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## New Rules for Retiring Judges and Firms That Hire Them

By Sean T. Carnathan, Litigation News Associate Editor

The New Jersey Supreme Court has issued bright line rules for judges seeking post-judicial employment and law firms who recruit them. In *DeNike v. Cupo*, the court's order of a full retrial to remedy the appearance of impropriety—despite finding no actual bias—is a warning to both bench and bar.

Shortly after a bench trial before a respected New Jersey state court judge, plaintiff's counsel invited the judge to join his law firm when the judge reached mandatory retirement age, which was only a month away. The judge eventually did join the firm.

After that offer and before the judge's retirement, the defendant from the bench trial case questioned the applicable interest rate awarded, and contended he should receive a \$98,530 credit against the sum awarded. Plaintiff objected and each party submitted a proposed order. The court adopted plaintiff's proposed order with some modifications,

denying defendant's motion to credit him with \$98,530.

When the judge later joined the plaintiff's law firm, the defendant moved to vacate the judgment and requested a new trial. Both the trial court judge, who reviewed the motion to vacate, and the New Jersey Appellate Division affirmed the judgment as entered, finding that only "ministerial" tasks remained after the employment negotiations began, and there was no violation of any canon of ethics.

The New Jersey Supreme Court disagreed. In an opinion referring to both Rule 1.12 of the Rules of Professional Conduct for attorneys and Canon 3(C)(1) of the Code of Judicial Conduct, the Supreme Court vacated the judgment. It held that the circumstances were such that "a reasonable, fully informed person [would] have doubts about the judge's impartiality." "A full retrial is required to restore public confidence in the integrity and impartiality of the proceedings," the court concluded.

"Judges are bound by different rules and a higher standard than lawyers," observes Ann Marie Painter, Dallas, cochair of the Section of Litigation's Employment and Labor Relations Committee. "The appearance of impropriety is not a lawyer issue under the rules of professional responsibility," notes Painter. But it is clearly an issue lawyers need to consider when discussing employment with sitting judges.

Firms need to be sensitized to the appearance of impropriety standard, and avoid "jeopardizing their client relationship by being too anxious" to hire a sitting judge, observes Painter.

"This is a very hot area," says Penny White, Knoxville, TN, cochair of the Section's Task Force on the Independence of the Judiciary. "The appearance standard garnered a lot of attention when the ABA rewrote the Model Code of Judicial Conduct." During the 2007 revision of the Model Code of Judicial Conduct, the ABA panel recommended diluting the appearance standard, concerned that the standard was too vague and could lead to unfair judicial discipline. After widespread criticism from both bench and bar, however, the panel reinstated the obligation to avoid the appearance of impropriety in the new Model Code.

"It seems to me that the New Jersey Supreme Court got it right," says White. "A judge who accepts the honor of judicial office must sacrifice. . . . Given the trust that we must place in our judicial officers, and the honor that the office should bestow upon them, the requirement that they forego lining up employment with a firm who has cases in which the judge is presently participating does not seem like much to ask."