

Judicial Ethics Opinions from the Advisory Committee on Judicial Ethics

[From time to time, NYPRR will publish an Opinion of the Advisory Committee on Judicial Ethics. The Opinions published are those selected by Justice George D. Marlow, Committee Chair, and Jeremy R. Feinberg, who serves among the Committee's Counsel. Permission to reprint the Opinion below was requested by NYPRR because of its significance to New York lawyers who appear before the Courts.]

The Advisory Committee on Judicial Ethics (www.nycourts.gov/ip/acje) responds to written inquiries from New York State's full- and part-time judges, candidates for elective judicial office, and quasi-judicial officials such as support magistrates, court attorney-referees, and judicial hearing officers. The committee's opinions interpret the Rules Governing Judicial Conduct (22 NYCRR Part 100), the Code of Judicial Conduct and Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36). Justice George D. Marlow chairs the committee of 26 judges, and Maryrita Dobiell, Esq. is its Chief Counsel.

Joint Opinion 08-183/08-202/09-112

December 4, 2008

Digest: Whether a judge files a formal complaint against an attorney or makes an informal report to a disciplinary authority ultimately resulting in charges of misconduct against an attorney, and whether that complaint is filed before or after the judge ascends to the bench, the judge is disqualified from presiding during the pendency of the disciplinary matter. If charges are filed, but ultimately dismissed, or if a non-public discipline is imposed, the judge is disqualified from presiding for a period of two years after that matter is resolved. In neither case is such disqualification subject to remittal.

Rules: 22 NYCRR 100.2; 100.2(A); 100.3(D)(2); 100.3(E); 100.3(E)(1); 100.3(F); 101.1; 1200.4; Opinions 08-138; 08-28; 08-08; 07-200; 07-181; 06-111; 06-168; 06-107; Joint Opinion 06-19/06-29; 04-74; 02-85; 01-120 (Vol. XX); 98-95 (Vol. XVII); 91-114 (Vol. VIII); 89-54 (Vol. III).

Opinion:

Two judges ask several questions about disclosure and/or recusal obligations when a judge initiates or otherwise is involved in a disciplinary proceeding against an attorney. The first judge advises that he/she reported an assistant district attorney (ADA) to a disciplinary committee, but did not file a formal complaint. The ADA subsequently learned of the judge's report and wants the judge to exercise recusal in all matters where he/she appears. The judge asks whether he/she must disqualify him/herself from all matters involving the ADA while a disciplinary matter is pending against the ADA after making the informal report to the disciplinary committee about the ADA's conduct.

The second judge filed a formal complaint against an attorney before the judge assumed the bench and learned of the outcome of the ensuing disciplinary proceeding after he/she assumed the bench. The attorney has written the judge a letter demanding a "blanket recusal" from all matters in which the

attorney appears and indicating that the attorney will not agree to remittal. The judge asks whether he/she must disqualify him/herself from any proceedings involving the attorney.

A judge must avoid impropriety and the appearance of impropriety in all the judge's activities (see 22 NYCRR 100.2) and must 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]). Therefore, a judge must disqualify him/herself in any proceeding where the judge's impartiality might reasonably be questioned (see 22 NYCRR 100.3[E][1]).

The Committee previously has advised that a judge who files a complaint with a disciplinary committee against an attorney must disqualify him/herself in any matter involving the attorney while the complaint is pending (see Opinions 08-28; 08-08; 07-200), and must disclose that he/she made such complaint for a period of two years after the complaint is resolved (see Joint Opinion 06-19/06-29). The Committee can discern no meaningful distinction between filing a formal complaint alleging an attorney's ethical violation and informally reporting the same. In both instances, the judge is presumably acting on his/her belief that the attorney has, at the very least, engaged in misconduct, or the judge may believe there is "a substantial likelihood" of a "substantial violation" of the applicable attorney ethics rules (see 22 NYCRR 100.3[D][2]). In either case, the expectation is that the relevant disciplinary authorities will initiate an investigation and dispose of the matter in whatever fashion they deem appropriate. Because the consequences of the judge's communication may not differ in degree based on the form of the complaint, it is the Committee's view that a judge, upon making even an informal report such as the one the first inquiring judge describes, must disqualify him/herself from presiding in all matters involving the attorney while the complaint is pending (see 22 NYCRR 100.3[E]).

That a judge filed a complaint against an attorney before the judge assumed the bench does not warrant a different result. Both judges and attorneys have comparable reporting responsibilities with respect to attorney misconduct (see 22 NYCRR 100.3[D][2]; former 22 NYCRR 1200.4 [DR 1-103]). And, the risk that a judge's impartiality might reasonably be questioned (see 22 NYCRR 100.3[E]) as the result of filing a complaint against an attorney with the appropriate disciplinary body is not mitigated by the timing of the complaint. Therefore, the judge in the second inquiry must disqualify him/herself in all matters in which the attorney who was the subject of the judge's complaint is involved for a period of two years after the complaint was resolved.

Except in certain limited circumstances, not relevant to the present inquiry, the parties to a proceeding in which a judge disqualifies him/herself may remit the disqualification (see 22 NYCRR 100.3[E]; 100.3[F]). Therefore, the Committee previously has advised that remittal is available when a judge disqualifies him/herself after filing a complaint against an attorney appearing in the judge's court (see Opinion 08-28, 08-08). However, out of concern for the hardship that disclosure - while a disciplinary proceeding is pending or after it is resolved in the attorney's favor - might inflict on an attorney's professional standing, the Committee advised that a judge who disqualifies him/herself in these circumstances should seriously consider the confidential nature of an attorney disciplinary proceeding before disclosing the reason for his/her disqualification (see Opinion 08-28; 07-181). But, after further consideration, it is now the Committee's view that the attorney's right to confidentiality, both during the disciplinary proceeding and after it is resolved in his/her favor, is paramount. Therefore, the Committee now concludes that disclosure in order to obtain remittal, either during the pendency of the proceeding or after it is resolved in the attorney's favor, is never appropriate. Accordingly, a judge who files a disciplinary complaint

against an attorney must disqualify him/herself during the pendency of the disciplinary proceeding when the attorney appears in the judge's court and may not disclose the reason for his/her disqualification to effect remittal.

Further, where a disciplinary proceeding is resolved in the attorney's favor, the complaining judge must also disqualify him/herself during the two years thereafter and may not disclose the reason for such disqualification to effect remittal. The Committee considers a disciplinary matter to be resolved in an attorney's favor when the charges are dismissed or where the attorney is privately sanctioned. However, if an attorney is publicly disciplined or an appeal to the Appellate Division is publicly reported, the complaining judge may disclose his/her reason for disqualification and accept remittal by the parties and their attorneys (see 22 NYCRR 100.3[F]), but not when a party is self-represented (see, e.g., Opinion 06-111).

Whether a particular disciplinary proceeding is pending depends on the nature and availability of reconsideration motions, appeals, and other case-specific procedural mechanisms prescribed in the rules governing such proceedings. If a judge cannot otherwise determine whether a disciplinary matter is pending, for the purpose of disqualification, an attorney disciplinary proceeding ends and the two-year period for disqualification described above commences on the earliest of the following dates: (1) the actual date of any final disciplinary decision; (2) the date a disciplinary disposition is made public; or (3) the date of an official notice of the disposition.

As the result of the Committee's response to the present inquiry, the following prior Committee Opinions are modified or overruled: Opinions 08-28; 07-200; 07-181; 06-168; Opinion 06-107; Joint Opinion 06-19 and 06-29; Opinion 01-120 [Vol. XX].

This Opinion does not address the circumstance where a judge is called to testify as a fact witness or subpoenaed to testify as a character witness during an attorney disciplinary proceeding without having had any involvement in the initiation of the proceeding. Under such circumstances, and regardless of whether the judge's testimony is helpful or harmful to the lawyer's cause, a judge is not required to disqualify him/herself after so testifying (see Opinion 08-138).

The first inquiring judge also is concerned because the District Attorney continues to assign the ADA in question to appear in the judge's court, knowing full well that the judge must disqualify him/herself. The judge also indicates that his/her on-going disqualification creates administrative difficulties because he/she presides in a rural county and is assigned to handle most of the criminal matters that arise in his/her court. While these may be legitimate issues, they do not excuse compliance with the Rules Governing Judicial Conduct. In addition, the Committee has no jurisdiction to address them (see 22 NYCRR 101.1). Rather, the inquiring judge must consult with his/her administrative judge to resolve the administrative issues resulting from the District Attorney's actions. In addition, if the judge believes there is a substantial likelihood that the District Attorney has committed or is committing a substantial violation of the Code of Professional Responsibility, the judge must take appropriate action (see 22 NYCRR 100.3[D][2]). This Committee has generally and consistently advised that the presiding judge can best determine whether an attorney has committed a substantial violation of the Code of Professional Responsibility (see Opinions 04-74; 02-85; 98-95 [Vol. XVII]; 91-114 [Vol. VIII]). We have taken that position because all of the relevant facts and circumstances are likely best known and accessible to the judge and because this Committee is neither authorized nor equipped to conduct fact-finding inquiries or

hearings. In addition, the Committee has stated that a substantial violation of ethics is one which raises a question as to the accused lawyer's honesty, trustworthiness or fitness to continue practicing law (see Opinion 89-54 [Vol. III]).

Finally, the first inquiring judge asks whether he/she is disqualified from presiding in all cases involving the District Attorney's office because the ADA he/she reported to the disciplinary committee acts in a supervisory capacity. In Joint Opinion 06-19/06-29, where the judge filed an attorney disciplinary complaint against the Public Defender, the Committee advised that the judge need not recuse when assistant public defenders from the same office appear before the judge. Similarly, the first inquiring judge in the present inquiry also is not disqualified from presiding when other ADA's appear in his/her court, unless a particular ADA was involved in the circumstances giving rise to the judge's report to the disciplinary committee.

¹ The Disciplinary Rules of the Code of Professional Responsibility (22 NYCRR part 1200) were amended effective April 1, 2009.