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Carolyn M. Van Noy

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THE APPEARANCE OF FAIRNESS DOCTRINE: A CONFLICT IN VALUES

The Washington Supreme Court created the appearance of fairness doctrine to maintain public confidence in the decisionmaking process of appointed and elected officials who decide the legal rights and privileges of parties after a public hearing.[1] While the doctrine has its roots in common law concepts of fundamental fairness,[2] application of the doctrine raises a conflict between two values: accountability and independence. Accountability, a value inherent in representative democracy, requires that public officials interact with constituents. Independence, a value basic to fundamental fairness, demands that decisionmakers be isolated from the parties involved and the public to assure an impartial decision. Because of this conflict, application of the appearance of fairness doctrine has caused frustration and confusion.[3] Consequently, the doctrine has been modified by legislative action.[4] In addition, several supreme court dissenting and concurring opinions have suggested abandoning the doctrine and replacing it with the Washington State Code of Judicial Conduct and due process.[5]

This Comment compares the appearance of fairness doctrine with the Washington State Code of Judicial Conduct and shows that abandoning the doctrine and substituting the Code and due process would not resolve the conflict between independence and accountability, but would further exacerbate it. Rather, the appearance of fairness doctrine, modified by the 1982

1. *See* Washington Medical Disciplinary Bd. v. Johnston, 99 Wn. 2d 466, 478, 663 P.2d 457, 464 (1983); Harris v. Hornbaker, 98 Wn. 2d 650, 658, P.2d 1219, 1222 (1983).

2. The first case in which the Washington court held a quasi-judicial decisionmaker to the appearance of fairness standard was State *ex rel.* Barnard v. Board of Educ., 19 Wash. 8, 17–18, 52 P. 317, 320–21 (1898), referring to the requirement that a proceeding appear to be fair:

> The principle of impartiality, disinterestedness, and fairness on the part of the judge is as old as the history of courts. . . . Caesar demanded that his wife should not only be virtuous, but beyond suspicion; and the state should not be any less exacting with its judicial officers, in whose keeping are placed not only the financial interests, but the honor, the liberty and the lives of its citizens . . . .

3. *See* Alkire, *Washington's Super-Zoning Commission*, 14 GONZ. L. REV. 559 (1979) (the Washington Supreme Court has mischaracterized zoning decisions as quasi-judicial when they are legislative decisions to which the appearance of fairness doctrine should not apply); Vache, *Appearance of Fairness: Doctrine or Delusion?*, 13 WILLAMETTE L.J. 479 (1977) (while the holdings in the appearance of fairness cases seem to be based on constitutional due process, the dicta make the doctrine too broad and undefined, resulting in a doctrine that is unpredictable and unfair).

4. WASH. REV. CODE §§ 42.36.010–.900 (1985).

5. *See* Zehring v. City of Bellevue *(Zehring I)*, 99 Wn. 2d 488, 499–501, 663 P.2d 823, 829–30 (1983) (Utter, Stafford, Dolliver, Dimmick, JJ., dissenting), *vacated*, Zehring v. City of Bellevue *(Zehring II)*, 103 Wn. 2d 588, 694 P.2d 638 (1985); *Washington Medical Disciplinary Bd.*, 99 Wn. 2d at 483–85, 663 P.2d at 466–67 (Utter, Dolliver, Dimmick, JJ., concurring); *Harris*, 98 Wn. 2d at 664–68, 658 P.2d at 1228–30 (Utter, Dolliver, Dimmick, JJ., concurring); Westside Hilltop Survival Comm. v. King County, 96 Wn. 2d 171, 181–82, 634 P.2d 862, 867–68 (1981) (Dolliver, J., concurring).

appearance of fairness statute, is a standard that accommodates the conflict inherent in any bias standard applied to elected and appointed officials. The legislative modifications, however, fall short of the need for a clearly defined doctrine that provides guidance and certainty for the decisionmakers and the courts. Further modification of the doctrine is needed. Therefore, this Comment proposes modification of the doctrine that includes a careful definition of the doctrine, identification of the proceedings to which it applies, and the inclusion of staff members among those held to a bias standard and ex parte rules when they participate in those proceedings.

I. THE APPEARANCE OF FAIRNESS DOCTRINE

A. Components of the Appearance of Fairness Doctrine

The appearance of fairness doctrine requires that hearings and decisions appear to be fair as well as being fair in fact.[6] The Washington courts apply the doctrine only to "quasi-judicial decisionmakers" acting in "quasi-judicial proceedings"[7] but not to legislative,[8] ministerial administrative,[9] or judicial procedures.[10] The terms "quasi-judicial decisionmaker" and "quasi-judicial proceeding" have not been clearly defined by the Washington courts. The lack of a clear definition of these terms causes much of the confusion and uncertainty about the doctrine. Decisionmakers and courts remain uncertain as to when the doctrine applies and to whom it applies.

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6. *See* Chicago, Milwaukee, St. P. & Pac. R.R. v. Washington State Human Rights Comm'n, 87 Wn. 2d 802, 808–09, 557 P.2d 303, 312 (1976); Anderson v. Island County, 81 Wn. 2d 312, 326, 501 P.2d 594, 602 (1972); Smith v. Skagit County, 75 Wn. 2d 715, 739, 453 P.2d 832, 846 (1969).

7. *See Zehring I*, 99 Wn. 2d 488, 496, 663 P.2d 823, 827 (1983), *vacated, Zehring II*, 103 Wn. 2d 588, 590, 694 P.2d 638, 639 (1985); Washington Medical Disciplinary Bd. v. Johnston, 99 Wn. 2d 466, 478, 663 P.2d 457, 464 (1983); Harris v. Hornbaker, 98 Wn. 2d 650, 660, 658 P.2d 1219, 1223 (1983); Polygon Corp. v. City of Seattle, 90 Wn. 2d 59, 67, 578 P.2d 1309, 1314 (1978); Dorsten v. Port of Skagit County, 32 Wn. App. 785, 792, 650 P.2d 220, 224 (1982).

8. The United States Supreme Court explained that in legislative decisions there is no right to a public hearing because such a requirement would be impracticable and because injured parties find redress for unfair treatment at the polls:

> The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.

Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915).

9. Ministerial administrative action is usually performed by employees of the executive branch of government and, while it can be an action that confers or denies legal rights, it is a nondiscretionary action. *See* Juanita Bay Valley Community Ass'n v. City of Kirkland, 9 Wn. App. 59, 73, 510 P.2d 1140, 1149, *rev. denied*, 83 Wn. 2d 1002 (1973).

10. Judicial procedures are reviewed under the WASHINGTON STATE CODE OF JUDICIAL CONDUCT, therefore, the appearance of fairness doctrine does not apply.

1. Quasi-Judicial Decisionmaker

A quasi-judicial decisionmaker is generally a legislator, not a judge.[11] He or she is elected to represent local constituents or is an official appointed by a local legislator. The quasi-judicial decisionmaker sits on a tribunal with peers, deciding the legal rights and privileges of parties under a statute or ordinance. Members of the boards of county commissioners, city councils, and planning commissions are examples of quasi-judicial decisionmakers.[12] More important to the question of the appearance of fairness doctrine, however, is the determination of whether a decisionmaker is, in fact, presiding over a quasi-judicial proceeding. If so, the decisionmaker is quasi-judicial.

2. Quasi-Judicial Proceeding

a. The Problem: Vague and Inconsistent Language

The Washington Supreme Court's latest appearance of fairness decision, *Zehring v. City of Bellevue, (Zehring II),*[13] demonstrates the way in which unclear language in appearance of fairness cases causes uncertainty and confusion. The first time the court reviewed the case, in *Zehring v. City of Bellevue (Zehring I),*[14] it held that a design review hearing, which was required by the Bellevue City Council as a condition of granting a rezone, was a quasi-judicial proceeding to which the appearance of fairness doctrine applied.[15] The court held that the three factors indicative of a quasi-judicial action were present in this case: (1) the issue involved identifiable parties; (2) the decision would have a greater impact on those parties than on the public in general; and (3) a public hearing was statutorily required.[16] The court reasoned that even though public hearings were not statutorily required for a design review, they were required for zoning reclassifications;[17] the court labelled the design review a zoning reclassification

11. The term "quasi-judicial decisionmaker" excludes judges because the word "quasi" means "as if" or "analogous to." *See* BLACK'S LAW DICTIONARY, 5th Ed. 1120 (1979). Since judges are judicial decisionmakers, they cannot be as if or analogous to judicial decisionmakers, i.e., they cannot be quasi-judicial decisionmakers.

12. This generalization follows from a survey of the cases. *See, e.g.,* Harris v. Hornbaker, 98 Wn. 2d 650, 658 P.2d 1219 (1983) (county commissioners); Westside Hilltop Survival Comm. v. King County, 96 Wn. 2d 171, 634 P.2d 862 (1981) (county council); Parkridge v. City of Seattle, 89 Wn. 2d 454, 573 P.2d 359 (1978) (city council); Narrowsview Preservation Ass'n v. City of Tacoma, 84 Wn. 2d 416, 526 P.2d 897 (1974) (planning commission).

13. 103 Wn. 2d 588, 694 P.2d 638 (1985).

14. 99 Wn. 2d 495, 663 P.2d 823 (1983), *vacated, (Zehring II),* 103 Wn. 2d 588, 694 P.2d 638 (1985).

15. 99 Wn. 2d at 497, 663 P.2d at 828.

16. *Id.* at 496, 663 P.2d at 828.

17. *Id.* at 497, 663 P.2d at 828.

because it was an extension of the rezone action. The City Council granted the rezone on condition that the applicant's plan pass the design review.[18]

On reconsideration, in *Zehring II*,[19] the Washington court reversed its decision. The court held the previous characterization of the design review hearing to be erroneous.[20] The design review hearing was now labelled an "administrative function,"[21] to which the doctrine did not apply. It was not an extension of the rezone after all because the rezone ordinance had already been passed and the planning commission could not authorize activity on the property not already granted in the rezone.[22] The planning commission could grant the individual applicant no new rights. The court stated that the legal rights of the parties were determined in the rezone decision, which was final with the passage of the ordinance prior to the design review hearing.[23] The court then noted that the appearance of fairness doctrine has never been applied to "administrative actions" unless the hearing was statutorily required; the Bellevue City Code did not require hearings for design review.[24] The *Zehring II* court ignored two of the three factors held determinative in *Zehring I:* (1) that the issues involved identifiable parties and (2) that the decision would have a greater impact on those parties than on the public in general.[25] The court appears to have replaced those factors with the requirement that the decision authorize something more than a previous decision on the same subject.[26]

The *Zehring II* definition of a proceeding to which the appearance of fairness doctrine applies appears to include: (1) a requirement that the decision determine the legal rights of the parties; (2) that the decision grant legal rights not previously granted;[27] and (3) the hearing be statutorily required if the action is classified as administrative.

The difficulties posed by the definition are numerous. The court failed to explain what determining the legal rights of the parties includes and why the design review board's power to effectively abrogate the legal rights of

18. *Id.* at 496, 663 P.2d at 828.

19. 103 Wn. 2d 588, 694 P.2d 638 (1985).

20. *Id.* at 590, 694 P.2d at 639.

21. *Id.* at 591, 694 P.2d at 639. The *Zehring II* court characterized the design review hearing as an "administrative function" and cited Polygon Corp. v. City of Seattle, 90 Wn. 2d 59, 578 P.2d 1309 (1978), for the proposition that the doctrine is never applied to such actions unless a hearing is statutorily required. The issue in *Polygon* was the denial of a building permit. No hearing was conducted. The *Polygon* definition of "administrative" seems to be any action of municipal employees that does not require a public hearing. *Polygon*, 90 Wn. 2d at 67–68, 578 P.2d at 1314.

22. 103 Wn. 2d at 591, 694 P.2d at 639.

23. *Id.* at 590, 694 P.2d at 639.

24. *Id.* at 591, 694 P.2d at 639.

25. 99 Wn. 2d at 497, 663 P.2d at 828.

26. 103 Wn. 2d at 591, 694 P.2d at 639.

27. *Id.*

the parties was not included.[28] It failed to confirm whether two of the three requirements set forth in *Zehring I*,[29] that parties must be identifiable and the decision must impact the parties more than the general public, still pertain. The *Zehring II* court seemed to add a new requirement that unless the determination was a grant of new legal rights, it would not be considered a sufficient determination to invoke the doctrine.[30] The opinion does not define "administrative action." Nor does the opinion indicate whether the hearing must be statutorily required if the action is not "administrative."

28. The rezone was granted conditioned on an agreement that required approval of the design by the planning commission. The agreement stipulated that the two-story building that the owners wanted to construct could be built if the planning commission found in the design review that the building would not visually intrude on neighboring properties. If the design was found visually intrusive, the planning commission could recommend the two story building could not be built and the city could revoke the rezone. 103 Wn. 2d at 590, 694 P.2d at 639.

29. *See supra* note 16 and accompanying text.

30. 103 Wn. 2d at 590, 591, 694 P.2d at 639. The court stated that "The rezone, not design review, determined the legal rights of the parties. . . . Design review to determine only whether the proposed buildings will visually intrude upon specified residential areas is not a rezone action. The planning commission's determination authorized no activity on the property not previously authorized by the City Council." *Id.* This language can be read to imply that the planning commission had very limited discretion in determining if the design was visually intrusive because it had to follow strict standards laid out in ordinance or regulations. However, the court did not indicate that this was the basis of its reasoning.

Because of that omission, the *Zehring II* court apparently reached two conclusions. First, the setting of zoning controls, e.g., granting a rezone, is an adjudicatory function, but the enforcement of zoning controls, e.g., rezone conditions, is not an adjudicatory function; therefore, enforcement of zoning controls is not subject to the doctrine. The court took a different position in Durocher v. King County, 80 Wn. 2d 139, 152–53, 492 P.2d 547, 555–56 (1972). Second, a recommending body will not be subject to the doctrine because the final power to decide rests in another body. This is contrary to the holding in Buell v. City of Bremerton, 80 Wn. 2d 518, 525, 495 P.2d 1358, 1362–63 (1972). If this is the holding in *Zehring II*, a large percentage of administrative decisions might be removed from review under the doctrine because boards and commissions, legislative bodies, and hearings examiners often enforce ordinances in individual cases in public hearings. *See, e.g.*, WASH. REV. CODE §§ 35A.63.120, .170, 36.70.580, .970 (1985).

Such a holding could also result in the doctrine being no longer applicable to decisions made by recommending bodies. The statute authorizes application of the doctrine to "planning commissions . . . or boards which determine the legal rights, duties, or privileges of specific parties in a hearing or other contested case proceeding." WASH. REV. CODE § 42.36.010 (1985); 103 Wn. 2d at 593, 694 P.2d at 640 (Dore, J., dissenting). Several Washington cases have subjected planning commission proceedings to the doctrine. *See, e.g.*, Narrowsview Preservation Ass'n v. City of Tacoma, 84 Wn. 2d 416, 526 P.2d 897 (1974); Buell v. City of Bremerton, 80 Wn. 2d 518, 495 P.2d 1358 (1972); Chrobuck v. Snohomish County, 78 Wn. 2d 858, 480 P.2d 489 (1971); Smith v. Skagit County, 75 Wn. 2d 715, 453 P.2d 832 (1969). This interpretation would severely narrow the scope of the doctrine.

On the other hand, the facts in *Zehring II* can lead one to the conclusion that the planning commission did determine a legal right separate from that granted in the rezone. The planning commission determined if the owners could build a two-story building. With that reading of the facts, provided the determination of visual impairment was not based upon specific standards which the commission was required to invoke, the design review hearing is a quasi-judicial proceeding under the *Zehring II* definition. The crucial point may be that the courts or the legislature must clarify the meaning of the words "determine the legal rights of the parties."

Decisionmakers need a clearer definition of quasi-judicial proceeding that will help them determine, in advance, if a hearing will be adjudicatory and thus subject to the appearance of fairness doctrine.

b. The Historical Definitions

First, quasi-judicial proceedings can be legislative proceedings or administrative proceedings, but they will always be adjudicatory proceedings.[31] This in itself has been confusing because the court has used "administrative" to designate an action or proceeding that does not require a public hearing,[32] to describe a proceeding in which the legislative body administers zoning controls,[33] and to characterize a proceeding as nonadjudicatory.[34] Since quasi-judicial proceedings are only adjudicatory proceedings, the distinction between adjudicatory and nonadjudicatory is the key distinction, whether the proceeding is legislative or administrative. The court must adhere to a constant usage of the phrase "administrative" as well as a constant definition of an "adjudication."

Second, then, among the court's concerns is the definition of adjudicatory proceedings. Adjudicatory proceedings can be identified by three factors: the issues involved, the degree of the decisionmaker's discretion, and statutory mandate. The distinction between adjudicatory and nonadjudicatory issues is not always clear. The United States Supreme Court identified the characteristics of this distinction in two related cases in which the plaintiffs claimed the right to a hearing. The due process right to a hearing applies only to issues that lead to adjudicatory decisions, not to legislative decisions that are nonadjudicatory.[35] In *Londoner v. City and County of Denver,*[36] the plaintiff challenged an assessment of his property for street paving improvements on the grounds that he was not afforded an opportunity to be heard.[37] In *Bi-Metallic Investment Co. v. State Board of Equalization,*[38] a Denver property owner challenged the increase of property values for all properties in the City of Denver on the same grounds.[39]

31. *See* Fleming v. City of Tacoma, 81 Wn. 2d 292, 298–99, 502 P.2d 327, 331 (1972).

32. *See supra* note 21.

33. *See* Leonard v. City of Bothell, 87 Wn. 2d 847, 850, 557 P.2d 1306, 1309 (1976); Durocher v. King County, 80 Wn. 2d 139, 152–53, 492 P.2d 547, 555–56 (1972).

34. *See Zehring II,* 103 Wn. 2d at 590, 694 P.2d at 639.

35. *See supra* note 8. Courts and commentators will often use legislative to mean nonadjudicatory because legislative decisions are based on nonadjudicatory facts, i.e., facts general to the populace, not specific to individuals. *See infra* notes 44–47 and accompanying text. Therefore, legislative proceedings can be adjudicatory, but legislative decisions are not.

36. 210 U.S. 373 (1908).

37. *See id.* at 374.

38. 239 U.S. 441 (1915).

39. *Id.* at 444.

The *Londoner* Court held that a hearing was required,[40] but the *Bi-Metallic* Court held that due process did not require a hearing.[41] The *Bi-Metallic* Court distinguished the two cases.[42] The Court reasoned that because the *Londoner* case involved a relatively small group of owners, exceptionally affected, each on individual grounds, the issue was adjudicatory. Accordingly, the tax assessment without a hearing was a violation of due process.[43] On the other hand, the valuation increase in the City of Denver, at issue in the *Bi-Metallic* case, did not turn on factors peculiar to the individual properties involved, but on more generalized considerations about the level of taxes needed. Hence, the proceeding did not require the opportunity for all affected to be heard because such a requirement would be impracticable.[44] The *Londoner/Bi-Metallic* distinction suggests that the issue is adjudicatory when the decision exceptionally affects a relatively small group of people, each on facts specific to the individual in the proceeding.

Since the function being performed by the decisionmaker determines whether the appearance of fairness requirement applies, it is essential to identify the function by characterizing the issues as adjudicatory or nonadjudicatory. When deciding adjudicatory issues, the decisionmaker is performing an adjudicatory function; when deciding legislative issues, the decisionmaker is performing a legislative function. This distinction between adjudicatory and legislative functions is very important because most quasi-judicial decisionmakers are also legislators who may perform both legislative and adjudicatory functions in the same proceeding. Under *Londoner/Bi-Metallic*, the key to the distinction between the legislative and adjudicatory function is the basis of the decision being made. In the legislative function, the final decision turns on facts general to all parties who may be affected, whether they participated in the proceeding or not.[45] The purpose of the legislative function is to make policy or law.[46] In an adjudication, by contrast, the decision is based on the facts specific to the individuals in the proceeding.[47] The purpose of the adjudicative function is

40. 210 U.S. at 385.

41. 239 U.S. at 445.

42. *Id.* at 445–46.

43. 210 U.S. at 386.

44. 239 U.S. at 445–46.

45. *See Bi-Metallic Inv. Co.*, 239 U.S. at 445–46.

46. In Fleming v. City of Tacoma, 81 Wn. 2d 292, 299, 502 P.2d 327, 331 (1972), the Washington court distinguished between legislative and adjudicatory functions of a legislative body and declared that legislative functions involve "policy making." *See also* Dorsten v. Port of Skagit County, 32 Wn. App. 785, 792, 650 P.2d 220, 224 (1982).

47. *See Bi-Metallic Inv. Co.*, 239 U.S. at 445.

In *Fleming*, the Washington Supreme Court also made the distinction between legislative and adjudicatory actions. The court defined an adjudication as a proceeding in which the parties are

to resolve the conflict between or among the parties to the proceeding.[48]

The line between the adjudicative function and the legislative function, however, is often hard to recognize. Sometimes policy or law emerges from an adjudicatory decision, and sometimes legislative decisions affect specific parties based on facts specific to those parties. For example, in a local zoning proceeding, adopting a zoning ordinance is a legislative act. The policy decision turns not so much on facts peculiar to specific parcels of land as on more general considerations about the community affected. The proceeding is legislative rather than adjudicatory even though it requires a public hearing and affects individual landowners.[49] The decision to change the zoning of a particular piece of land (to rezone), on the other hand, is adjudicatory. The specific facts of the individual case before the decisionmakers shape the results.

The categories are not free of overlap, and potential for confusion looms large.[50] Often zoning ordinances benefit particular landowners who supported the ordinance in a public hearing. In addition, a rezone sometimes reflects or establishes a policy regarding changes in zoning.[51] Despite the

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identifiable and the impact is felt in a small geographic area. *See* 81 Wn. 2d at 299, 502 P.2d at 331. These factors are similar to the *Londoner/Bi-Metallic* definition. The *Fleming* definition, however, does not explicitly include the requirement in *Bi-Metallic* that the identifiable parties be "exceptionally affected on individual grounds" and that the decision in an adjudication turns on facts specific to the parties. *See Bi-Metallic Inv. Co.*, 239 U.S. at 446. The *Fleming* definition seems to provide a broader protection. It also, however, adds to the confusion by not addressing the nature of the facts under consideration since many legislative decisions affect identifiable individuals, but are not decided on facts specific to the individuals. The tax assessment in *Bi-Metallic* is a perfect example. Therefore, this Comment advocates adoption of the more specific *Londoner/Bi-Metallic* formulation. *See supra* notes 36–44 and accompanying text.

48. *See Fleming*, 81 Wn. 2d at 299, 502 P.2d at 331; *see also* Cramton, *A Comment On Trial-Type Hearings In Nuclear Power Plant Siting*, 58 VA. L. REV. 585, 588 (1972).

49. *See* 81 Wn. 2d at 299, 502 P.2d at 331.

50. The Washington Supreme Court has added to the inherent confusion surrounding the distinction between adjudication and nonadjudication. *See supra* notes 13–30 and accompanying text.

51. The Washington court attempted to deal with the distinction between legislative and adjudicative functions in Leonard v. City of Bothell, 87 Wn. 2d 847, 557 P.2d 1306 (1976), a case that challenged the validity of rezoning by means of referendum. The court focused on the temporal aspect of the issue, and defined legislative acts as those regarding subjects that are permanent and general as opposed to temporary and specific to special circumstances. Adoption of a zoning code or comprehensive plan is thus legislative, and amending the zoning code (a rezone) is administrative and adjudicatory, therefore, "quasi-judicial." *Id.* at 850–51, 557 P.2d at 1308–09 (citing *Fleming*, 81 Wn. 2d at 299, 502 P.2d at 331).

If local government units followed uniform operating procedures, such as those outlined in the Washington Administrative Procedures Act (APA), the reviewing courts and decisionmakers could more easily determine which functions are legislative and which are adjudicative. *See* WASH. REV. CODE § 34.04.010–.940 (1985). Local governments, however, do not operate under a uniform set of procedures and are not covered by this legislation. In addition, under the APA's uniform standards the distinction between rulemaking and adjudication is as unclear and has as much overlap as the distinction between adjudicative and legislative functions. Note that even if application of the APA solved certain definitional problems, it might not remove the necessity of developing an appearance of fairness

overlap in these functions, and the difficulty of distinguishing them at the outset, the distinction is useful for purposes of determining whether to apply the doctrine. When a decision exceptionally affects a small group of people on individual grounds, and when the decision is to be based on a hearing, those affected should be granted the safeguards of an adjudicatory proceeding that includes an impartial decisionmaker.

Identifying an adjudicatory issue, however, is only part of the determination that a proceeding is adjudicatory; agency employees, who are not quasi-judicial decisionmakers, often perform tasks that affect a small group of people, exceptionally, on individual grounds. The second element used to define an adjudicatory proceeding is the amount of discretion of the decisionmaker. The decisionmaker in an adjudication commands broad discretion that usually includes fashioning a decision that will serve the public welfare. A decisionmaker performing a ministerial administrative function, on the other hand, has very limited discretion.[52] Statutes or regulations specificially define the discretion that the ministerial administrative decisionmaker possesses. A fire code inspector, for example, is a ministerial administrative decisionmaker. The fire code inspector must issue a citation for violation of the fire code if the inspected premises do not meet the standards laid out in the relevant ordinance and regulations. The local legislative body, however, on appeal, in its discretion, may make an exception or set conditions for approval of the premises.[53]

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doctrine. A proposed revision of the Washington APA has been developed by a special task force of the Washington State Bar Association. The introductory comment for the proposal states the goal of fairness and an appearance of fairness in administrative procedures. *See* WASHINGTON STATE BAR ASS'N ADMIN. LAW TASK FORCE, PROPOSED REVISIONS WASHINGTON ADMINISTRATIVE PROCEDURES ACT (1984). The proposed revision includes a provision for disqualification of a presiding officer "for bias, prejudice, interest, or any other cause provided in this chapter or for which a judge is disqualified." *Id.* Part IV § 39. Since the introductory comment states a goal of appearance of fairness and since judges can be disqualified for appearance of fairness violations, the APA under the proposal will incorporate an appearance of fairness requirement for hearings parallel to the appearance of fairness doctrine. *Id.* at 2 (introductory comment).

52. *See supra* note 9.

53. In the appeal proceeding, the inspector, representing the government, and the owner will become adversaries. The inspector may contend that the approval should not be granted while the owner contends that it should; both sides have the opportunity to be heard before the tribunal, both have notice of the hearing and an opportunity to cross-examine witnesses, and the decisionmakers have the discretion to grant an exception not specifically expressed in the statute or regulations.

The determination that the decisionmaker has sufficient discretion to make an issue adjudicatory or nonadjudicatory does not necessarily remain static. For example, the Washington Supreme Court noted that the ministerial administrative act of granting a permit has been changed into a discretionary action by the State Environmental Policy Act of 1971 (SEPA), WASH. REV. CODE § 43.21C.010–.914 (1985). *See Polygon Corp.*, 90 Wn. 2d at 64, 578 P.2d at 1312. SEPA mandates that a determination of whether a proposed project involves major action with significant impact on the environment be made by the granting agency before a permit may be granted.

The Washington court has not always carefully articulated the nature of the discretion of the decisionmaker in characterizing a decision as adjudicatory or not. In *Zehring II*, the court appeared to

The Washington Supreme Court has apparently added a third step in determining whether a proceeding is quasi-judicial. If the issue is adjudicatory, the next inquiry is whether a hearing is statutorily required.[54] If a hearing is required, the doctrine applies.[55] Where a hearing is not required and the issue is adjudicatory, the Washington court has never applied the doctrine.[56]

The Washington court's discussion of the hearing requirement in *Zehring II*,[57] however, adds some ambiguity to this analysis. In that case,

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find no discretion in the ability of the planning commission to recommend that the conditions of the rezone were not met if the applicant had not met the design review requirements, because if the commission found a "visual intrusion," it had no choice but to deny the application for the two-story structure. 103 Wn. 2d 588, 591, 694 P.2d 638, 639 (1985). The dissent, on the other hand, found the "visual intrusion" standard itself to be a matter of discretion. *See* 103 Wn. 2d at 591–94, 694 P.2d at 640–41 (1985) (Dore, J., dissenting). A nondiscretionary matter might be enforcement of a regulation that the structure be 20 ft. from the street. This disagreement can best be handled not by renouncing the appearance of fairness doctrine, but by carefully examining the decision involved in each case and identifying its discretionary reach.

54. *See* Harris v. Hornbaker, 98 Wn. 2d 650, 658 P.2d 1219 (1983). In *Harris*, the court stated that a public hearing is necessary before a proceeding is quasi-judicial. *Id.* at 660, 658 P.2d at 1223. The *Harris* court reasoned, however, that the statutory requirement of a hearing was not a sufficient condition to find that a proceeding was quasi-judicial: "Prior cases should not be interpreted as indicating that a decision becomes quasi judicial and triggers the appearance of fairness doctrine by the mere fact that a hearing is required by statute." *Id.* at 660, 658 P.2d at 1223.

55. The Washington court has avoided stating an outright statutory requirement by including the existence of a statutorily required hearing with other elements. *See Zehring II*, 103 Wn. 2d at 591, 694 P.2d at 639 ("The appearance of fairness doctrine has never been applied to administrative action except where a public hearing was required by statute."); *Zehring I*, 99 Wn. 2d at 495, 663 P.2d at 827 ("[A] rule may be formulated that whenever an administrative body, acting in a legislative or quasi-judicial capacity, conducts a public hearing, required by law, . . . the appearance of fairness doctrine should apply."); *Fleming*, 81 Wn. 2d at 299, 502 P.2d at 331 ("Finally, legislative hearings are generally discretionary with the body conducting them, whereas zoning hearings are required by statute, charter, or ordinance. The fact that these hearings are required is itself recognition of the fact that the decisionmaking process must be more sensitive to the rights of the individual citizen involved."); Smith v. Skagit County, 75 Wn. 2d 715, 739, 453 P.2d 832, 846 (1969) ("It is axiomatic that, whenever the law requires a hearing of any sort as a condition precedent to the power to proceed, it means a fair hearing, a hearing not only fair in substance, but fair in appearance as well.").

56. *See Polygon*, 90 Wn. 2d at 67–68, 578 P.2d at 1314:

> The appearance of fairness doctrine was first applied in *Smith v. Skagit County*, [citation omitted] to provide a due-process type standard for statutorily *required hearings* of a legislative body acting in a quasi-judicial capacity. It has never been applied to administrative action, except where a public hearing was required by statute. *See Seattle v. Loutsis Inv. Co.*, 16 Wn. App. 158, 173, 554 P.2d 379 (1976) (emphasis in original).

Thus, where a hearing is statutorily required and is conducted, the doctrine has been applied.

Again, subject to its intended meaning of the word "administrative," the *Polygon* court seemed to imply further that if a legislative body was deciding an adjudicatory issue but a hearing was not required, the doctrine would not apply. In the *Polygon* case the action challenged was not that of a legislative body, but an administrative agency: no hearing was required and no hearing was conducted. No case has arisen, however, where the court has refused to apply the doctrine once it unambiguously found the proceeding was adjudicatory and a hearing was conducted though not statutorily required.

57. 103 Wn. 2d at 591, 694 P.2d at 639.

the court stated that "[t]he appearance of fairness doctrine has never been applied to administrative action except where a public hearing was required by statute."[58] This sentence is subject to two interpretations because of the ways in which the court uses "administrative." First, the court may have merely affirmed the *Polygon Corp. v. City of Seattle*[59] formulation that only those adjudicatory proceedings that are administrative, as opposed to legislative, and that entail a statutorily required hearing are subject to application of the appearance of fairness doctrine.[60] Second, the court may have intended that the doctrine apply even to nonadjudicatory administrative actions, so long as a hearing is statutorily required. If the latter interpretation is correct, a broad range of proceedings previously exempt from the doctrine could now be subject to it. Moreover, under this interpretation, the court would have implicitly overruled a line of prior cases such as *Harris v. Hornbaker*[61] where the court stressed that the central issue was whether the proceeding was an adjudication, not that a statute required a hearing.

The goal of the appearance of fairness doctrine is to maintain public confidence in adjudicatory decisions by nonjudges through procedural safeguards.[62] To apply the doctrine to all decisions that require a hearing even though the decisionmaker lacks discretion or even though the issues were not individual in nature, as the *Zehring II* opinion can be read to imply,[63] would not meet the goal of the doctrine. Disregarding the confusion in cases such as *Zehring II*[64] and focusing instead on this purpose, Washington courts have three options for defining the limits of the appearance of fairness doctrine. First, the courts could apply the appearance of

58. *Id.*

59. 90 Wn. 2d 59, 578 P.2d 1309 (1978).

60. *See supra* note 56.

61. 98 Wn. 2d 650, 659, 658 P.2d 1219, 1223 (1983).

62. In *Polygon*, 90 Wn. 2d at 68, 578 P.2d at 1314, the court asserted that the appearance of fairness doctrine had been developed for hearings. In Smith v. Skagit County, 75 Wn. 2d 715, 739, 453 P.2d 832, 846 (1969), the court held that whenever a hearing is required, that hearing must appear to be fair as well as be fair. The doctrine has its roots in the common law due process principle that whenever a person is subjected to a judicial proceeding, the decisionmaker must be impartial. *See supra* note 2.

63. 103 Wn. 2d 588, 694 P.2d 638 (1985). Application of the doctrine to administrative proceedings that are nonadjudicatory simply because the hearing is statutorily required would be contrary to prior case law, and could be incredibly burdensome because it would subject many hearings that are not now covered to review under the doctrine. *See, e.g.*, Somer v. Woodhouse, 28 Wn. App. 262, 274, 623 P.2d 1164, 1171 (1981) (rulemaking concerning apprentice opticians); Evergreen School Dist. No. 114 v. Clark County Comm. on School Dist. Org., 27 Wn. App. 826, 832, 621 P.2d 770, 774 (1980) (decision to change school district boundaries). State and local agency rulemaking and ratemaking hearings, school board budget hearings, special district planning hearings, and many more could be swept into the purview of the doctrine.

64. 103 Wn. 2d 588, 694 P.2d 638 (1985).

fairness doctrine when the issues are adjudicatory and the decisionmaker has broad discretion, even if a hearing is not held. Second, the doctrine could be applied only when the issues are adjudicatory, the decisionmaker has broad discretion, and a hearing is statutorily required. Third, courts could apply the doctrine when the issues are adjudicatory, the decisionmaker has broad discretion, and a hearing is conducted, whether or not it is statutorily required.

Under the first option, since the doctrine requires notice, an opportunity to be heard, and other elements of a fair hearing in cases where no hearing was held, the court in retrospect would always find a violation. This is too broad a reading of the doctrine and would prove burdensome for the government entities involved. Many adjudicatory decisions are made without hearings because of the great expense a hearing would add.[65] For example, professional licensing involves an adjudicatory decision. Instead of holding a separate hearing for every person that wants to practice law in the state of Washington, an examination is administered, and those participants scoring above a preset passing grade are then allowed to practice law. To hold a separate adjudicatory hearing for the more than one thousand applicants each year would be far too expensive and inefficient.[66]

The second option, then, requires an additional element, a statutory mandate. Such a mandate, however, does not bear on the right to an impartial decisionmaker. This right may arise under the due process clause of the state and federal constitutions or the common law, as well as by statute. The fact that no statute required a hearing that was actually held should not, therefore, determine the fairness standard for the hearing.[67]

If a hearing is not statutorily required, but is conducted anyway, the decisionmaker should be required to be impartial and the hearing required to be fair under the doctrine. Therefore, the third option suggests the best course for the courts. When the issues are adjudicatory, the decisionmaker possesses broad discretion, and a hearing is conducted, the appearance of fairness doctrine should be applied.[68] Adopting this analysis would end the

65. *See* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915).

66. For the past few years the Washington State Bar Association has received 1000 to 1200 bar examination applications each year. Telephone interview with Wayne Wilson, Director of Public Affairs of the Washington State Bar Association (January 21, 1986) (notes of interview on file with the *Washington Law Review*).

67. When an administrative decision is made and no hearing is held or required, a claim that the decisionmaker is biased will be reviewed by the court with an actual bias standard. Proof of influence outside the record would be required. *See Polygon*, 90 Wn. 2d at 68, 578 P.2d at 1314. Note that whether a hearing should have been held under principles of due process is a separate question. If a court finds a hearing should have been conducted under the fourteenth amendment but was not, it will remand for a hearing and the doctrine would then apply.

68. *See* Withrow v. Larkin, 421 U.S. 35, 46 (1975). For example, in *Zehring II*, 103 Wn. 2d 588, 694 P.2d 638 (1985), had the court held that the issue of the proceeding being reviewed was

confusion about whether and when a hearing is required to apply the doctrine. Whether the public hearing is statutorily required or not is irrelevant.

Courts then should make it clear that quasi-judicial proceedings are those public hearings in which adjudicatory issues are heard and decisions are made by decisionmakers, who are not judges, with broad discretion. Such proceedings may involve legislative or administrative decisions to the same degree, but only if an adjudicatory issue is heard by a decisionmaker with broad discretion is the proceeding quasi-judicial within the context of the appearance of fairness doctrine.

3. *The Appearance of Fairness Violation*

The definition of the elements constituting a violation of the appearance of fairness standard is perhaps the clearest component of the appearance of fairness doctrine. If a proceeding is quasi-judicial, the test for whether the proceeding has an appearance of fairness is whether a reasonably prudent and disinterested observer would conclude that all parties obtained a fair and impartial hearing.[69] Two aspects of the hearing are examined under this test: (1) the fairness of the hearing procedures; and (2) the impartiality of the decisionmakers, also known as the bias standard.[70]

To satisfy the procedural element of the appearance of fairness standard regarding hearing procedures, interested parties must be afforded the right to adequate notice,[71] the right to be heard,[72] the right to cross-examine witnesses,[73] and the right to have knowledge of all communications with the decisionmaker.[74] A verbatim record must also be kept.[75]

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adjudicatory, the additional fact that a hearing was conducted should have triggered application of the doctrine.

69. *See* Swift v. Island County, 87 Wn. 2d 348, 361, 552 P.2d 175, 183 (1976).

70. *See* Fleming v. City of Tacoma, 81 Wn. 2d 292, 299, 502 P.2d 327, 331 (1972).

71. *See* Glaspey & Sons v. Les Conrad, 83 Wn. 2d 707, 521 P.2d 1173 (1974).

72. *See* Hayden v. Port Townsend, 28 Wn. App. 192, 622 P.2d 1291 (1981) (court found a violation because of direct benefit to the decisionmaker's employer but also found unfair access to decisionmakers because of participation in hearing by chairperson after voluntary disqualification); *see also* Anderson v. Island County, 81 Wn. 2d 312, 501 P.2d 594 (1972) (chairperson told opponents at public hearing they were wasting their time); Smith v. Skagit County, 75 Wn. 2d 715, 739–42, 453 P.2d 832, 846–47 (1969) (opponents were excluded from meeting of decisionmakers with proponents).

73. *See* Chrobuck v. Snohomish County, 78 Wn. 2d 858, 871, 480 P.2d 489, 496 (1971) (court held cross-examination required for an objective factual evaluation where proponents and opponents are represented by counsel, expert witnesses called, and complex technical data disputed).

74. *See Smith*, 75 Wn. 2d at 734–41, 453 P.2d at 843–47 (meeting with proponents, excluding opponents, in private session outside public hearing).

75. *See* Parkridge v. City of Seattle, 89 Wn. 2d 454, 464, 573 P.2d 359, 365 (1978) (verbatim record required of quasi-judicial proceedings to facilitate judicial review).

The bias standard forbids prejudgment of the issue. For example, courts have disqualified quasi-judicial decisionmakers when the decisionmaker announced the decision before the hearing[76] and when the decisionmaker told opponents of the proposal before the hearing that they were wasting their time.[77]

The impartiality standard also forbids financial or personal interest in the outcome of a decision. The Washington court has disqualified decisionmakers who owned land near the property being rezoned,[78] and a decisionmaker who was the mortgagee of the property involved in the proceeding.[79] Quasi-judicial decisionmakers have also been disqualified when the decisionmaker was employed by the successful rezone applicant soon after the hearing,[80] when the decisionmaker's employer would directly benefit from the decision,[81] and when the decisionmaker had a pending employment application with one of the parties to the proceeding.[82] Moreover, Washington courts have disqualified decisionmakers who were associated with an organization which publicly supported one of the parties.[83] Probably the broadest reading of the personal bias standard was applied by the Washington Court of Appeals in *Fleck v. King County*,[84] when it held that a proceeding in which spouses voted on the same side of an issue violated the appearance of fairness doctrine.[85]

B. Development of the Doctrine: Further Opportunities to Clarify the Doctrine

As early as 1894, a Washington court held that "trials of causes should have the appearance of fairness."[86] Interpreting the Washington State Code of Judicial Conduct and the statute that provides for disqualification of

76. *Chrobuck*, 78 Wn. 2d at 866–67, 480 P.2d at 494–95.
77. *Anderson*, 81 Wn. 2d at 326, 501 P.2d at 602.
78. Buell v. City of Bremerton, 80 Wn. 2d 518, 525, 495 P.2d 1358, 1362 (1972) (chair of planning commission owned property two lots from the property involved); *but see* Byers v. Board of Clallam County Comm'rs, 84 Wn. 2d 796, 529 P.2d 823 (1974) (members of planning commission owned property 10 to 15 miles from area involved, court found no evidence of direct or indirect benefit, ordinance stricken on other grounds).
79. *Swift*, 87 Wn. 2d at 361, 552 P.2d at 183.
80. *Fleming*, 81 Wn. 2d at 300, 502 P.2d at 331.
81. Narrowsview Preservation Ass'n v. City of Tacoma, 84 Wn. 2d 416, 420–21, 526 P.2d 897, 900–01 (1974).
82. Chicago, Milwaukee, St. P. & Pac. R.R. v. Washington State Human Rights Comm'n, 87 Wn. 2d 802, 806, 557 P.2d 307, 310 (1976) (this is the first nonland-use case to which the doctrine was applied).
83. Save a Valuable Env't v. City of Bothell, 89 Wn. 2d 862, 872–73, 576 P.2d 401, 407 (1978).
84. 16 Wn. App. 668, 672–73, 558 P.2d 254, 257–58 (1977).
85. *Id.*
86. Vollrath v. Crowe, 9 Wash. 374, 376, 37 P. 474, 475 (1894) (new trial ordered because plaintiff and a juryman were drinking and playing cards in a saloon during progress of trial).

judges,[87] later cases relied on the basic principle that justice requires an appearance of fairness.[88] In 1898, the appearance of fairness standard was

87. *See* WASH. REV. CODE §§ 4.12.040–.050 (1985), explained in Harris v. Hornbaker, 98 Wn. 2d 650, 666 n.3, 658 P.2d 1219, 1229 n.3 (1983) (Utter, J., concurring).

88. *See, e.g.*, Dimmel v. Campbell, 68 Wn. 2d 697, 414 P.2d 1022 (1966) (defendant's possession of letter from judge's former law partner opining that case would result as was finally decided held sufficient to disqualify judge for appearance of bias although judge did not remember ever seeing letter and contents were never reviewed by trial court); State v. Romano, 34 Wn. App. 567, 569, 662 P.2d 406, 407 (1983) (sentencing judge's contact with two personal friends to check veracity of defendant's contention about financial matters violated Judicial Code of Conduct's ban on ex parte communication about pending case; citing *In re* Murchison, 349 U.S. 133 (1955) ("justice must satisfy the appearance of fairness.")); Henriksen v. Lyons, 33 Wn. App. 123, 652 P.2d 18 (1982) (implied bias issue valid but defendant waited too long to raise implied bias); State v. Hoff, 31 Wn. App. 809, 644 P.2d 763, (plaintiff may contend that judge is biased because he represented defendant's wife in previous action, but contention waived by failure to raise until after trial), *cert. denied sub nom.* Hoff v. Washington, 459 U.S. 1093 (1982); Rich v. Starczewski, 29 Wn. App. 244, 628 P.2d 831 (1981) (defendant may assert judge denied motion for mistrial due to bias; however, court finds no evidence of bias and bias cannot be presumed but must be affirmatively pleaded); Brister v. City of Tacoma, 27 Wn. App. 474, 619 P.2d 982 (1980) (appearance of fairness is violated by judge's taking adversarial role after learning developer will rent houses to low income residents, but challenge raised too late); State v. Bolton, 23 Wn. App. 708, 598 P.2d 734 (1979) (appearance of fairness challenge recognized, but defendant charged with negligent driving may not raise on appeal after defendant willingly accepted discretionary judgments by judge whose son was killed by hit and run driver), *rev. denied*, 93 Wn. 2d 1014, 598 P.2d 734 (1980); State v. Giebler, 22 Wn. App. 640, 591 P.2d 465 (1979) (judge should not have had ex parte discussion with sheriff about defendant's role in assault in jail while awaiting sentencing; however, defendant did not object until appeal); State v. Price, 17 Wn. App. 247, 562 P.2d 256 (1977) (court examined the fairness question, but found judge's refusal to admit defendant's polygraph test results at pretrial hearing was not perceived unfairness in trial); State v. Grant, 10 Wn. App. 468, 519 P.2d 261 (1974) (judge's refusal to admit new alibi evidence obtained after prosecution rested sufficient to affect appearance of fair trial; new trial ordered); State v. Buntain, 11 Wn. App. 101, 521 P.2d 752 (1974) (although appearance of fairness is legitimate question, presence of cattlemen at trial of alleged cattle thief and newspaper articles did not prejudice judge and trial sufficiently to affect appearance of fair trial, citing *Smith*, *Fleming*, and State v. Madry, 8 Wn. App. 61, 504 P.2d 1156 (1972) for appearance of fairness doctrine); *Madry*, 8 Wn. App. 61, 504 P.2d 1156 (judge's investigation of defendant's personal life raised at presentencing hearing sufficient to violate appearance of fairness, required new trial). *But see* State v. Smith, 93 Wn. 2d 329, 610 P.2d 869 (judge's concern that defendant had been dealing in drugs did not make sentencing unfair; defendant did not raise affidavit of prejudice so waived right), *cert. denied sub nom.* Smith v. Washington, 449 U.S. 873 (1980).

See also Chicago, Milwaukee, St. P. & Pac. R.R. v. Washington State Human Rights Comm'n, 87 Wn. 2d 802, 807, 557 P.2d 307, 311 (1976), in which the court held that the same common law rules for disqualification of judges apply to quasi-judicial decisionmakers.

But compare cases in which a test of reasonable doubt of bias instead of appearance of fairness was used, *e.g.*, State v. Franulovich, 89 Wn. 2d 521, 573 P.2d 1298 (1978) (judge disqualified because reasonable doubt of fairness presented by proof that in previous prosecution he had said that he believed fishing regulation at issue in present trial was invalid); Gardner v. Malone, 60 Wn. 2d 836, 376 P.2d 651, 379 P.2d 918 (1962) (three jury members making private trip to scene of accident raises reasonable doubt as to fairness of trial); Turngren v. King County, 33 Wn. App. 78, 649 P.2d 153 (1982) (judge alleged to have said that he had great deal of respect for prosecutor who requested search warrant held not sufficiently biased because no record of the statement existed; objecting counsel could have provided record by requesting court reporter for hearing but did not); Williams & Mauseth Ins. Brokers v. Chapple, 11 Wn. App. 623, 524 P.2d 431 (1974) (judge who knew the only defense witness, said at recess that he would have disqualified himself before trial if he had known that defense witness was involved; possibility of bias not sufficient, absent showing of reasonable doubt); Brauhn v. Brauhn, 10

first applied to a quasi-judicial proceeding. In that case, the court disqualified a school board member from participating in the board's discharge decision because he had brought the complaint against the superintendent, whose job the board was considering, and announced that he would vote to discharge him no matter what the evidence.[89]

The appearance of fairness standard appears most frequently in the context of land-use regulation. In *Smith v. Skagit County,*[90] the Washington court first established the requirement that land-use regulation hearings not only be fair, but appear to be fair. In *Smith,* the board of county commissioners had met with proponents of a rezone while refusing to meet with the opponents. The court held that even though a rezone was a legislative action, fundamental fairness demanded that the hearing appear to be fair in addition to being fair.[91] The *Smith* court focused on the fairness of the procedures.

The Washington court added the bias element to the standard in *Fleming v. City of Tacoma.*[92] There the court overruled a 1955 decision[93] which had held that the motives of legislators could not be scrutinized, and reversed a rezone decision because one of the city council members was employed by the proponents of the rezone within days after the decision was rendered.[94] The court held that rezone decisions are quasi-judicial, not legislative, and therefore subject to an appearance of fairness standard.[95] In *Chrobuck v. Snohomish County,*[96] the Washington court established a totality of the circumstances test for the doctrine. The *Chrobuck* court held that the cumulative affect of the behavior of the planning commissioners in a rezone hearing lacked an "appearance of fairness": the commissioners had publicly supported one of the parties, associated with the parties before the proceeding, and denied all parties the right to cross-examine witnesses.[97]

Wn. App. 592, 518 P.2d 1089 (1974) (judge's statement that fathers can better raise boys and mothers raise girls not sufficient to show bias against mother seeking custody of youngest son; bias must be against specific person); Spratt v. Davidson, 1 Wn. App. 523, 463 P.2d 179 (1969) (new trial order reversed because trial court used possible influence test for appearance of fairness, not reasonable doubt test, where jury member and defense attorney became sick, possibly making jury sympathetic to defendant).

89. State *ex rel.* Barnard v. Board of Educ., 19 Wash. 8, 52 P. 317 (1898).

90. 75 Wn. 2d 715, 453 P.2d 832 (1969).

91. *Id.* at 739–41, 453 P.2d at 846–47.

92. 81 Wn. 2d 292, 502 P.2d 327 (1972).

93. Lillions v. Gibbs, 47 Wn. 2d 629, 289 P.2d 203 (1955).

94. 81 Wn. 2d at 300, 502 P.2d at 331.

95. *Id.* at 299, 502 P.2d at 331.

96. 78 Wn. 2d 858, 870, 480 P.2d 489, 496 (1971). The court acknowledged that, standing alone, the circumstances would not constitute a breach of public trust, but the "combination of circumstances" and the "cumulative impact . . . cast an aura of improper influence, partiality and prejudgment over the proceedings thereby creating and erecting the appearance of unfairness condemned in *Smith v. Skagit County, supra.*"

97. *See id.*

The Washington courts have since applied the appearance of fairness doctrine to adjudicatory proceedings in areas other than land-use regulation.[98] The Washington State Medical Disciplinary Board,[99] Law

98. The court used the doctrine to review claims of appearance of bias in adjudicatory decisions. Decisions reveal a variety of ways in which courts limit the doctrine. *See In re* Marriage of Wolfe, 99 Wn. 2d 531, 663 P.2d 469 (1983) (show cause procedure of court of appeals in which commissioner presides is valid; allegation that decision made without reading record is speculative); Washington Educ. Ass'n v. State, 97 Wn. 2d 899, 652 P.2d 1347 (1982) (board's dual role as policymaker and adjudicator in terminating faculty member does not give rise to an appearance of fairness violation); Ritter v. Board of Comm'rs, 96 Wn. 2d 503, 637 P.2d 940 (1981) (showing that one of hearing committee witnesses participated on appellate review body in action to suspend hospital privileges is not an affirmative showing of prejudgment bias); Standow v. City of Spokane, 88 Wn. 2d 624, 564 P.2d 1145 (1977) (city council decision upholding police department denial of taxi operator's license involves no possibility of gain or loss as result of decision); Amoss v. University of Wash., 40 Wn. App. 666, 700 P.2d 350 (1985) (two assistant attorneys general representing University in appeal of denial of tenure did not confer and kept separate files); Butner v. City of Pasco, 39 Wn. App. 408, 693 P.2d 733 (1985) (no violation of apearance of fairness; commissioner testified at officer's discharge appeal, abstained from voting, was cross-examined by officer); Skold v. Johnson, 29 Wn. App. 541, 557–58, 630 P.2d 456, 465–66 (1981) (no appearance of fairness violation because Human Rights Commission has statutory mandate to apply state law against discrimination instead of state and federal constitutions); *In re* Stockwell, 28 Wn. App. 295, 622 P.2d 910 (1981) (no violation of appearance of fairness where member of chiropractic board that complained of misconduct voluntarily disqualified self from hearing committee and abstained from board vote, defendant's license revoked for misconduct); Valley View v. Department of Social and Health Servs., 24 Wn. App. 192, 599 P.2d 1313 (1979) (hearing examiner as employee of agency that withdrew medicare patients from appellant medical facility not partial, no proof of entangling influences); Booker v. South Cent. School Dist., 23 Wn. App. 274, 597 P.2d 395 (1979) (superintendent is both accusor and employee of board; no indication that board would vote in appeal of teacher's hiring to please superintendent). *See also infra* notes 99–102. *But see* Chicago, Milwaukee, St. P. & Pac. R.R. v. Washington State Human Rights Comm'n, 87 Wn. 2d 802, 557 P.2d 307 (1976) (the only nonland-use case in which a violation was found; member of hearing tribunal had employment application pending with party in dispute).

The court has also held some proceedings nonadjudicatory so the doctrine did not apply. *See* Side v. Cheney, 37 Wn. App. 199, 679 P.2d 403 (1984) (mayor's decision to hire police chief is not quasi-judicial decision); Somer v. Woodhouse, 28 Wn. App. 262, 623 P.2d 1164 (1981) (action to change rule regarding supervision of opticians is rulemaking which is quasi-legislative, not quasi-judicial). *But see* Hasan v. Frederickson, 37 Wn. App. 800, 683 P.2d 203 (1984) (no appearance of fairness violation because there was no indication university president's decision to ignore appeal committee recommendation to grant professor pay increase was based on previous dispute with professor). In *Hasan,* the court did not raise question whether proceeding was quasi-judicial, but should have since the decision was not an adjudicatory issue and no hearing was conducted.

Statutes have been cited to restrict application of the doctrine. *See* Local Union 1296, International Ass'n of Firefighters v. Kennewick, 86 Wn. 2d 156, 542 P.2d 1252 (1975) (standard of review of arbitration by statute is "arbitrary and capricious"; fairness doctrine does not apply); Loveland v. Leslie, 21 Wn. App. 84, 584 P.2d 664 (1979) (unknown to appellant, member of hearing tribunal was member of commission; not violation of fairness doctrine because statute encourages commission members to participate in hearings and provides safeguards by requiring that such participants not have been involved with case or a part of investigation).

99. Washington Medical Disciplinary Bd. v. Johnston, 29 Wn. App. 613, 630 P.2d 1354 (1981) (agency's dual functions of investigation and prosecution is violation of doctrine), *rev'd,* 99 Wn. 2d 466, 663 P.2d 457 (1983).

Enforcement Disability Board,[100] Department of Labor and Industries Appeals Board,[101] and Clark County Committee on School District Organization,[102] among others, have been the subject of review under the doctrine.

C. *Statutory Modification of the Doctrine*

In 1978 the Washington Supreme Court, in dictum, stated that the appearance of fairness doctrine is not constitutionally based.[103] The legislature promptly limited the doctrine by statute.[104] The appearance of fairness statute does not attempt to define the doctrine, but limits the doctrine's application and scope.[105] The statute attempts to limit application of the doctrine in land-use regulation by identifying the local land-use decisionmaking bodies to which the appearance of fairness doctrine may be applied.[106] The statute prohibits application of the doctrine to local decisionmakers conducting nonquasi-judicial business with constituents and to the legislative actions of local legislative bodies.[107]

The statute provides that candidates for public office may express opinions and act upon those opinions in a quasi-judicial proceeding without violating the doctrine.[108] It allows candidates to receive campaign contributions from parties to a pending proceeding without violating the doctrine.[109] However, because campaign statements and contributions could

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100. Keever v. Law Enforcement Officers' & Firefighters' Retirement Bd., 34 Wn. App. 873, 664 P.2d 1256 (1983) (board waiting until after condition improved to order physical exam and cancelling appellant's membership in Law Enforcement Officers' and Firefighters' Retirement System held not a violation).

101. Hill v. Department of Labor & Indus., 90 Wn. 2d 276, 580 P.2d 636 (1978) (appellant knew chair of appeal board was supervisor of claims when disputed claim was closed but did not raise charge of bias in proceeding; therefore waived right to application of doctrine on appeal).

102. Evergreen School Dist. v. Clark County Comm. on School Dist. Org., 27 Wn. App. 826, 621 P.2d 770 (1980) (decision to transfer property from one school to another is quasi-legislative decision, not quasi-judicial; doctrine does not apply).

103. City of Bellevue v. King County Boundary Review Bd., 90 Wn. 2d 856, 863, 586 P.2d 470, 475 (1978) ("Our appearance of fairness doctrine, though related to concerns dealing with due process considerations, is not constitutionally based."). The court did not indicate why it made this declaration. However, opponents of the doctrine took this opportunity to attempt to abolish the doctrine. Since it is not constitutionally based, it is subject to revision through the legislative process. *See* R. SETTLE, WASHINGTON LAND USE AND ENVIRONMENTAL LAW AND PRACTICE 203 (1983).

104. WASH. REV. CODE §§ 42.36.010–.900 (1985).

105. The official title of the statute is "The Appearance of Fairness Doctrine—Limitations." This Comment will refer to it as "the appearance of fairness statute".

With the exception of Justice Dore's dissent in *Zehring II*, 103 Wn. 2d 588, 593, 694 P.2d 638, 640 (1985), the Washington courts have not acknowledged the existence of the statute. The reason for this is not clear.

106. WASH. REV. CODE § 42.36.010 (1985).

107. *Id.* § 42.36.020–.030.

108. *Id.* § 42.36.040.

109. *Id.* § 42.36.050.

bias a decisionmaker, the statute does not preclude a due process challenge to a local land-use proceeding.[110]

Under the statute a challenged decisionmaker may participate in a proceeding when a disqualification of several decisionmakers would destroy a quorum, making it impossible for the decisionmaking body to vote or deliberate.[111] The challenged decisionmaker must, in that case, disclose the basis of the challenge.

The statute seeks to prevent a broader application of the doctrine.[112] It prohibits parties from raising the doctrine as a basis for disqualifying a decisionmaker if the challenge is not raised before a decision is rendered.[113] The statute excepts a challenge from this timing requirement if the challenger did not know the basis at that time.[114] It provides that the doctrine can be restricted or eliminated by the appellate courts.[115]

D. *Judicial Criticism of the Appearance of Fairness Doctrine:*

In recent years, the appearance of fairness doctrine has been severely criticized by several members of the Washington Supreme Court.[116] In *Westside Hilltop Survival Committee v. King County*[117] and *Harris v. Hornbaker,*[118] the concurrence suggested abandoning the doctrine.

The Washington Supreme Court, as recently constituted, has not yet addressed the appearance of fairness doctrine.[119] It is not clear whether the

110. *Id.* § 42.36.110.

111. *Id.* § 42.36.090. This policy of providing an exception when otherwise a decision could not be rendered is known as the "doctrine of necessity."

112. *Id.* § 42.36.100. After identifying limits to application of the doctrine, the statute expressly states that the statute shall not be construed to expand application of the doctrine. *See infra* note 120.

113. WASH. REV. CODE § 42.36.080 (1985).

114. *Id.* § 42.36.080.

115. *Id.* § 42.36.100. This is an unusual grant of power at first glance. Unlike most legislation concerning judicially-created doctrines, however, the appearance of fairness statute does not codify the doctrine. Therefore, this provision is just an acknowledgment that the legislature has left the doctrine's ultimate fate to the courts.

116. *See supra* notes 3–5 and accompanying text.

117. 96 Wn. 2d 171, 181–82, 634 P.2d 862, 867–68 (1981) (Dolliver, J., concurring).

118. 98 Wn. 2d 659, 664–68, 658 P.2d 1219, 1228–30 (1983) (Utter, J., concurring).

119. Of the four "new" justices, Justices Durham and Goodloe were not members of the court until after the *Zehring II* decision, the last opinion published on the appearance of fairness issue. Justices Andersen and Callow were members of the Washington Supreme Court when *Zehring II* was heard, but did not participate in that decision. Justice Callow, as an appeals court judge, wrote the opinion in Fleck v. King County, 16 Wn. App. 668, 558 P.2d 254 (1977), which held that spouses voting on the same board violated the doctrine. See Justice Utter's concurring opinion in Harris v. Hornbaker, 98 Wn. 2d 650, 667, 658 P.2d 1219, 1229–30 (1983) (Utter, J., concurring), for criticism of the result reached in *Fleck*. Only two of the justices who have criticized the doctrine, Justice Dolliver and Justice Utter, remain on the court.

court will continue to apply the doctrine, limit it further, replace it, or take the legislature's invitation to eliminate it.[120]

A possible alternative to the doctrine suggested in a concurring opinion in *Harris v. Hornbaker,*[121] is the Washington State Code of Judicial Conduct and procedural due process. The Code, many believe, offers an actual bias standard instead of the appearance of bias standard of the doctrine.[122] It is also contended that since the appearance of a fair and impartial hearing is a fundamental tenet of due process, the appearance of fairness doctrine is merely a label for procedural due process.[123] Thus, the title "appearance of fairness" might be abandoned in favor of a "fairness" inquiry[124] that would include the actual bias standard of the Code and the procedural standard of due process.

These alternatives to the appearance of fairness doctrine arise for several reasons. First, there is a concern that quasi-judicial decisionmakers should not be held to a stricter standard than judges. Under the doctrine, quasi-judicial decisionmakers must meet an appearance of fairness standard, whereas many believe judges are held only to an actual bias standard.[125] Those who would prefer the Code of Judicial Conduct over the appearance of fairness doctrine point to decisions that resulted in "speculative and conjectural" scrutiny of the actions of quasi-judicial decisionmakers.[126] The suggestion has been made that with a "fairness" inquiry "jurisprudentially rooted," the quasi-judicial decisionmaker will not come under a stricter standard than judges.[127] Second, because the doctrine has created confusion for the courts and counsel, proponents of the due process standard insist that courts and lawyers would have a larger, better known body of case law for guidance.[128] This case law would eliminate the confusion surrounding the doctrine, leaving decisionmakers more certain of what behavior would be consistent with a fair proceeding.

120. WASH. REV. CODE § 42.36.100 (1985): "Nothing in this chapter prohibits the restriction or elimination of the appearance of fairness doctrine by the appellate courts."

121. 98 Wn. 2d 650, 658 P.2d 1219 (1983) (Utter, J., concurring).

122. *Id.*, 98 Wn. 2d at 665, 658 P.2d at 1228.

123. Washington Medical Disciplinary Bd. v. Johnston, 99 Wn. 2d 466, 483–85, 663 P.2d 457, 466–67 (1983) (Utter, J., concurring).

124. *Harris*, 98 Wn. 2d at 667–68, 658 P.2d at 1228–30 (Utter, J., concurring).

125. *See id.; Zehring I*, 99 Wn. 2d 488, 500, 663 P.2d 823, 830 (1983) (Utter, J., dissenting), *vacated*, *Zehring II*, 103 Wn. 2d 588, 694 P.2d 638 (1985).

126. *Harris*, 98 Wn. 2d at 667–68, 658 P.2d at 1228–30.

127. *Id.* at 668, 658 P.2d at 1230.

128. *Zehring I*, 99 Wn. 2d at 500, 663 P.2d at 829–30 (Utter, J., dissenting).

II. CODE OF JUDICIAL CONDUCT

The Washington State Code of Judicial Conduct, promulgated by the Washington Supreme Court, establishes the standard of behavior for judges and others performing judicial functions.[129] The purpose of the Code is to assure that hearings are conducted by impartial decisionmakers and to maintain the integrity of the court.[130] The Code promotes the independence of the judiciary by requiring judges to avoid impropriety or the appearance of impropriety and to perform the duties of the office impartially and with diligence.[131] It also requires judges to regulate extra-judicial activities so that the activities will not conflict with judicial duties. The Code allows only limited participation by judges in political activities.[132]

A. *Replacing the Doctrine With Procedural Due Process Will Not Eliminate an Appearance of Fairness Standard*

Just as the substitution of the Code of Judicial Conduct would not eliminate the need for appearance of fairness analysis, neither would the reliance on due process jurisprudence. The appearance of fairness doctrine analysis is due process analysis.[133] Common law due process requires that no person having a conflict of interest may judge a case[134] because our system of justice requires that no question or suspicion of the system and the judge appear:[135] "[J]ustice must satisfy the appearance of justice."[136] Constitutional due process requires an impartial decisionmaker.[137] This requirement prohibits the "probability of unfairness."[138] Therefore, abandoning the "appearance of fairness" title and replacing it with a "fairness" standard of due process would not substantially affect the outcome of cases

129. WASHINGTON STATE CODE OF JUDICIAL CONDUCT [hereinafter cited as JUDICIAL CODE], Preamble (1986).

130. *Id.*, Canon 1.

131. *Id.*, Canons 1–3.

132. *Id.*, Canons 5, 7.

133. *See* Washington Medical Disciplinary Bd. v. Johnston, 99 Wn. 2d 466, 484, 663 P.2d 457, 467 (1983) (Utter, J., concurring) ("The requirement that a reasonably prudent and disinterested observer should be able to conclude all parties obtained a fair, impartial and neutral hearing is a fundamental tenet of due process.").

134. *See* Chicago, Milwaukee, St. P. & Pac. R.R. v. Washington State Human Rights Comm'n, 87 Wn. 2d 802, 807, 557 P.2d 307, 311 (1976).

135. *Id.* at 808, 557 P.2d at 312.

136. Offutt v. United States, 348 U.S. 11, 14 (1954).

137. *See Chicago, Milwaukee*, 87 Wn. 2d at 807–09, 557 P.2d at 311–12 (1976) (the common law rules of disqualification for judges and quasi-judicial decisionmakers include the appearance of a fair, unbiased decisionmaker).

138. *In re* Murchison, 349 U.S. 133, 136 (1955), cited by Justice Utter in *Washington Medical Disciplinary Bd.*, 99 Wn. 2d at 484, 663 P.2d at 467 (1983) (Utter, J., concurring).

because constitutional due process and common law due process both include an appearance of fairness element.[139] Under either label, the specific doctrine for the context of quasi-judicial proceedings must be developed.

As due process proponents suggest, due process analysis may provide more settled and authoritative case law. Such case law, however, cannot guide courts or decisionmakers in answering the threshold question of the elements comprising a quasi-judicial proceeding. Decisionmakers must still initially decide if they are in fact conducting a quasi-judicial proceeding, because due process is not required in nonadjudicatory legislative actions, which are the more frequent functions of many quasi-judicial decisionmakers.[140] The appearance of fairness cases provide the substantial body of case law distinguishing quasi-judicial and non-adjudicatory legislative action.[141]

B. *Replacing the Doctrine With the Code of Judicial Conduct Will Not Eliminate an Appearance of Fairness Standard*

In *Harris v. Hornbaker,*[142] the concurrence asserted that Canon 3 of the Washington State Code of Judicial Conduct should be applied to guide the conduct of quasi-judicial decisionmakers because it would limit the scope of the doctrine by imposing an actual bias standard.[143] Cases interpreting

139. *See, e.g.,* Withrow v. Larkin, 421 U.S. 35, 46 (1975) (procedural due process requires a fair trial in a fair tribunal in administrative agencies and courts); State *ex rel.* Barnard v. Board of Educ., 19 Wash. 8, 17–19, 52 P. 317, 320–21 (1898). This does not mean that due process considerations at issue in appearance of fairness cases should not be fully articulated. The due process analysis should be incorporated wherever it applies. *Washington Medical Disciplinary Bd.,* 99 Wn. 2d at 484–85, 663 P.2d at 467 (1983) (Utter, J., concurring):

> To label what are really due process concerns as the appearance of fairness doctrine is unnecessarily confusing to lawyers who must attempt in some way to give meaning to an unfathomable phrase. If we wish to maintain the continuing vitality of concerns over procedural due process, its constitutional basis and scope must be acknowledged.

140. *See Harris,* 98 Wn. 2d at 657, 658 P.2d at 1221.

141. *See id.;* Westside Hilltop Survival Comm. v. King County, 96 Wn. 2d 171, 634 P.2d 862 (1981); Leonard v. City of Bothell, 87 Wn. 2d 847, 557 P.2d 1306 (1976); Fleming v. City of Tacoma, 81 Wn. 2d 292, 502 P.2d 327 (1972).

142. 98 Wn. 2d 650, 658 P.2d 1219 (1983).

143. *Id.* at 665, 658 P.2d at 1228 (Utter, J., concurring). *See also id.* at 668, 658 P.2d at 1230. Justice Utter cites Fleck v. King County, 16 Wn. App. 668, 558 P.2d 254 (1977), as an example of a "speculative and conjectural" fairness inquiry. In *Fleck,* the Washington Court of Appeals held that a decision by a planning commission was invalid because the tie-breaking vote of the commission chairman was the same as that of his wife who was voting on the commission. The court acknowledged that it was expanding the doctrine to prohibit service of married people on the same quasi-judicial board because it found this circumstance an "entangling influence," raising doubts as to whether both sides to the argument received equal treatment. *See Fleck,* at 673, 558 P.2d at 257.

Had the Judicial Code been applied, however, the court would have had no better guidance because no cases have been found in which a challenged judge has served on a panel with his or her spouse. Had

Canon 3, however, have interpreted that section to impose an appearance of fairness standard.[144] Therefore, even if the Code supplanted the appearance of fairness doctrine as the bias standard for quasi-judicial decisionmakers, appearance of fairness as well as actual bias would still be the standard.

The earliest Washington case in which the court held a quasi-judicial decisionmaker to a standard of appearance of fairness was *State ex rel. Barnard v. Board of Education.*[145] In that case the decisionmaker was not a judge in a court of law, but a school board member who had announced that he would vote to discharge the superintendent. The Washington court, nevertheless, applied the judicial standard of conduct.[146] The Washington Supreme Court has recognized the shared ancestry of the standard for judges and the appearance of fairness doctrine by citing this case for the proposition that the same standard of appearance of fairness applies to judges and quasi-judicial decisionmakers.[147]

An appearance of fairness standard has been used to disqualify judges and to require new proceedings in several Washington court decisions. Washington courts have disqualified judges for participation in ex parte contacts,[148] for personal investigations outside the courtroom,[149] and for knowledge of the case before the trial.[150] They have required new proceedings because a trial lacked the appearance of fairness when a judge rejected alibi evidence offered after the prosecution had rested, although he could have granted a continuance,[151] and when a judge had actively interceded in the examination of witnesses.[152]

Opponents of the appearance of fairness concept might argue the standard should be dropped in both the judicial and quasi-judicial setting in favor of the actual bias standard. But the reason for going beyond proven bias is to maintain public confidence by giving the benefit of the doubt to

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such an occurrence come before the court, the Code might support the same result as the *Fleck* decision because the court would still have to determine if, under the circumstances, the integrity of the court was called into question. *See* JUDICIAL CODE, *supra* note 129, Canon 2(B) and Official Comment to 2(B).

144. *See* State v. Romano, 34 Wn. App. 567, 569, 662 P.2d 406, 407–08 (1983); State v. Madry, 8 Wn. App. 61, 70, 504 P.2d 1156, 1161 (1972); *see also* Dimmel v. Campbell, 68 Wn. 2d 697, 699, 414 P.2d 1022, 1023 (1966); State v. Buntain, 11 Wn. App. 101, 107, 521 P.2d 752, 755–56 (1974).

145. 19 Wash. 8, 52 P. 317 (1898).

146. *Id.* at 17–19, 52 P. at 320–21.

147. *See* Chicago, Milwaukee, St. P. & Pac. R.R. v. Washington State Human Rights Comm'n, 87 Wn. 2d 802, 807–08, 557 P.2d 307, 311 (1976).

148. State v. Romano, 34 Wn. App. 567, 662 P.2d 406 (1983) (sentencing judge contacted two personal friends to check veracity of defendant's testimony; court held that even where no actual bias, appearance of fairness is required).

149. State v. Madry, 8 Wn. App. 61, 504 P.2d 1156 (1972).

150. Dimmel v. Campbell, 68 Wn. 2d 697, 414 P.2d 1022 (1966).

151. State v. Grant, 10 Wn. App. 468, 519 P.2d 261 (1974).

152. Egede-Nissen v. Crystal Mountain, 93 Wn. 2d 127, 606 P.2d 1214 (1980) (judge actively interceded by examining witnesses with disbelief; new trial granted).

the potentially injured party, not the potentially biased one.[153] Both the appearance of fairness doctrine and the impartiality standard of the Washington State Code of Judicial Conduct retain an appearance of fairness element because both appear to have developed from the same common law concept of due process.

Even though the Code and the appearance of fairness doctrine have an appearance of fairness requirement, the appearance of fairness doctrine seems to be a more burdensome standard. This is because of the conflict in values that arises when a bias standard is applied to nonjudicial officials. Elected and appointed officials must generally be accountable to their constituents. Judges must generally be independent of outside influence. The values of accountable public officials and independent decisionmakers clash when an elected or appointed official is given quasi-judicial duties. The accountable elected official has an affirmative duty to consider the concerns of constituents. The official accounts for this duty by maintaining open communication with the constituents. Yet, quasi-judicial decisionmakers must also consider every discussion with a constituent a possible ex parte contact that could violate the appearance of fairness doctrine in an adjudication. Judges, however, have no conflicting duty to maintain contact with constituents. Thus, quasi-judicial decisionmakers find it much more difficult to maintain the appearance of fairness while at the same time seeking input on matters of public concern. Since judges need not, indeed may not, actively solicit public input, they have no such thin line to walk.

C. *Code of Judicial Conduct as a Standard for Quasi-Judicial Decisionmakers*

The Washington State Code of Judicial Conduct does not solve the confusion surrounding the appearance of fairness doctrine since it carries with it its own implied doctrine of appearance of fairness.[154] The substitution of the Code as the standard for quasi-judicial decisionmakers would pose additional problems.

1. *Code Does Not Distinguish Legislative From Quasi-Judicial Functions*

Because the courts may not apply a bias standard in reviewing legislative decisions,[155] the distinction between legislative and quasi-judicial functions is critical to determining when any bias standard may be applied to

153. *See supra* notes 133–39 and accompanying text.

154. *See supra* notes 142–52 and accompanying text.

155. *See Harris*, 98 Wn. 2d at 657, 658 P.2d at 1221.

quasi-judicial decisionmakers. The distinction between legislative and quasi-judicial functions is not addressed by the Washington State Code of Judicial Conduct. The Code does not speak to this issue because judges do not ordinarily have legislative duties. The only reference in the Code to nonjudicial functions is the requirement that judges should never allow outside activities to interfere with judicial duties nor appear to grant special privileges to any party.[156]

2. *Application of the Washington State Code of Judicial Conduct Sacrifices Accountability for Independence*

If courts apply the bias standard in the Code to quasi-judicial decisionmakers, courts will impinge on the decisionmaker's accountability to the electorate. The bias standard of the Code includes not only Canon 3, cited by the concurrence in *Harris v. Hornbaker,*[157] but also Canons 2, 5, and 7.[158] Canon 7 requires a restraint on political activity. It prohibits the judicial candidate from making "pledges or promises of conduct in office" as well as from discussing "his views on disputed legal or political issues."[159] It also prohibits personal solicitation of campaign contributions by judicial candidates.[160]

The Judicial Code's restraint on elected judges is proper since judges face no conflict between the values of independence and accountability. While judges in Washington are elected, they cannot be accountable to the electorate in the same degree or in the same manner as quasi-judicial decisionmakers.[161] The effective administration of justice demands that the performance of a judge should not be representative of the concerns of the electorate; rather, a judge should make decisions based on the merits of the case and the applicable rules of law. Thus, Canon 7 of the Washington State Code of Judicial Conduct prohibits discussion of pending cases and judicial opinions.[162] If a judicial candidate publicly expressed personal views on issues in a current or impending proceeding, that expression would be taken as a signal as to the way the judge would perform. The administration

156. *See* JUDICIAL CODE, *supra* note 129, Canon 3(A)(4).

157. 98 Wn. 2d 650, 658 P.2d 1219 (1983).

158. The bias standard of the Code includes: Canon 2—A Judge Should Avoid Impropriety And The Appearance Of Impropriety In All His Activities; Canon 3—A Judge Should Perform The Duties Of His Office Impartially And Diligently; Canon 5—A Judge Should Regulate His Extrajudicial Activities To Minimize The Risk of Conflict With His Judicial Duties; Canon 7—A Judge Should Refrain From Political Activity Inappropriate To His Judicial Office. JUDICIAL CODE, *supra* note 129.

159. *Id.*, Canon 7(B)(1)(c).

160. *Id.*, Canon 7(B)(2).

161. *See* Note, *Ethical Conduct In A Judicial Campaign: Is Campaigning An Ethical Activity?*, 57 WASH. L. REV. 119, 136 (1981).

162. JUDICIAL CODE, *supra* note 129, Canon 7(B)(1)(c); *see also id.*, Canon 3(A)(6).

of justice requires public faith in the legal system. Impartiality of the judiciary is an essential element in developing and maintaining that public faith.[163] Campaign promises are not compatible with impartiality.

If Canon 7 were applied to quasi-judicial decisionmakers, however, the accountability of these officials would be eroded. Elected officials are held to a greater degree of public accountability than judges because the primary function of these elected officials is to represent their constituencies.[164]

Forbidding the quasi-judicial decisionmaker from having ex parte contacts and from announcing a stand in advance of the decision may conflict with the decisionmaker's role as a legislator.[165] Quasi-judicial decisionmakers are elected primarily as legislators, not judicial decisionmakers. It is the legislator's responsibility to listen to and represent constituents. When an elected official is restrained from communicating with members of the electorate, or from informing the electorate of a position on controversial issues, the electoral process is impeded and the values of representative democracy are subverted. Prohibiting candidate discussion of controversial issues in a political campaign and restricting discussion with constituents and potential constituents, as the Code of Judicial Conduct does, sacrifices accountability for independence.

While not a perfect standard, the appearance of fairness doctrine, as modified by the statute, accommodates the conflict in values inherent in an impartiality standard for elected officials. The appearance of fairness statute accommodates the conflict between accountability and independence by allowing candidates for public office to promise to vote a certain way on pending quasi-judicial matters and to vote as promised without

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163. *See* Note, *supra* note 161, at 136.

164. *See* Ellis, *Judges and Politics: Accountability and Independence in an Election Year*, 12 N.M.L. REV. 873, 881 (1982) ("It is universally conceded that accountability to the voters is a desirable goal in the executive and legislative branches of government.").

For further discussion of the conflict between the value of an accountable public official and the provision in the Code of Judicial Conduct that prohibits the expression of opinion by judicial candidates as political candidates, see Lovrich & Sheldon, *Voters in Judicial Elections: An Attentive Public Or An Uninformed Electorate?*, 9 JUST. SYS. J. 23 (1984); Ellis, *supra*.

165. Even the court has recognized that the legislator's role requires an expression of opinion on issues. In Smith v. Skagit County, 75 Wn. 2d 715, 740–41, 453 P.2d 832, 847 (1969) the court stated:

> Unlike a judicial hearing where issues of fact should be resolved from the evidence only without regard to the private views of the judges, a legislative hearing may reach a decision in part from the legislator's personal predilections or preconceptions. Indeed, the election of legislators is often based on their announced views and attitudes on public questions.

In Westside Hilltop Survival Comm. v. King County, 96 Wn. 2d 171, 179, 634 P.2d 862, 866 (1981), the court addressed the issue of ex parte contacts with legislators in their role as legislator:

> As for ex parte contacts between the legislator and his constituents advocating specific legislation, it is an integral part of representative government at every level. It is a daily if not an hourly occurrence across the land. Absent a charge of corruption, the court should not intrude upon the legislative process. We leave to the political process the sanction, if any there be, for the conduct of either of the councilmen complained of herein.

violating the appearance of fairness doctrine.[166] This accommodation, however, seems to sanction decisions based on personal bias rather than evidence, thereby raising an issue of denial of constitutional due process.[167] The statute addresses this possibility by providing that the statute does not prohibit a due process challenge.[168] The Washington legislature has balanced the right of free political speech and the value of accountable elected official with the due process right to an impartial decisionmaker and may have devised the only viable compromise. The Washington State Code of Judicial Conduct would not provide such a balance.[169]

3. *Application of Canon 7(2) of the Washington State Code of Judicial Conduct Could Foster New Uncertainty Regarding Campaigning*

To ensure that judges will be free from outside influences and will maintain the dignity of the office, the Washington State Code of Judicial Conduct, Canon 7(2), prohibits the personal solicitation of campaign funds by judges.[170] Application of this provision to quasi-judicial decisionmakers who are elected officials would present administrative difficulties and result in uncertainty.

Quasi-judicial decisionmakers are appointed and elected officials who are not judges but make adjudicatory decisions as part of their duties of office.[171] Not all elected officials, however, make decisions which are adjudicatory in nature. Typically mayors of the larger jurisdictions, county executives, county auditors, county prosecutors, and city attorneys have no quasi-judicial duties. Application of the prohibition of personal campaign solicitations only to those officials who are quasi-judicial decisionmakers would present a substantial administrative burden. For example, in some communities the mayor sits on the council and participates in quasi-judicial decisions; candidates for mayor in those jurisdictions would not be allowed to personally solicit campaign funds. In other jurisdictions, however, the mayor never participates in such decisions; candidates for mayor in those jurisdictions would not be subject to the ban.

Also, to be effective, application of Canon 7(2) to quasi-judicial decisionmakers would require a before-the-election determination of which

166. WASH. REV. CODE § 42.36.040 (1985); *see supra* note 108 and accompanying text.

167. Procedural due process requires some kind of hearing before an impartial decisionmaker. *See generally* Goldberg v. Kelly, 397 U.S. 254 (1970).

168. WASH. REV. CODE § 42.36.110 (1985); *see infra* note 169 and accompanying text.

169. The ban on discussion of issues and personal solicitation of campaign contributions in the Code is absolute; there are no exceptions. *See* JUDICIAL CODE, *supra* note 129, Canons 3(A)(6), 7(B)(1)(c), 7(B)(2).

170. *Id.*, Canon 7(B)(2).

171. *See supra* text accompanying notes 11–12.

positions were subject to the ban. Candidates would have to know in advance if the ban on personal solicitation of campaign funds applied to them so they could make a good faith effort to comply with the law. A government entity would have to determine which candidates must abide by the ban and which need not. Because of the number of potential candidates involved, a difficult and costly process could result.

No Washington judicial decision tests whether an appearance of unfairness is created when a party to a quasi-judicial proceeding has made a campaign contribution to a decisionmaker.[172] The Washington legislature, however, answered the question in the appearance of fairness statute. The statute provides that campaign contributions to quasi-judicial decisionmakers do not create appearance of fairness doctrine violations.[173] If the Washington State Code of Judicial Conduct were applied to quasi-judicial decisionmakers instead of the appearance of fairness doctrine, the court could develop a compromise for the Code's ban on personal solicitation of campaign contributions.[174] Whatever the compromise, it would offer less guidance than the appearance of fairness statute which precludes any finding of a violation of the appearance of fairness doctrine due to the receipt of campaign contributions. The Code or a compromise would also provide less certainty than the doctrine and could be costly to administer.

4. *Application of Canons 3(A)(4) and (6) Does Not Account for the Unique Role of Staff in the Quasi-Judicial Proceeding*

A glaring omission in the appearance of fairness doctrine is that it does not deal with the problems that arise as a result of the unique role of staff in quasi-judicial proceedings. If any part of the Code of Judicial Conduct offered a solution, the courts should seriously consider incorporating it into the doctrine. The Code, however, does not address the opportunity for ex parte contacts of staff with decisionmakers and the parties to the proceeding, and the potential for conflict of interest of participating staff.

172. The only discussion of campaign contributions in a Washington appearance of fairness case was by the Washington Supreme Court in *Westside Hilltop*, 96 Wn. 2d 171, 634 P.2d 862 (1981). In an action concerning an ordinance allowing construction of an office building, the court held that the disputed action was an amendment to the comprehensive plan, therefore not subject to the doctrine because amendments to comprehensive plans are legislative actions. Thus, the campaign contributions were also not subject to an appearance of fairness review. The *Westside* court noted that the public disclosure act, WASH. REV. CODE §§ 42.17.010–.945 (1985), provides a reporting system that allows the public to judge the public officeholder's impartiality. *See* 96 Wn. 2d at 179, 634 P.2d at 866.

173. *See* WASH. REV. CODE § 42.36.050 (1985); *see supra* note 109 and accompanying text.

174. Possible compromises could include contribution limitations, or restrictions on time of contribution in relation to the proceeding. The court could develop compromises, but the necessity of developing compromises offsets any value of adopting the readymade rules and applications of the Code.

Ex parte contacts are addressed in Canons 3(A)(4) and 3(A)(6) of the Washington State Code of Judicial Conduct.[175] Those provisions prohibit judges from engaging in ex parte contacts and communications about pending proceedings.[176] Judges may seek the advice of disinterested experts, but only in the form of amicus briefs.[177] The official comments to Canon 3(A)(4) provide that the judge may consult with other judges or court personnel in deciding cases.[178] Judges may not publicly comment on proceedings pending in any court, however, and must require the same behavior of their employees.[179]

The role of staff in the quasi-judicial proceeding is very different from that of judicial staff in a judicial proceeding. Judicial staff members do not submit and comment on evidence during the judicial proceeding and are not relied on as subject matter experts by the judge in making a decision. Quasi-judicial decisionmakers, however, often must rely on the staff of various departments for technical and support information.[180] Such information is given both privately and in public hearings. Frequently, in quasi-judicial proceedings, staff present evidence, comment on evidence presented, and make recommendations based on their expertise. Often staff reports are the major source of evidence used against a party to the proceeding.[181] The appearance of fairness statute prohibits ex parte contacts between decisionmakers and parties during the pendency of a proceeding unless made on the record,[182] but it does not address ex parte contacts with staff. The Washington State Code of Judicial Conduct does not provide guidance for dealing with the unique role of staff in the quasi-judicial proceeding.[183]

175. JUDICIAL CODE, *supra* note 129, Canon 3(A)(4), 3(A)(6) ("Judge Should Perform the Duties Of His Office Impartially and Diligently").

176. *Id.*, Canon 3(A)(6).

177. *Id.*, Canon 3(A)(4).

178. *Id.*, Canon 3(A)(4) Comment.

179. *Id.*, Canon 3(A)(6).

180. *See* Bowing v. Board of Trustees, 85 Wn. 2d 300, 312, 534 P.2d 1365, 1372 (1975), in which the court noted that agency decisionmakers commonly rely on staff to read the record and issue reports on which the decisionmakers rely as the basis of adjudicatory decisions. The members of the Board of Trustees were not required to read the record of the review committee's hearings themselves in making a decision to discharge a faculty member. *See also* Smith v. Skagit County, 75 Wn. 2d 715, 734, 453 P.2d 832, 843 (1969), in which the court presumed the assistance of the staff in the planning commission's deliberations and decision: "This announcement, we think, unmistakably conveyed the idea that the commission was retiring to deliberate upon its decision, relying only upon its legally constituted staff to aid it in formulating its judgment and to express it in words, graphs, charts and pictures."

181. *See Chicago, Milwaukee*, 87 Wn. 2d at 803, 557 P.2d at 309 (1976); Chrobuck v. Snohomish County, 78 Wn. 2d 858, 861, 480 P.2d 489, 492 (1971).

182. WASH. REV. CODE § 42.36.060 (1985).

183. The Administrative Procedures Act (APA) may assist in dealing with the staff's role because it does provide distinctions among staff members. *See* 5 U.S.C. §§ 551–59 (1982). The APA has been interpreted to divide staff into three classifications: decisionmaking staff, investigative staff, and other

Another problem that is inherent in the unique role of staff in the quasi-judicial proceeding is the potential for staff conflict of interest. Staff may personally benefit directly or indirectly from a decision. Staff members who participate in the proceeding, or whose investigations are used in the proceeding, often have greater influence with the decisionmaker than the parties to the conflict because of their recognized expertise. Yet, staff members are not forbidden from participating in the hearings or required to disclose their interests when a potential conflict of interest arises.

Neither the appearance of fairness statute nor the courts have dealt with the potential conflict of interest of staff participating in a quasi-judicial proceeding[184] or the effect of staff's personal bias on the decision. This omission would not be corrected by substituting the Washington State Code of Judicial Conduct for the appearance of fairness doctrine. The Code does not address the personal biases of staff or account for the unique role of staff as experts in the quasi-judicial proceeding.

III. MODIFYING THE DOCTRINE

The appearance of fairness doctrine creates confusion and frustration among decisionmakers and courts because the proceeding to which it is

members. *See* Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759 (1981), *reprinted in* ADMIN. CONF. OF THE U. S. RECOMMENDATIONS AND REP. 141, 147 (1981). Decisionmaking staff include administrative law judges and intermediate review boards and their staffs. Under the APA, decisionmakers can be advised off-the-record by other decisionmakers and their personal staffs, and by everyone else who has had no dealings with the pending issue. *Id.* at 147. Investigative staff who have worked or will be working on the pending issue, on the other hand, may not give off-the-record advice to decisionmakers. They may only advise on-the-record as witnesses or counsel for the agency. *Id.* This model could be effectively applied to staff under the appearance of fairness doctrine which deals with the problem in only a limited way.

Under the appearance of fairness doctrine, staff who investigate prior to a proceeding or participate in a proceeding would not be allowed to have off-the-record discussions with the decisionmaker, but the decisionmaker's personal staff or other staff who do not have a role in the pending proceeding would be allowed to have off-the-record discussions of the pending issues with the decisionmaker. *See infra* Part III.*B.2.a.*

Staff can include anyone from secretary to technician. Anyone who works for the agency is subject to the rules and procedures of the agency.

184. The City of Seattle has provided for this possibility with an ordinance:

> No current city officer or employee shall: have a financial or other private interest, direct or indirect, personally or through a member of his or her immediate family, in any matter upon which the officer or employee is required to act in the discharge of his or her official duties, and fail to disqualify himself or herself from acting or participating.

See SEATTLE MUNICIPAL CODE § 4.16.070 (A)(1)(b) (1985).

Seattle is the largest city in Washington State and one of only ten Washington cities operating under a home rule charter. Most of the other 256 cities and towns in Washington have populations of 5000 or less. They are unlikely to have formal procedures that include ethics codes. Telephone interview with Patrick Mason, Legal Consultant of the Municipal Research and Services Center, Seattle, Washington (January 8, 1986) (notes of interview on file with the *Washington Law Review*).

applied is not clearly defined and the elements of a violation are not comprehensively stated. Also, the doctrine is not as effective as it could be because it does not address ex parte contacts with staff and the potential for staff bias. Rather than abandon the appearance of fairness doctrine, the Washington courts or legislature should further modify it to correct its deficiencies, and clearly define its elements and the prerequisites for violation.

A clear definition of the threshold distinction between legislative, administrative, and quasi-judicial proceedings is needed to provide certainty for the courts and the decisionmakers. Several Washington cases contain discussion of the distinction, but none has a comprehensive definition of a quasi-judicial proceeding.[185]

An airtight definition cannot be devised, of course, because any definition of the appearance of fairness doctrine must be flexible, allowing for the "totality of the circumstances." It is impossible to define every circumstance in which a violation of the doctrine will be found. However, a workable definition of the violation of an appearance of fairness must include the most common circumstances to which the doctrine would be applied. A workable definition must provide a standard broad enough to penalize the most egregious violators and yet narrow enough to provide an incentive for quasi-judicial decisionmakers to disqualify themselves, since the courts have an opportunity to review only a minimal number of cases.[186]

A. A Suggested Definition of a Quasi-Judicial Proceeding:

Quasi-judicial proceedings involve: (1) issues in which the parties are a relatively small group of people, exceptionally affected, each on individual grounds; (2) a decisionmaker who applies general principles to the facts presented to affect each of the parties individually; (3) a decisionmaker who has broad discretion; and (4) a hearing.

The proposed definition provides that whenever a hearing is conducted and all of the other requirements of an adjudication are met, the doctrine

185. *See* Harris v. Hornbaker, 98 Wn. 2d 650, 657, 658 P.2d 1219, 1222 (1983); Westside Hilltop Survival Comm. v. King County, 96 Wn. 2d 171, 176–78, 634 P.2d 862, 865 (1981); Leonard v. City of Bothell, 87 Wn. 2d 847, 850–51, 557 P.2d 1306, 1308–09 (1976); Fleming v. City of Tacoma, 81 Wn. 2d 292, 299, 502 P.2d 327, 331 (1972).

186. *See Westside Hilltop*, 96 Wn. 2d at 181, 634 P.2d at 867 (1981) (Rosellini, J., concurring):

> The number of cases which the courts review regarding quasi-judicial action is miniscule when compared to the number of cases on which quasi-judicial boards function. The action of a quasi-judicial board may change a marginal plan developer into a millionaire. In the public utility field, a board may grant a rate increase as high as $60 million per year. The appearance of fairness doctrine is designed to assure unbiased review. Hopefully, it prevents excessive fraternization, conflict of interest, prejudgment and improper ex parte contacts; and what is commonly known in street parlance as "pal deals."

applies. It does not give weight to the technicality of whether the hearing was statutorily required. It includes both elements of an adjudication included in the *Londoner/Bi-Metallic* analysis of identifiable parties, exceptionally affected and a decision based on facts specific to those parties. It includes reference to the basis of the decision, an element of an adjudication not clearly expressed in the Washington cases. The definition requires a review of the amount of discretion of the decisionmaker in all cases, not just those in which the decisionmaker is an employee of the executive branch of government. This definition provides better guidance for the courts and quasi-judicial decisionmakers by identifying the characteristics of an adjudicatory issue and the circumstances in which the resolution of such issues are adjudicatory proceedings to which the appearance of fairness doctrine applies.

B. A Suggested Definition of an Appearance of Fairness Violation

Neither the statute nor the cases sufficiently define an appearance of fairness violation;[187] decisionmakers do not know what combination of circumstances would taint the appearance of fairness. The statute contains no definition or "test" for the appearance of fairness. The judicial "test" for appearance of fairness is whether a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing.[188] This test requires that quasi-judicial decisionmakers plan their actions without the benefit of a particularized list of procedures and behavior that demonstrates bias.

The Judicial Code and the cases that interpret it give no clearer guidelines for an appearance of unfairness than the statute and the appearance of fairness doctrine cases. The Code does not attempt to define an appearance of fairness or an appearance of fairness violation; rather it uses an equally ambiguous phrase, "Appearance of Impropriety."[189] It also requires disqualification of a judge if the judge's "impartiality might reasonably be questioned."[190] The Code's standard is a reasonable person test like that of the appearance of fairness doctrine.

Washington case law has developed a rough definition of the appearance of fairness violation. This should be codified to provide guidance for the quasi-judicial decisionmaker and the court in applying the doctrine.

187. As Justice Utter noted in *Harris*, 98 Wn. 2d at 668, 658 P.2d at 1229 (Utter, J., concurring), the board members could not have predicted in advance the result in Fleck v. King County, 16 Wn. App. 668, 558 P.2d 254 (1977).

188. *See* Swift v. Island County, 87 Wn. 2d 348, 552 P.2d 175 183 (1976).

189. JUDICIAL CODE, *supra* note 129, Canon 2.

190. *Id.*, Canon 3(C)(1).

1. Suggested Guidelines for Regulating the Decisionmaker

a. Procedural:

An appearance of fairness violation will require a new proceeding when any one or more of the following occurs: (1) notice was not adequate; (2) the opportunity to be heard was not given to all parties to the proceeding; (3) cross-examination of all parties to the proceeding represented by counsel was not allowed to all parties who requested the right; (4) a verbatim record was not kept.

b. Bias of the Decisionmaker:

A new proceeding will be held without the challenged decisionmaker when a reasonable, disinterested observer would conclude that one or more of the parties did not receive a fair, impartial, and neutral hearing because the challenged decisionmaker: (1) had a direct or indirect[191] financial or personal interest in the outcome of the decision, unless that interest can be shown to be de minimus; or (2) had some association with one of the parties to the proceeding that would influence his decision, unless it can be shown that the association did not influence the decision; or (3) had an employer with a direct financial or personal interest in the outcome of the decision, unless it can be shown that that interest was de minimus; or (4) was employed by one of the parties within one year after the decision or had an opportunity to be employed by one of the parties as a result of the outcome of the decision; or (5) expressed a predecision opinion, outside of a political campaign, as to the subsequent outcome of the proceeding; or (6) had ex parte contacts, during pendency of the proceeding, with parties to the proceeding or with staff who participated in the proceeding and did not enter those contacts in the record of the proceeding.

The question of whether there has been a violation of the appearance of fairness doctrine must be decided on the basis of each and every specific fact relevant to the adjudication in question. All circumstances must be considered. Any single element from the lists above, however, would be

191. The court found indirect benefit to the decisionmaker sufficient to taint the proceedings in *Swift*, 87 Wn. 2d at 361, 552 P.2d at 183 (chairman of board of county commissioners was stockholder and chairman of the board of the bank that held mortgage interest in land involved), and Buell v. City of Bremerton, 80 Wn. 2d 518, 525, 495 P.2d 1358, 1362–63 (1972) (chairman of planning commission owned property two lots removed from the land to be rezoned). *But see* West Slope Community Council v. City of Tacoma, 18 Wn. App. 328, 336, 569 P.2d 1183, 1188 (1977) (councilman's cabinet company often bid for subcontract work with proponent; interest held too remote and tenuous to taint proceeding), *rev. denied*, 89 Wn. 2d 1016 (1978); Byers v. Board of Clallam County Comm'rs, 84 Wn. 2d 796, 802–03, 529 P.2d 823, 828–29 (1974) (members of planning commission owned property 10 to 15 miles from area to be zoned and no indication property would be benefited).

grounds for eliminating a decisionmaker or requiring a new proceeding, if the violation is so egregious that a reasonable, disinterested observer would conclude that one or more of the parties did not receive a fair, impartial, and neutral hearing.

Two of the circumstances enumerated above are not currently found in the Washington cases: association of the decisionmaker with one of the parties to the proceeding, and ex parte contacts with staff.

The proposed definition of a violation of appearance of fairness includes a prohibition of the decisionmaker's association with the parties to the proceeding, but does not prohibit association with members of the tribunal. An association with one of the parties could be sufficient to disqualify a decisionmaker because a reasonable observer could conclude that the association influenced the decision. However, under this proposal the presumption that an association between a decisionmaker and a party to a proceeding is a violation may be rebutted. The presumption is rebuttable because associations are not always influential and are often impossible to avoid in small or close communities.

The proposal does not include a presumption that an appearance of fairness is violated when the association is between members of a tribunal, unlike the potential scope of the decision in *Fleck v. King County,*[192] in which the court held that the votes of spouses on the same board appeared to be biased because their association provided an "entangling influence."[193] To presume that mere association among decisionmakers results in a lack of independent judgment could severely impede the functioning of many councils, boards, and commissions that make critical decisons in local government. Members of the tribunal who conduct the business of the tribunal often must associate to perform their duties. Therefore, the proposed association provision presumes that decisionmakers will not be influenced by the mere association with other decisionmakers. Unlike the rest of the doctrine, it gives the benefit of the doubt to the decisionmaker, not to the potentially injured party. The provision, however, includes a proviso that allows for the exceptional case where the presumption is rebutted by a specific showing of undue influence through association.

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192. 16 Wn. App. 668, 558 P.2d 254 (1977).

193. *Id.* at 672, 558 P.2d 257. The court did not discuss what other relationships might be deemed excessively "entangling." Subsequent developments in the women's movement toward recognition of independent thinking may render *Fleck* obsolete.

2. Suggested Guidelines for Regulating the Staff

a. Ex parte Communiciations With Staff:

A new proceeding will be required when a reasonable, disinterested observer would conclude that one or more of the parties to a proceeding did not receive a fair, impartial, and neutral hearing because the following contacts during the pendency of the proceeding were not placed in the record: (1) contacts between parties to the hearing and a staff member who is investigating an issue concerning those parties, or who is a participant in the proceeding to which they are parties; or (2) contacts between a decisionmaker and a staff member who is investigating an issue that is pending before that decisionmaker or who is participating in the proceeding before that decisionmaker. Contacts with decisionmakers or staff who are not investigating the pending issue nor participating in the pending proceeding need not be placed in the record. The decisionmaker's own personal staff is exempt from the ex parte recording requirement unless that person has a role in the proceeding.

This standard is an expansion of the rule that requires all ex parte contacts between quasi-judicial decisionmakers and parties to the proceeding be placed in the record. It includes contacts between participating/investigating staff and the interested parties and participating/investigating staff and the decisionmaker. This standard gives the parties to the proceeding an opportunity to respond to staff comment and information, like any other supportive or adverse testimony that might influence the decision.

b. Bias of Staff:

A new proceeding will be required when a reasonable, disinterested observer would conclude that one of the parties to the proceeding did not receive a fair, impartial, and neutral hearing because a staff member who participated in the proceeding through written or oral report, or by conducting some aspect of the proceeding, or who did investigatory work prior to the proceeding: (l) had a direct or indirect financial or personal interest in the outcome of the decision, unless that interest can be shown to be de minimus; (2) had some association with one of the parties to the proceeding that would influence his or her work, unless it can be shown that the association would not influence his or her work; (3) had an opportunity to be employed by one of the parties to the proceeding as a result of the outcome of the staff person's recommendation or the decision; or (4) was employed by one of the parties to the proceeding within one year of the decision, unless it can be shown the employment was not the result of the

staff person's recommendation in the proceeding. If the staff member does not voluntarily disqualify himself or herself, any party to the proceeding can challenge the participation of the staff member with the same effect as if challenging a decisionmaker. Disqualification of a staff member also means that staff member's written or oral report may not be used in the quasi-judicial process.

The potential conflict of interest of staff and the influence that staff has on quasi-judicial decisionmaking is a sufficient threat to the fairness of the proceeding to justify applying the bias standard that is applied to decisionmakers to staff who participate in the proceeding. Any staff person who participates in a quasi-judicial proceeding as an expert witness, personally or through a report, or by presenting or commenting on evidence should be disqualified from any participation in the proceeding if that person may benefit, directly or indirectly, from the decision, unless the benefit can be shown to be de minimus.[194] The one exception to the standard imposed on decisionmakers is that a decision should not be subject to reversal on appearance of fairness grounds because a staff member accepted employment with a party to the proceeding within one year of the decision. This concession represents a balancing between the need for the appearance of fairness and the tendency of staff members to accept employment in areas of their expertise. A strict requirement would be too restrictive because hiring a staff person is not direct assurance of a favorable decision. Staff members may only influence a decisionmaker; they cannot vote.

c. Coping With Compliance With the Doctrine

The bias standard and ex parte contacts requirement for staff are appropriate additions to the doctrine because they provide a safeguard on the influential role of staff in a quasi-judicial proceeding. The standards will add to the credibility of the process since often the parties involved in a quasi-judicial proceeding might feel helpless in dealing with biased members of the staff. Some measure of accountability occurs at the ballot box to eliminate biased quasi-judicial decisionmakers who are elected officials, or to eliminate them indirectly by voting against an appointing official of the biased decisionmaker. Staff, however, are not answerable to the parties and often, because of civil service or other employment arrangements, they are not even accountable to the decisionmakers. The staff bias standard and ex parte contacts requirement would provide a better opportunity for a fair and impartial hearing.

These proposed guidelines will eventually result in the necessity of filling the gap left by the disqualified staff member. No jurisdictional

194. For definition of staff, see *supra* note 183.

problem would arise in replacing a staff person who has been disqualified, since staff are not limited to one jurisdiction, as elected and appointed officials are. In small jurisdictions, however, disqualification of a staff person could present an economic problem, since frequently only one person on staff has the requisite expertise to advise the decisionmakers. Those jurisdictions often have contracts with other jurisdictions for the exchange or use of personnel in times of need.[195] Formal and informal agreements could be used to alleviate the problem by providing the needed expertise and perhaps even reducing the cost by paying with services in-kind. While replacing disqualified staff members will be an added cost of the proceeding, procedural safeguards which assure an impartial decisionmaker are usually more expensive than less structured public hearings. Fairness demands those safeguards.

IV. CONCLUSION

In contrast to the nearly 2,000-year development of the common law due process principles on which it is based, Washington's appearance of fairness doctrine has been developing for less than two decades. The uncertainty and lack of guidance that attend the development of new law cause frustration and conflict for those to whom the law applies and those who must apply it. However, to abandon the doctrine for the Washington State Code of Judicial Conduct would lead to equal or greater frustration. The Code does not address the conflict of values that inevitably flows from application of an impartiality standard to political decisionmakers. Indeed, the Code sacrifices the value of accountable political decisionmaker for that of independent decisionmaker; it does not balance those values.

Nor is procedural due process analysis a viable substitute because it, too, includes an appearance of fairness element. Due process analysis does not define an appearance of unfairness any more clearly than does the appearance of fairness doctrine and does not answer the threshold question of what constitutes a quasi-judicial proceeding. Therefore, it would not advance jurisprudence to abandon the appearance of fairness doctrine in favor of due process analysis, nor provide more certainty.

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195. A mechanism exists for cities and towns to provide for the replacement of a biased staff person with a staff person from another jurisdiction. Washington law authorizes cities, towns, and special districts to enter agreements with other government entities to share the cost and usage of, or pay a reasonable fee for, services or equipment. WASH. REV. CODE §§ 39.34.010–.920 (1985). Smaller towns and cities frequently use these agreements, known as interlocal agreements, to expand their services more economically. Thus, several cities in a county could contract for the services of staff that might be involved in quasi-judicial proceedings, at a reasonable fee, if a staff person should be disqualified. Telephone interviews with City Clerks of Edmonds, Lake Forest Park, and Lynnwood, Washington (January 8, 1986) (notes of interviews on file with the *Washington Law Review*).

The Washington legislature has attempted to ameliorate the conflict in values that results from application of a bias standard to elected officials by statutorily modifying the doctrine. That task is incomplete. The legislature or the court could provide a clearer definition of quasi-judicial proceedings (the threshold determination for application of the doctrine), an enumeration of the circumstances in which the appearance of unfairness would be most likely to occur, and a recognition of the role of staff members in the process and accommodation for the possibility that their biases may make a decision appear unfair.

The appearance of fairness doctrine creates difficulties for quasi-judicial decisionmakers because of their dual role as legislators and adjudicators. Abandoning the doctrine will only result in a need to develop another because of the inadequacy of existing analogous jurisprudence.[196] Perfecting the doctrine is a far better alternative.

Carolyn M. Van Noy

196. In a recent decision the King County Superior Court held that a Bellevue City Council member's attendance at a building project opponent's fundraising meeting prior to a vote that denied approval of the project was a violation of the doctrine. *West Main Assocs. v. City of Bellevue*, No. 85-2-13557-1 (King County Super. Ct. Wash. April 21, 1986).