

# Judicial Ethics In New York State (Part 1)

BY JEREMY R. FEINBERG

Regular readers of NYPRR are well aware of the New York Code of Professional Responsibility, which governs attorneys' professional conduct, and of the risk of discipline for violations of the Code. Attorneys are often much less familiar, however, with the guidelines and disciplinary procedures governing the ethical conduct of the more than 3,000 full-and part-time judges and justices in New York State. Over the course of this two-part article, I will describe this ethics landscape to help educate attorneys who must appear in court, or interact with judges on a social or other non-adjudicative basis. In this first part, I will discuss the statutory and regulatory framework (primarily the Rules Governing Judicial Conduct and certain provisions of the Judiciary Law), and provide an overview of the interpretation and enforcement mechanisms. The second part will address several specific judicial ethics issues lawyers may commonly encounter in their dealings with judges.

## The Statutory Framework

### A. The Rules Governing Judicial Conduct

In New York State, the Rules Governing Judicial Conduct, 22 NYCRR Part 100 (the "Rules"), set standards for the ethical conduct of judges and candidates for judicial office, as well as certain quasi-judicial employees of the court system, such as Judicial Hearing Officers. These Rules, based largely on the American Bar Association's Model Code of Judicial Conduct, not only provide guidance but also set forth certain binding obligations, the violation of which can result in disciplinary action by the New York State Commission on Judicial Conduct (the "Commission"). They are intended to help maintain the integrity of the judiciary and to ensure that judges uphold their duties as neutral arbiters of the law. Not every transgression warrants discipline, however, as the Rules are intended to be "rules of reason." 22 NYCRR 100, *Preamble*. Just as in the disciplinary process for attorneys, factors such as the seriousness of the transgression, the frequency of occurrence, and the effect the conduct has on the functioning of the judicial system, determine which sanctions, if any, should be imposed. *Id.*

Like the New York Code of Professional Responsibility, which focuses on a lawyer's behavior both in and out of office, the Rules delineate appropriate conduct not only in the performance of the judge's judicial duties, but in the judge's everyday life as well. In fact, the Rules specifically address certain activities the judge may wish to undertake as a member of the community and as a private citizen, such as attending political gatherings, speaking at bar association programs, or writing exclusive of judicial opinions. First and foremost, the Rules require that a judge must "uphold the integrity and independence of the judiciary" through "maintaining and enforcing high standards of conduct," (22 NYCRR 100.1), and require a judge to "avoid impropriety and the appearance of impropriety in all of the judge's activities." 22 NYCRR 100.2 (emphasis added). These all-encompassing provisions require judges at all times to be cognizant of their obligations as members of the judiciary.

Only Section 100.3 directly addresses judicial duties. Because a judge must perform these "impartially

and diligently," this section outlines the judge's official duties, such as deciding cases; performing administrative duties such as appointing staff; discharging disciplinary responsibilities, such as reporting the misconduct of others; and observing obligations regarding recusal and disqualification. 22 NYCRR 100.3(A)-(E).

The remainder of Part 100 limits certain extra-judicial activities, instructing judges to avoid conflicts between their judicial and non-judicial conduct. Section 100.4 generally prohibits extra-judicial activities that risk conflict with judicial obligations, including those that may cast doubt on a judge's ability to remain impartial, detract from the dignity of the office, or otherwise interfere with the proper performance of judicial duties. 22 NYCRR 100.4(A). Similarly, Section 100.5, which focuses on judges and candidates for elective judicial office, prohibits political activity except in limited circumstances, in order to maintain the impartiality of the bench and to prevent political bias or partisan interests from swaying the judge's decision-making.

## **B. The Judiciary Law**

The Rules, however, are not the only source of ethical guidelines for New York State judges. Certain sections of the New York State Judiciary Law also address the ethical conduct of judges. Among other things, Article 2 of the Judiciary Law covers disqualification, practice of law by part-time judges, conflicts with judicial duties, and the appointment of law guardians. See, NY Jud. Law §14-20; 35(7). In addition, the Judiciary Law establishes a Commission on Judicial Conduct as well as an Advisory Committee on Judicial Ethics, to enforce and to interpret the rules governing the ethical conduct of judges. NY Jud. Law §§ 41; 212 (2)(l). Both of these administrative bodies are discussed below.

## **Disciplinary Procedures**

### **A. The Commission on Judicial Conduct**

So how are judges disciplined? Who investigates complaints against them?

Prior to the 1970s, different courts throughout the state enforced judicial discipline in New York. This system, which relied on judges to discipline their colleagues, proved ineffective, resulting in the discipline of only 23 judges in the one hundred years before the establishment, in 1974, of a temporary commission to investigate and prosecute judicial misconduct. *Creation of the New York State Commission on Judicial Conduct, Mandate and History*, at <http://www.scjc.state.NY.us/general%20information/gen%20info%20Pages/mandate&history.htm> (last visited July 27, 2007). The current Commission replaced its temporary predecessor as of 1978, following a constitutional amendment and legislative enactment, passed in 1976. NYS Const. Art. VI, § 22; NY Jud. Law § 41. In the years since its inception, the Commission has considered more than 30,000 complaints and conducted over 6,000 investigations. Of these, more than 800 resulted in disciplinary action, over 1,200 resulted in cautionary letters to the judge involved, more than 500 complaints were closed after a judge's resignation, and almost 400 were closed after judges vacated their offices. *Summary of Complaints Considered since the Commission's Inception, Mandate and History, supra.*

The Commission's objective is to hold New York State judges to the highest standards of ethical conduct while at the same time safeguarding the independence of the judiciary. There are 11 members on the

Commission. The governor appoints four, the Chief Judge of the Court of Appeals three, and four Legislators appoint one member each. NY Jud. § 41. The Law Commission's stated purpose is to receive, initiate and investigate complaints filed against judges in New York State. *Membership and Staff at Mandate and History.*

The Commission meets and reviews complaints against judges several times a year. It may decide to dismiss or to investigate a complaint, or authorize staff attorneys to commence investigations and to file formal charges. The staff may not undertake either function without the Commission's prior permission. *Procedures at Mandate and History.* During investigations by the staff, the judge involved may respond to the allegations in writing, and if required to appear at a hearing, may give testimony under oath. The judge is entitled to be represented by counsel and may also submit evidentiary data for the Commission's consideration. The Commission will issue a formal written complaint only if the investigation determines that a hearing is warranted. The complaint contains specific charges of misconduct, and upon issuance, commences formal disciplinary proceedings. *Id.* In response to the formal charges, a judge or the judge's counsel may submit legal memoranda and present oral argument on the relevant issues. The Commission will then deliberate without the presence of the regular staff... if it determines that discipline is warranted, the Commission may admonish, censure, remove from office, or retire a judge (for disability). The Commission may also issue a confidential letter dismissing the complaint, but cautioning the judge. *Id.*

A judge who is charged with formal discipline has thirty days to request review by the Court of Appeals. The Court may accept or reject any of the Commission's findings, or make a different determination, and even impose a sanction different from that recommended by the Commission. If the judge does not request a review after thirty days, the Commission's determination becomes effective. The Commission's formal determinations are available on the internet at <http://wwwscjc.state.NY.us/Determinations/alldecisions.htm> . They are also published yearly in bound volumes.

## **Interpretation of the Rules**

### **1. The Advisory Committee on Judicial Ethics**

The Rules Governing Judicial Conduct and the Commission's determinations are not an exhaustive guide for proper judicial conduct. There are constantly new and emerging issues requiring interpretation. It may be that novel fact patterns develop, or that an ethics question is not specifically addressed in the Rules or prior Commission determinations. Fortunately, since 1987, there has been an interpretative body: the Advisory Committee on Judicial Ethics (the "ACJE" or the "Committee"). The ACJE's mandate is to provide guidance on the Rules, the Judiciary Law, and other relevant authority, as they apply to specific judicial conduct. In 1988, the Legislature codified creation of the ACJE in Judiciary Law § 212 (2)(l). Currently, Hon. George D. Marlow, Associate Justice of the Appellate Division, First Department, is the chair of the 26-member committee, and retired First Department Associate Justice Hon. Betty Ellerin and Hon. Jerome C. Gorski, Associate Justice of the Appellate Division, Fourth Department, serve as the Committee's Vice-Chairs.

The ACJE includes both sitting and retired judges and justices from virtually every level of court within the Unified Court System and is supported by several staff counsel. It issues formal opinions, based on individual inquiries from sitting judges and candidates for judicial office. The inquiries, the inquiring judge's identity, and the Committee's deliberations remain, by law, completely confidential. NY Jud. Law

§ 212(2)(l)(iii). Further, the Committee's opinions provide statutory protection for judges and judicial candidates, in that "actions of any judge...taken in accordance with findings or recommendations contained in an advisory opinion issued by the panel shall be presumed proper for the purposes of any subsequent investigation by the state commission on judicial conduct." *Id.* at § 212(2)(l)(iv).

Although the Committee acts as a resource for individual judges concerned with maintaining the ethical standards to which they are bound, ACJE opinions also provide guidance for the state judiciary as a whole, affording judges the comfort of knowing precisely what is expected of them in situations not always neatly covered in the Rules or past precedents of the Commission or Court of Appeals. The opinions of the ACJE are available as a resource in a free searchable database on the website of the New York State Unified Court System, at [www.NYcourts.gov](http://www.NYcourts.gov) (click on "Judges" and then "Judicial Ethics Opinions.") Some of the ACJE opinions are published in the New York Law Journal and may also be found on Lexis and Westlaw.

## 2. The Judicial Campaign Ethics Center

Judges are generally prohibited from engaging in most types of political activity. During a campaign for elective judicial office, however, judge and non-judge candidates for judicial office have more leeway, as set forth in Section 100.5 of the Rules Governing Judicial Conduct. This Section enumerates prohibited political activity, but also describes the limited political activity that candidates for judicial office may undertake as part of their campaigns. This permissible political activity is only allowed during a candidate's "window period," a specific period of time which runs at least fifteen months in the election cycle in which the candidate is seeking office. 22 NYCRR 100.0(Q).

Because of the narrow and specific ways in which the Rules Governing Judicial Conduct apply to campaigns for judicial office, and the corresponding frequency of recurring issues likely to arise throughout a campaign, the New York State Unified Court System established the Judicial Campaign Ethics Center (the "JCEC") in the Fall of 2004. As liaison to a subcommittee of the ACJE, the JCEC issues quick and reliable advice to judicial candidates concerning campaign-related issues so they can plan their campaigns and related activities in an ethical manner. Thus, as ethical questions emerge during the course of a campaign, the candidate (or an authorized campaign representative) can write to the JCEC for real-time ethical advice. A five-judge subcommittee of the ACJE reviews each inquiry and response, and formally approves the advice that goes to the candidate.

The JCEC's responses are not available in searchable format as the JCEC, unlike the ACJE, does not publish its responses. Both the underlying inquiry and the response are kept confidential. Even if an inquiring candidate shares an answer from the JCEC with others, it provides no presumption of proper ethical conduct for any other candidate. Indeed, as the result of a written agreement between the Commission and the ACJE, an JCEC response provides a safe harbor only to the particular candidate who submits an inquiry and is valid only for conduct during the same campaign season. Even if multiple candidates have the same, or a very similar question, each must call or write in for an individual answer if he or she wishes to have the benefit of the answer's protection. See <http://www.NYcourts.gov/ip/JCEC/faq.shtml> . Sometimes, however, the ACJE will issue opinions on questions that are frequently presented to the JCEC, thus allowing all candidates for judicial office to rely on that published guidance.

In addition to its role as a provider of "real-time" ethics advice, the JCEC also educates judicial candidates and the voting public in several ways. On-line, the JCEC summarizes key campaign ethics rules and published opinions, and highlights significant changes in the ethics landscape; provides information and links about court rules affecting judicial candidates, including the court system's financial disclosure requirements and the court-organized screening panels; and compiles candidate information into an on-line voter guide for the general election. Off-line, the JCEC also designs and implements the mandatory training for judicial candidates about their campaign ethics responsibilities (required, since 2006, by Section 100.5(A)(4)(f) of the Rules) and responds to general media inquiries.

## **Conclusion**

Now that you've seen the basic ethics framework involving judicial conduct in New York State, the second part of this article will address specific issues that attorneys may encounter in their contacts with judges.

---

*Jeremy R. Feinberg is the Statewide Special Counsel for Ethics for the New York Unified Court System. He would like to thank his colleagues Maryrita Dobiela, Laura Smith and Rebecca Adams for their insight and suggestions that immeasurably improved this article. The views expressed in this article are those of the author only and are not those of the Office of Court Administration or Unified Court System.*