of impropriety standard in Nebraska); *State v. Kinkennon*, 747 N.W.2d 437, 444 (Neb. 2008); *O Builders & Assocs., Inc. v. Yuna Corp. of N.J.*, 19 A.3d 966, 981 (N.J. 2011) (refusing to apply the appearance of impropriety standard in New Jersey); *In re Sup. Ct. Advisory Comm. on Pro. Ethics Op. No. 697*, 911 A.2d 51, 53 (N.J. 2006); *Ark. Valley State Bank v. Phillips*, 171 P.3d 899, 909, 911 (Okla. 2007) (refusing to apply the appearance of impropriety standard in Oklahoma); *Prospective Inv. & Trading Co. v. GBK Corp.*, 60 P.3d 520, 523 (Okla. Civ. App. 2002); *State v. Bell*, 646 S.E.2d 888, 891 (S.C. Ct. App. 2007) (citing *State v. Smart*, 299 S.E.2d 686, 688 (S.C. 1982) (refusing to apply the appearance of impropriety standard in South Carolina), *overruled on other grounds by State v. Torrence*, 406 S.E.2d 315, 328 n.5 (S.C. 1991)).

⁷³ See cases cited *supra* note 72.

⁷⁴ See Swisher, *supra* note 5, at 150 (discussing how only fifteen percent of the states understand that the appearance of impropriety standard is no longer applicable).

lawyer disqualification can be attributed, at least in part, to the appearance of impropriety.⁷⁵ It is apparent, therefore, that the standard remains a relevant factor for the legal profession even though the ABA eliminated it from the *Model Rules*.⁷⁶

Despite the continued relevance of the appearance of impropriety standard, however, courts have yet to provide a clear definition for what amounts to an appearance of impropriety.⁷⁷ Most courts nowadays simply ask whether the lawyer's conduct creates an appearance of impropriety "in the mind of an 'ordinary knowledgeable citizen acquainted with the facts.'" ⁷⁸ Consequently, judges still have to make idiosyncratic decisions regarding their views of what the public considers to be improper.

Commentators have not offered an empirical basis for when a private lawyer's conduct will give rise to an appearance of impropriety either.⁷⁹ No study to date asks what conduct the public actually considers to be improper.⁸⁰ This empirical gap is especially unfortunate considering the continued relevance of the standard for private lawyers in many jurisdictions and the associated costs for clients, lawyers, and the courts as a result of lawyer disqualification. This Article, therefore, seeks to first address this gap by exploring empirically whether the public finds improper various decisions that private lawyers make when faced with common ethical dilemmas in the legal profession.

E. *The Selective Application of the Standard*

The need for empirical clarity is augmented by the fact that the ABA and most state ethics committees continue to apply the standard to judges and government lawyers.⁸¹ Regardless of whether a jurisdiction chooses to apply the standard to private lawyers, all jurisdictions either apply the standard for judges and government lawyers or rely on the standard as an interpretive principle in cases involving judges and government lawyers.⁸²

⁷⁵ See *id.* at 77.

⁷⁶ See *id.* (displaying how appearance of impropriety disqualification cases occur more frequently than five other categories for disqualification).

⁷⁷ See Green, *supra* note 3, at 337.

⁷⁸ See *id.* (quoting *In re Tenure Hearing of Onoverole*, 511 A.2d 1171, 1178 (N.J. 1986)).

⁷⁹ See Rotunda, *supra* note 40, at 1146–47; Swisher, *supra* note 5, at 154.

⁸⁰ See generally sources cited *supra* note 79.

⁸¹ See MODEL CODE OF JUD. CONDUCT r. 1.2 (AM. BAR ASS'N 2020); N.Y. RULES OF PRO. CONDUCT r. 1.11 (N.Y. STATE BAR ASS'N 2018); see also KAUFMAN, WILKINS, WALD & SWISHER, *supra* note 2, at 203, 293.

⁸² See, e.g., Conn. Bar Assoc. Comm. on Pro. Ethics, Informal Op. 96-17 (1996); Conn. Bar Assoc. Comm. on Pro. Ethics, Informal Op. 95-10 (1995); Green, *supra* note 3, at 343. Similar to the origins of the appearances of impropriety standard as applied to lawyers, the standard as applied to judges can be traced to 1924 when drafters of the ABA *Canons of Judicial Ethics*, headed by Supreme Court Justice William Howard Taft, created the standard as an aspirational guide for judges. See Flowers, *supra* note 30, at 720–21.

1. *The Standard for Judges*

Rule 1.2 of the ABA's *Model Code of Judicial Conduct*, the judicial equivalent of the ABA's *Model Rules*, states that "[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."⁸³ Comment 5 further explains, in a manner similar to the analogous *Model Code* provision for lawyers, that "[t]he test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge."⁸⁴ Commentators have developed a well-known corollary in light of the continued application of the standard for judges: "[T]he appearance of unethical conduct [for judges] cannot be divorced from the conduct itself."⁸⁵ In most instances, "reality is irrelevant" and "[t]he question is rarely whether the conduct is itself unethical."⁸⁶ The focus is whether the "watching and suspicious public" would consider the judicial conduct under question as unethical.⁸⁷ In addition, similar to how the standard covers all matters of lawyering for private lawyers in many jurisdictions, the standard for judges typically covers all aspects of serving as a judge including, for example, the solicitation of campaign funds and commenting publicly on a pending matter.⁸⁸ And if a judge is found to have engaged in what appears to be improper conduct, the remedy is almost always disqualification.⁸⁹

Some of the most infamous early cases of judicial misconduct illustrate how the standard can be used as an independent basis to discipline judges who have

⁸³ MODEL CODE OF JUD. CONDUCT r. 1.2 (AM. BAR ASS'N 2020).

⁸⁴ *Id.* r. 1.2 cmt. 5.

⁸⁵ Howard T. Markey, C.J., *The Delicate Dichotomies of Judicial Ethics*, 101 F.R.D. 373, 383 (1984).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ See, e.g., *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1671 (2015) ("Florida has reasonably determined that personal appeals for money by a judicial candidate inherently create an appearance of impropriety that may cause the public to lose confidence in the integrity of the judiciary. That interest may be implicated to varying degrees in particular contexts, but the interest remains whenever the public perceives the judge personally asking for money."); *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860–61 (1988); *In re Boston's Child. First*, 244 F.3d 164, 164–65 (1st Cir. 2001) (finding that a sitting district court judge, Nancy Gertner, "should have recused herself after commenting publicly on a pending matter" because her comments created an appearance of impropriety even though she did not "abdicate[] any of her ethical responsibilities").

⁸⁹ See E. WAYNE THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 60–61 (1973) ("Any conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's 'impartiality might reasonably be questioned' is a basis for the judge's disqualification.").

not violated a specific ethics rule.⁹⁰ In 1920, Judge Kenesaw Mountain Landis was appointed the Commissioner of Major League Baseball (“MLB”).⁹¹ Judge Landis’ concurrent public and private employment caused the U.S. Department of Justice to investigate Judge Landis for possible judicial misconduct.⁹² Attorney General Mitchell Palmer concluded that there was no rule that prohibited Judge Landis from receiving additional compensation for his work as an arbitrator or commissioner.⁹³ The *Canons of Judicial Ethics* at the time allowed judges to accept private employment as long as it did not interfere with their judicial duties.⁹⁴ The ABA, however, passed a resolution censuring Judge Landis and heaped “unqualified condemnation” on his actions—even though he did not violate any specific law or ethics rule—because of the appearance of impropriety.⁹⁵

Decades later, Supreme Court Justice Abe Fortas became embroiled in a scandal that similarly invoked the appearance of impropriety standard.⁹⁶ Justice Fortas accepted a modest payment of \$20,000 for helping a charity, but the founder of the charity was later indicted by the Securities and Exchange Commission.⁹⁷ Justice Fortas promptly returned the payment and did not violate any laws.⁹⁸ However, the ABA opined that he had violated the *Canons of Judicial Ethics* due to his appearance of impropriety.⁹⁹ *Time* magazine further reported that determining whether Justice Fortas actually committed a crime “miss[ed] the point” because his actions raised “a question about the appearance of virtue on the court.”¹⁰⁰ In a more recent Supreme Court case, *Liljeberg v. Health Services Acquisition Corp.*, Judge Robert Collins of the Eastern District

⁹⁰ See McKoski, *supra* note 13, at 1921–25 (providing a more complete account of the investigation into Judge Landis and his appearance of impropriety).

⁹¹ *Id.* at 1921–22. See generally ELIOT ASINOF, EIGHT MEN OUT: THE BLACK SOX AND THE 1919 WORLD SERIES 13–15, 197–200 (1963).

⁹² See DAVID PIETRUSZA, JUDGE AND JURY: THE LIFE AND TIMES OF JUDGE KENESAW MOUNTAIN LANDIS 197 (1998).

⁹³ *Id.*

⁹⁴ See CANONS OF JUD. ETHICS Canon 31 (AM. BAR ASS’N 1924); PIETRUSZA, *supra* note 92, at 197.

⁹⁵ *Transactions of the Forty-Fourth Annual Meeting of the American Bar Association*, 44 ANN. REP. A.B.A. 19, 61–68 (1921); *Bar Meeting Votes Censure of Landis*, N.Y. TIMES, Sept. 2, 1921, at 1 (reprinting the ABA resolution censuring Judge Landis).

⁹⁶ See Jake Garn & Lincoln C. Oliphant, *Disqualification of Federal Judges Under 28 U.S.C. § 455(a): Some Observations on and Objections to an Attempt by the United States Department of Justice to Disqualify a Judge on the Basis of His Religion and Church Position*, 4 HARV. J.L. & PUB. POL’Y 1, 22 (1981).

⁹⁷ See *id.*

⁹⁸ See John Anthony Maltese, *The Selling of Clement Haynsworth: Politics and the Confirmation of Supreme Court Justices*, 72 J. AM. JUDICATURE SOC’Y 338, 340 (1989).

⁹⁹ See Fred Graham, *Abe Fortas*, in 4 THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 1451, 1463–64 (Leon Friedman & Fred L. Israel eds., 1997).

¹⁰⁰ *Judgment on a Justice*, TIME (May 23, 1969), <http://content.time.com/time/subscriber/article/0,33009,900850,00.html> [https://perma.cc/WH43-VRQG].

of Louisiana ruled in favor of a litigant with whom he had a tenuous connection.¹⁰¹ The Court noted that Judge Collins may or may not have known about his connection with the litigant prior to his ruling, but Judge Collins' actual knowledge was irrelevant because "the public might reasonably believe that he . . . knew."¹⁰²

2. *The Standard for Government Lawyers*

Similarly, several jurisdictions continue to apply the standard for government lawyers despite the ABA's decision to remove the standard for all lawyers in 1983.¹⁰³ For instance, Rule 1.11 of the *New York Rules of Professional Conduct* states that if a former government lawyer joins private practice, the lawyer's firm is vicariously disqualified from representing a client in connection with any matter in which the lawyer participated personally and substantially as a public officer, unless the firm screens the lawyer and there is no "appearance of impropriety."¹⁰⁴ This provision, which applies only to former government lawyers, supersedes the general imputation provisions for private lawyers moving from one firm to another under Rule 1.10 by adding the appearance of impropriety standard for government lawyers.¹⁰⁵ In practice, most cases implicating the standard today tend to involve government lawyers or former government lawyers.¹⁰⁶

3. *The Case for and Against the Selective Standard*

The continued application of the standard for judges and government lawyers—but not always private lawyers—warrants a discussion of the arguments for and against the selective application of the standard. Proponents of the selective application of the standard contend that there is a greater "public interest" in the case of judges and government lawyers, which justifies the selective application.¹⁰⁷

¹⁰¹ See *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 850 (1988).

¹⁰² *Id.* at 860–61.

¹⁰³ See, e.g., N.Y. RULES OF PRO. CONDUCT r. 1.11 (N.Y. STATE BAR ASS'N 2018); see sources cited *supra* note 4.

¹⁰⁴ See N.Y. RULES OF PRO. CONDUCT r. 1.11 (N.Y. STATE BAR ASS'N 2018).

¹⁰⁵ See Roy Simon, *Rule 1.11: Screening Former Government Lawyers*, N.Y. LEGAL ETHICS REP. (Oct. 2010), <http://www.newyorklegalethics.com/rule-1-11-screening-former-government-lawyers/> [<https://perma.cc/EJS9-PRQA>].

¹⁰⁶ See Green, *supra* note 3, at 336.

¹⁰⁷ See *id.* at 336–37; see also *In re Ferrara*, 582 N.W.2d 817, 827 (Mich. 1998) ("The effectiveness of our judicial system is dependent upon the public's trust."); *Jud. Inquiry & Rev. Comm'n v. Shull*, 651 S.E.2d 648, 658 (Va. 2007) (opining that the legal system depends on the public's confidence in the judiciary); KAUFMAN, WILKINS, WALD & SWISHER, *supra* note 2, at 203; see, e.g., JAMES J. ALFINI, STEVEN LUBET, JEFFREY M. SHAMAN & CHARLES GARDNER GEYH, *JUDICIAL CONDUCT AND ETHICS* § 10.04B, at 10-14

To elaborate, proponents of the selective standard argue that judges assume a greater responsibility towards the public because they hold a position of public trust and oversee the legal process.¹⁰⁸ As such, they argue that a judge's appearance of impropriety will cause a greater loss in public confidence in the legal system than a private lawyer's appearance of impropriety.¹⁰⁹ The appearance of impropriety standard is thus justified in the case of judges to protect the integrity of the legal system, even if it is no longer applied in the case of private lawyers.¹¹⁰

A similar argument can be made for government lawyers, especially prosecutors.¹¹¹ Prosecutors occupy a special role not only as an advocate but also as a "minister of justice."¹¹² They have enormous discretion in directing investigations, determining criminal charges, and affecting sentences.¹¹³ They epitomize the government itself in criminal trials.¹¹⁴ As such, it is entirely plausible that prosecutors, as well as other government lawyers, play an influential role in shaping the public's perception of the legal system as a whole.¹¹⁵ Some commentators thus argue that prosecutors should similarly be held to the higher ethical standard of avoiding even the appearance of impropriety.¹¹⁶ In other words, the same concerns regarding the public's perception of judges also apply to prosecutors who assume a quasi-judicial

(4th ed. 2007) (finding that the legal system could not function if public confidence in the judiciary was lost).

¹⁰⁸ See Green, *supra* note 3, at 321, 336.

¹⁰⁹ See *id.* at 337–38.

¹¹⁰ See *id.*

¹¹¹ See, e.g., George T. Frampton, Jr., *Some Practical and Ethical Problems of Prosecuting Public Officials*, 36 MD. L. REV. 5, 7 (1976) (arguing that the prosecutor "is both an advocate in the criminal justice system and also an administrator of that system"); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 356 (2001); H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1697 (2000).

¹¹² See, e.g., MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2021); see also STANDARDS RELATING TO THE ADMIN. OF CRIM. JUST. § 3-1.1(b)–(c) (AM. BAR ASS'N 1986) (stating that the prosecutor's duty 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) (explaining the prosecutor's duty as an advocate who "must temper his zeal with a recognition that his broader responsibilities are to seek justice").

¹¹³ See Smith, *supra* note 111, at 385; Uviller, *supra* note 111, at 1697, 1701.

¹¹⁴ See Smith, *supra* note 111, at 381; Uviller, *supra* note 111, at 1697.

¹¹⁵ See Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1218 (1958) (arguing that "[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").

¹¹⁶ See Flowers, *supra* note 30, at 703; see also Samuel J. Levine, *Taking Prosecutorial Ethics Seriously: A Consideration of the Prosecutor's Ethical Obligation to "Seek Justice" in a Comparative Analytical Framework*, 41 HOUS. L. REV. 1337, 1339–40 (2004) (arguing that prosecutors should abide by broad ethical standards).

role.¹¹⁷ This, in turn, justifies the selective application of the standard for government lawyers, even if the standard does not apply to private lawyers.¹¹⁸

Proponents of the selective application of the standard also argue that, unlike private lawyers, judges have specialized expertise regarding the ethical norms of the legal profession and can provide the standard with the necessary specificity.¹¹⁹ According to their view, ethics codes do not need to provide greater specificity to the admittedly vague appearance standard because judges, as members of a learned profession, can provide the required specificity through their “common knowledge and understanding” of the legal profession.¹²⁰ Similar arguments can be made for prosecutors who have specialized expertise regarding the norms surrounding prosecutorial misconduct.¹²¹

However, critics claim that such a defense of the selective standard is misguided.¹²² The standard does not call on members of the legal profession—in this case, judges and government lawyers—to supply the necessary specificity with their specialized expertise.¹²³ Rather, the standard calls on members of the public to determine what appears to be improper from their perspective.¹²⁴ No professional norm can provide any basis for the application of a standard that is, by definition, based on non-professional norms.¹²⁵ As Professor Raymond McKoski argues, “[A]ppearances are judged by the ordinary reasonable person. Insertion of the ordinary observer into the equation defeats any argument that professional norms supply [the] needed specificity to the appearance standard.”¹²⁶ The standard, therefore, still requires specificity grounded in empirical reality rather than professional expertise.

As before with private lawyers, however, there is no empirical basis for what conduct by judges and government lawyers actually amounts to an appearance of impropriety in the eyes of the public. Critics, including Supreme Court Justices Tom Clark and Arthur Goldberg, characterize the appearance standard as applied to judges as “unbelievably ambiguous” and “susceptible to

¹¹⁷ See sources cited *supra* note 116.

¹¹⁸ See sources cited *supra* note 116.

¹¹⁹ See McKoski, *supra* note 13, at 1937.

¹²⁰ *Perez v. Hoblock*, 368 F.3d 166, 176 (2d Cir. 2004) (“[W]here the language of a statute fails to provide an objective standard by which conduct can be judged, the required specificity may nonetheless be provided by the common knowledge and understanding of members of the particular vocation or profession to which the standard applies.” (internal quotation marks omitted) (quoting *Cranston v. City of Richmond*, 710 P.2d 845, 851 (Cal. 1985))); see also *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 666 (1985) (Brennan, J., concurring in part and dissenting in part) (quoting *In re Ruffalo*, 390 U.S. 544, 555 (1968)).

¹²¹ See Flowers, *supra* note 30, at 738 & n.281, 739.

¹²² See McKoski, *supra* note 13, at 1940–41.

¹²³ See *id.*

¹²⁴ See *id.*

¹²⁵ See *id.*

¹²⁶ *Id.* at 1940.

great abuse and thus potentially dangerous to judicial legitimacy.”¹²⁷ Justice William Rehnquist observed that the standard as applied to judges led to absurd results that “cut [too] broadly.”¹²⁸ For example, in the case of Judge Landis, the MLB Commissioner, it was unclear whether his conduct actually undermined the public’s faith in the legal system.¹²⁹ Despite the ABA’s censure based on its assumptions about the public, the public appeared to praise Judge Landis for ridding the national pastime of its corrupt gambling influences during his tenure as the MLB Commissioner.¹³⁰ Thus, without actually asking members of the public, it is unclear what conduct warrants the application of the standard for judges and government lawyers. Furthermore, there is no empirical basis for the stipulation that a judge’s conduct or a government lawyer’s conduct is more harmful to the public’s confidence in the legal system as to justify the selective application of the standard.

Critics of the selective standard also argue that the opportunity costs of the standard are too prohibitive for judges and government lawyers.¹³¹ Because of the lack of clarity, judges, for instance, spend much time and effort trying to appear ethical, rather than acting in a manner that does not betray their actual ethical responsibilities.¹³² Judge Alex Kozinski argues that the “[i]ncreasing the number of rules and prohibitions—making sure that judges don’t attend conferences at swank resorts with plush golf courses—will do absolutely

¹²⁷ *Nonjudicial Activities of Supreme Court Justices and Other Federal Judges: Hearings on S. 1097 and S. 2109 Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 91st Cong. 175 (1969) (statement of Tom C. Clark, Associate Justice, U.S. Supreme Court, retired); Abramson, *supra* note 11, at 956 n.23; Lubet, *supra* note 11, at 399; Pingree, *supra* note 11, at 1128.

¹²⁸ William H. Rehnquist, *Sense and Nonsense About Judicial Ethics*, 28 REC. ASS’N BAR CITY N.Y. 694, 701 (1973) (suggesting that under the standard “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”).

¹²⁹ See, e.g., J.G. TAYLOR SPINK, JUDGE LANDIS AND TWENTY-FIVE YEARS OF BASEBALL 74 (1947) (“[T]he entire country felt pleased and gratified with the selection of Landis as [the MLB commissioner].”); Geo. W. Hall, Letter to the Editor, *Judge Landis and the American Bar Association*, CHI. DAILY TRIB., Sept. 5, 1921, at 6 (“What the public wants is results and not mere ethical theories, and we challenge the [ABA] to show us another United States judge whose services have been of greater public benefit than those of Judge Landis.”); Olson Condemns “Lynching” of Landis by Bar, CHI. DAILY TRIB., Sept. 7, 1921, at 17 (“Just a word to let you [Landis] know that I do not approve of the lynching of your character by the [ABA]. . . . If more judges had your character and courage, the country would be better served than it often is now.” (quoting a letter from Chief Justice Harry Olson to Judge Landis)).

¹³⁰ See sources cited *supra* note 129.

¹³¹ See Alex Kozinski, *The Real Issues of Judicial Ethics*, 32 HOFSTRA L. REV. 1095, 1105 (2004).

¹³² See *id.*

nothing to increase judicial responsibility where it counts.”¹³³ Judge Kozinski opines that “the more hoops judges have to jump through to avoid the appearance of impropriety, the more likely [judges] are [going] to feel that hoop-jumping” is the end goal of their ethical responsibilities.¹³⁴ As a result, he argues that judges are less likely to give careful consideration to the job’s true “ethical pitfalls,” namely failing to fairly adjudicate the cases before them.¹³⁵ Therefore, according to the critics, providing clarity as to what amounts to an appearance of impropriety is essential to more effectively regulating judges and government lawyers and allowing them to focus on their substantive ethical responsibilities.

In sum, the case against the selective application of the standard again comes down to the lack of clarity. As it stands, many jurisdictions continue to rely on the standard to regulate judges and government lawyers, without any empirical basis for the claim that questionable conduct by judges and government lawyers will result in a greater loss of public trust than the same conduct by private lawyers. There is a need for clarity especially since the current application of the standard poses an undue burden on judges and government lawyers, not to mention the public-at-large as clients of both.¹³⁶ Therefore, this Article seeks to fill this second empirical gap and provide some insight into what conduct by judges and government lawyers creates an appearance of impropriety. The Article also seeks to clarify whether the public is more likely to lose faith in the legal system if judges and government lawyers, as opposed to private lawyers, engage in conduct that could create an appearance of impropriety.

III. RESEARCH DESIGN

A. *Research Questions*

Although the appearance of impropriety standard is based on the public’s view of professional responsibility, no study to date has attempted to demonstrate empirically what the public actually considers to be improper. As such, this Article seeks to provide some empirical clarity by surveying members of the public, rather than relying on judges’ and disciplinary committees’ assumptions about the public. Since the standard relies on the “eye of the

¹³³ *Id.* It bears noting that Judge Kozinski retired abruptly from the bench after numerous allegations of sexual misconduct and abusive employment practices. See Matt Zapotosky, *Judge Who Quit Over Harassment Allegations Reemerges, Dismaying Those Who Accused Him*, WASH. POST (July 24, 2018), https://www.washingtonpost.com/world/national-security/judge-who-quit-over-harassment-allegations-reemerges-dismaying-those-who-accused-him/2018/07/23/750a02f2-89db-11e8-a345-a1bf7847b375_story.html [https://perma.cc/6FNG-L3JM].

¹³⁴ Kozinski, *supra* note 131, at 1105.

¹³⁵ *See id.*

¹³⁶ *See* Swisher, *supra* note 5, at 154–55 (arguing that disqualified lawyers suffer financial and reputational harm).

beholder,” it only makes sense that the legal profession asks the public beholder what it considers to be improper.¹³⁷

More specifically, this Article seeks to tackle three questions. First, considering the continued application of the standard for private lawyers in many jurisdictions, the Article explores which types of conduct by private lawyers reduce the public's confidence in the legal system. Answering this question will provide greater clarity to the vague standard and give better guidance to private lawyers as to what conduct creates an appearance of impropriety and therefore warrants sanctions.

Second, considering the application of the standard for judges and government lawyers in most jurisdictions, the Article explores which types of conduct by judges and government lawyers reduce the public's confidence in the legal system. Similar to the first question, answering this second question will provide greater clarity to the vague standard and give better guidance to judges and government lawyers as to what conduct creates an appearance of impropriety and therefore warrants sanctions.

Third, the Article explores whether an appearance of impropriety by judges and government lawyers reduces the public's confidence in the legal system more than an appearance of impropriety by private lawyers. In light of the selective application of the appearance standard in many jurisdictions, it is important to ask whether the public holds judges and government lawyers in higher regard such that their appearances of impropriety are more likely to undermine the public's confidence in the legal system while a similar appearance of impropriety by private lawyers is less likely to undermine the public's confidence.

In sum, this Article's main research questions can be stated as follows:

- (1) What conduct by private lawyers creates an appearance of impropriety that undermines the public's confidence in the legal system?
- (2) What conduct by judges and government lawyers creates an appearance of impropriety that undermines the public's confidence in the legal system?
- (3) Is the conduct of judges and government lawyers more likely to create an appearance of impropriety that undermines the public's confidence in the legal system, relative to the conduct of private lawyers?

¹³⁷ See, e.g., *Weber v. Shell Oil Co.*, 566 F.2d 602, 609 (8th Cir. 1977); *Analytica, Inc. v. NPD Rsch., Inc.*, 708 F.2d 1263, 1269 (7th Cir. 1983); *Sears v. Olivarez*, 28 S.W.3d 611, 615 (Tex. Ct. App. 2000) (“[T]he inquiry should be ‘whether a reasonable member of the public at large, knowing all the facts in the public domain concerning the judge’s conduct, would have a reasonable doubt that the judge is actually impartial.’” (quoting *Rogers v. Bradley*, 909 S.W.2d 872, 881 (Tex. 1995) (Enoch, J., concurring))).

B. Survey Methodology

In order to answer these questions, the study conducted an original public opinion survey involving 794 respondents.¹³⁸ Each respondent participated in four experiments embedded within the survey to address the research questions. Each experiment presented a relatively common ethical dilemma in the legal profession as a hypothetical case.

Before discussing the four experiments in depth, it should be noted that the hypothetical cases were designed with three considerations in mind. First, to maximize external validity, the survey text was presented to the respondents in the form of short news articles.¹³⁹ This format ensured that survey respondents reflected the type of layperson whom the courts and drafters of the ethics rules had in mind when constructing the standard.¹⁴⁰ That is, courts and commentators have repeatedly stated that the ordinary layperson whom this standard envisions is a “partly informed observer” who “may determine appearances from available information including incomplete or unproven media reports.”¹⁴¹ Justice Michael Allen of the Florida Supreme Court opined that newspaper articles—the veracity of which he could not vouch for— informed his conception of the ordinary layperson when levying disciplinary sanctions based on the standard.¹⁴² Similarly, the court in *In re Blackman*, also relied on newspaper articles to create its impression of what it believed the public would consider to be improper.¹⁴³ The Second Circuit in *Meyerhofer v. Empire Fire & Marine Ins. Co.* asked whether “a shallow reading of the facts might lead a casual observer to conclude that there was an aura of complicity.”¹⁴⁴ In other words, the appearance of impropriety standard envisions not a reasonable person but a casual observer who possesses only information “reasonably available” on the “public domain.”¹⁴⁵ As such, the survey text took the form of news reports, and the survey text was left intentionally short and “shallow” in order to fit the traditional interpretation of the standard.¹⁴⁶

¹³⁸ Commentators have suggested the need for opinion surveys in related settings to determine what conduct is considered to be proper or improper. For instance, because the effectiveness of confidentiality screens in large law firms is unclear, Professor Andrew Kaufman suggested client surveys to determine whether screens meet the reasonable expectations of the clients to justify their continued use. See Andrew L. Kaufman, *Ethics 2000 – Some Heretical Thoughts*, PRO. LAW., 2001 Symposium Issue, at 1, 2.

¹³⁹ See *infra* Figure 1.

¹⁴⁰ See MODEL CODE OF PRO. RESP. EC 9-2 (AM. BAR ASS'N 1980).

¹⁴¹ McKoski, *supra* note 13, at 1947; see, e.g., *Meyerhofer v. Empire Fire & Marine Ins. Co.*, 497 F.2d 1190, 1195 (2d Cir. 1974); *Childers v. Florida*, 936 So. 2d 619, 623 (Fla. Dist. Ct. App. 2006) (Allen, J., concurring); *In re Blackman*, 591 A.2d 1339, 1341 (N.J. 1991).

¹⁴² See *Childers*, 936 So. 2d at 623.

¹⁴³ See *In re Blackman*, 591 A.2d at 1341.

¹⁴⁴ *Meyerhofer*, 497 F.2d at 1195 (emphasis added).

¹⁴⁵ See McKoski, *supra* note 13, at 1949–50.

¹⁴⁶ *Meyerhofer*, 497 F.2d at 1195.

Second, the appearance of impropriety standard is controversial when it is used as an independent factor that can wholly or partially justify disqualification, even in the absence of actual impropriety.¹⁴⁷ This Article would not add much to the legal debate regarding the appearance of impropriety standard if it only considered conduct that posed an actual impropriety by violating other ethics rules and thus already warranted sanctions.¹⁴⁸ All hypothetical cases, therefore, depicted conduct that did not implicate specific ethics rules but conduct that could potentially create an appearance of impropriety.¹⁴⁹ Furthermore, as alluded to earlier, the hypothetical cases posed relatively more common ethical dilemmas—such as those involving potential conflicts of interest or problematic confidentiality obligations—for greater relevance to the legal profession.

Third and relatedly, as with all public opinion studies, an obligatory point must be made about the framing of the survey questions. Word choice is especially important because loading the question with evocative terms can shift responses one way or the other. Evocative terms that characterize conduct as gross misconduct, for instance, would exaggerate the treatment effects, resulting in an unreliable finding that questionable ethical conduct always undermines public trust in the legal system. Therefore, in this Article, a conscious choice was made to keep the survey text as neutral as possible in order to get a conservative estimate of the treatment effects. By removing all evocative terms and presenting the questions in the most neutral manner possible, the survey is less likely to yield a significant effect. As such, if the experiments nonetheless yield a statistically significant treatment effect, one can be more confident in the results.

The four survey experiments were as follows. The first experiment (“Experiment 1”) examined the first question about what conduct, by private lawyers, created an appearance of impropriety. Respondents were randomly assigned to one of four treatments: the control treatment (“CT”); imputed conflict of interest treatment (“ICIT”); communication with person represented by counsel treatment (“CPRCT”); or disclosure of confidential information treatment (“DCIT”). As noted earlier, each treatment condition described conduct that is not explicitly prohibited by the *Model Rules*. Respondents in the CT read about a private lawyer engaged in the ordinary course of litigation. This treatment condition provided a baseline to compare the other treatment conditions. Respondents in the ICIT read about a law firm that had an attorney

¹⁴⁷ See Green, *supra* note 3, at 333.

¹⁴⁸ See *id.* at 353.

¹⁴⁹ There are federal and state statutes that prohibit certain types of conduct related to the practice of law. See, e.g., 18 U.S.C. § 207 (containing the federal conflict of interest statutes). Statutes pose a separate analysis in the context of a civil or criminal case, which is distinct from state ethics committees and courts considering disciplinary sanctions for violations of ethics rules. Because the focus of this Article is on possible violations of ethics rules, this Article does not take into consideration possible violations of federal and state statutes.

who had previously represented an adversary, though not in a manner that violated the conflict of interest rules in the *Model Rules*.¹⁵⁰ Respondents in the CPRCT read about a private lawyer who communicated with a person who was arguably represented by counsel.¹⁵¹ Respondents in the DCIT read about a private lawyer who refused to disclose confidential information about his client's fraud.¹⁵² All respondents otherwise read the same information. Afterwards, all respondents were asked whether they had confidence in the legal system on a five-point Likert scale. The wording of the question itself was modeled after the Gallup poll survey, which measures confidence in courts, among other institutions.¹⁵³ The five-point Likert scale was later converted to percentages for statistical analysis.¹⁵⁴ The survey text and figures for this experiment are reproduced below.¹⁵⁵ For brevity, the survey figures for all subsequent experiments are reproduced in the Appendix.¹⁵⁶

Chris Cooley is the owner of a local construction company. In October 2014, Cooley got in a disagreement with his local supplier, Sam Smith, over their business contract. Cooley hired Attorney Andrew Anderson to represent him. Yesterday, Attorney Anderson helped Cooley settle the lawsuit for an undisclosed amount, which ended the long-standing dispute between the two local businesses.

[CT] [No further information]

[ICIT] However, it was revealed today that a junior lawyer at Attorney Anderson's law firm used to work for the other side. The junior lawyer was one of Sam Smith's lawyers and worked on this lawsuit for Sam Smith for 7 hours before switching sides to join Attorney Anderson's law firm.¹⁵⁷

¹⁵⁰ See *infra* note 157 and accompanying text.

¹⁵¹ See *infra* note 158 and accompanying text.

¹⁵² See *infra* note 159 and accompanying text.

¹⁵³ See *Confidence in Institutions*, GALLUP, <https://news.gallup.com/poll/1597/confidence-institutions.aspx> [<https://perma.cc/8FGR-GYZD>] (asking respondents: "Please tell me how much confidence you, yourself, have in [the court]—a great deal, quite a lot, some or very little?").

¹⁵⁴ The five-point Likert scale was converted as follows: "None at all" to 0%; "Very little" to 25%; "Some" to 50%; "Quite a lot" to 75%; and "A great deal" to 100%. The conversion was necessary to conduct t-tests and ordinary least squares ("OLS") regression analysis, which are the conventional forms of statistical analysis in the social sciences.

¹⁵⁵ See *infra* Figure 1.

¹⁵⁶ See *infra* Appendix A.

¹⁵⁷ Under the *Model Rules*, whether this hypothetical case constitutes actual impropriety likely depends on how a court interprets Rule 1.9, which prohibits attorneys from representing the adversaries of former clients if they worked for the former client on a "substantially related matter." MODEL RULES OF PRO. CONDUCT r. 1.9 (AM. BAR ASS'N 2021). Whether a previous representation amounts to a substantially related matter can be a "question of degree" as in this hypothetical case. *Id.* r. 1.9 cmt. 2; see *O'Donnell v. Robert Half Int'l, Inc.*, 724 F. Supp. 2d 217, 218, 223 (D. Mass. 2010) (affirming a magistrate judge's finding that a law firm, that hired an associate who had worked for an adversary for

[CPRCT] However, it was revealed today that during the lawsuit Attorney Anderson got damaging information about Sam Smith from Sam Smith's employee—information to use against Sam Smith to force him to settle. Attorney Anderson secretly spoke with Sam Smith's employee without letting Sam Smith or his lawyer know.¹⁵⁸

[DCIT] However, it was revealed today that during the lawsuit Attorney Anderson found out that his client Chris Cooley committed fraud against other suppliers, possibly using his legal advice. Attorney Anderson did not report Chris Cooley's fraud to anyone.¹⁵⁹

After reading about Attorney Anderson, how much confidence do you, yourself, have in the legal system—a great deal, quite a lot, some, very little, or none at all?



- A great deal
- Quite a lot
- Some
- Very little
- None at all

7.2 hours, was disqualified in an “admittedly close” case but refusing to enforce the disqualification globally); *see also* *Analytica, Inc. v. NPD Rsch., Inc.*, 708 F.2d 1263, 1278 (7th Cir. 1983); MODEL RULES OF PRO. CONDUCT r. 1.10 (AM. BAR ASS'N 2021).

¹⁵⁸ Under the *Model Rules*, whether this hypothetical case constitutes actual impropriety likely depends on how a court interprets Rule 4.2, which prohibits attorneys from interacting with persons represented by counsel. *See* MODEL RULES OF PRO. CONDUCT r. 4.2 (AM. BAR ASS'N 2021). According to the accompanying comments, the plaintiff's lawyer may discuss matters with the defendant's employee as long as the employee does not have the “authority to obligate the [defendant] with respect to the matter or whose act or omission in connection with the matter may be imputed to the [defendant] for purposes of civil or criminal liability.” *Id.* r. 4.2 cmt. 7. In other words, as long as the employee is not within the control group of the organization, the plaintiff's lawyer may speak with the employee without legal counsel present. *See id.*

¹⁵⁹ Under the *Model Rules*, whether this hypothetical case constitutes actual impropriety likely depends on how a court interprets Rule 1.6, which prohibits the disclosure of confidential information. *See* MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 2021). This hypothetical case likely does not constitute actual impropriety since Rule 1.6 gives attorneys the discretion to disclose instances of fraud. *See id.* r. 1.6(b)(2); *see also* *People v. Belge*, 50 A.D.2d 1088, 1088 (N.Y. App. Div. 1975) (providing an example of a more extreme case in which disciplinary committees did not punish lawyers who did not disclose the location of human corpses), *aff'd*, 41 N.Y.2d 60 (1976).

Figure 1: *Survey Text and Figures for Experiment 1*¹⁶⁰

Control treatment (CT)	Imputed conflict of interest treatment (ICIT)
<div style="text-align: center;"> <h2 style="margin: 0;">Local Businesses Settle Lawsuit</h2> <p style="margin: 0;">By KATHERINE CARTER</p> <hr style="width: 20%; margin: 10px auto;"/> <p>Chris Cooley is the owner of a local construction company. In October 2014, Cooley got in a disagreement with his local supplier, Sam Smith, over their business contract. Cooley hired Attorney Andrew Anderson to represent him. Yesterday, Attorney Anderson helped Cooley settle the lawsuit for an undisclosed amount, which ended the long-standing dispute between the two local businesses.</p>  <p style="text-align: center;">Reuters</p> </div>	<div style="text-align: center;"> <h2 style="margin: 0;">Local Businesses Settle Lawsuit</h2> <p style="margin: 0;">By KATHERINE CARTER</p> <hr style="width: 20%; margin: 10px auto;"/> <p>Chris Cooley is the owner of a local construction company. In October 2014, Cooley got in a disagreement with his local supplier, Sam Smith, over their business contract. Cooley hired Attorney Andrew Anderson to represent him. Yesterday, Attorney Anderson helped Cooley settle the lawsuit for an undisclosed amount, which ended the long-standing dispute between the two local businesses.</p> <p>However, it was revealed today that a junior lawyer at Attorney Anderson's law firm used to work for the other side. The junior lawyer was one of Sam Smith's lawyers and worked on this lawsuit for Sam Smith for 7 hours before switching sides to join Attorney Anderson's law firm.</p>  <p style="text-align: center;">Reuters</p> </div>

¹⁶⁰ It bears repeating that the survey text was intentionally short and “shallow” in order to fit the traditional interpretation of the standard. *See Meyerhofer v. Empire Fire & Marine Ins.*, 497 F.2d 1190, 1195 (2d Cir. 1974).

Figure 1: *Survey Text and Figures for Experiment 1*
(continued)

Communication with
person represented by counsel
treatment (CPRCT)

Local Businesses Settle Lawsuit

By KATHERINE CARTER

Chris Cooley is the owner of a local construction company. In October 2014, Cooley got in a disagreement with his local supplier, Sam Smith, over their business contract. Cooley hired Attorney Andrew Anderson to represent him. Yesterday, Attorney Anderson helped Cooley settle the lawsuit for an undisclosed amount, which ended the long-standing dispute between the two local businesses.

However, it was revealed today that during the lawsuit Attorney Anderson got damaging information about Sam Smith from Sam Smith's employee – information to use against Sam Smith to force him to settle. Attorney Anderson secretly spoke with Sam Smith's employee without letting Sam Smith or his lawyer know.



Reuters

Disclosure of confidential
information treatment (DCIT)

Local Businesses Settle Lawsuit

By KATHERINE CARTER

Chris Cooley is the owner of a local construction company. In October 2014, Cooley got in a disagreement with his local supplier, Sam Smith, over their business contract. Cooley hired Attorney Andrew Anderson to represent him. Yesterday, Attorney Anderson helped Cooley settle the lawsuit for an undisclosed amount, which ended the long-standing dispute between the two local businesses.

However, it was revealed today that during the lawsuit Attorney Anderson found out that his client Chris Cooley committed fraud against other suppliers, possibly using his legal advice. Attorney Anderson did not report Chris Cooley's fraud to anyone.



Reuters

The second experiment (“Experiment 2”) examined the second question about what conduct, by judges, created an appearance of impropriety. Since various courts have applied the standard to all types of judicial conduct, this experiment considered a variety of ethical dilemmas that judges commonly face.¹⁶¹ Respondents were randomly assigned to one of four treatments: the control treatment (“CT”); personal relationship with a criminal treatment (“PRCT”); misuse of prestige treatment (“MPT”); or favoritism in appointments treatment (“FAT”). Similar to Experiment 1, each treatment condition depicted judicial conduct that do not implicate specific provisions of the *Model Code of Judicial Conduct*, save for the appearance of impropriety standard in Rule 1.2.¹⁶² Respondents in the CT read about a judge engaged in the ordinary course of adjudication. Respondents in the PRCT read about a judge who formed a personal relationship with criminals.¹⁶³ Respondents in the MPT read about a judge who misused the prestige of his office.¹⁶⁴ Respondents in the FAT read about a judge who showed favoritism in making fiduciary appointments.¹⁶⁵ All respondents otherwise read the same information.

Jim Jones is a local judge that recently completed his second term. He has been a judge for 10 years. During that time, he presided over many civil and criminal trials. Before becoming a judge, he worked for a law firm for 20 years. The local bar association gathered yesterday for Judge Jones’ 10-year anniversary as a judge.

[CT] [No further information]

[PRCT] However, it was revealed today that Judge Jones developed close personal relationships with four businessmen who were found guilty of financial fraud last year. Some people claim that he had several expensive dinners and visited exclusive golf courses with the convicted businessmen.¹⁶⁶

[MPT] However, it was revealed today that when Judge Jones was questioned by a restaurant staff member last week, he told the staff member, “Do you know

¹⁶¹ See, e.g., *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 453 (2015); *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860–61 (1988); *In re Boston’s Child. First*, 244 F.3d 164, 164 (1st Cir. 2001).

¹⁶² See MODEL CODE OF JUD. CONDUCT r. 1.2 (AM. BAR ASS’N 2020); McKoski, *supra* note 13, at 1967–78.

¹⁶³ See *infra* note 166 and accompanying text.

¹⁶⁴ See *infra* note 167 and accompanying text.

¹⁶⁵ See *infra* note 168 and accompanying text.

¹⁶⁶ Under the *Model Code of Judicial Conduct*, this hypothetical case does not constitute actual impropriety, and scholars have argued that the appearance of impropriety standard should regulate such behavior. See MODEL CODE OF JUD. CONDUCT r. 1.2 cmt. 5 (AM. BAR ASS’N 2020); Cynthia Gray, *When a Family Member Supports a Political Candidate*, JUD. CONDUCT REP., Spring 2008, at 1, 9 (discussing how judges should take precautions to avoid the appearance of participation or involvement in individuals’ political activities); McKoski, *supra* note 13, at 1967–70.

who I am?” and implied that he was a judge. Some people claim that he did this several times before.¹⁶⁷

[FAT] However, it was revealed today that Judge Jones appointed the sons of his work colleagues to prestigious positions as trustees and receivers for his cases. Some people claim that he did this several times before.¹⁶⁸

After reading about Judge Jones, how much confidence do you, yourself, have in the legal system—a great deal, quite a lot, some, very little, or none at all?

- A great deal
- Quite a lot
- Some
- Very little
- None at all

The third experiment (“Experiment 3”) examined the second half of the second question about what conduct, by government lawyers, created an appearance of impropriety. Given the focus in legal academia about whether the appearance standard should regulate prosecutorial misconduct, the hypothetical cases focused on prosecutors, rather than other government lawyers.¹⁶⁹ As before, the hypothetical cases depicted ethical dilemmas that prosecutors commonly face but that do not implicate ethics rules for government lawyers, save for the appearance standard as applied to government lawyers in most jurisdictions. In other words, given the controversy surrounding the application of the standard to regulate prosecutors in the absence of actual misconduct, such as a *Brady* violation or blatant witness tampering, the hypothetical cases described questionable prosecutorial conduct that is not explicitly prohibited by

¹⁶⁷ Under the *Model Code of Judicial Conduct*, whether this hypothetical case constitutes actual impropriety likely depends on how a court interprets Rule 1.3, which prohibits judges from abusing the prestige of their office to advance their personal or economic interests. See MODEL CODE OF JUD. CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS’N 2020). In practice, courts would likely not consider such subtle behavior to amount to a violation of Rule 1.3, and commentators have argued that the appearance of impropriety standard should regulate such subtle behavior. See Gray, *supra* note 166, at 9–10. But see *In re Sasso*, No. ACJC 2007-162, at 6–9 (Sup. Ct. N.J. Advisory Comm. on Jud. Conduct Mar. 31, 2009); McKoski, *supra* note 13, at 1970–71.

¹⁶⁸ Under the *Model Code of Judicial Conduct*, whether this hypothetical case constitutes actual impropriety likely depends on how a court interprets Rule 2.13, which prohibits judges from nepotism and favoritism in administrative appointments. See MODEL CODE OF JUD. CONDUCT r. 2.13 (AM. BAR ASS’N 2020). In practice, courts have found that such conduct did not amount to a violation of Rule 2.13 and relied exclusively on the appearance of impropriety standard to discipline judges in similar cases. See *generally In re Spector*, 392 N.E.2d 552 (N.Y. 1979) (holding that discipline is appropriate “even if it cannot be said that there is proof of the fact of disguised nepotism, [because] appearance of such impropriety is no less to be condemned than is the impropriety itself”); McKoski, *supra* note 13, at 1972–78.

¹⁶⁹ See Flowers, *supra* note 30, at 736; Levine, *supra* note 116, at 1340.

the ethics rules. Respondents were randomly assigned to one of four treatments: the control treatment (“CT”); discussion of other evidence treatment (“DOET”); rehearsal of witness testimony treatment (“RWTT”); or group witness preparation treatment (“GWPT”). Respondents in the CT read about a prosecutor engaged in the ordinary course of litigation. Respondents in the DOET read about a prosecutor who showed potential witnesses other incriminating evidence against the defendant before their testimony.¹⁷⁰ Respondents in the RWTT read about a prosecutor who met with potential witnesses to rehearse their testimony.¹⁷¹ Respondents in the GWPT read about a prosecutor who arranged for potential witnesses to congregate and refresh each other’s memory before giving their testimony.¹⁷² It should be noted that commentators have cited all three types of conduct as instances in which the appearance of impropriety standard should regulate prosecutors.¹⁷³ All respondents otherwise read the same information.

Earlier today, the jury found David Dixon guilty of a felony. Prosecutor Paul Parker was a government attorney handling the criminal case against Dixon, who was arrested in January.

[CT] Prosecutor Parker selected a few witnesses to testify at trial. On the day of the trial, all of the witnesses identified Dixon as the perpetrator.

[DOET] Prosecutor Parker selected a few witnesses to testify at trial. Two weeks before their testimony, Parker privately told the witnesses about all the other evidence that pointed to Dixon as the guilty person. On the day of the trial, all of the witnesses identified Dixon as the perpetrator.¹⁷⁴

[RWTT] Prosecutor Parker selected a few witnesses to testify at trial. Two weeks before their testimony, Parker met with each of the witnesses to rehearse

¹⁷⁰ See *infra* note 174 and accompanying text.

¹⁷¹ See *infra* note 175 and accompanying text.

¹⁷² See *infra* note 176 and accompanying text.

¹⁷³ See Flowers, *supra* note 30, at 764–66.

¹⁷⁴ Under the *Model Rules*, whether this hypothetical case constitutes actual impropriety likely depends on how a court interprets Rules 1.2(d), 3.3(a)(3), 8.4(c), and 8.4(d), which bear on a lawyer’s responsibility when preparing a witness. See MODEL RULES OF PROFESSIONAL CONDUCT r. 1.2(d) (AM. BAR ASS’N 2021) (prohibiting lawyers from assisting clients in conduct that they know to be fraudulent); *id.* r. 3.3(a)(3) (prohibiting lawyers from offering evidence that they know to be false); *id.* r. 8.4(c) (prohibiting lawyers from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); *id.* r. 8.4(d) (prohibiting lawyers from engaging in conduct prejudicial to the administration of justice). In practice, the hypothetical prosecutor’s conduct likely does not violate any of the above ethical obligations, due to his lack of actual knowledge of fraud or misrepresentation, and commentators have argued that the appearance of impropriety standard should regulate prosecutors in such instances where there is no actual impropriety. See Flowers, *supra* note 30, at 764.

their testimony for several days. On the day of the trial, all of the witnesses identified Dixon as the perpetrator.¹⁷⁵

[GWPT] Prosecutor Parker selected a few witnesses to testify at trial. Two weeks before their testimony, Parker gathered all of the selected witnesses together and allowed them to refresh each other's memory. On the day of the trial, all of the witnesses identified Dixon as the perpetrator.¹⁷⁶

After reading about Prosecutor Parker, how much confidence do you, yourself, have in the legal system—a great deal, quite a lot, some, very little, or none at all?

- A great deal
- Quite a lot
- Some
- Very little
- None at all

The fourth experiment (“Experiment 4”) examined the last question about whether an appearance of impropriety by judges and government lawyers undermined the public’s confidence in the legal system more than an appearance of impropriety by private lawyers. Respondents received one of three treatments: the private lawyer treatment (“PLT”); judge treatment (“JT”); or government lawyer treatment (“GLT”). Because the treatment responses were to be compared to each other, the nature of the conduct in question had to be analogous across all three treatment conditions. All treatment conditions, therefore, considered conduct that could appear to pose a conflict of interest, which is arguably the most common ethical dilemma that spans all three subgroups of the legal profession. Respondents in the PLT read about a private lawyer who represented a client despite what could appear to be a potential conflict of interest.¹⁷⁷ Respondents in the JT read about a judge who presided over a trial despite what could appear to be a potential conflict of interest.¹⁷⁸ Respondents in the GLT read about a former government lawyer’s firm that represented a client despite what could appear to be a potential conflict of

¹⁷⁵ Similar to the previous hypothetical case, under the *Model Rules*, this hypothetical case likely does not constitute actual impropriety. See MODEL RULES OF PRO. CONDUCT r. 1.2(d) (AM. BAR ASS’N 2021); *id.* r. 3.3(a)(3); *id.* r. 8.4(c); *id.* r. 8.4(d). Commentators have argued that the appearance of impropriety standard should regulate prosecutors in such instances where there is no actual impropriety. See Flowers, *supra* note 30, at 764–65.

¹⁷⁶ Similar to the previous hypothetical case, under the *Model Rules*, this hypothetical case likely does not constitute actual impropriety. See MODEL RULES OF PRO. CONDUCT r. 1.2(d) (AM. BAR ASS’N 2021); *id.* r. 3.3(a)(3); *id.* r. 8.4(c); *id.* r. 8.4(d). Commentators have argued that the appearance of impropriety standard should regulate prosecutors in such instances where there is no actual impropriety. See Flowers, *supra* note 30, at 765–66.

¹⁷⁷ See *infra* note 180 and accompanying text.

¹⁷⁸ See *infra* note 181 and accompanying text.

interest.¹⁷⁹ As before, all three hypothetical cases were worded such that they did not implicate specific conflict of interest rules. All respondents otherwise read the same information.

[PLT] Two years ago, TopTec sued Counting Computers. Attorney Luke Lewis was the lawyer for TopTec. Yesterday, TopTec won the lawsuit. However, it was revealed today that a junior lawyer at Attorney Lewis' law firm previously worked for their opponent Counting Computers on four unrelated legal problems several months ago. The junior lawyer learned damaging confidential information about Counting Computers while working for Counting Computers. Attorney Lewis claims that he did not interact with the junior lawyer during the lawsuit and did not use the damaging confidential information about Counting Computers to win his case for TopTec.¹⁸⁰

[JT] Two years ago, TopTec sued Counting Computers. Judge Brad Wilson oversaw the case. Yesterday, TopTec won the lawsuit. However, it was revealed today that Judge Wilson's law clerk previously worked for Counting Computers on four unrelated legal problems several months ago. The law clerk learned damaging confidential information about Counting Computers while working for Counting Computers. Judge Wilson claims that he did not interact with his law clerk during the lawsuit and did not use the damaging confidential information about Counting Computers to make his final decision for TopTec.¹⁸¹

[GLT] Two years ago, Prosecutor Eric Elliott charged TopTec for corporate fraud. Yesterday, TopTec was found guilty. However, it was revealed today a junior prosecutor in Elliott's office previously worked for TopTec's competitor. The junior prosecutor learned damaging confidential information about TopTec while working for TopTec's competitor. Prosecutor Elliott

¹⁷⁹ See *infra* note 182 and accompanying text.

¹⁸⁰ Under the *Model Rules*, whether this hypothetical case constitutes actual impropriety likely depends on how a court interprets Rules 1.3, 1.7, and 1.9. See MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. 4 (AM. BAR ASS'N 2021) (requiring lawyers to carry to conclusion all matters undertaken for a client); *id.* r. 1.7 (prohibiting lawyers from conflicts of interests); *id.* r. 1.9 (outlining lawyers' duties to former clients). Simply put, whether there has been actual impropriety depends on whether Counting Computer is a former or current client. See *id.* In practice, the Third Circuit previously found that a similarly situated adversary was a former client and that there was no actual impropriety but disqualified the lawyer nonetheless for an appearance of impropriety. See *IBM Corp. v. Levin*, 579 F.2d 271, 277, 281 (3d Cir. 1978) (disqualifying an attorney—who worked at a firm that had represented an adversary on a recurrent basis for four unrelated matters—based on the appearance of impropriety standard because the firm was found to have engaged in a continuous attorney-client relationship with the adversary).

¹⁸¹ Under the *Model Code of Judicial Conduct*, whether this hypothetical case constitutes actual impropriety likely depends on how a court interprets Rule 2.4, which prohibits family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment. MODEL CODE OF JUD. CONDUCT r. 2.4 (AM. BAR ASS'N 2020). In practice, the law clerk's former employment, with no indication that the law clerk will return to his former employment, will likely not constitute actual impropriety.

claims that he did not interact with the junior prosecutor during the lawsuit and did not use the damaging confidential information about TopTec to win his case against TopTec.¹⁸²

After reading about this case, how much confidence do you, yourself, have in the legal system—a great deal, quite a lot, some, very little, or none at all?

- A great deal
- Quite a lot
- Some
- Very little
- None at all

In addition, the survey asked respondents about several demographic characteristics, such as age, income, gender, race, political ideology, political involvement, education, general legal knowledge, and specific knowledge of the ethics rules. The survey also asked questions about the respondents' general trust in courts, judges, lawyers, and prosecutors, as well as their general concern with fraud and legal malpractice.¹⁸³ A summary of the respondents' demographic characteristics is included in the Appendix.¹⁸⁴

For respondent recruitment, the study relied on Amazon Mechanical Turk ("MTurk") to recruit 794 survey respondents. MTurk is an online survey platform that academics regularly use to gauge public opinion in peer-reviewed studies.¹⁸⁵ This survey took place on October 26, 2020, and was only available for U.S. respondents over the age of 18. To ensure the quality of survey responses, the survey also included two attention-check questions to flag respondents who were not paying attention to the survey prompt. Those who failed the first attention-check question were not included in the survey and not

¹⁸² Under the *Model Rules*, whether this hypothetical case constitutes actual impropriety likely depends on how a court interprets Rules 1.7 and 1.11. See MODEL RULES OF PROFESSIONAL CONDUCT r. 1.7 (AM. BAR ASS'N 2021) (prohibiting lawyers from conflicts of interests); *id.* r. 1.11 (prohibiting current government lawyers from participating on matters in which they participated personally and substantially while in private practice). In practice, because this hypothetical case describes a prosecutor who did not personally work for his competitor in private practice, a court is unlikely to find actual impropriety.

¹⁸³ The questions about general trust in courts, judges, lawyers, and prosecutors were the following: "How much confidence do you have in the [courts/judges/lawyers/prosecutors] to act in the best interest of the public?" The questions about general concern with fraud and legal malpractice were the following: "How concerned are you about [fraud/legal malpractice] in the U.S.?"

¹⁸⁴ See *infra* Table 2.

¹⁸⁵ See, e.g., Cass R. Sunstein, Sebastian Bobadilla-Suarez, Stephanie C. Lazzaro & Tali Sharot, *How People Update Beliefs About Climate Change: Good News and Bad News*, 102 CORNELL L. REV. 1431, 1434–35 (2017) (using 302 MTurk respondents to run a public opinion survey on climate change).

made a part of the final sample of 794 respondents.¹⁸⁶ Those who failed the second attention-check question were allowed to re-do the second attention-check question and continue with the rest of the survey.¹⁸⁷

C. Assumptions and Limitations

Before discussing the survey results, it is important to note this methodology's assumptions and limitations. First, the study relies on t-tests for the difference in means to analyze the results. T-tests are unbiased estimators for treatment effects because the randomization of treatment assignments caused all confounders and potential omitted variables to be balanced across the treatment groups.¹⁸⁸ Nonetheless, following the convention of social science research to include ordinary least squares ("OLS") regressions as robustness checks,¹⁸⁹ the Appendix includes OLS regressions that control for potential confounders, including all of the aforementioned demographic characteristics—age, income, gender, race, political ideology, political involvement, education, general legal knowledge, general knowledge of ethics rules, general trust in courts, judges, lawyers, and prosecutors, and general concern with fraud and legal malpractice.¹⁹⁰ By controlling for these variables, the OLS regressions take into account any effect caused by potential differences among the respondents' characteristics. The OLS regressions ultimately yield the same findings as the t-tests.

Next, the survey does not use a random sample of observations, which raises some concerns about selection bias and external validity. MTurk respondents self-selected themselves to participate in the survey. As a result, compared to the U.S. adult population, this study's sample has a higher proportion of males and non-Hispanic Whites and a lower proportion of Hispanics.¹⁹¹ The

¹⁸⁶ Of the 971 respondents who originally attempted to participate in the survey, 177 respondents failed the first attention-check question.

¹⁸⁷ Of the 794 respondents, 50 respondents failed the second attention-check question. Robustness checks excluding the 50 respondents who failed the second attention-check question did not yield significantly different results.

¹⁸⁸ See K.P. Suresh, *An Overview of Randomization Techniques: An Unbiased Assessment of Outcome in Clinical Research*, 4 J. HUM. REPROD. SCI. 8, 8–11 (2011).

¹⁸⁹ See, e.g., Joshua D. Kertzer, Kathleen E. Powers, Brian C. Rathbun & Ravi Iyer, *Moral Support: How Moral Values Shape Foreign Policy Attitudes*, 76 J. POL. 825, 832 (2014).

¹⁹⁰ See *infra* Tables 3, 4, 5, 6. The OLS regressions include several categories for race, in keeping with the conventions of social science journals. Additional robustness checks using a binary variable for race (i.e., White v. non-White) yield the same overall findings. Also, the assumption of heteroskedasticity could have been violated for some of the OLS regressions, since certain treatment assignments could have led to larger variations in the public's confidence in the legal system compared to other treatment conditions. As such, all of the OLS regressions in the Appendix use White's heteroskedastic-consistent robust standard errors.

¹⁹¹ See *infra* Table 2; AM. NAT'L ELECTION STUD., UNIV. MICH. & STAN. UNIV., USERS GUIDE AND CODEBOOK FOR THE ANES 2016 TIME SERIES STUDY 512, 556 (2019).

overrepresented demographic groups may disproportionately affect the survey results, and drawing inferences to U.S. adults may be problematic. Fortunately, weighting the MTurk sample to reflect the U.S. population is one possible solution to self-selection and the consequent overrepresentation of specific demographic groups. Robustness checks after weighting the MTurk sample according to the 2016 American National Election Studies (“ANES”) mirror all of the following results using the un-weighted MTurk sample.¹⁹² Furthermore, scholars have found that other studies using un-weighted MTurk samples can be replicated on nationally representative samples,¹⁹³ and there is no theoretical reason to expect otherwise for the un-weighted MTurk sample used in this study. For instance, a previous study compared survey results using MTurk respondents and respondents from the Cooperative Congressional Election Survey (“CCES”), a nationally stratified sample survey.¹⁹⁴ After examining the joint distributions of key demographic characteristics, that study found that the estimated differences between MTurk and CCES are mostly negligible, and researchers can use MTurk respondents without serious concerns of external validity.¹⁹⁵

The final methodological concern to note is the possibility of question order affecting the results (i.e., ordering effects). Therefore, the questions were presented in random order, and respondents had to answer demographic questions in between the experiments to minimize the risk of any ordering effects.

¹⁹² It should be noted that using post-stratification weights (i.e., weights placed after treatment assignment for post-hoc regression analyses) can lead to covariate imbalance across the treatment conditions and also complicate the estimation of the sampling variance of the treatment effects. As such, weighted least squares regression models should only be used as robustness checks, not as the main models for analyses. *See, e.g.,* Annie Franco, Neil Malhotra, Gabor Simonovits & L.J. Zigerell, *Developing Standards for Post-Hoc Weighting in Population-Based Survey Experiments*, 4 J. EXPERIMENTAL POL. SCI. 161, 168 (2017). *See generally* Andrew Gelman, *Struggles with Survey Weighting and Regression Modeling*, 22 STAT. SCI. 153 (2007) (exploring the motivation for hierarchical regression, combined with poststratification, as a strategy for correcting for differences between sample and population).

¹⁹³ *See, e.g.,* Adam J. Berinsky, Gregory A. Huber & Gabriel S. Lenz, *Evaluating Online Labor Markets for Experimental Research: Amazon.com's Mechanical Turk*, 20 POL. ANALYSIS 351, 361–66 (2012) (finding that MTurk respondents are often more representative of the U.S. population than in-person convenience samples and also replicating important published experimental work using MTurk samples).

¹⁹⁴ *See generally* Connor Huff & Dustin Tingley, “Who Are These People?” *Evaluating the Demographic Characteristics and Political Preferences of MTurk Survey Respondents*, RSCH. & POL. 1 (Sept. 10, 2015), <https://journals.sagepub.com/doi/pdf/10.1177/2053168015604648> (on file with the *Ohio State Law Journal*) (affirming the use of MTurk for social science research by comparing results using MTurk respondents and the Cooperative Congressional Election Survey respondents).

¹⁹⁵ *See id.* at 8.

IV. RESULTS AND RAMIFICATIONS

A. *The Standard for Private Lawyers*

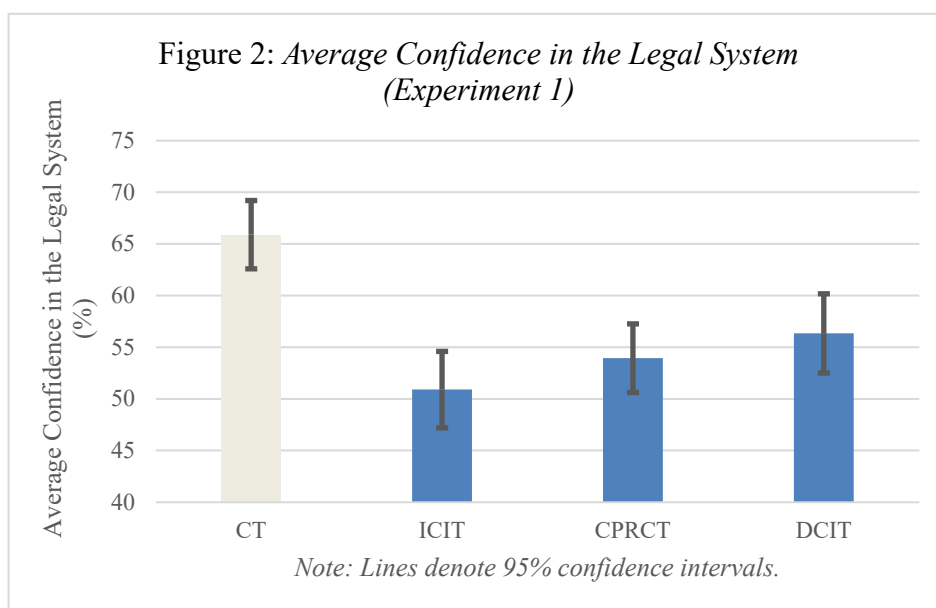
The first experiment examined what type of conduct, by private lawyers, created an appearance of impropriety, thereby justifying the continued reliance on the standard in a majority of jurisdictions. As the figure below demonstrates, respondents in the control group (“CT”), who read about a lawyer engaged in the ordinary course of litigation, had an average 65.90% confidence in the legal system.¹⁹⁶ This percentage is denoted in the figure in grey, as a baseline comparison with the other treatment groups.

Respondents in the imputed conflict of interest treatment group (“ICIT”), who read about a lawyer who had what could appear to be a conflict of interest, though not one that violated the *Model Rules*, had an average 50.91% confidence in the legal system. The difference in the level of confidence between this treatment group and the control treatment group was 14.99%, which was statistically significant ($t=5.96$, $p<0.0000$). As such, there is strong evidence that a potential conflict of interest creates a statistically significant decrease in the level of confidence in the legal system, even if it does not necessarily violate the *Model Rules*.

Respondents in the communication with person represented by counsel treatment group (“CPRCT”), who read about a lawyer who communicated with a person represented by counsel, though not in a manner that violated the *Model Rules*, had an average 53.95% confidence in the legal system. The difference in the level of confidence between this treatment group and the control treatment group was 11.95%, which was statistically significant ($t=5.03$, $p<0.0000$). As such, there is strong evidence that communicating with persons arguably represented by counsel creates a statistically significant decrease in the level of confidence in the legal system, even if it does not necessarily violate the *Model Rules*.

Respondents in the disclosure of confidential information treatment group (“DCIT”), who read about a lawyer who refused to disclose confidential information about a client’s fraud, which does not violate the *Model Rules*, had an average 56.34% confidence in the legal system. The difference in the level of confidence between this treatment group and the control treatment group was 19.24%, which was statistically significant ($t=3.72$, $p<0.0002$). As such, there is strong evidence that not disclosing confidential information about fraud creates a statistically significant decrease in the level of confidence in the legal system, even if it does not necessarily violate the *Model Rules*.

¹⁹⁶ See *infra* Figure 2.



These results provide empirical evidence of three relatively more common types of conduct by private lawyers that create an appearance of impropriety. Because the three types of conduct do not violate any specific provision in the *Model Rules*, but nonetheless reduce the public's confidence in the legal system, jurisdictions that punish lawyers for similar conduct based on the appearance standard are empirically justified. At the same time, overlooking similar conduct, simply because it does not amount to a clear violation of ethics rules, would risk undermining the public's confidence in the legal system. As such, drafters of the *Model Rules* would be empirically justified in reintroducing the standard for private lawyers.

B. The Standard for Judges

The second experiment examined what type of conduct, by judges, created an appearance of impropriety, thereby justifying the use of the standard in the *Model Code of Judicial Conduct* and in most jurisdictions. As the figure below demonstrates, respondents in the control group ("CT"), who read about a judge engaged in the ordinary course of adjudication, had an average 66.36% confidence in the legal system.¹⁹⁷ This percentage is denoted in the figure in grey, as a baseline comparison with the other treatment groups.

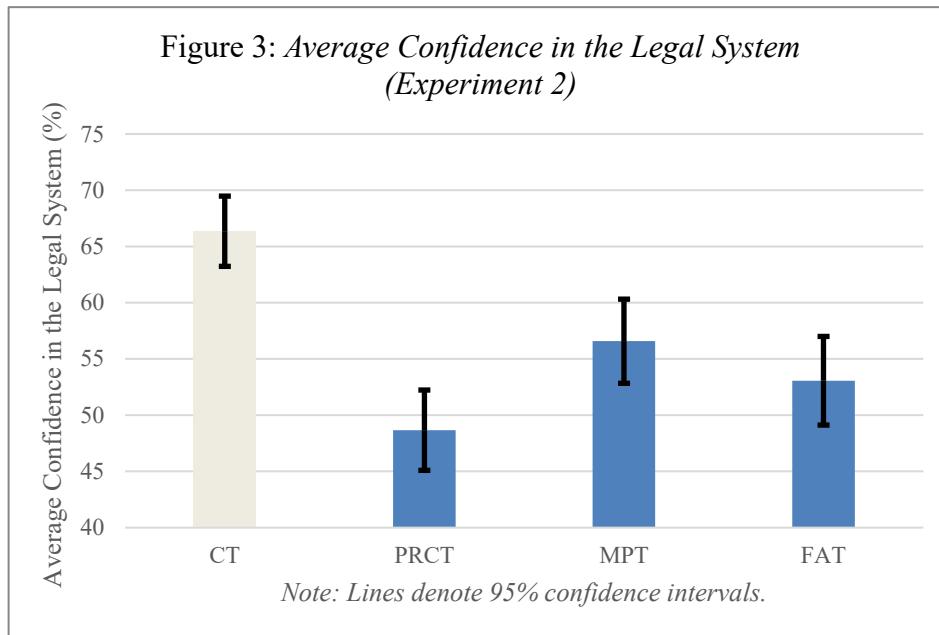
Respondents in the personal relationship with a criminal treatment group ("PRCT"), who read about a judge who formed a personal relationship with criminals, though not a manner that violated the *Model Code of Judicial Conduct*, had an average 48.67% confidence in the legal system. The difference

¹⁹⁷ See *infra* Figure 3.

in the level of confidence between this treatment group and the control treatment group was 17.70%, which was statistically significant ($t=7.35$, $p<0.0000$). As such, there is strong evidence that a relationship with criminals creates a statistically significant decrease in the level of confidence in the legal system, even if it does not necessarily violate the *Model Code of Judicial Conduct*.

Respondents in the misuse of prestige treatment group (“MPT”), who read about a judge who misused the prestige of his office, though not in a manner that violated the *Model Code of Judicial Conduct*, had an average 56.58% confidence in the legal system. The difference in the level of confidence between this treatment group and the control treatment group was 9.78%, which was statistically significant ($t=3.96$, $p<0.0001$). As such, there is strong evidence that the misuse of prestige creates a statistically significant decrease in the level of confidence in the legal system, even if it does not necessarily violate the *Model Code of Judicial Conduct*.

Respondents in the favoritism in appointments treatment group (“FAT”), who read about a judge who showed favoritism in making fiduciary appointments, though not in a manner that violated the *Model Code of Judicial Conduct*, had an average 53.06% confidence in the legal system. The difference in the level of confidence between this treatment group and the control treatment group was 13.30%, which was statistically significant ($t=5.22$, $p<0.0000$). As such, there is strong evidence that showing favoritism in making fiduciary appointments creates a statistically significant decrease in the level of confidence in the legal system, even if it does not necessarily violate the *Model Code of Judicial Conduct*.



These results provide empirical evidence of three relatively more common types of conduct by judges that create an appearance of impropriety. Because the types of conduct do not clearly violate the *Model Code of Judicial Conduct*, but nonetheless create an appearance of impropriety, the *Model Code of Judicial Conduct* and jurisdictions that discipline judges for such conduct based on the standard are empirically justified. The standard serves a valuable independent purpose in preserving the public's confidence in the legal system, especially in instances where provisions in the *Model Code of Judicial Conduct* do not specify an actual impropriety.

C. The Standard for Government Lawyers

The third experiment examined what type of conduct, by government lawyers, specifically prosecutors, created an appearance of impropriety, thereby justifying the continued use of the standard for government lawyers in several jurisdictions. As the figure below demonstrates, respondents in the control group ("CT"), who read about a prosecutor engaged in the ordinary course of litigation, had an average 61.01% confidence in the legal system.¹⁹⁸ This percentage is denoted in the figure in grey, as a baseline comparison with the other treatment groups.

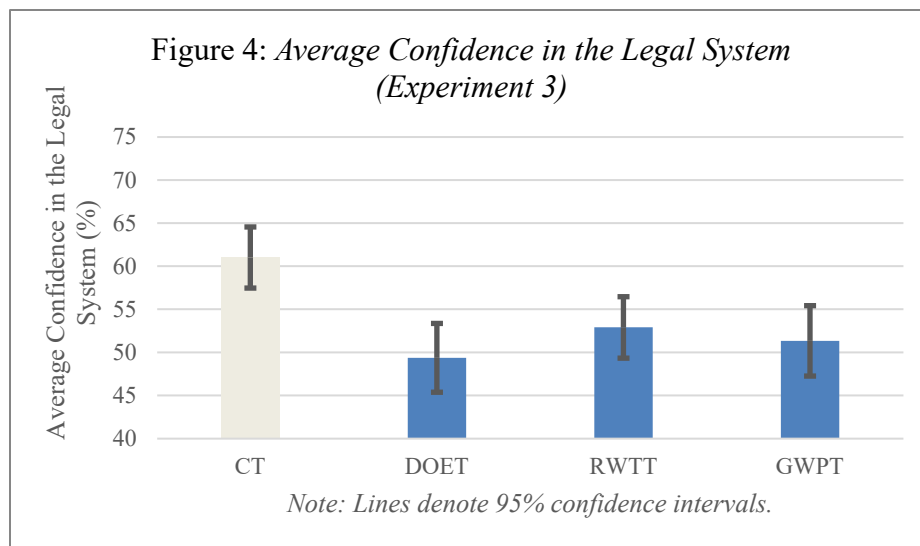
Respondents in the discussion of other evidence treatment group ("DOET"), who read about a prosecutor who showed witnesses incriminating evidence against the defendant before their testimony, though not a manner that violated any ethics rules, had an average 49.37% confidence in the legal system. The difference in the level of confidence between this treatment group and the control treatment group was 11.64%, which was statistically significant ($t=4.30$, $p<0.0000$). As such, there is strong evidence that showing potential witnesses incriminating evidence against the defendant creates a statistically significant decrease in the level of confidence in the legal system, even if it does not necessarily violate any ethics rules.

Respondents in the rehearsal of witness testimony treatment group ("RWTT"), who read about a prosecutor who met with potential witnesses to rehearse their testimony, though not in a manner that violated any ethics rules, had an average 52.90% confidence in the legal system. The difference in the level of confidence between this treatment group and the control treatment group was 8.11%, which was statistically significant ($t=3.18$, $p<0.0016$). As such, there is strong evidence that rehearsing witness testimony creates a statistically significant decrease in the level of confidence in the legal system, even if it does not necessarily violate any ethics rules.

Respondents in the group witness preparation treatment group ("GWPT"), who read about a prosecutor who allowed potential witnesses to congregate and refresh each other's memory, though not in a manner that violated any ethics rules, had an average 51.33% confidence in the legal system. The difference in

¹⁹⁸ See *infra* Figure 4.

the level of confidence between this treatment group and the control treatment group was 9.68%, which was statistically significant ($t=3.53$, $p<0.0005$). As such, there is strong evidence that allowing witnesses to congregate and refresh each other's memory creates a statistically significant decrease in the level of confidence in the legal system, even if it does not necessarily violate any ethics rules.



These results provide empirical evidence of three relatively more common types of conduct by prosecutors that create an appearance of impropriety. Because the types of conduct do not clearly violate any ethics rules, but nonetheless create an appearance of impropriety, jurisdictions that discipline prosecutors for such conduct based on the standard are empirically justified. As before, the standard serves a useful independent purpose in preserving the public's confidence in the legal system, especially in instances where the ethics rules fail to specify an actual impropriety. Furthermore, drafters of the *Model Rules* would be empirically justified in reintroducing the standard for government lawyers.

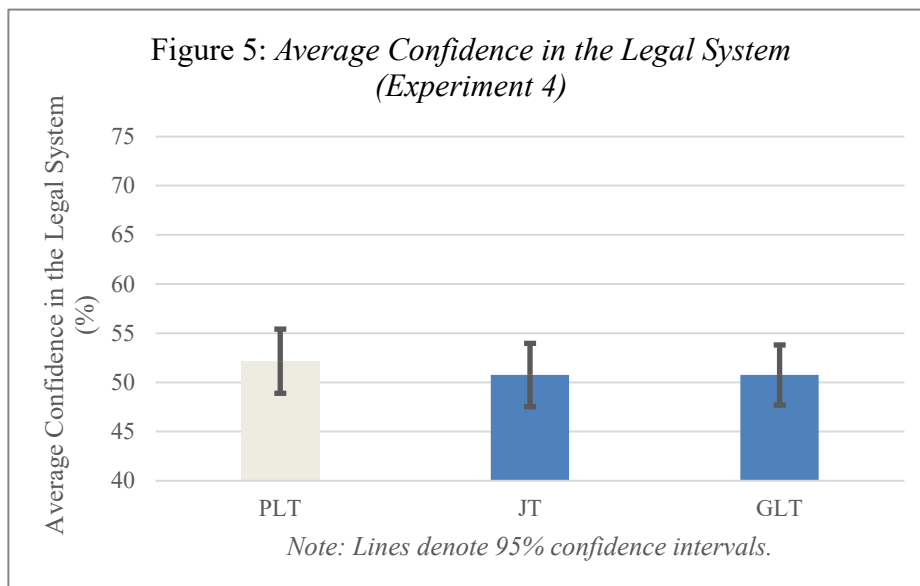
D. The Selective Application of the Standard

The fourth experiment examined whether an appearance of impropriety by judges and government lawyers reduces the public's confidence in the legal system more than that of private lawyers. As the figure below demonstrates, respondents in the private lawyer treatment group ("PLT"), who read about a private lawyer who had a potential conflict of interest, though not one that violated the *Model Rules*, had an average 52.16% confidence in the legal

system.¹⁹⁹ This percentage is denoted in the figure in grey, as a baseline comparison with the other treatment groups.

Respondents in the judge treatment group (“JT”), who read about a judge who had a potential conflict of interest, though not one that violated the *Model Code of Judicial Conduct*, had an average 50.75% confidence in the legal system. The difference in the level of confidence between this treatment group and the PLT was 6.78%, which was not statistically significant ($t=0.60$, $p<0.5458$). As such, there is no evidence that the public is more likely to lose faith in the legal system when a judge engages in apparent impropriety than when a private lawyer engages in analogous conduct.

Respondents in the government lawyer treatment group (“GLT”), who read about a former government lawyer who had a potential conflict of interest, though not one that violated the *Model Rules*, had an average 50.76% confidence in the legal system. The difference in the level of confidence between this treatment group and the PLT was 1.40%, which was not statistically significant ($t=0.62$, $p<0.5372$). As such, there is no evidence that the public is more likely to lose faith in the legal system when a government lawyer engages in apparent impropriety than when a private lawyer engages in analogous conduct.



These consistent results have several implications. First, in contrast with the underlying assumption for the selective application of the standard under the *Model Rules* and the *Model Code of Judicial Conduct*, the public is not more likely to lose confidence in the legal system for appearances of impropriety by judges and government lawyers than for similar appearances of impropriety by

¹⁹⁹ See *infra* Figure 5.

private lawyers. Therefore, the selective application of the standard is not empirically justified. Jurisdictions that apply the standard for judges and government lawyers, but not private lawyers, based on an assumption that the public will lose more confidence in the legal system when judges and government lawyers engage in analogous conduct, is misguided. There is no empirical data that suggest that the public holds judges or government lawyers in higher regard than private lawyers to justify the application of a higher ethical standard for judges and government lawyers.

When considering the results of Experiment 4 in conjunction with the previous experiments, it seems that, while the appearance of impropriety standard can justifiably regulate the conduct of private lawyers, judges, and government lawyers that is not covered by specific ethics rules, the selective application of the standard is not justified.

Lastly, there is one final caveat that bears mentioning. It is theoretically possible that the results depend on the respondents' assumptions about the ethics rules. For instance, less knowledgeable respondents could have assumed that the hypothetical private lawyer, judge, or government lawyer's conduct in Experiment 4 was an actual violation of a specific ethics rule. If so, their responses could have been a reaction to what they believed was an actual impropriety according to their misunderstanding of the ethics rules, rather than a reflection of a layperson's view of questionable conduct. However, robustness checks controlling for the respondents' legal knowledge, knowledge of the ethics rules, and level of education did not change the results. Moreover, an overwhelming majority of respondents were unfamiliar with the ethics rules, thus making the survey responses an optimal measure of whether various conduct not proscribed by the ethics rules created an appearance of impropriety. Finally, the random assignment of treatment conditions meant that the treatment groups all had an equivalent number of highly informed and poorly informed respondents such that the respondents' prior knowledge was a non-factor.

V. CAUSAL MECHANISMS

In this penultimate Part, as a final robustness check for the final experiment, this Article explores the causal mechanisms through which the appearance of impropriety affects public confidence in the legal system. This Part asks why appearances of impropriety by different subgroups within the legal profession yield similar levels of public confidence in the legal system. Given that the final experiment yielded no differences in public confidence among the three different subgroups, this Part analyzes whether the lack of difference was because appearances of impropriety had a similar effect on respondents through similar causal mechanisms, rather than the appearance of impropriety having a similar effect on the respondents through varying causal mechanisms. This Part thus explores whether there is any evidence that the public holds judges and government lawyers to a higher ethical standard, compared to private lawyers,

for serving in positions of public trust, as to justify the use of a selective standard.

In terms of methodology, for the final experiment, the survey asked all respondents to provide, in their own words, the reason for their increased or decreased confidence in the legal system after reading their respective hypothetical vignettes. The Article then relied on a descriptive-inductive classification of open-ended responses.²⁰⁰ That is, the open-ended responses from both treatment groups were coded into three separate mechanisms, which were deduced from reading the responses. These causal mechanisms encapsulated the reasons for why respondents rated their confidence in the legal system the way that they did. The three mechanisms were: (1) disbelief in the hypothetical private lawyer, judge, or government lawyer's claims due to the appearance of impropriety; (2) benefit of the doubt in the hypothetical private lawyer, judge, or government lawyer's claims despite the appearance of impropriety; or (3) the catch-all category of "other." Respondents categorized as belonging in the first mechanism reasoned that their level of confidence in the legal system was determined by the fact that the vignette posed an appearance of impropriety, and they were thus unwilling to believe the hypothetical private lawyer, judge, or government lawyer's claim of propriety. Respondents categorized as belonging in the second mechanism reasoned that their confidence in the legal system was determined by the fact that they were willing to extend the hypothetical private lawyer, judge, or government lawyer the benefit of the doubt despite the possible appearance of impropriety. Finally, those categorized in the final category of "other" typically gave an evasive reason or gave other miscellaneous reasons. The "other" category also included responses that stated both of the aforementioned mechanisms and concluded by neither approving nor disapproving of the legal system. The following table provides an overview of typical open-ended responses provided for each causal mechanism.²⁰¹

²⁰⁰ The Article also considered automated text analysis, namely structural topic models to consider whether certain treatment groups were more likely to give any particular reason for their level of confidence than other treatment groups. In brief, structural topic models use machine learning to identify whether certain treatment groups are more likely use certain words and phrases—or topics—than other treatment groups. The goal is to determine from the identified topics, used more frequently in some treatment groups than others, the causal mechanisms through which the treatments caused the estimated level of confidence. See Margaret E. Roberts, Brandon M. Stewart & Dustin Tingley, *stm: An R Package for Structural Topic Models*, J. STAT. SOFTWARE, Oct. 2019, at 1, 2. Structural topic models using responses from this survey were inconclusive because all treatment groups used similar words to explain their reasoning. The only identified topics that appeared more frequently in certain treatment groups than other treatment groups were topics involving particular job titles. In other words, the word "lawyer" was more likely to appear in the PLT, "judge" was more likely to appear in the JT, and "prosecutor" was more likely to appear in the GLT. This difference was an expected result and yields little insight into causal mechanisms. As such, the Article omits the results from the automated text analysis.

²⁰¹ See *infra* Table 1.

If there are differences in the frequency of causal mechanisms cited across the three treatment groups—because, for instance, judges and government lawyers are in positions of public trust and respondents are therefore less likely to give them the benefit of the doubt for appearance of impropriety compared to private lawyers—then such a finding would suggest that the similar levels of confidence in the legal system found in the main results is a coincidental result. In other words, such a finding would bring to light how appearances of impropriety by certain subgroups lead to increased or reduced public confidence in the legal system in ways that appearances of impropriety by other subgroups do not, possibly justifying a selective application of the appearance of impropriety standard even if the main results found that appearances of impropriety by different subgroups had similar effects on the public's confidence in the legal system.

On the other hand, if the three treatment groups had similar causal mechanisms—meaning each treatment assignment had respondents citing the three mechanisms in similar proportions—then the results would suggest that there is no evidence that the public holds judges and government lawyers to a higher standard for serving in positions of public trust, compared to private lawyers, as to justify the selective standard. Such a finding would confirm the main results that appearances of impropriety by different subgroups have a similar effect on the public's confidence in the legal system by affecting public perceptions in a comparable manner.

Table 1: *Examples Open-ended Responses by Causal Mechanisms and Treatment Assignment*

	PLT	JT	GLT
Disbelief due to appearance of impropriety mechanism	<p>“With the lawyer having outside contact with the other parties it shows an appearance of corruption or impropriety. It doesn’t show that his hands are clean so to say.”</p> <p>“It[’]s not necessarily that Lewis did anything WRONG. The optics look pretty bad though.”</p>	<p>“Just the appearance [sic] of the possibility [sic] of conflict of interest [sic] is not good. The junior prosecutor [sic] should have not been on the case.”</p> <p>“ . . . Just saying that Elliott had no contact with the junior prosecutor does not install great confidence in the system overall.”</p> <p>“Even though it may be true that Elliot did not interact or use the junior prosecutor’s information, it still shines a bad light on the validity of his case. People will be questioning if he really did know the incriminating information and then used it.”</p>	<p>“While Judge Wilson claims that he did not interact with the law clerk in his firm who used to work for Counting Computers, and had no knowledge of the damaging information the law clerk in his firm learned about Counting Computers while employed there perception is important. Perception counts. And the perception is that Judge Wilson had information outside of what was presented in his courtroom that influenced his decision.”</p>

Table 1: *Examples Open-ended Responses by Causal Mechanisms and Treatment Assignment (continued)*

PLT			JT	GLT
Benefit of the doubt mechanism	“You have to take the lawyers word on good faith. That’s how the legal system works and a lot of them take it very seriously.”	“I believe the judge when he says he did not interact with his clerk. I believe that he reviewed the facts of the case and came to his own conclusion. There is no proof of any impropriety or wrongdoing on his part, and I believe that he made his decision honestly and fairly.”	“The prosecutor may be telling the truth about what he did or did not know.”	
“Other” mechanism	“Without any further evidence, it is one man’s story against another man’s story. Additional evidence must be put forward for me to make a stronger case one way or another.”	“I am not too concerned with above legal issue. I am staying neutral on the issue.”	“Benefit of the doubt begin [sic] what it is, it’s quite possible Elliott did not have any communication with his junior prosecutor, and so would not have committed any impropriety here. (But there’s certainly an *appearance* of impropriety, and that needs to be addressed within the office.) Even so, the evidence for corporate fraud against Top Tec has to be objective to secure a conviction and stands apart from whatever unethical behaviors, if any, have transpired in Elliott’s office.”	

In terms of statistical analysis, after coding the responses, the Article regressed the coded responses on the respondents' level of confidence in the legal system and the other demographic control variables using three multinomial logistic regression models for each of the three treatment assignments.²⁰² Multinomial logistic regression models are the conventional models used to analyze categorically coded dependent variables, such as different causal mechanisms.²⁰³ The Appendix includes the results from three multinomial logistic regression models.²⁰⁴ Due to the difficulty in interpreting the coefficients of a multinomial logistic regression, the figures below show the predicted probabilities of the median survey respondent mentioning a particular mechanism for his level of confidence in the legal system by treatment condition.²⁰⁵

The following figures show similar patterns across the three treatment assignments.²⁰⁶ As confidence increases, the disbelief due to an appearance of impropriety mechanism decreases and the benefit of the doubt mechanism increases. These results, therefore, provide additional evidence confirming that an appearance of impropriety by any subgroup promotes or undermines confidence in the legal system in a similar manner. Respondents are willing to extend the benefit of the doubt to all subgroups in a similar fashion, rather than only to private lawyers. The appearance of impropriety by a private lawyer, judge, or government lawyer results in similar disbelief in their claims of propriety and thereby reduces the public's confidence in the legal system in a similar manner. In short, there is little empirical justification for the selective standard since the public is no more likely to hold judges and government lawyers to a higher standard or less likely to give them the benefit of the doubt, compared to private lawyers.

²⁰² An alternative configuration of the multinomial logistic regression is one regression model regressing the coded responses on the treatment assignment and other control variables while disregarding the respondents' level of confidence. The alternative configuration, while providing a more direct measure of whether the treatment assignment affects the frequency of each causal mechanism, does not have advantage of illustrating the variations in the frequency of the causal mechanisms according to the respondents' level of confidence and treatment assignment. As such, the Appendix includes this alternative multinomial regression model and accompanying figure of predicted probabilities as a robustness check. The alternative configuration yields the same overall conclusion, namely the treatment assignment is not a significant variable at the 95% level of statistical confidence. See *infra* Table 8, Figure 9.

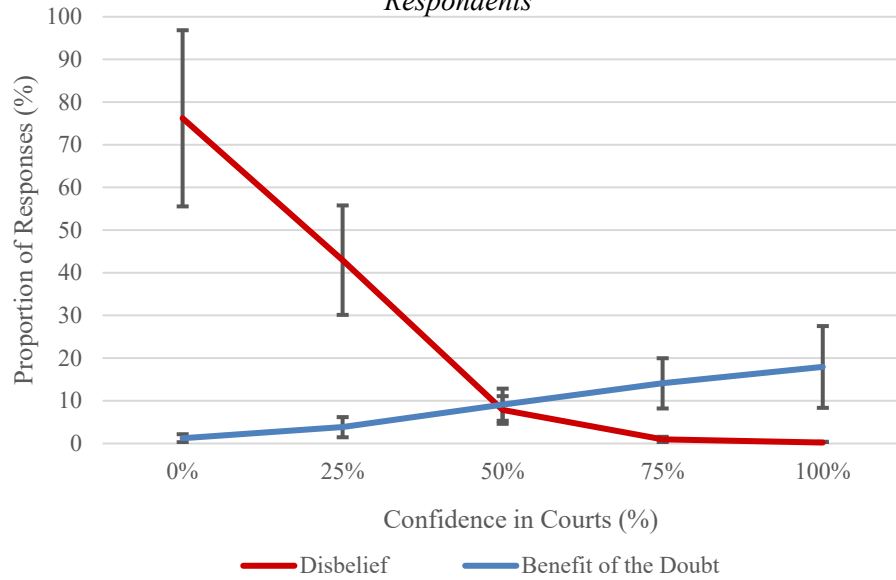
²⁰³ See Matthew Kim, *Public and Elite Opinion on International Human Rights Law: Completing the Causal Chain of the Domestic Compliance Mechanism*, 18 J. HUM. RTS. 419, 429 (2019); *Multinomial Logistic Regression*, STATSTEST.COM, <https://www.statstest.com/multinomial-logistic-regression/> [<https://perma.cc/L2PL-MH9X>].

²⁰⁴ See *infra* Table 7.

²⁰⁵ The median respondent was a 38-year-old white male, who was college-educated, and politically moderate. See *infra* Figures 6, 7, 8.

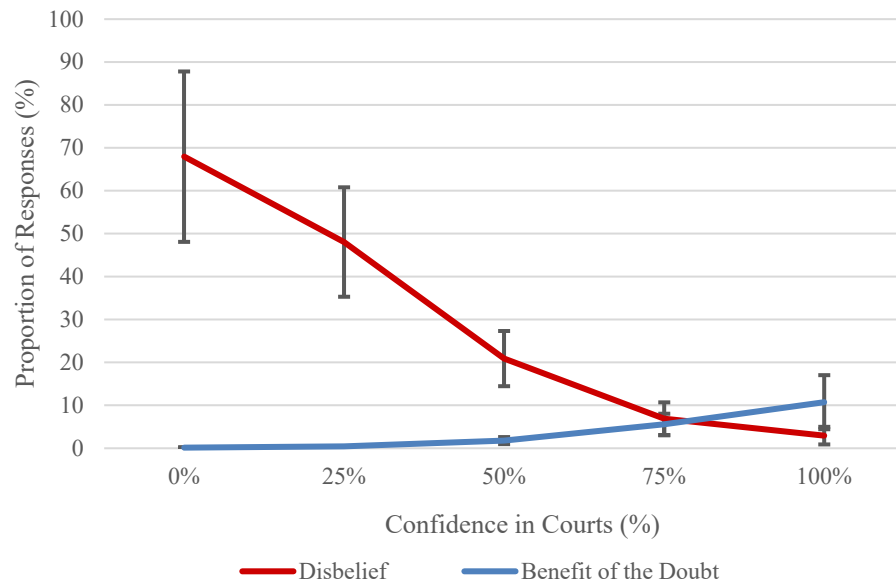
²⁰⁶ See *infra* Figures 6, 7, 8.

Figure 6: *Proportion of Mechanisms Cited by PLT Respondents*

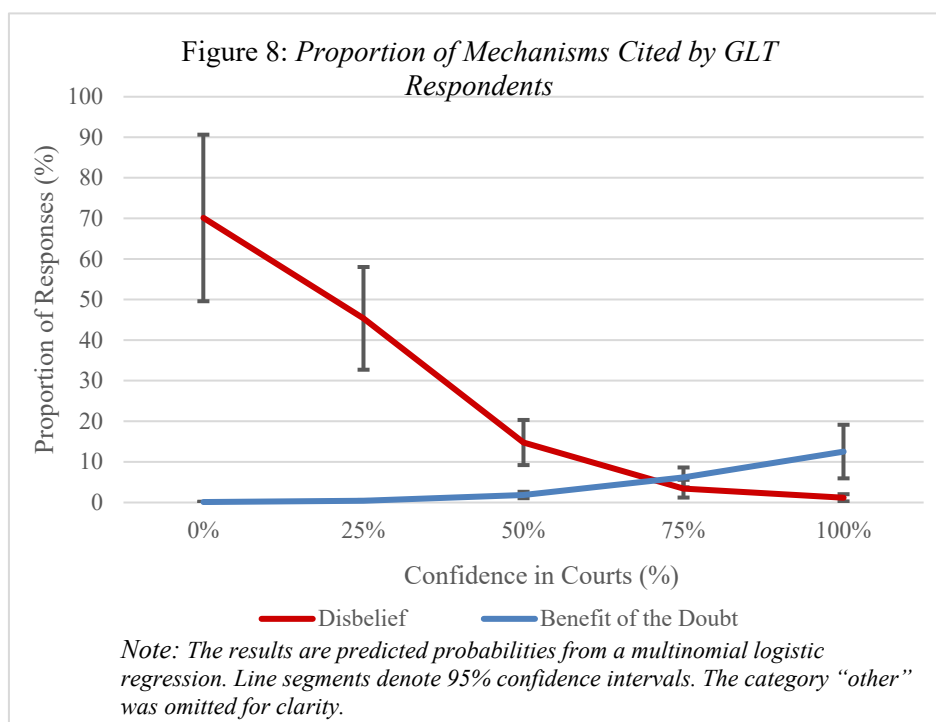


Note: The results are predicted probabilities from a multinomial logistic regression. Line segments denote 95% confidence intervals. The category "other" was omitted for clarity.

Figure 7: *Proportion of Mechanisms Cited by JT Respondents*



Note: The results are predicted probabilities from a multinomial logistic regression. Line segments denote 95% confidence intervals. The category "other" was omitted for clarity.



VI. CONCLUSION

“In matters of ethics, appearance and reality often converge as one.”²⁰⁷

— Justice Anthony Kennedy

The appearance of impropriety standard is a controversial test that continues to confuse members of the legal profession. Even well-intentioned lawyers and judges find themselves on the wrong side of the standard.²⁰⁸ Jurisdictions have thus adopted differing approaches.²⁰⁹ Some rely on the standard as an independent factor for disciplinary sanctions.²¹⁰ Others do not.²¹¹ Some only apply the standard to judges.²¹² Others only apply it to judges and government

²⁰⁷ *Liteky v. United States*, 510 U.S. 540, 565 (1994) (Kennedy, J., concurring).

²⁰⁸ See FLAMM, *supra* note 5, § 23.3.

²⁰⁹ See *supra* notes 64–74 and accompanying text.

²¹⁰ See *supra* note 65 and accompanying text.

²¹¹ See *supra* note 67 and accompanying text.

²¹² See MODEL CODE OF JUD. CONDUCT r. 1.2 (AM. BAR ASS’N 2020).

lawyers.²¹³ Still others apply it to all members of the legal profession.²¹⁴ Legal commentators also argue for and against the standard.²¹⁵

The crux of the problem is the lack of clarity as to what amounts to an appearance of impropriety.²¹⁶ Simply put, it is impossible to know what appears to be improper without actually asking the public. Since the legal profession continues to rely on a standard that is defined by the public's view of impropriety, it is only natural that the legal profession actually asks the public about its views. This Article is the first to do exactly that.

This Article finds several examples of common ethical dilemmas that do not implicate most jurisdictions' ethics rules but nonetheless cause a significant decrease in the public's confidence in the legal system. This Article's findings have two overarching ramifications. First, there is a strong empirical argument that the ethics rules should be amended to expressly prohibit questionable conduct or apply the appearances of impropriety standard more broadly. In this sense, this Article is in agreement with the chorus of scholars calling for more specific prohibitions to supplement the appearance of impropriety standard.²¹⁷ It is important to recognize, however, that there are countervailing priorities that may make such express prohibitions or a broad application of the standard unattainable. Normatively speaking, it is also debatable as to whether public confidence in the courts should be the determinative factor in shaping ethics rules. After all, there are countervailing interests such as confidentiality or administrative efficiency that must be considered when determining whether the entire profession should be governed by the standard. However, the existence of such countervailing priorities does not mean that the public's confidence in the legal system should not be a factor in shaping how the legal profession is practiced, especially since the profession relies on the goodwill of the people.²¹⁸

Second, while recognizing that the universal application of the standard may not always be possible, this Article addresses critics who argue that the standard is too vague by providing empirical grounding for specific instances in which the standard should be used.²¹⁹ This Article demonstrates that the appearance of impropriety standard should at least regulate the choices that members of the legal profession often make when faced with the common ethical dilemmas discussed in this Article. If the legal profession's professed need to maintain the

²¹³ See, e.g., N.Y. RULES OF PRO. CONDUCT r. 1.11 (N.Y. STATE BAR ASS'N 2018).

²¹⁴ See *supra* note 66 and accompanying text.

²¹⁵ Compare Flowers, *supra* note 30, at 699–700, 736; Green, *supra* note 3, at 337, 357–58; Longan, *supra* note 34, at 296–97, and Tyler, *supra* note 34, at 52, with WOLFRAM, *supra* note 24, at 332–33; McKoski, *supra* note 13, at 1920, 1986; Rotunda, *supra* note 40, at 1146–47, and Swisher, *supra* note 5, at 155–56.

²¹⁶ See Swisher, *supra* note 5, at 155.

²¹⁷ See, e.g., Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned,"* 14 GEO. J. LEGAL ETHICS 55, 56 (2000).

²¹⁸ See *supra* note 34 and accompanying text.

²¹⁹ See Swisher, *supra* note 5, at 155–56 (arguing against the “unfortunately vague” standard).

public's positive view of the legal system is more than just lip service, the standard should be applied in the specific instances shown in this Article. That is, if the legal profession is, in fact, concerned about the ordinary layperson's view of the integrity of the courts, as it should be, then it is imperative that courts and ethics committees seriously consider applying the standard to the types of conduct that this Article has shown to reduce the public's confidence in the legal system.

In particular, for private lawyers, the standard should be applied to relatively minor imputed conflicts of interest that may not warrant disqualification under most conflict of interest rules. The standard should also regulate private lawyers' communication with persons arguably not represented by counsel and failures to disclose information about a client's fraud. For judges, the standard should be applied when they develop personal relationships with criminals, misuse the prestige of their office, or show favoritism when making fiduciary appointments. For government lawyers, the standard should be applied when prosecutors attempt to influence witness testimony using questionable tactics, such as disclosing other incriminating evidence to potential witnesses, rehearsing witness testimony, and allowing witnesses to congregate before the trial to exchange testimony. Although the legal profession may have been unwilling to use the vague standard in the past due to countervailing interests, this Article provides empirical evidence to apply the standard with the necessary specificity for several common ethical dilemmas that have now been shown to reduce the public's confidence in the legal system.

Furthermore, the empirical evidence suggests that the selective application of the standard is misguided. The underlying assumption that judges and government lawyers should be held to a higher standard because they occupy positions of public trust and can do greater damage to the public's confidence in the legal system through their appearances of impropriety is empirically unfounded. In sum, jurisdictions that selectively hold only judges and government lawyers to the standard are not justified in doing so, especially if those jurisdictions are relying on the public's supposed high regard for judges and government lawyers to impose such a standard on them but not private lawyers. Private lawyers, judges, and government lawyers should all be subject to the same appearance standard.

In terms of methodology, this Article demonstrates new insights that public opinion survey research can bring to age-old assumptions that undergird ethics codes. First, the Article demonstrates how numerous other questionable conduct that is not prohibited by ethics rules may nonetheless reduce the public's faith in the legal system. While this Article focuses a limited set of ethical dilemmas, further studies should test whether the public's faith is a variety of other common ethical dilemmas, such as a judge's undisclosed business interests.²²⁰

²²⁰ Under the *Model Code of Judicial Conduct*, whether an undisclosed financial interest in a case constitutes actual impropriety likely depends on how a court interprets Rule 3.11, which prohibits judges from engaging in financial, business, or remunerative activities that would interfere with their duties. See MODEL CODE OF JUD. CONDUCT r. 3.11 (AM. BAR

For decades, courts and scholars have made arguments for and against the standard based on assumptions about the public.²²¹ The use of scientifically rigorous survey experiments in this Article demonstrates how quantitative tools can help test these assumptions. Furthermore, looking beyond the appearance of impropriety standard in regulating the legal profession, it is evident that many areas of the law depend on assumptions about public attitudes.²²² Legislators and the Court, for instance, rely on assumptions about which types of campaign contributions create an “appearance of corruption” in the eyes of the public, despite the lack of any empirical evidence to support their views about the public’s views.²²³ Rather than making unfounded assertions about the public or turning to less convincing legal justifications, this Article demonstrates how leveraging the recent advances made in public opinion survey research can help legal scholars find answers to longstanding assumptions about public attitudes.

In closing, Justice Anthony Kennedy once wrote, “In matters of ethics, appearance and reality often converge as one.”²²⁴ Though he likely did not realize it at the time, the numbers prove that he was right. The public consistently demands more of all members of the legal profession when dealing with a variety of common ethical dilemmas that do not violate the ethics rules. The only remaining question is whether the profession is willing to answer this call and hold itself to a higher standard.

ASS’N 2020). In practice, a minor business interest likely does not warrant disciplinary sanction under the *Model Code*, but it may undermine public confidence in the legal system. The failed Supreme Court nomination of Judge Clement Haynsworth, the Chief Judge of the Fifth Circuit Court of Appeals, for instance, could be the basis for another empirical test. *See* Garn, *supra* note 96, at 23–24; William Kling, *Haynsworth Absolved by Justice Dept.*, CHI. TRIB., Sept. 10, 1969, at 22. At the time of Judge Haynsworth’s nomination, the relevant federal disqualification statute called for “disqualification only where a judge had ‘a substantial interest, had been of counsel, had been a material witness, or was connected to a party or attorney in a case so as to render it improper “in his opinion” to sit.’” Winslow v. Lehr, 641 F. Supp. 1237, 1239 (D. Colo. 1986) (quoting Susan E. Barton, Note, *Judicial Disqualification in the Federal Courts: Maintaining an Appearance of Justice Under 28 U.S.C. § 455*, 1978 U. ILL. L. F. 863, 867–68 (1978)). As such, Judge Clement’s decision to own stock in several corporations that appeared before his court may have had the appearance of impropriety but was not otherwise prohibited by the statute. *See* McKoski, *supra* note 13, at 1929–30.

²²¹ *See supra* Parts II.A–B.

²²² *See* Citizens United v. FEC, 558 U.S. 310, 314 (2010); Buckley v. Valeo, 424 U.S. 1, 25 (1976).

²²³ *See* Buckley, 424 U.S. at 25.

²²⁴ *Liteky v. United States*, 510 U.S. 540, 565 (1994).

APPENDIX A: SURVEY TEXT


Experiment 1:

Control treatment (CT)

Local Businesses Settle Lawsuit

By KATHERINE CARTER

Chris Cooley is the owner of a local construction company. In October 2014, Cooley got in a disagreement with his local supplier, Sam Smith, over their business contract. Cooley hired Attorney Andrew Anderson to represent him. Yesterday, Attorney Anderson helped Cooley settle the lawsuit for an undisclosed amount, which ended the long-standing dispute between the two local businesses.



Reuters


Imputed conflict of
interest treatment (ICIT)

Local Businesses Settle Lawsuit

By KATHERINE CARTER

Chris Cooley is the owner of a local construction company. In October 2014, Cooley got in a disagreement with his local supplier, Sam Smith, over their business contract. Cooley hired Attorney Andrew Anderson to represent him. Yesterday, Attorney Anderson helped Cooley settle the lawsuit for an undisclosed amount, which ended the long-standing dispute between the two local businesses.

However, it was revealed today that a junior lawyer at Attorney Anderson's law firm used to work for the other side. The junior lawyer was one of Sam Smith's lawyers and worked on this lawsuit for Sam Smith for 7 hours before switching sides to join Attorney Anderson's law firm.



Reuters

Communication with
person represented by
counsel treatment
(CPRCT)

Local Businesses Settle Lawsuit

By KATHERINE CARTER

Chris Cooley is the owner of a local construction company. In October 2014, Cooley got in a disagreement with his local supplier, Sam Smith, over their business contract. Cooley hired Attorney Andrew Anderson to represent him. Yesterday, Attorney Anderson helped Cooley settle the lawsuit for an undisclosed amount, which ended the long-standing dispute between the two local businesses.

However, it was revealed today that during the lawsuit Attorney Anderson got damaging information about Sam Smith from Sam Smith's employee – information to use against Sam Smith to force him to settle. Attorney Anderson secretly spoke with Sam Smith's employee without letting Sam Smith or his lawyer know.



Reuters

Disclosure of
confidential information
treatment (DCIT)

Local Businesses Settle Lawsuit

By KATHERINE CARTER

Chris Cooley is the owner of a local construction company. In October 2014, Cooley got in a disagreement with his local supplier, Sam Smith, over their business contract. Cooley hired Attorney Andrew Anderson to represent him. Yesterday, Attorney Anderson helped Cooley settle the lawsuit for an undisclosed amount, which ended the long-standing dispute between the two local businesses.

However, it was revealed today that during the lawsuit Attorney Anderson found out that his client Chris Cooley committed fraud against other suppliers, possibly using his legal advice. Attorney Anderson did not report Chris Cooley's fraud to anyone.



Reuters

Experiment 2:

Control treatment (CT)

Judge Jones Completes His Second Term

By ELIZABETH MILLER

Jim Jones is a local judge that recently completed his second term. He has been a judge for 10 years. During that time, he presided over many civil and criminal trials. Before becoming a judge, he worked for a law firm for 20 years. The local bar association gathered yesterday for Judge Jones' 10-year anniversary as a judge.



Reuters

Personal relationship with a criminal treatment (PRCT)

Judge Jones Completes His Second Term

By ELIZABETH MILLER

Jim Jones is a local judge that recently completed his second term. He has been a judge for 10 years. During that time, he presided over many civil and criminal trials. Before becoming a judge, he worked for a law firm for 20 years. The local bar association gathered yesterday for Judge Jones' 10-year anniversary as a judge.

However, it was revealed today that Judge Jones developed close personal relationships with four businessmen who were found guilty of financial fraud last year. Some people claim that he had several expensive dinners and visited exclusive golf courses with the convicted businessmen.



Reuters

Misuse of prestige
treatment (MPT)

Judge Jones Completes His Second Term

By ELIZABETH MILLER

Jim Jones is a local judge that recently completed his second term. He has been a judge for 10 years. During that time, he presided over many civil and criminal trials. Before becoming a judge, he worked for a law firm for 20 years. The local bar association gathered yesterday for Judge Jones' 10-year anniversary as a judge.

However, it was revealed today that when Judge Jones was questioned by a restaurant staff member last week, he told the staff member, "Do you know who I am?" and implied that he was a judge. Some people claim that he did this several times before.



Reuters

Favoritism in
appointments treatment (FAT)

Judge Jones Completes His Second Term

By ELIZABETH MILLER

Jim Jones is a local judge that recently completed his second term. He has been a judge for 10 years. During that time, he presided over many civil and criminal trials. Before becoming a judge, he worked for a law firm for 20 years. The local bar association gathered yesterday for Judge Jones' 10-year anniversary as a judge.

However, it was revealed today that Judge Jones appointed the sons of his work colleagues to prestigious positions as trustees and receivers for his cases. Some people claim that he did this several times before.



Reuters

Experiment 3:

Control treatment (CT)



SPRINGFIELD, IL---Earlier today, the jury found David Dixon guilty of a felony. Prosecutor Paul Parker was a government attorney handling the criminal case against Dixon, who was arrested in January.

Prosecutor Parker selected a few witnesses to testify at trial. On the day of the trial, all of the witnesses identified Dixon as the perpetrator.

Discussion of other evidence treatment (DOET)



SPRINGFIELD, IL---Earlier today, the jury found David Dixon guilty of a felony. Prosecutor Paul Parker was a government attorney handling the criminal case against Dixon, who was arrested in January.

Prosecutor Parker selected a few witnesses to testify at trial. Two weeks before their testimony, Parker privately told the witnesses about all the other evidence that pointed to Dixon as the guilty person. On the day of the trial, all of the witnesses identified Dixon as the perpetrator.

Rehearsal of witness testimony treatment (RWTT)



SPRINGFIELD, IL---Earlier today, the jury found David Dixon guilty of a felony. Prosecutor Paul Parker was a government attorney handling the criminal case against Dixon, who was arrested in January.

Prosecutor Parker selected a few witnesses to testify at trial. Two weeks before their testimony, Parker met with each of the witnesses to rehearse their testimony for several days. On the day of the trial, all of the witnesses identified Dixon as the perpetrator.

Group witness preparation treatment (GWPT)



SPRINGFIELD, IL---Earlier today, the jury found David Dixon guilty of a felony. Prosecutor Paul Parker was a government attorney handling the criminal case against Dixon, who was arrested in January.

Prosecutor Parker selected a few witnesses to testify at trial. Two weeks before their testimony, Parker gathered all of the selected witnesses together and allowed them to refresh each other's memory. On the day of the trial, all of the witnesses identified Dixon as the perpetrator.

Experiment 4:

Private lawyer treatment (PLT)



SAN FRANCISCO, CA---Two years ago, TopTec sued Counting Computers. Attorney Luke Lewis was the lawyer for TopTec. Yesterday, TopTec won the lawsuit.

However, it was revealed today that a junior lawyer at Attorney Lewis' law firm previously worked for their opponent Counting Computers on four unrelated legal problems several months ago. The junior lawyer learned damaging confidential information about Counting Computers while working for Counting Computers. Attorney Lewis claims that he did not interact with the junior lawyer during the lawsuit and did not use the damaging confidential information about Counting Computers to win his case for TopTec.

Judge treatment (JT)



SAN FRANCISCO, CA---Two years ago, TopTec sued Counting Computers. Judge Brad Wilson oversaw the case. Yesterday, TopTec won the lawsuit.

However, it was revealed today that Judge Wilson's law clerk previously worked for Counting Computers on four unrelated legal problems several months ago. The law clerk learned damaging confidential information about Counting Computers while working for Counting Computers. Judge Wilson claims that he did not interact with his law clerk during the lawsuit and did not use the damaging confidential information about Counting Computers to make his final decision for TopTec.

Government lawyer treatment (GLT)



SAN FRANCISCO, CA---Two years ago, Prosecutor Eric Elliott charged TopTec for corporate fraud. Yesterday, TopTec was found guilty.

However, it was revealed today a junior prosecutor in Elliott's office previously worked for TopTec's competitor. The junior prosecutor learned damaging confidential information about TopTec while working for TopTec's competitor. Prosecutor Elliott claims that he did not interact with the junior prosecutor during the lawsuit and did not use the damaging confidential information about TopTec to win his case against TopTec.

APPENDIX B: TABLES AND REGRESSION MODELS

Table 2: *Survey Sample Characteristics*

Gender	
Male	0.510
Female	0.490
Age	
18-29	0.228
30-44	0.440
45-64	0.276
65 +	0.057
Education	
High school or below	0.068
Some college	0.1889
College/university	0.525
Graduate/professional school	0.218
Race/Ethnicity	
Non-Hispanic White	0.768
Hispanic/Latinx	0.037
African American	0.095
Asian	0.121
Other/Mixed	0.018
Political Ideology	
Liberal	0.479
Neutral	0.144
Conservative	0.378

Table 3: *Experiment 1 OLS Results*

	<i>Confidence in legal system</i>	
ICIT	−0.150*** (0.025)	−0.147*** (0.023)
CPRCT	−0.120*** (0.026)	−0.140*** (0.023)
DCIT	−0.096*** (0.025)	−0.127*** (0.023)
Age		0.0003 (0.001)
Female		−0.003 (0.017)
Education		0.128*** (0.045)
Income		−0.016 (0.034)
Liberal		−0.082*** (0.026)
Political involvement		0.162*** (0.026)
General legal knowledge		−0.060** (0.025)
General knowledge of ethics codes		0.019 (0.024)
General trust in legal system		−0.103*** (0.035)
General trust in judges		−0.055 (0.033)
General trust in lawyers		−0.052 (0.034)
General trust in prosecutors		−0.026 (0.033)
General concern with fraud		0.016 (0.039)
General concern with legal malpractice		0.089** (0.040)
Race: African American		0.003 (0.026)
Race: Asian		0.011 (0.036)
Race: Hispanic/Latinx		0.032 (0.044)
Race: Other/Mixed		0.047 (0.063)
Constant	0.659*** (0.018)	0.617*** (0.057)
Observations	794	794
R ²	0.047	0.233
Adjusted R ²	0.044	0.212
Residual Std. Error	0.254 (df = 790)	0.230 (df = 772)
F Statistic	13.103*** (df = 3; 790)	11.188*** (df = 21; 772)

Note:

*p<0.1; **p<0.05; ***p<0.01

The reference group for the treatment is the control condition in which the hypothetical lawyer engaged in the ordinary course of litigation. The reference group for race is White. The response variable (confidence in the legal system) was measured on a 5-point Likert scale and converted to percentage points for analysis.

Table 4: *Experiment 2 OLS Results*

	<i>Confidence in legal system</i>	
PRCT	-0.177*** (0.026)	-0.154*** (0.024)
MPT	-0.098*** (0.026)	-0.089*** (0.024)
FAT	-0.133*** (0.027)	-0.130*** (0.024)
Age		0.0002 (0.001)
Female		0.008 (0.017)
Education		0.223*** (0.045)
Income		-0.017 (0.035)
Liberal		-0.045* (0.026)
Political involvement		0.155*** (0.026)
General legal knowledge		-0.038 (0.025)
General knowledge of ethics codes		-0.024 (0.024)
General trust in legal system		-0.044 (0.036)
General trust in judges		-0.071** (0.034)
General trust in lawyers		-0.071** (0.035)
General trust in prosecutors		-0.026 (0.034)
General concern with fraud		0.013 (0.040)
General concern with legal malpractice		0.101** (0.041)
Race: African American		0.002 (0.027)
Race: Asian		-0.057 (0.037)
Race: Hispanic/Latinx		-0.026 (0.045)
Race: Other/Mixed		-0.099 (0.064)
Constant	0.664*** (0.019)	0.516*** (0.058)
Observations	794	794
R ²	0.059	0.246
Adjusted R ²	0.056	0.225
Residual Std. Error	0.258 (df = 790)	0.234 (df = 772)
F Statistic	16.648*** (df = 3; 790)	11.987*** (df = 21; 772)

Note:

*p<0.1; **p<0.05; ***p<0.01

The reference group for the treatment is the control condition in which the hypothetical judge engaged in the ordinary course of adjudication. The reference group for race is White. The response variable (confidence in the legal system) was measured on a 5-point Likert scale and converted to percentage points for analysis.

Table 5: *Experiment 3 OLS Results*

	<i>Confidence in legal system</i>	
DOET	−0.116*** (0.028)	−0.122*** (0.025)
RTT	−0.081*** (0.028)	−0.105*** (0.025)
GWPT	−0.097*** (0.027)	−0.118*** (0.025)
Age		0.0001 (0.001)
Female		−0.027 (0.018)
Education		0.155*** (0.048)
Income		−0.001 (0.036)
Liberal		−0.091*** (0.027)
Political involvement		0.147*** (0.028)
General legal knowledge		−0.065** (0.026)
General knowledge of ethics codes		−0.030 (0.026)
General trust in legal system		−0.173*** (0.037)
General trust in judges		−0.099*** (0.035)
General trust in lawyers		0.015 (0.036)
General trust in prosecutors		0.003 (0.035)
General concern with fraud		−0.015 (0.042)
General concern with legal malpractice		0.116*** (0.043)
Race: African American		−0.029 (0.028)
Race: Asian		0.045 (0.039)
Race: Hispanic/Latinx		−0.0002 (0.047)
Race: Other/Mixed		−0.028 (0.067)
Constant	0.610*** (0.020)	0.616*** (0.060)
Observations	794	794
R ²	0.025	0.236
Adjusted R ²	0.022	0.215
Residual Std. Error	0.273 (df = 790)	0.244 (df = 772)
F Statistic	6.856*** (df = 3; 790)	11.373*** (df = 21; 772)

Note:

*p<0.1; **p<0.05; ***p<0.01

The reference group for the treatment is the control condition in which the hypothetical prosecutor engaged in the ordinary course of litigation. The reference group for race is White. The response variable (confidence in the legal system) was measured on a 5-point Likert scale and converted to percentage points for analysis.

Table 6: *Experiment 4 OLS Results*

	<i>Confidence in legal system</i>	
JT	-0.014 (0.023)	-0.006 (0.021)
GLT	-0.014 (0.023)	-0.008 (0.022)
Age		0.0003 (0.001)
Female		-0.032* (0.018)
Education		0.098** (0.048)
Income		-0.033 (0.036)
Liberal		-0.054** (0.027)
Political involvement		0.136*** (0.028)
General legal knowledge		-0.033 (0.026)
General knowledge of ethics codes		-0.002 (0.026)
General trust in legal system		-0.075** (0.038)
General trust in judges		-0.118*** (0.036)
General trust in lawyers		-0.050 (0.036)
General trust in prosecutors		0.022 (0.035)
General concern with fraud		-0.052 (0.042)
General concern with legal malpractice		0.127*** (0.043)
Race: African American		-0.019 (0.028)
Race: Asian		0.002 (0.039)
Race: Hispanic/Latinx		-0.009 (0.047)
Race: Other/Mixed		-0.113* (0.067)
Constant	0.522*** (0.016)	0.516*** (0.059)
Observations	794	794
R ²	0.001	0.154
Adjusted R ²	-0.002	0.132
Residual Std. Error	0.263 (df = 791)	0.245 (df = 773)
F Statistic	0.252 (df = 2; 791)	7.051*** (df = 20; 773)

Note:

*p<0.1; **p<0.05; ***p<0.01

The reference group for the treatment is the treatment condition in which a private lawyer appeared to have a potential conflict of interest. The reference group for race is White. The response variable (confidence in the legal system) was measured on a 5-point Likert scale and converted to percentage points for analysis

Table 7: *Multinomial Logistic Regression Results of Causal Mechanisms from Experiment 4*

	<i>Private Lawyer Treatment</i>		<i>Judge Treatment</i>		<i>Government Lawyer Treatment</i>	
	Disbelief	Benefit of Doubt	Disbelief	Benefit of Doubt	Disbelief	Benefit of Doubt
Confidence in legal system	-7.157*** (1.236)	1.393 (0.987)	-4.128*** (0.958)	3.368*** (1.172)	-5.176*** (1.104)	3.786*** (1.048)
Age	0.039** (0.017)	0.006 (0.017)	0.013 (0.015)	0.004 (0.018)	-0.006 (0.015)	0.026 (0.017)
Female	0.062 (0.406)	-0.160 (0.462)	0.644* (0.380)	-0.191 (0.442)	0.974** (0.384)	0.595 (0.439)
Education	0.922 (1.110)	-2.160* (1.122)	-1.250 (1.022)	-3.406*** (1.193)	-0.457 (1.002)	-1.643 (1.206)
Income	2.113** (0.826)	0.560 (0.871)	0.650 (0.755)	1.847** (0.922)	0.463 (0.739)	1.043 (0.926)
Liberal	-0.254 (0.636)	0.050 (0.671)	0.441 (0.600)	-0.693 (0.695)	0.568 (0.646)	0.648 (0.710)
Political involvement	0.246 (0.628)	-2.552*** (0.846)	-1.432** (0.639)	-2.075*** (0.763)	-0.691 (0.590)	-0.203 (0.717)
General legal knowledge	1.593** (0.703)	1.130* (0.666)	1.935*** (0.597)	1.596** (0.706)	1.099 (0.678)	1.002 (0.719)
General knowledge of ethics codes	-0.148 (0.604)	0.022 (0.651)	0.425 (0.521)	1.215** (0.617)	1.801*** (0.576)	0.533 (0.661)
General trust in legal system	1.277 (1.029)	-1.667* (0.968)	0.002 (0.860)	-0.288 (0.971)	0.896 (1.079)	-0.004 (1.036)
General trust in judges	0.155 (0.963)	0.438 (0.913)	-1.299 (0.845)	-0.972 (0.908)	0.888 (0.862)	0.756 (0.915)
General trust in lawyers	-1.435 (0.894)	-0.603 (0.915)	0.747 (0.898)	1.131 (0.971)	0.844 (0.939)	1.022 (0.894)
General trust in prosecutors	-0.218 (0.860)	-0.293 (0.873)	-0.939 (0.836)	0.140 (1.020)	-0.771 (0.872)	0.318 (0.957)
General concern with fraud	-1.216 (1.003)	-0.662 (1.043)	1.547 (1.023)	0.853 (1.194)	-0.751 (0.956)	-0.269 (1.063)
General concern with legal malpractice	2.485** (1.147)	1.231 (1.150)	-2.289** (1.078)	-1.554 (1.213)	-0.554 (0.971)	-0.618 (1.077)
Race: African American	0.614 (0.656)	0.241 (0.733)	-0.138 (0.652)	-1.534 (1.131)	0.262 (0.651)	0.617 (0.632)
Race: Asian	-1.257 (1.042)	0.518 (0.775)	-0.742 (0.829)	-22.261*** (0.000)	0.906 (0.838)	-16.252*** (0.00000)
Race: Hispanic/Latinx	0.647 (1.214)	0.244 (1.208)	0.839 (0.894)	-17.117*** (0.000)	-0.327 (0.960)	-15.692*** (0.00000)
Race: Other/Mixed	-15.537*** (0.00000)	1.996* (1.089)	1.069 (1.418)	-12.267*** (0.00000)	-1.717 (1.441)	-13.288*** (0.00000)
Constant	-3.307** (1.555)	-1.101 (1.404)	0.517 (1.379)	-1.940 (1.762)	-0.907 (1.347)	-6.136*** (1.539)
Akaike Inf. Crit.	405.094	405.094	427.349	427.349	417.057	417.057

Note:

*p<0.1; **p<0.05; ***p<0.01

For each 1-unit change in the independent variable, the logit of the dependent variable relative to the reference group will change by its respective coefficient estimate. The coefficient estimate is in log-odds units. The reference group for the dependent variable is the “other” mechanism. The reference group for race is White. The primary independent variable of interest (confidence in the legal system) was measured on a 5-point Likert scale and converted to percentage points. A 1-unit increase corresponds to a 25% increase in confidence in courts.

Table 8: *Alternative Multinomial Logistic Regression Results of Causal Mechanisms from Experiment 4*

	Causal Mechanism:	
	Disbelief	Benefit of Doubt
JT	0.402* (0.231)	0.385 (0.276)
GLT	0.151 (0.232)	0.128 (0.284)
Age	0.013* (0.007)	0.018** (0.009)
Female	0.518*** (0.190)	-0.101 (0.230)
Education	-0.862* (0.498)	-1.719*** (0.602)
Income	1.025*** (0.378)	0.862* (0.455)
Liberal	0.490* (0.297)	-0.012 (0.354)
Political involvement	-1.033*** (0.305)	-0.897** (0.369)
General legal knowledge	1.573*** (0.319)	1.011*** (0.365)
General knowledge of ethics codes	0.478* (0.268)	0.473 (0.327)
General trust in legal system	0.537 (0.443)	-0.622 (0.505)
General trust in judges	0.143 (0.403)	-0.050 (0.469)
General trust in lawyers	-0.046 (0.419)	0.327 (0.497)
General trust in prosecutors	-0.650 (0.401)	0.116 (0.492)
General concern with fraud	-0.139 (0.473)	-0.505 (0.550)
General concern with legal malpractice	0.018 (0.489)	0.063 (0.571)
Race: African American	0.388 (0.317)	0.123 (0.388)
Race: Asian	-0.051 (0.402)	-0.863 (0.639)
Race: Hispanic/Latinx	0.023 (0.508)	-1.370 (1.045)
Race: Other/Mixed	-0.250 (0.734)	0.503 (0.728)
Constant	-3.001*** (0.657)	-1.719** (0.761)
Akaike Inf. Crit.	1,347.418	1,347.418

Note:

*p<0.1; **p<0.05; ***p<0.01

For each 1-unit change in the independent variable, the logit of the dependent variable relative to the reference group will change by its respective coefficient estimate. The coefficient estimate is in log-odds units. The reference group for the dependent variable is the "other" mechanism. The reference group for race is White. The reference group for the primary independent variable of interest (treatment assignment) is the private lawyer treatment (PLT).

