Is it better to be ethical or to appear ethical?

BY NICHOLAS BIRDSONG

If something looks like a duck and quacks like a duck, then it probably is a duck.

But what if it were a talented goose in disguise? Would it make any difference to a person who likes watching ducks? Wouldn’t some avid duck-watchers be more disappointed by an ugly duck than a deceptive goose?

If those seem like odd questions, look at them as a thought experiment regarding the importance of perception in the context of government ethics. A well-functioning government relies on the public’s faith and perception of legitimacy. Legitimacy, particularly in a representative democracy, requires the perception that the state and its leaders are acting in the public interest.

Government ethics oversight encourages righteous behavior by revealing and punishing officials who abuse positions of trust. Consequently, ethical rules strengthen the state by enhancing legitimacy in the eyes of the public.

But, are we a bit like the duck-watchers above who care more about the view than the truth? Does it matter more that government appears ethical than it actually be ethical? To some, this question may seem counterintuitive, even offensive. Modern ethicists often critique appearance ethics by citing the 18th-century novel “Tom Jones.” The villain of the story manipulates the “ornaments of decency and decorum” to appear ethical and malign the genuinely honorable protagonist. The story demonstrates how this sort of “ethics” can be, itself, unethical.

Few would describe attempts to address the appearance of impropriety as unethical, though such rules have been challenging to implement in non legislative contexts. The American Bar Association, for example, adopted a model rule in 1932 based on a biblical passage that forbade “all appearance of evil.” The rule was removed soon after because it was too vague to be enforced, unpredictably and subjectively applied, and often redundant because of more specific ethical prohibitions.

Critics have suggested replacing general appearance-of-impropriety prohibitions with rules that forbid specific actions that tend to appear corrupt. Revolving-door prohibitions, for example, provide a bright-line rule against state employees and officials leaving public service to immediately go to work as lobbyists. The practice is not inherently unethical or contrary to the public interest, but it can create the perception and increase the risk that well-funded special interests are able to unethically buy influence.

On the other hand, rules using an appearance-of-impropriety standard can be more effective at preventing, revealing and punishing instances of actual misconduct than those limited to what’s banned specifically by statute or regulation. An ethics board could avoid the arduous task of proving a corrupt act occurred and instead simply demonstrate how the circumstances appear unethical.

Proper appearances may also matter more when applied to public service than the context of the ABA’s rules for private practice attorneys, justifying broader restrictions. An objective “reasonable, well-informed person” standard might help avoid the subjective and unpredictable application of appearance-based standards.

Being ethical is likely more important than appearing ethical, but appearances can help inform the development of ethics rules or be used as a standard of conduct. A middle road might incorporate aspirational rules that encourage avoiding the appearance of impropriety while stopping short of naming consequences for violating them. Even those most wary of the darker side of appearance ethics would likely see little harm in aspiring to avoid actions that appear unethical.

After all, as in the duck test, if something looks unethical and sounds unethical, then it probably is unethical.

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