

## ETHICS REFERENCE SHEETS

(A STARTER COLLECTION)

ADVISORY COMMITTEE ON JUDICIAL ETHICS  
SUMMER 2017

### RECOMMENDATION ON READING ETHICS OPINIONS

- Use the “digest” to see if an opinion is in the right ballpark...
- But then **read the full opinion** to understand the nuances, cautions and limitations.

Are your circumstances identical?  
**When in doubt, ASK!**

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### DISQUALIFICATION

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)

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### RECOMMENDATION CONCERNING SOCIAL RELATIONSHIPS

Make a record, such as a memo to file, of the basis for your conclusion about how to categorize your relationship with an attorney under Opinion 11-125.

- This practice, although not mandatory, may be of practical assistance if similar circumstances arise in the future or if anyone later questions your decision.

Opinion 12-125

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### WHEN DO THE RULES MANDATE RECUSAL (1 OF 5)

- Judge
  - **Has personal bias or prejudice**
  - Has personal knowledge of disputed evidentiary facts
  - **Served as lawyer in the matter**
  - **Has been a material witness concerning it**
  - **Made improper pledge or promise as candidate (or other public statement not in his/her adjudicative capacity)**

Sections 100.3(E)(1)(a)-(b), (f)

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### WHEN DO THE RULES MANDATE RECUSAL (2 OF 5)

- Judge’s former associate
  - **Served as lawyer in the matter during their former association**

Section 100.3(E)(1)(b)(ii)

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### WHEN DO THE RULES MANDATE RECUSAL (3 OF 5)

- Judge, spouse or minor child in household
  - Has economic interest in the subject matter in controversy or in a party to the proceeding
  - Has any other interest that could be substantially affected

Section 100.3(E)(1)(c)  
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### WHEN DO THE RULES MANDATE RECUSAL (4 OF 5)

- Judge's fourth-degree relative by blood or marriage
  - Is acting as a lawyer
  - Is likely to be a material witness

Section 100.3(E)(1)(e)  
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### WHEN DO THE RULES MANDATE RECUSAL (5 OF 5)

- Judge's sixth-degree by blood or marriage
  - Is a party
  - Is an officer, director or trustee of a party
  - Has an interest that could be substantially affected

Section 100.3(E)(1)(d)  
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### REFERENCE CHART: RELATIVES WITHIN 4<sup>TH</sup> DEGREE

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### REFERENCE CHART: WITHIN 6<sup>TH</sup> DEGREE...

\* Includes all relatives within fourth degree (e.g., spouse, siblings, first cousins, etc.).

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### COLOR-CODED EXAMPLE:

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### REMITTAL PROCEDURE

1. **Fully disclose** basis on the record
2. Agreement of **all parties** who have appeared and not defaulted **AND** their **lawyers**
3. Judge can be **impartial** and is willing to preside
4. Include agreement **in the record**

Opinion 15-06; 22 NYCRR 100.3(F)

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### REFERENCE CHART: WHEN REMITTAL IS UNAVAILABLE

Judge has <b>personal bias or prejudice</b>	Ex parte application, such as TRO or search warrant*
Party is <b>6th-degree relative</b> of judge or spouse	Party is <b>appearing without counsel</b> (pro se litigant)
Judge was <b>material witness</b> or served as a <b>lawyer</b> in the matter	Judge <b>cannot fully disclose</b> – e.g. if judge reported the attorney for misconduct

\* If no conflict-free judge is available, a judge may consider whether an emergency situation is presented (see e.g. Opinions 11-147; 96-91).

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### WHEN IS DISCLOSURE MANDATORY?

- **For remittal of disqualification.** If you are disqualified, but wish to offer the parties and their counsel an opportunity for remittal, you must fully disclose the basis for disqualification on the record.
- **When mandated in lieu of outright disqualification.** In some circumstances, the Committee advises a judge should not preside unless there is full disclosure of a possible conflict to the parties and their counsel.

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### DISCLOSURE: MANDATORY VS PROPHYLACTIC

Where Disclosure Is...	If a Party is Appearing Pro Se...	If ALL Parties are Represented...
Mandated in lieu of outright disqualification	Judge must disqualify.	Judge has discretion to preside, even if a party objects.
Merely prophylactic	Judge has discretion to preside, even if a party objects.	

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### PUBLIC COMMENT RULE

No public comment about a **pending or impending** proceeding in **any court** within the United States or its territories.

- Must require similar abstention by court personnel
- OK to make public statements in course of official duties
- OK to explain court procedures to public

22 NYCRR 100.3(B)(8)

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### TRAPS FOR THE UNWARY: "PENDING AND IMPENDING" CASES

Case **remains pending or impending** if

- “the time for appeal has not yet been exhausted”
- “a collateral or post-judgment application, an appeal, a parole hearing, or other proceeding” is **reasonably foreseeable**.

Opinion 15-61

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## PUBLIC COMMENT RULE & SOCIAL MEDIA

The Commission on Judicial Conduct has observed:

- “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.”

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## CONFIDENTIALITY AND THE INTERNET: THEN AND NOW

“On the Internet, nobody knows you're a dog.”

-- Peter Steiner, cartoon caption  
in *The New Yorker* (July 5, 1993)

“Remember when, on the Internet, nobody knew who you were?”

-- Kaamran Hafeez, cartoon caption  
in *The New Yorker* (Feb. 23, 2015)

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## EX PARTE COMMUNICATIONS...

A judge must not **initiate, permit or consider** *ex parte* communications unless an exception applies...

22 NYCRR 100.3(B)(6)

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## ... AND FIVE EXCEPTIONS

### Scheduling/administrative:

- No tactical advantage
- No subst'l rights affected
- Prompt notice + Opportunity to respond

### Court personnel; judges

### Authorized by law

### Parties consent

### Disinterested legal expert:

- Substance or Copy of advice
- Notice + Reasonable opportunity to respond

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## RECOMMENDATION TO AVOID EX PARTE COMMUNICATIONS

Have staff review all correspondence to screen for *ex parte* communications. Staff can simply return it to the sender, advising that the judge cannot consider the information conveyed without notice to all parties.

Opinion 15-178

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## EXTRA-JUDICIAL ACTIVITIES

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

22 NYCRR 100.4

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## OFFICER OR DIRECTOR: TRAPS FOR THE UNWARY

Usually OK to be an officer/director of a non-profit. But watch out :

- Do you have the power to make referrals to the entity?
- Does it regularly engage in litigation in **ANY** court? (**full-time** judges)
- Is it too “political”?

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## PRESTIGE OF JUDICIAL OFFICE; CHARACTER TESTIMONY

A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others.... A judge shall not testify voluntarily as a character witness.

22 NYCRR 100.2(C)

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## DISCIPLINARY RESPONSIBILITIES

A judge who **receives** information indicating a **substantial likelihood** that another judge/attorney has committed a **substantial violation** of the applicable disciplinary rules shall take **appropriate action**.

22 NYCRR 100.3(D)(1)-(2)

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## DISCIPLINARY RESPONSIBILITIES

Judge's Reporting  
Obligation - Rule 100.3(D)

Attorney or judge

Substantial Likelihood

Substantial Violation

"Appropriate Action"\*

In all but the most extreme cases, the judge has full discretion at each stage of the analysis to determine whether each element is met.

\* What is “appropriate action”?

It's almost always in the judge's discretion.

Reporting is required **ONLY** if the misconduct is so serious that it calls into question a judge's fitness to continue in office, or an attorney's honesty, trustworthiness or fitness as a lawyer.

Opinions 13-69; 10-85

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## APPEARANCE OF IMPROPRIETY

A judge shall respect and comply with the law and shall act at all times in a manner that **promotes public confidence** in the integrity and impartiality of the judiciary.

22 NYCRR 100.2(A)

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## POLITICAL ACTIVITY

Neither a sitting judge nor a candidate for election to judicial office shall **directly or indirectly** engage in **any** political activity except...

22 NYCRR 100.5(A)(1)

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## WHEN TO SEEK HELP

Consider Judge Marlow's "seven rules" – best to check if it involves

1. Money
2. Commerce/business
3. Politics
4. Charity
5. Character testimony/letter of reference
6. Something you don't want in the news
7. A gut feeling something isn't quite right

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## WHEN TO SEEK HELP

You can always tell when you're about to rationalize your way to a bad decision.

It's when you start using phrases such as **'It would be wrong, but . . .'**

-- Fictional character Molly Carpenter, reflecting on advice from her mentor, Harry Dresden (Jim Butcher, "Bombshells" [2013]).

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## CONTACT US

### Informal Guidance – by Telephone

**Main Number: 866-795-8343**

- Quick response
- We'll direct you to published opinions and black-letter rules where available
- No statutory presumption

#### Direct Dial Numbers

- Hon. George Marlow, Co-Chair (845) 454-2125
- Laura Smith, Chief Counsel (212) 428-2504
- Hon. Edward Borrelli, Special Counsel (914) 824-5329

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## CONTACT US

### Formal Written Inquiries

- Statutory presumption
- Signed original by mail (NO EMAILS)
- Include two telephone numbers
- Focus on your own proposed conduct; be concrete.

**Mailing Address:** Advisory Committee on Judicial Ethics  
c/o Laura Smith, Chief Counsel  
NYS Unified Court System  
25 Beaver Street, Suite 866  
New York, NY 10004

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## IN A HURRY?

After the meeting where the Committee has considered your inquiry, **call us at 1-866-795-8343**

to learn what the Committee decided.

- Meeting dates are listed on the website.
- You may call as early as *that afternoon*.
- A written opinion will follow in due course.

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## OPINION SEARCH PAGE

Visit [www.nycourts.gov/ip/acje](http://www.nycourts.gov/ip/acje)



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