JUDICIAL ETHICS:

WHAT'S A JUDGE TO DO?

Presented By:
Hon. Randy Sue Marber, *Chair*
Hon. Vito M. DeStefano
Susan Fagen Britt, Esq.
Matthew Flanagan, Esq.
Tracy Frankel, Esq.
Edgar A. Hirsch, III, Esq.
Omid Zareh, Esq.

JUDICIAL ETHICS PROGRAM AGENDA

Time:	
5 min	Introduction of Program and Panel *Hon. Randy Sue Marber*
20-25 min	Judicial Ethics Framework and History Discussion Discussion *Hon. Vito M. DeStefano*
5-10 min	Q + A/ Discussion
30 min	To Recuse or Not to Recuse? Q +A/ Discussion *Tracy Frankel, Esq.* *Omid Zareh, Esq.*
30 min	Welcome to "Attractive Nuisance" Q +A/ Discussion *Matthew Flanagan, Esq.* *Susan Fagen Britt, Esq.* *Edgar A. Hirsch, III, Esq.*
5 min	Conclusion *Hon. Randy Sue Marber*

BIOGRAPHY OF JUSTICE RANDY SUE MARBER

Justice Randy Sue Marber was elected in November 2006 to the Supreme Court of the State of New York in the Tenth Judicial District which includes all of Nassau and Suffolk Counties. She currently presides in a civil part in the Supreme Court in Mineola. Prior to her election, she served from 2002 through 2006 as a Judge of the Nassau County District Court. In District Court she presided over a variety of matters including civil bench and jury trials, criminal cases and landlord-tenant disputes. She is a past President of the Nassau County District Court Judges Association.

Prior to taking the bench, from January 2000 until December 2001, Justice Marber was the Principal Law Clerk/Law Secretary to New York State Supreme Court Justice and Associate Appellate Term Justice Allan L. Winick in Mineola. Before joining the Unified Court System, Justice Marber was a Senior Associate and Trial Attorney at Curtis Zaklukiewicz Vasile Devine and McElhenny in Merrick where she served as outside counsel to various insurance carriers and self-insured corporations, primarily in the defense of personal injury litigation. She also worked as Staff Counsel to the Hanover Insurance Company at Huenke & Rodriguez in Melville in a similar capacity.

Justice Marber is a graduate of the Boston University School of Law and the University of Rochester. She is admitted to practice in the State and Federal Courts of NY and NJ as well as the United States Supreme Court.

Justice Marber has been involved in a number of community organizations, including her local civic association, the Syosset-Woodbury Chamber of Commerce and school PTA. She has participated in various autism awareness events. Justice Marber serves on the Board of Trustees of Temple Beth Torah in Westbury.

Justice Marber lectures for the New York State and the Nassau County Bar Associations, the NYS Office of Court Administration, the NYS Academy of Trial Lawyers and other organizations. She has served as a high school mock trial tournament judge and judges law school moot court competitions. She is a member of the Speakers Bureau of the Nassau County Court System. Justice Marber regularly participates in Career Day events for schools throughout Long Island and lectures as part of "The Law Squad," which teaches high school students how the law impacts their lives. She appeared on an episode of "The Law Squad" which aired on cable television.

Justice Marber is a member of the New York State Bar Association, Bar Association of Nassau County, Suffolk County Bar Association, Nassau-Suffolk Trial Lawyers Association, New York State Trial Lawyers Association (NYSTLA), Association of Trial Lawyers of America (ATLA), Women's Bar Association, the Huntington Lawyers Club and the Theodore Roosevelt American Inn of Court.

Justice Marber is currently on the Civil Law Advisory Committee and the Operations Committee of the New York State Office of Court Administration. She is also a member

of the Judicial Hearing Officer Selection Advisory Committee for the Second Judicial Department, Tenth Judicial District.

Justice Marber is also a member of the National Association of Women Judges and has served on the District Court Committee, Women in the Courts Committee, Criminal Courts Committee and the Supreme Court Committee of the Nassau County Bar Association. She previously served as liaison between the Supreme Court Committee and the Law Secretaries Association in Nassau County. She is also a member of Yashar and the Jewish Lawyers Association.

Justice Marber is a past member of CSEA.

Justice Marber grew up on Long Island and now resides in Jericho. She has two adult children.

Vito M. DeStefano is a New York State Supreme Court Justice presiding in the Commercial Division. He was elected to Supreme Court in 2007. Prior to serving in the Supreme Court, Judge DeStefano was a Nassau County District Court Judge for four years. In his judicial capacity, Judge DeStefano has handled thousands of civil and criminal matters from commencement through verdict or decision.

He is the author of many published decisions covering a wide array of legal issues. In 2004, Judge DeStefano was profiled in theNew York Law Journal for his successful efforts in settling 1,400 no-fault insurance cases pending in District Court.

Judge DeStefano has served as a member of the Advisory Committee on Judicial Ethics("ACJE") since 2009. The ACJE is comprised of judges and retired judges and provides ethics advice to the New York State Judiciary.

Judge DeStefano has been an adjunct professor at Hofstra University School of Law, St. John's University School of Law, Long Island University C.W. Post School of Accountancy and at Molloy College in the undergraduate and graduate business programs. Among the courses taught by Judge DeStefano are Business Ethics (to MBA students) and Lawyers' Ethics at Hofstra University School of Law. In the summer of 2016, Judge DeStefano co-taught advanced argumentation at St. John's University School of Law (with DC Judge Joseph Bianco). He is currently teaching Professional Responsibility at St. John's; in the Fall 2017 semester, Judge DeStefano will be teaching New York Civil Practice at St. John's.

Judge DeStefano is a frequent continuing legal education lecturer.

From 1999 through 2003, Judge DeStefano was as an associate at a major mid-town lawfirm. A substantial part of his practice involved appellate work and insurance litigation of alltypes. Before entering private practice, Judge DeStefano served as an Appellate Court Attorney at the Appellate Division Second Judicial Department. Judge DeStefano received his juris doctor degree from Brooklyn Law School and his Bachelor of Arts Degree in Philosophy and Religious Studies (magna cum laude) from Wagner College. He graduated from Stuyvesant High School and was born in Brooklyn, New York.

SUSAN FAGEN BRITT

Susan Fagen Britt has been a member of the New York bar since 1985, and has been a member of the bar of the U.S. District Courts for the Southern and Eastern Districts of New York since 1985.

Ms. Britt is a founding member of Hirsch, Britt & Mosé in Garden City, New York, which was established in 1997. Ms. Britt was an associate and then a partner at Matturro & Hirsch. Ms. Britt was associated with the firm of Rivkin, Radler & Kremer in Uniondale where she practiced for eight years. She is a trial attorney and has tried medical malpractice cases, personal injury cases, as well as arbitration matters. She has handled major general liability, products liability, professional liability and civil RICO matters.

She is an Instructor in the National Institute for Trial Advocacy and a member of the Board of Directors of the Theodore Roosevelt Chapter of the American Inns of Court. She is an Assistant Adjunct Professor of Medicine at the New York College of Osteopathic Medicine in Old Westbury, New York and has lectured for "in-service" programs at Franklin Hospital Medical Center, the Northport Veterans Administration Hospital and LaGuardia Hospital. Ms. Britt has also taught at Hofstra University School of Law. She has been a member of the Medical-Legal Committee of the Nassau County Bar Association and has lectured for the Nassau Academy of Law. Ms. Britt has served on the Board of Trustees for the American Lung Association of Nassau-Suffolk Counties, New York. Ms. Britt was also a member of the Institutional Review Board at the New York College of Osteopathic Medicine. Also Ms. Britt participates as a mediator in the Supreme Court, Nassau County.

Prior to law school, Ms. Britt practiced as a registered nurse at Brookdale University Hospital Medical Center and served as a lecturer in microbiology at Brooklyn College.

Ms. Britt is a graduate of Hofstra University School of Law. She completed her undergraduate studies at Adelphi University, where she majored in Biology.

Matthew Flanagan is a 1989 graduate of Fordham University and received a Juris Doctorate degree from St. John's University School of Law in 1992. He is a skilled litigator with extensive trial and appellate experience in the area of legal malpractice defense, professional liability and general litigation. He has successfully argued numerous appeals in the Appellate Divisions for the First, Second and Third Departments, and New York's highest court: the Court of Appeals.

Mr. Flanagan has been named annually to the New York *Super Lawyers* list as one of the top attorneys in the New York Metropolitan area since 2012, and has been awarded a rating of AV Preeminent™ by Martindale-Hubbell. The Rating is the Highest Possible Rating in both Legal Ability and Ethical Standards, and was awarded following a Peer Review Rating Process, which included surveys of judges and other attorneys. He has also been named annually as one of the top professional liability and legal malpractice defense attorneys on Long Island by LexisNexis Martindale-Hubbell, and has been given an AVVO rating of "Superb" (10.0 out of 10.0).

Mr. Flanagan is admitted to practice before the Courts of the State of New York, the United States District Courts for the Southern and Eastern Districts of New York, and the United States Court of Appeals for the Second Circuit. He is a member of the American Bar Association, New York State Bar Association, the Nassau County Bar Association and the Theodore Roosevelt American Inn of Court.

Mr. Flanagan is a frequent lecturer regarding legal malpractice prevention and defense, and ethics and professional liability.

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Tracy Frankel, Esq. is a Partner at Farber Brocks & Zane, LLP where she concentrates in the area of Appellate Practice. Tracy initiated and leads the firm's Appellate Department, which handles appeals brought in from outside counsel as well as the appeals for the firm. She has presented appeals in various Appellate Departments in the State of New York as well as the New York Court of Appeals. Tracy counsels attorneys on litigation strategy from a case's inception through trial in areas such as Labor Law; Personal Injury; Property Damage; Products Liability; Defamation; Construction Claims; Professional Malpractice; Construction and Insurance Disputes. In 2016, Tracy was honored as one of Long Island's Outstanding Women in Law by Hofstra's Center for Children Families and the Law in the area of Appellate Practice. Tracy was also selected as a New York Metro Area Super Lawyer in the area of Appellate Practice for 2015 and 2016 and is a Fellow of the Litigation Counsel of America. Tracy graduated from the Benjamin N. Cardozo School of Law in 1999 and earned a BA from the University of Michigan with High Honors in Communications in 1996. She is licensed in the Federal and State Courts in New York and New Jersey as well as the Courts in the State of North Carolina.

Tracy is also in her second term as an elected Trustee of the Syosset Central School District Board of Education where she has served on the Policy Committee's 2-year effort to overhaul the District's entire Policy Manual and participated on the Food Allergy Committee which developed Syosset's first policy to reduce accidental exposure and improve crisis response to life-threatening food and other allergies in the schools.

EDGAR A. HIRSCH III

Edgar A. Hirsch has been a member of the New York State Bar since 1980 and the United States District Court for the Eastern District of New York since 1984.

Mr. Hirsch was formerly associated with the firms of Martin, Clearwater & Bell and Kroll, Pomerantz & Cameron. He was a partner in the medical litigation unit of Rivkin, Radler & Kremer. Prior to founding the firm, Mr. Hirsch had spent five years as a partner and senior trial attorney at Matturro & Hirsch. His responsibilities include trial and appellate work in the courts of the State of New York and the Federal Courts.

Mr. Hirsch is a member of the Theodore Roosevelt Chapter of the American Inns of Court, an organization comprised of prominent judges, law professors and practicing attorneys. He has served as a member of the Medical Legal Committee of the Nassau County Bar Association and has lectured for the Nassau Academy of Law. Mr. Hirsch has served as a guest lecturer at the New York College of Osteopathic Medicine and has lectured at North Shore University Hospital.

Mr. Hirsch is a graduate of the Syracuse University College of Law where he served as an editor of the Syracuse Law Review. His undergraduate training was at the University of Virginia where he graduated magna cum laude.

WZMP
Weinberg Zareh Malkin Price LLP

Omid Zareh

Mr. Zareh is a founding partner of Weinberg Zareh Malkin Price LLP.

He focuses on the needs of executives and their companies in corporate planning and all phases of complex, commercial arbitration and litigation. He advises in varied areas of law including attorney professional responsibility, technology, intellectual property, real property, and contractual and corporate disputes. His clients range from law firms, entrepreneurs, start-up companies, established financial companies, and seasoned investors.

Mr. Zareh is a member of the bars of New York State and New Jersey, as well as the Federal Circuit. He is an active member of the NYU Law Alumni Association (a former Vice President), the Long Island Entrepreneurs Group where he serves as General Counsel currently, and the Nassau County Bar Association (former Chair of the Ethics Committee and Co-Chair of the Intellectual Property Committee). He also has participated in a number of community and professional organizations, and often lectures about the law. Mr. Zareh also serves as an officer of real estate holding companies. While attending New York University Law School, Mr. Zareh was the Legal Theory Editor of the Review of Law and Social Change.

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The Advisory Committee on Judicial Ethics

In 1987, the Committee was formed to help New York State judges and justices adhere to the high standards set forth in the Rules. In 1988, the legislature codified the Committee's creation in Judiciary Law §212(2)(l), which provides that whenever a judge acts in accordance with an advisory opinion of the Committee, that act is "presumed proper" for purposes of any subsequent investigation by the New York State Commission on Judicial Conduct. Since then, the Committee has issued between 100 and 250 formal opinions annually in response to questions from judges and justices about the propriety of their own political and other activities. Those opinions set forth the Committee's interpretations of the Rules regulating political activities of judicial candidates, providing guidance for circumstances not specifically governed by a particular rule.

Search ACJE opinions

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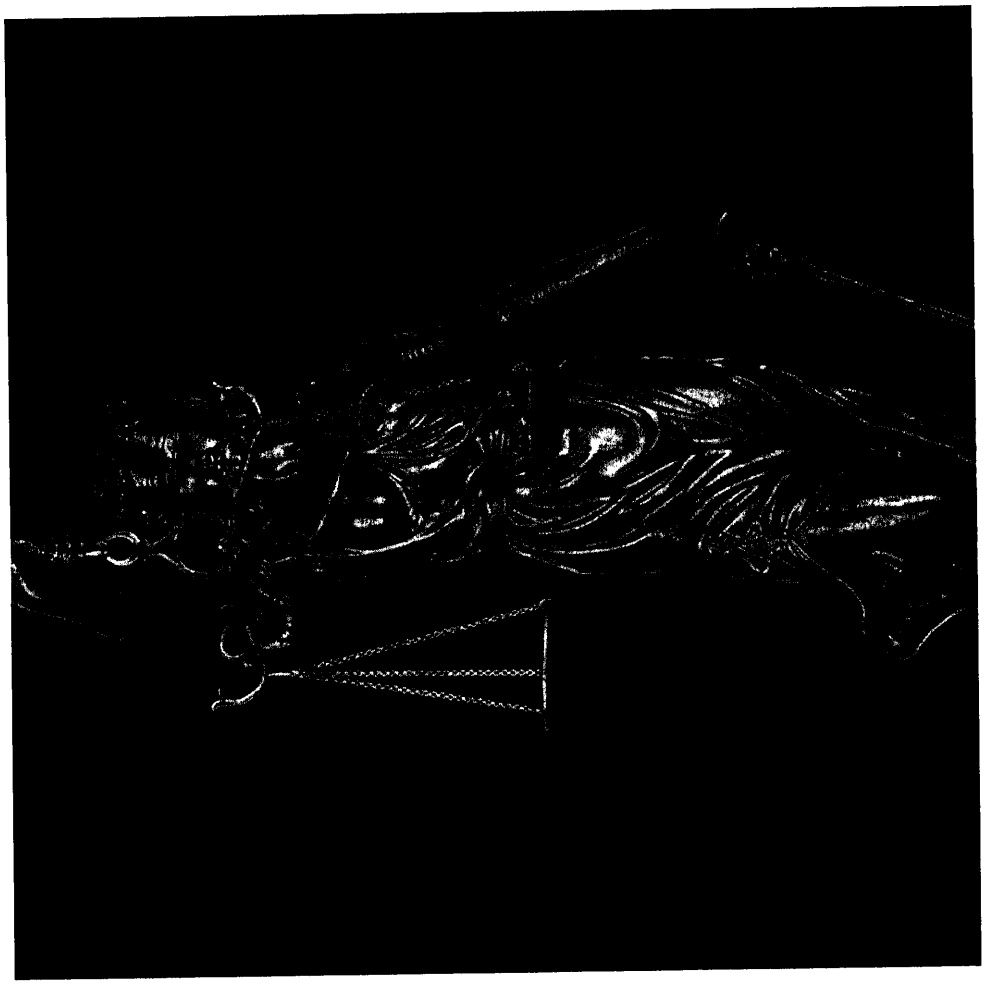

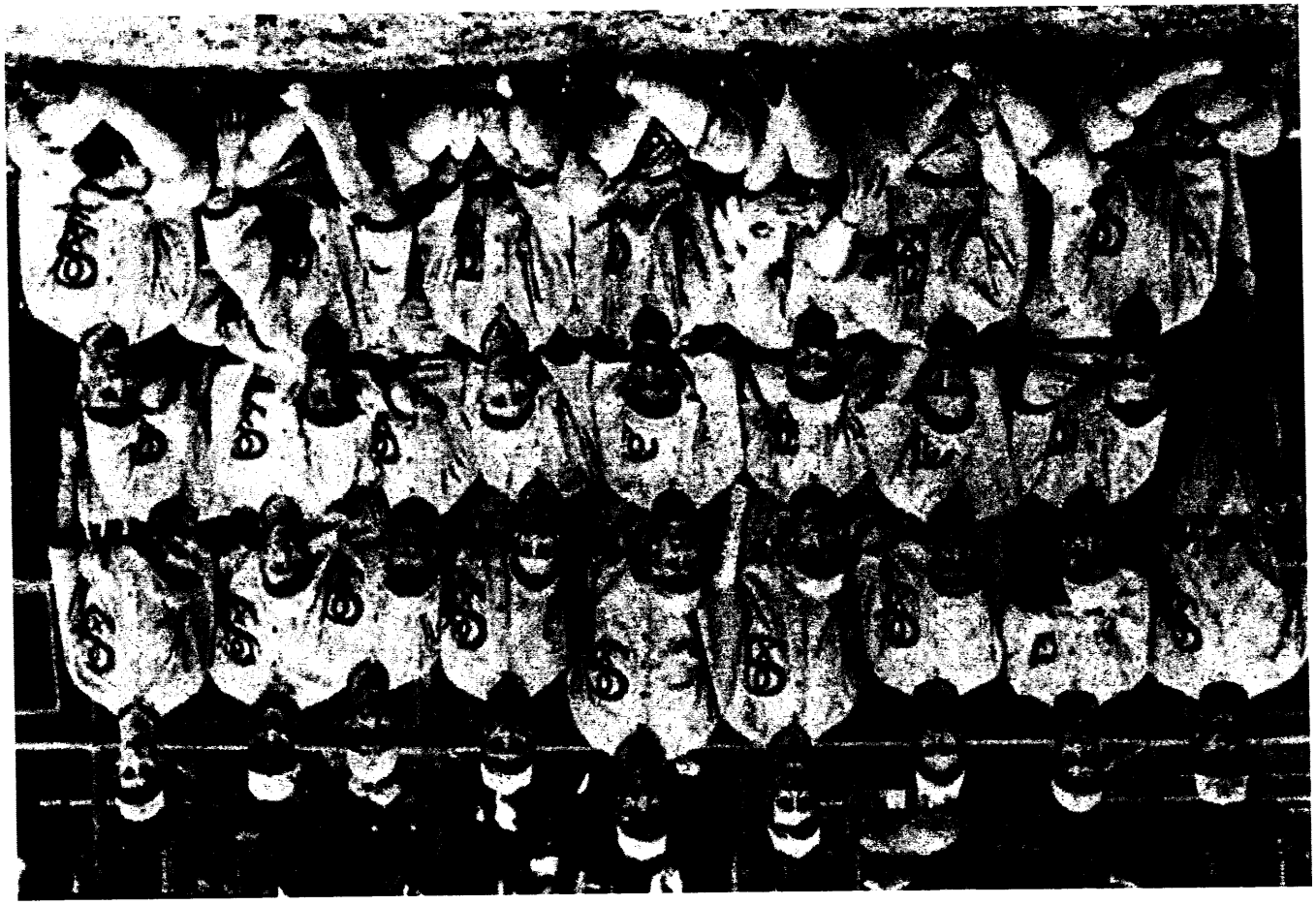

ABA Model Code of Judicial Conduct

- **CANON 1**
  A judge shall uphold and promote the, independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.
- **CANON 2**
  A judge shall perform the duties of judicial office impartially, competently, and diligently.
- **CANON 3**
  A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.
- **CANON 4**
  A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the , integrity, or impartiality of the judiciary.

- http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct.html

NY Rules Governing Judicial Conduct
22 NYCRR 100.1, et seq.

100.1 A judge shall uphold the integrity and independence of the judiciary

100.2 A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities

100.3 A judge shall perform the duties of judicial office impartially and diligently

100.4 A judge shall so conduct the judge's extra-judicial activities as to minimize the riask of conflict with judicial obligations

100.5 A judge or candidate for elective judicial office shall refrain from inappropriate political activity

NY Judiciary Law

- § 14. Disqualification of judge by reason of interest or consanguinity.

  A judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding to which he is a party, or in which he has been attorney or counsel, or in which he is interested, or if he is related by consanguinity or affinity to any party to the controversy within the sixth degree. The degree shall be ascertained by ascending from the judge to the common ancestor, descending to the party, counting a degree for each person in both lines, including the judge and party, and excluding the common ancestor. But no judge of a court of record shall be disqualified in any action, claim, matter, motion or proceeding in which an insurance company is a party or is interested by reason of his being a policy holder therein. No judge shall be deemed disqualified from passing upon any litigation before him because of his ownership of shares of stock or other securities of a corporate litigant, provided that the parties, by their attorneys, in writing, or in open court upon the record, waive any claim as to disqualification of the judge.

175 FRD 364 (1998)

- http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges
- Canon 1: A Judge Should Uphold the Integrity and Independence of the Judiciary
  Canon 2: A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities
  Canon 3: A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently
  Canon 4: A Judge May Engage in Extrajudicial Activities That are Consistent With the Obligations of Judicial Office
  Canon 5: A Judge Should Refrain From Political Activity
  Compliance with the Code of Conduct

28 USC 455(a)-(f): Disqualification

- https://www.law.cornell.edu/uscode/text/28/455

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

- The disqualification section of the code is applicable to the US Supreme Court

- compare – NY ACJE Op 11-125

http://www.courts.state.ny.us/ip/judicialethics/opinions/11-125.htm

E) Disqualification – NY

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) (i) the judge has a personal bias or prejudice concerning a party or (ii) the judge has personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge knows that (i) the judge served as a lawyer in the matter in controversy, or (ii) a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or (iii) the judge has been a material witness concerning it;

(c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other interest that could be substantially affected by the proceeding;

(d) the judge knows that the judge or the judge's spouse, or a person known by the judge to be within the sixth degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding;

(ii) is an officer, director or trustee of a party;

(iii) has an interest that could be substantially affected by the proceeding;

(e) The judge knows that the judge or the judge's spouse, or a person known by the judge to be within the fourth degree of relationship to either of them, or the spouse of such a person, is acting as a lawyer in the proceeding or is likely to be a material witness in the proceeding.

(f) the judge, while a judge or while a candidate for judicial office, has made a pledge or promise of conduct in office that is inconsistent with the impartial performance of the adjudicative duties of the office or has made a public statement not in the judge's adjudicative capacity that commits the judge with respect to

(i) an issue in the proceeding; or

(ii) the parties or controversy in the proceeding.

(g) notwithstanding the provisions of subparagraphs (c) and (d) above, if a judge would be disqualified because of the appearance or discovery, after the matter was assigned to the judge, that the judge individually or as fiduciary, the judge's spouse, or a minor child residing in his or her household has an economic interest in a party to the proceeding, disqualification is not required if the judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

(F) **Remittal of Disqualification.** A judge disqualified by the terms of subdivision (E), except subparagraph (1)(a)(i), subparagraph (1)(b)(i) or (iii) or subparagraph (1)(d)(i) of this section, may disclose on the record the basis of the judge's disqualification. If, following such disclosure of any basis for disqualification, the parties who have appeared and not defaulted and their lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge believes that he or she will be impartial and is willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

Rule 2.11: Disqualification

- http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_11disqualification.html

- Comment: [1] Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (6) apply. In many jurisdictions, the term "recusal" is used interchangeably with the term "disqualification."

Commission on Judicial Conduct (appealed decisions)

- http://www.scjc.state.ny.us/appealed_decisions.htm

- Note that the Court of Appeals can increase or decrease the penalty….

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D30564
C/hu

_____AD3d_____

Argued - February 22, 2011

PETER B. SKELOS, J.P.
RUTH C. BALKIN
LEONARD B. AUSTIN
SANDRA L. SGROI, JJ.

2010-07562

DECISION & ORDER

Daniel Silber, appellant, v Eda Silber, respondent.

(Index No. 200532/06)

Gassman, Baiamonte, Betts & Tannenbaum, P.C., Garden City, N.Y. (Stephen Gassman and Cheryl Y. Mallis of counsel), for appellant.

Robert Hiltzik, Jericho, N.Y., for respondent.

In an action for a divorce and ancillary relief, the husband appeals from an order of the Supreme Court, Nassau County (Gartenstein, J.H.O.), dated July 21, 2010, which granted the wife's motion to recuse Judicial Hearing Officer Stanley Gartenstein from the trial of the action.

ORDERED that the order is reversed, on the facts and in the exercise of discretion, with costs, the wife's motion to recuse Judicial Hearing Officer Stanley Gartenstein from the trial of the action is denied, and the matter is remitted to the Supreme Court, Nassau County, for further proceedings on the complaint.

After 16 days of testimony in this contentious divorce action before a judicial hearing officer (hereinafter the JHO), the JHO learned from a member of his family that the family member had just been hired by the husband's father to babysit for the husband's children for four days. The husband's father was unaware that the babysitter and the JHO were members of the same family. Upon learning of the hiring, the JHO immediately convened the attorneys and disclosed the situation. Eventually, upon the wife's motion, the JHO recused himself. The husband appeals.

Absent a legal disqualification under Judiciary Law § 14, a court is the sole arbiter of

the need for recusal, and this "discretionary decision is within the personal conscience of the court when the alleged appearance of impropriety arises from inappropriate awareness of 'nonjudicial data'" (*People v Moreno,* 70 NY2d 403, 405-406, quoting *People v Horton*, 18 NY2d 355, 362, *cert denied* 387 US 934; *see Matter of Alyssa A.* [*Michelle N. —Sandra N.*], 79 AD3d 740, 742, *lv denied* 16 NY3d 704; *Irizarry v State of New York,* 56 AD3d 613, 614; *Matter of Imre v Johnson,* 54 AD3d 427, 427-428; *EECP Ctrs. of Am. v Vasomedical, Inc.,* 277 AD2d 349, 350; *People v Fischer,* 143 AD2d 1036). Additionally, the Court of Appeals has noted that while "it may be the better practice in some situations for a court to disqualify itself in a special effort to maintain the appearance of impartiality . . . [e]ven then, however, when recusal is sought based upon 'impropriety as distinguished from legal disqualification, the judge . . . is the sole arbiter'" (*People v Moreno,* 70 NY2d at 406, quoting *People v Patrick,* 183 NY 52, 54). Nevertheless, when there is no ground for recusal, recusal should not be ordered, especially when prejudice will result. Indeed, "'[a] judge has an obligation not to recuse himself or herself, even if sued in connection with his or her duties, unless he or she is satisfied that he or she is unable to serve with complete impartiality, in fact or appearance'" (*Robert Marini Bldr. v Rao,* 263 AD2d 846, 848, quoting *Spremo v Babchik,* 155 Misc 2d 796, 799, *mod on other grounds* 216 AD2d 382, *cert denied* 516 US 1161).

Under the unique circumstances of this case, recusal was not warranted. Although we understand the distress that the JHO felt upon having a family member implicated in the case, he, himself, stated emphatically, several times, that he could be fair. Moreover, his prompt action when he learned of the situation concerning his family member would firmly convince any fair-minded observer that there was no reasonable ground for questioning his fairness and impartiality. Finally, the JHO's family member was in no position to offer any testimony in the case, much less material testimony (*see* 22 NYCRR 100.3[E]).

SKELOS, J.P., BALKIN, AUSTIN and SGROI, JJ., concur.

ENTER:

Matthew G. Kiernan
Clerk of the Court

Opinion 13-22

March 14, 2013

Digest: A judge who is not in his/her window period for election may not participate in a politically sponsored sporting event in which one local political party's team will compete against another local political party's team, where the purpose of the event is to improve both parties' public image.

Rules: 22 NYCRR 100.0(Q); 100.2; 100.2(A); 100.5(A)(1); 100.5 (A)(1)(I)-(iii); 100.5(A)(1)(d); 100.5(A)(1)(g); 100.5(A)(2).

Opinion:

A judge who is not in his/her window period asks whether he/she may participate in an informal, friendly sporting event organized by two local political parties. The judge states that the event is not a fund-raiser and is not in furtherance of a partisan political purpose. Rather, the game's purpose is to demonstrate publicly that party members on both sides of the aisle can put their differences aside and play together. The judge has also provided a copy of a newspaper article about a similar event held in a previous year. Among other things, the article identifies by name several participants who were running for election at the time.

A judge must always avoid even the appearance of impropriety (*see* 22 NYCRR 100.2) and must always act in a manner that promotes the public's confidence in the judiciary's integrity and impartiality (*see* 22 NYCRR 100.2[A]). Generally, a sitting judge is prohibited from engaging either directly or indirectly in any political activity except in furtherance of his/her own campaign for election or re-election during the applicable window period (*see* 22 NYCRR 100.5[A][1]-[2]; 100.0[Q] [defining "Window Period"]).[1] Therefore, a judge who is not a candidate within his/her window period must not attend political gatherings (*see* 22 NYCRR 100.5[A][1][g]), and must not permit his/her name to be used in connection with any activity of a political organization (*see* 22 NYCRR 100.5[A][1][d]).

The Committee notes that the goal of the event, *i.e.*, to demonstrate that party members on both sides of the aisle can put their differences aside and play together, is political in nature in that it seeks to improve the public image of both parties.[2] The Committee notes that the event appears to be specifically designed to attract media coverage, whether to address constituents' concerns about political gridlock or to allow party members who are currently seeking election to gain favorable press coverage. Thus, under the circumstances presented, this politically sponsored sporting event is a political gathering in which a sitting judge, outside his/her window period, should not participate. Therefore, the inquiring judge, who is not within his/her Window Period, is prohibited from participating in the event (*see* 22 NYCRR 100.5[A][1][g]).

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[1] A sitting judge may nonetheless vote and identify him/herself as a member of a political party and may engage in political activities as authorized by law and on behalf of measures to improve the law, the legal system or the administration of justice; (*see* 22 NYCRR 100.5[A][1][I]-[iii]).

[2] Although the event appears to be bi-partisan, it cannot be said to be truly non-partisan, as it includes only two of the six ballot-qualified parties in New York.

Opinion 16-79

June 16, 2016

Digest: A judicial candidate may not personally distribute campaign materials that, on their face, invite the public to "donate" to his/her campaign, but may permit his/her campaign committee to do so.

Rules: 22 NYCRR 100.0(Q); 100.5(A)(2)(i)-(ii); 100.5(A)(4)(c); 100.5(A)(5); Opinions 15-121; 13-126; 12-84/12-95(B)-(G); 11-65; 07-135; 01-44.

Opinion:

A non-judge candidate for judicial office asks whether he/she may personally distribute palm cards and other campaign literature that exhort supporters "[t]o volunteer and/or donate to" the candidate by accessing the campaign committee's website.

A judicial candidate, i.e., a judge or non-judge who is seeking public election to judicial office, may personally participate in his/her campaign during the applicable window period (*see* 22 NYCRR 100.0[Q]), but may not personally solicit or accept campaign donations (*see* 22 NYCRR 100.5[A][2][i]; 100.5[A][5]). For example, to support his/her candidacy, a judicial candidate may appear in media advertisements; distribute pamphlets and other campaign literature; and appear and speak at his/her own gatherings, provided he/she does not personally solicit donations (*see* 22 NYCRR 100.5[A][2][i]-[ii]). Nevertheless, he/she may establish a committee of responsible persons to conduct campaigns on his/her behalf, and solicit and accept reasonable campaign donations and public support (*see* 22 NYCRR 100.5[A][5]).[1]

The Committee has previously observed that a judicial candidate's campaign committee may maintain a campaign website and social media pages on the candidate's behalf during his/her applicable window period (*see* Opinions 15-121; 13-126; 12-84/12-95[B]-[G], at question 5; 22 NYCRR 100.5[A][5]). Also, it may solicit campaign donations on its website, provided they are directed to the campaign committee (*see* Opinion 07-135).

Although a judicial candidate may not personally solicit campaign contributions, neither in person nor on his/her own website or social media page, he/she may nevertheless seek non-financial support from the public (*see* Opinions 13-126; 11-65; 01-44). Indeed, it is ethically permissible for a judicial candidate to use an email signature block that states "Please support me in my campaign for [position]! Like us on Facebook" and provides links to the Facebook page and campaign website, where the message contains no explicit reference to financial support or contributions (*see* Opinion 13-126).

Thus, if these campaign materials merely encouraged people "[t]o volunteer" for the candidate by accessing the campaign's website, the candidate could personally distribute them. Instead, they exhort supporters "[t]o volunteer and/or donate to" the candidate. As the campaign materials' explicit reference to donations constitutes a direct solicitation of contributions, the candidate may not personally distribute them. Plainly, members of the candidate's campaign committee may solicit contributions and may therefore distribute such campaign materials on his/her behalf (*see* 22 NYCRR 100.5[A][5]). But the candidate may not personally distribute materials expressly requesting donations (*see id.*).

In sum, the candidate may not personally distribute campaign materials that, on their face, invite the public to "donate" to his/her campaign, but may permit his/her campaign committee to do so.

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[1] This is an express exception to the rule that a candidate "shall not authorize or knowingly permit any person to do for the candidate what the candidate is prohibited from doing under this Part" (22 NYCRR 100.5[A][4][c]).

Opinion 13-126

October 24, 2013

Digest: During the applicable window period, a judicial candidate may use an email signature block on his/her personal email which requests non-financial support from voters and provides links to the campaign committee's social media page and campaign website.

Rules: 22 NYCRR 100.0(Q); 100.5(A)(1); 100.5(A)(1)(h); 100.5(A)(2); 100.5(A)(2)(I); 100.5(A)(4)(a); 100.5(A)(5); Joint Opinion 12-84/12-95[B]-[G]; Opinions 11-65; 08-176; 08-152; 08-43; 07-135; 05-101; 01-44 (Vol. XX); 99-155 (Vol. XVIII).

Opinion:

A sitting judge who is currently a judicial candidate asks whether he/she may, during his/her window period, use an email signature block for his/her personal email that provides links to his/her campaign committee's social media page and campaign website, with language such as:

> "Please support me in my campaign for [position]!
> Like us on Facebook: [Committee Name]
> [campaign website address]"

A judge or non-judge who is a candidate for public election to judicial office may participate in his/her own campaign during his/her window period, subject to certain limitations (*see* 22 NYCRR 100.5[A][1]-[2]; *see also* 22 NYCRR 100.0[Q] [defining "window period"]). For example, a judicial candidate must act in a manner consistent with the impartiality, integrity and independence of the judiciary throughout his/her campaign (*see* 22 NYCRR 100.5[A][4][a]), may contribute to his/her own campaign as permitted by law (*see* 22 NYCRR 100.5[A][2]), and may authorize a committee of responsible persons to solicit and accept funds for his/her campaign (*see* 22 NYCRR 100.5[A][5]).

A judicial candidate's campaign committee may maintain a campaign website on behalf of the candidate during the applicable window period (*see generally* 22 NYCRR 100.5[A][5]; Joint Opinion 12-84/12-95[B]-[G]; Opinion 07-135). For example, the Committee has advised that a judicial candidate may authorize his/her campaign committee to solicit campaign contributions on a website it sponsors, provided that the contributors are directed to send all donations to the campaign committee and not to the candidate him/herself (*see* Opinion 07-135). Such campaign websites may include a profile on a social network or other social media presence (*cf.* Opinion 08-176 [noting that Committee could not "discern anything inherently inappropriate about a judge joining and making use of a social network"]).

Moreover, although a judicial candidate may not personally solicit or accept campaign funds (*see* 22 NYCRR 100.5[A][1][h]; 100.5[A][2][I]; Opinion 08-43), the Rules Governing Judicial Conduct do not prohibit a candidate from personally soliciting and accepting non-financial support. Of particular note, the Committee has advised that a judicial candidate may personally solicit endorsements for his/her election during the judge's window period (*see* Opinions 11-65 [discussing prior opinions]; 01-44 [Vol. XX] [candidate may personally seek the endorsement of the Police Benevolent Association and other organizations]).[1] By analogy, the Committee concludes that a judicial candidate may personally request that voters "like" a social media site maintained by the candidate's campaign committee, as this is a request for non-financial support of the candidate.

Therefore, it is ethically permissible for the inquiring judicial candidate to use the proposed email signature block on his/her personal email during the applicable window period, as the signature block merely requests non-financial support from voters and provides links to campaign websites maintained by the judicial candidate's campaign committee (*see generally* 22 NYCRR 100.5[A][2]; 100.5[A][5]; Opinion 01-44 [Vol. XX]).[2]

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[1] In personally soliciting non-financial support, a judicial candidate must take care to avoid the appearance of impropriety (*see e.g.* Opinions 11-65 [judge who is a judicial candidate should not personally solicit endorsements from individual court officers who work in the judge's court, as this could create an appearance of undue pressure on public employees who might otherwise expect their employment to be completely independent of the outcome of a specific judge's re-election campaign]; 08-152 [judge who is a judicial candidate may ask attorneys who regularly appear before him/her to attend a reception and speak to attendees about their experience appearing before him/her as a judge, as long as he/she takes care to avoid any appearance of undue pressure on the attorneys in making this request]).

[2] The Committee notes that, to avoid any impression that the courthouse is being used for political purposes, a judicial candidate who is a sitting judge should not include a campaign message in the signature block for his/her Unified Court System email (*see* Opinions 05-101 [noting "the danger of a public perception of entanglement of the judiciary itself in the political process"]; 99-155 [Vol. XVIII] [judge may not use court stationery in a re-election campaign, even if the stationery is marked "personal and unofficial"]).

LexisNexis

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1. *People v. Moreno, 70 N.Y.2d 403*

Client/Matter: -None-
Search Terms: 70 N.Y.2d 403
Search Type: Natural Language
Narrowed by:

Content Type	Narrowed by
Cases	-None-

People v. Moreno

Court of Appeals of New York

October 13, 1987, Argued ; November 19, 1987, Decided

No Number in Original

Reporter
70 N.Y.2d 403 *; 516 N.E.2d 200 **; 521 N.Y.S.2d 663 ***; 1987 N.Y. LEXIS 18966 ****

The People of the State of New York, Respondent, v. Carlos Moreno, Appellant

Prior History: [**1]** Appeal, by permission of the Chief Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered November 20, 1986, which affirmed a judgment of the Supreme Court (David Stadtmauer, J.), rendered in Bronx County after a nonjury trial, convicting defendant of murder in the second degree, assault in the first degree and three counts of attempted robbery in the first degree.

People v Moreno, 124 AD2d 1076.

Disposition: Order affirmed.

Core Terms

recusal, impropriety, pretrial, disqualified, nonjury

Case Summary

Procedural Posture
Defendant sought review of a decision from the Appellate Division of the Supreme Court in the First Judicial Department (New York), which affirmed a judgment convicting defendant of murder in the second degree, assault in the first degree, and three counts of attempted robbery in the first degree.

Overview
Defendant argued that his right to a fair trial was violated because recusal was required to avoid the appearance of impropriety based on the bench trial judge's prior knowledge of defendant's record and of inadmissible evidence of his involvement in the crimes charged. On appeal, the court stated that when recusal was sought based upon impropriety as distinguished from legal disqualification, the judge was the sole arbiter. Further, the court ruled that in the absence of a violation of express statutory provisions, bias, prejudice, or unworthy motive on the part of a judge unconnected with an interest in the controversy would not be a cause of disqualification unless shown to affect the result. The court held that a judge who during pretrial adjudication acquired information inadmissible before the fact finder of guilt or innocence was not legally disqualified from conducting a bench trial which defendant chose based on a fully informed waiver of the jury trial right.

Outcome
The court affirmed the decision of the court below, which affirmed a judgment convicting defendant of murder in the second degree, assault in the first degree, and three counts of attempted robbery in the first degree.

LexisNexis® Headnotes

Civil Procedure > Trials > Bench Trials

Civil Procedure > Trials > Jury Trials > Right to Jury Trial

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Disqualification & Recusal

HN1[] A judge, who during pretrial adjudication acquires information inadmissible before the fact finder of guilt or innocence, is not legally disqualified from conducting a bench trial which defendant chose based on a fully informed waiver of the jury trial right.

Civil Procedure > ... > Inability to Proceed > Disqualification & Recusal > General Overview

Civil Procedure > ... > Disqualification & Recusal > Grounds for Disqualification & Recusal > Appearance of Impropriety

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Disqualification & Recusal

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview

Governments > Courts > Judges

HN2[] Absent a legal disqualification under *N.Y. Jud. Law § 14*, a trial judge is the sole arbiter of recusal. This discretionary decision is within the personal conscience of the court when the alleged appearance of impropriety arises from inappropriate awareness of "nonjuridical data." When the alleged impropriety arises from information derived during the performance of the court's adjudicatory function, then recusal could surely not be directed as a matter of law. A court's decision in this respect may not be overturned unless it was an abuse of discretion.

Civil Procedure > Judicial Officers > Judges > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Disqualification & Recusal

Governments > Courts > Judges

HN3[] Unlike a lay jury, a judge by reasons of learning, experience, and judicial discipline, is uniquely capable of distinguishing the issues and of making an objective determination based upon appropriate legal criteria, despite awareness of facts which cannot properly be relied upon in making the decision. Recognizing this key premise, it suffices to say that there is no prohibition against the same judge conducting a pretrial hearing as well as the trial itself.

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Disqualification & Recusal

HN4[] Even the court's appointment of special prosecuting counsel, prior association with a law firm employed by a party, past prosecution of the defendant, or past professional affiliation in a field specialized in by a party do not require the disqualification of a trial justice.

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Disqualification & Recusal

Governments > Courts > Judges

HN5[] When recusal is sought based upon impropriety as distinguished from legal disqualification, the judge is the sole arbiter.

Civil Procedure > ... > Disqualification & Recusal > Grounds for Disqualification & Recusal > Personal Bias

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Disqualification & Recusal

HN6[] In the absence of a violation of express statutory provisions, bias or prejudice or unworthy motive on the part of a judge, unconnected with an interest in the controversy, will not be a cause of disqualification, unless shown to affect the result.

Civil Procedure > Judicial Officers > Judges > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Disqualification & Recusal

HN7[] The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.

Headnotes/Syllabus

Headnotes

Judges -- Disqualification -- Bench Trial -- Judge Who Acquires Inadmissible Information during Pretrial Adjudication

A Judge, who during pretrial adjudication acquires information inadmissible before the fact finder of guilt or

innocence, is not legally disqualified from conducting a bench trial which defendant chose based on a fully informed waiver of the jury trial right. Absent a legal disqualification under Judiciary Law § 14, a Trial Judge is the sole arbiter of recusal. When the alleged impropriety arises from information derived during the performance of the court's adjudicatory function, then recusal could surely not be directed as a matter of law. A court's **[****2]** decision in this respect may not be overturned unless it was an abuse of discretion. Alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the Judge learned from his participation in the case. Accordingly, where defendant made a fully informed waiver of a jury trial, it was not an abuse of discretion for the Trial Justice to deny defendant's motion that the Trial Justice recuse himself on the ground that the Justice's pretrial acquired knowledge of defendant's criminal history and of a suppressed photo array undermined the defense of misidentification.

Counsel: *Alan S. Axelrod* and *Philip L. Weinstein* for appellant. Appellant was denied his due process right to a fair trial by the Trial Judge's refusal to recuse himself despite the fact that he was aware of inadmissible evidence that was seriously prejudicial to the defense. (People v Smith, 63 NY2d 41; Corradino v Corradino, 48 NY2d 894; People v Brown, 24 NY2d 168; People v Sykes, 22 NY2d 159; Matter of Rotwein, 291 NY 116; People v Patrick, 183 NY 52; People v Zappacosta, 77 AD2d 928; People **[****3]** v Corelli, 41 AD2d 939; People v Latella, 112 AD2d 324; Matter of Johnson v Hornblass, 93 AD2d 732.)

Mario Merola, District Attorney (Billie Manning and *Peter D. Coddington* of counsel), for respondent. I. Defendant's guilt was proven beyond a reasonable doubt by overwhelming evidence. II. The trial court properly denied defendant's recusal motion. (People v Mountain, 66 NY2d 197; People v Dancey, 57 NY2d 1033; People v West, 56 NY2d 662; People v Thomas, 50 NY2d 467; People v Alfaro, 66 NY2d 985; People v Satloff, 56 NY2d 745; People v Horton, 18 NY2d 355; People v Tartaglia, 35 NY2d 918; People v Smith, 63 NY2d 41; People v Patrick, 183 NY 52.)

Judges: Bellacosa, J. Chief Judge Wachtler and Judges Simons, Kaye, Alexander, Titone and Hancock, Jr., concur.

Opinion by: BELLACOSA

Opinion

[*404] [201] [***664] OPINION OF THE COURT**

HN1[↑] A Judge, who during pretrial adjudication acquires information inadmissible before the fact finder of guilt or innocence, is not legally disqualified from conducting a bench trial which defendant chose based on a fully informed waiver of the jury trial right.

Defendant and two accomplices **[****4]** were indicted for offenses arising from a robbery of a Bronx service station during which an attendant was killed. A joint pretrial hearing resulted in a photo array being held inadmissible as unduly suggestive; a lineup identification being held admissible; an independent source basis being found for an in-court identification; and, a confession of one defendant implicating all three being held admissible. On motion, defendant Moreno's trial was severed from the confessing codefendant's trial and was consolidated with the other defendant's. The consolidated case, itself eventually **[*405]** severed also, was then assigned to a different Justice for trial, who first conducted and ruled on Sandoval (34 NY2d 371) matters with respect to defendant Moreno. Moreno's attorney at one point advised the Trial Justice of the earlier suppressed photo array evidence.

Defendant Moreno then, against the advice of counsel, made an application to waive a jury trial. The court fully explained the pros and cons of jury and nonjury trials and explicitly informed Moreno during an allocution that, as the Judge who had presided at his *Sandoval* hearing, he would know more than a jury would **[****5]** about his criminal history. Defendant nevertheless duly waived the jury trial.

Moreno's counsel subsequently indicated he was considering an application that the Trial Justice recuse himself because of his knowledge of Moreno's criminal history and of the suppressed photo array. On the day the trial was to commence, counsel formally requested that the Trial Justice recuse himself, arguing that his pretrial acquired knowledge undermined the defense of misidentification. The Trial Justice refused, pointing out that Moreno was made aware of the scope of his knowledge during the allocution prior to executing the jury trial waiver, but he nevertheless offered to allow Moreno to withdraw his waiver. Defendant declined.

Moreno was tried nonjury and alone and was convicted of murder in the second degree, assault in the first degree, and attempted robbery in the first degree. At

sentencing, he moved to set aside the verdict and for a new trial again on the recusal ground. The motion was denied. The Appellate Division affirmed the judgment of conviction.

Defendant argues that his right to a fair trial was violated because recusal is required to avoid the appearance of impropriety based **[****6]** on the bench Trial Judge's pretrial acquired knowledge of defendant's record and of inadmissible evidence of his involvement in the crimes charged.

[*665]** *HN2*[↑] Absent a legal disqualification under *Judiciary Law § 14*, a Trial Judge is the sole arbiter of recusal. This discretionary decision is within the personal conscience of the court when the alleged appearance **[**202]** of impropriety arises from inappropriate awareness of "nonjuridical data" *(People v Horton, 18 NY2d 355, 362; see also, People v Smith, 63 NY2d 41, 68; People v Patrick, 183 NY 52, 54)*. When the alleged impropriety arises from information derived during the performance of the court's adjudicatory function, then recusal could surely **[*406]** not be directed as a matter of law. A court's decision in this respect may not be overturned unless it was an abuse of discretion *(People v Tartaglia, 35 NY2d 918, 919-920; People v Horton, 18 NY2d 355, 362, supra)*.

HN3[↑] Unlike a lay jury, a Judge "by reasons of * * * learning, experience and judicial discipline, is uniquely capable of distinguishing the issues and of making an objective determination" based upon appropriate legal criteria, despite **[****7]** awareness of facts which cannot properly be relied upon in making the decision *(People v Brown, 24 NY2d 168, 172)*. Recognizing this key premise, "it suffices to say that there is no prohibition against the same Judge conducting a pretrial hearing as well as the trial itself" *(People v De Curtis, 63 Misc 2d 246, 249* [App Term], *affd 29 NY2d 608* [suppression hearing Justice not disqualified from presiding over nonjury trial]; *see also, People v Brown, 24 NY2d 168, supra [Huntley* hearing Justice may preside over nonjury trial]; *People v Latella, 112 AD2d 324 [Sandoval* hearing Judge not disqualified from presiding at nonjury trial]).

HN4[↑] Even the court's appointment of special prosecuting counsel *(People v Smith, 63 NY2d 41, 68, supra)*, prior association with a law firm employed by a party *(Corradino v Corradino, 48 NY2d 894, 895)*, past prosecution of the defendant *(People v Tartaglia, 35 NY2d 918, supra; People ex rel. Stickle v Fay, 14 NY2d 683; contra, People v Corelli, 41 AD2d 939)*, or past professional affiliation in a field specialized in by a party *(Matter of Rotwein, 291 NY 116)* do not require the disqualification of **[****8]** a Trial Justice.

Yet, this court has noted that it may be the better practice in some situations for a court to disqualify itself in a special effort to maintain the appearance of impartiality *(Corradino v Corradino, 48 NY2d 894, 895, supra)*. Even then, however, *HN5*[↑] when recusal is sought based upon "impropriety as distinguished from legal disqualification, the judge * * * is the sole arbiter" *(People v Patrick, 183 NY 52, 54, supra; see also, e.g., People v Bartolomeo, 126 AD2d 375, 391, lv denied 70 NY2d 702* [Kaye, J.]; *Matter of Johnson v Hornblass, 93 AD2d 732, 733)*.

In *People v Zappacosta (77 AD2d 928, 930)*, the Appellate Division noted the presence of an "amalgam of peculiar circumstances" which required recusal despite a recognition of the rule that "there is no general prohibition against the same Judge conducting a bench trial as conducted preliminary hearings on the admissibility of evidence" *(id., at 929)*. The **[*407]** Trial Justice, during the plea allocution of Zappacosta's codefendant wife, actively elicited information which incriminated Zappacosta. The information was not necessary to taking the wife's plea, but "constituted information **[****9]** on the ultimate issue of appellant's guilt which the court, as trier of fact, would not otherwise have had" *(id., at 929)*. In analogizing to the rule which permits an individual who withdraws a guilty plea to request a trial before a different Judge *(People v Selikoff, 35 NY2d 227)* **[***666]** and noting its sensitivity to avoiding the appearance of partiality, the Appellate Division held in the exercise of its review function that defendant's recusal motion should have been granted. That exceptional case **[**203]** may not be read to have erected an objective appearance of impropriety test premised on a presumption of irregularity or bias.

Rather, *Matter of Johnson v Hornblass (93 AD2d 732, supra)* is more to the point, noting that *HN6*[↑] "[in] the absence of a violation of express statutory provisions, bias or prejudice or unworthy motive on the part of a Judge, unconnected with an interest in the controversy, will not be a cause of disqualification, unless shown to affect the result" *(id., at 733)*.

Insofar as the purportedly prejudicial information in this case was acquired through the court's performance of its adjudicative responsibilities, the precatory suggestion **[****10]** for recusal as the "better practice" in *Matter of Johnson v Hornblass (id.)* and in *Corradino v Corradino (supra)* has no applicability. *HN7*[↑] "The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on

the merits on some basis other than what the judge learned from his participation in the case" (*United States v Grinnell Corp., 384 U.S. 563, 583*; *see also, Berger v United States, 255 U.S. 22, 31* ["bias or prejudice which can be urged against a judge must be based upon something other than rulings in the case"]).

The radical test defendant advances, equating knowledge acquired as part of pretrial adjudication with an appearance of impropriety thus requiring recusal for bench trial purposes, finds no support in law, ethics or sound policy. It was not an abuse of discretion for the court to deny the recusal motion, so the order of the Appellate Division should be affirmed.

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STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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In the Matter of the Proceeding
Pursuant to Section 44, subdivision 4,
of the Judiciary Law in Relation to

DETERMINATION

DORIS T. APPEL,

a Justice of the Chatham Town Court,
Columbia County.

- -

THE COMMISSION:

Raoul Lionel Felder, Esq., Chair
Honorable Thomas A. Klonick, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci, Of Counsel) for the Commission

Roche, Corrigan, McCoy & Bush, PLLC (by Scott W. Bush) for the Respondent

The respondent, Doris T. Appel, a Justice of the Chatham Town Court, Columbia County, was served with a Formal Written Complaint dated September 15,

2006, containing one charge. The Formal Written Complaint alleged that respondent presided over two matters notwithstanding that she was biased against the defendants' attorney, and that thereafter she barred the attorney from appearing before her based on hearsay information. Respondent filed a Verified Answer dated October 6, 2006.

On March 27, 2007, the Administrator of the Commission, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On May 10, 2007, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Chatham Town Court since 1984. She is not an attorney.

2. On November 30, 2005, respondent's court clerk told respondent about a conversation between a state trooper and the deputy town attorney, which the clerk had overheard. The conversation concerned a traffic stop for speeding on or about September 17, 2005, involving attorney Juliane Massarelli and another motorist, during which Ms. Massarelli provided the other driver with her business card. Respondent concluded from this hearsay information that Ms. Massarelli had acted unprofessionally. Respondent also concluded that Ms. Massarelli believed she should receive special treatment in the adjudication of her speeding ticket, which was heard by respondent's co-judge, because

of her friendship with the deputy town attorney.

3. On the basis of the foregoing, respondent developed a personal bias against Ms. Massarelli.

4. On December 7, 2005, Ms. Massarelli appeared before respondent on behalf of two defendants charged with speeding in violation of the Vehicle and Traffic Law. About six weeks earlier, respondent had been presented with plea agreements in the cases, and Ms. Massarelli's appearance on December 7, 2005, without the defendants, was to supply respondent with proof of the completion by her clients of defensive driving courses and for respondent to assess fines.

5. On December 7, 2005, after finalizing the two Vehicle and Traffic Law charges, respondent informed Ms. Massarelli, in open court, that for personal reasons she did not explain, she would not permit Ms. Massarelli to appear before her in future cases. All of her future cases would be heard by respondent's co-judge Jason Shaw. Respondent refused Ms. Massarelli's request for an explanation at that time. Thereafter, Ms. Massarelli never reappeared before respondent, who never explained to her the reason for respondent's refusal to allow her to appear before her.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(B)(3), 100.3(B)(4) and 100.3(E)(1) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal

Written Complaint is sustained, and respondent's misconduct is established.

By presiding over the sentencing of two defendants represented by an attorney just before announcing that she was barring the attorney from appearing before her in the future, respondent violated Section 100.3(E) of the Rules, which requires disqualification in matters where the judge's impartiality might reasonably be questioned. As a judge, respondent is required to set aside her personal biases and to act impartially; she must not only be, but appear to be, impartial. If she could not do so because of a personal bias, she was required to disqualify herself. While the record gives no indication that respondent's handling of those two matters was influenced by her bias against the attorney, respondent should not have presided in the cases in view of her evident bias.

The record further establishes that respondent barred the attorney from appearing before her in any future matters based solely on unsubstantiated hearsay information about a purported overheard conversation. Without explanation, respondent effectively punished the attorney by announcing in open court that she was barring the attorney from appearing before her in any future case. Respondent's conduct was irresponsible, undignified and demeaning (Rules, §100.3[B][3]). *See, Matter of Hanofee*, 1990 Annual Report 109 (Comm. on Judicial Conduct) (judge refused to hear an attorney's cases for 88 days in an attempt to extract an apology for making remarks the judge deemed offensive). Moreover, by refusing to explain the reason for her precipitous action, respondent never gave the attorney an opportunity to refute the scurrilous information respondent had received.

By reason of the foregoing, the Commission determines that the appropriate disposition is admonition.

Mr. Felder, Judge Klonick, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Harding, Mr. Jacob, Judge Konviser, Judge Peters and Judge Ruderman concur.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct.

Dated: May 14, 2007

Jean M. Savanyu, Esq., Clerk
New York State
Commission on Judicial Conduct

http://www.nycourts.gov/ip/judicialethics/opinions/07-102.htm

Opinion 07-102

June 6, 2007

Digest: A judge who exercises recusal when an attorney appears before him/her is not required to disclose the reason for such recusal.

Rules: 22 NYCRR 100.3(E)(1)(a)(i); 100.3(F); Opinion 91-51 (Vol. VII); Matter of Appel, (Comm. on Jud Conduct, Slip Op [May 14, 2007]).

Opinion:

A judge asks whether he/she must disclose to an attorney the judge's reason for exercising recusal when the attorney appears before him/her. The attorney asked the judge to recuse him/herself because the attorney was representing a client well known to the judge. While the judge did exercise recusal when the attorney appeared before him/her, it was for a reason unrelated to the attorney's professional relationship with that client. The attorney subsequently advised the judge that the matter involving that client was concluded and asked the judge to hear the attorney's other cases.

As the judge's decision to recuse when the attorney appeared before the judge was unrelated to the attorney's professional relationship with the client, the judge advised the attorney by letter that he/she would continue to exercise recusal. On several occasions, the attorney has asked the judge to state his/her reason for the continued recusals, but the judge has declined to reveal it.

In light of the Commission on Judicial Conduct's (Commission) recent decision in Matter of Appel (NY Comm on Jud Conduct, May 14, 2007), the judge now asks whether he/she must disclose to the attorney the reason for the judge's continued recusal from cases in which the attorney appears, and/or whether the judge must provide the attorney an opportunity to be heard concerning the judge's recusal.

In Appel, the Commission admonished the judge for refusing to explain her reasons for prohibiting an attorney from appearing before her in future cases. The Commission found that, based solely on unsubstantiated hearsay information about a purported overheard conversation, the judge had developed a personal bias against the attorney. Nevertheless, the judge finalized two Vehicle and Traffic Law cases in which the attorney represented the defendants. Immediately thereafter, the judge informed the attorney - in open court and in a manner that unnecessarily exposed the attorney to public embarrassment - that for personal reasons the judge did not disclose or explain, the judge would not permit the attorney to appear before her in future cases. The judge simply refused to explain her reasons for declining to hear any cases in which the attorney appeared.

Whether it is proper to sit in a particular case "is a matter confined to the conscience of the particular judge." Opinion 91-51 (Vol. VII); see *also* *People v Moreno*, 70 NY2d 403, 405. Pursuant to the Rules Governing Judicial Conduct, a judge must disqualify him/herself in a proceeding in which the judge's impartiality might reasonably be questioned. 22 NYCRR 100.3(E)(1)(a)(i). The Rules provide for remittal of disqualification where a judge discloses the basis of disqualification on the record, but such disclosure is not mandatory. 22 NYCRR 100.3(F). And, in those situations where recusal is mandatory and therefore remittal is not permitted, *id.*, disclosure may serve no practical purpose.

The judge in the present inquiry has communicated his/her intent to recuse to the attorney by letter, not in open court. Unlike the judge in Appel, there is no indication that the inquiring judge is using recusal to punish or otherwise hurt or embarrass the attorney. The inquiring judge has not acted - nor is he/she proposing to act in future recusals - in an irresponsible, undignified or demeaning manner towards the attorney as the Commission found was the case in Appel.

The Committee believes that, in most cases, judges explain their reasons for recusal, a practice that serves to promote the public's confidence in the integrity and impartiality of the judiciary. However, the Committee strongly believes also that a blanket rule requiring judges to disclose their reasons for recusal in all situations is inadvisable, unnecessary, and counterproductive due to the chilling effect such an edict would have in certain situations where recusal is otherwise and clearly warranted. In the Committee's view, therefore, judges must have the discretion to decide, on a case-by-case basis, whether to disclose their reasons for recusal. This approach is reasonable and makes sense because it both protects judges and others from suffering unnecessary embarrassment or humiliation as the result of a particular disclosure, and it ensures that judges will exercise recusal in all appropriate cases.

Therefore, it is in the inquiring judge's discretion to decline to disclose his/her reason for recusal from cases involving a particular attorney.

http://www.nycourts.gov/ip/judicialethics/opinions/11-125.htm

Opinion 11-125

October 27, 2011

Digest: Whether a judge must disclose the relationship or disqualify him/herself when the judge and an attorney appearing before the judge are acquaintances, friends, or otherwise interact socially depends on such factors as the nature of the relationship with the attorney, the inter-relationships among their respective immediate family members, the frequency and context of their contacts, and whether they or their respective family members share confidences.

Rules: Judiciary Law §14; 22 NYCRR 100.2; 100.2(A); 100.2(B); 100.3(E)(1); 100.3(E)(1)(a)(i);100.3(E)(1)(a)-(e); 100.3(F); 100.4(D)(5)(c); Opinions 11-101; 11-45;11-20; 09-234; 08-204; 08-166; 07-141; 07-126; Joint Opinion 07-114/07-120; Opinions 07-26; 06-170; 06-149; 06-44; Joint Opinion 05-89/05-90; Opinions 95-99 (Vol. XIII); 93-87 (Vol. XI); 92-22 (Vol. IX); 91-136 (Vol. VIII); 89-23 (Vol. III); 87-12 (Vol. I); *Matter of Huttner* (2006 Ann Rep of NY Comm. on Jud. Conduct, at 193); *Matter of Robert* (1997 Ann Rep of NY Comm. on Jud. Conduct, at 127, *sanction accepted* 89 NY2d 745 (1997); *People v Moreno*, 70 NY2d 403 (1987).

Opinion:

A judge who presides in criminal cases asks about his/her ethical obligations when certain attorneys the judge knows socially appear before him/her. The inquirer states these individuals were previously his/her colleagues at a legal services organization, and they regularly appear on behalf of the same organization as criminal defense attorneys. Although the judge's professional association with the attorneys ended more than a decade ago, the judge's friendships with each attorney originated before his/her professional association with them and have continued into the present.

A judge must always avoid even the appearance of impropriety (*see* 22 NYCRR 100.2) and must always act to promote public confidence in the judiciary's integrity and impartiality (*see* 22 NYCRR 100.2[A]). Therefore, a judge must not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment (*see* 22 NYCRR 100.2[B]), and must disqualify him/herself in a proceeding in which the judge's impartiality might reasonably be questioned (*see* 22 NYCRR 100.3[E][1]) or in other specific circumstances required by rule or law (*see generally id.*; Judiciary Law §14).

Clearly, a judge who cannot be impartial when a particular attorney appears before the judge must disqualify him/herself, and remittal is not available (*see* 22 NYCRR 100.3[E][1][a][i]; 100.3[F]). However, even when a judge's disqualification is not mandated by either Judiciary Law §14 or the specific circumstances described in §100.3(E)(1)(a)-(e) of the Rules and the judge believes that he/she can be impartial, if the judge's impartiality might

reasonably be questioned by others, he/she must nonetheless disqualify him/herself, but, in such circumstances, the disqualification is subject to remittal (*see* 22 NYCRR 100.3[E][1]). Whether a judge's friendship with an attorney causes a judge's impartiality reasonably to be questioned depends on the facts of each case.

The Committee previously has issued a number of opinions addressing a judge's obligations when an attorney, with whom the judge has some kind of social relationship or friendship, appears before the judge. Because the Committee realizes it is difficult and time consuming for a judge to review all the existing opinions to determine how to proceed in his/her individual, fact-specific situation, the Committee takes this opportunity to consolidate and harmonize the existing opinions on this subject.

The Committee has consistently advised that in a particular proceeding, the presiding judge is ordinarily in the best position to assess whether his/her impartiality might reasonably be questioned when an attorney whom the judge knows socially, with whom the judge is acquainted, or whom the judge considers a friend appears before him/her (*see* Opinions 11-45; 07-26; 22 NYCRR 100.3[E][1]; *cf. People v Moreno*, 70 NY2d 403 [1987]). This issue is especially challenging because human relationships are so varied, fact-dependent, and unique to the individuals involved. Therefore, the Committee can provide only general guidelines to assist judges who ultimately must determine the nature of their own specific relationships with particular attorneys and their ethical obligations resulting from those relationships. When doing so, a judge should take into account such factors as the nature of his/her relationship with the attorney; the inter-relationships, if any, among and between their respective immediate and close family members; the frequency and context of their contacts; whether they or their respective family members have financial, political or other ties; and whether they or their respective family members share confidences (*see e.g.* Opinions 11-45; 08-166; 07-26; 06-149; 06-44).

After reviewing its prior opinions, the Committee identifies three broad categories of interpersonal relationships between judges and lawyers who appear before them in order to assist them in evaluating their relationships so as to determine what, if any, ethical obligation those relationships impose on the judge.

I. Acquaintance

The first category is acquaintance. In the Committee's view, a judge is acquainted with an attorney when their interactions outside court result from happenstance or some coincidental circumstance such as being members of the same profession, religion, civic or professional organization, etc. For example, the judge and the attorney both attend bar association meetings (*see* Opinion 07-126 [judge and attorney appearing in judge's court serve on a bar association elder law committee]), other professional gatherings, sporting or other school events involving their children; they patronize the same retail establishment; they see each other primarily when socializing with mutual friends, but not otherwise; they are members of the same country or golf club; or they attend the same religious services. Generally, neither will initiate social contact with the other, but they greet each other and interact cordially when they participate in common but not necessarily personally shared interests. In the Committee's view, the mere fact that a judge is acquainted with and cordial to an attorney who appears before the judge when they

come into contact outside the court - even if such contacts are regular or periodic - without more, is not a reasonable basis to question the judge's impartiality (*see* 22 NYCRR 100.3[E][1]; Opinion 11-20; *see also* Opinion 09-234 [judge need not disclose nor disqualify if judge and attorney sit on same not-for-profit organization's board of directors]).

This category also includes situations that initially may appear to be personal or close but are in fact instances of ordinary social hospitality. Pursuant to §100.4(D)(5)(c) of the Rules Governing Judicial Conduct, a judge may accept ordinary social hospitality even from attorneys who appear before them (*see* Opinions 95-99 [Vol. XIII] [full-time judge may attend and participate in member/guest golf outing as guest of attorney who practices in judge's court]; 91-136 [Vol. VIII] [judge may attend opening of new law office of attorney who appears in judge's court]; 89-23 [Vol. III] [judge may attend formal dinner party celebrating prominent attorney's 75th birthday when attorney's firm appears in the judge's court, and other judges and prominent attorneys are likely to attend]; 87-12 [Vol. I] [judge may attend ordinary holiday-type party given by a law firm or legal agency]; *see also* Joint Opinion 05-89/05-90 [judge need not disclose that attorney appearing in judge's court attended judge's annual holiday party).[1] A judge is not required to disclose such contacts nor to disqualify him/herself simply because the judge has participated in such events at the invitation of an attorney or law firm but is free to do so, even if a party appears without representation.

Nevertheless, while such social contact is permissible, it is not without limitation. Accordingly, the judge should make reasonable efforts to avoid private social activity with attorneys appearing before the judge during actual trial days (*see* Opinions 92-22 [Vol. IX]; 95-99 [Vol. XIII]); the judge must refrain from *ex parte* discussion about matters pending in the judge's court that involve the attorney (*see* Opinion 95-99 [Vol. XIII]); and the judge must avoid any actions that may be perceived to advance the private interests of an individual, office or other entity (*see* Opinion 06-170). Nor may such social contact occur if it would otherwise create an appearance of impropriety (*see* Opinions 92-22 [Vol. IX]; 06-170).

When an attorney with whom a judge has such a relationship appears before the judge, neither disqualification nor disclosure is required as long as the judge believes he/she can be fair and impartial. Rather, any decisions to disclose the nature of the relationship and any subsequent disqualification are left solely in the judge's discretion.

II. Close Social Relationship

In contrast, if the relationship between a judge and an attorney can be characterized as a **close social** relationship, the judge must, at the very least, disclose the relationship either in writing or on the record, even if the judge believes he/she can be fair and impartial (*see* Joint Opinion 05-89/05-90). Whether the judge must disqualify him/herself when a party objects to the judge's continued participation in the matter after such disclosure remains solely within the judge's discretion (*see People v Moreno*, 70 NY2d 403 [1987]; Opinion 08-166). However, if a party appears without representation the judge must disqualify him/herself, and remittal is not permitted (*see* Opinion 08-204; Joint Opinion 07-114/07-120).

For example, where an attorney worked for several years in the judge's law firm while the

attorney attended high school and college; worked for one year after graduating law school at a firm where the judge was a partner; subsequently maintained his/her own law practice in office space shared with the same law firm for two years; and for the last several years has maintained a personal relationship with the judge, during which time the judge's children were members of the attorney's wedding party; the judge, the attorney, and their spouses have dined together once a year; and the judge's children cared for the attorney's children, the judge and the attorney have a close social relationship (*see* Opinion 08-166). In the Committee's view, the judge must fully disclose these facts and the nature of the relationship whenever the attorney appears before the judge and must exercise his/her discretion in determining whether to recuse upon request. The judge must also consider whether, given the circumstances and the rationale for any objection to his/her continued participation in the case, his/her impartiality can reasonably be questioned. If so, the judge must disqualify him/herself and exercise recusal (*see id*).

If the judge decides to preside after fully disclosing the nature of the relationship with the attorney, the judge should put his/her reasons for doing so on the record (*see* Opinion 11-20).

This Opinion modifies prior Opinions 93-87 (Vol. XI) (judge not required to disclose that judge and attorney have maintained a friendship since law school) and 92-22 (Vol. IX) (judge may have breakfast, lunch or dinner with attorney who practices in the judge's court, but should avoid private social activity on actual trial days) to the extent they are inconsistent with this conclusion. This Opinion also modifies prior Joint Opinion 05-89/05-90 to the extent that it provides that a judge who has a close social relationship with an attorney who appears before the judge must disqualify him/herself, subject to remittal.

III. Close Personal Relationship

Where a judge and an attorney maintain a **close personal** relationship, the judge's impartiality might reasonably be questioned (*see* 22 NYCRR 100.3[E][1]). Therefore, the judge must disqualify him/herself when the attorney appears in the judge's court (*see* Opinions 11-45; 07-26). Disqualification for this reason is subject to remittal (*see* 22 NYCRR 100.3[F]) unless a party appears without representation, in which case the judge must exercise recusal (*see* Opinion 08-204; Joint Opinion 07-114/07-120).

A close personal relationship is one where the judge and the attorney share intimate aspects of their personal lives. For example, where the judge, the attorney, and/or members of their immediate families share confidences, socialize regularly, vacation together, celebrate significant events in each other's lives and/or share interests that are important to them personally (*see e.g.* Opinions 11-45 [judge and former law partner have known each other since childhood; practiced law together for almost a decade in hometown; partnership ended within the past three years; have many mutual friends; they and spouses continue to see each other at social events and family outings; children are close friends and visit each other's homes; attorney is godparent of judge's child; the attorney's spouse buys small birthday and holiday gifts for judge's child each year] and 06-149 [attorney who lives in same city as judge drives to judge's house once or twice a month and they walk dogs together; for past two to four years, they dined together at a restaurant a few times each year and went to the beach together; attorney drove judge to re-election campaign events and has attended social functions at the judge's residence]).

In these circumstances involving close personal relationships, the judge must disqualify him/herself when the attorney appears before the judge (*see e.g.* Opinion 07-26 [judge disqualified subject to remittal where relationship is sufficiently close to give rise to perception that judge's impartiality might reasonably be questioned]). In *Matter of Robert* (1997 Ann Rep of NY Comm. on Jud. Conduct, at 127, *sanction accepted*, 89 NY2d 745 (1997), the judge was removed for presiding over cases involving persons with whom the judge had close personal relationships. Specifically, the judge, a former law enforcement officer, was friends for about 25 years with a law enforcement officer who was the arresting officer in several cases filed in the judge's court. Several years earlier, they had taken a cross-country motorcycle trip together; had fished together; had socialized in each other's homes; and often had coffee together in a local diner. The judge was also friends with an animal control officer and his father. The judge had coffee regularly with the father, and they discussed their common interest in guns. The judge and the animal control officer have hunted and fished together; have engaged in business dealings; have socialized at each other's homes; and on at least two occasions, had taken a long road trip together. Notwithstanding the judge's close personal relationship with the animal control officer, he presided over five animal control violation cases filed by the animal control officer. The judge also presided over numerous cases in which a close relative of the animal control officer and his father appeared before the judge as a defendant. Based on the appearance of impropriety, the Commission on Judicial Conduct confirmed the recommendation that the judge be removed (*id.*).

Opinion 11-20 is modified to the extent that it is inconsistent with this conclusion (judge who has close personal relationship with attorney must disclose nature and extent of relationship when attorney appears but has discretion to disqualify him/herself after considering all relevant factors). Also, Opinion 11-45 is modified to the extent that the relationship described is characterized as a **close social** relationship. Based on the standards articulated in the present opinion, the Committee now would characterize the relationship described as a **close personal** relationship.

IV. Decision by the Commission on Judicial Conduct

In *Matter of Huttner* (2006 Ann Rep of NY Comm. on Jud. Conduct, at 193), the Commission advised that because the respondent had a close social relationship with an attorney (relationship included meals together, family celebrations, and visits to each others' homes),"[a]t the very least, respondent should have disclosed the relationship so that the parties and their attorneys, could have had an opportunity to consider whether to seek his disqualification (*see* Section 100.3[F] of the Rules)" (*id.* at 194). Based on the within current Committee Opinion, the Committee would characterize the relationship described in *Matter of Huttner* as a **close personal** relationship that would warrant disqualification, subject to remittal, unless a party appears without representation (*see* 22 NYCRR 100.3[E][1]; Opinion 08-204; Joint Opinion 07-114/07-120).

V. Conclusion

A judge must disqualify him/herself in any proceeding in which the judge's impartiality might reasonably be questioned (*see* 22 NYCRR 100.3 [E][1]). Whether disqualification is required when an attorney, whom the judge knows or otherwise interacts with outside the

courtroom, appears in the judge's courtroom, depends on the nature of their relationship. Generally, where a judge is acquainted with or casually socializes with an attorney in situations that are unplanned or coincidental, without more, neither disclosure nor disqualification is required. Nevertheless, the judge may choose to disclose such interactions with an attorney that occur outside the courtroom. Neither such a prophylactic disclosure nor a disqualification is required even if a party appears without representation.

Finally, where a judge maintains a close personal relationship with an attorney appearing before the judge (e.g. one that involves sharing intimate aspects of their lives or their families' lives), the judge must disqualify him/herself from the proceeding. Disqualification for this reason is subject to remittal, but only if all parties are represented by counsel.

In the Committee's view, the relationships the inquiring judge describes are close social relationships. Therefore, if all parties are represented, the judge must disclose the nature of his/her relationship with the appearing attorney and, if a party objects to the judge's continued participation in the matter, the judge has the discretion to exercise recusal or to preside. However, if a party appears without representation, the judge must disqualify him/herself and remittal is not available.

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[1]Not every interaction between a judge and an attorney will fit neatly into a particular category. While a purely professional relationship would not normally require disclosure, a wedding can be perceived as evidencing a closer social relationship which warrants disclosure for a limited period of time (*see* Opinion 06-44). Thus, although a judge considers his/her relationship with an attorney who occasionally appears in a judge's court as purely professional and the attorney, therefore, an acquaintance, if the judge attends the attorney's wedding, the judge must, for a reasonable period of time thereafter, disclose that he/she did so (*see* Opinion 11-101). And, where a judge attends a party for a public defender's spouse and a religious function for a law guardian's daughter, even though the judge has not recently socialized with either attorney, the judge should disclose his/her attendance when either attorney appears in the judge's court for a reasonable period of time after such events (*see* Opinion 07-141). Also, a judge and attorney may have both social and professional relationships, neither of which standing alone warrants disclosure or disqualification, but when considered together create an obligation for the judge to disclose the relationships (*see* Opinion 08-166).

http://www.nycourts.gov/ip/judicialethics/opinions/91-51.htm

Opinion 91-51

April 25, 1991

Digest: Absent a statutory disqualification, whether a part-time judge should discontinue his or her prior voluntary recusal in matters pertaining to an attorney and the attorney's law firm, is solely within the conscience and discretion of the judge, subject to ethical considerations.

Rules: Judiciary Law §14, 22 NYCRR §§100.5 (f); 100.1: 100.2; 100.3 (c).

Opinion:

A part-time judge inquires whether the judge must continue to disqualify himself or herself from sitting in matters in which a particular attorney or his firm is representing a party.

The judge has disqualified himself or herself for the past four years in cases in which that attorney or his firm appeared because four years ago the judge instituted an action naming the attorney as a defendant in a representative stake-holder capacity. One year ago, a dispute occurred involving the judge's spouse and the attorney's spouse concerning a transfer of funds.

The judge now has advised that attorney that the judge intends to preside in a traffic infraction case because the judge feels that the prior disqualification no longer is warranted, and that the judge can render a fair and just determination in any matter in which that attorney or his firm is involved. The attorney strenuously has objected to the judge's decision to forego recusal.

Conflicts are inevitable in a system which permits judges to practice law during their tenure on the bench, especially in relation to opposing counsel. Section 100.5(f) of the Rules of the Chief Administrator governs those part-time judges who happen also to be practicing lawyers, to guard against those conflicts of interest that inevitably arise when one's adjudicatory responsibilities cross paths with client obligations.

Here, both the judge and the attorney apparently are active litigators in the same community and the attorney's reasons for the judge's disqualification stem from past associations that might have involved professional antagonism, from which the attorney implies present bias or prejudice of the judge toward him and his firm. These past conflicts do not rise to such a level.

Section 14 of the Judiciary Law provides in pertinent part:

> A judge shall not sit as such in, or take any part in, the decision of an action, claim, matter, motion or proceeding to which he is a party, or in which he has been an attorney or counsel, or in which he is interested, or if he is related by consanguinity or affinity to any party to the controversy within the sixth degree.

This is the sole statutory authority in New York for disqualification of a judge. The purpose of Section 14 is to maintain the purity and dignity of the administration of justice and to insure that litigants are entitled to an unbiased, unprejudiced and unpressured finder of facts.

As a general rule, whether it would be improper to sit in a particular case is a matter confined to the conscience of the particular judge. In the absence of a violation of the above express statutory provisions, alleged bias or prejudice or unworthy motive on the part of a judge, unconnected with an interest in the controversy, will not be a cause for disqualification, unless shown to affect the result. As to alleged impropriety, as distinguished from legal disqualification, the judge himself is the sole arbiter [Johnson v. Hornblass, 93 A.D.2d 732 (1st Dept., 1983)] and is, at best, a matter of personal conscience and discretion [Matter of Estate of Smith, 84 A.D.2d 664, 666 (3d Dept., 1981); Casserella v. Casserella, 65 A.D.2d 614, 615 (2d Dept., 1978); app. dsm'd 46 N.Y.2d 939(1979)].

In the exercise of that discretion, a judge should be guided by ethical standards. Section 100.1 of the Rules of the Chief Administrator mandates that every judge shall observe the high standards of conduct so that the integrity of the judiciary is maintained. Section 100.2 requires a judge to conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Section 100.3(c) states that a "judge shall disqualify himself or herself in a proceeding in which his or her impartiality might reasonably be questioned, including, but not limited to circumstances where: 1) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."

If, in the observance of these guidelines, and, in good conscience, in the exercise of discretion, the judge believes that his or her feelings toward the attorney or his firm would not prejudice the attorney's client or future clients, recusal is not required.

http://www.nycourts.gov/ip/judicialethics/opinions/07-126.htm

Opinion 07-126

January 25, 2008

Digest: A judge and the judge's staff may join a bar association's elder law committee, and the judge may appoint otherwise eligible attorneys who also are members of the committee to fiduciary and counsel positions in the judge's court in accordance with the Rules Governing Judicial Conduct and the Chief Judge's Rules Governing Appointments by the Court.

Rules: 22 NYCRR 36.0;100.3(E)(1); 100.3(C)(3); 100.4(A)(1),(3); 100.4(C)(3); Opinions: 06-121; 04-78; 91-18 (Vol. VII); 88-100 (Vol. II).

Opinion:

A judge asks if it is ethically permissible for the judge and the judge's staff to join a county bar association's elder law committee. The judge regularly presides in Mental Hygiene Law Article 81 proceedings, appoints attorneys to serve as counsel and fiduciaries and awards fees in such proceedings. Many of the attorneys eligible for these appointments are members of the same bar association elder law committee.

Pursuant to the Rules Governing Judicial Conduct, a judge may be a member of an organization devoted to the improvement of the law, the legal system or the administration of justice. 22 NYCRR 100.4(C)(3); Opinion 06-121. As participation in bar associations and other legal organizations is to be encouraged (Opinion 88-100 [Vol. II]), the inquiring judge and his/her staff may join a county bar association's elder law committee.

Pursuant to the Rules Governing Judicial Conduct, a judge must disqualify him/herself in any proceeding where the judge's impartiality might reasonably be questioned. 22 NYCRR 100.3(E)(1). In Opinion 04-78, this Committee advised that a Family Court judge, who serves as chair of an advisory committee dealing with child protective issues, should disclose his/her role with the committee when another committee member appears before the judge as an expert witness, and exercise recusal upon a party's request. In the Committee's view, disclosure and recusal are appropriate in those circumstances as the judge must assess an expert witness' credibility and knowledge of a subject that is not necessarily familiar to the judge. The judge's ability to remain impartial in doing so, when the expert serves on a committee with the judge and frequently interacts with the judge in that setting, might reasonably be questioned.

The Committee concludes that this is distinguishable from the situation presented here, where the inquirer is asked to evaluate legal arguments and evidence from attorneys he/she knows from bar association committee work, rather than evaluating the lawyer's testimonial crediblity. The judge in the present inquiry, therefore, need not exercise recusal when an attorney who also is a member of the bar association elder law committee appears in the judge's court.

With respect to appointing attorneys who also are members of the bar association elder law

committee to serve as fiduciaries or as counsel, and also approving their fees, the inquiring judge must adhere to the Rules Governing Judicial Conduct and the Rules of the Chief Judge Governing Appointments by the Court. In accordance with such Rules, a judge must avoid nepotism and favoritism, and make appointments impartially and on the basis of merit. 22 NYCRR 36.0; 100.3(C)(3). By serving on the bar association's elder law committee, the inquiring judge is likely to increase his/her knowledge of the character, personality, judgment and competence of attorneys otherwise eligible for appointment in the judge's court, thereby enhancing his/her ability to make the most informed appointments possible. The judge in the present inquiry, therefore, may appoint an attorney who also is a member of the committee to serve as counsel or as a fiduciary, so long as the appointment and resulting fee otherwise comply with the Rules Governing Judicial Conduct and the Chief Judge's Rules Governing Appointments by the Court.

Finally, to the extent members of the judge's staff desire to serve on the bar association's elder law committee, the Committee discerns no reason, pursuant to the Rules, why they may not do so. The Committee recognizes, however, that there may be other considerations presented by the Rules Governing Conduct Of Nonjudicial Employees (22 NYCRR Part 50). Accordingly, the judge's staff should contact the Unified Court System's Office of Court Administration, the agency with the ultimate authority to interpret Part 50 of the Chief Judge's Rules, for further guidance. (Contact: ETHICS HELPLINE: 1-888-28-ETHIC.)

New York Judiciary Law § 14.

Disqualification of judge by reason of interest or consanguinity

A judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding to which he is a party, or in which he has been attorney or counsel, or in which he is interested, or if he is related by consanguinity or affinity to any party to the controversy within the sixth degree. The degree shall be ascertained by ascending from the judge to the common ancestor, descending to the party, counting a degree for each person in both lines, including the judge and party, and excluding the common ancestor. But no judge of a court of record shall be disqualified in any action, claim, matter, motion or proceeding in which an insurance company is a party or is interested by reason of his being a policy holder therein. No judge shall be deemed disqualified from passing upon any litigation before him because of his ownership of shares of stock or other securities of a corporate litigant, provided that the parties, by their attorneys, in writing, or in open court upon the record, waive any claim as to disqualification of the judge.

Administrative Rules of the Unified Court System & Uniform Rules of the Trial Courts

Rules of the Chief Administrative Judge

https://www.nycourts.gov/rules/chiefadmin/100.shtml

22 NY ADC 100.3
22 NYCRR 100.3

N.Y. Comp. Codes R. & Regs. tit. 22, § 100.3

OFFICIAL COMPILATION OF CODES, RULES AND REGULATIONS OF THE STATE OF NEW YORK
TITLE 22. JUDICIARY
SUBTITLE A. JUDICIAL ADMINISTRATION
CHAPTER I. STANDARDS AND ADMINISTRATIVE POLICIES
SUBCHAPTER C. RULES OF THE CHIEF ADMINISTRATOR OF THE COURTS
PART 100. JUDICIAL CONDUCT
Text is current through April 15, 2006.

Section 100.3 A judge shall perform the duties of judicial office impartially and diligently.

(A) *Judicial duties in general.* The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply.

(B) *Adjudicative responsibilities.*

(1) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.

(2) A judge shall require order and decorum in proceedings before the judge.

(3) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

(4) A judge shall perform judicial duties without bias or prejudice against or in favor of any person. A judge in the performance of judicial duties shall not, by words or conduct, manifest bias or prejudice, including but not limited to bias or prejudice based upon age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, and shall require staff, court officials and others subject to the judge's direction and control to refrain from such words or conduct.

(5) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, against parties, witnesses, counsel or others. This paragraph does not preclude legitimate advocacy when age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, or other similar factors are issues in the proceeding.

(6) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties or their lawyers concerning a pending or impending proceeding, except:

(a) *Ex parte* communications that are made for scheduling or administrative purposes and that do not affect a substantial right of any party are authorized, provided the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication, and the judge, insofar as practical and appropriate, makes provision for prompt notification of other parties or their lawyers of the

substance of the *ex parte* communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and a copy of such advice if the advice is given in writing and the substance of the advice if it is given orally, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge, with the consent of the parties, may confer separately with the parties and their lawyers on agreed-upon matters.

(e) A judge may initiate or consider any *ex parte* communications when authorized by law to do so.

(7) A judge shall dispose of all judicial matters promptly, efficiently and fairly.

(8) A judge shall not make any public comment about a pending or impending proceeding in any court within the United States or its territories. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This paragraph does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This paragraph does not apply to proceedings in which the judge is a litigant in a personal capacity.

(3) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair

(9) A judge shall not:

(a) make pledges or promises of conduct in office that are inconsistent with the impartial performance of the adjudicative duties of the office;

(b) with respect to cases, controversies or issues that are likely to come before the court, make commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.

(10) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

(C) *Administrative responsibilities.*

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

(2) A judge shall require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

value of services rendered. A judge shall not appoint or vote for the appointment of any person as a member of the judge's staff or that of the court of which the judge is a member, or as an appointee in a judicial proceeding, who is a relative within the fourth degree of relationship of either the judge or the judge's spouse or the spouse of such a person. A judge shall refrain from recommending a relative within the fourth degree of relationship of either the judge or the judge's spouse or the spouse of such person for appointment or employment to another judge serving in the same court. A judge also shall comply with the requirements of Part 8 of the Rules of the Chief Judge (22 NYCRR Part 8) relating to the appointment of relatives of judges. Nothing in this paragraph shall prohibit appointment of the spouse of the town or village justice, or other member of such justice's household, as clerk of the town or village court in which such justice sits, provided that the justice obtains the prior approval of the Chief Administrator of the Courts, which may be given upon a showing of good cause.

(D) *Disciplinary responsibilities.*

(1) A judge who receives information indicating a substantial likelihood that another judge has committed a substantial violation of this Part shall take appropriate action.

(2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a substantial violation of the Code of Professional Responsibility shall take appropriate action.

(3) Acts of a judge in the discharge of disciplinary responsibilities are part of a judge's judicial duties.

(E) *Disqualification.*

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) (i) the judge has a personal bias or prejudice concerning a party; or (ii) the judge has personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge knows that: (i) the judge served as a lawyer in the matter in controversy; or (ii) a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter; or (iii) the judge has been a material witness concerning it;

(c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other interest that could be substantially affected by the proceeding;

(d) the judge knows that the judge or the judge's spouse, or a person known by the judge to be within the sixth degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding;
(ii) is an officer, director or trustee of a party;
(iii) has an interest that could be substantially affected by the proceeding;

(e) the judge knows that the judge or the judge's spouse, or a person known by the judge to be within the fourth degree of relationship to either of them, or the spouse of such a person, is acting as a lawyer in the proceeding or is likely to be a material witness in the proceeding.

(f) The judge, while a judge or while a candidate for judicial office, has made a pledge or promise of conduct in office that is inconsistent with the impartial performance of the adjudicative duties of the office or has made a public statement not in the judge's adjudicative capacity that commits the judge with respect to:

(*i*) an issue in the proceeding; or

(*ii*) the parties or controversy in the proceeding.

(g) Notwithstanding the provisions of subparagraphs (c) and (d) of this section, if a judge would be disqualified because of the appearance or discovery, after the matter was assigned to the judge, that the judge individually or as a fiduciary, the judge's spouse, or a minor child residing in his or her household has an economic interest in a party to the proceeding, disqualification is not required if the judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

(2) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household.

(F) *Remittal of disqualification.* A judge disqualified by the terms of subdivision (E), except subparagraph (1)(a)(i), subparagraph (1)(b)(i) or (iii) or subparagraph (1)(d)(i) of this section, may disclose on the record the basis of the judge's disqualification. If, following such disclosure of any basis for disqualification, the parties who have appeared and not defaulted and their lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge believes that he or she will be impartial and is willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

Historical Note

Sec. filed Aug. 1, 1972; amd. filed Nov. 26, 1976; renum. 111.3, new added by renum. and amd. 33.3, filed Feb. 2, 1982; amds. filed: Nov. 15, 1984; July 14, 1986; June 21, 1988; July 13, 1989; Oct. 27, 1989; repealed, new filed Feb. 1, 1996; amds. filed: Feb. 21, 2006; March 6, 2006 eff. Feb. 28, 2006. Amended (C), (E).

<General Materials (GM) - References, Annotations, or Tables>

22 NY ADC 100.3
22 NYCRR 100.3

N.Y. Comp. Codes R. & Regs. tit. 22, § 100.3

RESEARCH REFERENCES AND PRACTICE AIDS:

28 NY Jur 2d, Courts and Judges §§ 348 et seq, 411, 440, 443

57 NY Jur 2d, Evidence § 927

58A NY Jur 2d, Evidence and Witnesses §§ 924-928

105 NY Jur 2d, Trial § 375

47 Am Jur 2d, Judges §20

Annotations:

Interest of judge in an official or representative capacity, or relationship of judge to one who is a party in an official or representative capacity, as disqualification. 10 ALR2d 1307

Disqualification of judge by state, in criminal case, for bias or prejudice. 68 ALR3d 509

Membership in fraternal or social club or order affected by a case as ground for disqualification of judge. 75 ALR3d 1021

Disqualification of judge because of political association or relation to attorney in case. 65 ALR4th 73

Judge's previous legal association with attorney connected to current case as warranting disqualification. 85 ALR4th 700

Removal or discipline of state judge for neglect of, or failure to perform, judicial duties. 87 ALR4th 727

Consorting with, or maintaining social relations with, criminal figure as ground for disciplinary action against judge. 15 ALR5th 923

Disqualification of judge for bias against counsel for litigant. 54 ALR5th 575

1. Validity

CASE NOTES:

State trial court judge failed to establish likelihood of success on claim that state code of judicial conduct section prohibiting ex parte communications "concerning a pending or impending proceeding" was unconstitutionally vague, as required to preliminarily enjoin enforcement of the code section; judge used his specific factual scenario to demonstrate what he saw as the vagueness of the language. Connor v. New York State Com'n on Judicial Conduct, 2003, 260 F.Supp.2d 517

CASE NOTES:

State trial court judge failed to establish likelihood of success on claim that state judicial conduct code section requiring judge to disqualify himself when impartiality might be questioned was vague, as required to preliminarily enjoin enforcement of the code, although judge claimed that code section did not prohibit recusal for "spurious reasons"; "bias" and "prejudice" required no statutory definition to put judges on notice. Connor v. New York State Com'n on Judicial Conduct, 2003, 260 F.Supp.2d 517

2. Generally

CASE NOTES:

Removal of town court justice was warranted as a sanction for conduct which included converting escrow funds and retaliating against district attorney who made complaint against justice. In re Cerbone, 2004, 812 N.E.2d 932, 780 N.Y.S.2d 106, 2 N.Y.3d 479

CASE NOTES:

On review of record, court concluded that record disclosed serious administrative failings in petitioner's handling of cases in issue, but no persistent or deliberate neglect of his judicial duties rising to level of misconduct. Matter of Greenfield, 1990, 557 N.E.2d 1177, 558 N.Y.S.2d 881, 76 N.Y.2d 293

CASE NOTES:

Town justice who allowed attorney to accept guilty pleas, who allowed attorney to determine amount of fines to be paid by defendants, who allowed attorney to enter disposition of cases on official court records, and who made deceptive responses to Administrative Law Judge's inquiry into allegation of improper delegation of judicial duties violates 22 NYCRR §100.3(a)(4) re according party right to be heard and avoiding ex parte communications. Matter of Greenfeld, 1988, 521 N.E.2d 768, 526 N.Y.S.2d 810, 71 N.Y.2d 389

CASE NOTES:

Indictment charging judge with receiving reward for official misconduct in second degree was insufficient, where judge's duty as public servant was defined solely by reference to Rules of Judicial Conduct. People v. Garson (2 Dept. 2005) 793 N.Y.S.2d 539, 17 A.D.3d 695, leave to appeal granted 834 N.E.2d 1266, 801 N.Y.S.2d 256, 5 N.Y.3d 762

CASE NOTES:

Absent an express violation of statute providing for disqualification of judge by reason of interest or consanguinity, the decision on a recusal motion based upon alleged bias and prejudice is generally a matter of the court's personal conscience and discretion. Chang v. SDI Intern. Inc. (2 Dept. 2005) 792 N.Y.S.2d 92, 15 A.D.3d 520

CASE NOTES:

Before an appearance of impropriety can be imputed or a conflict created, some other factor needs to be present that creates an interest that could be substantially affected by the outcome of the proceeding. Matter of Emory CC (3 Dept. 1993) 606 N.Y.S.2d 99, 199 A.D.2d 932, leave to appeal dismissed 634 N.E.2d 600, 612 N.Y.S.2d 104, 83 N.Y.2d 837

CASE NOTES:

Presence of a factor that creates an interest that could be substantially affected, and any action required thereby, are decisions best left to the trial judge's discretion. Matter of Emory CC (3 Dept. 1993) 606 N.Y.S.2d 99, 199 A.D.2d 932, leave to appeal dismissed 634 N.E.2d 600, 612 N.Y.S.2d 104, 83 N.Y.2d 837

CASE NOTES:

Judge has an obligation to deny insufficient recusal motions and should not recuse himself in the absence of a valid legal reason. People v. Diaz, 1986, 498 N.Y.S.2d 698, 130 Misc.2d 1024

3. Professional competence

CASE NOTES:

Judge's removal from office as sanction for misconduct was warranted, where she filed late, incomplete, and false quarterly reports and maintained a persistent backlog, with some delays of longer than two years, despite repeated administrative efforts to assist her; judge's conduct demonstrated that she was either unwilling or unable to discharge her judicial duties. In re Washington, 2003, 800 N.E.2d 348, 768 N.Y.S.2d 175, 100 N.Y.2d 873

CASE NOTES:

Town court justice's neglect of more than 100 cases for a period of over eight months in spite of repeated reminders from court personnel, the town board, and state auditors, was willful violation of rule governing judicial conduct requiring judges to perform their duties impartially and diligently. In re Assini, 1999, 720 N.E.2d 882, 698 N.Y.S.2d 605, 94 N.Y.2d 26

CASE NOTES:

City Court judge who improperly committed defendants to jail without bail was censured rather than removed from office. Matter of LaBelle, 1992, 591 N.E.2d 1156, 582 N.Y.S.2d 970, 79 N.Y.2d 350

N.Y. Comp. Codes R. & Regs. tit. 22, § 100.3

CASE NOTES:

Reviewing confirmed charges, Court of Appeals agreed with Commission that petitioner's continuance in office of Town Court Justice would pose threat to proper administration of justice; her conduct displayed lack of basic qualities of fairness, impartiality and self-restraint. Matter of Tyler, 1990, 553 N.E.2d 1316, 554 N.Y.S.2d 806, 75 N.Y.2d 525, reargument denied 559 N.E.2d 681, 559 N.Y.S.2d 987, 76 N.Y.2d 773

4. Partisan interests

CASE NOTES:

Conduct by judge in ex parte communication conveying the impression that his rulings will be based on his allegiance and loyalty to former political leader jeopardizes the public confidence in the integrity and impartiality of the judiciary and warrants removal from office. Matter of Levine, 1989, 545 N.E.2d 1205, 546 N.Y.S.2d 817, 74 N.Y.2d 294

CASE NOTES:

Motion court was not statutorily disqualified from deciding motion to dismiss action to annul foreclosure sale based on its ownership of stock in mortgagee's parent corporation; court did not have stock in the mortgagee, and no motion to recuse was made based on court's ownership of stock in parent or any other corporation. DeRosa v. Chase Manhattan Mortg. Corp. (1 Dept. 2004) 782 N.Y.S.2d 5, 10 A.D.3d 317

CASE NOTES:

Error, if any, on part of judge, who had testified for prosecution in its case-in-chief to establish defendant's prior conviction, to recuse himself from deciding defendant's subsequent motion to vacate judgment of conviction, to avoid any appearance of partiality, did not warrant reversal and a new trial. People v. Saunders (3 Dept. 2003) 753 N.Y.S.2d 620, 301 A.D.2d 869, leave to appeal denied 793 N.E.2d 422, 763 N.Y.S.2d 8, 100 N.Y.2d 542

CASE NOTES:

Fact that trial judge and his wife had owned stock in defendant corporation did not require judge's disqualification in contractor's action to recover additional compensation for extra work performed under construction contract, where judge and his wife had divested themselves of such stock immediately upon being informed by contractor of the apparent conflict. Barsotti's, Inc. v. Consolidated Edison Co. of New York, Inc. (1 Dept. 1997) 666 N.Y.S.2d 182, 245 A.D.2d 178

5. Order and decorum

CASE NOTES:

Finding that soon-to-retire judge engaged in inappropriate and demeaning conduct toward his secretary, warranting censure, was supported by evidence that he made numerous comments to her of sexual nature, repeatedly touched her without her invitation or consent and, on one occasion, pulled her onto his lap and kissed her mouth without her invitation or consent. In re Shaw, 2001, 747 N.E.2d 1272, 724 N.Y.S.2d 672, 96 N.Y.2d 7

Requirement that male attorney wear necktie to court while not requiring same of female attorneys was not unconstitutional sex discrimination and was permissible pursuant to 22 NYCRR §100.3(a)(2) requiring that judge maintain order and decorum in court, where court could reasonably conclude that, because of fashion differences, a male attorney appearing without necktie lacked proper decorum whereas female attorney not wearing necktie was not subject to that criticism. Devine v. Lonschein, 1985, 621 F.Supp. 894, affirmed 800 F.2d 1127

CASE NOTES:

Town justice's misconduct on and off the bench--including outspoken insensitivity about charges of domestic violence and sexual abuse, uttering profane and disparaging remarks about a complainant who was a former client of his private law practice, and attempting to instigate a criminal complaint to benefit a friend and client--constituted a serious abuse of judicial authority and demonstrated a pattern of serious disregard for the standards of judicial conduct; and, as such, warranted a sanction of removal from office. In re Romano, 1999, 712 N.E.2d 1216, 690 N.Y.S.2d 849, 93 N.Y.2d 161

6. Comportment

CASE NOTES:

Reviewing confirmed charges, Court of Appeals agreed with Commission that petitioner's continuance in office of Town Court Justice would pose threat to proper administration of justice; her conduct displayed lack of basic qualities of fairness, impartiality and self-restraint. Matter of Tyler, 1990, 553 N.E.2d 1316, 554 N.Y.S.2d 806, 75 N.Y.2d 525, reargument denied 559 N.E.2d 681, 559 N.Y.S.2d 987, 76 N.Y.2d 773

CASE NOTES:

7. Ex Parte communications

CASE NOTES:

City Court judge who improperly committed defendants to jail without bail was censured rather than removed from office. Matter of LaBelle, 1992, 591 N.E.2d 1156, 582 N.Y.S.2d 970, 79 N.Y.2d 350

CASE NOTES:

On review of record, court concluded that record disclosed serious administrative failings in petitioner's handling of cases in issue, but no persistent or deliberate neglect of his judicial duties rising to level of misconduct. Matter of Greenfield, 1990, 557 N.E.2d 1177, 558 N.Y.S.2d 881, 76 N.Y.2d 293

CASE NOTES:

Reviewing confirmed charges, Court of Appeals agreed with Commission that petitioner's continuance in office of Town Court Justice would pose threat to proper administration of justice; her conduct displayed lack of basic qualities of fairness, impartiality and self-restraint. Matter of Tyler, 1990, 553 N.E.2d 1316, 554 N.Y.S.2d 806, 75 N.Y.2d 525, reargument denied 559 N.E.2d 681, 559 N.Y.S.2d 987, 76 N.Y.2d 773

CASE NOTES:

Town Court Justice, who routinely sought out and interviewed witnesses outside of court and made judgments based on their unsworn ex parte communications, who berated teen-age boy whom he believed to be carrying open container outside restaurant and used intemperate language and threatened harsh punishment if boy appeared in his court, who on one occasion arraigned and accepted guilty plea from and sentenced person appearing before him as complaining witness in unrelated manner although no accusatory instrument was filed and person was never informed of charges, who failed to disqualify himself from hearing two criminal cases even though he was witness to event underlying charges, and who accepted guilty plea from teen-ager based on teen- ager's statement which implicated third person in alleged crime which Town Justice had heard about through private conversation, violated 22 NYCRR §100.3(a)(4) re avoiding ex parte communications. Matter of VonderHeide, 1988, 532 N.E.2d 1252, 536 N.Y.S.2d 24, 72 N.Y.2d 658

CASE NOTES:

Town Court Justice, who routinely sought out and interviewed witnesses outside of court and made judgments based on their unsworn ex parte communications, who berated teen-age boy whom he believed to be carrying open container outside restaurant and used intemperate language and threatened harsh punishment if boy appeared in his court, who on one occasion arraigned and accepted guilty plea from and sentenced person appearing before him as complaining witness in unrelated manner although no accusatory instrument was filed and person was never informed of charges, who failed to disqualify himself from hearing two criminal cases even though he was witness to event underlying charges, and who accepted guilty plea from teen-ager based on teen- ager's statement which implicated third person in alleged crime which Town Justice had heard about through private conversation, violated 22 NYCRR §100.3(c)(1)(i) re disqualifying oneself in proceedings where impartiality may be questioned because of personal knowledge of disputed facts. Matter of VonderHeide, 1988, 532 N.E.2d 1252, 536 N.Y.S.2d 24, 72 N.Y.2d 658

CASE NOTES:

Judge's alleged violation of Rules of Chief Administrator prohibiting unauthorized ex parte communications and lending the prestige of judicial office to advance private interests could not satisfy violation of duty element of receiving reward for official misconduct in the second degree; even if such rules were binding on judge via constitutional command, such rules were not designed as a basis for criminal prosecution. People v. Garson, 2004, 775 N.Y.S.2d 827, 4 Misc.3d 258, affirmed 793 N.Y.S.2d 539, 17 A.D.3d 695, leave to appeal granted 834 N.E.2d 1266, 801 N.Y.S.2d 256, 5 N.Y.3d 762

CASE NOTES:

There is a general presumption that ex parte applications for judicial subpoenas duces tecum are improper. People v. Owens, 1999, 701 N.Y.S.2d 602, 182 Misc.2d 794

8. Amicus briefs

CASE NOTES:

Non-profit education organization and city bar association made showing sufficient for Supreme Court to sign orders to show cause with respect to their motions for amicus curiae status in state senator's Article 78 proceeding alleging that proposed reorganization of

CASE NOTES:

In deciding whether to grant amicus curiae status, Supreme Court would consider, as fourth among five factors, whether case concerned questions of important public interest. New York State Senator Kruger v. Bloomberg, 2003, 768 N.Y.S.2d 76, 1 Misc.3d 192

CASE NOTES:

In deciding whether to grant amicus curiae status, Supreme Court would consider, as fourth among five factors, whether amicus curiae application or status would substantially prejudice rights of parties, including delaying original action/proceeding. New York State Senator Kruger v. Bloomberg, 2003, 768 N.Y.S.2d 76, 1 Misc.3d 192

CASE NOTES:

In deciding whether to grant amicus curiae status, Supreme Court would consider, as third among five factors, whether affidavit/affirmation in support indicated showing that parties were not capable of full and adequate presentation and that movant could remedy such deficiency, or indicated that movant would invite Court's attention to law or arguments which might otherwise escape its consideration, or indicated that its amicus brief would otherwise be of special assistance to the Court. New York State Senator Kruger v. Bloomberg, 2003, 768 N.Y.S.2d 76, 1 Misc.3d 192

public school system violated Election Law. New York State Senator Kruger v. Bloomberg, 2003, 768 N.Y.S.2d 76, 1 Misc.3d 192

CASE NOTES:

In deciding whether to grant amicus curiae status, Supreme Court would consider, as second among five factors, whether affidavit/affirmation in support indicated movant's interest in issues to be briefed and set forth the issues, with proposed brief attached. New York State Senator Kruger v. Bloomberg, 2003, 768 N.Y.S.2d 76, 1 Misc.3d 192

CASE NOTES:

In deciding whether to grant amicus curiae status, Supreme Court would consider, as first among five factors, whether movant moved by order to show cause; motion by order to show cause would be preferable procedure as Supreme Court could then set expeditious return date and procedure for providing notice by specifying how parties were to be served, so as not to interfere with main action. New York State Senator Kruger v. Bloomberg, 2003, 768 N.Y.S.2d 76, 1 Misc.3d 192

CASE NOTES:

The Supreme Court can set conditions on the granting of amicus status, such as limiting or denying oral argument, and even has the discretion, in an appropriate

case, to allow the amicus to ask questions of a witness. New York State Senator Kruger v. Bloomberg, 2003, 768 N.Y.S.2d 76, 1 Misc.3d 192

CASE NOTES:

CASE NOTES:

If the granting of amicus curiae status might delay a case, the Supreme Court can deny the application in its discretion. New York State Senator Kruger v. Bloomberg, 2003, 768 N.Y.S.2d 76, 1 Misc.3d 192

CASE NOTES:

The same considerations which persuade the Supreme Court to deny intervention by permission may come to play in denying a request for amicus status. New York State Senator Kruger v. Bloomberg, 2003, 768 N.Y.S.2d 76, 1 Misc.3d 192

CASE NOTES:

Where all possible points of view have been represented by counsel, an application to appear as amicus will be denied, as nothing would be served by allowing additional appearances. New York State Senator Kruger v. Bloomberg, 2003, 768 N.Y.S.2d 76, 1 Misc.3d 192

CASE NOTES:

An amicus curiae is not a party, and cannot assume the functions of a party; he must accept the case before the court with issues made by the parties, and may not control the litigation. New York State Senator Kruger v. Bloomberg, 2003, 768 N.Y.S.2d 76, 1 Misc.3d 192

Where a person is uniquely qualified to give relevant testimony, the Supreme Court, in the exercise of its discretion, may call the person as amicus curiae to give testimony. New York State Senator Kruger v. Bloomberg, 2003, 768 N.Y.S.2d 76, 1 Misc.3d 192

CASE NOTES:

Where the movant seeking amicus curiae status begs leave of the Supreme Court to intervene as a party, but asserts no right against anyone, nor claims a duty owing by anyone, he may nevertheless be of assistance to the Court as amicus curiae, and be allowed to introduce argument, authority, or evidence to protect his interests. New York State Senator Kruger v. Bloomberg, 2003, 768 N.Y.S.2d 76, 1 Misc.3d 192

CASE NOTES:

Where the Supreme Court needs to obtain the advice of a disinterested expert on the law applicable to a proceeding before the Court, it can invite the expert to file a brief amicus curiae, provided that it gives notice to the parties of the person consulted and a copy of such advice, and affords the parties reasonable opportunity to respond. New York State Senator Kruger v. Bloomberg, 2003, 768 N.Y.S.2d 76, 1 Misc.3d 192

CASE NOTES:

9. Public comment

CASE NOTES:

Conduct of town court justice, after signing a search warrant authorizing search of company's premises for environmental violations, in telephoning the company's attorney and informing him of the impending search, was misconduct warranting removal from office, even if the judge did not phone the attorney to tip him off about the search warrant, but acted merely out of anger concerning the company's alleged conduct. In re Gibbons, 2002, 778 N.E.2d 1041, 749 N.Y.S.2d 211, 98 N.Y.2d 448

CASE NOTES:

Conduct by judge in ex parte communication conveying the impression that his rulings will be based on his allegiance and loyalty to former political leader jeopardizes the public confidence in the integrity and impartiality of the judiciary and warrants removal from office. Matter of Levine, 1989, 545 N.E.2d 1205, 546 N.Y.S.2d 817, 74 N.Y.2d 294

CASE NOTES:

Judges and their representatives are expressly forbidden from publicly commenting about matters pending before them; order granting motion to quash plaintiff's subpoena duces tecum unanimously affirmed. Baghoomian v. Basquiat (1 Dept. 1990) 561 N.Y.S.2d 212, 167 A.D.2d 124

10. Personal bias or prejudice

CASE NOTES:

Under both federal constitutional and New York law, defendant's due process rights were not violated by trial judge's refusal to recuse himself for bias or prejudice, given judge's certainty that he could be fair and impartial; trial judge, who participated in plea bargaining and attempted to induce defendant to take a plea, made comments concerning his assessment of strength of the evidence against defendant based upon information acquired when he presided over trial of co-perpetrator. McMahon v. Hodges, 2002, 225 F.Supp.2d 357, reversed 382 F.3d 284

CASE NOTES:

Removal was appropriate sanction for town justice who violated regulations which governed the handling of court funds, in failing to deposit funds in his official account within 72 hours of receipt and in failing to remit funds in timely manner, and who acted in retaliatory manner toward two attorneys and one attorney's client based upon animosity existing between them. In re Corning, 2000, 741 N.E.2d 117, 718 N.Y.S.2d 272, 95 N.Y.2d 450

CASE NOTES:

Judge created appearance of partiality by not recusing himself or disclosing relevant facts while presiding over cases involving party to whom he owed money; these actions warranted removal. Matter of Murphy, 1993, 626 N.E.2d 48, 605 N.Y.S.2d 232, 82 N.Y.2d 491

CASE NOTES:

Town Court Justice, who routinely sought out and interviewed witnesses outside of court and made judgments based on their unsworn ex parte communications, who berated teen-age boy whom he believed to be carrying open container outside restaurant and used intemperate language and threatened harsh punishment if boy appeared in his court, who on one occasion arraigned and accepted guilty plea from and sentenced person appearing before him as complaining witness in unrelated manner although no accusatory instrument was filed and person was never informed of charges, who failed to disqualify himself from hearing two criminal cases even though he was witness to event underlying charges, and who accepted guilty plea from teen-ager based on teen- ager's statement which implicated third person in alleged crime which Town Justice had heard about through private conversation, violated 22 NYCRR §100.3(c)(1)(i) re disqualifying oneself in proceedings where impartiality may be questioned because of personal knowledge of disputed facts. Matter of VonderHeide, 1988, 532 N.E.2d 1252, 536 N.Y.S.2d 24, 72 N.Y.2d 658

CASE NOTES:

Husband failed to establish that supreme court was openly hostile and prejudiced against him in his divorce action and biased in favor of his wife, as could have affected his due process right to a fair trial or required a trial de novo of the issues, where court merely attempted to keep respective parties focused upon a succinct presentation of evidence relevant to issues to be decided, and court had such power in order to insure an orderly and expeditious trial. Douglas v. Douglas (3 Dept. 2001) 722 N.Y.S.2d 87, 281 A.D.2d 709

CASE NOTES:

Mandatory recusal was not warranted merely because pro se litigant was the spouse of the judge's opponent in a prior election. People v. T & C Design, Inc., 1998, 680 N.Y.S.2d 832, 178 Misc.2d 971

CASE NOTES:

County Court's remarks to co-defendant in prior proceeding some years earlier "not to appear before court again" do not, standing alone, establish that County Court's impartiality might be reasonably questioned under 22 NYCRR §100.3[c][1]. People v. Cline (3 Dept. 1993) 596 N.Y.S.2d 925, 192 A.D.2d 957, leave to appeal denied 619 N.E.2d 668, 601 N.Y.S.2d 590, 81 N.Y.2d 1071

CASE NOTES:

Trial court did not err in denying recusal motion, under 22 NYCRR §100.3[c], where defendant established no more than tenuous relationship between court and plaintiff's brokerage services. Muriel Siebert & Co., Inc. v. Ponmany (1 Dept. 1993) 593 N.Y.S.2d 1010, 190 A.D.2d 544, Unreported

CASE NOTES:

Judge did not abuse his discretion by refusing to recuse himself from case because alleged victim held position of Chief Clerk of Supreme and County Courts for County of Niagara where record contained no suggestion that judge's impartiality might reasonably be challenged. People v. Bibbs (4 Dept. 1991) 578 N.Y.S.2d 297, 177 A.D.2d 1056, appeal denied 590 N.E.2d 1206, 582 N.Y.S.2d 78, 79 N.Y.2d 918

CASE NOTES:

Judge should have disqualified himself from a proceeding wherein questions were raised regarding his impartiality; allegations and documentary evidence of a party raising serious questions as to the relationship between the judge and the party could easily be

Fact that court requested appointment of special prosecutor to conduct independent investigation of certain prosecutorial and police conduct which court observed during course of two prior trials, including murder prosecution of defendant, did not establish personal bias and prejudice on part of court against People in their prosecution of defendant. People v. Diaz, 1986, 498 N.Y.S.2d 698, 130 Misc.2d 1024

CASE NOTES:

Fact that court requested appointment of special prosecutor to conduct independent investigation of certain prosecutorial and police conduct which court observed during course of two prior trials, including murder prosecution of defendant, did not place court in accusatory posture with respect to office of District Attorney of Suffolk County so as to require court to recuse itself from presiding over defendant's case. People v. Diaz, 1986, 498 N.Y.S.2d 698, 130 Misc.2d 1024

CASE NOTES:

For bias and prejudice to disqualify a judge, it must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case; it should not result from conduct which the court observed during

interpreted as affecting the judge's impartiality. Leombruno v. Leombruno (3 Dept. 1989) 540 N.Y.S.2d 925, 150 A.D.2d 902

CASE NOTES:

course of his function as a trial judge. People v. Diaz, 1986, 498 N.Y.S.2d 698, 130 Misc.2d 1024

11. Family relationship

CASE NOTES:

Petitioner admittedly presided over six cases involving relatives in violation of the Rules and Canons governing judicial conduct; this alone makes removal the appropriate sanction. Matter of Wait, 1986, 490 N.E.2d 502, 499 N.Y.S.2d 635, 67 N.Y.2d 15

CASE NOTES:

Any involvement by a judge in cases to which a family member is a party or any similar suggestion of favoritism to family members has been and will continue to be viewed as serious misconduct. Matter of Wait, 1986, 490 N.E.2d 502, 499 N.Y.S.2d 635, 67 N.Y.2d 15

CASE NOTES:

A judge must recuse herself when her husband has any

involvement in a case before her. Matter of Emory CC (3 Dept. 1993) 606 N.Y.S.2d 99, 199 A.D.2d 932, leave to appeal dismissed 634 N.E.2d 600, 612 N.Y.S.2d 104, 83 N.Y.2d 837

12. Compensation of appointees

CASE NOTES:

Failure of Surrogate's Court judge to abide by legal requirements of office, in manner conveying appearance of impropriety and favoritism, warranted removal; judge had appointed friend as counsel to Public Administrator, and had systematically approved counsel's fee requests without considering statutory factors. In re Feinberg, 2005, 5 N.Y.3d 206, 800 N.Y.S.2d 529, 833 N.E.2d 1204

22 NYCRR 100.3, 22 NY ADC 100.3

22 NY ADC 100.3
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STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

In the Matter of the Proceeding
Pursuant to Section 44, subdivision 4,
of the Judiciary Law in Relation to

DETERMINATION

LISA J. WHITMARSH,

a Justice of the Morristown Town Court,
St. Lawrence County.

THE COMMISSION:

Joseph W. Belluck, Esq., Chair
Paul B. Harding, Esq., Vice Chair
Honorable Rolando T. Acosta
Joel Cohen, Esq.
Jodie Corngold
Richard D. Emery, Esq.
Honorable Thomas A. Klonick
Honorable Leslie G. Leach
Richard A. Stoloff, Esq.
Honorable David A. Weinstein
Akosua Garcia Yeboah

APPEARANCES:

Robert H. Tembeckjian (S. Peter Pedrotty and Cathleen S. Cenci, Of Counsel) for the Commission

Michael F. Young for the Respondent

The respondent, Lisa J. Whitmarsh, a Justice of the Morristown Town Court, St. Lawrence County, was served with a Formal Written Complaint dated October 28, 2016, containing one charge. The Formal Written Complaint alleged that respondent

made improper public comments on her Facebook account about a matter pending in another court and failed to delete public comments about the matter made by her court clerk. Respondent filed a Verified Answer dated November 16, 2016.

On December 2, 2016, the Administrator, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Section 44, subdivision 5, of the Judiciary Law, stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On December 7, 2016, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Morristown Town Court, St. Lawrence County, since January 1, 2014. Her term expires on December 31, 2017. She is not an attorney.

2. As set forth below, from March 13, 2016 to March 28, 2016, with respect to *People v David VanArnam,* a matter then pending in the Canton Town Court, St. Lawrence County, respondent made public comments on her Facebook account about the pending proceeding and failed to delete public comments about the pending proceeding made by a Morristown Town Court clerk.

3. On March 3, 2016, a felony complaint was filed in the Canton Town Court charging David VanArnam with Offering a False Instrument for Filing in the First Degree, in violation of Penal Law Section 175.35(1). The felony complaint alleged that

Mr. VanArnam, who was running for election to the Morristown town council, had filed nominating petitions in which he falsely swore that he personally witnessed the signatures on the petitions. On March 7, 2016, Mr. VanArnam was issued an appearance ticket, directing him to appear in the Canton Town Court on March 16, 2016.

4. Facebook is an internet social networking website which allows its users to, *inter alia*, post and share content on their own Facebook pages as well as on the pages of other users. Facebook users are responsible for managing the privacy settings associated with their accounts. At the option of the account holder, the content on one's internet Facebook page may be viewable by the public or restricted to one's Facebook "friends."

5. In March 2016, respondent maintained a Facebook account under the name "Lisa Brown Whitmarsh." Respondent had approximately 352 Facebook "friends." Respondent's Facebook account privacy settings were set to "Public," meaning that any internet user, with or without a Facebook account, could view content posted on her Facebook page.

6. On March 13, 2016, respondent posted a comment to her publicly viewable Facebook account, as shown on Exhibit A to the Agreed Statement of Facts, criticizing the investigation and prosecution of Mr. VanArnam. Respondent commented, *inter alia*, that she felt "disgust for a select few," that Mr. VanArnam had been charged with a felony rather than a misdemeanor because of a "personal vendetta," that the investigation was the product of "CORRUPTION" caused by "personal friends calling in personal favors," and that Mr. VanArnam had "[a]bsolutely" no criminal intent.

7. Respondent's post also referred to her judicial position, stating, "When the town board attempted to remove a Judge position – I stood up for my Co-Judge. When there is a charge, I feel is an abuse of the Penal Law – I WILL stand up for DAVID VANARNUM" [sic] [emphasis in original].

8. Other Facebook users posted comments on respondent's Facebook page, commending respondent's statements in her post of March 13, 2016, and/or criticizing the prosecution of Mr. VanArnam. The first Facebook user to comment was Morristown Town Court Clerk Judy Wright, who posted the following on March 13, 2016, at 7:58 AM: "Thank you Judge Lisa! You hit the nail on the head." Respondent did not delete the court clerk's comment, which was viewable by the public.

9. In two comments, posted on respondent's Facebook page on March 13, 2016, at 8:02 AM and 8:56 AM, respondent's husband, Gary Whitmarsh, questioned whether the complainant in the *VanArnam* case had a "close personal relationship" with "our prosecutor" and called the matter a "real 'Rain Wreck,'" referring to St. Lawrence County District Attorney Mary Rain. These comments were viewable by the public.

10. Respondent clicked the "like" button next to some of the comments to her post, including, *inter alia*, the following:

- one comment posted on March 13, 2016, at 8:12 AM, stating that the charges against Mr. VanArnam were "an abuse of our legal system" and "uncalled for";
- a comment posted on March 13, 2016, at 9:22 AM, criticizing District Attorney Rain; and

- another comment by Mr. Whitmarsh posted on March 13, 2016, at 2:10 PM, stating, "This is what's wrong with our justice system."

11. Respondent's "likes" of these comments were visible to the public when viewed online by hovering one's cursor over the "like" button next to each comment.

12. According to the Facebook online Help Center, clicking the "like" button is a way for Facebook users to indicate that they "enjoy" a post. The person who posted the content receives a notification that another Facebook user has "liked" it. *See* https://www.facebook.com/help/452446998120360.

13. Respondent's March 13, 2016, post about the *VanArnam* case was shared at least 90 times by other Facebook users.

14. On March 16, 2016, respondent posted on her public Facebook account a website link to a news article reporting that the charge against Mr. VanArnam had been dismissed.

15. On March 23, 2016, a local news outlet posted an article on its website reporting on respondent's Facebook comments concerning the *VanArnam* case and re-printed respondent's Facebook post of March 13, 2016, in its entirety.

16. On March 28, 2016, respondent removed all postings concerning the *VanArnam* matter from her Facebook page after receiving a letter from District Attorney Rain questioning the propriety of her comments and requesting her recusal from all matters involving the District Attorney's office.

17. On August 29, 2016, based upon the same conduct for which he was

earlier charged, Mr. VanArnam was indicted by a grand jury for Offering a False Instrument for Filing in the First Degree and Making an Apparently Sworn False Statement in the Second Degree. On November 30, 2016, the indictment was dismissed with leave to re-present within 30 days.

Additional Factors

18. Respondent has been cooperative and contrite throughout the Commission's inquiry.

19. Respondent avers – and the Administrator has no evidence to the contrary – that she had set her Facebook account privacy settings to "Public" for an unrelated reason a few years earlier. At the time of her posting about the *VanArnam* case, respondent did not realize that her privacy settings were still set to "Public" and had intended her post to be seen by her Facebook "friends" only. Nevertheless, respondent recognizes that commenting about a pending case to an intended audience of 352 individuals is still an impermissible "public" comment under the Rules.

20. Respondent avers that she will refrain from all similar conduct in the future.

21. Respondent deleted all postings concerning the *VanArnam* matter promptly upon her receipt of District Attorney Rain's letter and, by letter dated March 28, 2016, informed District Attorney Rain of that fact.

22. Soon after receiving District Attorney Rain's letter, respondent recused herself from all matters involving the District Attorney's office to avoid any appearance of impropriety.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(C) and 100.3(B)(8) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

By posting public comments on her Facebook page criticizing the prosecution of an individual whose case was pending in another court, respondent violated Section 100.3(B)(8) of the Rules, which prohibits a judge from "mak[ing] any public comment about a pending or impending proceeding in any court within the United States or its territories." As the language of the rule makes clear, the prohibition is not limited to comments about cases in the judge's own court. *See Matter of McKeon*, 1999 NYSCJC Annual Report 117 (judge's televised comments addressing the merits of the pending O.J. Simpson case, the witnesses' credibility and the attorneys' strategies in that matter violated the rule). Comments posted on Facebook are clearly public, regardless of whether they are intended to be viewable by anyone with an internet connection or by a more limited audience of the user's Facebook "friends." Even such a "limited" audience, we note, can be substantial, and to the extent that such postings can be captured or shared by others who have the ability to see them, they cannot be viewed as private in any

meaningful sense.[1] Accordingly, a judge who uses Facebook or any other online social network "should ... recognize the public nature of anything he/she places on a social network page and tailor any postings accordingly" (Adv Op 08-176).

Respondent's comments about the VanArnam matter, posted on her Facebook page ten days after a felony complaint against him was filed in another town court, addressed the defendant's culpability (stating that he "is not a criminal" and had "[a]bsolutely" no criminal intent) and criticized the prosecution in intemperate language, suggesting that it arose from a "personal vendetta" and that the investigation was the product of "CORRUPTION" caused by "personal friends calling in personal favors." These statements were improper (*see Matter of Williams*, 2002 NYSCJC Annual Report 175 [judge's "unwarranted public criticism of the prosecutor," alleging with no basis that his office was making prosecutorial decisions for political reasons, was inconsistent with the Rules]). Regardless of respondent's intent, her comments – and her "likes" of comments criticizing the District Attorney that were posted in response to her message – conveyed not only respondent's personal view that the prosecution was unjust, but the appearance that she was impugning the integrity of the prosecution and endorsing others' criticism of the District Attorney's office and the District Attorney personally. Her statements, which were viewable online for 15 days and were reported by the media, were inconsistent with her duty to "act at all times in a manner that promotes public

[1] *See* ABA Formal Opinion 462, "Judge's Use of Electronic Social Networking Media," (2/21/13) (advising that judges who use electronic social media "must assume that comments posted [on such forums] will not remain within the circle of the judge's connections").

confidence in the integrity and impartiality of the judiciary" (Rule 100.2[A]) and resulted in her recusal from all matters involving the District Attorney's office. Moreover, by referring to her judicial position in the same post (stating that she had once "stood up for my Co-Judge"), respondent lent her judicial prestige to her comments, which violated the prohibition against using the prestige of judicial office to advance private interests (Rule 100.2[C]).

We note further that since Rule 100.3(B)(8) mandates that a judge "require similar abstention [from public comment about pending proceedings] on the part of court personnel subject to the judge's direction and control," the comments posted by respondent's court clerk on respondent's Facebook page were also objectionable. Respondent promptly deleted her own post and all references to the VanArnam matter on her Facebook page after the District Attorney contacted her and questioned the propriety of her statements.

In accepting the stipulated sanction of admonition in this matter, we note that respondent has been cooperative and contrite throughout the Commission's inquiry and avers that she will refrain from all similar conduct in the future. We also take this opportunity to remind judges that the Rules Governing Judicial Conduct apply in cyberspace as well as to more traditional forms of communications and that in using technology, every judge must consider how such activity may impact the judge's ethical responsibilities.

The obligations potentially affected by evolving technology extend well beyond Rule 100.3(B)(8) and include, for example, the duty to refrain from *ex parte*

communications, political endorsements, improper pledges and promises, and any extra-judicial activity that detracts from the dignity of judicial office or undermines public confidence in the judiciary (Rules, §§100.3[B][6], 100.5[A][1][e], 100.3[B][9], 100.4[A][2], 100.2[A]). While the ease of electronic communication may encourage informality, it can also, as we are frequently reminded, foster an illusory sense of privacy and enable too-hasty communications that, once posted, are surprisingly permanent. For judges, who are held to "standards of conduct more stringent than those acceptable for others" (*Matter of Kuehnel*, 49 NY2d 465, 469 [1980]) and must expect a heightened degree of public scrutiny, internet-based social networks can be a minefield of "ethical traps for the unwary" (John G. Browning, "Why Can't We Be Friends? Judges' Use of Social Media," 68 U. Miami L. Rev. 487, 511 [Winter 2014]).

The Advisory Committee on Judicial Ethics has cautioned judges about the public nature and potential perils of social networks and has advised that judges who use such forums must exercise "an appropriate level of prudence, discretion and decorum" so as to ensure that their conduct is consistent with their ethical responsibilities (Adv Op 08-176). Further, since the technology behind social media can change rapidly and unpredictably, it is essential that judges who use such forums "stay abreast of new features of and changes to any social networks they use" since such developments may impact the judge's duties under the Rules (*Id*).

These are excellent guidelines for any judge who joins and uses an online social network. At a minimum, judges who do so must exercise caution and common sense in order to avoid ethical missteps.

By reason of the foregoing, the Commission determines that the appropriate disposition is admonition.

Mr. Belluck, Mr. Harding, Judge Acosta, Mr. Cohen, Ms. Corngold, Mr. Emery, Judge Klonick, Judge Leach, Mr. Stoloff and Judge Weinstein concur.

Ms. Yeboah did not participate.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct.

Dated: December 28, 2016

Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

Compilation of Codes, Rules and Regulations of the State of New York Currentness
Title 22. Judiciary
Subtitle A. Judicial Administration.
Chapter I. Standards and Administrative Policies
Subchapter C. Rules of the Chief Administrator of the Courts
Part 100. Judicial Conduct (Refs & Annos)

22 NYCRR 100.5

Section 100.5. A judge or candidate for elective judicial office shall refrain from inappropriate political activity

(A) *Incumbent judges and others running for public election to judicial office.*

(1) Neither a sitting judge nor a candidate for public election to judicial office shall directly or indirectly engage in any political activity except (i) as otherwise authorized by this section or by law, (ii) to vote and to identify himself or herself as a member of a political party, and (iii) on behalf of measures to improve the law, the legal system or the administration of justice. Prohibited political activity shall include:

(a) acting as a leader or holding an office in a political organization;

(b) except as provided in paragraph (3) of this subdivision, being a member of a political organization other than enrollment and membership in a political party;

(c) engaging in any partisan political activity, provided that nothing in this section shall prohibit a judge or candidate from participating in his or her own campaign for elective judicial office or shall restrict a non-judge holder of public office in the exercise of the functions of that office;

(d) participating in any political campaign for any office or permitting his or her name to be used in connection with any activity of a political organization;

(e) publicly endorsing or publicly opposing (other than by running against) another candidate for public office;

(f) making speeches on behalf of a political organization or another candidate;

(g) attending political gatherings;

(h) soliciting funds for, paying an assessment to, or making a contribution to a political organization or candidate; or

(i) purchasing tickets for politically sponsored dinners or other functions, including any such function for a non-political purpose.

(2) A judge or non-judge who is a candidate for public election to judicial office may participate in his or her own campaign for judicial office as provided in this section and may contribute to his or her own campaign as permitted under the Election Law. During the window period as defined in section 100.0(Q) of this Part, a judge or non-judge who is a candidate for public election to judicial office, except as prohibited by law, may:

(i) attend and speak to gatherings on his or her own behalf, provided that the candidate does not personally solicit contributions;

(ii) appear in newspaper, television and other media advertisements supporting his or her candidacy, and distribute pamphlets and other promotional campaign literature supporting his or her candidacy;

(iii) appear at gatherings, and in newspaper, television and other media advertisements with the candidates who make up the slate of which the judge or candidate is a part;

(iv) permit the candidate's name to be listed on election materials along with the names of other candidates for elective public office;

(v) purchase two tickets to, and attend, politically sponsored dinners and other functions, provided that the cost of the ticket to such dinner or other function shall not exceed the proportionate cost of the dinner or function. The cost of the ticket shall be deemed to constitute the proportionate cost of the dinner or function if the cost of the ticket is $250 or less. A candidate may not pay more than $250 for a ticket unless her or she obtains a statement from the sponsor of the dinner or function that the amount paid represents the proportionate cost of the dinner or function.

(3) A non-judge who is a candidate for public election to judicial office may also be a member of a political organization and continue to pay ordinary assessments and ordinary contributions to such organization.

(4) A judge or a non-judge who is a candidate for public election to judicial office:

(a) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the impartiality, integrity and independence of the judiciary, and shall encourage members of the candidate's family to adhere to the same standards of political conduct in support of the candidate as apply to the candidate;

(b) shall prohibit employees and officials who serve at the pleasure of the candidate, and shall discourage other employees and officials subject to the candidate's direction and control, from doing on the candidate's behalf what the candidate is prohibited from doing under this Part;

(c) except to the extent permitted by paragraph (A)(5) of this section, shall not authorize or knowingly permit any person to do for the candidate what the candidate is prohibited from doing under this Part;

(d) shall not:

(i) make pledges or promises of conduct in office that are inconsistent with the impartial performance of the adjudicative duties of the office;

(ii) with respect to cases, controversies or issues that are likely to come before the court, make commitments that are inconsistent with the impartial performance of the adjudicative duties of the office;

(iii) knowingly make any false statement or misrepresent the identity, qualifications, current position or other fact concerning the candidate or an opponent; but

(e) may respond to personal attacks or attacks on the candidate's record as long as the response does not violate subparagraphs (a) and (d) of this paragraph;

(f) shall complete an education program, either in person or by videotape or by internet correspondence course, developed or approved by the Chief Administrator or his or her designee anytime after the candidate makes a public announcement of candidacy or authorizes solicitation or acceptance of contributions for a known judicial vacancy, but no later than 30 days after receiving the nomination for judicial office. The date of nomination for candidates running in a primary election shall be the date upon which the candidate files a designating petition with the Board of Elections. This provision shall apply to all candidates for elective judicial office in the Unified Court System except for town and village justices;

(g) shall file with the Ethics Commission for the Unified Court System a financial disclosure statement containing

the information and in the form set forth in the annual statement of financial disclosure adopted by the Chief Judge of the State of New York. Such statement shall be filed within 20 days following the date on which the judge or non-judge becomes such a candidate; provided, however, that the Ethics Commission for the Unified Court System may grant an additional period of time within which to file such statement in accordance with rules promulgated pursuant to section 40.1(i)(3) of the Rules of the Chief Judge of the State of New York (22 NYCRR 40.1). Notwithstanding the foregoing, compliance with this subparagraph shall not be necessary where a judge or non-judge already is or was required to file a financial disclosure statement for the preceding calendar year pursuant to Part 40 of the Rules of the Chief Judge. This requirement shall not apply to candidates for election to town and village courts.

(5) A judge or candidate for public election to judicial office shall not personally solicit or accept campaign contributions, but may establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept reasonable campaign contributions and support from the public, including lawyers, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. Such committees may solicit and accept such contributions and support only during the window period. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

(6) A judge or a non-judge who is a candidate for public election to judicial office may not permit the use of campaign contributions or personal funds to pay for campaign-related goods or services for which fair value was not received.

(7) Independent Judicial Election Qualifications Commissions, created pursuant to Part 150 of the Rules of the Chief Administrator of the Courts, shall evaluate candidates for elected judicial office, other than justice of a town or village court.

(B) *Judge as candidate for nonjudicial office.* A judge shall resign from judicial office upon becoming a candidate for elective nonjudicial office either in a primary or in a general election, except that the judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention if the judge is otherwise permitted by law to do so.

(C) *Judge's staff.* A judge shall prohibit members of the judge's staff who are the judge's personal appointees from engaging in the following political activity:

(1) holding an elective office in a political organization, except as a delegate to a judicial nominating convention or a member of a county committee other than the executive committee of a county committee;

(2) contributing, directly or indirectly, money or other valuable consideration in amounts exceeding $500 in the aggregate during any calendar year to all political campaigns for political office, and other partisan political activity including, but not limited to, the purchasing of tickets to political functions, except that this $500 limitation shall not apply to an appointee's contributions to his or her own campaign. Where an appointee is a candidate for judicial office, reference also shall be made to appropriate sections of the Election Law;

(3) personally soliciting funds in connection with a partisan political purpose, or personally selling tickets to or promoting a fund-raising activity of a political candidate, political party, or partisan political club; or

(4) political conduct prohibited by section 50.5 of the Rules of the Chief Judge (22 NYCRR 50.5).

Credits

Sec. filed Aug. 1, 1972; renum. 111.5, new added by renum. and amd. 33.5, filed Feb. 2, 1982; amds. filed: Dec. 21, 1983; May 8, 1985; March 2, 1989; April 11, 1989; Oct. 30, 1989; Oct. 31, 1990; repealed, new filed Feb. 1, 1996; amds. filed: March 25, 1996; Jan. 29, 2004; Feb. 21, 2006; July 21, 2006; Oct. 23, 2006; Oct. 29, 2007 eff. Oct. 24, 2007. Amended (A)(4)(f).

Current with amendments included in the New York State Register, XXXIX, Issue 13 dated March 29, 2017.

22 NYCRR 100.5, 22 NY ADC 100.5

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Opinion 08-176

January 29, 2009

Digest: Provided that the judge otherwise complies with the Rules Governing Judicial Conduct, he/she may join and make use of an Internet-based social network. A judge choosing to do so should exercise an appropriate degree of discretion in how he/she uses the social network and should stay abreast of the features of any such service he/she uses as new developments may impact his/her duties under the Rules.

Rules: 22 NYCRR 100.2, 100.2(A); 100.3(B)(8); 100.4(A)(2), 100.4(G); 100.6(B); Opinions 07-141; 07-135; 06-149; 01-14 (Vol. XIX).

Opinion:

A judge received an e-mail inviting him/her to join an online "social network" and inquires whether it is appropriate for him/her to accept that offer and participate.

Social networks, as they are commonly known, are Internet-based meeting places where users with similar interests and backgrounds can communicate with each other. Users create their own personal website - a profile page - with information about themselves that is available for other users to see. Users can establish "connections" with other users allowing increased access to each other's profile, including, in many cases, the ability to contact any connections the other user has and to comment on material posted on each other's pages.

Although they vary in certain specific details, social networks generally allow users to reconnect with friends and family, discuss common interests, share photographs, and play games with each other. Other social networks, such as the one at issue in this inquiry, are more business-oriented in nature, with an almost-exclusive focus on professional networking and sharing of business-related information. The social network at issue would allow the judge to join an online community and interact with lawyers and litigants among many other users.

There are multiple reasons why a judge might wish to be a part of a social network: reconnecting with law school, college, or even high school classmates; increased interaction with distant family members; staying in touch with former colleagues; or even monitoring the usage of that same social network by minor children in the judge's immediate family.

The Committee cannot discern anything inherently inappropriate about a judge joining and making use of a social network. A judge generally may socialize in person with attorneys who appear in the judge's court, subject to the Rules Governing Judicial Conduct (the "Rules") (*see* Opinion 07-141). Moreover, the Committee has not opined that there is anything per se unethical about communicating using other forms of technology, such as a cell phone or an Internet web page (*see e.g.* Opinion 07-135 [permitting use of a website in a judge's campaign for office]). Thus, the question is not whether a judge can use a social network but, rather, how he/she does so.

The Rules require that a judge must avoid impropriety and the appearance of impropriety in all of the judge's activities (*see* 22 NYCRR 100.2) and shall act at all times in a

manner that promotes public confidence in the integrity and impartiality of the judiciary (*see* 22 NYCRR 100.2[A]). Similarly, a judge shall conduct all of the judge's extra-judicial activities so that they do not detract from the dignity of judicial office (*see* 22 NYCRR 100.4[A][2]).

What a judge posts on his/her profile page or on other users' pages could potentially violate the Rules in several ways. The Committee has, for example, advised that a court should not provide a link on its web page to an advocacy group for Megan's Law which listed the names and counties of residence for registered sex offenders (*see* Opinion 01-14 [Vol. XIX]; *but see* Opinion 07-135 [permissible to provide link to newspaper articles on judge's website, provided that they are dignified, truthful, and not misleading]). A judge should thus recognize the public nature of anything he/she places on a social network page and tailor any postings accordingly.

The judge also should be mindful of the appearance created when he/she establishes a connection with an attorney or anyone else appearing in the judge's court through a social network. In some ways, this is no different from adding the person's contact information into the judge's Rolodex or address book or speaking to them in a public setting. But, the public nature of such a link (i.e., other users can normally see the judge's friends or connections) and the increased access that the person would have to any personal information the judge chooses to post on his/her own profile page establish, at least, the appearance of a stronger bond. A judge must, therefore, consider whether any such online connections, alone or in combination with other facts, rise to the level of a "close social relationship" requiring disclosure and/or recusal (*compare* Opinion 07-141 *with* Opinion 06-149).

Further, other users of the social network, upon learning of the judge's identity, may informally ask the judge questions about or seek to discuss their cases, or seek legal advice. As is true in face-to-face meetings, a judge may not engage in these communications. The Rules bar all judges from commenting publicly on pending or impending matters (*see* 22 NYCRR 100.3[B][8]). Likewise, a full-time judge may not practice law and can only act pro se or give uncompensated advice to a family member (*see* 22 NYCRR 100.4[G]). Part-time judges, to the extent permitted to practice law (*see* 22 NYCRR 100.6[B]), should be mindful of the public nature of communications via social networks.

The guidance set forth above is, and can only be, a non-exhaustive list of issues that judges using social networks should consider. The Committee urges all judges using social networks to, as a baseline, employ an appropriate level of prudence, discretion and decorum in how they make use of this technology, above and beyond what is specifically described above. It is not difficult to find many mainstream news reports regarding negative consequences and notoriety for social network users who used social networks haphazardly (*see e.g.* Helen A.S. Popkin, *Twitter Gets You Fired In 140 Characters Or Less*, http://www.msnbc.msn.com/id/29796962/ [March 23, 2009, accessed April 10, 2009] [discussing dangers of postings about workplace on social networks]); *Facebook Post Gets Worker Fired*, http://sports.espn.go.com/nfl/news/story?id=3965039 [March 9, 2009, accessed April 10, 2009] [discussing termination of NFL team employee for criticizing a player personnel move on Facebook]).

Finally, the Committee is also aware that the functions and resources available on, and technology behind, social networks rapidly change. Neither this opinion, nor any future opinion the Committee could offer, can accurately predict how these technologies will

change and, accordingly, affect judges' responsibilities under the Rules. Thus, judges who use social networks consistent with the guidance in this opinion should stay abreast of new features of, and changes to, any social networks they use and, to the extent those features present further ethics issues not addressed above, consult the Committee for further guidance.

Opinion 13-22

March 14, 2013

Digest: A judge who is not in his/her window period for election may not participate in a politically sponsored sporting event in which one local political party's team will compete against another local political party's team, where the purpose of the event is to improve both parties' public image.

Rules: 22 NYCRR 100.0(Q); 100.2; 100.2(A); 100.5(A)(1); 100.5 (A)(1)(I)-(iii); 100.5(A)(1)(d); 100.5(A)(1)(g); 100.5(A)(2).

Opinion:

A judge who is not in his/her window period asks whether he/she may participate in an informal, friendly sporting event organized by two local political parties. The judge states that the event is not a fund-raiser and is not in furtherance of a partisan political purpose. Rather, the game's purpose is to demonstrate publicly that party members on both sides of the aisle can put their differences aside and play together. The judge has also provided a copy of a newspaper article about a similar event held in a previous year. Among other things, the article identifies by name several participants who were running for election at the time.

A judge must always avoid even the appearance of impropriety (*see* 22 NYCRR 100.2) and must always act in a manner that promotes the public's confidence in the judiciary's integrity and impartiality (*see* 22 NYCRR 100.2[A]). Generally, a sitting judge is prohibited from engaging either directly or indirectly in any political activity except in furtherance of his/her own campaign for election or re-election during the applicable window period (*see* 22 NYCRR 100.5[A][1]-[2]; 100.0[Q] [defining "Window Period"]).[1] Therefore, a judge who is not a candidate within his/her window period must not attend political gatherings (*see* 22 NYCRR 100.5[A][1][g]), and must not permit his/her name to be used in connection with any activity of a political organization (*see* 22 NYCRR 100.5[A][1][d]).

The Committee notes that the goal of the event, *i.e.*, to demonstrate that party members on both sides of the aisle can put their differences aside and play together, is political in nature in that it seeks to improve the public image of both parties.[2] The Committee notes that the event appears to be specifically designed to attract media coverage, whether to address constituents' concerns about political gridlock or to allow party members who are currently seeking election to gain favorable press coverage. Thus, under the circumstances presented, this politically sponsored sporting event is a political gathering in which a sitting judge, outside his/her window period, should not participate. Therefore, the inquiring judge, who is not within his/her Window Period, is prohibited from participating in the event (*see* 22 NYCRR 100.5[A][1][g]).

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[1] A sitting judge may nonetheless vote and identify him/herself as a member of a political party and may engage in political activities as authorized by law and on behalf of measures to improve the law, the legal system or the administration of justice; (*see* 22 NYCRR 100.5[A][1][I]-[iii]).

[2] Although the event appears to be bi-partisan, it cannot be said to be truly non-partisan, as it includes only two of the six ballot-qualified parties in New York.

Opinion 13-126

October 24, 2013

Digest: During the applicable window period, a judicial candidate may use an email signature block on his/her personal email which requests non-financial support from voters and provides links to the campaign committee's social media page and campaign website.

Rules: 22 NYCRR 100.0(Q); 100.5(A)(1); 100.5(A)(1)(h); 100.5(A)(2); 100.5(A)(2)(I); 100.5(A)(4)(a); 100.5(A)(5); Joint Opinion 12-84/12-95[B]-[G]; Opinions 11-65; 08-176; 08-152; 08-43; 07-135; 05-101; 01-44 (Vol. XX); 99-155 (Vol. XVIII).

Opinion:

A sitting judge who is currently a judicial candidate asks whether he/she may, during his/her window period, use an email signature block for his/her personal email that provides links to his/her campaign committee's social media page and campaign website, with language such as:

> "Please support me in my campaign for [position]!
> Like us on Facebook: [Committee Name]
> [campaign website address]"

A judge or non-judge who is a candidate for public election to judicial office may participate in his/her own campaign during his/her window period, subject to certain limitations (*see* 22 NYCRR 100.5[A][1]-[2]; *see also* 22 NYCRR 100.0[Q] [defining "window period"]). For example, a judicial candidate must act in a manner consistent with the impartiality, integrity and independence of the judiciary throughout his/her campaign (*see* 22 NYCRR 100.5[A][4][a]), may contribute to his/her own campaign as permitted by law (*see* 22 NYCRR 100.5[A][2]), and may authorize a committee of responsible persons to solicit and accept funds for his/her campaign (*see* 22 NYCRR 100.5[A][5]).

A judicial candidate's campaign committee may maintain a campaign website on behalf of the candidate during the applicable window period (*see generally* 22 NYCRR 100.5 [A][5]; Joint Opinion 12-84/12-95[B]-[G]; Opinion 07-135). For example, the Committee has advised that a judicial candidate may authorize his/her campaign committee to solicit campaign contributions on a website it sponsors, provided that the contributors are directed to send all donations to the campaign committee and not to the candidate him/herself (*see* Opinion 07-135). Such campaign websites may include a profile on a social network or other social media presence (*cf.* Opinion 08-176 [noting that Committee could not "discern anything inherently inappropriate about a judge joining and making use of a social network"]).

Moreover, although a judicial candidate may not personally solicit or accept campaign funds (*see* 22 NYCRR 100.5[A][1][h]; 100.5[A][2][I]; Opinion 08-43), the Rules Governing Judicial Conduct do not prohibit a candidate from personally soliciting and accepting non-

financial support. Of particular note, the Committee has advised that a judicial candidate may personally solicit endorsements for his/her election during the judge's window period (*see* Opinions 11-65 [discussing prior opinions]; 01-44 [Vol. XX] [candidate may personally seek the endorsement of the Police Benevolent Association and other organizations]).[1] By analogy, the Committee concludes that a judicial candidate may personally request that voters "like" a social media site maintained by the candidate's campaign committee, as this is a request for non-financial support of the candidate.

Therefore, it is ethically permissible for the inquiring judicial candidate to use the proposed email signature block on his/her personal email during the applicable window period, as the signature block merely requests non-financial support from voters and provides links to campaign websites maintained by the judicial candidate's campaign committee (*see generally* 22 NYCRR 100.5[A][2]; 100.5[A][5]; Opinion 01-44 [Vol. XX]).[2]

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[1] In personally soliciting non-financial support, a judicial candidate must take care to avoid the appearance of impropriety (*see e.g.* Opinions 11-65 [judge who is a judicial candidate should not personally solicit endorsements from individual court officers who work in the judge's court, as this could create an appearance of undue pressure on public employees who might otherwise expect their employment to be completely independent of the outcome of a specific judge's re-election campaign]; 08-152 [judge who is a judicial candidate may ask attorneys who regularly appear before him/her to attend a reception and speak to attendees about their experience appearing before him/her as a judge, as long as he/she takes care to avoid any appearance of undue pressure on the attorneys in making this request]).

[2] The Committee notes that, to avoid any impression that the courthouse is being used for political purposes, a judicial candidate who is a sitting judge should not include a campaign message in the signature block for his/her Unified Court System email (*see* Opinions 05-101 [noting "the danger of a public perception of entanglement of the judiciary itself in the political process"]; 99-155 [Vol. XVIII] [judge may not use court stationery in a re-election campaign, even if the stationery is marked "personal and unofficial"]).

Opinion 16-79

June 16, 2016

Digest: A judicial candidate may not personally distribute campaign materials that, on their face, invite the public to "donate" to his/her campaign, but may permit his/her campaign committee to do so.

Rules: 22 NYCRR 100.0(Q); 100.5(A)(2)(i)-(ii); 100.5(A)(4)(c); 100.5(A)(5); Opinions 15-121; 13-126; 12-84/12-95(B)-(G); 11-65; 07-135; 01-44.

Opinion:

A non-judge candidate for judicial office asks whether he/she may personally distribute palm cards and other campaign literature that exhort supporters "[t]o volunteer and/or donate to" the candidate by accessing the campaign committee's website.

A judicial candidate, i.e., a judge or non-judge who is seeking public election to judicial office, may personally participate in his/her campaign during the applicable window period (*see* 22 NYCRR 100.0[Q]), but may not personally solicit or accept campaign donations (*see* 22 NYCRR 100.5[A][2][i]; 100.5[A][5]). For example, to support his/her candidacy, a judicial candidate may appear in media advertisements; distribute pamphlets and other campaign literature; and appear and speak at his/her own gatherings, provided he/she does not personally solicit donations (*see* 22 NYCRR 100.5[A][2][i]-[ii]). Nevertheless, he/she may establish a committee of responsible persons to conduct campaigns on his/her behalf, and solicit and accept reasonable campaign donations and public support (*see* 22 NYCRR 100.5[A][5]).[1]

The Committee has previously observed that a judicial candidate's campaign committee may maintain a campaign website and social media pages on the candidate's behalf during his/her applicable window period (*see* Opinions 15-121; 13-126; 12-84/12-95[B]-[G], at question 5; 22 NYCRR 100.5[A][5]). Also, it may solicit campaign donations on its website, provided they are directed to the campaign committee (*see* Opinion 07-135).

Although a judicial candidate may not personally solicit campaign contributions, neither in person nor on his/her own website or social media page, he/she may nevertheless seek non-financial support from the public (*see* Opinions 13-126; 11-65; 01-44). Indeed, it is ethically permissible for a judicial candidate to use an email signature block that states "Please support me in my campaign for [position]! Like us on Facebook" and provides links to the Facebook page and campaign website, where the message contains no explicit reference to financial support or contributions (*see* Opinion 13-126).

Thus, if these campaign materials merely encouraged people "[t]o volunteer" for the candidate by accessing the campaign's website, the candidate could personally distribute them. Instead, they exhort supporters "[t]o volunteer and/or donate to" the candidate. As the campaign materials' explicit reference to donations constitutes a direct solicitation of contributions, the candidate may not personally distribute them. Plainly, members of the candidate's campaign committee may solicit contributions and may therefore distribute such campaign materials on his/her behalf (*see* 22 NYCRR 100.5[A][5]). But the candidate may not personally distribute materials expressly requesting donations (*see id.*).

In sum, the candidate may not personally distribute campaign materials that, on their face, invite the public to "donate" to his/her campaign, but may permit his/her campaign committee to do so.

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[1] This is an express exception to the rule that a candidate "shall not authorize or knowingly permit any person to do for the candidate what the candidate is prohibited from doing under this Part" (22 NYCRR 100.5[A][4][c]).

Opinion 17-38

March 16, 2017

Digest: (1) A judge who wishes to participate in a high-profile, apparently non-partisan march, whose purpose is to recognize the importance of scientific endeavors and rational thought in society, must monitor the march's agenda and publicly reported affiliations and sponsorships in the period leading up to the event. The judge must not participate in the march unless the judge determines (a) the march is not co-sponsored by or affiliated with any political organization; (b) the march does not support or oppose any political party or candidate for election; (c) the judge's participation will not involve the judge in impermissible political activity; and (d) the judge's participation will not insert him/her unnecessarily into public controversy.
(2) A judge may not (a) call a Senate Committee to express an opinion on a pending federal executive branch appointment; (b) sign a MoveOn.org petition concerning a federal executive branch appointment, whether as a private citizen or otherwise; or (c) participate in a local political rally, march or demonstration sponsored by grassroots organizations, even if he/she would refrain from any speaking role.

Rules: 22 NYCRR 100.0(M); 100.3(A); 100.4(A)(1)-(3); 100.4(C)(1); 100.5(A)(1); 100.5(A)(1)(g); Opinions 16-169; 16-85; 15-210; 14-117; 13-189/14-02; 13-17; 06-93; 04-24; 02-116; 98-101; 97-36; 92-21.

Opinion:

Several full-time judges ask if they may join in activities bearing an arguably political or quasi-political component. Specifically, they wish to join in an upcoming March for Science, weigh in on certain federal executive branch appointments, and participate in certain unspecified local political rallies, marches, or demonstrations organized by grassroots organizations.

A judge's judicial duties take precedence over all his/her other activities (*see* 22 NYCRR 100.3[A]). Thus, all extra-judicial activities must be compatible with judicial office and must not (1) cast reasonable doubt on the judge's capacity to act impartially as a judge; (2) detract from the dignity of judicial office; or (3) interfere with the performance of judicial duties (*see* 22 NYCRR 100.4[A][1]-[3]). A full-time judge must not appear at a public hearing before an executive or legislative body or official except on matters relating to the law, the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interests (*see* 22 NYCRR 100.4[C][1]). As for political activities, Section 100.5(A)(1) provides:

> Neither a sitting judge nor a candidate for public election to judicial office shall directly or indirectly engage in any political activity except (i) as otherwise authorized by this section or by law, (ii) to vote and to identify himself or herself as a member of a political party, and (iii) on behalf of measures to improve the law, the legal system or the administration of justice.

> Prohibited political activity shall include:
>
> (a) acting as a leader or holding an office in a political organization; (b) ... being a member of a political organization other than enrollment and membership in a political party; (c) engaging in any partisan political activity, provided that nothing in this section shall prohibit a judge or candidate from participating in his or her own campaign for elective judicial office ...; (d) participating in any political campaign for any office or permitting his or her name to be used in connection with any activity of a political organization; (e) publicly endorsing or publicly opposing (other than by running against) another candidate for public office; (f) making speeches on behalf of a political organization or another candidate; (g) attending political gatherings; (h) soliciting funds for, paying an assessment to, or making a contribution to a political organization or candidate; or (i) purchasing tickets for politically sponsored dinners or other functions, including any such function for a non-political purpose.

Thus, Section 100.5 starts with an across-the-board prohibition of *any* direct or indirect political activity by judges before delineating three discrete exceptions to the blanket prohibition. Accordingly, the ensuing recitation of examples of specific prohibited political activities can by no means be seen as all-encompassing or comprehensive, lest the broad reach of the prohibition be eviscerated.

Nevertheless, this Committee recognizes that a blanket prohibition of all political activity is a heavy burden to impose on judges, many of whom hold elective offices. As a result, our prior opinions have advised that judges may engage in certain public advocacy activities where the judge has a clear and direct personal interest at stake (*see* 22 NYCRR 100.4[C][1]). Thus, a judge may circulate a petition to force a referendum on a proposed sale of a nearby parcel of land owned by the local school district (*see* Opinion 16-169); speak at a public hearing regarding power lines to be located near judge's house (*see* Opinion 06-93); and speak about the proposed re-zoning of property owned by the judge (*see* Opinions 02-116; 92-21). In addition, a judge may write to a governmental authority about a proposed traffic light near the judge's home (*see* Opinion 97-36) or to the State Liquor Authority regarding the renewal of a liquor license for an establishment near the judge's home (*see* Opinion 04-24).

In each of the above cases, the Committee advised judges they may engage in political activity related to the judges' personal interests. However, the Committee has been unwavering in insisting upon the narrow-tailoring of these exceptions in order to preserve the preeminent principle that the breadth of the prohibition against political activity must remain robust. In Opinion 13-189/14-02, for example, this Committee found that "a judge's association may seek repeal or amendment of specific SAFE Act provisions which affect them as sitting judges, as such provisions clearly relate to the administration of justice." Nevertheless, the same Opinion found that "a judges' association may not seek the repeal of the SAFE Act in its entirety, as the law, when considered as a whole appears to relate primarily to highly controversial gun control issues which do not clearly and directly implicate the law, the legal system or the administration of justice within the meaning of the Committee's prior opinions" (*id.*).

Given the Rule's language and the Committee's prior opinions, the starting point for an inquiry about political activity is one of prohibition, with discrete and narrow exceptions drawn only after a careful analysis of all of the factors informing the decision.

1. March For Science

The judges first ask if they may attend the "March For Science" scheduled for April 22, 2017 in several cities. The March is, unquestionably, a high-profile event, and judges should very carefully consider the risks of publicly associating themselves with it in light of ongoing media coverage and possible changes in its purpose, activities, sponsorship, and/or affiliations.

According to the inquiry, the stated mission of the March For Science is to refrain from silence as persons who value science in their lives. On this basis, the March For Science purports to be a non-partisan gathering advocating for a recognition of the importance of scientific endeavors and rational thought in society. However, a review of media reports regarding the March for Science reveals that the March has only recently been proposed and organized and, as such, there are conflicting reports about the full agenda of the March as it develops. Therefore, judges must be careful to monitor the agenda and positions taken by organizers of the March. Judges must be careful not to be "associated with matters that are the subject of litigation or public controversy" (Opinion 98-101). Judges must also avoid involvement with "political organizations," which this Committee has defined as any "group whose principal purpose is to further the election or appointment of candidates to political office" (22 NYCRR 100.0[M]; *see* Opinion 15-210).

Should the March For Science or its organizers become involved in or suggest they will become involved in litigation related to the March's agenda, advocate for or against the election or appointment of specific individuals to public office, or become the subject of public controversy, then judges should not attend the March For Science because it will be more of a platform for political protest against the perceived preference among some individuals and groups which ignore or discredit the scientific consensus in favor of what others perceive to be "junk" science, disconnected from critical thinking and fact-based solutions. If that be the case, the March may be seen as related primarily to highly controversial environmental issues such as global warming and resource depletion, matters that do not clearly and directly implicate the law, the legal system or the administration of justice in a manner consistent with this Committee's prior Opinions. The Committee also trusts that a judge will exercise discretion and leave the area on the day of the March if the judge finds that political signs unexpectedly dominate the occasion.

In sum, a judge who wishes to participate in a high-profile, apparently non-partisan march intended to recognize the importance of scientific endeavors and rational thought in society must monitor the march's agenda and publicly reported affiliations and sponsorships in the period leading up to the event. The judge must not participate in the march unless the judge determines (a) the march is not co-sponsored by or affiliated with any political organization; (b) the march does not support or oppose any political party or candidate for election; (c) the judge's participation will not involve the judge in impermissible political activity; and (d) the judge's participation will not insert him/her unnecessarily into public controversy.

2. Federal Executive Branch Appointments

The judges next ask if they may call a Senate Committee to express, as private citizens, an opinion on a federal executive branch appointment. They give, as an example, the appointment of Stephen K. Bannon to the National Security Council. This executive branch appointment does not clearly pertain to the law, the legal system or the administration of justice, and the Committee perceives no direct, personal interest these judges could possibly have in this appointment. The judges' proposed intervention in the appointment is thus impermissible under the rules and prior opinions (*see* 22 NYCRR 100.4[C][1]; 100.5[A][1]).

The inquiring judges also ask if they may sign a petition electronically as a private citizen. As an example, the judges wish to sign a petition prepared by MoveOn.org to oppose the President's decision to seat Stephen K. Bannon on the National Security Council. There may potentially be instances where a judge would be permitted to sign a petition either electronically or in person. This would be most likely, for example, if the petition directly related to a specific personal interest of the judge - *i.e.*, in circumstances where a judge would be permitted to appear before a governmental body or write a letter to the editor or otherwise publicly express his/her views on a matter involving the judge's personal interests (*see e.g.* Opinions 16-169; 06-93; 04-24; 02-116; 97-36; 92-21). Even in such cases, however, a judge is not free to sign *all* conceivable petitions relating to his/her personal interests or relating to improvement of the law, the legal system or the administration of justice. For example, a judge may not sign a legislator's petition regarding a proposed change in the law, where the petition is framed as a partisan political initiative designed to garner statements of public support for the individual legislator (*see* Opinion 13-17). In the Committee's view, a judge also should not sign a petition sponsored by MoveOn.org, which the Committee has already identified as a "political organization" under the Rules (*see* Opinion 14-117; 22 NYCRR 100.0[M]).

Thus, regarding the specific example given, these judges may not sign a MoveOn.org petition concerning a federal executive branch appointment, whether as private citizens or otherwise.

3. Grassroots Rallies, Marches, and Demonstrations

Finally, the judges ask if they may participate, without speaking, in a local rally, march or demonstration sponsored by grassroots organizations. As an example, the judges list a rally recently held in opposition to the so-called Trump Muslim Ban. But, 22 NYCRR 100.5(A)(1)(g) specifically prohibits judges from attending political gatherings. This is another general question that, like signing an electronic petition, would generally be prohibited political activity, subject to specific facts fitting within a narrow exception to the blanket prohibition. As to the specific example these judges provided, participation in such a gathering is impermissible. Clearly, it involves great public controversy, which is also the subject of litigation.

The Committee would also remind judges that "[c]oncealing one's name and judicial status does not ordinarily render prohibited [political] conduct permissible" (Opinion 16-85).

The prohibition on political activity is a heavy burden. However, it is one individuals must accept if they wish to take on the sensitive and critically important role of judges in the Unified Court System, because it is absolutely necessary to maintain an impartial judiciary both in practice and perception.

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

In the Matter of the Proceeding
Pursuant to Section 44, subdivision 4,
of the Judiciary Law in Relation to

LISA J. WHITMARSH,

a Justice of the Morristown Town Court,
St. Lawrence County.

DETERMINATION

THE COMMISSION:

Joseph W. Belluck, Esq., Chair
Paul B. Harding, Esq., Vice Chair
Honorable Rolando T. Acosta
Joel Cohen, Esq.
Jodie Corngold
Richard D. Emery, Esq.
Honorable Thomas A. Klonick
Honorable Leslie G. Leach
Richard A. Stoloff, Esq.
Honorable David A. Weinstein
Akosua Garcia Yeboah

APPEARANCES:

Robert H. Tembeckjian (S. Peter Pedrotty and Cathleen S. Cenci, Of Counsel) for the Commission

Michael F. Young for the Respondent

The respondent, Lisa J. Whitmarsh, a Justice of the Morristown Town Court, St. Lawrence County, was served with a Formal Written Complaint dated October 28, 2016, containing one charge. The Formal Written Complaint alleged that respondent

made improper public comments on her Facebook account about a matter pending in another court and failed to delete public comments about the matter made by her court clerk. Respondent filed a Verified Answer dated November 16, 2016.

On December 2, 2016, the Administrator, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Section 44, subdivision 5, of the Judiciary Law, stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On December 7, 2016, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Morristown Town Court, St. Lawrence County, since January 1, 2014. Her term expires on December 31, 2017. She is not an attorney.

2. As set forth below, from March 13, 2016 to March 28, 2016, with respect to *People v David VanArnam*, a matter then pending in the Canton Town Court, St. Lawrence County, respondent made public comments on her Facebook account about the pending proceeding and failed to delete public comments about the pending proceeding made by a Morristown Town Court clerk.

3. On March 3, 2016, a felony complaint was filed in the Canton Town Court charging David VanArnam with Offering a False Instrument for Filing in the First Degree, in violation of Penal Law Section 175.35(1). The felony complaint alleged that

Mr. VanArnam, who was running for election to the Morristown town council, had filed nominating petitions in which he falsely swore that he personally witnessed the signatures on the petitions. On March 7, 2016, Mr. VanArnam was issued an appearance ticket, directing him to appear in the Canton Town Court on March 16, 2016.

4. Facebook is an internet social networking website which allows its users to, *inter alia*, post and share content on their own Facebook pages as well as on the pages of other users. Facebook users are responsible for managing the privacy settings associated with their accounts. At the option of the account holder, the content on one's internet Facebook page may be viewable by the public or restricted to one's Facebook "friends."

5. In March 2016, respondent maintained a Facebook account under the name "Lisa Brown Whitmarsh." Respondent had approximately 352 Facebook "friends." Respondent's Facebook account privacy settings were set to "Public," meaning that any internet user, with or without a Facebook account, could view content posted on her Facebook page.

6. On March 13, 2016, respondent posted a comment to her publicly viewable Facebook account, as shown on Exhibit A to the Agreed Statement of Facts, criticizing the investigation and prosecution of Mr. VanArnam. Respondent commented, *inter alia*, that she felt "disgust for a select few," that Mr. VanArnam had been charged with a felony rather than a misdemeanor because of a "personal vendetta," that the investigation was the product of "CORRUPTION" caused by "personal friends calling in personal favors," and that Mr. VanArnam had "[a]bsolutely" no criminal intent.

7. Respondent's post also referred to her judicial position, stating, "When the town board attempted to remove a Judge position - I stood up for my Co-Judge. When there is a charge, I feel is an abuse of the Penal Law – I WILL stand up for DAVID VANARNUM" [sic] [emphasis in original].

8. Other Facebook users posted comments on respondent's Facebook page, commending respondent's statements in her post of March 13, 2016, and/or criticizing the prosecution of Mr. VanArnam. The first Facebook user to comment was Morristown Town Court Clerk Judy Wright, who posted the following on March 13, 2016, at 7:58 AM: "Thank you Judge Lisa! You hit the nail on the head." Respondent did not delete the court clerk's comment, which was viewable by the public.

9. In two comments, posted on respondent's Facebook page on March 13, 2016, at 8:02 AM and 8:56 AM, respondent's husband, Gary Whitmarsh, questioned whether the complainant in the *VanArnam* case had a "close personal relationship" with "our prosecutor" and called the matter a "real 'Rain Wreck,'" referring to St. Lawrence County District Attorney Mary Rain. These comments were viewable by the public.

10. Respondent clicked the "like" button next to some of the comments to her post, including, *inter alia*, the following:

- one comment posted on March 13, 2016, at 8:12 AM, stating that the charges against Mr. VanArnam were "an abuse of our legal system" and "uncalled for";
- a comment posted on March 13, 2016, at 9:22 AM, criticizing District Attorney Rain; and

- another comment by Mr. Whitmarsh posted on March 13, 2016, at 2:10 PM, stating, "This is what's wrong with our justice system."

11. Respondent's "likes" of these comments were visible to the public when viewed online by hovering one's cursor over the "like" button next to each comment.

12. According to the Facebook online Help Center, clicking the "like" button is a way for Facebook users to indicate that they "enjoy" a post. The person who posted the content receives a notification that another Facebook user has "liked" it. *See* https://www.facebook.com/help/452446998120360.

13. Respondent's March 13, 2016, post about the *VanArnam* case was shared at least 90 times by other Facebook users.

14. On March 16, 2016, respondent posted on her public Facebook account a website link to a news article reporting that the charge against Mr. VanArnam had been dismissed.

15. On March 23, 2016, a local news outlet posted an article on its website reporting on respondent's Facebook comments concerning the *VanArnam* case and re-printed respondent's Facebook post of March 13, 2016, in its entirety.

16. On March 28, 2016, respondent removed all postings concerning the *VanArnam* matter from her Facebook page after receiving a letter from District Attorney Rain questioning the propriety of her comments and requesting her recusal from all matters involving the District Attorney's office.

17 On August 29, 2016, based upon the same conduct for which he was

earlier charged, Mr. VanArnam was indicted by a grand jury for Offering a False Instrument for Filing in the First Degree and Making an Apparently Sworn False Statement in the Second Degree. On November 30, 2016, the indictment was dismissed with leave to re-present within 30 days.

Additional Factors

18. Respondent has been cooperative and contrite throughout the Commission's inquiry.

19. Respondent avers – and the Administrator has no evidence to the contrary – that she had set her Facebook account privacy settings to "Public" for an unrelated reason a few years earlier. At the time of her posting about the *VanArnam* case, respondent did not realize that her privacy settings were still set to "Public" and had intended her post to be seen by her Facebook "friends" only. Nevertheless, respondent recognizes that commenting about a pending case to an intended audience of 352 individuals is still an impermissible "public" comment under the Rules.

20. Respondent avers that she will refrain from all similar conduct in the future.

21. Respondent deleted all postings concerning the *VanArnam* matter promptly upon her receipt of District Attorney Rain's letter and, by letter dated March 28, 2016, informed District Attorney Rain of that fact.

22. Soon after receiving District Attorney Rain's letter, respondent recused herself from all matters involving the District Attorney's office to avoid any appearance of impropriety.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(C) and 100.3(B)(8) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

By posting public comments on her Facebook page criticizing the prosecution of an individual whose case was pending in another court, respondent violated Section 100.3(B)(8) of the Rules, which prohibits a judge from "mak[ing] any public comment about a pending or impending proceeding in any court within the United States or its territories." As the language of the rule makes clear, the prohibition is not limited to comments about cases in the judge's own court. *See Matter of McKeon*, 1999 NYSCJC Annual Report 117 (judge's televised comments addressing the merits of the pending O.J. Simpson case, the witnesses' credibility and the attorneys' strategies in that matter violated the rule). Comments posted on Facebook are clearly public, regardless of whether they are intended to be viewable by anyone with an internet connection or by a more limited audience of the user's Facebook "friends." Even such a "limited" audience, we note, can be substantial, and to the extent that such postings can be captured or shared by others who have the ability to see them, they cannot be viewed as private in any

meaningful sense.[1] Accordingly, a judge who uses Facebook or any other online social network "should ... recognize the public nature of anything he/she places on a social network page and tailor any postings accordingly" (Adv Op 08-176).

Respondent's comments about the VanArnam matter, posted on her Facebook page ten days after a felony complaint against him was filed in another town court, addressed the defendant's culpability (stating that he "is not a criminal" and had "[a]bsolutely" no criminal intent) and criticized the prosecution in intemperate language, suggesting that it arose from a "personal vendetta" and that the investigation was the product of "CORRUPTION" caused by "personal friends calling in personal favors." These statements were improper (*see Matter of Williams*, 2002 NYSCJC Annual Report 175 [judge's "unwarranted public criticism of the prosecutor," alleging with no basis that his office was making prosecutorial decisions for political reasons, was inconsistent with the Rules]). Regardless of respondent's intent, her comments -- and her "likes" of comments criticizing the District Attorney that were posted in response to her message -- conveyed not only respondent's personal view that the prosecution was unjust, but the appearance that she was impugning the integrity of the prosecution and endorsing others' criticism of the District Attorney's office and the District Attorney personally. Her statements, which were viewable online for 15 days and were reported by the media, were inconsistent with her duty to "act at all times in a manner that promotes public

[1] *See* ABA Formal Opinion 462, "Judge's Use of Electronic Social Networking Media," (2/21/13) (advising that judges who use electronic social media "must assume that comments posted [on such forums] will not remain within the circle of the judge's connections").

confidence in the integrity and impartiality of the judiciary" (Rule 100.2[A]) and resulted in her recusal from all matters involving the District Attorney's office. Moreover, by referring to her judicial position in the same post (stating that she had once "stood up for my Co-Judge"), respondent lent her judicial prestige to her comments, which violated the prohibition against using the prestige of judicial office to advance private interests (Rule 100.2[C]).

We note further that since Rule 100.3(B)(8) mandates that a judge "require similar abstention [from public comment about pending proceedings] on the part of court personnel subject to the judge's direction and control," the comments posted by respondent's court clerk on respondent's Facebook page were also objectionable. Respondent promptly deleted her own post and all references to the VanArnam matter on her Facebook page after the District Attorney contacted her and questioned the propriety of her statements.

In accepting the stipulated sanction of admonition in this matter, we note that respondent has been cooperative and contrite throughout the Commission's inquiry and avers that she will refrain from all similar conduct in the future. We also take this opportunity to remind judges that the Rules Governing Judicial Conduct apply in cyberspace as well as to more traditional forms of communications and that in using technology, every judge must consider how such activity may impact the judge's ethical responsibilities.

The obligations potentially affected by evolving technology extend well beyond Rule 100.3(B)(8) and include, for example, the duty to refrain from *ex parte*

communications, political endorsements, improper pledges and promises, and any extra-judicial activity that detracts from the dignity of judicial office or undermines public confidence in the judiciary (Rules, §§100.3[B][6], 100.5[A][1][e], 100.3[B][9], 100.4[A][2], 100.2[A]). While the ease of electronic communication may encourage informality, it can also, as we are frequently reminded, foster an illusory sense of privacy and enable too-hasty communications that, once posted, are surprisingly permanent. For judges, who are held to "standards of conduct more stringent than those acceptable for others" (*Matter of Kuehnel*, 49 NY2d 465, 469 [1980]) and must expect a heightened degree of public scrutiny, internet-based social networks can be a minefield of "ethical traps for the unwary" (John G. Browning, "Why Can't We Be Friends? Judges' Use of Social Media," 68 U. Miami L. Rev. 487, 511 [Winter 2014]).

The Advisory Committee on Judicial Ethics has cautioned judges about the public nature and potential perils of social networks and has advised that judges who use such forums must exercise "an appropriate level of prudence, discretion and decorum" so as to ensure that their conduct is consistent with their ethical responsibilities (Adv Op 08-176). Further, since the technology behind social media can change rapidly and unpredictably, it is essential that judges who use such forums "stay abreast of new features of and changes to any social networks they use" since such developments may impact the judge's duties under the Rules (*Id*).

These are excellent guidelines for any judge who joins and uses an online social network. At a minimum, judges who do so must exercise caution and common sense in order to avoid ethical missteps.

By reason of the foregoing, the Commission determines that the appropriate disposition is admonition.

Mr. Belluck, Mr. Harding, Judge Acosta, Mr. Cohen, Ms. Corngold, Mr. Emery, Judge Klonick, Judge Leach, Mr. Stoloff and Judge Weinstein concur.

Ms. Yeboah did not participate.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct.

Dated: December 28, 2016

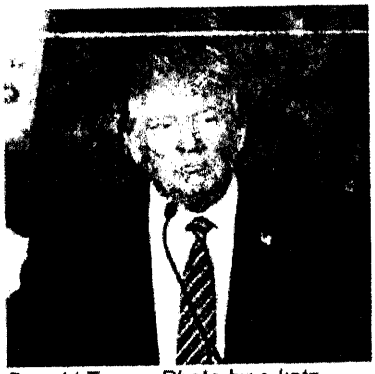
Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

U.S. SUPREME COURT

Did Justice Ginsburg's comments on Donald Trump violate ethics rules?

POSTED JUL 12, 2016 10:55 AM CDT

BY DEBRA CASSENS WEISS (HTTP://WWW.ABAJOURNAL.COM/AUTHORS/4/)



Donald Trump. Photo by a katz (http://www.shutterstock.com/gallery-940660p1.html?cr=00&pl=edit-00) / Shutterstock.com (http://www.shutterstock.com/editorial?cr=00&pl=edit-00)

Updated: Did Justice Ruth Bader Ginsburg go too far when she criticized Donald Trump?

Ethics and legal experts have varying opinions on whether her comments were better left unsaid. But they do agree she didn't violate the Code of Conduct for U.S. Judges because it doesn't bind Supreme Court justices.

The controversy stems from Ginsburg's recent interview (http://www.abajournal.com/news/article/ginsburg_comments_on_trump_she_doesnt_want_to_contemplate_his_presidency/?utm_source=internal&utm_medium=navigation&utm_campaign=most_read) with the New York Times. "I can't imagine what this place would be—I can't imagine what the country would be—with Donald Trump as our president," she said. "For the country, it could be four years. For the court, it could be—I don't even want to contemplate that."

Ginsburg didn't retreat from her comments in an interview with CNN (http://www.cnn.com/2016/07/12/politics/justice-ruth-bader-ginsburg-donald-trump-fake/index.html) on Monday. "He is a faker," Ginsburg said of Trump. "He has no consistency about him. He says whatever comes into his head at the moment. He really has an ego. ... How has he gotten away with not turning over his tax returns? The press seems to be very gentle with him on that."

Trump responded to Ginsburg's comments with a call for her to resign, Politico (http://www.politico.com/story/2016/07/trump-ruth-bader-ginsburg-resign-225460) reports. "Justice Ginsburg of the U.S. Supreme Court has embarrassed all by making very dumb political statements about me. Her mind is shot—resign!" he said in a tweet.

However, on Thursday, Ginsburg released a statement saying she regretted making the remarks about Trump. "My recent remarks in response to press inquiries were ill-advised, and I regret making them," she said. "Judges should avoid commenting on a candidate for public office. In the future, I will be more circumspect."

Several law professors and ethics experts asked about Ginsburg's New York Times interview told the Washington Post (https://www.washingtonpost.com/politics/courts_lawfin-her-remarks-on-the-presumptive-gop-nominee-ruth-bader-ginsburg-may-have-trumped-her-usual-outspokenness/2016/07/11/860ef316-47a5-11e6-bdb9-701687974517_story.html?hpid=hp_hp-top-table-main_supreme-0725pm%3Ahomepage%2Fstory) that Ginsburg shouldn't have commented, while the New York Times features experts on both sides of the issue.

The Code of Conduct for U.S. Judges—which applies only to lower federal court judges—says judges should not "make speeches for a political candidate, or publicly endorse or oppose a candidate for public office" or "engage in any other political activity."

Though the code doesn't apply to justices, the idea of keeping judges out of politics helps protect the rule of law, according to New York University law professor Stephen Gillers, who wrote a post for the New York Times Room for Debate column (http://www.nytimes.com/roomfordebate/2016/07/12/can-a-supreme-court-justice-denounce-a-candidate/its-clearly-not-right-for-justices-to-say-which-candidate-they-support).

"Much as I wish it were otherwise," Gillers writes, "there is no way to read these remarks as nonpolitical. The clear message is that Ginsburg believes that Donald Trump will be bad for the country and the court. I agree, but a Supreme Court justice should not say so."

"Why do we keep judges out of politics?" Gillers asks. "To protect the rule of law. We want the public to view judicial rulings solely as the product of law and legal reasoning, uninfluenced by political considerations. Acceptance of court rulings is undermined if the public believes that judicial decisions are politically motivated."

Stetson University law professor Louis Virelli III tells the Washington Post that Ginsburg's comments could be seen as grounds for her to recuse herself in cases involving Donald Trump and his administration, if he is elected. "I don't necessarily think she would be required to do that, and I certainly don't believe that she would in every instance, but it could invite challenges to her impartiality based on her public comments," Virelli said.

Supporting Ginsburg are University of California at Irvine law dean Erwin Chemerinsky and Georgetown University law professor Paul Butler, who also wrote posts for the Room for Debate column.

"Normally Supreme Court justices should refrain from commenting on partisan politics," Butler wrote (http://www.nytimes.com/roomfordebate/2016/07/12/can-a-supreme-court-justice-denounce-a-candidate/ginsburg-knows-if-trump-wins-the-rule-of-law-is-at-risk). "But these are not normal times. The question is whether a Supreme Court justice—in this case, the second woman on the court, a civil rights icon and pioneering feminist—has an obligation to remain silent when the country is at risk of being ruled by a man who has repeatedly demonstrated that he is a sexist and racist demagogue. The answer must be no."

Like Gillers, University of California at Irvine law dean Erwin Chemerinsky notes that Code of Conduct did not apply to the justices. In any event, he doesn't think its restrictions on political speech "are constitutional or desirable."

"The First Amendment is based on the strong presumption that more speech is beneficial because it means we are all better informed," he writes (http://www.nytimes.com/roomfordebate/2016/07/12/can-a-supreme-court-justice-denounce-a-candidate/justices-have-free-speech-rights-too). "I think it is valuable for people to hear what the justices have to say on important issues. As a lawyer and as a citizen, I'd always rather know what justices and judges think rather than have enforced silence and pretend they have no views. We are in a relatively new era of public statements by justices, and I applaud it."

Updated on July 12 to include Ginsburg's comments to CNN. Updated on July 13 to include Trump's response. Updated on July 14 to note Ginsburg's statement.

Compilation of Codes, Rules and Regulations of the State of New York Currentness
Title 22. Judiciary
Subtitle A. Judicial Administration.
Chapter I. Standards and Administrative Policies
Subchapter C. Rules of the Chief Administrator of the Courts
Part 100. Judicial Conduct (Refs & Annos)

22 NYCRR 100.5

Section 100.5. A judge or candidate for elective judicial office shall refrain from inappropriate political activity

(A) *Incumbent judges and others running for public election to judicial office.*

(1) Neither a sitting judge nor a candidate for public election to judicial office shall directly or indirectly engage in any political activity except (i) as otherwise authorized by this section or by law, (ii) to vote and to identify himself or herself as a member of a political party, and (iii) on behalf of measures to improve the law, the legal system or the administration of justice. Prohibited political activity shall include:

(a) acting as a leader or holding an office in a political organization;

(b) except as provided in paragraph (3) of this subdivision, being a member of a political organization other than enrollment and membership in a political party;

(c) engaging in any partisan political activity, provided that nothing in this section shall prohibit a judge or candidate from participating in his or her own campaign for elective judicial office or shall restrict a non-judge holder of public office in the exercise of the functions of that office;

(d) participating in any political campaign for any office or permitting his or her name to be used in connection with any activity of a political organization;

(e) publicly endorsing or publicly opposing (other than by running against) another candidate for public office;

(f) making speeches on behalf of a political organization or another candidate;

(g) attending political gatherings;

(h) soliciting funds for, paying an assessment to, or making a contribution to a political organization or candidate; or

(i) purchasing tickets for politically sponsored dinners or other functions, including any such function for a non-political purpose.

(2) A judge or non-judge who is a candidate for public election to judicial office may participate in his or her own campaign for judicial office as provided in this section and may contribute to his or her own campaign as permitted under the Election Law. During the window period as defined in section 100.0(Q) of this Part, a judge or non-judge who is a candidate for public election to judicial office, except as prohibited by law, may:

(i) attend and speak to gatherings on his or her own behalf, provided that the candidate does not personally solicit contributions;

(ii) appear in newspaper, television and other media advertisements supporting his or her candidacy, and distribute pamphlets and other promotional campaign literature supporting his or her candidacy;

(iii) appear at gatherings, and in newspaper, television and other media advertisements with the candidates who make up the slate of which the judge or candidate is a part;

(iv) permit the candidate's name to be listed on election materials along with the names of other candidates for elective public office;

(v) purchase two tickets to, and attend, politically sponsored dinners and other functions, provided that the cost of the ticket to such dinner or other function shall not exceed the proportionate cost of the dinner or function. The cost of the ticket shall be deemed to constitute the proportionate cost of the dinner or function if the cost of the ticket is $250 or less. A candidate may not pay more than $250 for a ticket unless her or she obtains a statement from the sponsor of the dinner or function that the amount paid represents the proportionate cost of the dinner or function.

(3) A non-judge who is a candidate for public election to judicial office may also be a member of a political organization and continue to pay ordinary assessments and ordinary contributions to such organization.

(4) A judge or a non-judge who is a candidate for public election to judicial office:

(a) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the impartiality, integrity and independence of the judiciary, and shall encourage members of the candidate's family to adhere to the same standards of political conduct in support of the candidate as apply to the candidate;

(b) shall prohibit employees and officials who serve at the pleasure of the candidate, and shall discourage other employees and officials subject to the candidate's direction and control, from doing on the candidate's behalf what the candidate is prohibited from doing under this Part;

(c) except to the extent permitted by paragraph (A)(5) of this section, shall not authorize or knowingly permit any person to do for the candidate what the candidate is prohibited from doing under this Part;

(d) shall not:

(i) make pledges or promises of conduct in office that are inconsistent with the impartial performance of the adjudicative duties of the office;

(ii) with respect to cases, controversies or issues that are likely to come before the court, make commitments that are inconsistent with the impartial performance of the adjudicative duties of the office;

(iii) knowingly make any false statement or misrepresent the identity, qualifications, current position or other fact concerning the candidate or an opponent; but

(e) may respond to personal attacks or attacks on the candidate's record as long as the response does not violate subparagraphs (a) and (d) of this paragraph;

(f) shall complete an education program, either in person or by videotape or by internet correspondence course, developed or approved by the Chief Administrator or his or her designee anytime after the candidate makes a public announcement of candidacy or authorizes solicitation or acceptance of contributions for a known judicial vacancy, but no later than 30 days after receiving the nomination for judicial office. The date of nomination for candidates running in a primary election shall be the date upon which the candidate files a designating petition with the Board of Elections. This provision shall apply to all candidates for elective judicial office in the Unified Court System except for town and village justices;

(g) shall file with the Ethics Commission for the Unified Court System a financial disclosure statement containing

the information and in the form set forth in the annual statement of financial disclosure adopted by the Chief Judge of the State of New York. Such statement shall be filed within 20 days following the date on which the judge or non-judge becomes such a candidate; provided, however, that the Ethics Commission for the Unified Court System may grant an additional period of time within which to file such statement in accordance with rules promulgated pursuant to section 40.1(i)(3) of the Rules of the Chief Judge of the State of New York (22 NYCRR 40.1). Notwithstanding the foregoing, compliance with this subparagraph shall not be necessary where a judge or non-judge already is or was required to file a financial disclosure statement for the preceding calendar year pursuant to Part 40 of the Rules of the Chief Judge. This requirement shall not apply to candidates for election to town and village courts.

(5) A judge or candidate for public election to judicial office shall not personally solicit or accept campaign contributions, but may establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept reasonable campaign contributions and support from the public, including lawyers, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. Such committees may solicit and accept such contributions and support only during the window period. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

(6) A judge or a non-judge who is a candidate for public election to judicial office may not permit the use of campaign contributions or personal funds to pay for campaign-related goods or services for which fair value was not received.

(7) Independent Judicial Election Qualifications Commissions, created pursuant to Part 150 of the Rules of the Chief Administrator of the Courts, shall evaluate candidates for elected judicial office, other than justice of a town or village court.

(B) *Judge as candidate for nonjudicial office.* A judge shall resign from judicial office upon becoming a candidate for elective nonjudicial office either in a primary or in a general election, except that the judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention if the judge is otherwise permitted by law to do so.

(C) *Judge's staff.* A judge shall prohibit members of the judge's staff who are the judge's personal appointees from engaging in the following political activity:

(1) holding an elective office in a political organization, except as a delegate to a judicial nominating convention or a member of a county committee other than the executive committee of a county committee;

(2) contributing, directly or indirectly, money or other valuable consideration in amounts exceeding $500 in the aggregate during any calendar year to all political campaigns for political office, and other partisan political activity including, but not limited to, the purchasing of tickets to political functions, except that this $500 limitation shall not apply to an appointee's contributions to his or her own campaign. Where an appointee is a candidate for judicial office, reference also shall be made to appropriate sections of the Election Law;

(3) personally soliciting funds in connection with a partisan political purpose, or personally selling tickets to or promoting a fund-raising activity of a political candidate, political party, or partisan political club; or

(4) political conduct prohibited by section 50.5 of the Rules of the Chief Judge (22 NYCRR 50.5).

Credits

Sec. filed Aug. 1, 1972; renum. 111.5, new added by renum. and amd. 33.5, filed Feb. 2, 1982; amds. filed: Dec. 21, 1983; May 8, 1985; March 2, 1989; April 11, 1989; Oct. 30, 1989; Oct. 31, 1990; repealed, new filed Feb. 1, 1996; amds. filed: March 25, 1996; Jan. 29, 2004; Feb. 21, 2006; July 21, 2006; Oct. 23, 2006; Oct. 29, 2007 eff. Oct. 24, 2007. Amended (A)(4)(f).

Current with amendments included in the New York State Register, XXXIX, Issue 13 dated March 29, 2017.

22 NYCRR 100.5, 22 NY ADC 100.5

End of Document

Compilation of Codes, Rules and Regulations of the State of New York Currentness
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Subchapter C. Rules of the Chief Administrator of the Courts
Part 100. Judicial Conduct (Refs & Annos)

22 NYCRR 100.0

Section 100.0. Terminology

The following terms used in this Part are defined as follows:

(A) A *candidate* is a person seeking selection for or retention in public office by election. A person becomes a candidate for public office as soon as he or she makes a public announcement of candidacy, or authorizes solicitation or acceptance of contributions.

(B) *Court personnel* does not include the lawyers in a proceeding before a judge.

(C) The *degree of relationship* is calculated according to the civil law system. That is, where the judge and the party are in the same line of descent, degree is ascertained by ascending or descending from the judge to the party, counting a degree for each person, including the party but excluding the judge. Where the judge and the party are in different lines of descent, degree is ascertained by ascending from the judge to the common ancestor, and descending to the party, counting a degree for each person in both lines, including the common ancestor and the party but excluding the judge. The following persons are relatives within the fourth degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, first cousin, child, grandchild, great-grandchild, nephew or niece. The sixth degree of relationship includes second cousins.

(D) *Economic interest* denotes ownership of a more than *de minimus* legal or equitable interest, or a relationship as officer, director, advisor or other active participant in the affairs of a party, except that:

(1) ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the judge participates in the management of the fund or a proceeding pending or impending before the judge could substantially affect the value of the interest,

(2) service by a judge as an officer, director, advisor or other active participant in an educational, religious, charitable, cultural, fraternal or civic organization, or service by a judge's spouse or child as an officer, director, advisor or other active participant in any organization does not create an economic interest in securities held by that organization;

(3) a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association or of a member in a credit union, or a similar proprietary interest, is not an economic interest in the organization, unless a proceeding pending or impending before the judge could substantially affect the value of the interest;

(4) ownership of government securities is not an economic interest in the issuer unless a proceeding pending or impending before the judge could substantially affect the value of the securities;

(5) *de minimus* denotes an insignificant interest that could not raise reasonable questions as to a judge's impartiality.

(E) *Fiduciary* includes such relationships as executor, administrator, trustee, and guardian.

(F) *Knowingly, knowledge, known* or *knows* denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(G) *Law* denotes court rules as well as statutes, constitutional provisions and decisional law.

(H) *Member of the candidate's family* denotes a spouse, child, grandchild, parent, grandparent or other relative or person with whom the candidate maintains a close familial relationship.

(I) *Member of the judge's family* denotes a spouse, child, grandchild, parent, grandparent or other relative or person with whom the judge maintains a close familial relationship.

(J) *Member of the judge's family residing in the judge's household* denotes any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household.

(K) *Nonpublic information* denotes information that, by law, is not available to the public. Nonpublic information may include but is not limited to: information that is sealed by statute or court order, impounded or communicated in camera; and information offered in grand jury proceedings, presentencing reports, dependency cases or psychiatric reports.

(L) A *part-time judge*, including an acting part-time judge, is a judge who serves repeatedly on a part-time basis by election or under a continuing appointment.

(M) *Political organization* denotes a political party, political club or other group, the principal purpose of which is to further the election or appointment of candidates to political office.

(N) *Public election* includes primary and general elections; it includes partisan elections, nonpartisan elections and retention elections

(O) *Require.* The rules prescribing that a judge *require* certain conduct of others, like all of the rules in this Part, are rules of reason. The use of the term *require* in that context means a judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge's direction and control.

(P) *Rules;* citation. Unless otherwise made clear by the citation in the text, references to individual components of the rules are cited as follows:

Part refers to Part 100

section refers to a provision consisting of 100 followed by a decimal (100.1)

subdivision refers to a provision designated by a capital letter (A).

paragraph refers to a provision designated by an arabic numeral (1)

subparagraph refers to a provision designated by a lower-case letter (a).

(Q) *Window period* denotes a period beginning nine months before a primary election, judicial nominating convention, party caucus or other party meeting for nominating candidates for the elective judicial office for which a judge or non-judge is an announced candidate, or for which a committee or other organization has publicly solicited or supported the judge's or non-judge's candidacy, and ending, if the judge or non-judge is a candidate in the general election for that office, six months after the general election, or if he or she is not a candidate in the general election, six months after the date of the primary election, convention, caucus or meeting.

(R) *Impartiality* denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge.

(S) An *independent* judiciary is one free of outside influences or control.

(T) *Integrity* denotes probity, fairness, honesty, uprightness and soundness of character. Integrity also incluses a firm adherence to this Part or its standard of values.

(U) A *pending proceeding* is one that has begun but not yet reached its final disposition.

(V) An *impending proceeding* is one that is reasonably foreseeable but has not yet been commenced.

Credits

Sec. filed Feb. 1, 1996; amds. filed: Sept. 17, 2004; Feb. 21, 2006 eff. Feb. 14, 2006. Added (R)—(V).

Current with amendments included in the New York State Register, XXXIX, Issue 13 dated March 29, 2017.

22 NYCRR 100.0, 22 NY ADC 100.0

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