King of the Mountain

Judicial Intrigue and 'Mount Laurel IV'

By **Marc Garfinkle** | December 25, 2017

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Because of Constitutional and other considerations, the obligation to avoid the appearance of impropriety no longer applies to attorneys. Fortunately, it still applies to judges, whose actions, even off the bench, must never call into question the judge's character or the integrity of the system. Sometimes, however, it is not easy to discern what *looks* wrong from what *is* wrong, or to understand what a reasonable observer looking in might think. Judges must be particularly sensitive to that. Most of them are. At least one was not.

An intriguing case of wrongful appearances may eventually be heard by our Supreme Court. *In the Matter of the Application of the Township of South Brunswick* emerged from the ultra-high stakes world of zoning and lower-income housing, where land speculators can make fortunes securing the right to construct high-density inclusionary zoning projects, and where municipalities can lose control of their zoning at the stroke of a judge's pen.

Enter plaintiff township's attorney, Jeffrey Surenian, who unsuccessfully argued to a trial judge South Brunswick's motion to vacate a series of decisions by then-judge Douglas Wolfson. Those decisions, he contends, should never have been made, because the judge's mutually beneficial relationship with a prominent developer raised

reasonable doubts about the judge's impartiality. In view of his smoldering pile of proof, Surenian is disappointed that the Supreme Court punted the issue, "kicking the can down the road," as he described it, by denying his interlocutory motion, deflecting until later the opportunity to vacate the Wolfson decisions on ethical grounds, a result he considers certain.

Surenian is quick to point out that the pleadings do not allege criminality or even impropriety by Wolfson, beyond the reserved-for-judges impropriety that arises from appearances, and he only smiled when asked to explain why the same allegations which dropped this writer's jaw drew him a quick and public rebuke by a former president of the state bar association. Surenian returns to his refrain: the township only seeks judicial review because the decision is a bad one, creates dangerous precedent, and undermines jurisprudential integrity. He supports the latter claim with a damning, albeit circumstantial, visual timeline of events, correlating judicial decisions in the case with extraordinary perks to the judge. He repeated that no finding of impropriety beyond the *appearance* of impropriety is needed to compel the court to vacate those decisions.

The Law

Here is what you need to know about judges and the appearance of impropriety (from *The Code of Judicial Conduct*):

> *RULE 1.1 Independence, Integrity and Impartiality of the Judiciary.* A judge shall … personally observe high standards of conduct so that the integrity, impartiality and independence of the judiciary is preserved.
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> *RULE 2.1 Promoting Confidence in the Judiciary.* 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.
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> *RULE 2.2 External Influences on Judicial Conduct.* Judges shall decide cases according to the law and facts. Judges shall not permit family, social, political, financial or other relationships or interests to influence their judicial conduct or judgment.

Comment 8 to Rule 3.15 … A judge who engages in post-retirement employment negotiations or discussions while still on the bench with any party, attorney or law firm that does not have a matter pending before the judge, must do so in a way that minimizes the need for disqualification, does not interfere with the proper performance of the judge's judicial duties, and upholds the integrity of the courts. … A judge should also inform the Appellate Division Presiding …or … Assignment Judge, about the post-retirement employment negotiations or discussions to the extent that such negotiations or discussions will interfere with the judge's regular assignments.

RULE 3.17 Disqualification. … Judges shall disqualify themselves in proceedings in which their impartiality or the appearance of their impartiality might reasonably be questioned … Judges shall disqualify themselves if they individually or as a fiduciary have a financial interest in an enterprise related to the litigation.

RULE 5.1 Extrajudicial Activities in General. … Judges shall conduct their extrajudicial activities in a manner that would not cast reasonable doubt on the judge's capacity to act impartially as a judge, demean the judicial office, or interfere with the proper performance of judicial duties.

Comment: …. Confidence in the judiciary is eroded if judicial decision-making is perceived to be subject to outside influence.

The Facts, According to Plaintiff

Before ascending to the bench, Douglas Wolfson had been a successful attorney who represented developers in affordable housing proceedings. Later, as a judge, he handled such matters again. Naturally, he had friends and contacts in that industry. One of them was Jack Morris, a wealthy developer actively involved in *Mount Laurel* rezoning. Regarding this friendship, Surenian says that trial counsel was aware that Wolfson had vacationed with Morris and had even been invited onto Morris' private jet. Their antennae up, but apparently lacking enough evidence to get Wolfson to disqualify himself, as evidenced by his repeated refusal, the Township made further inquiries. These revealed that the Wolfson-Morris relationship, like an iceberg, was quietly broader and deeper than known.

Enter the family connection that heightens the intrigue. Douglas Wolfson's wife is a very well-respected federal judge; their son is an attorney. Morris' wife owns a law firm—the Weingarten Law Firm—which represented Morris in *Mount Laurel* matters and also employs the Wolfsons' son as an attorney.

According to South Brunswick's filings, the Wolfsons' mandatory financial disclosure forms, uncovered piecemeal by South Brunswick, revealed that during an eight-year period, Morris entities paid, in whole or in part, for 32 vacations for the Wolfsons, 19 of them while Douglas was a sitting judge. Although Douglas Wolfson's disclosure form makes no mention of their "Secret Santa," Mrs. Wolfson reported the vacations, describing them as "reimbursement." Whether the disclosure forms undergo scrutiny by ethics authorities is of little interest to Surenian, who only is seeking judicial review of Douglas Wolfson's wide-reaching decisions.

Even if the Wolfson vacations *can* be understood in a non-suspicious way, the timing of some of them looks awfully bad—so bad that judicial decisions made in their wake seem necessarily tainted. For instance, Douglas Wolfson's four most recent vacations have an uncomfortably close temporal relationship to rulings which, according to Surenian, benefit inclusionary developers like Morris:

1. On May 2, 2016, Wolfson returned from a Morris-paid Boca Raton vacation. The next day, he revoked the Township's immunity even though he had not yet even established the Township's "fair share." In short order thereafter, seven developers filed builder's remedy suits.
2. On July 21, 2016, Wolfson issued the state's first "Fair Share Methodology" opinion for the four municipalities where Morris was seeking more lucrative inclusionary zoning. This new approach imposed average "prospective need" obligations 68 percent higher than those calculated by Richard Reading, the neutral and highly-regarded expert appointed by judges in 10 other counties. Later that day, Wolfson flew on Morris' jet to a vacation in Sag Harbor, New York.
3. On Sept. 26, 2016, Wolfson returned from another Sag Harbor vacation. Ten days later, he issued his so-called "Gap Period" opinion, even though the Supreme Court had already stayed the Appellate Division's ruling and pledged to expedite its review.
4. On Dec. 16, 2016, Wolfson denied the Township's motion to reconsider his "fair share" opinion. That same day, he left for another Boca Raton vacation. On Jan. 4, 2017, two business days after he retired from the bench, he appeared in Middlesex County courthouse as an attorney and announced that he was now a principal of, and general counsel to, Edgewood Properties, an inclusionary developer owned by Jack Morris. He also said he was now "of counsel" to the Weingarten Law Firm.

New Jersey lawyers and jurisprudence always seem to be living down one black eye or another. These have been associated with influence peddling, criminal syndicates, personal greed and ambition, and other nemeses of good law and good government. Fortunately, our Supreme Court demonstrably understands the need for lawyers and judges to instill and maintain public confidence in the system. It has responded to New Jersey's version of the moral crisis by ratcheting up discipline for attorney ethics violations that shake public confidence and by filtering all bar candidates through the daunting Supreme Court Committee on Character. It has even imposed an obligation on attorneys and judges to report our colleagues' misconduct, and it takes that obligation seriously. No state ascribes more importance to character and integrity issues than New Jersey.

Therein lies the hope of Surenian and the Township of South Brunswick. The issue is not yet dead. It has not yet been swept under the carpet. Despite the powerful influences involved and the enormous effort required to undo the harm, Surenian has confidence in the outcome. He believes that, when the Supreme Court again has the opportunity to review the South Brunswick affair, they will look askance at the appearance of impropriety, vacate the Wolfson rulings, and restore public confidence in the creation and application of the law of the land. Any other decision would appear wrong.

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