

Judicial Ethics In New York State (Part 2)

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In the first part of this two-part article, I discussed the statutory and regulatory framework of judicial ethics in New York State and provided an overview of the interpretation and enforcement mechanisms. Here, in Part Two, I have selected a handful of judicial ethics issues that lawyers may (or may not) commonly encounter in their interactions with the judiciary: (1) judges' obligations when they observe illegal or unethical conduct; (2) why, and under what circumstances, judges exercise recusal from cases; (3) attorney involvement in a judge's campaign for election or re-election; and (4) whether and to what extent judges may perform civic and charitable functions in the community.

A. Reporting Obligations

Most attorneys are aware that they have a duty, under certain circumstances, to report colleagues in the profession who engage in professional misconduct or otherwise demonstrate reasons to question their honesty, trustworthiness, or fitness as lawyers. DR 1-103; *see generally, Wieder v. Skala*, 80 N.Y.2d 628 (1992). Judges also have duties that require them, at times, to report attorney misconduct [22 NYCRR 100.3(D)(2)], and the discretion to report misconduct of non-lawyers to the appropriate authorities.

The Rules Governing Judicial Conduct (the "Rules") specifically state that "[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." 22 NYCRR 100.3(D)(2) (emphasis added). It is left to the judge's discretion to determine whether the two conditions, a substantial likelihood and a substantial violation, are met. The Advisory Committee on Judicial Ethics ("ACJE") has offered some guidance for identifying a "substantial violation." In Opinion 06-99, examining whether the Rules required the inquiring judge to report a lawyer who had just lost a malpractice trial before a jury, the ACJE noted in language that parallels DR 1-103 that "a substantial violation is one that implicates the attorney's honesty, trustworthiness, or fitness as a lawyer." NY Jud. Adv. Op. 06-99 *citing* Opinions 89-74; 89-54. When a judge concludes that a substantial likelihood of a substantial violation exists, however, the judge must take action, such as by reporting the lawyer to the appropriate disciplinary committee. This duty to report is not optional. 22 NYCRR 100.3(D)(2); NY Jud. Adv. Ops. 06-99; 06-24; 05-30.

The ACJE has also guided judges as to their reporting obligations when they observe misconduct by a non-lawyer. Although noting that the Rules contain no corresponding provision for misconduct by non-lawyers, the ACJE has concluded that a judge *may* choose to report any misconduct of parties or witnesses uncovered during a judicial proceeding. NY Jud. Adv. Ops. 06-13; 05-84. In deciding whether to report, the judge should weigh various factors, including the likelihood of injury if the conduct is not reported. The ACJE stated the reason for this discretionary rule in Opinion 03-110: "[T]he primary purpose of a legal proceeding is to ascertain the truth, and if litigants or witnesses know that the judge presiding at a trial is obligated to report illegal conduct revealed in the course of litigation, such litigants and witnesses might be unwilling to testify truthfully about such conduct." NY Jud. Adv. Op. 03-110.

B. Recusal Obligations

One of the most common, but perhaps least understood, judicial ethics issues that lawyers encounter is the need for a judge to recuse from hearing a specific case. There is no easy way to catalog the myriad circumstances under which recusal is or is not appropriate - indeed, searching through the ACJE opinions that mention recusal reveals several hundred fact-specific determinations. Instead, it may be easiest to focus on and provide here the ground rules for recusal: when it is mandatory; examples of when it may be remitted by consent of the parties; and a few occasions when the judge must only disclose certain facts (and consider a motion for recusal based on those facts).

Under certain circumstances specified under the Rules and the Judiciary Law, judges must exercise recusal. 22 NYCRR 100.3(E)(1)(a)-(g); N.Y. Jud. Law §14. For example, recusal is required in matters where (1) the judge or judge's spouse, or a minor child residing in the judge's household, has an economic interest in the subject matter of the controversy; (2) the judge has knowledge of certain disputed evidentiary facts concerning the proceeding; or (3) the judge's spouse or relative, or a relative's spouse, is serving as a lawyer in the proceeding. 22 NYCRR 100.3(E)(1)(a)(ii), (c), (e).

In one instance, the ACJE applied the mandatory disqualification provisions of 22 NYCRR 100.3(E), where the judge's spouse was the attorney-in-charge of a legal services provider's criminal practice. NY Jud. Adv. Ops 05-87. There, the ACJE concluded that the judge was required to recuse from criminal cases where the spouse's organization was representing the defendant, even though the spouse was not the attorney of record for the defendant (which itself would have mandated recusal). The ACJE held that the spouse, who was a very senior member of the organization, was nonetheless "involved" in the outcome of the cases in which the organization served as counsel, and that the judge needed to recuse in order to avoid the appearance of impropriety. *Id.*, citing 22 NYCRR 100.2.

There are only four instances listed under the rules, however, where the recusal doctrine is an absolute bar to the judge's participation in a case. In such situations, even the parties cannot stipulate to permit the judge to hear the case. A judge absolutely *may not* preside over cases where (1) the judge has a personal bias or prejudice concerning a party; (2) the judge served as a lawyer in the matter in controversy; (3) the judge has been a material witness concerning it; or (4) 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, is a party to the proceeding. 22 NYCRR 100.3(E)(1)(a)(i), (b)(i), (iii), (d)(i).

In all other cases where recusal is called for but is not mandated under the Rules, it may not necessarily end the judge's role in the case. Parties may, under certain circumstances, agree to allow the judge to nonetheless hear the case - a process known as remittal of disqualification. 22 NYCRR 100.3(F). When permitted, however, remittal is only available if "parties . . . 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 agreement shall be incorporated in the record of the proceeding." 22 NYCRR 100.3(F); NY Jud. Adv. Op. 06-111. In other words, the judge must recuse unless, after full disclosure of the relevant facts, the parties conclude that they have no objection to the judge's serving on the case. It is not enough that the parties fail to object after the judge's disclosure - they must affirmatively agree that the judge should not be disqualified. 22 NYCRR 100.3(F).

To illustrate, the ACJE has concluded that remittal was available where the judge's sibling was partner in a law firm that often appeared before the judge. NY Jud. Adv. Op. 06-111. The Committee advised that where other members of the sibling's law firm appear, the judge should exercise recusal, but that such recusal is "subject to remittal." *Id.* The opinion also noted one of the circumstances under which remittal is never available, regardless of the judge's reason for recusal: when a *pro se* litigant appears before the judge. *Id.* See also NY Jud. Adv. Op. 01-07.

Even where the Rules do not require a judge to exercise recusal from hearing a case, often they dictate disclosure of the relevant facts to the parties during a certain period of time. After disclosure, the judge may continue to hear the case, unless a party makes a motion to recuse, which the judge must decide on the merits. NY Jud. Adv. Ops. 07-73; 06-44.

For instance, for a period of one year after a judge's law clerk leaves the judge's chambers, the judge is required to disclose the relationship if the clerk appears as an attorney before her, and to recuse upon a party's request. NY Jud. Adv. Op. 07-04. In concluding that disclosure was appropriate, the ACJE held that the judge/law clerk relationship stood in contrast to that of the judge's relationship to a former, more "transient" staff member, such as a summer research clerk or student intern, which the judge is *not* required to disclose. NY Jud. Adv. Ops. 95-58; 88-157.

Finally, even in those instances where neither recusal nor disclosure is required, a judge retains the right to recuse "based on whether the judge believes he/she can remain fair and impartial," a determination left to the sound discretion of the judge. NY Jud. Adv. Ops. 07-35; 00-119; *People v. Moreno*, 70 N.Y.2d 403 (1987).

As noted above, there are many, many ACJE opinions on recusal covering a host of different factual scenarios. If you want to have a better idea of how the Rules apply in a particular factual scenario, you may wish to search the ACJE's free, searchable internet opinion database. This can be located on the Unified State Court System's website at www.nycourts.gov/judges. If, on that page, you click on "judicial ethics opinions" on the left-hand side bar, you will gain access to the database, and can search by key-word to learn whether judges have been required to exercise recusal under similar circumstances. It may be helpful to search for "recuse" or "disqualify" or for the relevant section of the Rules Governing Judicial Conduct ("100.3(E)" or "100.3(F)") together with other case-specific terms.

C. Lawyers' Roles in Judicial Election Campaigns

The majority of the trial court judgeships in New York State are attained through elective judicial office. Although that may change as a result of United States Supreme Court review [*See, Lopez Torres v. N.Y. State Bd. of Elections*, 462 F.3d 161 (2d Cir. 2006), *cert. granted*, 127 S. Ct. 1325 (U.S. 2007)], for the time being, elections are the status quo.

Judicial candidates may engage only in very limited political activity during their campaigns for office. Judicial candidates may not, for example, personally solicit or accept campaign contributions. 22 NYCRR 100.5(A)(5). The rules limiting judges' political activities are in place to prevent parties or attorneys from "buying" favor with judges by contributing to their campaigns. Does this mean that lawyers cannot support judicial candidates? They can, but doing so can raise ethics issues during and after the campaign season.

Except for the rare campaign that is entirely self-financed, judicial candidates must use a campaign committee to raise the money necessary to conduct a campaign for office while insulating themselves from the solicitation of these funds to the greatest extent possible. The Rules Governing Judicial Conduct specifically provide for such committees, and require that committee members be "responsible persons" whose role is to "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." 22 NYCRR 100.5(A)(5).

Judicial candidates are not limited to awaiting volunteers for their campaign. They may ask people, including attorneys who appear or have appeared in their courts, to serve on a campaign committee. *See*, NY Jud. Adv. Op. 92-19. Many attorneys view the opportunity to serve on a campaign committee as an honor and a privilege. But attorneys should be aware: such service, depending on the degree of involvement, can have lasting effects on the lawyer's ability to practice before that judge, and even the lawyer's firm's ability to appear in that judge's court, well beyond the campaign and election.

Lawyers may wish to state publicly that they support a particular judicial candidate. Taken by itself, a lawyer's public support of a judge's campaign does not require a judge to recuse when that lawyer subsequently appears before the judge. NY Jud. Adv. Op. 03-64. Similarly, the ACJE has opined that a judge is not required to exercise recusal if a lawyer appearing before the judge did nothing more than volunteer to be listed among attorneys supporting the judge's election campaign. *Id.*, *see also* NY Jud. Adv. Op. 90-182.

If a lawyer actively supports a judge's candidacy, however, such as by fund-raising or petitioning for the judge, the judge will be required to recuse when that lawyer appears during the campaign. NY Jud. Adv. Ops. 03-64; 97-129. Where the lawyer takes more of a prominent role in the campaign, the judge's duties and obligations grow even more. If an attorney holds a leadership position, such as campaign manager or finance chair, or continues to raise funds for a judge for the duration of the campaign, the judge also is required to recuse from any matter involving the attorney's law firm, for the duration of the campaign. NY Jud. Adv. Op. 97-129. In each of these instances, if the parties agree to remittal as described above, the judge may continue to hear the case. NY Jud. Adv. Ops. 03-64; 97-129.

For lawyers serving in key positions on the judge's campaign committee, the judge's obligation to recuse also extends well beyond the duration of the campaign. The ACJE has advised that for a period of two years after the election, a judge must recuse (subject to the possibility of remittal) if the judge's former campaign manager or treasurer appears before the judge. NY Jud. Adv. Op. 03-64; 97-129. Even after two years, the judge still must disclose the campaign manager's or treasurer's prior service and, if any party objects, seriously consider recusal, unless the judge "thinks the objection is frivolous, in bad faith, or is wholly without merit." NY Jud. Adv. Op. 97-129, *quoting* NY Jud. Adv. Op. 89-107.

Moreover, if partners or associates of key campaign leaders or advisors appear before the judge after the election, the ACJE has advised that the judge may "disclose the relationship with the partners and associates [of the campaign leaders], including whether that partner or associate was involved in the campaign (if that fact is known to the judge) and should consider disqualifying himself/herself if a meritorious argument is made by one of the parties." NY Jud. Adv. Op. 97-129.

D. A Judge's Civic Duties

Judges must conduct their outside lives as extensions of their judicial offices. This means that they must not participate in outside activities that "cast doubt on their ability to act impartially as a judge; detract from the dignity of judicial office; or interfere with the proper performance of judicial duties." 22 NYCRR 100.4(A). These restrictions can make it difficult for judges to take on outside engagements, even some that initially appear to be harmless. In sharing a couple of common examples below, I hope it will be clearer why judges must often decline opportunities, even if they could otherwise make meaningful and worthwhile contributions to causes.

Judges, like most attorneys, typically attend law school reunions every five or ten years. Understandably, they frequently are sought after as guests of honor, speakers, planning committee members, or even fund-raising chairs. Often, they must decline some or all of these requests because of their ethical obligations.

A Judge may "be a member or serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice or of an educational, religious, charitable, cultural, fraternal or civic organization not conducted for profit..." subject to certain restrictions under the Rules. 22 NYCRR 100.4(C)(3). So, if you want to ask a judge to participate with you on a law school alumni committee, particularly to the extent of planning or encouraging fellow classmates to attend, and nothing more, the judge most likely will be free to do so. A judge may not, however, participate in any fund-raising activity. 22 NYCRR 100.4(C)(3)(b)(i), (iv). This means that the judge's name may not appear on a letterhead that is regularly used for fund-raising purposes, and that the judge may not directly solicit funds in any way, including by serving as a speaker or guest of honor at almost all fund-raising events. 22 NYCRR 100.4(C)(3)(b)(ii). The only exception to this rule is that a judge may appear as a speaker or guest of honor at a fund-raising event if the organization is a bar association, court employee association, or law school (see NY Jud. Adv. Op. 06-117), but even then, a judge may not be involved in the direct solicitation of funds. *Id.* Whatever an organization's purpose, a judge still may be involved in a secondary capacity: the judge may help organize events that involve fund-raising, but may not directly participate in the solicitation and collection of monies. NY Jud. Adv. Ops. 02-39; 90-175.

Judges are permitted to write, speak, lecture and teach, but these activities are also subject to the judge's ethical obligations under the Rules. This means that the judge may not write or speak concerning a case that is pending or impending in any court in the United States or its territories including on appeal or in a collateral proceeding. 22 NYCRR 100.3(B)(8); NY Jud. Adv. Ops. 06-53; 01-03. A judge also may not write or speak to a group of lawyers who represent a certain class of litigants (for example, only District Attorneys, or only plaintiff's lawyers) in a way that expresses a predisposition to decide cases a certain way or that gives partisan advice. NY Jud. Adv. Ops. 07-37; 05-134.

The ACJE has advised, for instance, that a judge may participate as a panelist at a meeting sponsored by a non-profit organization about a state statute involving the termination of parental rights when a child has been placed in foster care. NY Jud. Adv. Op. 06-53. The ACJE warned, however, that the judge should refrain from commenting on any matter pending or impending in a court within the United States or its territories. *Id.*

The ACJE also has concluded that a judge may participate in a training program that is designed for lawyers who represent battered women in custody proceedings. NY Jud. Adv. Op. 05-134. The Committee cautioned, however, that although the judge could critique participants in the program, the judge should remain neutral, and should not teach the lawyers how to "win cases." *Id.* In contrast, the ACJE advised that a judge may not teach a class of police officers who act as prosecutors of traffic cases, where the purpose of the class is to teach them how to successfully prosecute their cases. NY Jud. Adv. Op. 95-121.

E. Conclusion

As one often hears at Judicial Ethics training programs, no one knows every ethics rule. Even if someone did, he or she would not be able to predict infallibly how the ACJE might opine on issues not covered in the Rules or in prior advisory opinions. Hopefully, having read this far, you now have a basic understanding of a New York State judge's obligations under the ethics rules governing his or her conduct and a sense of where to look for further guidance.

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