

# ETHICS REFERENCE SHEETS

(A STARTER COLLECTION)

ADVISORY COMMITTEE ON JUDICIAL ETHICS

DECEMBER 2022

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1

## 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!

2

2

## 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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3

## WHAT DOES IT MEAN IF YOU ARE DISQUALIFIED?

“[I]t is not the parties’ burden to request the judge’s disqualification. Rather, it is **the judge’s** burden to disqualify him/herself **at the outset**, even if the parties are fully aware of the conflict and do not express any concern.”

Opinion 20-22

4

4

## 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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6

### 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)

7

7

### 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 relative 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:

12

12

## REMITTAL PROCEDURE

1. **Fully disclose** basis on the record
2. Voluntary, affirmative consent from
  - **all parties** who have appeared and not defaulted
  - **AND** (if represented) their **lawyers**
3. Judge can be **impartial** and is willing to preside
4. Include agreement **in the record**

Opinion 21-22(A); 22 NYCRR 100.3(F)

13

13

## REFERENCE CHART: WHEN REMITTAL IS UNAVAILABLE

Personal bias or prejudice	Ex parte application, such as TRO or search warrant*
Party is 6th-degree relative	2 <sup>nd</sup> -degree relative present as attorney or witness
You were <b>material witness</b> or served as a lawyer in the case	You are <b>unwilling or unable to fully disclose</b> basis for recusal
Law enforcement agency headed by 1st-degree relative (Ops. 21-15; 19-89)	You reported an attorney for misconduct (e.g. Op. 08-183/08-202/09-112)

\* 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).

14

14

## 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

15

15

## WHEN IS DISCLOSURE ETHICALLY MANDATED?

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

**NOTE:** See Judiciary Law § 9 for legal requirement.

16

16

## 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)

17

17

## 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

18

18

## 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.”

19

19

## 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)

20

20

## 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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21

## ... 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

22

22

## 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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## 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)

24

24

## 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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25

## 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 direct OR indirect referrals to the entity?
- Does it regularly engage in litigation in ANY court? (**full-time** judges)
- Is it too "political"?

26

26

## 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)

27

27

## 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

28

28

## THE "GIFT RULE" 22 NYCRR 100.4(D)(5)

A judge **shall not accept**, and **shall urge** members of the judge's family residing in the judge's household not to accept,

- a **gift, bequest, favor or loan** from anyone, except in specified circumstances.

29

29

## GIFT, BEQUEST, FAVOR OR LOAN – FREQUENT EXCEPTIONS

Some very common exceptions include:

- free admission to **bar association events** for you + guest;
- gifts from **family and very close friends**;
- ordinary social hospitality**;
- scholarships or fellowships** awarded on the same terms and criteria as other applicants; or
- bank loans** in the regular course of business on the same terms as other applicants.

30

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## DETAILED CHECKLIST: 10 GIFT RULE EXCEPTIONS

### (a) ADMISSION TO BAR FUNCTIONS:

An invitation to judge + spouse/guest to attend either

- “a bar-related function” or
- “activity devoted to the improvement of the law, the legal system or the administration of justice”;

### (b) INCIDENT TO SPOUSE’S BUSINESS:

Gift/award/benefit “incident to the business, profession or other separate activity of a spouse or other family member residing in the judge’s household,”

**only if** it “could not reasonably be perceived as intended to influence” performance of judicial duties.

31

31

## DETAILED CHECKLIST: 10 GIFT RULE EXCEPTIONS

### (c) ORDINARY SOCIAL HOSPITALITY

The Committee has observed that “ordinary social hospitality” does not include “a party that provides guests with a complete dinner at an expensive restaurant, a cruise, or like affair that is more expensive or lavish than an ordinary party.” Rather, a buffet or sit-down dinner that is not unusually expensive or lavish is permissible. [A] judge should not accept an invitation extended in the midst of a trial or other currently, actively contested proceeding if the host attorney or law firm is an active participant in the matter.

– Opinion 12-185 (citations omitted)

32

32

## DETAILED CHECKLIST: 10 GIFT RULE EXCEPTIONS

### (d) SPECIAL OCCASION GIFT:

Gift from “a relative or friend, for a special occasion such as a wedding, anniversary or birthday,”

**only if** “fairly commensurate with the occasion and the relationship”

### (e) FAMILY/CLOSE PERSONAL FRIEND:

Gift “from a relative or close personal friend whose appearance or interest in a case **would in any event require disqualification** under section 100.3(E)”

33

33

## DETAILED CHECKLIST: 10 GIFT RULE EXCEPTIONS

### (f) ARMS’-LENGTH LOAN FROM BANK:

“a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges”

### (g) SCHOLARSHIP/FELLOWSHIP ON SAME TERMS AS OTHERS:

“a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants”

34

34

## DETAILED CHECKLIST: 10 GIFT RULE EXCEPTIONS

### PUBLISHERS’ RESOURCE MATERIALS:

“books, tapes and other resource materials supplied by publishers on a complimentary basis for official use”

### PUBLIC TESTIMONIAL:

“a gift incident to a public testimonial”

Note: These are both found in Section 100.4(D)(5)(a).

35

35

## DETAILED CHECKLIST: 10 GIFT RULE EXCEPTIONS

### (h) “CATCH-ALL” EXCEPTION

If none of the above-referenced exceptions apply, a judge may accept **ONLY IF**:

- the donor is not a party or other person who has come or is likely to come or whose interests have come or are likely to come before the judge.

36

36

## WHEN TO SEEK HELP

Best to check if it involves

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

37

37

## 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]).

38

38

## 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

- Laura Smith, Chief Counsel (212) 428-2504

39

39

## CONTACT US

### Formal Written Inquiries

- Statutory presumption
- Include two telephone numbers
- Focus on your own proposed conduct; be concrete.
- Decided **ONLY** at the Committee's seven formal meetings.

**BY EMAIL:** [part100@nycourts.gov](mailto:part100@nycourts.gov)

**OR BY MAIL:** Advisory Committee on Judicial Ethics  
c/o Laura Smith, Chief Counsel  
NYS Unified Court System  
25 Beaver Street, 8<sup>th</sup> floor  
New York, NY 10004

40

40

## 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.

41

41

## OPINION SEARCH PAGE

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



42

42