New York University School of Law

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Ethics and Best Practices for Housing Court Judges

Gerald Lebovits

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NEW YORK CITY CIVIL COURT
HOUSING PART

LEGAL UPDATE
FOR JUDGES

October 16, 2007

ETHICS AND BEST PRACTICES
FOR
HOUSING COURT JUDGES

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Ethical Judicial Writing — Part I

No judicial function is more important than deciding cases ethically. Judges resolve disputes. They create, apply, and enforce rights and obligations. Judges affect lives. Society trusts judges to rule fairly and impartially, irrespective of issue or litigant. Judges, who must behave with integrity, professionalism, and respect, must be ethical on and off the bench. Judicial ethics are scrutinized by written opinions. Judges leave their mark in written opinions. An unethically written opinion is a black mark that defines a judge, while the honest, just, well-written opinion is celebrated. This three-part article addresses ethical issues that arise in judicial writing, with a New York focus.

Codes, Rules, Commissions, and Beyond
Judges must write within the bounds of the law and the bounds of ethics. They must look for guidance to the law in the jurisdiction where they preside, but no code or rule directly addresses judicial opinion writing.

Federal judges have their own code of judicial conduct. Judges in the United States Circuit Courts, District Courts, Court of International Trade, Court of Federal Claims, Bankruptcy and Magistrate Courts must comply with the Code of Conduct for United States Judges. The American Bar Association formulated the Model Code of Judicial Conduct in 1972. The ABA wrote the Model Code, as the preamble explains, so “that judges . . . respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system.” The New York State Bar Association implements the Model Code, known as the New York Code of Judicial Conduct (CJC).

The New York State Constitution provides that “[j]udges and justices . . . shall . . . be subject to such rules of conduct as may be promulgated by the chief administrator of the courts with the approval of the court of appeals.” Pursuant to the State Constitution, the Chief Administrator of the Courts to “[p]romulgate rules of conduct for judges and justices of the unified court system with approval of the Court of Appeals.” The Administrative Board of the Judicial Conference promulgated the Rules Governing Judicial Conduct (RGJC) in 1972. New York’s Chief Administrator of the Courts adopted the RGJC with the Court of Appeals’ approval. The RGJC and the CJC are nearly parallel. The CJC consists of canons and sections. The canons set out broad standards; the sections, delineated under each canon, set out specific rules. Commentaries after each section explain the purpose and meaning of the canons and sections. The RGJC consists of rules, not canons. The Chief Administrator of the Courts has not adopted the CJC’s commentaries. Where inconsistencies arise between the RGJC and the CJC, the RGJC prevails, except that the CJC prevails regarding a non-judge candidate for elective judicial office.

The Advisory Committee on Judicial Ethics (ACJE) advises New York judges who have ethical questions. A judge who telephones an ACJE member or staff attorney might get informal, oral guidance, although the member or staff attorney will often recommend that the query be posed in writing. Inquiries via e-mail are not accepted. A judge who writes to the ACJE will get a written answer from the full Committee. The ACJE issues confidential opinions and publishes them without identifying information. A judge who follows the ACJE’s written advice is presumed to be acting ethically if faced with a complaint to the New York State Commission on Judicial Conduct.

The Commission on Judicial Conduct, the agency authorized “to receive and review written complaints of misconduct against judges, initiate complaints on its own motion, conduct investigations, file Formal Written Complaints and conduct formal hearings . . . subpoena witnesses and documents, and make appropriate determinations as to dismissing complaints or disciplining judges . . . .” The Commission’s staff investigates complaints about “improper demeanor, conflicts of interest, violations of defendants’ or litigants’ rights, intoxication, bias, prejudice, favoritism, gross neglect, corruption, certain prohibited political activity and other misconduct on or off the bench.”

The Advisory Committee only interprets the RGJC, not the CJC. The Commission currently considers alleged violations of the RGJC, not the

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Administrator of the Courts all cases undecided within 60 days after final submission and any undecided motion for interim maintenance or child support within 30 days after final submission. In summary proceedings like matters in the New York City Civil Court’s Housing Part, judges must resolve within 30 days after final submission cases involving nonhazardous or hazardous violations and within 15 days after final submission cases involving immediately hazardous violations or injunctions.

Administrators must remind Supreme Court justices to resolve motions. The deputy chief administrative judge for courts inside and outside of New York City must tell the justice that a motion "has been pending for 60 days after final submission." If a motion is "unusually complex," the justice may apply to the local administrative judge no later than 20 days after final submission to designate the motion as "complex." If the administrative judge agrees, the justice has 120 days to decide the motion.

In one case, In re Greenfield, a New York State Supreme Court justice delayed issuing opinions between seven months and nine years. Some litigants were forced to begin proceedings against the justice to compel him to render decisions. Despite a strong dissent, the Court of Appeals declined to sanction him. The court noted that imposing sanctions under the RGJC would be appropriate if a judge purposely concealed delays or failed to cooperate with an administrative judge’s efforts to assure that decisions are rendered timely. The court found that the justice’s actions were not a “persistent or deliberate” neglect of judicial duties sufficient to warrant formal penalties. When Greenfield was decided, the rules requiring judges to report late decisions had been recently promulgated and were loosely enforced. Since then numerous courts have disagreed with Greenfield. Most commentators believe that judges who issue decisions late are acting unethically.

Today, the rules requiring judges to report cases are strictly enforced.

An unethically written opinion is a black mark that defines a judge, while the honest, just, well-written opinion is celebrated.

Court administrators keep close track of undecided cases, remind judges about undecided cases, and adjust a judge’s caseload to enable that judge to dispose of undecided matters promptly. Were Greenfield decided today, the court might render a different decision.

Candor
Candid judges give real reasons for their decisions. A judge who is uncomfortable with doing so should decide the case differently or on different grounds. A judge who recognizes that the real reason for deciding a case is inappropriate should use the occasion to reconsider.

Our democratic process requires reasoned opinions. However, reasoned opinions are not necessarily candid. Candid opinions help readers—litigants, lawyers, law students, appellate judges, and the public—understand precedent and outcomes. In turn, readers decide for themselves whether judges are doing their jobs. A lack of candor reveals a lack of integrity.

Candor has its limits, however. Precedent, collegiality, the lawyers’ and litigants’ personalities, and politics test these limits. Judges should avoid revealing their personal thoughts in the guise of candor.

An opinion is not easy to write. The result is not always pleasant. The law can be complex. It can lead to peculiar results. A judge should not discuss the opinion in the opinion. Judges should not state the difficulty in writ-
ing the opinion, time spent working on the opinion, or efforts made to ensure a fair opinion. Justice Oliver Wendell Holmes made an ethical appeal to his readers when he wrote in his dissent in *Lochner v. New York* that “[i]f this case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should study it further and long before making up my mind.”

Judges who say how deliberate, conscientious, hard-working, honest, or smart they are will not persuade readers. An opinion should resolve issues, not be a vehicle for self-congratulation.

Judges might also be unsure about the opinion’s result. A tentative opinion is a draft opinion that a judge issues seeking comment before the final decision. In a dubitative opinion, a judge expresses findings of fact and conclusions of law with reservations.

The public expects judges to decide difficult controversies. Litigants know that one side will lose and the other will win. A judge must deal with the good, the bad, and the ugly. Judges must bring finality to disputes and take responsibility for their decisions.

Humility and Humanity

Some judges get so caught up with their power that they lose sight of their goal: to “be both lawyer and philosopher of the highest grade, blessed with saving common sense and practical experience as well as sound comprehensive learning.” Judges should write intelligent, honest, and clear opinions that adhere to ethical and moral principles. Harvard Law Professor Lon Fuller synthesized that rare quality of great judges: “[T]heir fame rests on their ability to devise apt, just, and understandable rules of law...[T]hey were able to bring to clear expression thoughts in lesser minds would have remained too vague and confused to serve as adequate guideposts for human conduct.” Some non-judges naively believe that judges have supernatural powers. Judges are lost souls when they take to heart the compliments and honorifics they receive. Judges must never confuse the law’s power with its dignity.

An example of an immodest opinion is *Bianchi v. Savage*. The court treated the New York landlord-tenant issue in that case as if civilization itself depended on the court’s ruling. The judge’s lack of modesty is endless. He used the royal “we” and “us”; he used capitals, italics, italicized capitals, and exclamation marks. To emphasize, the judge used adverbs, adjectives, Latin, metadiscourse, and self-congratulatory phrases. Justice Holmes, in *Haddock v. Haddock*, used a more modest approach when he wrote, “I do not suppose that civilization will come to an end whichever way this case is decided.”

Judges must rely on their humanity to write opinions that offer just solutions to all. Judges who attempt to write literary masterpieces will lose sight of “the holy function of justice.” Justice demands just solutions, not brilliant opinions or purple prose. Judges must not use opinions to display their intelligence. Modesty, humility, and dignity are essential in opinion writing.

Dicta and Public Policy

Judges should be careful about creating or relying on dicta. Dictum is “[a]n opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision.” Overusing and misusing dicta lead readers to confuse dicta with findings and holdings. Public confidence in the judiciary is not promoted if the public does not understand what the opinion holds and why.

Dictum arises when judges try to resolve too many contentions. Some issues are more important than others. Some contentions are argued heatedly, but a judge will later discover that the contention is not relevant to the ultimate determination. A judge may resolve a somewhat minor issue in a short paragraph or two. Overly considering minor claims detracts from important issues and sounds defensive.

Courts should discuss all of the separate grounds for an opinion’s holding. Doing so does not create dicta. It is important for lawyers to argue in the alternative; they do not know whether a judge will reach an argument. But judges who use alternative holdings, as opposed to separate arguments for a single holding, dilute opinions and perplex readers. Readers could mix up findings with ruminations when judges hold in the alternative.

Judges sometimes use dicta to lecture about policies that are ancillary to the issues before them. Judges may use public policy to supplement, but not supplant, existing legal rules. Judges who disagree with a rule should state why it is unwise and may appeal to the legislature to change the law. They must not mislead the reader into believing that policy — not the law — is the basis for the holding. To take a landlord-tenant example, a court that considers whether a tenant is entitled to remain in an apartment should decide the case on legal grounds. A judge who discusses homelessness or slumlordism risks letting the reader believe that the case was decided for personal or political reasons. The discussion might also reflect prejudice. It might imply that a party falls into a category not established in the particular case.

Next issue: This three-part column continues with tone, temperament, facts, claims, issues, and standards of review.

1. For an excellent review of ethical legal writing for New York practitioners and judges, see Gary D. Spivak & Maureen L. Clemenb, *The Ethics of Legal*

Ethical Judicial Writing — Part II*

Last issue the Legal Writer offered some suggestions on writing ethical judicial opinions. We continue.

Tone and Temperament
Judges must maintain impartiality, credibility, and objectivity. The Rules Governing Judicial Conduct (RGJC) require judges to promote integrity in the judiciary, to maintain order and decorum in the courtroom, and to be patient, dignified, and courteous to all. Judges must not be advocates: "An ethical judge cannot be a polemicist." The RGJC prohibits judges from showing bias or prejudice "based upon age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status." Some judges, even United States Supreme Court Justices, have written biased opinions. In Plessy v. Ferguson, for example, Justice Henry B. Brown commented that if segregation offended African-Americans, it was "solely because the colored race chooses to put that construction upon it." When the Sioux Nation sued to get land promised by the 1868 Fort Laramie Treaty, a dissenting Justice wrote that "Indians did not lack their share of villainy." Judges must refrain from making any statement that could be construed as biased. They must "identify and understand [their] own biases and how they affect [their] reaction to a case." Judges should likewise refrain from incorporating graphic sexual descriptions into their opinions except as necessary to resolve a case. Opinions should be dignified. They must not cater to voyeurs. In our Internet age, in which the public has access to many more opinions than before, judges should be careful about how and whether to identify individuals unimportant to the litigation.

Judges should treat lawyers and litigants respectfully. Lawyers aren't always prepared. Sometimes litigants behave poorly or are involved in seemingly humorous situations. Litigants don't always bring perfect cases. Delusional litigants bring bizarre claims. A judge tempted to condemn an unprepared lawyer, berate a nasty or delusional litigant, or ridicule a litigant's unfortunate situation might use sarcasm, humor, or scorn to attack or make fun of lawyers and litigants. Attacking lawyers or litigants is unseemly. Humor, sarcasm, and scorn have no place in judicial opinion writing. Judges who write this way undermine "public confidence in the integrity . . . of the judiciary." As Judge Joyce George wrote, "propriety is at the very core of what a judge writes . . . . A judge's professional responsibilities require him to select carefully the language and phraseology necessary to communicate the decision and not to be humorous at the litigants' expense or to satisfy some personal need to be funny." One Bankruptcy judge from Texas used humor to deny a defendant's motion as incomprehensible. The judge compared the defendant and his motion "to Adam Sandler's title character in the movie 'Billy Madison,'" after Billy Madison had responded to a question with an answer that sounded superficially reasonable but lacked any substance. Billy Madison, like the defendant in this case, was berated for his stupidity: [W]hat you've just said is one of the most insanely idiotic things I've ever heard. At no point in your rambling, incoherent response was there anything that could be considered a rational thought. Everyone in this room is now dumber for having listened to it. I award you no points, and may God have mercy on your soul.

Judges are different from everyone else in a courtroom. They should decipher rambling, irrational, incoherent thoughts. They should unearth the buried argument, comprehend the incomprehensible, clarify the opaque. They shouldn't give up easily on a litigant who sounds like Billy Madison. Judges who act disrespectfully to lawyers and litigants will in turn be treated disrespectfully.


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Litigants question the impartiality of a judge who fails to consider the losing side's facts.

for legal or private reasons. This question recurs with judges who have had negative experiences in legal matters, like an unpleasant divorce or custody case. Judges affected by personal experiences must take precautions against prejudging cases or litigants. They must leave their baggage at the courthouse door.

Litigants don't always see eye to eye with one another. Judges don't always get along with other judges. Judges shouldn't use opinions to criticize other judges, whether on a lower court, or on a higher court, or a dissenting judge, or the author of a majority opinion. Judges are entrusted to promote public confidence in the legal system. Judges who engage in infighting are not likely to win the case because of animosity, not on the merits.

Judges should also avoid writing in formats foreign to opinion writing. Some judges have written opinions as poetry and prose. Others have included stanzas, animal references, folk language, or popular references. One judge disparaged medical-liability law by writing that "the work of the Alabama Legislature in the area of medical liability is a mule - the bastard offspring of intercourse among lawyers, legislators, and lobbyists, having no pride of ancestry and no hope of posterity." Judges who use unusual formats send a message that they take lightly their opinions and their role as judges. Using clever prose or poetry forecloses the best and clearest language. A judge who tries to be a poet can't use all available language and hence creates the appearance that the attempt to be clever had priority over clarity and candor.

A good opinion is credible and impartial. A dispute that requires judicial intervention is serious to society and the litigants. Judges owe a duty to deal with litigants' claims. They may inject their own style and character in their written opinions. They may include emotional themes, without writing emotionally. But an opinion should be written in the format the public expects: It should address the litigant's claims in an organized, reasoned, and honest manner. Deriding litigants, using droll references, and treating the opinion as though it were literature diminishes the opinion's quality.

The Facts
Facts set the stage for a judicial opinion. The law can be applied only to the facts the judge incorporates into a written opinion. It's an ethical problem when a judge fails to include key facts or incorporates too many facts. Judges should use accurate facts and use them accurately. Without accurate facts, the ruling will be wrong. A judge who includes too many facts forces the reader to sift through irrelevant ones. That makes the opinion unfocused and results in dictum. Irrelevant facts lengthen an opinion and decrease clarity. A judge who omits important facts will write an erroneous opinion, one that will affect a litigant's ability to appeal. An appellate court can't consider what's absent from the record.

Litigants shade facts to further their interests. Judges may never shade facts. An opinion should make the reader agree with the judge's rationale and conclusion without crossing the line from persuasion to distortion. Nor should judges adopt a litigant's version of the facts verbatim or fail to verify the facts in the record. The law belongs to the judge, but facts belong to the parties, who won't forgive a judge who cheats or doesn't think independently.

Judges should incorporate facts helpful to the losing side to strengthen the opinion and assure the reader that the judge considered the relevant facts. Without facts helpful to the losing side, the court's reasoning might be unsound - the judge couldn't justify the result in the face of the losing side's facts. Litigants question the impartiality of a judge who fails to consider the losing side's facts.

Getting the facts right on appeal is important not only to the litigants but also to the trial judge: "The prime expectation of the trial judge, when his adjudication goes to an appellate court, is that the latter, in its published decision, will make an honest statement of the case." Claims, Issues, and Standards of Review
Litigants are taught to pose issues persuasively. Judges should "write a judicious opinion, not a brief [], and slate the question to be decided neutrally." Claims and issues should be introduced by combining law with fact. Only after they frame the issue can judges accept a party's argument. Judges who use headings in an opinion should write them neutrally, too.

Judges shouldn't choose one line of authority over another without explaining why. When judges don't explain themselves, a reader familiar with the authority ignored will believe that the judge was sloppy, unable to distinguish the authority, or agenda-driven.

As to issues, a trial-court opinion should offer a logical, disinterested explanation of the case for the litigants that allows appellate review. Intermediate appellate courts review trial-court opinions for correctness and sharpen the issues for further appellate consideration.
An appellate court that reviews a lower-court or agency determination must state the appropriate standard of review, such as "reasonable doubt," "clear and convincing evidence," "clearly erroneous," or "arbitrary and capricious." The standard should be stated neutrally, followed by a fair application of law to fact. Standards of review, and how they're written, often determine outcomes. Judges should avoid polarized standards, defined as one line of cases in which one class of litigant (e.g., defendants) prevailed. Polarized standards, which lead to inevitable conclusions, confuse litigants. They allow "the court merely [to] invoke... the 'tough' or 'easy' version of the standard of review."

Next issue: This column continues with judicial writing style, boilerplate, plagiarism, law clerks, and extrajudicial writing.
REFERENCES IN CASES

1. E.g., State v. McElligott, 529 N.Y.S.2d 753, 754 (N.Y. Ct. App. 1987) (dictum). ("Old Dave Baird, the prosecuting attorney up in Nodaway County, thought he had a case against Les McElligott for receiving stolen property; to wit: a chain saw, so he ups and tries on Les.").

2. E.g., Schenk v. Comm'r, 886 F.2d 315, 316 (8th Cir. 1989) (Goldberg, J.) (parroding Ecclesiastes 3:1); Allied Chemical Corp. v. Hess Tankship Co. of Delaware, 461 F.2d 1044, 1046 (5th Cir. 1972) (Brown, J.) (parroding opening line from Edward George Bulwer-Lytton's 1830 novel Paul Clifford: "It was a dark and stormy night.").


5. Generally William A. Balsam, Reflections on the Art and Craft of Judging, 38 Judges' J. 4, 34 (Spring 1999) ("Although the urge behind overinclusion is the understandable one of thoroughness, a truly controlled presentation is also focused.").

6. For more about writing shorter opinions, see Gerald Lebovits, The Legal Writer, Short Judicial Opinions: The Weight of Authority, 76 N.Y. St. B.J. 64 (Sept. 2004).

7. See Anthony D'Amato, Self-Regulation of Judicial Misconduct Could be Mis-Regulation, 80 Mich. L. Rev. 609, 619 (1982) (noting that one of worst things judges can do is ignore or misstate facts).


9. Although this practice is disapproved, "even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous." Anderson v. City of Downey, 470 U.S. 564, 572 (1985); or if the court didn't exercise independent judgment.

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Ethical Judicial Writing — Part III

For the past two issues, the Legal Writer offered suggestions on writing ethical judicial opinions. We continue.

Writing Style
A good opinion “expresses the decision and rationale of the court in language and style that generate confidence in the reader that justice has been fairly and effectively administered.” Judges may make their opinions readable: “[A] judicial opinion need not be a dull, stereotyped, colorless recital of facts, issues, propositions, and authorities but can be good writing and make good reading.” Memorable opinions with literary style best communicate the law. Nevertheless, a satisfactory “objective is not a literary gem but a useful precedent, and the opinion should be constructed with good words, not plastered with them.”

Judges must avoid pitfalls common to all legal writing. Nominalizations and the passive voice add unnecessary words that hide substance and allow a judge to escape or downplay responsibility for a decision. Hiding the subject, or actor, can both deceive and make sentences abstract. Nominalizations turn nouns into verbs. One way to spot some nominalizations is to watch for an “of” or a word ending in “ion”: “He committed a violation of the Penal Law.” Becomes: “He violated the Penal Law.” Passives place the action’s object before the actor. Look for the word “by”: “Opinions are written by judges.” Becomes: “Judges write opinions.” It’s unethical to use a bland, or double or nonagentive, passive to hide an important actor or to misdirect the reader. Example: “A mistake was made.” Becomes: “This court made a mistake.”

Metadiscourse is written throat-clearing, a needless preface to a substantive point. It introduces what the writer plans to write: “For all intents and purposes, the defendant disregarded the court’s order.” Becomes: “The defendant disregarded the court’s order.” Phrases like “bear in mind that,” “that is to say,” “it is the court’s conclusion that,” “the court recognizes that,” “it is well settled that,” “after careful consideration,” “it appears to be the case that,” and “it is hornbook law that” are metadiscoursive. Metadiscourse is pedantic and condescending. Without saying that they’re getting to the point, and especially without saying how well they researched or how seriously they considered the case, judges should get to the point, research fully, and consider the case carefully.

Judges should also refrain from writing pretentiously or overusing adjectives, adverbs, clichés, and overdeveloped metaphors. The opinion should leave the judge’s personality in the background and focus on logical analysis. Likewise, judges shouldn’t try to impress readers with vocabulary. Forcing readers to look up words lessens clarity and insults readers. Judges should also avoid writing in Latin or French if a simple English equivalent is available. So, too, should judges avoid legalisms. As New York’s Chief Judge Judith S. Kaye put it, “First, we need to make sure that our communications are accessible. For sitting judges, this starts with sensitive courtroom behavior and speaking clearly — in English, not in Latin, not in French, and not in pettifog . . . . We need to say what we mean in a way that people can understand.”

Judges who use sexist language offend both genders. Some states — New York included — require that opinions be gender neutral. A judge who uses gender-neutral language will appeal fair. Once again, Chief Judge Kaye said it best: “[G]ender-neutral writing is not only a good habit but also an easy one to acquire and internalize.”

Trial judges shouldn’t use “I” or “we.” “I” is inappropriate because it’s informal, placing the judge on the same level as the winning side. A trial judge writing an opinion shouldn’t use “we”; the word is inaccurate. It’s better to write “the court” or “this court.” Using “we” is appropriate only at the appellate level, where more than one judge will contribute to the opinion. “I” is acceptable in concurring and dissenting opinions. Concurrences and dissents aren’t the court’s ruling but the individual author’s argument.

Boilerplate Opinions
Faced with ever-increasing caseloads, judges are tempted to rely on the same cases or language to resolve issues encountered repeatedly. Boilerplate saves time. It’s convenient. But a judge who relies on boilerplate might not pay attention to facts and issues particular to the case. A boilerplate opinion can ignore issues. It can amount to nothing more than an ill-advised judicial shortcut. Writing quickly is

CONTINUED ON PAGE 56
important, but the litigants’ interests shouldn’t be sacrificed for judicial economy. Missing an issue because a judge used form precedent or form language is inexcusable. It causes litigants expense, delay, and anguish.

Judges, who must keep an open mind, should consider each case anew, even if the issues seem familiar. Judges who pen boilerplate opinions signal their laziness, and “[a] court must constantly be the alert against mental laziness. The decision suggested by habit might not be the right one.”

The rules prohibiting plagiarism affect extrajudicial writing as well. A Michigan judge was publicly censured for not acknowledging passages from one article and for incorporating without attribution portions of another.

Judges may use language from case law or a lawyer’s brief if they cite the source when paraphrasing or use quotation marks and attribution when words are taken verbatim. The opposite of plagiarism is scholarship: it’s scholarly to cite the starting point from which the judge’s idea was derived.

Law Clerks
It’s ethical for judges to rely on law clerks to research and help draft opinions. Although doing so is an accepted judicial practice, judges must be wary about potential dangers. The RGJC requires judges to perform their duties diligently. Diligence doesn’t mean delegating a task and forgetting about it. Even if the clerk plays a large role writing the decision, the judge must always take a hands-on approach.

Judges should give their clerks direction. If the clerk believes that the judge is mistaken, the judge should listen to the clerk and adjust the opinion, if necessary. This process should continue throughout the research and writing. The judge should edit the clerk’s drafts for style, research, and substance.

Regardless how much the law clerk contributed to the decision, the judge is responsible for the result. A well-written opinion reflects a judge’s skill and temperament. Every word and citation must be the judge’s authentic voice. A judge shouldn’t credit the law clerk’s work. In New York, the Law Reporting Bureau (LRB) has put into effect the Court of Appeals’s policy forbidding judges from thanking their law clerks or interns in opinions: The LRB won’t publish the acknowledgment. Before this rule went into effect, many judges lauded clerk and intern contributions. Some still do.

A judge may use a law clerk, student intern or extern, special master, or referee to assist in opinion writing. A judge may not use an outside expert, such as a law professor, to write the opinion. Judges who let court outsiders write for them can be reprimanded, censured, or removed from office.

Extrajudicial Writing
Judges may write things other than judicial opinions if the writing doesn’t cast doubt on their ability to act impartially, affect the court’s dignity, or interfere with judicial performance. Judges are prohibited from writing about pending or impending cases, whether about the merits, the facts, the litigants, or the attorneys. The RGJC doesn’t expressly prohibit judges from commenting on cases they’ve decided, but judges should avoid doing so. Unlike statutes, which legislative history clarifies, an opinion is self-contained. A judge’s extrajudicial comments should not guide future courts.

Controversy on this issue arose recently when a New York Family Court judge on the verge of retiring wrote a New York Law Journal commentary criticizing the Appellate Division, Second Department, for reversing one of his decisions.

The RGJC provides that “[a] judge shall not lend the prestige of judicial office to advance the private interests...
of the judge or others. The Advisory Committee on Judicial Ethics has issued several advisory opinions about extrajudicial writing that advances private interests.

Judges face ethical dilemmas when they write personal recommendations that give the appearance of partiality. Judges should mark “personal and unofficial” on whatever letter isn’t part of the court’s official business, and they should avoid writing unsolicited letters.

That said, New York judges may write recommendation letters on behalf of a law-school or job applicant or an attorney who seeks admission to an 18-B panel. A judge may recommend a former assistant district attorney for private employment. A judge may recommend a court employee seeking work in another court. A Criminal Court judge may not write a recommendation on behalf of a law student to a district attorney whose assistants appear before the judge. A judge may authorize a job candidate to list the judge as a reference; a judge may also respond to a district attorney’s request for information about the candidate. A judge may recommend a candidate with a “To Whom It May Concern” letter that the judge gives the candidate. A judge may also serve as a reference for attorneys seeking employment with a law firm that doesn’t appear before the judge and is located outside the judge’s jurisdiction. A judge may write a character letter for a co-op application. A judge shouldn’t write a recommendation for a police officer who will likely be a witness in a case before the judge. A judge is prohibited from giving a reference letter to a bank on behalf of a friend seeking a loan.

Judges may not lend their office’s prestige to further a friend’s private business interests. Or their own interests: Judges shouldn’t use judicial stationery for private matters.

Judges may teach, write, and speak on the law, the legal system, and the administration of justice and be compensated for doing so. But judges shouldn’t give continuing legal education instruction to associates of a law firm, even if the law firm doesn’t have pending cases before the judge. This behavior “associate[s] the judge with the competence of a private law firm and would serve the exclusive interests of that firm… rather than the common professional interests of a heterogeneous, unconnected group of lawyers, who . . . might be the beneficiaries of a judge’s lecture on legal practice, e.g., at a bar association program.”

A judge may publish fictional works but, again, may not publicly comment on pending or impending cases, even if a judge uses fictitious names to protect the innocent or guilty. Judges may write a book review but may not endorse the book: Judges “may not provide a quotation about a book for the purpose of its being used in the book jacket in conjunction with its sale. Such activity would involve a judge in the commercial and promotional aspects of marketing and . . . is prohibited.”

Judges must also be careful about publicly commenting on the law. Judges may not comment on a legal issue that might come before them or state a political view that might call their impartiality into question. It’s also improper for a judge to attack higher-court decisions. Doing so detracts from confidence in the judiciary andicast doubt on the judge’s ability to follow precedent. Still, judges may and should write to explain substantive law and procedure and comment on issues facing the judiciary, such as judicial-writing ethics.

Conclusion
A judge’s behavior on the bench might be forgotten. Not so a judge’s writing. Being ethical is critical for judges. They set examples for lawyers and laypersons. They decide cases and expound on the law. Written opinions reflect a judge’s values — and society’s values. Judges must never forget the special role entrusted to them. They must never forget to do what’s right within the bounds of the law and the law of ethics. Judges who stay within these bounds have done their jobs. For doing their jobs well, they will be venerated. The judiciary, the litigants, and society are better for it.

3. Id. at §103, at 204-05 (emphasis in original).
11. See David Mellinkoff, Legal Writing: Sense & Nonsense 101 (1982) (noting that forms offer “pre-packaged law . . . taken on quick faith by the
ignorant, the timid, and the bee busy — law and all
needed an exit.”; Moses Lasky, Observing Appellate
Opinions from Below the Bench, 49 Cal. L. Rev. 831,
837 (1961) (observing that form opinions can lead to
judicial shortchange).
12. See generally Elizabeth A. Lurie, The Case for
Better Way to Write Opinions, 4 Judges’ J. 26 (Fall
1988).
13. William L. Reynolds, Judicial Process in a
14. Webster’s Universal College Dictionary 604
(1997).
15. 22 N.Y.C.R.R. 100.2(A).
16. Id. 100.2(B)(1).
17. See generally Jaime S. Durand, Judicial
Plagiarism: It May Be Fair Use But Is It Ethical?, 18 Cardozo L.
19. Daniel J. Kornstein, Legal Writing for Litigants (N.Y.
County Bar Ass’n, CLE, Feb. 4, 2004) available at http://
nyclaw.org/index.cfm?option=CLE&page=DVD-
CD_Detailed&ItemID=149.
20. Chevrolet Motors Corp. v. Kostel Co., 288 F.2d
710, 724-25 (4th Cir.1961) (quoted in Bright v. Westover
County, 380 F.2d 729, 732 (4th Cir. 2004)).
21. See generally Daniel J. Kornstein, No Rules
Without Reasoning, N.Y.L.J., Feb. 30, 2006 (Mag.), at 49,
48.
22. See In re Brennan, 433 Mich. 428, 447 N.W.2d
23. See Jeffrey O. Cooper & Douglas A. Berman,
Passive Victims and Casual Victims in the Federal Courts of
Appeals, 66 Brook. L. Rev. 695, 707-08 (2001) (noting
that law clerks write most decisions); Richard A.
Pomier, Cardozo: A Study in Repudiation 148 (1990)(same);
Abby F. Rudzin & Lis Greenfield Pearl, Ten
Brief-Writing Don’ts — The Judges’ Clerk’s Perspective,
85 Staff. J. 285, 287 (1979) (same). For more about
law clerks and opinion writing, see Gerald Lebovits,
Reflections, Judges’ Law Clerks Play Vital Role in the
Opinion Drafting Process, 76 N.Y. St. B.J. 34
(July/Aug. 2004).
24. For the ethical differences between law clerks
and court attorneys, see Gerald Lebovits, Outside
Counsel, Judicial Ethics, Law Clerks and Politics,
25. A. Leo Levin & Michael E. Kunz, Thinking
About Judgments, 44 Am. U. L. Rev. 1627, 1646-40
26. 22 N.Y.C.R.R. 100.3.
27. Douglas K. Norman, Legal Staff and the
Dynamics of Appellate Decision Making, 84 Judicature
175, 177, 177 (2001) (stating that clerk should receive
initial guidance from judge).
28. Peter N. Thompson, Confidentiality in Chambers:
Is Private Judicial Action the Public’s Business, 62 Bench & B.
Minn. 14, 17 (Feb. 2008) (noting that law clerks are “use
wounding boards for tentative opinions and legal researchers who seek authorities that
decision”) (quoting Hall v. Small Business Admin., 695 F.2d 175, 179 (5th Cir. 1983) (Robin, J)).
29. See Norman, supra note 26, at 175 (stating
that after reviewing draft, judge should ask clerk to
make changes ranging from grammatical correc-
tions to major rewrite).
(explaining that opinion must be judge’s work, no
matter how capable clerk is).
30. Wolff v. Church of St. Rita, 132 Misc. 2d 464,
472, 505 N.Y.S.2d 327, 334 (Sup. Ct., Richmond Co.
1986) (Kaufman, J.); Acceptance Ins. Co. v. Schaefer, 651
31. In re New York, 43 N.Y.2d (j) 5y, 425 N.Y.S.2d
639, 648 (Sup. — Ct. on Jud. 1978) (per curiam).
32. In re Judicial Disciplinary Proceedings Against
(per curiam). Judges may, however, consult experts ex
parte if, after they receive the expert’s report, they
share the report with the litigants. Cf. Advisory
Commn on Jud. Ethics Op. 0-98, N.Y.L.J., May 20,
2005, at 7, col. 1 (requiring Drug Court judges to
inform parties of contents of expert’s communications
from court personnel).
33. 22 N.Y.C.R.R. 100.4(A)(1), (2) & (3).
03-011/Jan. 25, 2003); William G. Ross, Extralegal
Spies: Charting the Boundaries of Propriety, 2 Geo. J.
Legal Ethics 599, 598-99 (1989) (discussing extrajudicial
commendation from standpoint of Model Rules of
Judicial Conduct).
35. Judith S. Kaye, Safeguarding a Crown Jewel:
Judicial Independence and Labor Court Ethics, 25
Hofstra L. Rev. 703, 713 (1997) (stating that although
RCJ did not prohibit commenting about cases that
judge had already decided, doing so is unwise).
36. Ross, supra note 33, at 602.
37. See Guy P. DePhillips, Family Court Curves,
N.Y.L.J., May 18, 2006, at 2, col. 3. Three attorneys
responded by attacking the judge. See Richard J.
Monellone, How to Influence a Higher Court, N.Y.L.J.,
June 7, 2006, at 2, col. 6; Daniel J. Greenberg, Judge
Was Wrong on the Merits, N.Y.L.J., May 31, 2006,
at 2, col. 6; James Edward Polzer, Judge’s Attack on
Appellate Court is Improprtie, N.Y.L.J., May 25,
2006, at 2, col. 5.
38. 22 N.Y.C.R.R. 100.2(C).
40. Id. at 96-52 (Vol. XIV). Under County Law art.
18-B, courts appoint 18-B attorneys to represent
litigants financially unable to hire their own attor-
ney.
41. Id. at 94-36 (Vol. VII).
42. Id. at 90-46 (Vol. V).
43. Id. at 88-53 (Vol. III).
44. Id.
45. Id. at 10-114.
46. Id. at 98-103.
47. Id. at 01-27; 22 N.Y.C.R.R 100.2(C).
48. Id. at 89-15.
49. 22 N.Y.C.R.R. 100.4(B); 100.4(H)(4); Formal Op.
96-145 (Vol. XV); 90-204 (Vol. VII).
51. id.; see also 22 N.Y.C.R.R. 100.2(C) (requiring judge
in all judicial activities to avoid impropriety and its
appearance).
53. Id. at 97-133.
54. Kaye, supra note 34, at 712-33; accord Republican of.
Conduct Canon 311 ambiguous and unconstitution-
ally under First Amendment because clause for-
bade candidates for judicial election to announce
their views on disputed legal and political issues).
Another recent controversy arose when a New York
judge wrote a fictional book, Hot House Flowers.
Some critics contend from the book’s allusions and
metaphors “that immigrants might not be receiving a
fair shake in his courtroom.” Thomas Adcock,
Judge’s Book on Illegal Aliens Draws Ire, N.Y.L.J.,
Dec. 1, 2006, at 1, col. 3.
55. Ross, supra note 33, at 624-34.
56. See Barbara E. Reed, Tripping the Rig: Navigating
Judicial Speech Fault Lines in the Post-White Landscape,
56 Mercer L. Rev. 971, 996 (2005) (noting judges’
affirmative duty to speak on the record about cer-
tain types of issues, and to help educate the public
about the role and function of the judiciary and the
courts’

“I don’t care how much he knows about torts. If he
calls me ‘dude’ one more time he’s out of here.”
New York State
Commission on Judicial Conduct

Rules of Conduct

The Chief Administrator of the Courts, with the approval of the Court of Appeals, promulgates Rules Governing Judicial Conduct, which are incumbent upon all judges of the New York State Unified Court System. Violations of those Rules may result in disciplinary action by the Commission.

The Rules are available on the court system's website at http://www.nycourts.gov/rules/chiefadmin/100.shtml. They are also published here.

PART 100 OF THE RULES OF THE CHIEF ADMINISTRATOR OF THE COURTS GOVERNING JUDICIAL CONDUCT

22 NYCRR Part 100

Preamble

Section 100.0 Terminology.

Section 100.1 A judge shall uphold the integrity and independence of the judiciary.

Section 100.2 A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

Section 100.3 A judge shall perform the duties of judicial office impartially and diligently.

Section 100.4 A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of
conflict with judicial obligations.

Section 100.5  A judge or candidate for elective judicial office shall refrain from inappropriate political activity.

Section 100.6  Application of the rules of judicial conduct.

Section 100.7  [Repealed]

Section 100.8  [Repealed]

Preamble

The rules governing judicial conduct are rules of reason. They should be applied consistently with constitutional requirements, statues, other court rules and decisional law and in the context of all relevant circumstances. The rules are to be construed so as not to impinge on the essential independence of judges in making judicial decisions.

The rules are designed to provide guidance to judges and candidates for elective judicial office and to provide a structure for regulating conduct through disciplinary agencies. They are not designed or intended as a basis for civil liability or criminal prosecution.

The text of the rules is intended to govern conduct of judges and candidates for elective judicial office and to be binding upon them. It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system.

The rules are not intended as an exhaustive guide for conduct. Judges and judicial candidates also should be governed in their judicial and personal conduct by general ethical standards. The rules are intended, however, to state basic standards which should govern their conduct and to provide guidance to assist them in establishing and maintaining high standards of judicial and personal conduct.
Section 100.0 Terminology.

The following terms used in this Part are defined as follows:

(A) A "candidate" is a person seeking selection for or retention in public office by election. A person becomes a candidate for public office as soon as he or she makes a public announcement of candidacy, or authorizes solicitation or acceptance of contributions.

(B) "Court personnel" does not include the lawyers in a proceeding before a judge.

(C) The "degree of relationship" is calculated according to the civil law system. That is, where the judge and the party are in the same line of descent, degree is ascertained by ascending or descending from the judge to the party, counting a degree for each person, including the party but excluding the judge. Where the judge and the party are in different lines of descent, degree is ascertained by ascending from the judge to the common ancestor, and descending to the party, counting a degree for each person in both lines, including the common ancestor and the party but excluding the judge. The following persons are relatives within the fourth degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, first cousin, child, grandchild, great-grandchild, nephew or niece. The sixth degree of relationship includes second cousins.

(D) "Economic interest" denotes ownership of more than a de minimis legal or equitable interest, or a relationship as officer, director, advisor or other active participant in the affairs of a party, except that

(1) ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the judge participates in the management of the fund or a proceeding pending or impending before the judge could substantially affect the value of the interest;

(2) service by a judge as an officer, director, advisor or other active participant in an educational, religious, charitable, cultural, fraternal or civic organization, or service by a judge’s spouse or child as an officer, director, advisor or other active participant in any organization does not create an economic interest in securities held by that organization;

(3) a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association or of a member in a credit union, or a similar proprietary interest, is not an economic interest in the organization, unless a proceeding pending
or impending before the judge could substantially affect the value of the interest;

(4) ownership of government securities is not an economic interest in the issuer unless a proceeding pending or impending before the judge could substantially affect the value of the securities

(5) "de minimis" denotes an insignificant interest that could not raise reasonable questions as to a judge's impartiality.

(E) "Fiduciary" includes such relationships as executor, administrator, trustee, and guardian.

(F) "Knowingly", "knowledge", "known" or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(G) "Law" denotes court rules as well as statutes, constitutional provisions and decisional law.

(H) "Member of the candidate's family" denotes a spouse, child, grandchild, parent, grandparent or other relative or person with whom the candidate maintains a close familial relationship.

(I) "Member of the judge's family" denotes a spouse, child, grandchild, parent, grandparent or other relative or person with whom the judge maintains a close familial relationship.

(J) "Member of the judge's family residing in the judge's household" denotes any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household.

(K) "Nonpublic information" denotes information that, by law, is not available to the public. Nonpublic information may include but is not limited to: information that is sealed by statute or court order, impounded or communicated in camera; and information offered in grand jury proceedings, presentencing reports, dependency cases or psychiatric reports.

(L) A "part-time judge", including an acting part-time judge, is a judge who serves repeatedly on a part-time basis by election or under a continuing appointment.

(M) "Political organization" denotes a political party, political club or other group, the principal purpose of which is to further the election or appointment of candidates to political office.
(N) "Public election" includes primary and general elections; it includes partisan elections, nonpartisan elections and retention elections.

(O) "Require". The rules prescribing that a judge "require" certain conduct of others, like all of the rules in this Part, are rules of reason. The use of the term "require" in that context means a judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge's direction and control.

(P) "Rules"; citation. Unless otherwise made clear by the citation in the text, references to individual components of the rules are cited as follows:

"Part"-refers to Part 100.

"Section"-refers to a provision consisting of 100 followed by a decimal (100.1).

"Subdivision"-refers to a provision designated by a capital letter (A).

"Paragraph"-refers to a provision designated by an Arabic numeral (1)

"Subparagraph"-refers to a provision designated by a lower-case letter (a).

(Q) "Window Period" denotes a period beginning nine months before a primary election, judicial nominating convention, party caucus or other party meeting for nominating candidates for the elective judicial office for which a judge or non-judge is an announced candidate, or for which a committee or other organization has publicly solicited or supported the judge's or non-judge's candidacy, and ending, if the judge or non-judge is a candidate in the general election for that office, six months after the general election, or if he or she is not a candidate in the general election, six months after the date of the primary election, convention, caucus or meeting.

(R) "Impartiality" denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge.

(S) An "independent" judiciary is one free of outside influences or control.

(T) "Integrity" denotes probity, fairness, honesty, uprightness and soundness of character. "Integrity" also includes a firm adherence to this Part or its standard of values.

(U) A "pending proceeding" is one that has begun but not yet reached its final disposition.
(V) An "impending proceeding" is one that is reasonably foreseeable but has not yet been commenced.

Section 100.1 A judge shall uphold the integrity and independence of the judiciary.

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Part 100 are to be construed and applied to further that objective.

Section 100.2 A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

(A) 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.

(B) A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment.

(C) A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convene or permit others to convene the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

(D) A judge shall not hold membership in any organization that practices invidious discrimination on the basis of age, race, creed, color, sex, sexual orientation, religion, national origin, disability or marital status. This provision does not prohibit a judge from holding membership in an organization that is dedicated to the preservation of religious, ethnic, cultural
or other values of legitimate common interest to its members.

Historical Note

**Section 100.3  A judge shall perform the duties of judicial office impartially and diligently.**

(A) Judicial duties in general. The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply.

(B) Adjudicative Responsibilities.

(1) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.

(2) A judge shall require order and decorum in proceedings before the judge.

(3) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

(4) A judge shall perform judicial duties without bias or prejudice against or in favor of any person. A judge in the performance of judicial duties shall not, by words or conduct, manifest bias or prejudice, including but not limited to bias or prejudice based upon age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, and shall require staff, court officials and others subject to the judge's direction and control to refrain from such words or conduct.

(5) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, against parties, witnesses, counsel or others. This paragraph does not preclude legitimate advocacy when age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, or other similar factors are issues in the proceeding.
(6) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers concerning a pending or impending proceeding, except:

(a) Ex parte communications that are made for scheduling or administrative purposes and that do not affect a substantial right of any party are authorized, provided the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and the judge, insofar as practical and appropriate, makes provision for prompt notification of other parties or their lawyers of the substance of the ex parte communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and a copy of such advice if the advice is given in writing and the substance of the advice if it is given orally, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge, with the consent of the parties, may confer separately with the parties and their lawyers on agreed-upon matters.

(e) A judge may initiate or consider any ex parte communications when authorized by law to do so.

(7) A judge shall dispose of all judicial matters promptly, efficiently and fairly.

(8) A judge shall not make any public comment about a pending or impending proceeding in any court within the United States or its territories. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This paragraph does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This paragraph does not apply to proceedings in which the judge is a litigant in a personal capacity.

(9) A judge shall not:

(a) make pledges or promises of conduct in office that are inconsistent with
the impartial performance of the adjudicative duties of the office;
(b) with respect to cases, controversies or issues that are likely to come
before the court, make commitments that are inconsistent with the impartial
performance of the adjudicative duties of the office.

(10) A judge shall not commend or criticize jurors for their verdict other than
in a court order or opinion in a proceeding, but may express appreciation to
jurors for their service to the judicial system and the community.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial
duties, nonpublic information acquired in a judicial capacity.

(C) Administrative Responsibilities.

(1) A judge shall diligently discharge the judge's administrative
responsibilities without bias or prejudice and maintain professional
competence in judicial administration, and should cooperate with other
judges and court officials in the administration of court business.

(2) A judge shall require staff, court officials and others subject to the judge's
direction and control to observe the standards of fidelity and diligence that
apply to the judge and to refrain from manifesting bias or prejudice in the
performance of their official duties.

(3) A judge shall not make unnecessary appointments. A judge shall exercise
the power of appointment impartially and on the basis of merit. A judge shall
avoid nepotism and favoritism. A judge shall not approve compensation of
appointees beyond the fair value of services rendered. A judge shall not
appoint or vote for the appointment of any person as a member of the judge's
staff or that of the court of which the judge is a member, or as an appointee
in a judicial proceeding, who is a relative within the fourth degree of
relationship of either the judge or the judge's spouse or the spouse of such a
person. A judge shall refrain from recommending a relative within the fourth
degree of relationship of either the judge or the judge's spouse or the spouse
of such person for appointment or employment to another judge serving in
the same court. A judge also shall comply with the requirements of Part 8 of
the Rules of the Chief Judge (22 NYCRR Part 8) relating to the Appointment
of relatives of judges. Nothing in this paragraph shall prohibit appointment of
the spouse of the town or village justice, or other member of such justice's
household, as clerk of the town or village court in which such justice sits,
provided that the justice obtains the prior approval of the Chief
Administrator of the Courts, which may be given upon a showing of good
cause.

(D) Disciplinary Responsibilities.
(1) A judge who receives information indicating a substantial likelihood that another judge has committed a substantial violation of this Part shall take appropriate action.

(2) 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.

(3) Acts of a judge in the discharge of disciplinary responsibilities are part of a judge's judicial duties.

(E) Disqualification.

(1) A judge shall disqualified himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) (i) the judge has a personal bias or prejudice concerning a party or (ii) the judge has personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge knows that (i) the judge served as a lawyer in the matter in controversy, or (ii) a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or (iii) the judge has been a material witness concerning it;

(c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other interest that could be substantially affected by the proceeding;

(d) 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:

(i) is a party to the proceeding;
(ii) is an officer, director or trustee of a party;
(iii) has an interest that could be substantially affected by the proceeding;

(e) The judge knows that the judge or the judge's spouse, or a person known by the judge to be within the fourth degree of relationship to either of them, or the spouse of such a person, is acting as a lawyer in the proceeding or is likely to be a material witness in the proceeding.

(f) the judge, while a judge or while a candidate for judicial office, has made
a pledge or promise of conduct in office that is inconsistent with the impartial performance of the adjudicative duties of the office or has made a public statement not in the judge's adjudicative capacity that commits the judge with respect to
(i) an issue in the proceeding; or
(ii) the parties or controversy in the proceeding.

(g) notwithstanding the provisions of subparagraphs (c) and (d) above, if a judge would be disqualified because of the appearance or discovery, after the matter was assigned to the judge, that the judge individually or as fiduciary, the judge's spouse, or a minor child residing in his or her household has an economic interest in a party to the proceeding, disqualification is not required if the judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

(2) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household.

(F) Remittal of Disqualification. A judge disqualified by the terms of subdivision (E), except subparagraph (1)(a)(i), subparagraph (1)(b)(i) or (iii) or subparagraph (1)(d)(i) of this section, may disclose on the record the basis of the judge's disqualification. If, following such disclosure of any basis for disqualification, the parties who have appeared and not defaulted 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 judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

Amended 100.3 (B)(9)-(11) & (E)(1)(f) - (g) Feb. 14, 2006
Amended 100.3(C)(3) and 100.3(E)(1)(d) & (e) Feb. 28, 2006

Section 100.4  A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations.

(A) Extra-Judicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do not:

(1) cast reasonable doubt on the judge's capacity to act impartially as a judge;

(2) detract from the dignity of judicial office; or
(3) interfere with the proper performance of judicial duties and are not incompatible with judicial office.

(B) Avocational Activities. A judge may speak, write, lecture, teach and participate in extra-judicial activities subject to the requirements of this Part.

(C) Governmental, Civic, or Charitable Activities.

(1) A full-time judge shall not appear at a public hearing before an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interests.

(2)

(a) A full-time judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy in matters other than the improvement of the law, the legal system or the administration of justice. A judge may, however, represent a country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities.

(b) A judge shall not accept appointment or employment as a peace officer or police officer as those terms are defined in section 1.20 of the Criminal Procedure Law.

(3) 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 the following limitations and the other requirements of this Part.

(a) A judge shall not serve as an officer, director, trustee or non-legal advisor if it is likely that the organization

(i) will be engaged in proceedings that ordinarily would come before the judge, or
(ii) if the judge is a full-time judge, will be engaged regularly in adversary proceedings in any court.

(b) A judge as an officer, director, trustee or non-legal advisor, or a member or otherwise:

(i) may assist such an organization in planning fund-raising and may participate in the management and investment of the organization's funds, but
shall not personally participate in the solicitation of funds or other fund-raising activities;
(ii) may not be a speaker or the guest of honor at an organization's fund-raising events, but the judge may attend such events. Nothing in this subparagraph shall prohibit a judge from being a speaker or guest of honor at a court employee organization, bar association or law school function or from accepting at another organization's fund-raising event an unadvertised award ancillary to such event;
(iii) may make recommendations to public and private fund-granting organizations on projects and programs concerning the law, the legal system or the administration of justice; and
(iv) shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation, but may be listed as an officer, director or trustee of such an organization. Use of an organization's regular letterhead for fund-raising or membership solicitation does not violate this provision, provided the letterhead lists only the judge's name and office or other position in the organization, and, if comparable designations are listed for other persons, the judge's judicial designation.

(D) Financial activities.

(1) A judge shall not engage in financial and business dealings that:

(a) may reasonably be perceived to exploit the judge's judicial position;

(b) involve the judge with any business, organization or activity that ordinarily will come before the judge; or

(c) involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.

(2) A judge, subject to the requirements of this Part, may hold and manage investments of the judge and members of the judge's family, including real estate.

(3) A full-time judge shall not serve as an officer, director, manager, general partner, advisor, employee or other active participant of any business entity, except that:

(a) the foregoing restriction shall not be applicable to a judge who assumed judicial office prior to July 1, 1965, and maintained such position or activity continuously since that date; and

(b) a judge, subject to the requirements of this Part, may manage and participate in a business entity engaged solely in investment of the financial
resources of the judge or members of the judge's family; and

(c) any person who may be appointed to fill a full-time judicial vacancy on an interim or temporary basis pending an election to fill such vacancy may apply to the Chief Administrator of the Courts for exemption from this paragraph during the period of such interim or temporary appointment.

(4) A judge shall manage the judge's investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge shall divest himself or herself of investments and other financial interests that might require frequent disqualification.

(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:

(a) a "gift" incident to a public testimonial, books, tapes and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the judge and the judge's spouse or guest to attend a bar-related function or an activity devoted to the improvement of the law, the legal system or the administration of justice;

(b) a gift, award or benefit incident to the business, profession or other separate activity of a spouse or other family member of a judge residing in the judge's household, including gifts, awards and benefits for the use of both the spouse or other family member and the judge (as spouse or family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties;

(c) ordinary social hospitality;

(d) a gift from a relative or friend, for a special occasion such as a wedding, anniversary or birthday, if the gift is fairly commensurate with the occasion and the relationship;

(e) a gift, bequest, favor or loan 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);

(f) 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) a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants; or
(h) any other gift, bequest, favor or loan, 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; and if its value exceeds $150.00, the judge reports it in the same manner as the judge reports compensation in Section 100.4(H).

(E) Fiduciary Activities.

(1) A full-time judge shall not serve as executor, administrator or other personal representative, trustee, guardian, attorney in fact or other fiduciary, designated by an instrument executed after January 1, 1974, except for the estate, trust or person of a member of the judge's family, or, with the approval of the Chief Administrator of the Courts, a person not a member of the judge's family with whom the judge has maintained a longstanding personal relationship of trust and confidence, and then only if such services will not interfere with the proper performance of judicial duties.

(2) The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary capacity.

(3) Any person who may be appointed to fill a full-time judicial vacancy on an interim or temporary basis pending an election to fill such vacancy may apply to the Chief Administrator of the Courts for exemption from paragraphs (1) and (2) during the period of such interim or temporary appointment.

(F) Service as Arbitrator or Mediator. A full-time judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law.

(G) Practice of Law. A full-time judge shall not practice law. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to a member of the judge's family.

(H) Compensation, Reimbursement and Reporting.

(1) Compensation and reimbursement. A full-time judge may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Part, if the source of such payments does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

(a) Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activity.
(b) Expense reimbursement shall be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge’s spouse or guest. Any payment in excess of such an amount is compensation.

(c) No full-time judge shall solicit or receive compensation for extra-judicial activities performed for or on behalf of: (1) New York State, its political subdivisions or any office or agency thereof; (2) school, college or university that is financially supported primarily by New York State or any of its political subdivisions, or any officially recognized body of students thereof, except that a judge may receive the ordinary compensation for a lecture or for teaching a regular course of study at any college or university if the teaching does not conflict with the proper performance of judicial duties; or (3) any private legal aid bureau or society designated to represent indigents in accordance with article 18-B of the County Law.

(2) Public Reports. A full-time judge shall report the date, place and nature of any activity for which the judge received compensation in excess of $150, and the name of the payor and the amount of compensation so received. Compensation or income of a spouse attributed to the judge by operation of a community property law is not extra-judicial compensation to the judge. The judge’s report shall be made at least annually and shall be filed as a public document in the office of the clerk of the court on which the judge serves or other office designated by law.

(I) Financial Disclosure. Disclosure of a judge’s income, debts, investments or other assets is required only to the extent provided in this section and in section 100.3(F), or as required by Part 40 of the Rules of the Chief Judge (22 NYCRR Part 40), or as otherwise required by law.

Historical Note

Section 100.5 A judge or candidate for elective judicial office shall refrain from inappropriate political activity.

(A) Incumbent judges and others running for public election to judicial office.

(1) Neither a sitting judge nor a candidate for public election to judicial office shall directly or indirectly engage in any political activity except (i) as otherwise authorized by this section or by law, (ii) to vote and to identify
himself or herself as a member of a political party, and (iii) on behalf of measures to improve the law, the legal system or the administration of justice. Prohibited political activity shall include:

(a) acting as a leader or holding an office in a political organization;

(b) except as provided in Section 100.5(A)(3), being a member of a political organization other than enrollment and membership in a political party;

(c) engaging in any partisan political activity, provided that nothing in this section shall prohibit a judge or candidate from participating in his or her own campaign for elective judicial office or shall restrict a non-judge holder of public office in the exercise of the functions of that office;

(d) participating in any political campaign for any office or permitting his or her name to be used in connection with any activity of a political organization;

(e) publicly endorsing or publicly opposing (other than by running against) another candidate for public office;

(f) making speeches on behalf of a political organization or another candidate;

(g) attending political gatherings;

(h) soliciting funds for, paying an assessment to, or making a contribution to a political organization or candidate; or

(i) purchasing tickets for politically sponsored dinners or other functions, including any such function for a non-political purpose.

(2) A judge or non-judge who is a candidate for public election to judicial office may participate in his or her own campaign for judicial office as provided in this section and may contribute to his or her own campaign as permitted under the Election Law. During the Window Period as defined in Subdivision (Q) of section 100.0 of this Part, a judge or non-judge who is a candidate for public election to judicial office, except as prohibited by law, may:

(i) attend and speak to gatherings on his or her own behalf, provided that the candidate does not personally solicit contributions;

(ii) appear in newspaper, television and other media advertisements supporting his or her candidacy, and distribute pamphlets and other promotional campaign literature supporting his or her candidacy;
(iii) appear at gatherings, and in newspaper, television and other media advertisements with the candidates who make up the slate of which the judge or candidate is a part;

(iv) permit the candidate's name to be listed on election materials along with the names of other candidates for elective public office;

(v) purchase two tickets to, and attend, politically sponsored dinners and other functions, provided that the cost of the ticket to such dinner or other function shall not exceed the proportionate cost of the dinner or function. The cost of the ticket shall be deemed to constitute the proportionate cost of the dinner or function if the cost of the ticket is $250 or less. A candidate may not pay more than $250 for a ticket unless he or she obtains a statement from the sponsor of the dinner or function that the amount paid represents the proportionate cost of the dinner or function.

(3) A non-judge who is a candidate for public election to judicial office may also be a member of a political organization and continue to pay ordinary assessments and ordinary contributions to such organization.

(4) A judge or a non-judge who is a candidate for public election to judicial office:

(a) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the impartiality, integrity and independence of the judiciary, and shall encourage members of the candidate's family to adhere to the same standards of political conduct in support of the candidate as apply to the candidate;

(b) shall prohibit employees and officials who serve at the pleasure of the candidate, and shall discourage other employees and officials subject to the candidate's direction and control, from doing on the candidate's behalf what the candidate is prohibited from doing under this Part;

(c) except to the extent permitted by Section 100.5(A)(5), shall not authorize or knowingly permit any person to do for the candidate what the candidate is prohibited from doing under this Part;

(d) shall not:

(i) make pledges or promises of conduct in office that are inconsistent with the impartial performance of the adjudicative duties of the office;
(ii) with respect to cases, controversies or issues that are likely to come before the court, make commitments that are inconsistent with the impartial performance of the adjudicative duties of the office;
(iii) knowingly make any false statement or misrepresent the identity,
qualifications, current position or other fact concerning the candidate or an opponent; but

(e) may respond to personal attacks or attacks on the candidate's record as long as the response does not violate subparagraphs 100.5(A)(4)(a) and (d).

(f) shall complete an education program, either in person or by videotape or by internet correspondence course, developed or approved by the Chief Administrator or his or her designee within 30 days after receiving the nomination or 90 days prior to receiving the nomination for judicial office. The date of nomination for candidates running in a primary election shall be the date upon which the candidate files a designating petition with the Board of Elections. This provision shall apply to all candidates for elective judicial office in the Unified Court System except for town and village justices.

(g) shall file with the Ethics Commission for the Unified Court System a financial disclosure statement containing the information and in the form, set forth in the Annual Statement of Financial Disclosure adopted by the Chief Judge of the State of New York. Such statement shall be filed within 20 days following the date on which the judge or non-judge becomes such a candidate; provided, however, that the Ethics Commission for the Unified Court System may grant an additional period of time within which to file such statement in accordance with rules promulgated pursuant to section 40.1 (t)(3) of the Rules of the Chief Judge of the State of New York (22 NYCRR). Notwithstanding the foregoing compliance with this subparagraph shall not be necessary where a judge or non-judge already is or was required to file a financial disclosure statement for the preceding calendar year pursuant to Part 40 of the Rules of the Chief Judge. This requirement does not apply to candidates for election to town and village courts.

(5) A judge or candidate for public election to judicial office shall not personally solicit or accept campaign contributions, but may establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may 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. Such committees may solicit and accept such contributions and support only during the window period. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

(6) A judge or a non-judge who is a candidate for public election to judicial office may not permit the use of campaign contributions or personal funds to pay for campaign-related goods or services for which fair value was not
received.

(7) Independent Judicial Election Qualifications Commissions, created pursuant to Part 150 of the Rules of the Chief Administrator of the Courts, shall evaluate candidates for elected judicial office, other than justice of a town or village court.

(B) Judge as candidate for nonjudicial office. A judge shall resign from judicial office upon becoming a candidate for elective nonjudicial office either in a primary or in a general election, except that the judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention if the judge is otherwise permitted by law to do so.

(C) Judge's staff. A judge shall prohibit members of the judge's staff who are the judge's personal appointees from engaging in the following political activity:

(1) holding an elective office in a political organization, except as a delegate to a judicial nominating convention or a member of a county committee other than the executive committee of a county committee;

(2) contributing, directly or indirectly, money or other valuable consideration in amounts exceeding $500 in the aggregate during any calendar year to all political campaigns for political office, and other partisan political activity including, but not limited to, the purchasing of tickets to political functions, except that this $500 limitation shall not apply to an appointee's contributions to his or her own campaign. Where an appointee is a candidate for judicial office, reference also shall be made to appropriate sections of the Election Law;

(3) personally soliciting funds in connection with a partisan political purpose, or personally selling tickets to or promoting a fund-raising activity of a political candidate, political party, or partisan political club; or

(4) political conduct prohibited by section 25.39 of the Rules of the Chief Judge (22 NYCRR 25.39).

Historical Note


http://www.scjc.state.ny.us/Legal%20Authorities/rgjc.htm
Section 100.6  Application of the rules of judicial conduct.

(A) General application. All judges in the unified court system and all other persons to whom by their terms these rules apply, e.g., candidates for elective judicial office, shall comply with these rules of judicial conduct, except as provided below. All other persons, including judicial hearing officers, who perform judicial functions within the judicial system shall comply with such rules in the performance of their judicial functions and otherwise shall so far as practical and appropriate use such rules as guides to their conduct.

(B) Part-time judge. A part-time judge:

(1) is not required to comply with section 100.4(C)(1), 100.4(C)(2)(a), 100.4(C)(3)(a)(ii), 100.4(E)(1), 100.4(F), 100.4(G), and 100.4(H);

(2) shall not practice law in the court on which the judge serves, or in any other court in the county in which his or her court is located, before a judge who is permitted to practice law, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto;

(3) shall not permit his or her partners or associates to practice law in the court in which he or she is a judge, and shall not permit the practice of law in his or her court by the law partners or associates of another judge of the same court who is permitted to practice law, but may permit the practice of law in his or her court by the partners or associates of a judge of a court in another town, village or city who is permitted to practice law;

(4) may accept private employment or public employment in a Federal, State or municipal department or agency, provided that such employment is not incompatible with judicial office and does not conflict or interfere with the proper performance of the judge's duties.

(C) Administrative law judges. The provisions of this Part are not applicable to administrative law judges unless adopted by the rules of the employing agency.

(D) Time for compliance. A person to whom these rules become applicable shall comply immediately with all provisions of this Part, except that, with respect to section 100.4(D)(3) and 100.4(E), such person may make application to the Chief Administrator for additional time to comply, in no event to exceed one year, which the Chief Administrator may grant for good cause shown.
(E) Relationship to Code of Judicial Conduct. To the extent that any provision of the Code of Judicial Conduct as adopted by the New York State Bar Association is inconsistent with any of these rules, these rules shall prevail.

Historical Note
Sec. filed Aug. 1, 1972; repealed, new added by renum. 100.7, filed Nov. 26, 1976; renum. 111.6, new added by renum. and amd. 33.6, filed Feb. 2, 1982; repealed, new filed Feb. 1, 1996 eff. Jan. 1, 1996.

Amended 100.6(E) Feb. 14, 2006

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Section 100.8  [Repealed]

Historical Note
NEW YORK STATE BAR ASSOCIATION

CODE OF JUDICIAL CONDUCT

Adopted by the
New York State Bar Association
Effective April 13, 1996
CODE OF JUDICIAL CONDUCT
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PREFACE

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and highly visible symbol of government under the rule of law.

The Code of Judicial Conduct is intended to establish standards for ethical conduct of judges. It consists of broad statements called Canons, specific rules set forth in Sections under each Canon, a Terminology Section, an Application Section, and Commentary. The text of the Canons and Sections, including the Terminology and Application Sections, is authoritative and parallels the provisions contained in the Rules of the Chief Administrator of the Courts, 22 NYCRR part 100. References to Part 100 are included. The Commentary, by explanation and example, provides guidance with respect to the purpose and meaning of the Canons and Sections. The Commentary is not intended as a statement of additional rules and has not been adopted by the Chief Administrator of the Courts. When the text uses “shall” or “shall not,” it is intended to impose binding obligations the violation of which can result in disciplinary action. When “should” or “should not” is used, the text is intended as hortatory and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined. When “may” is used, it denotes permissible discretion or, depending on the context, it refers to action that is not covered by specific proscriptions.
PREAMBLE

The rules governing judicial conduct are rules of reason. They should be applied consistently with constitutional requirements, statutes, other court rules and decisional law and in the context of all relevant circumstances. The rules are to be construed so as not to impinge on the essential independence of judges in making judicial decisions.

The rules are designed to provide guidance to judges and candidates for elective judicial office and to provide a structure for regulating conduct through disciplinary agencies. They are not designed or intended as a basis for civil liability or criminal prosecution.

The text of the rules is intended to govern conduct of judges and candidates for elective judicial office and to be binding upon them. It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system.

The rules are not intended as an exhaustive guide for conduct. Judges and judicial candidates also should be governed in their judicial and personal conduct by general ethical standards. The rules are intended, however, to state basic standards which should govern their conduct and to provide guidance to assist them in establishing and maintaining high standards of judicial and personal conduct.

TERMINOLOGY. [§100.0]

The following terms used in this Part are defined as follows:

(A) A “candidate” is a person seeking selection for or retention in public office by election. A person becomes a candidate for public office as soon as he or she makes a public announcement of candidacy, or authorizes solicitation or acceptance of contributions.

(B) “Court personnel” does not include the lawyers in a proceeding before a judge.

(C) The “degree of relationship” is calculated according to the civil law system. That is, where the judge and the party are in the same line of descent, degree is ascertained by ascending or descending from the judge to the party, counting a degree for each person, including the party but excluding the judge. Where the judge and the
party are in different lines of descent, degree is ascertained by ascending from the judge
to the common ancestor, and descending to the party, counting a degree for each person
in both lines, including the common ancestor and the party but excluding the judge. The
following persons are relatives within the fourth degree of relationship: great-
greatgrandparent, grandparent, parent, uncle, aunt, brother, sister, first cousin, child,
grandchild, great-grandchild, nephew or niece. The sixth degree of relationship
includes second cousins.

(D) “Economic interest” denotes ownership of a legal or equitable interest,
however small, or a relationship as officer, director, advisor or other active participant
in the affairs of a party, except that

(1) ownership of an interest in a mutual or common investment fund
that holds securities is not an economic interest in such securities unless the
judge participates in the management of the fund or a proceeding pending or
impending before the judge could substantially affect the value of the interest;

(2) service by a judge as an officer, director, advisor or other active
participant in an educational, religious, charitable, cultural, fraternal or civic
organization, or service by a judge’s spouse or child as an officer, director,
advisor or other active participant in any organization does not create an
economic interest in securities held by that organization;

(3) a deposit in a financial institution, the proprietary interest of a
policy holder in a mutual insurance company, of a depositor in a mutual savings
association or of a member in a credit union, or a similar proprietary interest, is
not an economic interest in the organization, unless a proceeding pending or
impending before the judge could substantially affect the value of the interest;

(4) ownership of government securities is not an economic interest in
the issuer unless a proceeding pending or impending before the judge could
substantially affect the value of the securities.

(E) “Fiduciary” includes such relationships as executor, administrator,
trustee, and guardian.

(F) “Knowingly,” “knowledge,” “known” or “knows” denotes actual
knowledge of the fact in question. A person’s knowledge may be inferred from
circumstances.

(G) “Law” denotes court rules as well as statutes, constitutional provisions
and decisional law.
(H) "Member of the candidate's family" denotes a spouse, child, grandchild, parent, grandparent or other relative or person with whom the candidate maintains a close familial relationship.

(I) "Member of the judge's family" denotes a spouse, child, grandchild, parent, grandparent or other relative or person with whom the judge maintains a close familial relationship.

(J) "Member of the judge's family residing in the judge's household" denotes any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household.

(K) "Nonpublic information" denotes information that, by law, is not available to the public. Nonpublic information may include but is not limited to: information that is sealed by statute or court order, impounded or communicated in camera; and information offered in grand jury proceedings, pre-sentencing reports, dependency cases or psychiatric reports.

(L) A "part-time judge," including an acting part-time judge, is a judge who serves repeatedly on a part-time basis by election or under a continuing appointment.

(M) "Political organization" denotes a political party, political club or other group, the principal purpose of which is to further the election or appointment of candidates to political office.

(N) "Public election" includes primary and general elections; it includes partisan elections, nonpartisan elections and retention elections.

(O) "Require." The rules prescribing that a judge "require" certain conduct of others, like all of the rules in this Part, are rules of reason. The use of the term "require" in that context means a judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge's direction and control.

(P) "Rules"; citation. Unless otherwise made clear by the citation in the text, references to individual components of the rules are cited as follows:

"Part" - refers to Part 100

"section" - refers to a provision consisting of 100 followed by a decimal (100.1)

"subdivision" - refers to a provision designated by a capital letter (A).

"paragraph" - refers to a provision designated by an Arabic numeral (1).
“subparagraph” - refers to a provision designated by a lower-case letter (a).

(Q) “Window Period” denotes a period beginning nine months before a primary election, judicial nominating convention, party caucus or other party meeting for nominating candidates for the elective judicial office for which a judge or non-judge is an announced candidate, or for which a committee or other organization has publicly solicited or supported the judge's or non-judge's candidacy, and ending, if the judge or non-judge is a candidate in the general election for that office, six months after the general election, or if he or she is not a candidate in the general election, six months after the date of the primary election, convention, caucus or meeting.

CANON 1 [§100.1]

A JUDGE SHALL UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY.

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Part 100 are to be construed and applied to further that objective.

Commentary:

[1.1] Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depends in turn upon their acting without fear or favor. Although judges should be independent, they must comply with the law, including the provisions of this Code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law.

CANON 2 [§100.2]

A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMpropriety IN ALL OF THE JUDGE'S ACTIVITIES.

(A) 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.
(B) A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment.

(C) A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

(D) A judge shall not hold membership in any organization that practices invidious discrimination on the basis of age, race, creed, color, sex, sexual orientation, religion, national origin, disability or marital status. This provision does not prohibit a judge from holding membership in an organization that is dedicated to the preservation of religious, ethnic, cultural or other values of legitimate common interest to its members.

Commentary:

[2.1][2A] Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

[2.2][2A] The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules or other specific provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.

[2.3][2A] See also Commentary under Section 2C.

[2.4][2B] Maintaining the prestige of judicial office is essential to a system of government in which the judiciary functions independently of the executive and legislative branches. Respect for the judicial office facilitates the orderly conduct of legitimate judicial functions. Judges should distinguish between proper and improper use of the prestige of office in all of their activities. For example, it would be improper for a judge to allude to his or her judgeship to gain a personal advantage such as deferential treatment when stopped by a police officer for a traffic offense. Similarly, judicial letterhead must not be used for conducting a judge's personal business. A part-time judge who is authorized to practice law may not use or permit the use of a title or honorific such as 'judge' or 'honorable' in connection with his or her law practice.
[2.5][2B] A judge must avoid lending the prestige of judicial office for the advancement of the private interests of others. For example, a judge must not use the judge’s judicial position to gain advantage in a civil suit involving a member of the judge’s family. In contracts for publication of a judge’s writings, a judge should retain control over the advertising to avoid exploitation of the judge’s office. As to the acceptance of awards, see Section 4D(5)(a) and Commentary.

[2.6][2B] Although a judge should be sensitive to possible abuse of the prestige of office, a judge may, based on the judge’s personal knowledge, serve as a reference or provide a letter of recommendation. However, a judge must not initiate the communication of information to a sentencing judge or a probation or corrections officer but may provide such persons information for the record in response to a formal request.

[2.7][2B] Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration, and by responding to official inquiries concerning a person being considered for a judgeship. See also Canon 5 regarding use of a judge’s name in political activities.

[2.8][2C] A judge must not testify voluntarily as a character witness because to do so may lend the prestige of the judicial office in support of the party for whom the judge testifies. Moreover, when a judge testifies as a witness, a lawyer who regularly appears before the judge may be placed in the awkward position of cross-examining the judge. A judge may, however, testify when properly summoned. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.

[2.9][2D] Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge’s impartiality is impaired. Section 2D refers to the current practices of the organization. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization’s current membership rolls but rather depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of age, race, creed, color, sex, sexual orientation, religion, national origin, disability or marital status, persons who would otherwise be admitted to membership. See New York State Club Ass’n Inc. v. City of New York, 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988); Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987); Roberts v. United States Jaycees, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984).

[2.10][2D] Although Section 2D relates only to membership in organizations that invidiously discriminate on the basis of age, race, creed, color, sex, sexual orientation, religion, national origin, disability or marital status, a judge’s membership in an organization that
engages in any discriminatory membership practices prohibited by the law of the jurisdiction also violates Canon 2 and Section 2A and gives the appearance of impropriety. In addition, it would be a violation of Canon 2 and Section 2A for a judge to arrange a meeting at a club that the judge knows practices invidious discrimination on the basis of age, race, creed, color, sex, sexual orientation, religion, national origin, disability or marital status in its membership or other policies, or for the judge to regularly use such a club. Moreover, public manifestation by a judge of the judge's knowing approval of invidious discrimination on any basis gives the appearance of impropriety under Canon 2 and diminishes public confidence in the integrity and impartiality of the judiciary, in violation of Section 2A.

[2.11][2D] When a person who is a judge on the date this Code becomes effective learns that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Section 2D or under Canon 2 and Section 2A, the judge is permitted, in lieu of resigning, to make immediate efforts to have the organization discontinue its invidiously discriminatory practices, but is required to suspend participation in any other activities of the organization. If the organization fails to discontinue its invidiously discriminatory practice as promptly as possible (and in all events within a year of the judge's first learning of the practices), the judge is required to resign immediately from the organization.

CANON 3 [§100.3]

A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY.

(A) Judicial duties in general. The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply.

(B) Adjudicative responsibilities.

(1) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.

(2) A judge shall require order and decorum in proceedings before the judge.

(3) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

(4) A judge shall perform judicial duties without bias or prejudice against or in favor of any person. A judge in the performance of judicial duties shall not, by words
or conduct, manifest bias or prejudice, including but not limited to bias or prejudice based upon age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, and shall require staff, court officials and others subject to the judge's direction and control to refrain from such words or conduct.

(5) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, against parties, witnesses, counsel or others. This paragraph does not preclude legitimate advocacy when age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, or other similar factors are issues in the proceeding.

(6) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers concerning a pending or impending proceeding, except:

(a) Ex parte communications that are made for scheduling or administrative purposes and that do not affect a substantial right of any party are authorized, provided the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and the judge, insofar as practical and appropriate, makes provision for prompt notification of other parties or their lawyers of the substance of the ex parte communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and a copy of such advice if the advice is given in writing and the substance of the advice if it is given orally, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge, with the consent of the parties, may confer separately with the parties and their lawyers on agreed-upon matters.

(e) A judge may initiate or consider any ex parte communications when authorized by law to do so.

(7) A judge shall dispose of all judicial matters promptly, efficiently and fairly.
(8) A judge shall not make any public comment about a pending or impending proceeding in any court within the United States or its territories. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This paragraph does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This paragraph does not apply to proceedings in which the judge is a litigant in a personal capacity.

(9) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

(10) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

(C) Administrative responsibilities.

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

(2) A judge shall require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered. A judge shall not appoint or vote for the appointment of any person as a member of the judge's staff or that of the court of which the judge is a member, or as an appointee in a judicial proceeding, who is a relative within the sixth degree of relationship of either the judge or the judge's spouse or the spouse of such a person. A judge shall refrain from recommending a relative within the sixth degree of relationship of either the judge or the judge's spouse or the spouse of such person for appointment or employment to another judge serving in the same court. A judge also shall comply with the requirements of Part 8 of the Rules of the Chief Judge (22 NYCRR Part 8) relating to the appointment of relatives of judges. Nothing in this paragraph shall prohibit appointment of the spouse of the town or village justice, or other member of such justice's household, as clerk of the town or village court in which such justice sits, provided that the justice obtains the prior approval of the Chief Administrator of the Courts, which may be given upon a showing of good cause.
(D) Disciplinary responsibilities.

(1) A judge who receives information indicating a substantial likelihood that another judge has committed a substantial violation of this Part shall take appropriate action.

(2) 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.

(3) Acts of a judge in the discharge of disciplinary responsibilities are part of a judge's judicial duties.

(E) Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) (i) the judge has a personal bias or prejudice concerning a party or (ii) the judge has personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge knows that (i) the judge served as a lawyer in the matter in controversy, or (ii) a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or (iii) the judge has been a material witness concerning it;

(c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other interest that could be substantially affected by the proceeding;

(d) 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:

(i) is a party to the proceeding;
(ii) is an officer, director or trustee of a party;
(iii) has an interest that could be substantially affected by the proceeding;
(iv) is likely to be a material witness in the proceeding;
(e) the judge knows that the judge or the judge's spouse, or a person known by the judge to be within the fourth degree of relationship to either of them, or the spouse of such a person, is acting as a lawyer in the proceeding.

(f) Notwithstanding the provisions of subparagraphs (c) and (d) above, if a judge would be disqualified because of the appearance or discovery, after the matter was assigned to the judge, that the judge individually or as a fiduciary, the judge's spouse, or a minor child residing in his or her household has an economic interest in a party to the proceeding, disqualification is not required if the judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

(2) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household.

(F) Remittal of disqualification. A judge disqualified by the terms of subdivision (E), except subparagraph (1)(a)(i), subparagraph (1)(b)(i) or (iii) or subparagraph (1)(d)(i) of this section, may disclose on the record the basis of the judge's disqualification. If, following such disclosure of any basis for disqualification, the parties who have appeared and not defaulted 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 judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

Commentary:

[3.1][3B(3)] The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.

[3.2][3B(4)] A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial. Prejudicial behavior includes addressing a lawyer for one of the parties by an honorific title, such as "judge," "senator," "mayor" or "ambassador" in open court. However, this rule does not prohibit addressing a lawyer who appears in his or her capacity as a public official by the title of the office in which he or she appears, such as "Attorney General," "District Attorney" or "Solicitor General."
[3.3][3B(4)] A judge must refrain from speech, gestures or other conduct that could reasonably be perceived as harassment of any kind, including sexual harassment. The judge must require the same standard of conduct of others subject to the judge’s direction and control.

[3.4][3B(6)(e)] The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted.

[3.5][3B(6)(e)] To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

[3.6][3B(6)(e)] Whenever presence of a party or notice to a party is required by Section 3B(6), it is the party’s lawyer, or if the party is unrepresented the party, who is to be present or to whom notice is to be given.

[3.7][3B(6)(e)] An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief amicus curiae.

[3.8][3B(6)(e)] Certain ex parte communication is approved by Section 3B(6) to facilitate scheduling and other administrative purposes. In general, however, a judge must discourage ex parte communication and allow it only if all the criteria stated in Section 3B(6) are clearly met. A judge must disclose to all parties all ex parte communications described in Sections 3B(6)(a) and 3B(6)(b) regarding a proceeding pending or impending before the judge.

[3.9][3B(6)(e)] A judge must not independently investigate facts in a case and must consider only the evidence presented.

[3.10][3B(6)(e)] A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.

[3.11][3B(6)(e)] A judge may delegate the responsibilities of the judge under Canon 3B(6) to a member of the judge’s staff. A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Section 3B(6) is not violated through law clerks or other personnel on the judge’s staff. This provision does not prohibit the judge or the judge’s law clerk from informing all parties individually of scheduling or administrative decisions.

[3.12][3B(6)(e)] If communication between the trial judge and the appellate court with respect to a proceeding is permitted, a copy of any written communication or the substance of any oral communication should be provided to all parties.

[3.13][3B(7)] In disposing of matters promptly, efficiently and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Controlling costs while preserving fundamental rights of parties also protects the interests of witnesses and the general public. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs. A
judge should encourage and seek to facilitate settlement, but the judge should not take any action or make any comment that might reasonably be interpreted by any party or its counsel as (a) coercion to settle, or (b) impairing the party's right to have the controversy resolved by the court in a fair and impartial manner in the event settlement negotiations are unsuccessful. In matters that will be tried without a jury, a judge who seeks to facilitate settlement should exercise extreme care to avoid prejudging or giving the appearance of prejudging the case.

[3.14][3B(7)] Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with the judge to that end.

[3.15][3B(8)] The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition. A judge should not be influenced by the potential for personal publicity when making decisions in pending cases. Release of decisions to the media or notifying the media that the decision is available before counsel for the parties have been notified may be embarrassing or prejudicial to the private rights of the litigants. Filing an opinion with the clerk's office does not constitute release of the decision to the media. This Section does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, but in cases such as a writ of mandamus where the judge is a litigant in an official capacity, the judge must not comment publicly. The conduct of lawyers relating to trial publicity is governed by DR 7-107 of the Code of Professional Responsibility.

[3.16][3B(9)] Commenting or criticizing jurors for their verdict may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case.

[3.17][3C(3)] Appointees of a judge include assigned counsel, officials such as referees, commissioners, special masters, receivers and guardians and personnel such as clerks, secretaries and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by Section 3C(3).

[3.18][3C(3)] Appointment of a person well acquainted with the judge who is not a close relative is permissible as long as the person objectively merits the appointment.

[3.19][3D] Referral of a judge or lawyer to a substance abuse treatment agency is "appropriate" action under paragraphs (1) and (2).

[3.20][3D] Appropriate action may include direct communication with the judge or lawyer who has committed the violation, other direct action if available, and reporting the violation to the appropriate authority or other agency or body.

[3.21][3E(1)] Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules in Section 3E(1) apply. For example, if a judge were in the process of negotiating for employment with a law firm, the
judge would be disqualified from any matters in which that firm appeared, unless the disqualification was waived by the parties after disclosure by the judge.

[3.22][3E(1)] A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

[3.23][3E(1)] By decisional law, the rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as possible.

[3.24][3E(1)(b)] A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of Section 3E(1)(b); a judge formerly employed by a government agency, however, should disqualify himself or herself in a proceeding if the judge’s impartiality might reasonably be questioned because of such association.

[3.25][3E(1)(e)] The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that “the judge’s impartiality might reasonably be questioned” under Section 3E(1), or that the relative is known by the judge to have an interest in the law firm that could be “substantially affected by the outcome of the proceeding” under Section 3E(1)(d)(iii) may require that judge’s disqualification.

[3.26][3E(1)(e)] A judge is not automatically required to disqualify himself or herself in a proceeding in which (1) one of the parties or the lawyer personally representing one of the parties is the spouse or a relative within the fourth degree of relationship of the judge’s clerk or the spouse of such relative, or (2) the lawyer or law firm representing one of the parties has offered employment to the judge’s clerk; provided that the clerk does not work on the matter and the judge discloses the relationship or potential employment on the record.

[3.27][3F] A remittal procedure provides the parties an opportunity to proceed without delay if they wish to waive the disqualification in the event a remittal is available under the Section. To assure that consideration of the question of remittal is made independently of the judge, a judge must not solicit, seek or hear comment on possible remittal or waiver of the disqualification unless the lawyers jointly propose remittal after consultation as provided in the rule. A party may act through counsel if counsel represents on the record that the party has been consulted and consents. As a practical matter, a judge may wish to have all parties and their lawyers sign the remittal agreement.

CANON 4 [§100.4]
A JUDGE SHALL SO CONDUCT THE JUDGE’S EXTRA-JUDICIAL ACTIVITIES AS TO MINIMIZE THE RISK OF CONFLICT WITH JUDICIAL OBLIGATIONS.

(A) Extra-judicial activities in general. A judge shall conduct all of the judge's extra-judicial activities so that they do not:

(1) cast reasonable doubt on the judge's capacity to act impartially as a judge;

(2) detract from the dignity of judicial office; or

(3) interfere with the proper performance of judicial duties and are not incompatible with judicial office.

(B) Avocational activities. A judge may speak, write, lecture, teach and participate in extra-judicial activities subject to the requirements of this Part.

(C) Governmental, civic, or charitable activities.

(1) A full-time judge shall not appear at a public hearing before an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge’s interests.

(2) (a) A full-time judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy in matters other than the improvement of the law, the legal system or the administration of justice. A judge may, however, represent a country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities.

(b) A judge shall not accept appointment or employment as a peace officer or police officer as those terms are defined in section 1.20 of the Criminal Procedure Law.

(3) 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 the following limitations and the other requirements of this Part.

(a) A judge shall not serve as an officer, director, trustee or non-legal advisor if it is likely that the organization
(i) will be engaged in proceedings that ordinarily would come before the judge, or

(ii) if the judge is a full-time judge, will be engaged regularly in adversary proceedings in any court.

(b) A judge as an officer, director, trustee or non-legal advisor, or a member or otherwise:

(i) may assist such an organization in planning fund-raising and may participate in the management and investment of the organization's funds, but shall not personally participate in the solicitation of funds or other fund-raising activities;

(ii) may not be a speaker or the guest of honor at an organization's fund-raising events, but the judge may attend such events. Nothing in this subparagraph shall prohibit a judge from being a speaker or guest of honor at a bar association or law school function or from accepting at another organization's fund-raising event an unadvertised award ancillary to such event;

(iii) may make recommendations to public and private fund-granting organizations on projects and programs concerning the law, the legal system or the administration of justice; and

(iv) shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation, but may be listed as an officer, director or trustee of such an organization. Use of an organization's regular letterhead for fund-raising or membership solicitation does not violate this provision, provided the letterhead lists only the judge's name and office or other position in the organization, and, if comparable designations are listed for other persons, the judge's judicial designation.

(D) Financial activities.

(l) A judge shall not engage in financial and business dealings that:

(a) may reasonably be perceived to exploit the judge's judicial position,

(b) involve the judge with any business, organization or activity that ordinarily will come before the judge, or

(c) involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.
(2) A judge, subject to the requirements of this Part, may hold and manage investments of the judge and members of the judge's family, including real estate.

(3) A full-time judge shall not serve as an officer, director, manager, general partner, advisor, employee or other active participant of any business entity, except that:

(a) the foregoing restriction shall not be applicable to a judge who assumed judicial office prior to July 1, 1965, and maintained such position or activity continuously since that date; and

(b) a judge, subject to the requirements of this Part, may manage and participate in a business entity engaged solely in investment of the financial resources of the judge or members of the judge's family; and

(c) any person who may be appointed to fill a full-time judicial vacancy on an interim or temporary basis pending an election to fill such vacancy may apply to the Chief Administrator of the Courts for exemption from this paragraph during the period of such interim or temporary appointment.

(4) A judge shall manage the judge's investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge shall divest himself or herself of investments and other financial interests that might require frequent disqualification.

(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:

(a) a gift incident to a public testimonial, books, tapes and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the judge and the judge's spouse or guest to attend a bar-related function or an activity devoted to the improvement of the law, the legal system or the administration of justice;

(b) a gift, award or benefit incident to the business, profession or other separate activity of a spouse or other family member of a judge residing in the judge's household, including gifts, awards and benefits for the use of both the spouse or other family member and the judge (as spouse or family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties;

(c) ordinary social hospitality;
(d) a gift from a relative or friend, for a special occasion such as a wedding, anniversary or birthday, if the gift is fairly commensurate with the occasion and the relationship;

(e) a gift, bequest, favor or loan 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);

(f) 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) a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants; or

(h) any other gift, bequest, favor or loan, 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; and if its value exceeds $150.00, the judge reports it in the same manner as the judge reports compensation in section 100.4(H).

(E) Fiduciary activities.

(1) A full-time judge shall not serve as executor, administrator or other personal representative, trustee, guardian, attorney in fact or other fiduciary, designated by an instrument executed after January 1, 1974, except for the estate, trust or person of a member of the judge's family, or, with the approval of the Chief Administrator of the Courts, a person not a member of the judge's family with whom the judge has maintained a longstanding personal relationship of trust and confidence, and then only if such services will not interfere with the proper performance of judicial duties.

(2) The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary capacity.

(3) Any person who may be appointed to fill a full-time judicial vacancy on an interim or temporary basis pending an election to fill such vacancy may apply to the Chief Administrator of the Courts for exemption from paragraphs (l) and (2) during the period of such interim or temporary appointment.

(F) Service as arbitrator or mediator. A full-time judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law.

(G) Practice of law. A full-time judge shall not practice law. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to a member of the judge's family.
(H) Compensation, reimbursement and reporting.

(1) Compensation and reimbursement. A full-time judge may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Part, if the source of such payments does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

(a) Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activity.

(b) Expense reimbursement shall be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or guest. Any payment in excess of such an amount is compensation.

(c) No full-time judge shall solicit or receive compensation for extra-judicial activities performed for or on behalf of: (1) New York State, its political subdivisions or any office or agency thereof; (2) a school, college or university that is financially supported primarily by New York State or any of its political subdivisions, or any officially recognized body of students thereof, except that a judge may receive the ordinary compensation for a lecture or for teaching a regular course of study at any college or university if the teaching does not conflict with the proper performance of judicial duties; or (3) any private legal aid bureau or society designated to represent indigents in accordance with article 18-B of the County Law.

(2) Public reports. A full-time judge shall report the date, place and nature of any activity for which the judge received compensation in excess of $150, and the name of the payor and the amount of compensation so received. Compensation or income of a spouse attributed to the judge by operation of a community property law is not extra-judicial compensation to the judge. The judge's report shall be made at least annually and shall be filed as a public document in the office of the clerk of the court on which the judge serves or other office designated by law.

(I) Financial disclosure. Disclosure of a judge's income, debts, investments or other assets is required only to the extent provided in this section and in section 100.3(F), or as required by Part 40 of the Rules of the Chief Judge (22 NYCRR Part 40), or as otherwise required by law.

Commentary:

[4.1] Complete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives.
[4.2] Expressions of bias or prejudice by a judge, even outside the judge's judicial activities, may cast reasonable doubt on the judge's capacity to act impartially as a judge. Expressions which may do so include jokes or other remarks demeaning individuals on the basis of their age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status. See Section 2D and accompanying Commentary.

[4.3][4B] As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revisions of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that time permits, a judge is encouraged to do so, either independently or through a bar association, judicial conference or other organization dedicated to the improvement of the law. Judges may participate in efforts to promote the fair administration of justice, the independence of the judiciary and the integrity of the legal profession and may express opposition to the persecution of lawyers and judges in other countries because of their professional activities.

[4.4][4B] In this and other Sections of Canon 4, the phrase "subject to the requirements of this Code" is used, notably in connection with a judge's governmental, civic or charitable activities. This phrase is included to remind judges that the use of permissive language in various Sections of the Code does not relieve a judge from the other requirements of the Code that apply to the specific conduct.

[4.5][4B] See Section 2B regarding the obligation to avoid improper influence.

[4.6][4C(2)] Section 4C(2) prohibits a full-time judge from accepting any governmental position except one relating to the law, legal system or administration of justice as authorized by Section 4C(3). The appropriateness of accepting extra-judicial assignments must be assessed in light of the demands on judicial resources created by crowded dockets and the need to protect the courts from involvement in extra-judicial matters that may prove to be controversial. Judges should not accept governmental appointments that are likely to interfere with the effectiveness and independence of the judiciary.

[4.7][4C(2)] Section 4C(2) does not govern a full-time judge's service in a nongovernmental position. See Section 4C(3) permitting service by a judge with organizations devoted to the improvement of the law, the legal system or the administration of justice and with educational, religious, charitable, fraternal or civic organizations not conducted for profit. For example, service on the board of a public educational institution, unless it were a law school, would be prohibited under Section 4C(2), but service on the board of a public law school or any private educational institution would generally be permitted under Section 4C(3).

[4.8][4C(3)] Section 4C(3) does not apply to a judge's service in a governmental position unconnected with the improvement of the law, the legal system or the administration of justice; see Section 4C(2).

[4.9][4C(3)] See Commentary to Section 4B regarding use of the phrase "subject to the following limitations and the other requirements of this Code." As an example of the meaning of
the phrase, a judge permitted by Section 4C(3) to serve on the board of a fraternal institution may be prohibited from such service by Sections 2D or 4A if the institution practices invidious discrimination or if service on the board otherwise casts reasonable doubt on the judge’s capacity to act impartially as a judge.

\[4.10\][4C(3)] Service by a judge on behalf of a civic or charitable organization may be governed by other provisions of Canon 4 in addition to Section 4C. For example, a judge is prohibited by Section 4G from serving as a legal advisor to a civic or charitable organization.

\[4.11\][4C(3)(a)] The changing nature of some organizations and to their relationship to the law makes it necessary for a judge regularly to reexamine the activities of each organization with which the judge is affiliated to determine if it is proper for the judge to continue the affiliation. For example, in many jurisdictions charitable hospitals are now more frequently in court than in the past. Similarly, the boards of some legal aid organizations now make policy decisions that may have political significance or imply commitment to causes that may come before the courts for adjudication.

\[4.12\][4C(3)(b)] A judge may solicit membership or endorse or encourage membership efforts for an organization devoted to the improvement of the law, the legal system or the administration of justice or a non-profit educational, religious, charitable, fraternal or civic organization as long as the solicitation cannot reasonably be perceived as coercive and is not essentially a fund-raising mechanism.

\[4.13\][4C(3)(b)] Use of an organization letterhead for fund-raising or membership solicitation does not violate Section 4C(3)(b) provided the letterhead lists only the judge’s name and office or other position in the organization and, if comparable designations are listed for other persons, the judge’s judicial designation. In addition, a judge must also make reasonable efforts to ensure that the judge’s staff, court officials and others subject to the judge’s direction and control do not solicit funds on the judge’s behalf for any purpose, charitable or otherwise.

\[4.14\][4D] The Time for Compliance provision of this Code (Application Section 4D) postpones the time for compliance with certain provisions of this Section in some cases.

\[4.15\][4D] When a judge acquires in a judicial capacity information, such as materials contained in filings with the court, that is not yet generally known, the judge must not use the information for private gain. See Section 2B; see also Section 3B(10).

\[4.16\][4D] A judge must avoid financial and business dealings that involve the judge in frequent transactions or continuing business relationships with persons likely to come either before the judge personally or before other judges on the judge’s court. In addition, a judge should discourage members of the judge’s family from engaging in dealings that would reasonably appear to exploit the judge’s judicial position. This rule is necessary to avoid creating an appearance of exploitation of office or favoritism and to minimize the potential for disqualification. With respect to affiliation of relatives of a judge with law firms appearing before the judge, see Commentary to Section 3E(1) relating to disqualification.
[4.17][4D] Participation by a judge in financial and business dealings is subject to the general prohibitions in Section 4A against activities that tend to reflect adversely on impartiality, demean the judicial office, or interfere with the proper performance of judicial duties. Such participation is also subject to the general prohibition in Canon 2 against activities involving impropriety or the appearance of impropriety and the prohibition in Section 2C against the misuse of the prestige of judicial office. In addition, a judge must maintain high standards of conduct in all of the judge’s activities, as set forth in Canon 1. See Commentary for Section 4B regarding use of the phrase “subject to the requirements of this Code.”

[4.18][4D(2)] This Section provides that, subject to the requirements of this Code, a judge may hold and manage investments owned solely by the judge, investments owned solely by a member or members of the judge’s family, and investments owned jointly by the judge and members of the judge’s family.

[4.19][4D(3)] Although participation by a judge in a closely-held family business might otherwise be permitted by Section 4D(3), a judge may be prohibited from participation by other provisions of this Code when, for example, the business entity frequently appears before the judge’s court or the participation requires significant time away from judicial duties. Similarly, a judge must avoid participating in a closely-held family business if the judge’s participation would involve misuse of the prestige of judicial office.

[4.20][4D(5)] Section 4D(5) does not apply to contributions to a judge’s campaign for judicial office, a matter governed by Canon 5.

[4.21][4D(5)] Because a gift, bequest, favor or loan to a member of the judge’s family residing in the judge’s household might be viewed as intended to influence the judge, a judge must inform those family members of the relevant ethical constraints upon the judge in this regard and discourage those family members from violating them. A judge cannot, however, reasonably be expected to know or control all of the financial or business activities of all family members residing in the judge’s household.

[4.22][4D(5)(a)] Acceptance of an invitation to a law-related function is governed by Section 4D(5)(a); acceptance of an invitation paid for by an individual lawyer or group of lawyers is governed by Section 4D(5)(h).

[4.23][4D(5)(a)] A judge may accept a public testimonial or a gift incident thereto only if the donor organization is not an organization whose members comprise or frequently represent the same side in litigation, and the testimonial and gift are otherwise in compliance with other provisions of this Code. See Sections 4A(1) and 2B.

[4.24][4D(5)(d)] A gift to a judge, or to a member of the judge’s family living in the judge’s household, that is excessive in value raises questions about the judge’s impartiality and the integrity of the judicial office and might require disqualification of the judge where disqualification would not otherwise be required. See, however, Section 4D(5)(e).
Section 4D(5)(h) prohibits judges from accepting gifts, favors, bequests or loans from lawyers or their firms if they have come or are likely to come before the judge; it also prohibits gifts, favors, bequests or loans from clients of lawyers or their firms when the clients' interests have come or are likely to come before the judge.

The Time for Compliance provision of this Code (Application Section D) postpones the time for compliance with certain provisions of this Section in some cases.

The restrictions imposed by this Canon may conflict with the judge's obligation as a fiduciary. For example, a judge should resign as trustee if detriment to the trust would result from divestiture of holdings the retention of which would place the judge in violation of Section 4D(4).

Section 4F does not prohibit a judge from participating in arbitration, mediation or settlement conferences performed as part of judicial duties.

This prohibition refers to the practice of law in a representative capacity and not in a pro se capacity. A judge may act for himself or herself in all legal matters, including matters involving litigation and matters involving appearances before or relating to dealings with legislative and other governmental bodies. However, in so doing, a judge must not abuse the prestige of office to advance the interests of the judge or the judge's family. See Section 2B.

The Code allows a judge to give legal advice to and review legal documents for members of the judge's family, so long as the judge receives no compensation. A judge must not, however, act as an advocate or negotiator for a member of the judge's family in a legal matter.

See Section 4D(5) regarding reporting of gifts, bequests and loans.

The Code does not prohibit a judge from accepting honoraria or speaking fees provided that the compensation is reasonable and commensurate with the task performed. A judge should ensure, however, that no conflicts are created by the arrangement. A judge must not appear to trade on the judicial position for personal advantage. Nor should a judge spend significant time away from court duties to meet speaking or writing commitments for compensation. In addition, the source of the payment must not raise any question of undue influence or the judge's ability or willingness to be impartial.

Section 3E requires a judge to disqualify himself or herself in any proceeding in which the judge has an economic interest. See "economic interest as explained in the Terminology Section. Section 4D requires a judge to refrain from engaging in business and from financial activities that might interfere with the impartial performance of judicial duties; Section 4H requires a judge to report all compensation the judge received for activities outside judicial office. A judge has the rights of any other citizen, including the right to privacy of the judge's financial affairs, except to the extent that limitations established by law are required to safeguard the proper performance of the judge's duties.
CANON 5 [§100.5]

A JUDGE OR CANDIDATE FOR ELECTIVE JUDICIAL OFFICE SHALL REFRAIN FROM INAPPROPRIATE POLITICAL ACTIVITY.

(A) Incumbent judges and others running for public election to judicial office.

(1) Neither a sitting judge nor a candidate for public election to judicial office shall directly or indirectly engage in any political activity except (i) as otherwise authorized by this section or by law, (ii) to vote and to identify himself or herself as a member of a political party, and (iii) on behalf of measures to improve the law, the legal system or the administration of justice. Prohibited political activity shall include:

(a) acting as a leader or holding an office in a political organization;

(b) except as provided in section 100.5(A)(3), being a member of a political organization other than enrollment and membership in a political party;

(c) engaging in any partisan political activity, provided that nothing in this section shall prohibit a judge or candidate from participating in his or her own campaign for elective judicial office or shall restrict a non-judge holder of public office in the exercise of the functions of that office;

(d) participating in any political campaign for any office or permitting his or her name to be used in connection with any activity of a political organization;

(e) publicly endorsing or publicly opposing (other than by running against) another candidate for public office;

(f) making speeches on behalf of a political organization or another candidate;

(g) attending political gatherings;

(h) soliciting funds for, paying an assessment to, or making a contribution to a political organization or candidate; or

(i) purchasing tickets for politically sponsored dinners or other functions, including any such function for a non-political purpose.

(2) A judge or non-judge who is a candidate for public election to judicial office may participate in his or her own campaign for judicial office as provided in this section and may contribute to his or her own campaign as permitted under the Election Law. During the Window Period as defined in subdivision (Q) of section 100.0 of this
Part, a judge or non-judge who is a candidate for public election to judicial office, except as prohibited by law, may:

(i) attend and speak to gatherings on his or her own behalf, provided that the candidate does not personally solicit contributions;

(ii) appear in newspaper, television and other media advertisements supporting his or her candidacy, and distribute pamphlets and other promotional campaign literature supporting his or her candidacy;

(iii) appear at gatherings, and in newspaper, television and other media advertisements with the candidates who make up the slate of which the judge or candidate is a part;

(iv) permit the candidate's name to be listed on election materials along with the names of other candidates for elective public office;

(v) purchase two tickets to, and attend, politically sponsored dinners and other functions, even where the cost of the ticket to such dinner or other function exceeds the proportionate cost of the dinner or function.

(3) A non-judge who is a candidate for public election to judicial office may also be a member of a political organization and continue to pay ordinary assessments and ordinary contributions to such organization.

(4) A judge or a non-judge who is a candidate for public election to judicial office:

(a) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary, and shall encourage members of the candidate's family to adhere to the same standards of political conduct in support of the candidate as apply to the candidate;

(b) shall prohibit employees and officials who serve at the pleasure of the candidate, and shall discourage other employees and officials subject to the candidate's direction and control, from doing on the candidate's behalf what the candidate is prohibited from doing under this Part;

(c) except to the extent permitted by section 100.5(A)(5), shall not authorize or knowingly permit any person to do for the candidate what the candidate is prohibited from doing under this Part;

(d) shall not:
(i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;

(ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or

(iii) knowingly make any false statement or misrepresent the identity, qualifications, current position or other fact concerning the candidate or an opponent; but

(e) may respond to personal attacks or attacks on the candidate's record as long as the response does not violate subparagraphs 100.5(A)(4)(a) and (d).

(5) A judge or candidate for public election to judicial office shall not personally solicit or accept campaign contributions, but may establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may 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. Such committees may solicit and accept such contributions and support only during the Window Period. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

(B) Judge as candidate for nonjudicial office. A judge shall resign from judicial office upon becoming a candidate for elective nonjudicial office either in a primary or in a general election, except that the judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention if the judge is otherwise permitted by law to do so.

(C) Judge's staff. A judge shall prohibit members of the judge's staff who are the judge's personal appointees from engaging in the following political activity:

(1) holding an elective office in a political organization, except as a delegate to a judicial nominating convention or a member of a county committee other than the executive committee of a county committee;

(2) contributing, directly or indirectly, money or other valuable consideration in amounts exceeding $500 in the aggregate during any calendar year to all political campaigns for political office, and other partisan political activity including, but not limited to, the purchasing of tickets to political functions, except that this $500 limitation shall not apply to an appointee's contributions to his or her own campaign. Where an appointee is a candidate for judicial office, reference also shall be made to appropriate sections of the Election Law;
(3) personally soliciting funds in connection with a partisan political purpose, or personally selling tickets to or promoting a fund-raising activity of a political candidate, political party, or partisan political club; or

(4) political conduct prohibited by section 25.39 of the Rules of the Chief Judge (22 NYCRR 25.39).

Commentary:

[5.1] Canon 5 generally applies to all incumbent judges and candidates for judicial election. A successful candidate, whether or not an incumbent, is subject to judicial discipline for his or her campaign conduct; an unsuccessful candidate who is a lawyer is subject to lawyer discipline for his or her campaign conduct. A lawyer who is a candidate for judicial office is subject to DR 8-103(A) of the Code of Professional Responsibility.

[5.2][5A(1)] A judge or candidate for judicial office retains the right to participate in the political process as a voter and to be enrolled as a member of a political party.

[5.3][5A(1)(a)] Section 5A(1)(a) does not prohibit a candidate for elective judicial office from retaining during candidacy a public office such as county prosecutor, which is not "an office in a political organization."

[5.4][5A(1)(e)] Section 5A(1)(e) does not prohibit a judge or judicial candidate from privately expressing his or her views on judicial candidates or other candidates for public office.

[5.5][5A(1)(e)] A candidate does not publicly endorse another candidate for public office by having that candidate's name on the same ticket.

[5.6][5A(2)] Section 5A(2) contains a number of exceptions to the restrictions imposed by Section 5A(1), but only during a Window Period as defined in Definition Q.

[5.7][5A(3)] Although under Section 5A(3) non-judge candidates seeking appointment to judicial office are permitted during candidacy to retain office in a political organization, attend political gatherings and pay ordinary dues and assessments, they remain subject to other provisions of this Code during candidacy.

[5.8][5A(4)(a)] Although a judicial candidate must encourage members of his or her family to adhere to the same standards of political conduct in support of the candidate that apply to the candidate, family members are free to participate in other political activity.

[5.9][5A(4)(d)] Section 5A(4)(d) prohibits a candidate for judicial office from making statements that appear to commit the candidate regarding cases, controversies or issues likely to come before the court. As a corollary, a candidate should emphasize in any public statement the candidate's duty to uphold the law regardless of his or her personal views. See also Section
3B(9), the general rule on public comment by judges. Section 5A(4)(d) does not prohibit a candidate from making pledges or promises respecting improvements in court administration. Nor does this Section prohibit an incumbent judge from making private statements to other judges or court personnel in the performance of judicial duties. This Section applies to any statement made in the process of securing judicial office, such as statements to commissions charged with judicial selection and tenure and legislative bodies confirming an appointment. See also DR 8-103(A) of the Code of Professional Responsibility.

[5.10][5A(5)] Section 5A(5) permits a candidate, other than a candidate for appointment, to establish campaign committees to solicit and accept public support and reasonable financial contributions. At the start of the campaign, the candidate must instruct his or her campaign committees to solicit or accept only contributions that are reasonable under the circumstances. Though not prohibited, campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge, may be relevant to disqualification under Section 3E.

[5.11][5A(5)] Campaign committees established under Section 5A(5) should manage campaign finances reasonably, avoiding deficits that might necessitate post-election fund-raising, to the extent possible.

[5.12][5A(5)] Section 5A(5) does not prohibit a candidate from initiating an evaluation by a judicial selection commission or bar association, or, subject to the requirements of this Code, from responding to a request for information from any organization.

APPLICATION OF THE RULES OF JUDICIAL CONDUCT [§100.6]

(A) General application. All judges in the unified court system and all other persons to whom by their terms these rules apply, e.g., candidates for elective judicial office, shall comply with these rules of judicial conduct, except as provided below. All other persons, including judicial hearing officers, who perform judicial functions within the judicial system shall comply with such rules in the performance of their judicial functions and otherwise shall so far as practical and appropriate use such rules as guides to their conduct.

(B) Part-time judge. A part-time judge:

(1) is not required to comply with sections 100.4(C)(1), 100.4(C)(2)(a), 100.4(C)(3)(a)(ii), 100.4(E)(1), 100.4(F), 100.4(G), and 100.4(H);

(2) shall not practice law in the court on which the judge serves, or in any other court in the county in which his or her court is located, before a judge who is permitted to practice law, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto;
(3) shall not permit his or her partners or associates to practice law in the court in which he or she is a judge, and shall not permit the practice of law in his or her court by the law partners or associates of another judge of the same court who is permitted to practice law, but may permit the practice of law in his or her court by the partners or associates of a judge of a court in another town, village or city who is permitted to practice law;

(4) may accept private employment or public employment in a federal, state or municipal department or agency, provided that such employment is not incompatible with judicial office and does not conflict or interfere with the proper performance of the judge's duties.

(C) **Administrative law judges.** The provisions of this Part are not applicable to administrative law judges unless adopted by the rules of the employing agency.

(D) **Time for compliance.** A person to whom these rules become applicable shall comply immediately with all provisions of this Part, except that, with respect to sections 100.4(D)(3) and 100.4(E), such person may make application to the Chief Administrator for additional time to comply, in no event to exceed one year, which the Chief Administrator may grant for good cause shown.

(E) **Relationship to Code of Judicial Conduct.** To the extent that any provision of the Code of Judicial Conduct as adopted by the New York State Bar Association is inconsistent with any of these rules, these rules shall prevail, except that these rules shall apply to a non-judge candidate for elective judicial office only to the extent that they are adopted by the New York State Bar Association in the Code of Judicial Conduct.

Commentary:

[6.1][6C] The provisions of the Code of Judicial Conduct should be applied by the employing agency to administrative law judges with due consideration for the characteristics of the particular administrative law judges. In general, the provisions addressing political activity, partiality and conflicts of interest may be applicable to persons performing quasi-judicial functions.

[6.2][6D] If serving as a fiduciary when selected as a judge, a new judge may, notwithstanding the prohibitions in Section 4E, continue to serve as fiduciary but only for the period of time necessary to avoid serious adverse consequences to the beneficiary of the fiduciary relationship and in no event longer than one year. Similarly, if engaged at the time of judicial selection in a business activity, a new judge may, notwithstanding the prohibitions in Section 4D(3), continue in that activity for a reasonable period but in no event longer than one year.
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<td><strong>PREAMBLE</strong></td>
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| [1] An independent, fair and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system. | Preamble, first paragraph
Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law. |
| [2] Judges should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence. | Preamble, first paragraph
Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law. |
| The Model Code of Judicial Conduct establishes standards for the ethical conduct of judges and judicial candidates. It is not intended as an exhaustive guide for the conduct of judges and judicial candidates, who are governed in their judicial and personal conduct by general ethical standards as well as by the Code. The Code is intended, however, to provide guidance and assist judges in maintaining the highest standards of judicial and personal conduct, and to provide a basis for regulating their conduct through disciplinary agencies. | Preamble, sixth paragraph
The Code of Judicial Conduct is not intended as an exhaustive guide for the conduct of judges. They should also be governed in their judicial and personal conduct by general ethical standards. The Code is intended, however, to state basic standards which should govern the conduct of all judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct. |
<table>
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<tr>
<th><strong>2007 Model Code of Judicial Conduct</strong></th>
<th><strong>1990 Model Code of Judicial Conduct</strong></th>
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| **SCOPE** | Preamble, second paragraph  
The Code of Judicial Conduct is intended to establish standards for ethical conduct of judges. It consists of broad statements called Canons, specific rules set forth in Sections under each Canon, a Terminology Section, an Application Section and Commentary. The text of the Canons and the Sections, including the Terminology and Application Sections, is authoritative. The Commentary, by explanation and example, provides guidance with respect to the purpose and meaning of the Canons and Sections. The Commentary is not intended as a statement of additional rules. When the text uses "shall" or "shall not," it is intended to impose binding obligations the violation of which can result in disciplinary action. When "should" or "should not" is used, the text is intended as hortatory and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined. When "may" is used, it denotes permissible discretion or, depending on the context, it refers to action that is not covered by specific proscriptions. |
| [1] The Model Code of Judicial Conduct consists of four Canons, numbered Rules under each Canon, and Comments that generally follow and explain each Rule. Scope and Terminology sections provide additional guidance in interpreting and applying the Code. An Application section establishes when the various Rules apply to a judge or judicial candidate. | Preamble, second paragraph  
The Code of Judicial Conduct is intended to establish standards for ethical conduct of judges. It consists of broad statements called Canons, specific rules set forth in Sections under each Canon, a Terminology Section, an Application Section and Commentary. The text of the Canons and the Sections, including the Terminology and Application Sections, is authoritative. The Commentary, by explanation and example, provides guidance with respect to the purpose and meaning of the Canons and Sections. The Commentary is not intended as a statement of additional rules. When the text uses "shall" or "shall not," it is intended to impose binding obligations the violation of which can result in disciplinary action. When "should" or "should not" is used, the text is intended as hortatory and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined. When "may" is used, it denotes permissible discretion or, depending on the context, it refers to action that is not covered by specific proscriptions. |
| [2] The Canons state overarching principles of judicial ethics that all judges must observe. Although a judge may be disciplined only for violating a Rule, the Canons provide important guidance in interpreting the Rules. Where a Rule contains a permissive term, such as "may" or "should," the conduct being addressed is committed to the personal and professional discretion of the judge or candidate in question, and no disciplinary action should be taken for action or inaction within the bounds of such discretion. |  


result in disciplinary action. When "should" or "should not" is used, the text is intended as hortatory and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined. When "may" is used, it denotes permissible discretion or, depending on the context, it refers to action that is not covered by specific proscriptions.

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<th>[3] The Comments that accompany the Rules serve two functions. First, they provide guidance regarding the purpose, meaning, and proper application of the Rules. They contain explanatory material and, in some instances, provide examples of permitted or prohibited conduct. Comments neither add to nor subtract from the binding obligations set forth in the Rules. Therefore, when a Comment contains the term “must,” it does not mean that the Comment itself is binding or enforceable; it signifies that the Rule in question, properly understood, is obligatory as to the conduct at issue.</th>
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<td>Preamble, second paragraph</td>
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<tr>
<td>The Code of Judicial Conduct is intended to establish standards for ethical conduct of judges. It consists of broad statements called Canons, specific rules set forth in Sections under each Canon, a Terminology Section, an Application Section and Commentary. The text of the Canons and the Sections, including the Terminology and Application Sections, is authoritative. The Commentary, by explanation and example, provides guidance with respect to the purpose and meaning of the Canons and Sections. The Commentary is not intended as a statement of additional rules. When the text uses &quot;shall&quot; or &quot;shall not,&quot; it is intended to impose binding obligations the violation of which can result in disciplinary action. When &quot;should&quot; or &quot;should not&quot; is used, the text is intended as hortatory and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined. When &quot;may&quot; is used, it denotes permissible discretion or, depending on the context, it refers to action that is not covered by specific proscriptions.</td>
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<th>[4] Second, the Comments identify aspirational goals for judges. To implement fully the principles of this Code as articulated in the Canons, judges should strive to exceed the standards of conduct established by the Rules, holding themselves to the highest ethical standards and seeking to achieve those aspirational goals, thereby enhancing the dignity of the judicial office.</th>
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<tr>
<td>Preamble, second paragraph</td>
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<tr>
<td>The Code of Judicial Conduct is intended to establish standards for ethical conduct of judges. It consists of broad statements called Canons, specific rules set forth in Sections under each Canon, a Terminology Section, an Application Section and Commentary. The text of the Canons and the Sections, including the Terminology and Application Sections, is authoritative. The Commentary, by explanation and example, provides guidance with respect to the purpose and meaning of the Canons and</td>
</tr>
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</table>
[5] The Rules of the Model Code of Judicial Conduct are rules of reason that should be applied consistent with constitutional requirements, statutes, other court rules, and decisional law, and with due regard for all relevant circumstances. The Rules should not be interpreted to impinge upon the essential independence of judges in making judicial decisions.

[6] Although the black letter of the Rules is binding and enforceable, it is not contemplated that every transgression will result in the imposition of discipline. Whether discipline should be imposed should be determined through a reasonable and reasoned application of the Rules, and should depend upon factors such as the seriousness of the transgression, the facts and circumstances that existed at the time of the transgression, the extent of any pattern of improper activity, whether there have been previous violations, and the effect of the improper activity upon the judicial system or others.

[7] The Code is not designed or intended as a basis for civil or criminal liability. Neither is it intended to be the basis for litigants to seek collateral remedies against each other or to obtain tactical advantages in proceedings before a court.

Sections. The Commentary is not intended as a statement of additional rules. When the text uses "shall" or "shall not," it is intended to impose binding obligations the violation of which can result in disciplinary action. When "should" or "should not" is used, the text is intended as hortatory and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined. When "may" is used, it denotes permissible discretion or, depending on the context, it refers to action that is not covered by specific proscriptions.

Preamble, third paragraph
The Canons and Sections are rules of reason. They should be applied consistent with constitutional requirements, statutes, other court rules and decisional law and in the context of all relevant circumstances. The Code is to be construed so as not to impinge on the essential independence of judges in making judicial decisions.

Preamble, fifth paragraph
The text of the Canons and Sections is intended to govern conduct of judges and to be binding upon them. It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system. See ABA Standards Relating to Judicial Discipline and Disability Retirement.

Preamble, fourth paragraph
The Code is designed to provide guidance to judges and candidates for judicial office and to provide a structure for regulating conduct through disciplinary agencies. It is not designed or intended as a basis for civil liability or criminal
prosecution. Furthermore, the purpose of the Code would be subverted if the Code were invoked by lawyers for mere tactical advantage in a proceeding.
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<td><strong>TERMINOLOGY</strong></td>
<td><strong>TERMINOLOGY</strong></td>
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<tr>
<td>“Aggregate,” in relation to contributions for a candidate, means not only contributions in cash or in kind made directly to a candidate’s campaign committee, but also all contributions made indirectly with the understanding that they will be used to support the election of a candidate or to oppose the election of the candidate’s opponent. See Rules 2.11 and 4.4.</td>
<td>“Aggregate” in relation to contributions for a candidate under Sections 3E(1)(e) and 5C(3) and (4) denotes not only contributions in cash or in kind made directly to a candidate’s committee or treasurer, but also, except in retention elections, all contributions made indirectly with the understanding that they will be used to support the election of the candidate or to oppose the election of the candidate’s opponent. See Sections 3E(1)(e), 5C(3) and 5C(4).</td>
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<td>“Appropriate authority” means the authority having responsibility for initiation of disciplinary process in connection with the violation to be reported. See Rules 2.14 and 2.15.</td>
<td>“Appropriate authority” denotes the authority with responsibility for initiation of disciplinary process with respect to the violation to be reported. See Sections 3D(1) and 3D(2).</td>
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<tr>
<td>“Contribution” means both financial and in-kind contributions, such as goods, professional or volunteer services, advertising, and other types of assistance, which, if obtained by the recipient otherwise, would require a financial expenditure. See Rules 2.11, 2.13, 3.7, 4.1, and 4.4.</td>
<td>“De minimis” denotes an insignificant interest that could not raise reasonable question as to a judge’s impartiality. See Sections 3E(1)(e) and 3E(1)(d).</td>
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<td>“De minimis,” in the context of interests pertaining to disqualification of a judge, means an insignificant interest that could not raise a reasonable question regarding the judge’s impartiality. See Rule 2.11.</td>
<td>“Economic interest” denotes ownership of a more than de minimis legal or equitable interest, or a relationship as officer, director, advisor or other active participant in the affairs of a party, except that:</td>
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<td>“Domestic partner” means a person with whom another person maintains a household and an intimate relationship, other than a person to whom he or she is legally married. See Rules 2.11, 2.13, 3.13, and 3.14.</td>
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outcome of a proceeding before a judge, it does not include:
(1) an interest in the individual holdings within a mutual or common investment fund;
(2) an interest in securities held by an educational, religious, charitable, fraternal, or civic organization in which the judge or the judge's spouse, domestic partner, parent, or child serves as a director, an officer, an advisor, or other participant;
(3) a deposit in a financial institution or deposits or proprietary interests the judge may maintain as a member of a mutual savings association or credit union, or similar proprietary interests; or
(4) an interest in the issuer of government securities held by the judge.
See Rules 1.3 and 2.11.

(i) ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the judge participates in the management of the fund or a proceeding pending or impending before the judge could substantially affect the value of the interest;
(ii) service by a judge as an officer, director, advisor or other active participant in an educational, religious, charitable, fraternal or civic organization, or service by a judge's spouse, parent or child as an officer, director, advisor or other active participant in any organization does not create an economic interest in securities held by that organization;
(iii) a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association or of a member in a credit union, or a similar proprietary interest, is not an economic interest in the organization unless a proceeding pending or impending before the judge could substantially affect the value of the interest;
(iv) ownership of government securities is not an economic interest in the issuer unless a proceeding pending or impending before the judge could substantially affect the value of the securities.
See Sections 3E(1)(e) and 3E(2).

“Fiduciary” includes relationships such as executor, administrator, trustee, or guardian. See Rules 2.11, 3.2, and 3.8.

"Fiduciary" includes such relationships as executor, administrator, trustee, and guardian. See Sections 3E(2) and 4E.

“Impartial,” “impartiality,” and “impartially” mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge. See Canons 1, 2, and 4, and Rules 1.2, 2.2, 2.10, 2.11, 2.13, 3.1, 3.12, 3.13, 4.1, and 4.2.

“Impartiality” or “impartial” denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge. See Sections 2A, 3B(10), 3E(1), 5A(3)(a) and 5A(3)(d)(i).

“Impending matter” is a matter that is imminent or expected to occur in the near future. See Rules 2.9, 2.10, 3.13, and 4.1.

Section 3B(10)Commentary
Sections 3B(9) and (10) restrictions on judicial speech are essential to the maintenance of the integrity, impartiality,
<table>
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<tr>
<th>Term</th>
<th>Definition</th>
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<td>&quot;Impropriety&quot;</td>
<td>Includes conduct that violates the law, court rules, or provisions of this Code, and conduct that undermines a judge's independence, integrity, or impartiality. See Canon 1 and Rule 1.2.</td>
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<td>&quot;Independence&quot;</td>
<td>Means a judge's freedom from influence or actions that limit or impede her ability to carry out her duties impartially, without fear of public reprisal, or favoritism. See Canon 1 and Rule 1.2.</td>
</tr>
<tr>
<td>&quot;Integrity&quot;</td>
<td>Means probity, fairness, honesty, and soundness of character. See Canon 1 and Rule 1.2.</td>
</tr>
<tr>
<td>&quot;Judicial candidate&quot;</td>
<td>Means any person, including a sitting judge, who is seeking selection for or retention in judicial office by election or appointment. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority, authorizes or engages in solicitation or acceptance of contributions or support, or is nominated for election or appointment to office. See Rules 2.11, 4.1, 4.2, and 4.4.</td>
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<td>&quot;Knowingly,&quot; &quot;knowledge,&quot;</td>
<td>Denotes actual knowledge of the fact in question. A person's knowledge may be classified as &quot;knowing,&quot; &quot;know,&quot; &quot;knows,&quot; or &quot;knowledges&quot; depending on the context and the jurisdiction.</td>
</tr>
<tr>
<td>&quot;Candidate.&quot;</td>
<td>A candidate is a person seeking selection for or retention in judicial office by election or appointment. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority, authorizes solicitation or acceptance of contributions or support. The term &quot;candidate&quot; has the same meaning when applied to a judge seeking election or appointment to non-judicial office. See Preamble and Sections 5A, 5B, 5C and 5E.</td>
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A pending proceeding is one that has begun but not yet reached final disposition. An impending proceeding is one that is anticipated but not yet begun. The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition. Sections 3B(9) and (10) do not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, but in cases such as a writ of mandamus where the judge is a litigant in an official capacity, the judge must not comment publicly. The conduct of lawyers relating to trial publicity is governed by [Rule 3.6 of the ABA Model Rules of Professional Conduct]. (Each jurisdiction should substitute an appropriate reference to its rule.)
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<th><strong>“Law”</strong> encompasses court rules as well as statutes, constitutional provisions, and decisional law. See Rules 1.1, 2.1, 2.2, 2.6, 2.7, 2.9, 3.1, 3.4, 3.9, 3.12, 3.13, 3.14, 3.15, 4.1, 4.2, 4.4, and 4.5.</th>
<th><strong>“Law”</strong> denotes court rules as well as statutes, constitutional provisions and decisional law. See Sections 2A, 3A, 3B(2), 3B(6), 4B, 4C, 4D(5), 4F, 4I, 5A(2), 5A(3), 5B(2), 5C(1), 5C(3) and 5D.</th>
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<tr>
<td><strong>“Member of the candidate’s family”</strong> means a spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or person with whom the candidate maintains a close familial relationship. See Rules 3.7, 3.8, 3.10, and 3.11.</td>
<td><strong>“Member of the candidate's family”</strong> denotes a spouse, child, grandchild, parent, grandparent or other relative or person with whom the candidate maintains a close familial relationship. See Section 5A(3)(a).</td>
</tr>
<tr>
<td><strong>“Member of the judge’s family”</strong> means a spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. See Rules 3.7, 3.8, 3.10, and 3.11.</td>
<td><strong>“Member of the judge's family”</strong> denotes a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. See Sections 4D(3), 4E and 4G.</td>
</tr>
<tr>
<td><strong>“Member of a judge’s family residing in the judge’s household”</strong> means any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge’s family, who resides in the judge’s household. See Rules 3.11 and 3.13.</td>
<td><strong>“Member of the judge's family residing in the judge's household”</strong> denotes any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household. See Sections 3E(1) and 4D(5).</td>
</tr>
<tr>
<td><strong>“Nonpublic information”</strong> means information that is not available to the public. Nonpublic information may include, but is not limited to, information that is subject to statute or court order or impounded or communicated in camera, and information offered in grand jury proceedings, presentencing reports, dependency cases, or psychiatric reports. See Rule 3.5.</td>
<td><strong>“Nonpublic information” denotes information that, by law, is not available to the public. Nonpublic information may include but is not limited to: information that is subject to statute or court order, impounded or communicated in camera; and information offered in grand jury proceedings, presentencing reports, dependency cases or psychiatric reports.</strong> See Section 3B(11).</td>
</tr>
</tbody>
</table>
| **“Pending matter”** is a matter that has commenced. A matter continues to be pending through any appellate process until final disposition. See Rules 2.9, 2.10, 3.13, and 4.1. | **Section 3B(10) Commentary**
Sections 3B(9) and (10) restrictions on judicial speech are essential to the maintenance of the integrity, impartiality, and independence of the judiciary. A pending proceeding is one that has begun but not yet reached final disposition. An impending proceeding is one that is anticipated but not yet begun. The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition. Sections 3B(9) and (10) do |
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<th>Phrase</th>
<th>Definition</th>
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<tr>
<td>Personally solicit</td>
<td>A direct request made by a judge or a judicial candidate for financial support or in-kind services, whether made by letter, telephone, or any other means of communication. See Rule 4.1.</td>
</tr>
<tr>
<td>Political organization</td>
<td>A political party or other group sponsored by or affiliated with a political party or candidate, the principal purpose of which is to further the election or appointment of candidates for political office. For purposes of this Code, the term does not include a judicial candidate's campaign committee created as authorized by Rule 4.4. See Rules 4.1 and 4.2.</td>
</tr>
<tr>
<td>Public election</td>
<td>Primary and general elections, partisan elections, nonpartisan elections, and retention elections. See Rules 4.2 and 4.4.</td>
</tr>
<tr>
<td>Third degree of relationship</td>
<td>Includes the following persons: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, and niece. See Rule 2.11.</td>
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The conduct of lawyers relating to trial publicity is governed by [Rule 3.6 of the ABA Model Rules of Professional Conduct]. (Each jurisdiction should substitute an appropriate reference to its rule.)

"Political organization" denotes a political party or other group, the principal purpose of which is to further the election or appointment of candidates to political office. See Sections 5A(1), 5B(2) and 5C(1).

"Public election." This term includes primary and general elections; it includes partisan elections, nonpartisan elections and retention elections. See Section 5C.

"Third degree of relationship." The following persons are relatives within the third degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew or niece. See Section 3E(1)(d).
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<td><strong>APPLICATION</strong></td>
<td><strong>APPLICATION OF THE CODE OF JUDICIAL CONDUCT</strong></td>
</tr>
<tr>
<td>The Application section establishes when the various Rules apply to a judge or judicial candidate.</td>
<td>A. Anyone, whether or not a lawyer, who is an officer of a judicial system and who performs judicial functions, including an officer such as a magistrate, court commissioner, special master, referee, or member of the administrative law judiciary, is a judge within the meaning of this Code. All judges shall comply with this Code except as provided below.</td>
</tr>
<tr>
<td><strong>I. APPLICABILITY OF THIS CODE</strong></td>
<td><strong>A.</strong> Anyone, whether or not a lawyer, who is an officer of a judicial system and who performs judicial functions, including an officer such as a magistrate, court commissioner, special master, referee, or member of the administrative law judiciary, is a judge within the meaning of this Code. All judges shall comply with this Code except as provided below.**</td>
</tr>
<tr>
<td>(A) The provisions of the Code apply to all full-time judges. Parts II through V of this section identify those provisions that apply to four distinct categories of part-time judges. The four categories of judicial service in other than a full-time capacity are necessarily defined in general terms because of the widely varying forms of judicial service. Canon 4 applies to judicial candidates.</td>
<td><strong>Comment</strong></td>
</tr>
<tr>
<td>(B) A judge, within the meaning of this Code, is anyone who is authorized to perform judicial functions, including an officer such as a justice of the peace, magistrate, court commissioner, special master, referee, or member of the administrative law judiciary.</td>
<td>[1] The Rules in this Code have been formulated to address the ethical obligations of any person who serves a judicial function, and are premised upon the supposition that a uniform system of ethical principles should apply to all those authorized to perform judicial functions. <strong>Commentary:</strong> The four categories of judicial service in other than a full-time capacity are necessarily defined in general terms because of the widely varying forms of judicial service. For the purposes of this Section, as long as a retired judge is subject to recall the judge is considered to &quot;perform judicial functions.&quot; The determination of which category and, accordingly, which specific Code provisions apply to an individual judicial officer, depend upon the facts of the particular judicial service.</td>
</tr>
<tr>
<td><strong>Comment</strong></td>
<td><strong>[2] The determination of which category and, accordingly, which specific Rules apply to an individual judicial officer, depends upon the facts of the particular judicial service.</strong></td>
</tr>
</tbody>
</table>
[3] In recent years many jurisdictions have created what are often called “problem solving” courts, in which judges are authorized by court rules to act in nontraditional ways. For example, judges presiding in drug courts and monitoring the progress of participants in those courts’ programs may be authorized and even encouraged to communicate directly with social workers, probation officers, and others outside the context of their usual judicial role as independent decision makers on issues of fact and law. When local rules specifically authorize conduct not otherwise permitted under these Rules, they take precedence over the provisions set forth in the Code. Nevertheless, judges serving on “problem solving” courts shall comply with this Code except to the extent local rules provide and permit otherwise.

<table>
<thead>
<tr>
<th>II. Retired Judge Subject to Recall</th>
</tr>
</thead>
<tbody>
<tr>
<td>A retired judge subject to recall for service, who by law is not permitted to practice law, is not required to comply:</td>
</tr>
<tr>
<td>(A) with Rule 3.9 (Service as Arbitrator or Mediator), except while serving as a judge; or</td>
</tr>
<tr>
<td>(B) at any time with Rule 3.8 (Appointments to Fiduciary Positions).</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>[1] For the purposes of this section, as long as a retired judge is subject to being recalled for service, the judge is considered to &quot;perform judicial functions.&quot;</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>III. Continuing Part-Time Judge</th>
</tr>
</thead>
<tbody>
<tr>
<td>A judge who serves repeatedly on a part-time basis by election or under a continuing appointment, including a retired judge subject to recall who is permitted to practice law (&quot;continuing part-time judge&quot;),</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Terminology</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;Continuing part-time judge.&quot; A continuing part-time judge is a judge who serves repeatedly on a part-time basis by election or under a continuing appointment, including a retired judge subject to recall who is permitted to practice law. See Application Section C.</td>
</tr>
</tbody>
</table>
### Application C. Continuing Part-time Judge.

A continuing part-time judge:

1. is not required to comply
   - a) except while serving as a judge, with Section 3B(9); and
   - b) at any time with Sections 4C(2), 4D(3), 4E(1), 4F, 4G, 4H, 5A(1), 5B(2) and 5D.

2. shall not practice law in the court on which the judge serves or in any court subject to the appellate jurisdiction of the court on which the judge serves, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto.

### Comment

[1] When a person who has been a continuing part-time judge is no longer a continuing part-time judge, including a retired judge no longer subject to recall, that person may act as a lawyer in a proceeding in which he or she has served as a judge or in any other proceeding related thereto only with the informed consent of all parties, and pursuant to any applicable Model Rules of Professional Conduct. An adopting jurisdiction should substitute a reference to its applicable rule.

### Commentary

When a person who has been a continuing part-time judge is no longer a continuing part-time judge, including a retired judge no longer subject to recall, that person may act as a lawyer in a proceeding in which he or she has served as a judge or in any other proceeding related thereto only with the express consent of all parties pursuant to [Rule 1.12(a) of the ABA Model Rules of Professional Conduct]. (An adopting jurisdiction should substitute a reference to its applicable rule).
### IV. PERIODIC PART-TIME JUDGE

A periodic part-time judge who serves or expects to serve repeatedly on a part-time basis, but under a separate appointment for each limited period of service or for each matter,

<table>
<thead>
<tr>
<th>Terminology</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;Periodic part-time judge.&quot; A periodic part-time judge is a judge who serves or expects to serve repeatedly on a part-time basis but under a separate appointment for each limited period of service or for each matter. See Application Section D.</td>
</tr>
</tbody>
</table>

Application D. Periodic Part-Time Judge. A periodic part-time judge:

<table>
<thead>
<tr>
<th>(A) is not required to comply:</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) with Rule 2.10 (Judicial Statements on Pending and Impending Cases), except while serving as a judge; or</td>
</tr>
</tbody>
</table>

| (2) at any time with Rules 3.4 (Appointments to Governmental Positions), 3.7 (Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities), 3.8 (Appointments to Fiduciary Positions), 3.9 (Service as Arbitrator or Mediator), 3.10 (Practice of Law), 3.11 (Financial, Business, or Remunerative Activities), 3.13 (Acceptance and Reporting of Gifts, Loans, Bequests, Benefits, or Other Things of Value), 3.15 (Reporting Requirements), 4.1 (Political and Campaign Activities of Judges and Judicial Candidates in General), and 4.5 (Activities of Judges Who Become Candidates for Nonjudicial Office); and |

| (B) shall not practice law in the court on which the judge serves or in any court subject to the appellate jurisdiction of the court on which the judge serves, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto. |

### V. PRO TEMPORE PART-TIME JUDGE

A pro tempore part-time judge who serves or expects to serve once or only sporadically on a part-time basis under a separate appointment for each period of service or for each case heard is not required to comply:

<table>
<thead>
<tr>
<th>Terminology</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;Pro tempore part-time judge.&quot; A pro tempore part-time judge is a judge who serves or expects to serve once or only sporadically on a part-time basis under a separate appointment for each period of service or for each case heard. See Application Section E.</td>
</tr>
</tbody>
</table>

| Application E. Pro Tempore Part-time Judge. A pro tempore part-time judge:  
| (1) is not required to comply  
| (A) except while serving as a judge, with Rules 1.2 (Promoting Confidence in the Judiciary), 2.4 (External Influences on Judicial Conduct), 2.10 (Judicial Statements on Pending and Impending Cases), or 3.2 (Appearances before Governmental Bodies and Consultation with Government Officials); or  
| (B) at any time with Rules 3.4 (Appointments to Governmental Positions), 3.6 (Affiliation with Discriminatory Organizations), 3.7 (Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities), 3.8 (Appointments to Fiduciary Positions), 3.9 (Service as Arbitrator or Mediator), 3.10 (Practice of Law), 3.11 (Financial, Business, or Remunerative Activities), 3.13 (Acceptance and Reporting of Gifts, Loans, Bequests, Benefits, or Other Things of Value), 3.15 (Reporting Requirements), 4.1 (Political and Campaign Activities of Judges and Judicial Candidates in General), and 4.5 (Activities of Judges Who Become Candidates for Nonjudicial Office).  
| (a) except while serving as a judge, with Sections 2A, 2B, 3B(9) and 4C(1);  
| (b) at any time with Sections 2C, 4C(2), 4C(3)(a), 4C(3)(b), 4D(1)(b), 4D(3), 4D(4), 4D(5), 4E, 4F, 4G, 4H, 5A(1), 5A(2), 5B(2) and 5D.  

| VI. TIME FOR COMPLIANCE  
| A person to whom this Code becomes applicable shall comply immediately with its provisions, except that those judges to whom Rules 3.8 (Appointments to Fiduciary Positions) and 3.11 (Financial, Business, or Remunerative Activities) apply shall comply with those Rules as soon as reasonably possible, but in no event later than one year after the Code becomes applicable to the judge.  
| F. Time for Compliance. A person to whom this Code becomes applicable shall comply immediately with all provisions of this Code except Sections 4D(2), 4D(3) and 4E and shall comply with these Sections as soon as reasonably possible and shall do so in any event within the period of one year.  

<table>
<thead>
<tr>
<th>COMMENT</th>
<th>Commentary, first paragraph</th>
</tr>
</thead>
<tbody>
<tr>
<td>[1] If serving as a fiduciary when selected as judge, a new judge may,</td>
<td>If serving as a fiduciary when selected as judge, a new judge may,</td>
</tr>
<tr>
<td>notwithstanding the prohibitions in Rule 3.8, continue to serve as</td>
<td>notwithstanding the prohibitions in Section 4E, continue to serve</td>
</tr>
<tr>
<td>fiduciary, but only for that period of time necessary to avoid serious</td>
<td>as fiduciary but only for that period of time necessary to avoid</td>
</tr>
<tr>
<td>adverse consequences to the beneficiaries of the fiduciary relation-</td>
<td>serious adverse consequences to the beneficiary of the fiduciary</td>
</tr>
<tr>
<td>ship and in no event longer than one year. Similarly, if engaged at the</td>
<td>relationship and in no event longer than one year. Similarly, if</td>
</tr>
<tr>
<td>time of judicial selection in a business activity, a new judge may,</td>
<td>engaged at the time of judicial selection in a business activity, a</td>
</tr>
<tr>
<td>notwithstanding the prohibitions in Rule 3.11, continue in that activity</td>
<td>new judge may, notwithstanding the prohibitions in Section 4D(3),</td>
</tr>
<tr>
<td>for a reasonable period but in no event longer than one year.</td>
<td>continue in that activity for a reasonable period but in no event</td>
</tr>
<tr>
<td></td>
<td>longer than one year.</td>
</tr>
<tr>
<td><strong>2007 Model Code of Judicial Conduct</strong></td>
<td><strong>1990 Model Code of Judicial Conduct</strong></td>
</tr>
<tr>
<td>---------------------------------------</td>
<td>---------------------------------------</td>
</tr>
<tr>
<td><strong>CANON 1</strong></td>
<td><strong>CANON 1</strong></td>
</tr>
<tr>
<td><strong>RULE 1.1</strong></td>
<td><strong>CANON 2</strong></td>
</tr>
<tr>
<td><strong>Compliance with the Law</strong></td>
<td><strong>A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL OF THE JUDGE'S ACTIVITIES</strong></td>
</tr>
<tr>
<td>A judge shall comply with the law, including the Code of Judicial Conduct.</td>
<td></td>
</tr>
<tr>
<td>Section 2A. 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.</td>
<td>Section 1A Commentary: Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depends in turn upon their acting without fear or favor. A judiciary of integrity is one in which judges are known for their probity, fairness, honesty, uprightness, and soundness of character. An independent judiciary is one free of inappropriate outside influences. Although judges should be independent, they must comply with the law, including the provisions of this Code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law.</td>
</tr>
<tr>
<td><strong>RULE 1.2</strong></td>
<td><strong>CANON 2</strong></td>
</tr>
<tr>
<td>Promoting Confidence in the Judiciary</td>
<td>A JUDGE SHALL AVOID IMPROPIETY AND THE APPEARANCE OF IMPROPIETY IN ALL OF THE JUDGE'S ACTIVITIES</td>
</tr>
<tr>
<td>--------------------------------------</td>
<td>-----------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.</td>
<td>A. 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.</td>
</tr>
</tbody>
</table>

**COMMENT**

[1] Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety. This principle applies to both the professional and personal conduct of a judge.

Section 2A Commentary, first and second paragraphs
Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. Examples are the restrictions on judicial speech imposed by Sections 3(B)(9) and (10) that are indispensable to the maintenance of the integrity, impartiality, and independence of the judiciary.

The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules or other specific provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.

[2] A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed by the Code.

Section 2A Commentary, first paragraph
Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the
subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. Examples are the restrictions on judicial speech imposed by Sections 3(B)(9) and (10) that are indispensable to the maintenance of the integrity, impartiality, and independence of the judiciary.

[3] Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary. Because it is not practicable to list all such conduct, the Rule is necessarily cast in general terms.

Section 2A Commentary, first and second paragraphs
Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. Examples are the restrictions on judicial speech imposed by Sections 3(B)(9) and (10) that are indispensable to the maintenance of the integrity, impartiality, and independence of the judiciary.

The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules or other specific provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.

[4] Judges should participate in activities that promote ethical conduct among judges and lawyers, support professionalism within the judiciary and the legal profession, and promote access.
to justice for all.

[5] Actual improprieties include violations of law, court rules or provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge’s honesty, impartiality, temperament, or fitness to serve as a judge.

<table>
<thead>
<tr>
<th>Section 2A Commentary, second paragraph</th>
</tr>
</thead>
<tbody>
<tr>
<td>The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules or other specific provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.</td>
</tr>
</tbody>
</table>

[6] A judge should initiate and participate in community outreach activities for the purpose of promoting public understanding of and confidence in the administration of justice. In conducting such activities, the judge must act in a manner consistent with this Code.

<table>
<thead>
<tr>
<th>Section 2B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.</th>
</tr>
</thead>
<tbody>
<tr>
<td>RULE 1.3 Avoiding Abuse of the Prestige of Judicial Office</td>
</tr>
<tr>
<td>A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>COMMENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>[1] It is improper for a judge to use or attempt to use his or her position to gain personal advantage or deferential treatment of any kind. For example, it would be improper for a judge to allude to his or her judicial status to gain favorable treatment in encounters with traffic officials. Similarly, a judge must not use</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Section 2B Commentary, first and second paragraphs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maintaining the prestige of judicial office is essential to a system of government in which the judiciary functions independently of the executive and legislative branches. Respect for the judicial office facilitates the orderly conduct of legitimate judicial functions. Judges should distinguish between proper and</td>
</tr>
</tbody>
</table>

|-----------------------------------------|
| judicial letterhead to gain an advantage in conducting his or her personal business. | improper use of the prestige of office in all of their activities. For example, it would be improper for a judge to allude to his or her judgship to gain a personal advantage such as deferential treatment when stopped by a police officer for a traffic offense. Similarly, judicial letterhead must not be used for conducting a judge's personal business.

A judge must avoid lending the prestige of judicial office for the advancement of the private interests of others. For example, a judge must not use the judge's judicial position to gain advantage in a civil suit involving a member of the judge's family. In contracts for publication of a judge's writings, a judge should retain control over the advertising to avoid exploitation of the judge's office. As to the acceptance of awards, see Section 4D(5)(a) and Commentary. |

| [2] A judge may provide a reference or recommendation for an individual based upon the judge's personal knowledge. The judge may use official letterhead if the judge indicates that the reference is personal and if there is no likelihood that the use of the letterhead would reasonably be perceived as an attempt to exert pressure by reason of the judicial office. | Section 2B Commentary, third paragraph
Although a judge should be sensitive to possible abuse of the prestige of office, a judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation. However, a judge must not initiate the communication of information to a sentencing judge or a probation or corrections officer but may provide to such persons information for the record in response to a formal request. |

| [3] Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees, and by responding to inquiries from such entities concerning the professional qualifications of a person being considered for judicial office. | Section 2B Commentary, fourth paragraph
Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration, and by responding to official inquiries concerning a person being considered for a judgship. See also Canon 5 regarding use of a judge's name in political activities. |

| [4] Special considerations arise when judges write or contribute to publications of for-profit entities, whether related or unrelated to the law. A judge should not permit anyone associated with the publication of such materials to exploit the judge's office in a | Section 2B Commentary, second paragraph
A judge must avoid lending the prestige of judicial office for the advancement of the private interests of others. For example, a judge must not use the judge's judicial position to gain advantage |
manner that violates this Rule or other applicable law. In contracts for publication of a judge’s writing, the judge should retain sufficient control over the advertising to avoid such exploitation.

in a civil suit involving a member of the judge’s family. In contracts for publication of a judge’s writings, a judge should retain control over the advertising to avoid exploitation of the judge’s office. As to the acceptance of awards, see Section 4D(5)(a) and Commentary.
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Canon 2</strong></td>
<td><strong>Canon 3</strong></td>
</tr>
<tr>
<td>A judge shall perform the duties of judicial office impartially, competently, and diligently.</td>
<td>A judge shall perform the duties of judicial office impartially and diligently.</td>
</tr>
<tr>
<td><strong>Rule 2.1</strong></td>
<td>Section 3A. Judicial Duties in General. The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply.</td>
</tr>
<tr>
<td>Giving Precedence to the Duties of Judicial Office</td>
<td>[1] To ensure that judges are available to fulfill their judicial duties, judges must conduct their personal and extrajudicial activities to minimize the risk of conflicts that would result in frequent disqualification. See Canon 3.</td>
</tr>
<tr>
<td>The duties of judicial office, as prescribed by law, shall take precedence over all of a judge's personal and extrajudicial activities.</td>
<td>[2] Although it is not a duty of judicial office unless prescribed by law, judges are encouraged to participate in activities that promote public understanding of and confidence in the justice system.</td>
</tr>
<tr>
<td><strong>Comment</strong></td>
<td><strong>Comment</strong></td>
</tr>
<tr>
<td>[1] To ensure impartiality and fairness to all parties, a judge must be objective and open-minded.</td>
<td>[2] Although each judge comes to the bench with a unique</td>
</tr>
<tr>
<td>[2] Although each judge comes to the bench with a unique</td>
<td></td>
</tr>
</tbody>
</table>
background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.

[3] When applying and interpreting the law, a judge sometimes may make good-faith errors of fact or law. Errors of this kind do not violate this Rule.

[4] It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.

**RULE 2.3**

**Bias, Prejudice, and Harassment**

(A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.

(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

(C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.

Section 3B(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

Section 3B(6) A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.
(D) The restrictions of paragraphs (B) and (C) do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding.

Section 3B(6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.

**COMMENT**

[1] A judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute.

Section 3B(5) Commentary, second paragraph
A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

[2] Examples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics. Even facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice. A judge must avoid conduct that may reasonably be perceived as prejudiced or biased.

Section 3B(5) Commentary, second paragraph
A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

[3] Harassment, as referred to in paragraphs (B) and (C), is verbal or physical conduct that denigrates or shows hostility or aversion toward a person on bases such as race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation.

Section 3B(5) Commentary, first paragraph:

[4] Sexual harassment includes but is not limited to sexual
advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome.

<table>
<thead>
<tr>
<th>RULE 2.4</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>External Influences on Judicial Conduct</strong></td>
</tr>
<tr>
<td>(A) A judge shall not be swayed by public clamor or fear of criticism.</td>
</tr>
<tr>
<td>(B) A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment.</td>
</tr>
<tr>
<td>(C) A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.</td>
</tr>
</tbody>
</table>

**COMMENT**

[1] An independent judiciary requires that judges decide cases according to the law and facts, without regard to whether particular laws or litigants are popular or unpopular with the public, the media, government officials, or the judge's friends or family. Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences.

<table>
<thead>
<tr>
<th>RULE 2.5</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Competence, Diligence, and Cooperation</strong></td>
</tr>
</tbody>
</table>

| | A judge must refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge's direction and control. |
| | Section 3B(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism. |
| | Section 2B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness. |
| | Section 2B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness. |
(A) A judge shall perform judicial and administrative duties, competently and diligently. partisan interests, public clamor or fear of criticism.

Section 3B(8) A judge shall dispose of all judicial matters promptly, efficiently and fairly.

Section 3C(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

(B) A judge shall cooperate with other judges and court officials in the administration of court business. Section 3C(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

COMMENT

[1] Competence in the performance of judicial duties requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to perform a judge's responsibilities of judicial office.

Section 3B(8) Commentary, second paragraph
Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to take reasonable measures to ensure that court officials, litigants, and their lawyers cooperate with the judge to that end.

[2] A judge should seek the necessary docket time, court staff, expertise, and resources to discharge all adjudicative and administrative responsibilities.

Section 3B(8) Commentary, first paragraph
In disposing of matters promptly and efficiently, a judge must demonstrate due regard for the rights of parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases in ways that reduce or eliminate dilatory practices, avoidable delays, and unnecessary
costs.

| **RULE 2.6**  
| **Ensuring the Right to Be Heard**  
| **(A)** A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.  
| **Section 3B(7)** A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:  
| **(B)** A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.  
| **Section 3B(8)** Commentary, first paragraph  
In disposing of matters promptly, efficiently and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Containing costs while preserving fundamental rights of parties also protects the interests of witnesses and the general public. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs. A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.  

**COMMENT**  
[1] The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed.  

[2] The judge plays an important role in overseeing the settlement
of disputes, but should be careful that efforts to further settlement do not undermine any party's right to be heard according to law. The judge should keep in mind the effect that the judge's participation in settlement discussions may have, not only on the judge's own views of the case, but also on the perceptions of the lawyers and the parties if the case remains with the judge after settlement efforts are unsuccessful. Among the factors that a judge should consider when deciding upon an appropriate settlement practice for a case are (1) whether the parties have requested or voluntarily consented to a certain level of participation by the judge in settlement discussions, (2) whether the parties and their counsel are relatively sophisticated in legal matters, (3) whether the case will be tried by the judge or a jury, (4) whether the parties participate with their counsel in settlement discussions, (5) whether any parties are unrepresented by counsel, and (6) whether the matter is civil or criminal.

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<th>Rule 2.7</th>
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<td><strong>A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law.</strong></td>
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**Comment**

[1] Judges must be available to decide the matters that come before the court. Although there are times when disqualification is

Section 3B(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.
necessary to protect the rights of litigants and preserve public confidence in the independence, integrity, and impartiality of the judiciary, judges must be available to decide matters that come before the courts. Unwarranted disqualification may bring public disfavor to the court and to the judge personally. The dignity of the court, the judge’s respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge’s colleagues require that a judge not use disqualification to avoid cases that present difficult, controversial, or unpopular issues.

**RULE 2.8**

*Decorum, Demeanor, and Communication with Jurors*

(A) A judge shall require order and decorum in proceedings before the court.

(B) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge’s direction and control.

(C) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding.

**COMMENT**

[1] The duty to hear all proceedings with patience and courtesy is not inconsistent with the duty imposed in Rule 2.5 to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.

[2] Commending or criticizing jurors for their verdict may imply a judicial expectation in future cases and may impair a juror’s ability to be fair and impartial in a subsequent case.

**Section 3B(3)** A judge shall require order and decorum in proceedings before the judge.

**Section 3B(4)** A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge’s direction and control.

**Section 3B(11)** A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

**Section 3B(4) Commentary**

The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.

**Section 3B(11) Commentary**

Commending or criticizing jurors for their verdict may imply a judicial expectation in future cases and may impair a juror’s ability to be fair and impartial in a subsequent case.
[3] A judge who is not otherwise prohibited by law from doing so may meet with jurors who choose to remain after trial but should be careful not to discuss the merits of the case.

**RULE 2.9**

*Ex Parte Communications*

(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:

1. When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:
   - the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and
   - the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

2. A judge may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.

3. A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.

Section 3B(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

Section 3B(7)(a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

Section 3B(7)(a)(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

Section 3B(7)(a)(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

Section 3B(7)(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

Section 3B(7)(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.
| Section 3B(7)(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge. |
| (A) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so. |
| Section 3B(7)(e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so. |
| Section 3B(7) Commentary, sixth paragraph |
| A judge must not independently investigate facts in a case and must consider only the evidence presented. |
| Section 3B(7) Commentary, eighth paragraph |
| A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Section 3B(7) is not violated through law clerks or other personnel on the judge's staff. |
| Section 3B(7) Commentary, second paragraph |
| To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge. |
| Section 3B(7) Commentary, third paragraph |
| Whenever presence of a party or notice to a party is required by Section 3B(7), it is the party's lawyer, or if the party is unrepresented, the party, who is to be present or to whom notice is to be given. |
| Section 3B(7) Commentary, first paragraph |
| The proscription against communications concerning a proceeding includes communications with lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted by this Rule. |
| [4] A judge may initiate, permit, or consider ex parte communications expressly authorized by law, such as when serving on therapeutic or problem-solving courts, mental health |
courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.

[5] A judge may consult with other judges on pending matters, but must avoid ex parte discussions of a case with judges who have previously been disqualified from hearing the matter, and with judges who have appellate jurisdiction over the matter.

[6] The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.

[7] A judge may consult ethics advisory committees, outside counsel, or legal experts concerning the judge’s compliance with this Code. Such consultations are not subject to the restrictions of paragraph (A)(2).

**RULE 2.10**

*Judicial Statements on Pending and Impending Cases*

(A) A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impeding in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.

(B) A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

(C) A judge shall require court staff, court officials, and others subject to the judge’s direction and control to refrain from making

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statements that the judge would be prohibited from making by paragraphs (A) and (B).

reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This Section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.

(D) Notwithstanding the restrictions in paragraph (A), a judge may make public statements in the course of official duties, may explain court procedures, and may comment on any proceeding in which the judge is a litigant in a personal capacity.

Section 3B(9) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This Section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.

(E) Subject to the requirements of paragraph (A), a judge may respond directly or through a third party to allegations in the media or elsewhere concerning the judge's conduct in a matter.

Section 3B(10) Commentary
Sections 3B(9) and (10) restrictions on judicial speech are essential to the maintenance of the integrity, impartiality, and independence of the judiciary. A pending proceeding is one that has begun but not yet reached final disposition. An impending proceeding is one that is anticipated but not yet begun. The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition. Sections 3B(9) and (10) do not prohibit a judge from commenting on proceedings in which

COMMENT

[1] This Rule's restrictions on judicial speech are essential to the maintenance of the independence, integrity, and impartiality of the judiciary.
[2] This Rule does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity. In cases in which the judge is a litigant in an official capacity, such as a writ of mandamus, the judge must not comment publicly.

Section 3B(10) Commentary
Sections 3B(9) and (10) restrictions on judicial speech are essential to the maintenance of the integrity, impartiality, and independence of the judiciary. A pending proceeding is one that has begun but not yet reached final disposition. An impending proceeding is one that is anticipated but not yet begun. The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition. Sections 3B(9) and (10) do not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, but in cases such as a writ of mandamus where the judge is a litigant in an official capacity, the judge must not comment publicly. The conduct of lawyers relating to trial publicity is governed by [Rule 3.6 of the ABA Model Rules of Professional Conduct]. (Each jurisdiction should substitute an appropriate reference to its rule.)

[3] Depending upon the circumstances, the judge should consider whether it may be preferable for a third party, rather than the judge, to respond or issue statements in connection with allegations concerning the judge’s conduct in a matter.

RULE 2.11
Disqualification
(A) A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party

Section 3E. Disqualification.
(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

Section 3E(1)(a) the judge has a personal bias or prejudice
or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

(2) The judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is:

(a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;

(b) acting as a lawyer in the proceeding;

(c) a person who has more than a de minimis interest that could be substantially affected by the proceeding; or

(d) likely to be a material witness in the proceeding.

(3) The judge knows that he or she, individually or as a fiduciary, or the judge’s spouse, domestic partner, parent, or child, or any other member of the judge’s family residing in the judge’s household, has an economic interest in the subject matter in controversy or in a party to the proceeding.

(4) The judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous [insert number] year[s] made aggregate contributions to the judge's campaign in an amount that [is greater than $[insert amount] for an individual or $[insert amount] for an entity] [is reasonable and appropriate for an individual or an entity].

(5) The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

Section 3E(1)(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

Section 3E(1)(d)(i) is a party to the proceeding, or an officer, director or trustee of a party;

Section 3E(1)(d)(ii) is acting as a lawyer in the proceeding;

Section 3E(1)(d)(iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;

Section 3E(1)(d)(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

Section 3E(1)(c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding;

Section 3E(1)(e) the judge knows or learns by means of a timely motion that a party or a party's lawyer has within the previous [ ] year[s] made aggregate contributions to the judge's campaign in an amount that is greater than [[$ ] for an individual or ($ ] for an entity] [[is reasonable and appropriate for an individual or an entity].

Section 3E(1)(f) the judge, while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to
(i) an issue in the proceeding; or
(ii) the controversy in the proceeding.
(6) The judge:
(a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;

(b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;

(c) was a material witness concerning the matter; or

(d) previously presided as a judge over the matter in another court.

(B) A judge shall keep informed about the judge’s personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge’s spouse or domestic partner and minor children residing in the judge’s household.

(C) A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge’s disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record.

Section 3E(1)(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

Section 3E(1)(b) Commentary
A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of Section 3E(1)(b); a judge formerly employed by a government agency, however, should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association.

Section 3E(1)(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

Section 3E(2) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household.

Section 3F. Remittal of Disqualification. A judge disqualified by the terms of Section 3E may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the
of the proceeding.

**COMMENT**

[1] Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (6) apply. In many jurisdictions, the term "recusal" is used interchangeably with the term "disqualification."

Section 3E(1) Commentary, first paragraph
Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules in Section 3E(1) apply. For example, if a judge were in the process of negotiating for employment with a law firm, the judge would be disqualified from any matters in which that law firm appeared, unless the disqualification was waived by the parties after disclosure by the judge.

[2] A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.

[3] The rule of necessity may override the rule of disqualification.
By decisional law, the rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In matters that require immediate action, the judge must disclose on the record the basis for possible disqualification and make reasonable efforts to transfer the matter to another judge as soon as practicable.

[4] The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not itself disqualify the judge. If, however, the judge’s impartiality might reasonably be questioned under paragraph (A), or the relative is known by the judge to have an interest in the law firm that could be substantially affected by the proceeding under paragraph (A)(2)(c), the judge’s disqualification is required.

Section 3E(1)(f) Commentary
The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "the judge's impartiality might reasonably be questioned" under Section 3E(1), or that the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Section 3E(1)(d)(iii) may require the judge's disqualification.

[5] A judge should disclose on the record information that the

Section 3E(1) Commentary, second paragraph
judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.

[6] “Economic interest,” as set forth in the Terminology section, means ownership of more than a de minimis legal or equitable interest. Except for situations in which a judge participates in the management of such a legal or equitable interest, or the interest could be substantially affected by the outcome of a proceeding before a judge, it does not include:
(1) an interest in the individual holdings within a mutual or common investment fund;
(2) an interest in securities held by an educational, religious, charitable, fraternal, or civic organization in which the judge or the judge’s spouse, domestic partner, parent, or child serves as a director, officer, advisor, or other participant;
(3) a deposit in a financial institution or deposits or proprietary interests the judge may maintain as a member of a mutual savings association or credit union, or similar proprietary interests; or
(4) an interest in the issuer of government securities held by the judge.

**RULE 2.12**

**Supervisory Duties**

(A) A judge shall require court staff, court officials, and others subject to the judge’s direction and control to act in a manner consistent with the judge’s obligations under this Code.

(B) A judge with supervisory authority for the performance of other judges shall take reasonable measures to ensure that those judges properly discharge their judicial responsibilities, including the prompt disposition of matters before them.

**COMMENT**

[1] A judge is responsible for his or her own conduct and for the

A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

Section 3C(2) A judge shall require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

Section 3C(3) A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.
conduct of others, such as staff, when those persons are acting at the judge’s direction or control. A judge may not direct court personnel to engage in conduct on the judge’s behalf or as the judge’s representative when such conduct would violate the Code if undertaken by the judge.

[2] Public confidence in the judicial system depends upon timely justice. To promote the efficient administration of justice, a judge with supervisory authority must take the steps needed to ensure that judges under his or her supervision administer their workloads promptly.

**RULE 2.13**

*Administrative Appointments*

(A) In making administrative appointments, a judge:
(1) shall exercise the power of appointment impartially and on the basis of merit; and
(2) shall avoid nepotism, favoritism, and unnecessary appointments.

(B) A judge shall not appoint a lawyer to a position if the judge either knows that the lawyer, or the lawyer’s spouse or domestic partner, has contributed more than $[insert amount] within the prior [insert number] year[s] to the judge’s election campaign, or learns of such a contribution by means of a timely motion by a party or other person properly interested in the matter, unless:
(1) the position is substantially uncompensated;
(2) the lawyer has been selected in rotation from a list of qualified and available lawyers compiled without regard to their having made political contributions; or
(3) the judge or another presiding or administrative judge affirmatively finds that no other lawyer is willing, competent, and able to accept the position.

(C) A judge shall not approve compensation of appointees beyond the fair value of services rendered.

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Section 3C(4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

Section 3C(5) A judge shall not appoint a lawyer to a position if the judge either knows that the lawyer has contributed more than $[ ] within the prior [ ] years to the judge’s election campaign, or learns of such a contribution by means of a timely motion by a party or other person properly interested in the matter, unless:
(1) the position is substantially uncompensated;
(2) the lawyer has been selected in rotation from a list of qualified and available lawyers compiled without regard to their having made political contributions; or
(3) the judge or another presiding or administrative judge affirmatively finds that no other lawyer is willing, competent, and able to accept the position.

Section 3C(4) A judge shall not make unnecessary appointments.
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<td>[1] Appointees of a judge include assigned counsel, officials such as referees, commissioners, special masters, receivers, and guardians, and personnel such as clerks, secretaries, and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by paragraph (A).</td>
<td>Appointees of a judge include assigned counsel, officials such as referees, commissioners, special masters, receivers and guardians and personnel such as clerks, secretaries and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by Section 3C(4).</td>
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<td>[2] Unless otherwise defined by law, nepotism is the appointment or hiring of any relative within the third degree of relationship of either the judge or the judge’s spouse or domestic partner, or the spouse or domestic partner of such relative.</td>
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<td>[3] The rule against making administrative appointments of lawyers who have contributed in excess of a specified dollar amount to a judge’s election campaign includes an exception for positions that are substantially uncompensated, such as those for which the lawyer’s compensation is limited to reimbursement for out-of-pocket expenses.</td>
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**RULE 2.14**

*Disability and Impairment*

A judge having a reasonable belief that the performance of a lawyer or another judge is impaired by drugs or alcohol, or by a mental, emotional, or physical condition, shall take appropriate action, which may include a confidential referral to a lawyer or judicial assistance program.

| COMMENT | |
|---------| |
| [1] “Appropriate action” means action intended and reasonably likely to help the judge or lawyer in question address the problem and prevent harm to the justice system. Depending upon the circumstances, appropriate action may include but is not limited | |
to speaking directly to the impaired person, notifying an individual with supervisory responsibility over the impaired person, or making a referral to an assistance program.

[2] Taking or initiating corrective action by way of referral to an assistance program may satisfy a judge’s responsibility under this Rule. Assistance programs have many approaches for offering help to impaired judges and lawyers, such as intervention, counseling, or referral to appropriate health care professionals. Depending upon the gravity of the conduct that has come to the judge’s attention, however, the judge may be required to take other action, such as reporting the impaired judge or lawyer to the appropriate authority, agency, or body. See Rule 2.15.

<table>
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<tr>
<th>RULE 2.15</th>
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<tr>
<td><strong>Responding to Judicial and Lawyer Misconduct</strong></td>
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<tr>
<td>(A) A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question regarding the judge’s honesty, trustworthiness, or fitness as a judge in other respects shall inform the appropriate authority.</td>
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<tr>
<td>(B) A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority.</td>
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<tr>
<td>(C) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code shall take appropriate action.</td>
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Section 3D(1) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question as to the other judge’s fitness for office shall inform the appropriate authority.

Section 3D(1) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question as to the other judge’s fitness for office shall inform the appropriate authority.

Section 3D(2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct [substitute correct title if the applicable rules of lawyer conduct have a different title] should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct [substitute correct title if the applicable rules of lawyer conduct have a different title] that raises a substantial question as to the
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<th>(D) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct shall take appropriate action.</th>
<th>lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority.</th>
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<tr>
<td>Section 3D(2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct [substitute correct title if the applicable rules of lawyer conduct have a different title] should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct [substitute correct title if the applicable rules of lawyer conduct have a different title] that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority.</td>
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**COMMENT**

[1] Taking action to address known misconduct is a judge's obligation. Paragraphs (A) and (B) impose an obligation on the judge to report to the appropriate disciplinary authority the known misconduct of another judge or a lawyer that raises a substantial question regarding the honesty, trustworthiness, or fitness of that judge or lawyer. Ignoring or denying known misconduct among one's judicial colleagues or members of the legal profession undermines a judge's responsibility to participate in efforts to ensure public respect for the justice system. This Rule limits the reporting obligation to those offenses that an independent judiciary must vigorously endeavor to prevent.

[2] A judge who does not have actual knowledge that another judge or a lawyer may have committed misconduct, but receives information indicating a substantial likelihood of such misconduct, is required to take appropriate action under paragraphs (C) and (D). Appropriate action may include, but is not limited to, communicating directly with the judge who may have violated this Code, communicating with a supervising judge, or reporting the suspected violation to the appropriate authority or other agency or body. Similarly, actions to be taken in response to

Section 3D Commentary
Appropriate action may include direct communication with the judge or lawyer who has committed the violation, other direct action if available, and reporting the violation to the appropriate authority or other agency or body.
information indicating that a lawyer has committed a violation of the Rules of Professional Conduct may include but are not limited to communicating directly with the lawyer who may have committed the violation, or reporting the suspected violation to the appropriate authority or other agency or body.

**Rule 2.16**

*Cooperation with Disciplinary Authorities*

(A) A judge shall cooperate and be candid and honest with judicial and lawyer disciplinary agencies.

(B) A judge shall not retaliate, directly or indirectly, against a person known or suspected to have assisted or cooperated with an investigation of a judge or a lawyer.

**Comment**

[1] Cooperation with investigations and proceedings of judicial and lawyer discipline agencies, as required in paragraph (A), instills confidence in judges’ commitment to the integrity of the judicial system and the protection of the public.
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<tr>
<td><strong>CANON 3</strong></td>
<td><strong>CANON 4</strong></td>
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<td>A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.</td>
<td>A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations.</td>
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<tr>
<td><strong>RULE 3.1</strong></td>
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<tr>
<td>Extrajudicial Activities in General</td>
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<tr>
<td>A judge may engage in extrajudicial activities, except as prohibited by law or this Code. However, when engaging in extrajudicial activities, a judge shall not:</td>
<td>Section 4A. Extra-judicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do not:</td>
</tr>
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<td>(A) participate in activities that will interfere with the proper performance of the judge’s judicial duties;</td>
<td>Section 4A(3) interfere with the proper performance of judicial duties.</td>
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<td>(B) participate in activities that will lead to frequent disqualification of the judge;</td>
<td>Section 4A(3) interfere with the proper performance of judicial duties.</td>
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<td>(C) participate in activities that would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality;</td>
<td>Section 4A(1) cast reasonable doubt on the judge’s capacity to act impartially as a judge;</td>
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<tr>
<td>(D) engage in conduct that would appear to a reasonable person to be coercive; or</td>
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<td>(E) make use of court premises, staff, stationery, equipment, or other resources, except for incidental use for activities that concern the law, the legal system, or the administration of justice, or unless such additional use is permitted by law.</td>
<td>Section 2B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.</td>
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**COMMENT**

[1] To the extent that time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate extrajudicial activities. Judges are uniquely
qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects. In addition, judges are permitted and encouraged to engage in educational, religious, charitable, fraternal or civic extrajudicial activities not conducted for profit, even when the activities do not involve the law. See Rule 3.7.

including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that time permits, a judge is encouraged to do so, either independently or through a bar association, judicial conference or other organization dedicated to the improvement of the law. Judges may participate in efforts to promote the fair administration of justice, the independence of the judiciary and the integrity of the legal profession and may express opposition to the persecution of lawyers and judges in other countries because of their professional activities.

| [2] Participation in both law-related and other extrajudicial activities helps integrate judges into their communities, and furthers public understanding of and respect for courts and the judicial system. | Section 4A Commentary, first paragraph
Complete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives. |
| [3] Discriminatory actions and expressions of bias or prejudice by a judge, even outside the judge’s official or judicial actions, are likely to appear to a reasonable person to call into question the judge’s integrity and impartiality. Examples include jokes or other remarks that demean individuals based upon their race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, or socioeconomic status. For the same reason, a judge’s extrajudicial activities must not be conducted in connection or affiliation with an organization that practices invidious discrimination. See Rule 3.6. | Section 4A Commentary, second paragraph
Expressions of bias or prejudice by a judge, even outside the judge's judicial activities, may cast reasonable doubt on the judge's capacity to act impartially as a judge. Expressions which may do so include jokes or other remarks demeaning individuals on the basis of their race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status. See Section 2C and accompanying Commentary. |
| [4] While engaged in permitted extrajudicial activities, judges must not coerce others or take action that would reasonably be perceived as coercive. For example, depending upon the circumstances, a judge’s solicitation of contributions or memberships for an organization, even as permitted by Rule 3.7(A), might create the risk that the person solicited would feel obligated to respond favorably, or would do so to curry favor with the judge. |
**Rule 3.2**

*Appearances before Governmental Bodies and Consultation with Government Officials*

A judge shall not appear voluntarily at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interests.

(A) in connection with matters concerning the law, the legal system, or the administration of justice;

(B) in connection with matters about which the judge acquired knowledge or expertise in the course of the judge's judicial duties; or

(C) when the judge is acting pro se in a matter involving the judge's legal or economic interests, or when the judge is acting in a fiduciary capacity.

**Comment**

[1] Judges possess special expertise in matters of law, the legal system, and the administration of justice, and may properly share that expertise with governmental bodies and executive or legislative branch officials.

[2] In appearing before governmental bodies or consulting with government officials, judges must be mindful that they remain subject to other provisions of this Code, such as Rule 1.3, prohibiting judges from using the prestige of office to advance their own or others' interests, Rule 2.10, governing public comment on pending and impending matters, and Rule 3.1(C), prohibiting judges from engaging in extrajudicial activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality.

Section 4C(1) A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interests.

Section 4C(1) Commentary

See Section 2B regarding the obligation to avoid improper influence.
[3] In general, it would be an unnecessary and unfair burden to prohibit judges from appearing before governmental bodies or consulting with government officials on matters that are likely to affect them as private citizens, such as zoning proposals affecting their real property. In engaging in such activities, however, judges must not refer to their judicial positions, and must otherwise exercise caution to avoid using the prestige of judicial office.

**Rule 3.3**

*Testifying as a Character Witness*

A judge shall not testify as a character witness in a judicial, administrative, or other adjudicatory proceeding or otherwise vouch for the character of a person in a legal proceeding, except when duly summoned.

**Comment**

[1] A judge who, without being subpoenaed, testifies as a character witness abuses the prestige of judicial office to advance the interests of another. See Rule 1.3. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.

**Section 2B**

A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

**Section 2B Commentary, fifth paragraph**

A judge must not testify voluntarily as a character witness because to do so may lend the prestige of the judicial office in support of the party for whom the judge testifies. Moreover, when a judge testifies as a witness, a lawyer who regularly appears before the judge may be placed in the awkward position of cross-examining the judge. A judge may, however, testify when properly summoned. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.

**Rule 3.4**

*Appointments to Governmental Positions*

A judge shall not accept appointment to a governmental committee, board, commission, or other governmental position, unless it is one that concerns the law, the legal system, or the administration of justice.

**Section 4C(2)**

A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice. A judge may, however, represent a country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities.
**COMMENT**  
[1] Rule 3.4 implicitly acknowledges the value of judges accepting appointments to entities that concern the law, the legal system, or the administration of justice. Even in such instances, however, a judge should assess the appropriateness of accepting an appointment, paying particular attention to the subject matter of the appointment and the availability and allocation of judicial resources, including the judge's time commitments, and giving due regard to the requirements of the independence and impartiality of the judiciary.

[2] A judge may represent his or her country, state, or locality on ceremonial occasions or in connection with historical, educational, or cultural activities. Such representation does not constitute acceptance of a government position.

**RULE 3.5**  
*Use of Nonpublic Information*

A judge shall not intentionally disclose or use nonpublic information acquired in a judicial capacity for any purpose unrelated to the judge's judicial duties.

**COMMENT**  
[1] In the course of performing judicial duties, a judge may acquire information of commercial or other value that is unavailable to the public. The judge must not reveal or use such information for personal gain or for any purpose unrelated to his or her judicial duties.

[2] This rule is not intended, however, to affect a judge's ability to act on information as necessary to protect the health or safety of the judge or a member of a judge's family, court personnel, or

**Section 4C(2) Commentary, first paragraph**  
Section 4C(2) prohibits a judge from accepting any governmental position except one relating to the law, legal system or administration of justice as authorized by Section 4C(3). The appropriateness of accepting extra-judicial assignments must be assessed in light of the demands on judicial resources created by crowded dockets and the need to protect the courts from involvement in extra-judicial matters that may prove to be controversial. Judges should not accept governmental appointments that are likely to interfere with the effectiveness and independence of the judiciary.

**Section 4C(2) A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice. A judge may, however, represent a country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities.

**Section 3B(12) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.**

**Section 4D(1) Commentary, second paragraph**  
When a judge acquires in a judicial capacity information, such as material contained in filings with the court, that is not yet generally known, the judge must not use the information for private gain. See Section 2B; see also Section 3B(11).
other judicial officers if consistent with other provisions of this Code.

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<tr>
<th>Rule 3.6</th>
<th>Section 2C. A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin.</th>
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<tr>
<td><strong>Affiliation with Discriminatory Organizations</strong>&lt;br&gt; (A) A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation.</td>
<td><strong>Section 2C Commentary, third paragraph</strong>&lt;br&gt; When a person who is a judge in the date this Code becomes effective [in the jurisdiction in which the person is a judge] learns that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Section 2C or under Canon 2 and Section 2A, the judge is permitted, in lieu of resigning, to make immediate efforts to have the organization discontinue its invidiously discriminatory practices, but is required to suspend participation in any other activities of the organization. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible (and in all events within a year of the judge’s first learning of the practices), the judge is required to resign immediately from the organization.</td>
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<tr>
<td>(B) A judge shall not use the benefits or facilities of an organization if the judge knows or should know that the organization practices invidious discrimination on one or more of the bases identified in paragraph (A). A judge’s attendance at an event in a facility of an organization that the judge is not permitted to join is not a violation of this Rule when the judge’s attendance is an isolated event that could not reasonably be perceived as an endorsement of the organization’s practices.</td>
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**Comment**<br> [1] A judge’s public manifestation of approval of invidious discrimination on any basis gives rise to the appearance of impropriety and diminishes public confidence in the integrity and impartiality of the judiciary. A judge’s membership in an organization that practices invidious discrimination creates the perception that the judge’s impartiality is impaired.

| **Section 2C Commentary, first and second paragraphs**<br> Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired. Section 2C refers to the current practices of the organization. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of |
legitimate common interest to its members, or that it is in fact and
effect an intimate, purely private organization whose membership
limitations could not be constitutionally prohibited. Absent such
factors, an organization is generally said to discriminate
invidiously if it arbitrarily excludes from membership on the basis
of race, religion, sex or national origin persons who would
otherwise be admitted to membership. See New York State Club
Ass’n, Inc. v. City of New York, 108 S. Ct. 2225, 101 L. Ed. 2d 1
(1988); Board of Directors of Rotary International v. Rotary Club
of Duarte, 481 U.S. 537, 107 S. Ct. 1940 (1987), 95 L. Ed. 2d
474; Roberts v. United States Jaycees, 468 U.S. 609, 104 S. Ct.

Although Section 2C relates only to membership in organizations
that invidiously discriminate on the basis of race, sex, religion or
national origin, a judge's membership in an organization that
engages in any discriminatory membership practices prohibited
by the law of the jurisdiction also violates Canon 2 and Section
2A and gives the appearance of impropriety. In addition, it would
be a violation of Canon 2 and Section 2A for a judge to arrange a
meeting at a club that the judge knows practices invidious
discrimination on the basis of race, sex, religion or national origin
in its membership or other policies, or for the judge to regularly
use such a club. Moreover, public manifestation by a judge of the
judge's knowing approval of invidious discrimination on any
basis gives the appearance of impropriety under Canon 2 and
diminishes public confidence in the integrity and impartiality of
the judiciary, in violation of Section 2A.

[2] An organization is generally said to discriminate invidiously if
it arbitrarily excludes from membership on the basis of race, sex,
gender, religion, national origin, ethnicity, or sexual orientation
persons who would otherwise be eligible for admission. Whether
an organization practices invidious discrimination is a complex
question to which judges should be attentive. The answer cannot

Section 2C Commentary, first paragraph
Membership of a judge in an organization that practices invidious
discrimination gives rise to perceptions that the judge's
impartiality is impaired. Section 2C refers to the current practices
of the organization. Whether an organization practices invidious
discrimination is often a complex question to which judges should
be determined from a mere examination of an organization’s current membership rolls, but rather, depends upon how the organization selects members, as well as other relevant factors, such as whether the organization is dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members, or whether it is an intimate, purely private organization whose membership limitations could not constitutionally be prohibited.

be sensitive. The answer cannot be determined from a mere examination of an organization’s current membership rolls but rather depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex or national origin persons who would otherwise be admitted to membership. See New York State Club Ass’n, Inc. v. City of New York, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988); Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537, 107 S. Ct. 1940 (1987), 95 L. Ed. 2d 474; Roberts v. United States Jaycees, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984).

[3] When a judge learns that an organization to which the judge belongs engages in invidious discrimination, the judge must resign immediately from the organization.

Section 2C Commentary, third paragraph
When a person who is a judge in the date this Code becomes effective [in the jurisdiction in which the person is a judge] learns that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Section 2C or under Canon 2 and Section 2A, the judge is permitted, in lieu of resigning, to make immediate efforts to have the organization discontinue its invidiously discriminatory practices, but is required to suspend participation in any other activities of the organization. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible (and in all events within a year of the judge’s first learning of the practices), the judge is required to resign immediately from the organization.

[4] A judge’s membership in a religious organization as a lawful exercise of the freedom of religion is not a violation of this Rule.

Section 2C Commentary, first paragraph
Membership of a judge in an organization that practices invidious
discrimination gives rise to perceptions that the judge's impartiality is impaired. Section 2C refers to the current practices of the organization. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex or national origin persons who would otherwise be admitted to membership. See New York State Club Ass'n, Inc. v. City of New York, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988); Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537, 107 S. Ct. 1940 (1987), 95 L. Ed. 2d 474; Roberts v. United States Jaycees, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984).

5 This Rule does not apply to national or state military service.
**RULE 3.7**

**Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities**

(A) Subject to the requirements of Rule 3.1, a judge may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including but not limited to the following activities:

1. Assisting such an organization or entity in planning related to fund-raising, and participating in the management and investment of the organization’s or entity’s funds;

2. Soliciting contributions for such an organization or entity, but only from members of the judge’s family, or from judges over whom the judge does not exercise supervisory or appellate authority;

3. Soliciting membership for such an organization or entity, even though the membership dues or fees generated may be used to support the objectives of the organization or entity, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice;

4. Appearing or speaking at, receiving an award or other recognition at, being featured on the program of, and permitting his or her title to be used in connection with an event of such an organization or entity, but if the event serves a fund-raising

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Section 4C(3) A judge may 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, fraternal or civic organization not conducted for profit, subject to the following limitations and the other requirements of this Code.

Section 4C(3)(b)(i) may assist such an organization in planning fund-raising and may participate in the management and investment of the organization’s funds, but shall not personally participate in the solicitation of funds or other fund-raising activities, except that a judge may solicit funds from other judges over whom the judge does not exercise supervisory or appellate authority;

Section 4C(3)(b)(iii) shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or, except as permitted in Section 4C(3)(b)(i), if the membership solicitation is essentially a fund-raising mechanism;
purpose, the judge may participate only if the event concerns the law, the legal system, or the administration of justice;

(5) making recommendations to such a public or private fund-granting organization or entity in connection with its programs and activities, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice; and

Section 4C(3)(b)(ii) may make recommendations to public and private fund-granting organizations on projects and programs concerning the law, the legal system or the administration of justice;

(6) serving as an officer, director, trustee, or nonlegal advisor of such an organization or entity, unless it is likely that the organization or entity:

Section 4C(3)(a) A judge shall not serve as an officer, director, trustee or non-legal advisor if it is likely that the organization

(a) will be engaged in proceedings that would ordinarily come before the judge; or

Section 4C(3)(a)(i) will be engaged in proceedings that would ordinarily come before the judge, or

(b) will frequently be engaged in adversary proceedings in the court of which the judge is a member, or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

Section 4C(3)(a)(ii) will be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

(B) A judge may encourage lawyers to provide pro bono publico legal services.

COMMENT

[1] The activities permitted by paragraph (A) generally include those sponsored by or undertaken on behalf of public or private not-for-profit educational institutions, and other not-for-profit organizations, including law-related, charitable, and other organizations.

[2] Even for law-related organizations, a judge should consider whether the membership and purposes of the organization, or the nature of the judge’s participation in or association with the organization, would conflict with the judge’s obligation to refrain from activities that reflect adversely upon a judge’s independence, integrity, and impartiality.

Section 4C(3)(a) Commentary

The changing nature of some organizations and of their relationship to the law makes it necessary for a judge regularly to reexamine the activities of each organization with which the judge is affiliated to determine if it is proper for the judge to continue the affiliation. For example, in many jurisdictions charitable hospitals are now more frequently in court than in the past. Similarly, the boards of some legal aid organizations now make policy decisions that may have political significance or
imply commitment to causes that may come before the courts for adjudication.

Section 4C(3)(b) Commentary, first paragraph
A judge may solicit membership or endorse or encourage membership efforts for an organization devoted to the improvement of the law, the legal system or the administration of justice or a nonprofit educational, religious, charitable, fraternal or civic organization as long as the solicitation cannot reasonably be perceived as coercive and is not essentially a fund-raising mechanism. Solicitation of funds for an organization and solicitation of memberships similarly involve the danger that the person solicited will feel obligated to respond favorably to the solicitor if the solicitor is in a position of influence or control. A judge must not engage in direct, individual solicitation of funds or memberships in person, in writing or by telephone except in the following cases: 1) a judge may solicit for funds or memberships other judges over whom the judge does not exercise supervisory or appellate authority, 2) a judge may solicit other persons for membership in the organizations described above if neither those persons nor persons with whom they are affiliated are likely ever to appear before the court on which the judge serves and 3) a judge who is an officer of such an organization may send a general membership solicitation mailing over the judge’s signature.

[3] Mere attendance at an event, whether or not the event serves a fund-raising purpose, does not constitute a violation of paragraph 4(A). It is also generally permissible for a judge to serve as an usher or a food server or preparer, or to perform similar functions, at fund-raising events sponsored by educational, religious, charitable, fraternal, or civic organizations. Such activities are not solicitation and do not present an element of coercion or abuse the prestige of judicial office.

Section 4C(3)(b) Commentary, third paragraph
A judge must not be a speaker or guest of honor at an organization’s fund-raising event, but mere attendance at such an event is permissible if otherwise consistent with this Code.
[4] Identification of a judge’s position in educational, religious, charitable, fraternal, or civic organizations on letterhead used for fund-raising or membership solicitation does not violate this Rule. The letterhead may list the judge’s title or judicial office if comparable designations are used for other persons.

Section 4C(3)(b) Commentary, second paragraph
Use of an organization letterhead for fund-raising or membership solicitation does not violate Section 4C(3)(b) provided the letterhead lists only the judge's name and office or other position in the organization, and, if comparable designations are listed for other persons, the judge's judicial designation. In addition, a judge must also make reasonable efforts to ensure that the judge's staff, court officials and others subject to the judge's direction and control do not solicit funds on the judge's behalf for any purpose, charitable or otherwise.

[5] In addition to appointing lawyers to serve as counsel for indigent parties in individual cases, a judge may promote broader access to justice by encouraging lawyers to participate in pro bono publico legal services, if in doing so the judge does not employ coercion, or abuse the prestige of judicial office. Such encouragement may take many forms, including providing lists of available programs, training lawyers to do pro bono publico legal work, and participating in events recognizing lawyers who have done pro bono publico work.

Rule 3.8
Appointments to Fiduciary Positions
(A) A judge shall not accept appointment to serve in a fiduciary position, such as executor, administrator, trustee, guardian, attorney in fact, or other personal representative, except for the estate, trust, or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties.

Section 4E(1) A judge shall not serve as executor, administrator or other personal representative, trustee, guardian, attorney in fact or other fiduciary, except for the estate, trust or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties.

(B) A judge shall not serve in a fiduciary position if the judge as fiduciary will likely be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves, or one under its appellate jurisdiction.

Section 4E(2) A judge shall not serve as a fiduciary if it is likely that the judge as a fiduciary will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.
(C) A judge acting in a fiduciary capacity shall be subject to the same restrictions on engaging in financial activities that apply to a judge personally.

Section 4E(3) The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary capacity.

(D) If a person who is serving in a fiduciary position becomes a judge, he or she must comply with this Rule as soon as reasonably practicable, but in no event later than [one year] after becoming a judge.

Section 4E Commentary, first paragraph
The Time for Compliance provision of this Code (Application, Section F) postpones the time for compliance with certain provisions of this Section in some cases.

COMMENT
[1] A judge should recognize that other restrictions imposed by this Code may conflict with a judge’s obligations as a fiduciary; in such circumstances, a judge should resign as fiduciary. For example, serving as a fiduciary might require frequent disqualification of a judge under Rule 2.1I because a judge is deemed to have an economic interest in shares of stock held by a trust if the amount of stock held is more than de minimis.

Section 4E Commentary, second paragraph
The restrictions imposed by this Canon may conflict with the judge’s obligation as a fiduciary. For example, a judge should resign as trustee if detriment to the trust would result from divestiture of holdings the retention of which would place the judge in violation of Section 4D(4).

RULE 3.9
Service as Arbitrator or Mediator
A judge shall not act as an arbitrator or a mediator or perform other judicial functions apart from the judge’s official duties unless expressly authorized by law.

Section 4F. Service as Arbitrator or Mediator. A judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law.

COMMENT
[1] This Rule does not prohibit a judge from participating in arbitration, mediation, or settlement conferences performed as part of assigned judicial duties. Rendering dispute resolution services apart from those duties, whether or not for economic gain, is prohibited unless it is expressly authorized by law.

Section 4F Commentary
Section 4F does not prohibit a judge from participating in arbitration, mediation or settlement conferences performed as part of judicial duties.

RULE 3.10
Practice of Law
A judge shall not practice law. A judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge’s family, but is prohibited

Section 4G. Practice of Law. A judge shall not practice law. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge’s family.
from serving as the family member’s lawyer in any forum. Section 4G Commentary, second paragraph

The Code allows a judge to give legal advice to and draft legal documents for members of the judge's family, so long as the judge receives no compensation. A judge must not, however, act as an advocate or negotiator for a member of the judge's family in a legal matter.

**COMMENT**

[1] A judge may act pro se in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with governmental bodies. A judge must not use the prestige of office to advance the judge's personal or family interests. See Rule 1.3.

Section 4G Commentary, first paragraph

This prohibition refers to the practice of law in a representative capacity and not in a pro se capacity. A judge may act for himself or herself in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with legislative and other governmental bodies. However, in so doing, a judge must not abuse the prestige of office to advance the interests of the judge or the judge's family. See Section 2(B).

**RULE 3.11**

*Financial, Business, or Remunerative Activities*

(A) A judge may hold and manage investments of the judge and members of the judge's family.

Section 4D(2) A judge may, subject to the requirements of this Code, hold and manage investments of the judge and members of the judge's family, including real estate, and engage in other remunerative activity.

(B) A judge shall not serve as an officer, director, manager, general partner, advisor, or employee of any business entity except that a judge may manage or participate in:

Section 4D(3) A judge shall not serve as an officer, director, manager, general partner, advisor or employee of any business entity except that a judge may, subject to the requirements of this Code, manage and participate in:

1. A business closely held by the judge or members of the judge’s family; or

Section 4D(3)(a) A business closely held by the judge or members of the judge’s family, or

2. A business entity primarily engaged in investment of the financial resources of the judge or members of the judge’s family.

Section 4D(3)(b) A business entity primarily engaged in investment of the financial resources of the judge or members of the judge’s family.

(C) A judge shall not engage in financial activities permitted under paragraphs (A) and (B) if they will:

Section 4D(1) A judge shall not engage in financial and business dealings that:

1. Interfere with the proper performance of judicial duties;

Section 4D(1) Commentary, fourth paragraph

Participation by a judge in financial and business dealings is
subject to the general prohibitions in Section 4A against activities that tend to reflect adversely on impartiality, demean the judicial office, or interfere with the proper performance of judicial duties. Such participation is also subject to the general prohibition in Canon 2 against activities involving impropriety or the appearance of impropriety and the prohibition in Section 2B against the misuse of the prestige of judicial office. In addition, a judge must maintain high standards of conduct in all of the judge's activities, as set forth in Canon 1. See Commentary for Section 4B regarding use of the phrase "subject to the requirements of this Code."

Section 4D(3) Commentary, second paragraph
Although participation by a judge in a closely-held family business might otherwise be permitted by Section 4D(3), a judge may be prohibited from participation by other provisions of this Code when, for example, the business entity frequently appears before the judge's court or the participation requires significant time away from judicial duties. Similarly, a judge must avoid participating in a closely-held family business if the judge's participation would involve misuse of the prestige of judicial office.

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<th>(2) lead to frequent disqualification of the judge;</th>
<th>Section 4D(4) A judge shall manage the judge's investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge shall divest himself or herself of investments and other financial interests that might require frequent disqualification.</th>
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<td>(3) involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves; or</td>
<td>Section 4D(1)(b) involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.</td>
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<td>(4) result in violation of other provisions of this Code.</td>
<td>Section 4D(1) Commentary, third paragraph</td>
</tr>
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**COMMENT**
[1] Judges are generally permitted to engage in financial activities, including managing real estate and other investments for themselves or for members of their families. Participation in these activities, like participation in other extrajudicial activities, is subject to the requirements of this Code. For example, it would be improper for a judge to spend so much time on business activities that it interferes with the performance of judicial duties. See Rule 2.1. Similarly, it would be improper for a judge to use his or her official title or appear in judicial robes in business advertising, or to conduct his or her business or financial affairs in such a way that disqualification is frequently required. See Rules 1.3 and 2.11.

A judge must avoid financial and business dealings that involve the judge in frequent transactions or continuing business relationships with persons likely to come either before the judge personally or before other judges on the judge's court. In addition, a judge should discourage members of the judge's family from engaging in dealings that would reasonably appear to exploit the judge's judicial position. This rule is necessary to avoid creating an appearance of exploitation of office or favoritism and to minimize the potential for disqualification. With respect to affiliation of relatives of judge with law firms appearing before the judge, see Commentary to Section 3E(1) relating to disqualification.

Section 4D(2) Commentary
This Section provides that, subject to the requirements of this Code, a judge may hold and manage investments owned solely by the judge, investments owned solely by a member or members of the judge's family, and investments owned jointly by the judge and members of the judge's family.

Section 4D(3) Commentary, first paragraph
Subject to the requirements of this Code, a judge may participate in a business that is closely held either by the judge alone, by members of the judge's family, or by the judge and members of the judge's family.

[2] As soon as practicable without serious financial detriment, the judge must divest himself or herself of investments and other financial interests that might require frequent disqualification or otherwise violate this Rule.

Canon 4D(4) A judge shall manage the judge's investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge shall divest himself or herself of investments and other financial interests that might require frequent disqualification.

Section 4H(1) Compensation and Reimbursement. A judge may
### Compensation for Extrajudicial Activities

A judge may accept reasonable compensation for extrajudicial activities permitted by this Code or other law unless such acceptance would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality.

receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety.

(a) Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activity.

### COMMENT

[1] A judge is permitted to accept honoraria, stipends, fees, wages, salaries, royalties, or other compensation for speaking, teaching, writing, and other extrajudicial activities, provided the compensation is reasonable and commensurate with the task performed. The judge should be mindful, however, that judicial duties must take precedence over other activities. See Rule 2.1.

Section 4H Commentary, second paragraph

The Code does not prohibit a judge from accepting honoraria or speaking fees provided that the compensation is reasonable and commensurate with the task performed. A judge should ensure, however, that no conflicts are created by the arrangement. A judge must not appear to trade on the judicial position for personal advantage. Nor should a judge spend significant time away from court duties to meet speaking or writing commitments for compensation. In addition, the source of the payment must not raise any question of undue influence or the judge's ability or willingness to be impartial.

[2] Compensation derived from extrajudicial activities may be subject to public reporting. See Rule 3.15.

Section 4H Commentary, first paragraph

See Section 4D(5) regarding reporting of gifts, bequests and loans.

### RULE 3.13

**Acceptance and Reporting of Gifts, Loans, Bequests, Benefits, or Other Things of Value**

(A) A judge shall not accept any gifts, loans, bequests, benefits, or other things of value, if acceptance is prohibited by law or would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality.

Section 4D(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 for:

(B) Unless otherwise prohibited by law, or by paragraph (A), a judge may accept the following without publicly reporting such acceptance:

Section 4D(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 for:
<p>| (1) items with little intrinsic value, such as plaques, certificates, trophies, and greeting cards; | Section 4D(5)(e) a gift, bequest, favor or loan from a relative or close personal friend whose appearance or interest in a case would in any event require disqualification under Section 3E; |
| (2) gifts, loans, bequests, benefits, or other things of value from friends, relatives, or other persons, including lawyers, whose appearance or interest in a proceeding pending or impending before the judge would in any event require disqualification of the judge under Rule 2.11; | Section 4D(5)(e) ordinary social hospitality; |
| (3) ordinary social hospitality; | Section 4D(5)(f) a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; |
| (4) commercial or financial opportunities and benefits, including special pricing and discounts, and loans from lending institutions in their regular course of business, if the same opportunities and benefits or loans are made available on the same terms to similarly situated persons who are not judges; | Section 4D(5)(g) a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants; or |
| (5) rewards and prizes given to competitors or participants in random drawings, contests, or other events that are open to persons who are not judges; | Section 4D(5)(a) a gift incident to a public testimonial, books, tapes and other resource materials supplied by publishers on a complimentary basis for official use; or |
| (6) scholarships, fellowships, and similar benefits or awards, if they are available to similarly situated persons who are not judges, based upon the same terms and criteria; | Section 4D(5)(b) a gift, award or benefit incident to the business, profession or other separate activity of a spouse or other family member of a judge residing in the judge's household, including gifts, awards and benefits for the use of both the spouse or other family member and the judge (as spouse or family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties; |
| (7) books, magazines, journals, audiovisual materials, and other resource materials supplied by publishers on a complimentary basis for official use; or | |</p>
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<th>(C) Unless otherwise prohibited by law or by paragraph (A), a judge may accept the following items, and must report such acceptance to the extent required by Rule 3.15:</th>
<th>Section 4D(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 for:</th>
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<td>(1) gifts incident to a public testimonial;</td>
<td>Section 4D(5)(a) a gift incident to a public testimonial, books, tapes and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the judge and the judge's spouse or guest to attend a bar-related function or an activity devoted to the improvement of the law, the legal system or the administration of justice;</td>
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<td>(2) invitations to the judge and the judge's spouse, domestic partner, or guest to attend without charge: (a) an event associated with a bar-related function or other activity relating to the law, the legal system, or the administration of justice; or</td>
<td>Section 4D(5)(a) a gift incident to a public testimonial, books, tapes and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the judge and the judge's spouse or guest to attend a bar-related function or an activity devoted to the improvement of the law, the legal system or the administration of justice;</td>
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<td>(b) an event associated with any of the judge's educational, religious, charitable, fraternal or civic activities permitted by this Code, if the same invitation is offered to nonjudges who are engaged in similar ways in the activity as is the judge; and</td>
<td></td>
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<td>(3) gifts, loans, bequests, benefits, or other things of value, if the source is a party or other person, including a lawyer, who has come or is likely to come before the judge, or whose interests have come or are likely to come before the judge.</td>
<td>Section 4D(5)(h) any other gift, bequest, favor or loan, 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; and, if its value exceeds $150.00, the judge reports it in the same manner as the judge reports compensation in Section 4H.</td>
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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 NYCCR 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.sjc.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 50,000 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 300 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://www.nyscj.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 Fisher 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 (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 NYCCR 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 with 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/2/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)(b) 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 Debiel, 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.
Judicial Ethics In New York State (Part 2)

BY JEREMY R. FEINBERG

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 NYCCRR 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 NYCCRR 100.3(E)(1)(a)(ii), (c), (e).

In one instance, the ACJE applied the mandatory disqualification provisions of 22 NYCCRR 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 NYCCRR 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 NYCCRR 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 NYCCRR 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 NYCCRR 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 NYCCRR 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. 04-111. 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 (1989).

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 keyword 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(F)” or “100.3(E)”) 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.

Jeremy R. Feinberg is the Statewide Special Counsel for Ethics for the New York Unified Court System. He would like to thank his colleagues Maryrin Dobiel 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.
NEW YORK STATE UNIFIED COURT SYSTEM

STANDARDS
of
CIVILITY

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Presiding Justices of the
Appellate Division

OCTOBER 1997
How Do We Make the Standards of Civility Work?*

By Judith S. Kaye

The announcement that the New York State court system would adopt Standards of Civility for lawyers, judges and court personnel added mountains to my mail this summer. The mail, by the way, concerned only the guidelines pertaining to lawyers—even though the Standards apply as well to judges and court personnel. From members of the public it ran 100 percent in favor of the guidelines. Lawyers, not surprisingly, divided.

Among the messages that stand out was one from a lawyer-friend upstate who, though overwhelmingly supportive of the Standards, couldn’t resist concluding: “Having said all that, I confess to my own transgressions of incivility. It is just that there is something terribly satisfying in seeing my tire marks on my opponent’s chest.”

I know exactly what he means. Although I have now been privileged to serve as a Judge for 14 years, still I savor those rare but delicious moments from my days as a litigator when I succeeded in trouncing the opposition. They are absolutely unforgettable—even when one gets to be the Chief Judge. I disagree with my lawyer-friend, however, that those prized moments were the product of incivility. The merits, unquestionably. Skill, I hope. Luck, probably. But incivility? Those truly satisfying, long-remembered tire marks on an opponent’s chest are never earned by shouting, bullying or sharp practice.

I believe that is the predominant view today, as it has been during my own 35 years as a lawyer. But at the same time it is also undeniable that with our exploding numbers and increased bottom line pressures, the practice of law has grown tougher and meaner, eroding a core tradition of courtesy and civility. That we have in addition suffered a great loss in public trust and confidence is no secret. Now it is for us to do something about the situation.

With those thoughts in mind, the Administrative Board of the court system named a group of 16 lawyers and judges—the Craco Committee—to identify the sources of the problem and show us how to address it. In its report, the Craco Committee, as I do, put the emphasis on the positive, recognizing the enormous contribution the legal profession makes to the strength and vitality of our State and nation. The Committee concluded, however, there are also considerable negatives about modern-day practice, and it submitted numerous recommendations to overcome them. Among the recommendations was a code of civility “that will reorient the bar and bench toward the observance of courtesies that long have enhanced the quality of professionalism in New York. Aspirational in content, such a code will form a frame of reference to assist both bench and bar in discerning the bounds of civility among other things.”

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The court system then formed a second lawyer-judge committee, chaired by Appellate Division Justice Samuel L. Green, to draft such a code. Like the Craco Committee itself, the Green Committee was representative of the profession throughout the State. And like the Craco Committee, it did its work well, consulting several of the 88 or more jurisdictions—a remarkable number—that already have such codes (see, e.g., Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit, 143 FRD 371). The proposed Standards were then widely circulated for public comment before adoption by the Administrative Board. They will go into effect January 1, 1998.

To my mind, the Standards of Civility present a difficult question.

The question is not whether we really need a civility code. I believe the need has been amply established by what we ourselves see on a daily basis, by the dozens of jurisdictions that have adopted civility codes, and by the numerous bar association studies, surveys, and reports—several of them in New York—identifying lack of common courtesy as a pervasive problem today. Nor do I believe that we should be asking whether civility standards can really make any significant difference, given the absence of penalties and enforcement mechanisms. The intention was to upgrade and assure everyday professional behavior, not create another arena for contention and litigation.

The difficult question I hope we will all ask—and answer thoughtfully and constructively—is exactly what steps we might take to assure that these standards actually fulfill their purpose.

Clearly as a starting point we need to disseminate the standards as widely as possible, especially to organizations like law schools, law firms and bar associations. We need to be certain that the newest lawyers learn good habits early on, both from internalizing the succinct principles articulated in the Standards of Civility, and from observing the more seasoned among us give life to those principles in our own daily practice.

And we should use the issuance of the Standards as an opportunity for further discussion about the state of our profession. Does the local legal culture in fact reflect these basic tenets of behavior? How does the public regard our work? Can we restore the sense of collegiality?

The concepts in the Standards are not complicated. Indeed, they merely put on paper what lawyers overwhelmingly believe: that ours is an honorable profession, in which courtesy and civility should be observed as a matter of course. The issuance of the Standards, however, reminds us that critical self-examination is healthy for any institution, including the bar. Let’s use these guidelines as the benchmark, to determine whether any of our practices fall short of our ideals—and in the process demonstrate to the public that ours is a profession well worthy of their trust and respect.
STANDARDS of CIVILITY

Preamble

The New York State Standards of Civility for the legal profession set forth principles of behavior to which the bar, the bench and court employees should aspire. They are not intended as rules to be enforced by sanction or disciplinary action, nor are they intended to supplement or modify the Rules Governing Judicial Conduct, the Code of Professional Responsibility and its Disciplinary Rules, or any other applicable rule or requirement governing conduct. Instead they are a set of guidelines intended to encourage lawyers, judges and court personnel to observe principles of civility and decorum, and to confirm the legal profession's rightful status as an honorable and respected profession where courtesy and civility are observed as a matter of course. The Standards are divided into four parts: lawyers' duties to other lawyers, litigants and witnesses; lawyers' duties to the court and court personnel; judges' duties to lawyers, parties and witnesses; and court personnel's duties to lawyers and litigants.

As lawyers, judges and court employees, we are all essential participants in the judicial process. That process cannot work effectively to serve the public unless we first treat each other with courtesy, respect and civility.

Lawyers' Duties to Other Lawyers, Litigants and Witnesses

1. Lawyers should be courteous and civil in all professional dealings with other persons.
   A. Lawyers should act in a civil manner regardless of the ill feelings that their clients may have toward others.
   B. Lawyers can disagree without being disagreeable. Effective representation does not require antagonistic or acrimonious behavior. Whether orally or in writing, lawyers should avoid vulgar
language, disparaging personal remarks or acrimony toward other counsel, parties or witnesses.

C. Lawyers should require that persons under their supervision conduct themselves with courtesy and civility.

II. When consistent with their clients' interests, lawyers should cooperate with opposing counsel in an effort to avoid litigation and to resolve litigation that has already commenced.

A. Lawyers should avoid unnecessary motion practice or other judicial intervention by negotiating and agreeing with other counsel whenever it is practicable to do so.

B. Lawyers should allow themselves sufficient time to resolve any dispute or disagreement by communicating with one another and imposing reasonable and meaningful deadlines in light of the nature and status of the case.

III. A lawyer should respect the schedule and commitments of opposing counsel, consistent with protection of the client's interests.

A. In the absence of a court order, a lawyer should agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of the client will not be adversely affected.

B. Upon request coupled with the simple representation by counsel that more time is required, the first request for an extension to respond to pleadings ordinarily should be granted as a matter of courtesy.

C. A lawyer should not attach unfair or extraneous conditions to extensions of time. A lawyer is entitled to impose conditions appropriate to preserve rights that an extension might otherwise jeopardize, and may request, but should not unreasonably insist on, reciprocal scheduling concessions.

D. A lawyer should endeavor to consult with other counsel regarding scheduling matters in a good faith effort to avoid scheduling conflicts. A lawyer should likewise cooperate with opposing counsel when scheduling changes are requested, provided the interests of his or her client will not be jeopardized.

E. A lawyer should notify other counsel and, if appropriate, the court or other persons at the earliest possible time when hearings, depositions, meetings or conferences are to be canceled or postponed.
IV. A lawyer should promptly return telephone calls and answer correspondence reasonably requiring a response.

V. The timing and manner of service of papers should not be designed to cause disadvantage to the party receiving the papers.
   A. Papers should not be served in a manner designed to take advantage of an opponent's known absence from the office.
   B. Papers should not be served at a time or in a manner designed to inconvenience an adversary.
   C. Unless specifically authorized by law or rule, a lawyer should not submit papers to the court without serving copies of all such papers upon opposing counsel in such a manner that opposing counsel will receive them before or contemporaneously with the submission to the court.

VI. A lawyer should not use any aspect of the litigation process, including discovery and motion practice, as a means of harassment or for the purpose of unnecessarily prolonging litigation or increasing litigation expenses.
   A. A lawyer should avoid discovery that is not necessary to obtain facts or perpetuate testimony or that is designed to place an undue burden or expense on a party.
   B. A lawyer should respond to discovery requests reasonably and not strain to interpret the request so as to avoid disclosure of relevant and non-privileged information.

VII. In depositions and other proceedings, and in negotiations, lawyers should conduct themselves with dignity and refrain from engaging in acts of rudeness and disrespect.
   A. Lawyers should not engage in any conduct during a deposition that would not be appropriate in the presence of a judge.
   B. Lawyers should advise their clients and witnesses of the proper conduct expected of them in court, at depositions and at conferences, and, to the best of their ability, prevent clients and witnesses from causing disorder or disruption.
   C. A lawyer should not obstruct questioning during a deposition or object to deposition questions unless necessary.
   D. Lawyers should ask only those questions they reasonably believe are necessary for the prosecution or defense of an action. Lawyers should refrain from asking repetitive or argumentative questions and from making self-serving statements.
VIII. A lawyer should adhere to all express promises and agreements with other counsel, whether oral or in writing, and to agreements implied by the circumstances or by local customs.

IX. Lawyers should not mislead other persons involved in the litigation process.

A. A lawyer should not falsely hold out the possibility of settlement as a means for adjourning discovery or delaying trial.
B. A lawyer should not ascribe a position to another counsel that counsel has not taken or otherwise seek to create an unjustified inference based on counsel’s statements or conduct.
C. In preparing written versions of agreements and court orders, a lawyer should attempt to correctly reflect the agreement of the parties or the direction of the court.

X. Lawyers should be mindful of the need to protect the standing of the legal profession in the eyes of the public. Accordingly, lawyers should bring the New York State Standards of Civility to the attention of other lawyers when appropriate.

**Lawyers’ Duties to the Court and Court Personnel**

I. A lawyer is both an officer of the court and an advocate. As such, the lawyer should always strive to uphold the honor and dignity of the profession, avoid disorder and disruption in the courtroom, and maintain a respectful attitude toward the court.

A. Lawyers should speak and write civilly and respectfully in all communications with the court and court personnel.
B. Lawyers should use their best efforts to dissuade clients and witnesses from causing disorder or disruption in the courtroom.
C. Lawyers should not engage in conduct intended primarily to harass or humiliate witnesses.
D. Lawyers should be punctual and prepared for all court appearances; if delayed, the lawyer should notify the court and counsel whenever possible.

II. Court personnel are an integral part of the justice system and should be treated with courtesy and respect at all times.
Judges’ Duties to Lawyers, Parties and Witnesses

I. A judge should be patient, courteous and civil to lawyers, parties and witnesses.

A. A judge should maintain control over the proceedings and insure that they are conducted in a civil manner.

B. Judges should not employ hostile, demeaning or humiliating words in opinions or in written or oral communications with lawyers, parties or witnesses.

C. Judges should, to the extent consistent with the efficient conduct of litigation and other demands on the court, be considerate of the schedules of lawyers, parties and witnesses when scheduling hearings, meetings or conferences.

D. Judges should be punctual in convening all trials, hearings, meetings and conferences; if delayed, they should notify counsel when possible.

E. Judges should make all reasonable efforts to decide promptly all matters presented to them for decision.

F. Judges should use their best efforts to insure that court personnel under their direction act civilly toward lawyers, parties and witnesses.

Duties of Court Personnel to the Court, Lawyers and Litigants

I. Court personnel should be courteous, patient and respectful while providing prompt, efficient and helpful service to all persons having business with the courts.

A. Court employees should respond promptly and helpfully to requests for assistance or information.

B. Court employees should respect the judge’s directions concerning the procedures and atmosphere that the judge wishes to maintain in his or her courtroom.
PROFESSIONALISM IN THE LEGAL PROFESSION

by Hon. Gerald Lebovits

It is not always easy for lawyers to be civil, even if, like me, you work in Civil Court. Civil lawyers are polite lawyers. Civility in the law is a lawyer’s version of asking “May I have a glass of water, please?” and “Kindly pass the bread basket, if you would?”

The best teachers of professionalism are judges, good ones and bad. We learn from both. We emulate both. Judges enforce rules. They can disregard them, too.

I learned some lessons the first time I had a case in Supreme Court on the criminal side when I was a youthful Manhattan Legal Aid lawyer. While I awaited the court’s calling my case, I saw the judge ridicule one lawyer after another before the assembled, to the delight of all but the target of the court’s wit. The judge was smart and honorable — and decidedly sarcastic.

To one lawyer, who argued a point not wholly relevant, the judge said “Thank you. I shall file that in ‘Nice to Know.’” To another, who tried to explain why he needed an adjournment, the judge said, “I see you’ve avoided the dangers of over-preparation.”

My turn came. I approached the bench off the record and introduced myself. To my surprise, the judge arose, shook my hand, and introduced himself—though he needed no introduction. I told him that the case will have to be tried, that I do not want to waste the court’s time by talking about a plea. He thanked me, and I returned to counsel table to put the motion schedule on the record. That was when my test began.

“Professionalism among lawyers is more than competence. It is more than the ethical practice of law. Professionalism also means civility, and civility means courtesy, decency, fairness, integrity, and similar hallmarks of virtue. Professionalism means being honorable toward opposing counsel, toward clients, toward the court, toward witnesses, toward colleagues, toward everyone. Competence and ethics represent the floor below which no judge or lawyer may descend. Professionalism is the ceiling, the height of the profession of law, the goal to which all judges and lawyers should ascend.

Some dishonest lawyers are quite civil, while some nasty lawyers are perfectly ethical. Still others are civil and ethical, but you will not want to hire them, because they might not get the job done. The professional is the competent, ethical lawyer who daily displays the traits of civility. Professionalism wins cases, promotes public confidence is the legal profession, encourages the efficient resolution of disputes. Professionalism makes the practice of law enjoyable.

The judge spoke to my client directly. “Your lawyer says you don’t want a plea bargain,” the judge explained. “But if you plead guilty today, you will get the lowest possible sentence: 1 1/2 to 3. If you don’t take it, the next time you come to court the offer will be 2 to 4. Then, 2 1/2 to 5. Then 3 to 6. Then 3 1/2 to 7. Then 4 to 8. Then . . . .”

I gently rose my hand, interrupting him. The judge nodded his head, granting me permission to speak. I said: “The maximum is 3 1/2 to 7.” The judge retorted, without skipping a beat, “Then he’ll have something to appeal.”

One lesson I learned that day is how vital it is for judges to use the bench to dispense justice as best they can without profiting from the occasion to show how smart they are.

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I doubt that clients ever complain that their lawyer was rude to their adversary. But not every client knows what is best. They might think they want a Rambo lawyer. What they need is a lawyer who wins. When things are equal, and often when they are entirely unequal, the professional will win. Professionalism, like honesty, is not only the best policy; it is the only policy.

Professionals do not engage in reprisal; they never respond in kind to uncivil attacks. Lawyers often think that a response will deter bullies, defend clients, show innocence. Respond they may, but only if necessary, and never in kind. Professionals will read the judge, if the incivility occurs in court. If the judge signals in some way that the attack is meritless or irrelevant to the dispute, keep quiet, or at most ask whether the court wishes a response. Think of the movies. Heroes do not defend themselves against unworthy opponents. They do not have to. The audience will do it for them.

Professionals do not insult, use epithets, engage in name-calling, stoop to vulgarity, or disparage.

Professionals are not narcissistic. They comply with technical rules if they can, but they will not complain when an adversary violates some hyper-technical rule that the court has the discretion to ignore and will ignore. Points are lost, not won, by complaining. While thinking of ways to ignore the technical defect, the judge might lose track of the substantive argument. It is never good from an advocacy perspective when the judge sees the lawyer as a whining cry-baby.

Professionals have no martyrdom complex. Martyrs insist on their client’s innocence. Every time an adversary raises an argument, any argument, the martyr will contend that the adversary obviously seeks to commit some egregious due-process violation.

Professionals do not indict. Indictors accuse. The worst accuse falsely. They put people on the defensive. They comment on motive, not on merits.

Professionals are not editors. To edit is to inject personal beliefs, to vouch for the credibility of client and argument. Editors do not realize that it is stronger to argue, “The case should be dismissed” than to contend plaintively, “In my opinion the case should be dismissed.”

Professionals do not insult, use epithets, engage in name-calling, stoop to vulgarity, or disparage. Absent from their vocabulary is invective, vitriol, and caustic speech. Hyperbole and deception are non-existent, as are uncivil adjectives, verbs, adverbs, and nouns. Professionals do not threaten, obstruct, or assert frivolous claims or defenses.
The best lawyers know that stridency is ineffective, that road rage is the road to personal and professional failure, that the best clients distinguish between aggression and aggressive advocacy.

The best lawyers stand up to bullies, not by responding in kind, but by reporting unprofessional conduct as it occurs, by involving the court as appropriate, by creating a record of abusive tactics, by participating in activities that teach and promote professional conduct, and by being eternally self-vigilant.

Emanating from the work of the Committee on the Profession and the Courts, known as the “CraCo Committee,” the New York State Standards of Civility, codified at 22 NYCRR 1200, went into effect on January 1, 1998. It is not binding. It is not meant to supplement or supplant existing rules. Its violation cannot lead to punishment or sanctions. It is meant only to allow lawyers to disagree without being disagreeable—to glorify the zealous and bury the zealot.

Many opposed its promulgation. If lawyers had failed to abide by ethics and court rules, was the answer to devise yet another code, a toothless aspirational code, no less? Is it right to have an etiquette code that limits, even contradicts, tough representation? Do lawyers deserve to be treated like errant children, with a code that asks them please to play nicely? If a civility code is a public-relations device, will the public respect lawyers more than before because of a code that asks lawyers to play nicely, please?

Despite the opposition, most lawyers endorsed the Standards. Eight and a half years later, they are engrafted onto our legal consciousness. The rudeness the Standards were designed to discourage still exists, just as adopting the New York State Penal Law did not eliminate crime in New York City. But the Standards remind us what goals we seek for our colleagues, our profession, and ourselves.

The Standards’ Preamble reflects its intent: “to encourage lawyers, judges and court personnel to observe principles of civility and decorum, and to confirm the legal profession’s rightful status as an honorable and respected profession where courtesy and civility are observed as a matter of course.” Among its suggestions: “In professional dealings with others, lawyers should be courteous and civil in all communications.” It further suggests that “lawyers should act in a civil manner regardless of the ill feelings that their clients may have toward others.” The Standards tell lawyers to “avoid vulgar language, disparaging personal remarks or acrimony toward other counsel, parties or witnesses.” The Standards note that “effective representation does not require antagonistic or acrimonious behavior.”

The Standards ask lawyers, consistent with their clients’ interests, to respect opposing counsels’ schedule and commitments. They ask lawyers to return telephone calls and answer correspondence promptly.

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They ask lawyers not to serve papers in a way that takes advantage of an opponent’s absence from the office or inconveniences an adversary. They ask lawyers not to let any aspect of litigation be used to harass or unnecessarily prolong litigation or increase litigation expenses. They ask lawyers to conduct themselves with dignity and not be rude or disrespectful. They ask lawyers to adhere to promises and agreements with other counsel and to agreements that circumstances or local custom dictate.

The Standards cover judges and court personnel, too, and appropriately so. If judges are to teach professionalism, they must live it. Judges “should not employ hostile, demeaning or humiliating words in opinions or in written or oral communications with lawyers, parties or witnesses” and should consider everyone “when scheduling hearings, meetings or conferences.” Judges should be punctual and “decide promptly all matters presented to them for decision.”

What is wrong with any of that? Nothing. Unless you always thought that Atticus Finch was the bad guy. In which case, maybe you are not happy being a lawyer in any event.

I treasure the time I worked on Staten Island. Among the things I will always appreciate is that a sense of professionalism exists far more clearly here than elsewhere in New York City and beyond. The Richmond County Bar is personal and cohesive; the legal culture will turn into pariahs those violate the Standards and undermine their colleagues and the law. The Richmond County Bar deeply values the premise underlying the Standards: that we are the best advocates—and judges—when we remove ourselves from the charged, negative emotions that clients have toward each other and treat one another, and our profession, with dignity and devotion. May it ever be so.

Dinner. I plan to ask a colleague for a glass of water, please, and kindly to pass the bread basket. Coming with a smile on Staten Island, as nowhere else, are life’s basic necessities of bread and water, and a great deal more. And to get them, you do not need to have something to appeal.

Gerald Lebovits, a Housing Court judge in Manhattan, was honored to serve in Richmond County from January 2002 until mid-April 2003. This article is based loosely on a talk he gave at the Network of Bar Leaders in February 2006. He thanks Network President Daniel C. Marotta for that invitation to speak and Judge Matthew Sciarrino for encouraging him to write this article.
Reflections

Judges' Clerks Play Varied Roles In the Opinion Drafting Process

BY GERALD LEOVITS

In 1875, Massachusetts Chief Justice Horace Gray hired a law-school graduate to be his secretary. The Chief Justice paid the young man — whom he called a puisne judge — from his own pocket. A few years after the Chief Justice was elevated to the Supreme Court, the United States government decided to pay for a clerk for each Justice. Most Justices hired stenographers, but Justice Gray continued to hire young law graduates.

In 1919, after the government decided to pay for typists and a clerk, the other Justices began to hire recent law graduates. Thus began in federal court the institution of law clerks, which became common in federal court in 1936, when district judges were allowed to use law clerks, and widespread since 1959, when certifications of need for district judges were no longer required.

What Law Clerks Do

Law clerks, the generic title used in this article, are integral to the decision-making process, both federally and in every state court of record. They are not merely the judge's errand runners. They are the sounding boards for tentative opinions. Law clerks do time-consuming and essential tasks: checking the record, checking citations, performing legal research, and writing first drafts. Law clerks are indispensable to the judges, enabling them to focus on the decision itself and the refinement of the decision in writing. Dan White, the satirist, explains the law clerk's role this way: "All judicial clerks do the same thing, namely, whatever their judges tell them to do."

Law clerks are extensions of their judges. Whatever they do reflects on their judges. Good law clerks will excel at research, writing, administering the docket, and conferencing cases if in a trial part. Good law clerks maintain all personal and judicial confidences, play devil's advocate with and be confidants to the judge, leave the decision making to the judge, save the judge from committing errors, and commit few of their own. A poor law clerk "dislikes library work, or ... is unhappy unless agitating for a cause, or ... is addicted to the telephone or cannot stand solitude."

Law Clerk Confidentiality

A maxim for law clerks is that what happens in chambers stays in chambers. Rarely while they work for judges have law clerks been known to share secrets. History records only one notorious example. In 1919, Justice Joseph McKenna's law clerk was accused of leaking word of the decision in *United States v. Southern Pacific Co.* The clerk's alleged co-conspirators profited from insider trading. When the plot was uncovered, the clerk resigned and was indicted for "conspiracy to defraud the Government of its right of secrecy concerning the opinions." The clerk argued that no law forbade his supposed conduct, but his motion to dismiss was denied, as was his appeal to the D.C. Circuit and his petition for certiorari to the Court of his former employ. The prosecution, however, eventually moved to dismiss the charges. Everything else about this affair is shrouded in mystery, except this: When the clerk, later a successful Washington baker, died at 83, he was cremated, and his ashes were "strewn on court property ... under the cover of darkness." Current law clerks may not reveal current confidences, but may they discuss their duties after they retire? The conventional wisdom is that law clerks must take confidences to the grave. But dozens of the nation's most eminent attorneys and judges have written in surprising detail about their judges and the role they and their judges played in cases of national consequence. Law-clerk disclosure has turned into a "long-

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standing historical tradition that has developed over the past sixty years.13

A law clerk to Justice Robert Jackson was once accused of betraying confidences about other law clerks.16 In an article that created a firestorm of protest and support, then-Mr. William Rehnquist wrote that “a majority of the clerks I knew showed extreme solicitude for the claims of communists and other criminal defendants.”17 Apparentely recovered from that controversy, then-Justice Rehnquist later wrote a beautiful portrayal of his judge in an article that disclosed no confidences.18

One can write about experiences as a law clerk and divulge nothing secret. For a piece of this kind from a two-year New York Court of Appeals clerk, see an article by Mario M. Cuomo.19

Law-Clerk Writing

According to a federal judge who knows, “most judicial opinions are written by the judges’ law clerks rather than by the judges themselves.”20 Law clerks often write first drafts: “It is an ill-kept secret that law clerks often do early drafts of opinions for their judges.” Law-clerk opinion writing comes as no surprise to those who work in the courts: “It is widely recognized . . . that law clerks now draft many of the decisions that emanate from . . . chambers.”21 By their writing, law clerks play a role in decision making: “[M]any judges, if not most, require their law clerks to draft opinions for motions before the judges even skim the briefs. . . . [M]any motions present a close call. The person who gets to take the first crack at it (i.e., the law clerk) may influence the outcome.”22 The outcome is influenced because “[h]e who wields the pen on the first draft . . . controls the last draft.”23

Law clerks, especially at the appellate level, also write bench memorandums.24 The bench memorandum, or report, may include the following: A concise statement of the facts, with a verification of the litigants’ statements of fact by reference to the record; a statement of the issues in contention; the litigants’ arguments on the issues, verifying the authorities; an analysis of the issues and the law; a list of questions that inquiry at oral argument might resolve; a recommendation on whether the court should decide the matter with a full, per curiam, or memorandum opinion; and a draft per curiam or memorandum opinion if the law clerk recommends either following a screening process.

The precise format of the bench memorandum depends on the court’s tradition, but the memorandum should emphasize the relevant issues and be impartial, critical, and thorough — but not so thorough that the judges might as well have read the briefs and the record before oral argument. The law clerk’s goal is to familiarize the court with the case before oral argument and to focus a judge who wishes to do further research. It is appropriate for neutral, objective clerks to state their views pre-argument. The court may, and often does, disagree with the clerks’ views after oral argument and additional study. Moreover, the only mission of a [memorandum] opinion is to inform the parties why the court is deciding as it is and to assure them that the court considered and understood the case. . . . Staff in these cases can relieve the judges of the initial drafting job, simple though it may be, thereby freeing judge time for the other demands of the court’s business.”25

Is law-clerk writing good or bad for the administration of justice? According to D.C. Circuit Judge Patricia Wald, “judges who write every word of their own opinions (except for a few certifiable geniuses) do not produce works of markedly greater clarity, cogency, or semantic skill. The opposite is more likely true . . . . I for one would not return to the days when law clerks sharpened pencils and checked citations; the present system for deciding cases could not sustain that development.”26

Some believe that a rule should be enacted to make it unethical for law clerks to write judicial opinions.27 Most believe, however, that law-clerk writing is good for the courts.28

The Interplay Between Law Clerk And Judge in Opinion Writing

Much law-clerk judge writing is collaborative.29 But whether the law clerk prepares the initial drafts or the final edits, the entire adjudicative function and decisionmaking process must remain exclusively with the judge. The litigants’ rights and public confidence in the judiciary demand no less. Even if the law clerk writes every word of a particular opinion, the judge must agree with and understand every one of those words as if the judge alone wrote each word. Every word and citation must be the authentic expression of the judge’s thoughts, views, and findings. This requirement forces judges to review, with an eye toward editing, every opinion but the most routine, mundane, and brief draft.

In the end, “no matter how capable the clerk, the opinion must always be the judge’s work.”30 That is because “[w]e lose the judge’s processed involvement when technically proficient law clerks write the opin-
Law Clerks in New York

The position of law clerk in New York has been authorized for some judges since 1909. New York clerks are appointed differently from federal law clerks and play somewhat different, larger roles.

Like federal clerks, New York clerks should be selected with care. The judge-clerk relationship is "the most intense and mutually dependent one ... outside marriage, parenthood, or a love affair." But unlike federal judges, who typically appoint recent law-school graduates and mostly ask them to serve one- or two-year terms, New York judges tend to appoint experienced attorneys and retain them for lengthy durations as career court employees. New York practitioners and judges alike appreciate the maturity and wisdom that an experienced law clerk brings to a busy state court.

A federal clerkship has more status than a New York clerkship, but New York clerks are paid far better and in the main enjoy decidedly greater responsibilities, especially in the trial courts. Federal clerks can earn top salaries when they leave their judges, but New York clerks often secure job opportunities for which their federal counterparts must wait years: The New York judiciary is filled with law clerks who went directly from their clerkships to the bench, either by appointment or election.

In New York, court attorneys are called law clerks when they work for a Court of Claims judge or are the personal appointment of an elected Supreme Court justice. Otherwise, they are court attorneys — from the court attorneys in the New York City Civil Court's Housing Part, to the pool attorneys in Supreme Court, to the court attorneys to the Chief Judge of the State of New York. Law clerks and court attorneys used to be called, respectively, law secretaries and law assistants.

Central staff court attorneys of the Court of Appeals answer to the Chief Judge and the court rather than to any particular Associate Judge. Court attorneys in the Appellate Division and the Appellate Term answer to the Presiding Justice of the Department or Term. Court attorneys assigned to a trial-term judge answer first to their judge, then to their supervising and administrative judges, and ultimately to the person who appoints them: the Deputy Chief Administrative Judge for New York City Courts or the Deputy Chief Administrative Judge for Courts Outside New York City. Law clerks are hired and fired by their justices alone.

Trial Term court attorneys not assigned to a judge answer to their chief court attorney, then to their administrative judge, and ultimately to their respective Deputy Chief Administrative Judge.

The distinction between personally appointed law clerks and court-appointed court attorneys affects law clerks' and court attorneys' ethical obligations in terms of political activity, a fact of life in New York because many judges are elected from law-clerk ranks.

1. See N.Y. Judiciary Law §§ 166, 173 (Laws of 1909, Ch. 35), which gave Supreme Court justices the power to appoint confidential attendants and confidential law assistants.

lations and the judge understands his role more as a decision maker and editor, if that, than as a writer." Although judges delegate "the task of stating the reasons for the decision, not the authority to decide . . . . , the justice must make the final version his own opinion, because he is responsible for what it says." Thus, "the strongest control over staff personnel in their dealings with the judges is an ordinary sense of personal relationships. The judge is the boss. What he says and does are the final mandates on an issue . . . . " Third Circuit Senior Judge Aldisert gives this advice to his clerks: "You were not selected by me to be a 'yes man.' . . . [Yet] when the decision is in, that is it." "

Crediting Law Clerks and Law Students

Federal case law, including Supreme Court case law, is filled with textually relevant judicial acknowledgments that law clerks performed legal research. But a...
judge should never acknowledge that a law clerk or judicial intern (often called “extern”) wrote the opinion. Doing so makes it appear that someone other than the judge decided the case. Reversal and remand to a different judge might be warranted if a judge credits a law clerk’s “preparation of this opinion.” If a federal judge thanks an intern for assisting in writing an opinion, the West Group will print that appreciation. So will the New York Law Journal if a New York State judge does so. A Westlaw check disclosed a surprising 146 published opinions (82 in the First Department, 64 in the Second Department) from 1990 to March 2004, in which the Law Journal printed acknowledgments to student interns from New York State judges.

Judicial interns, especially those who receive law-school academic credit for their work, are now accepted features in the courthouse. Judges who thank their interns do so out of kindness to students who, mostly without pay, make a significant contribution. What is kind to the interns, however, is unkind to the litigants and the public. This is not to suggest that judges not use interns to help with opinions. To the contrary, judges and their law clerks improve legal education and sometimes their opinions when they assign research, writing, and editing tasks to interns, so long as the judge and the law clerk monitor all student work closely. But crediting the intern makes it appear that the court delegated its decision-making obligations to an unaccountable law student.

A higher authority forbids what the New York Law Journal and the West Group permit. For the past decade, the New York State Law Reporting Bureau has put into effect a Court of Appeals policy in which the State Reporter will not print judicial acknowledgments to law clerks or interns. This policy suggests that judges who want to thank their clerks and interns reconsider their impulse, however well meaning. Before the Court announced that policy, the New York State Official Reports occasionally printed irrelevant acknowledgments that law students provided “research assistance” “in the preparation of this opinion.”

**Law-Clerk Cheating**

Heaven forbid, a law clerk must never slip language or references past a judge. That happened in United States v. Abner, which contains multiple allusions to the songs and albums of the Talking Heads rock band. The law clerk included these references to get free Talking Heads concert tickets. To no one’s dismay, the clerks have been fined for including non-judge-approved writing in judicial opinions. Judge Jerry Buchmeyer tells the story of the soon-to-be-dismissed law clerk in State v. Lewis. Without consulting a judge, the clerk added a lawyer’s lament, written as a fictional “reporter,” to the Kansas official reports:

Statement of Case, by Reporter
This defendant, while at large,
Was arrested on a charge
Of burglary.
And direct to jail he went.
But he somehow felt misled,
And through prison walls he oozed,
And in some unheard-of shape
He effected his escape.

LEWIS, tried for this last act,
makes a special plea of fact:
"Wrongly did they me arrest,
As my trial did attest,
And while rightfully at large,
Taken on a wrongful charge.
I took back from them what they
From me wrongly took away."

Opinion of the Court. PER CURIAM:
We — don’t — make — law. We are bound
To interpret it as found.
The defendant broke away;
When arrested, he should stay.
This appeal can’t be maintained,
For the record does not show
Error in the court below,
And we nothing can infer.
Let the judgment be sustained —
All the justices concur.

Nor may a judge use an outside expert — as opposed to an intern, law clerk, special master, or referee — to assist in opinion writing. As the New York Court of Appeals wrote in In re Fuchseberg, “law clerks often contribute substantially to the preparation of opinions. [But] we cannot accept respondent’s explanation that he looked upon the law professors he consulted as ‘ad hoc’ law clerks.”

**First Amendment Rights**

May a law clerk refuse to draft an opinion? In Sheppard v. Beerman, a law clerk to a Supreme Court, Queens County, justice declined to draft an opinion that, the clerk claimed, would result in “railroading,” a defendant. The justice fired the clerk in December 1990 after the clerk called him a “son of a bitch” and “corrupt.” The clerk sued the justice under 42 U.S.C. § 1983. District Judge I. Leo Glasser of the Eastern District of New York twice granted the justice’s motions to dismiss the complaint. Citing the law clerk’s free-speech rights, however, the Court of Appeals for the Second Circuit
reversed — twice. From a unanimous Sheppard II: “The relationship between a judge and clerk is one based upon trust and faith.... But the First Amendment protects the eloquent and insolent alike.”

In early 2002, Judge Glasser granted the now-retired justice’s summary-judgment motion, which the justice filed after he and others, including his two children, were subjected to 31 depositions. In early 2003, in Sheppard III, the Second Circuit affirmed, “[t]his is not the first time that a judge has found a longitudinal serial assault to be a proper subject for an attack on the court’s impartiality.” The Supreme Court denied certiorari in late 2003. The 13-year saga thus ended on a First Amendment analysis, but not on whether a law clerk may refuse to write an opinion.

Advice to Law Clerks and Practitioners

Law clerks have neither the judge’s commission nor the judge’s experience. Some clerks tend to overwrite; they include the irrelevant because they are unsure about what is important and because they might not have been at oral argument.

Practitioners can overcome a possible obstacle by making it easy for clerks to read and understand their papers — thus making it easy for the court to rule for them. Getting to the point quickly, applying law to fact succinctly, attaching photocopies of key precedents and statutes (for trial judges), making clear what relief is requested, and countering the other side’s points in writing as opposed to leaving them for oral argument are among the good habits practitioners should consider, not only for judges but especially for their clerks.

For judges and their clerks, communication is one answer to assuring quick and accurate decision making and opinion writing. Here is another for clerks. Law clerks, who come and go, must learn a valuable talent: how to emulgate their judge’s writing style. Writing is connected to personality. Personality is reflected in the tone of the writing. Personality traits and writing styles do not change easily or overnight. Judges have preferences. Law clerks should learn them. Learning them maintains consistency, lets the judge adjudicate rather than edit for style, and, no small benefit, improves the law clerk’s writing. The best ways to learn the judge’s writing style is to study the judge’s opinions and to profit in future cases from the judge’s edits to current drafts.

Law clerks do not only write, whether opinions or jury charges. They also work with the public, whether it is scheduling cases or settling them. Law clerks are their judge’s alter egos. Clerks are imbued with the sense that they are more than their judge’s lawyers. As the Fifth Circuit put it, “Clerks are privy to the judge’s thoughts in a way that neither parties to the lawsuit nor his most intimate family members may be.” Clerks expect litigants and lawyers to deal with them as if they are dealing with the judge. Practitioners should realize that treating a member of the court family disrespectfully will not advance their case. And clerks, who are subject to many of the same ethical rules as judges, must treat litigants and lawyers with the respect, competence, and intelligence with which the judge with the mandate to treat all.

1. Pronounced “puny.”
11. 251 U.S. 1 (1919).
35. See Conroy v. Anisofoff, 507 U.S. 517, 527–28 (1993) (Scalia, J., concurring) (noting that legislative history "examined and quoted" was "unearthed by a hapless law clerk to whom I assigned the task"); Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 318 n.5 (1977) (Stevens, J., dissenting) (noting his law clerk's statistical analysis); Noto v. United States, 76 S. Ct. 255, 258 n.4 (1956) (Harlan, J.) (noting that data came from the record "or from the research of my Law Clerk").


40. 825 F.2d 835 (5th Cir. 1987) (Garza, J.).
42. 19 Kan. 260 (1878).
44. 43 N.Y.2d (1), (Y), 426 N.Y.S.2d 639, 648-49 (per curiam) (Opn. of Censurement — Ct. on Jud. 1978).
46. 94 F.3d at 829.
50. Hall, 695 F.2d at 179.
A STRONG CASE can be made that New York State judicial law clerks - called court attorneys in most courts and formerly called law assistants and law secretaries - should never engage in partisan politics. But that is not the law in New York.

Law clerks, judges and politicians should know what clerks may and may not do. Learning the ethical limits of a law clerk's permissible politicking is not simple; the rules are obscure, untested and often honored in the breach. This article tries to clarify the extent to which law clerks may be political.

Some political activity is forbidden and subjects the clerk to discipline and even criminal prosecution. Forbidden activity is covered by the Career Service Rules of the Chief Judge (RCJ) (22 NYCRR 25.39) and includes political activity conducted in a courthouse or during court time, or which interferes with court duties, suggests that a judge or the court is involved, interferes with work or uses court resources.

Law clerks are not subject to discipline for engaging in prohibited politics. Rather, the Commission on Judicial Conduct may discipline a judge whose law clerk is a personal appointee and member of the judge's personal staff if the clerk engages in impermissible political activity and if the judge can but does not prohibit that activity. Prohibited activity is covered by the Chief Administrator of the Courts' Rules Governing Judicial Conduct (RGJC) (22 NYCRR 100.5[C]), amended effective Jan. 1, 1996.

The distinction between "forbidden" and "prohibited" politics arises because the RCJ forbids "employees of the Unified Court System," including law clerks, from engaging in specified political activity, whereas RGJC §100.6(A) governs only judges and judge-candidates for elective judicial office.

Other than court attorney-referees, whom the RGJC advises never to engage in partisan politics, law clerks are neither bound nor explicitly guided by the CJC or the RGJC.

RGJC §100.5(C) directs judges to "prohibit members of the judge's staff who are
the judge's personal appointees from engaging in [prohibited] political activity."
A question thus arises who is a personal appointee. Only elected Supreme Court
justices may make personal appointments not subject to review. (See, e.g., Matter
27 NY2d 162, 166-67 [1970]).

Only those who clerk for elected Supreme Court justices, in fact, are "law
clers" (a term this article uses generically); other clerks are called "court
attorneys" because they are not appointed by the judges but by the court.

However, even if only an elected Supreme Court justice need not obtain pro forma
approval from an appointing authority to hire a law clerk, the law would likely
not permit judges to allow their clerks to engage in impermissible activities.

Non-Supreme Court law clerks who work for individual judges are as close to their
judges and the decision-making process as personal appointees. Accordingly, all
law clerks selected by a judge personally are probably subject to the RGJC's
requirement that a judge prohibit impermissible political activity.

Law clerks who work in Law Department pools or as court staff do not seem to be
personal appointees who are members of a judge's personal staff. Perhaps, then,
poor law clerks may engage in political activity prohibited by the RGJC but not
forbidden by the RCJ. If so, pool law clerks would be treated like court clerks,
over whom a "judge has no control ... outside of court." (Advisory Committee on
Judicial Ethics Opinions [which are current only through 1994] 91-80, 92-56,
92-105, 93-100, 94-35).

However, pool law clerks may be "analogous to a personal appointee" (Ethics
Opinion 91-77); their responsibilities are similar to law clerks who work for
individual judges, and they serve at the pleasure of their appointing judge.
Prudence suggests that pool law clerks consider themselves subject to their
appointing judge's prohibition under the RGJC.

Beyond the Rules

Even though the RGJC authorizes discipline for judges who fail to prohibit their
law clerks from engaging in prohibited politics, judges often prohibit their
clerks from engaging in permissible politics. A judge may want the clerk to be
above politics; or she may oppose the candidate or the cause. Either way, the law
clerk likely has no recourse against a judge's decision to forbid her from
engaging in permitted partisan politics. Here is why.

Law clerks, as members of the career civil service
classified-confidential-noncompetitive class (true law clerks - those who clerk
for elected Supreme Court justices - are exempt, not noncompetitive, because of
their personally appointive status), are unprotected by Civil Service Law §75.
Instead, they are disciplined for misconduct under RCJ §25.29 or a
collective-bargaining agreement.

Under RCJ §25.29 and the collective-bargaining agreements, law clerks may be
terminated at will. Indeed, law clerks are not entitled to a pretermination

hearing before dismissal for misconduct. (See, RCJ §25.29[a][3]; Matter of Conigland v. Rosenblatt, 171 AD2d 864, 864-65 [1st Dept. 1991])

A law clerk terminated for engaging in permitted political activity, or for not engaging in prohibited political activity, may sue for damages and injunctive and declaratory relief to vindicate First Amendment freedoms.

It is doubtful, ultimately, that a court would fault a judge's decision to fire at will a clerk for engaging in partisan politics - even, if notice is given, for engaging in activity the RGJC does not prohibit and even if, as a non-personal appointee, the clerk is not contemplated by the RGJC.

The U.S. Supreme Court has held that a state may bar all "partisan political activity" by a civil servant. (Brodrick v. Oklahoma, 413 US 601, 606, 616 [1973]).

Many state courts exercise their authority to prohibit court-employee partisan politics. The Pennsylvania Supreme Court has twice stricken legislative enactments that contradict Pennsylvania court rules that prohibit court staff from being partisan. (Matter of Prohibited Political Activity by Court-Appointed Employees [Petition of Dobson], 534 A2d 460, 464 [Pa 1987] [per curiam]; Snyder v. Unemployment Comp. Bd. of Review, 502 A2d 1232, 1234 [Pa 1985]; see also Matter of Prohibition of Political Activities by Court-Appointed Employees [Petition of Silvestri], 373 A2d 1257, 1259-60 [Pa 1977].)

Several New York neighbors forbid law-clerk partisanship, with New Jersey and Vermont forbidding even issue politics. (See, Matter of Randolph, 502 A2d 533 [NJ 1986] [per curiam]; Aranoff v. Bryan, 569 A2d 466, 467, 469 [Vt 1989].)

Notably, the American Judicature Society believes that non-law-clerk court employees may be partisan outside the courthouse but that "law clerks should be held to a higher standard of conduct ...." AJS Model Code of Conduct for Nonjudicial Court Employees, 73 Judicature 138, 139-40 [1989].

Forbidden Activity

The RCJ (22 NYCRR 25.39) forbids UCS employees, including law clerks, from engaging in certain political activity. By virtue of RCJ §25.1, RCJ §25.39 does not apply to judges directly. However, RGJC §100.5(C)(4) requires judges to prohibit conduct forbidden by RCJ §25.39. Judges are bound not to violate RCJ §25.39, and RGJC §100.5(A) forbids judges from engaging in partisanship enumerated in RCJ §25.39. This analysis is important because of the relationship between judges and their law clerks. The following are forbidden:

§25.39(a) - No UCS employee may recommend anyone for a job based on political opinions or affiliations; question an employee about political opinions or affiliations; appoint, hire or fire based on political opinions or affiliations; prejudice a court employee for not making a political contribution or rendering political assistance or advance any UCS employee's career for making a political contribution; or use official authority or influence to coerce anyone into engaging in political action or to interfere with an election.

Note: "Political opinions" would likely mean only partisan political opinions. Additionally, §25.39(a) forbids anyone in a supervisory capacity from using influence to coerce a law clerk into engaging in political action.

. §25.39(b)(1) - No UCS employee may mention any employee’s or dependant’s political affiliations as fitness to work for the UCS.

Note: This subdivision expands and limits RCJ §25.39(a). Violating § 25.39(b)(1) is a misdemeanor. "Employee" likely refers to everyone who works for the UCS, including interns and volunteers. This subdivision relates to law clerks who aid in hiring other pool law clerks and to any UCS employee who recommends anyone for a UCS position.

. §25.39(b)(2) - No UCS employee may inquire about an applicant’s political affiliations or discriminate for or against any applicant because of political opinions or affiliations.

Note: Section 25.39(b)(2), like one provision of RCJ §25.39(a), forbids judges (through RCJC §100.5[C][4]) from favoring in their hiring decisions members of political clubs. Moreover, a judge may not consider the clerk’s political affiliations in deciding to retain that clerk.

. §25.39(c) - No UCS employee may use authority or official influence to compel another court employee to pay a political assessment, subscription or contribution; no one may enter or remain in any government office to demand or collect a political assessment; and no one may ask any UCS employee for a political contribution or assist in requesting or receiving money from a UCS employee for a political purpose.

Note: Standing alone, the final provision of this subdivision may unconstitutionally infringe on free speech. In any event, the cases that apply Civil Service Law §107(3), to which §25.39(c) refers, require that the request be coercive. (See, e.g., Matter of Hempstead Democratic Club v. Incorporated Village of Hempstead, 112 AD2d 428, 430 [2d Dept. 1985].)

Any violation of §25.39(c) is a class "A" misdemeanor. If soliciting a UCS employee were criminal absent coercion, court employees would receive vastly less junk mail.

Thus, the RCJ likely forbids only coercive solicitations, such as soliciting a subordinate. Supporting this view is Stretton v. Disciplinary Bd. (944 F2d 137, 145 [3d Cir 1991] and (People v. Haif, 47 NY2d 645, 700 [1979]).

§25.39(d) - No public officer or someone seeking to become one may promise a favor in return for political support or threaten anyone for not giving political support.

Note: Although the question is fraught with ambiguity, most if not all law clerks probably are public officers under Public Officers Law §2. This subdivision makes it misdemeanor bribery through Civil Service Law §107(4) to promise, even indirectly, a job as a law clerk in return for political support.

Election Law §17-158 makes this a felony.

§25.39(e) - No UCS employee may hold elective office in a political organization except as a delegate to a judicial nominating convention or as a non-executive member of a county committee.

Note: First, being "appointed" rather than 'elected' to club positions is of questionable propriety. No law clerk should accept an appointment to a position traditionally filled by election. This includes ex officio membership. (Ethics Opinion 90-105). Second, law clerks may serve on judicial nominating conventions. Third, although this subdivision forbids election to most party offices, RCJ § 25.37 forbids law clerks, absent the Chief Administrator's consent, from holding any other elective or appointive state government position.

According to Ethics Opinions 89-101, 90-102, 93-36, 93-100, no law clerk may politic in the courthouse or use court resources (stationary, copying machines, etc.) for partisan activity. A violation subjects the law clerk, a public servant, to punishment for official misconduct under Penal Law §195.00. (Compare People v. Haywood, 201 AD2d 871, 871 [4th Dept. 1994] with People v. La Carruba, 46 NY2d 658, 665 [1979].)

Additionally, political activity may not take place on court time. (Ethics Opinions 93-36, 93-100). One advisory opinion provides that "court time" covers a law clerk's "normal working hours." (Ethics Opinion 90-102). This would forbid political activity during an excused leave, such as vacation time, if that activity occurs from 9:30 a.m. to 5:00 p.m. on non-holiday weekdays, when court is in regular session. The reasoning is that someone who sees a clerk politicking while court is in session might believe that the court endorses the clerk's partisan politics. A contrary argument is that "court time" covers only periods while the law clerk is on duty because a law clerk's lawful activities during that clerk's own time is not the court's business. Until this issue is resolved, clerks should refrain from political activity while court is session.

Finally, law clerks may not politic in a manner that suggests the involvement of the court or a judge not running for election or re-election. (Ethics Opinions 90-102, 93-100). Judges are forbidden from engaging in political activity except during a defined window period and, even then, only for their own campaigns. Law clerks "must make it reasonably clear" that no judge is involved in their political activity.

Prohibited Activity

Although law clerks are not bound by the RGJC, they should not place in jeopardy their judges' reputations or the integrity and the independence of the court. As a practical matter, a judge would be justified in terminating a law clerk who engages in forbidden or prohibited political activity - or even in permitted partisanship. Moreover, the non-lawyer public would not appreciate the distinction between "forbidden" and "prohibited" politics.

Prohibited political activities are enumerated in the RGJC at 22 NYCRR 100.5(C), entitled "Judge's Staff."

§100.5(C)(1) - A judge shall prohibit her staff from holding elective office in a political organization, except as a delegate to a judicial convention or a non-executive member of a county committee. (Ethics Opinion 90-105).

Note: This subdivision is identical to RCJ §25.39(e).

§100.5(C)(2) - The judge shall prohibit her staff from contributing consideration exceeding $500 a year for political campaigns (other than for the staff member's own campaign) or other partisan activity, including buying tickets to political functions.

Note: Some law clerks who contribute in excess of $500 a year claim they do so for their own future campaigns. This is improper and thus subject to a judge's prohibition. According to RGJC §100.0(A), a person becomes a "candidate" only on publicly announcing candidacy for a specific vacancy or by authorizing a responsible committee to solicit or accept contributions which requires a filing with the Board of Elections.

Five policies justify RGJC §100.5(C)(2): to prevent law clerks from buying judgeships; to limit to a reasonable time, place and manner the contacts law clerks have with politicians; to prevent politicians from extorting money from gullible law clerks in return for promises of future political support; to reduce internecine courthouse personality wars over who supports whom; and to provide court employees with job security based on merit and free from electoral politics.

§100.5(C)(3) - The judge shall prohibit her staff from soliciting for a partisan purpose and from selling tickets to or promoting political fundraising.

Note: As explained below, a law clerk may participate fully in fundraising activities, despite §100.5(C)(3)'s apparent prohibition against promoting fundraising, subject to certain exceptions, such as activity that involves personal solicitation or is coercive.

§100.5(C)(4) - The judge shall prohibit her staff from engaging in political conduct prohibited by RCJ §25.39.

Note: As discussed above, this subdivision is contained in the RCJ to discipline actual violators and in the RGJC to discipline judges who fail to enforce the RCJ.

§100.5(A)(4)(b) - The candidate-judge shall prohibit staff and employees subject to her direction from doing what she may not do.

Note: The candidate-judge must discourage court employees from committing acts that affect the judiciary or impair elections.

Permissible Activity

Law clerks may engage in countless forms of political activity. The judge for whom the law clerk is a personal appointee need not prohibit these activities and, indeed, under some interpretations may not even forbid them, lest the judge violate the law clerk's First Amendment free-speech or associational rights or

Fourteenth Amendment Equal Protection Clause rights.

Nonetheless, it would be judicious for the law clerk to advise her judge of her political activities, thus allowing the judge to prohibit impermissible activities.

For the political law clerk whose judge does not want to be apprised of the law clerk’s activities, special care must be taken to follow the rules.

Law clerk political activity is permitted if it takes place outside the courthouse and chambers, not on court time, without court resources, and neither implies that a judge or the court is involved nor affects the law clerk’s judicial work. (Ethics Opinions 90-27, 92-102, 93-36, 93-100).

Furthermore, a law clerk who agrees to assist the judge-candidate must not, according to RGJC §100.5(4)(b), do for the judge what the judge may not do, including soliciting or accepting campaign contributions, committing to issues likely to come before the court, and making false statements about the judge’s opponent. (See, 22 NYCRR 100.5[4][d]).

With these caveats, a law clerk may engage in "any [political] activity not specifically prohibited by the rules." (Ethics Opinion 90-102).

Thus, a law clerk may: solicit and coordinate volunteers (Ethics Opinion 93-36); canvass for signatures on nominating petitions and supervise such efforts (90-85, 93-36); conduct and supervise telephone polls (93-36); appear with a candidate at public gatherings and rallies (91-77); attend campaign strategy meetings (91-77); speak at engagements (91-77); secure endorsements for candidates (91-77); assist and attend campaign fundraising efforts (89-101, 91-77), other than through personal solicitations. A law clerk may not, however, be a campaign treasurer, for that position requires personal solicitations (91-77).

A clerk also may be on the board of directors of a citizens group that fundraises (90-85, 90-27); be active in a political organization or club (92-56, 93-100), except by holding most elective party office, as explained above; prepare, mail and personally distribute campaign literature (91-77), place campaign stickers on their cars (93-100), and post campaign signs on their property (93-100); permit family members to engage in political activity, including activities in which the law clerk may not engage, such as being a campaign manager who solicits funds personally. (Cf. Ethics Opinion 94-60).

The law clerk also may run for public office and, without even taking a leave of absence, resign from the position of law clerk only when inducted into public office. New York, unlike many states and the Federal Government under the Hatch Act, has no resign-to-run statute. The State Hatch Act prevents state employees in a federally supported agency from engaging in electoral politics. (5 USC §1502 [1994]). However, the Hatch Act does not cover law clerks, who are not members of New York’s executive branch of government. (See, 5 USC §1501[2] [1994]).

Conclusion

Unless their judge directs otherwise, law clerks may engage in political activity.
that does not suggest that the court endorses partisan politics. To the law clerk in doubt about what is ethical, here are three suggestions.

First, seek guidance from the judge, assuming that the judge wishes to discuss the matter. The judge, who may be disciplined for failing to prohibit impermissible political activity, should have the opportunity to prevent a violation.

Second, ask the judge to obtain an ethics opinion from the Advisory Committee on Judicial Ethics, c/o the Office of Court Administration, 270 Broadway, Room 1401, New York, NY 10007, (212) 417-2000, pursuant to 22 NYCRR 101.3(a).

Third, and most important, always err on the side of caution and scrupulously avoid close ethical calls. The court’s appearance of impartiality depends on it.

Gerald Lebovits is the principal court attorney to Justice Edward J. McLaughlin and an adjunct professor New York Law School.
COURT ATTORNEY GUIDELINES
"DO & DON'T"

DO:

1. Do dress in proper courtroom attire. Don’t wear jeans or sneakers.
2. Do introduce yourself to the parties and explain your role in the proceedings.
3. Do explain to a litigant that he or she does not have to talk to the other side if they do not want to.
4. Do explain to a litigant that he or she does not have to settle a case if they do not want to and that they have a right to a trial.
5. Do ascertain the identity of the parties and their authority to act.
6. Do give out procedural information and explain legal terminology.
7. Do refer a litigant to the Resource Center, and the Volunteer Lawyer.
8. Do make sure that a litigant understands what will happen if he or she defaults on a stipulation.
9. Do make sure you explore the litigant’s claims and defenses and options in light of them.
10. Do provide both parties with an opportunity to be heard.
11. Do ask the parties to speak directly to you and not to each other.
12. Do notify the court officer in the event of any potential conflict.
13. Do ask a self-represented litigant to explain the agreement in their own words.

DON’T:

1. Don’t call the lawyers by their first names.
2. Don’t permit the lawyers to call you by your first name.
3. Don’t permit the lawyers to use the courtrooms for their personal use, i.e., to store personal belongings or use the telephone.
5. Don't go out to lunch with lawyers who appear in your part.
6. Don't accept gifts from lawyers who appear in your part.
7. Don't engage in *ex parte* conversations.
8. Don't solicit letters on your behalf from lawyers.
9. Don't accommodate lawyers by moving cases up or holding their cases at a litigant's expense.
10. Don't allow lawyers to put their afternoon cases on in the morning.
11. Don't disparage or discuss your judge or another judge.
12. Don't state that your judge has a "policy" in every case.
13. Don't speak to one party separately without the permission of the parties, and only separate them in limited instances.
14. Don't position yourself next to one side when conferencing, but rather have both parties across from you.
15. Don't allow an attorney to give any legal information, advice, or otherwise advise, a self-represented litigant in your presence.
16. Don't accept any party's allegations as fact without conducting an inquiry first.
17. Don't forget that you are not the Judge.
18. Don't practice law without first obtaining permission from the court system.
19. Don't bring a child to court with you if you have a childcare problem.
PART 43. SUPERIOR COURTS FOR DRUG TREATMENT

§ 43.1 Superior Courts for Drug Treatment

(a) A Superior Court for Drug Treatment may be established in Supreme Court or County Court in any county by order of the Chief Administrator of the Courts following consultation with and agreement of the Presiding Justice of the Judicial Department in which such county is located. A Superior Court for Drug Treatment shall have as its purpose the hearing and determination of criminal cases in the courts of the county that are appropriate for disposition by a drug treatment court.

(b) The Chief Administrator, upon consultation with the Administrative Board of the Courts, shall promulgate such rules as are necessary to regulate operation of each Superior Court for Drug Treatment, and to permit transfer to the court, for disposition, of drug cases that are pending in another court in the same county.

PART 44. COURT APPOINTED SPECIAL ADVOCATES PROGRAMS

§ 44.0. General.

Recognizing the vital role that a Court Appointed Special Advocates program ("CASA program") can perform in aiding Family Court efforts to further the health, safety and well-being of children, and the need to insure that each such program has adequate resources, this rule is promulgated to standardize use of CASA programs in the courts of this State and to establish a program of State assistance under the direction of the Chief Administrator of the Courts. For purposes of this rule, a CASA program shall mean a not-for-profit corporation affiliated with, and in compliance with, the standards set forth by the National and New York State Court Appointed Special Advocates Associations.

§ 44.1. Use of CASA programs.

A CASA program may be appointed by Family Court in its discretion to provide assistance to the Court in cases regarding children in or at risk of out-of-home placement. The CASA program is not a party to the proceeding. To be eligible for such appointment, a program must meet regulations promulgated by the Chief Administrator of the Courts. Such regulations shall insure that each CASA program is capable of regularly providing thorough information about the health, safety, well-being and permanency plans of children and their families to the Court, the parties and law guardian; monitoring Family Court orders; meeting with children in the presence of, or with the consent of, their law guardians or as directed by the Family Court; working with legal and service providers assigned to their cases to facilitate collaborative solutions; and helping to promptly secure safe, stable homes and nurturing families for children so that they may thrive.

§ 44.2. State assistance.

The Chief Administrator of the Courts may by rule establish a program for the provision of grants of State assistance to individual CASA programs within appropriations annually made available to the Judiciary.

PART 50. RULES GOVERNING CONDUCT OF NONJUDICIAL COURT EMPLOYEES

§ 50.1 Code of Ethics for Nonjudicial Employees of the Unified Court System

PREAMBLE: A fair and independent court system is essential to the administration of justice. Court employees must observe and maintain high standards of ethical conduct in the performance of their duties in order to inspire public confidence and trust in the fairness and independence of the courts. This code of ethics sets forth basic principles of ethical conduct that court employees must observe, in addition to laws, rules and directives governing specific conduct, so that the court system can fulfill its role as a provider of effective and impartial justice.

I. Court employees shall avoid impropriety and the appearance of impropriety in all their activities.

A. Court employees shall respect and comply with the law.

B. Court employees shall not use or attempt to use their positions or the prestige of judicial affiliation to secure privileges or exemptions for themselves or others.

C. Court employees shall not solicit, accept or agree to accept any gifts or gratuities from
attorneys or other persons having or likely to have any official transaction with the court system.

D. Court employees shall not request or accept any payment in addition to their regular compensation for assistance given as part of their official duties, except as provided by law.

E. Court employees shall not perform any function in a manner that improperly favors any litigant or attorney.

II. Court employees shall adhere to appropriate standards in performing the duties of their office.

A. Court employees shall perform their duties properly and with diligence.

B. Court employees shall be patient and courteous to all persons who come in contact with them.

C. Court employees shall not discriminate, and shall not manifest by words or conduct bias or prejudice, on the basis of race, color, sex, sexual orientation, religion, creed, national origin, marital status, age or disability.

D. Court employees shall not disclose any confidential information received in the course of their official duties, except as required in the performance of such duties, nor use such information for personal gain or advantage.

III. Court employees shall conduct their outside activities in a manner that does not conflict with their employment duties.

A. Court employees shall not engage in outside employment or business activities that interfere with the performance of their official duties or that create an actual or appearance of conflict with those duties.

B. Court employees shall not engage in political activity during scheduled work hours or at the workplace.

§ 50.2 Rules Governing Conduct for Nonjudicial Court Employees Not Contained in this Part

(a) Appointments by the Court. Court employees may not be appointed as guardians, guardians ad litem, court evaluators, attorneys for alleged incapacitated persons, receivers, referees (to sell real property) or persons designated to perform services for any of these, as provided in section 36.2(c)(3) of the Rules of the Chief Judge.

(b) Financial Disclosure. Court employees who are required to file financial disclosure statements in accordance with section 40.2 of the Rules of the Chief Judge must comply with the requirements of that section.

(c) Political Activity of Personal Appointees of Judges. Court employees who are personal appointees of judges on the judges' staffs may not engage in political activities as set forth in section 100.5(C) of the Chief Administrator's Rules Governing Judicial Conduct.

§ 50.3 Dual Employment in the Court Service

(a) No employee regularly employed in a position in the classified service in the unified court system shall, while continuing to hold such position, accept appointment or employment in any other position or title, or in any capacity whatsoever, on a full-time or part-time basis, either in the classified or unclassified service, in another department or agency of the State or a political subdivision, or in the Legislature or the Judiciary, for which employment compensation or salary is payable, without the previous consent in writing of his or her appointing authority, except that such consent shall be subject to approval by the Chief Administrator of the Courts for employees of courts other than the appellate courts. Such written consent shall be required, in each case, for each such additional appointment or employment accepted or undertaken by such employee.

(b) A willful violation of the provisions of this section shall be deemed sufficient cause for disciplinary action, including removal.

§ 50.4 Obstruction of Court Service Rights; False Representation; Impersonation in Examination; Misuse or Misappropriation of Examination Material

(a) Any person who shall willfully, by himself or herself, or in cooperation with other persons, defeat, deceive or obstruct any person in respect of his or her right of examination, registration, certification, appointment, promotion or reinstatement, pursuant to the provisions of this Part or who shall willfully and falsely mark, grade, estimate or report upon the examination or proper standing of any person examined, registered or certified pursuant to the provisions of this Part or aid in so doing, or who shall willfully make any false representations concerning the same, or concerning the person examined, or who shall willfully furnish to any person any special or secret information for the purpose of either improving or injuring the prospects or chances of any person so examined, registered or certified, or to be examined, registered or certified, or who shall impersonate any other person, or permit or aid in any manner any other person to impersonate him or her, in connection with any registration or application or request to be registered, shall for each offense be subject to the provisions of section 106 of the Civil Service Law.

(b) A person who shall:

1. Impersonate, or attempt to or offer to impersonate, another person in taking an examination held pursuant to this Part; or
§ 50.4   STANDARDS AND ADMINISTRATIVE POLICIES

(2) Take, or attempt to take or offer to take, such an examination in the name of any other person; or

(3) Procure or attempt to procure any other person to falsely impersonate him or her or to take, or attempt to take or offer to take, any such examination in his or her name; or

(4) Have in his or her possession any questions or answers relating to any such examination, or copies of such questions or answers, unless such possession is duly authorized by the appropriate authorities; or

(5) Sell or offer to sell questions or answers prepared for use in any such examination; or

(6) Use in any such examination any questions or answers secured prior to the administration of the examination or secure the questions or secure or prepare the answers to the examination questions prior to the administration of the examination, unless duly authorized to do so by the appropriate authorities; or

(7) Disclose or transmit to any person the questions or answers to such examination prior to its administration, or destroy, falsify or conceal the records or results of such examination from the appropriate authorities to whom such records are required to be transmitted in accordance with this Part, unless duly authorized to do so by the appropriate authorities; shall be subject to the provisions of section 50(11) of the Civil Service Law. Additionally, a person who is found by the appropriate administrative authority to have violated this section, in addition to any disciplinary penalty that may be imposed, shall be disqualified from appointment to the position for which the examination is being held and may be disqualified from being a candidate for any civil service examination for a period of five years.

§ 50.5   Prohibition Against Certain Political Activities; Improper Influence

(a) Recommendations Based on Political Affiliations. No recommendation or question under the authority of this Part shall relate to the political opinions or affiliations of any person whatever; and no appointment or selection to or removal from an office or employment within the scope of this Part shall be in any manner affected or influenced by such opinions or affiliations. No person in the unified court system is for that reason under any obligation to contribute to any political fund or to render any political service, and no person shall be removed or otherwise prejudiced for refusing so to do. No person in the unified court system shall discharge or promote or reduce, or in any manner change the official rank or compensation of any other person in the unified court system, or promise or threaten so to do, for giving or withholding or neglecting to make any contribution of money or service or any other valuable thing for any political purpose. No person in the unified court system shall use his or her official authority or influence to coerce the political action of any person or body or to interfere with any election.

(b) Inquiry Concerning Political Affiliations.

(i) No person shall directly or indirectly ask, indicate or transmit orally or in writing the political affiliations of any employee in the unified court system or of any person dependent upon or related to such an employee, as a test of fitness for holding office. A violation of this subdivision shall be subject to the provisions of subdivision 2 of section 107 of the Civil Service Law.

Nothing herein contained shall be construed to prevent or prohibit inquiry concerning the activities, affiliation or membership of any applicant or employee in any group or organization which advocates that the government of the United States or of any state or of any political subdivision thereof be overthrown by force, violence or any unlawful means.

(ii) No question in any examination or application or other proceeding pursuant to this Part shall be so framed as to elicit information concerning, nor shall any other attempt be made to ascertain, the political opinions or affiliations of any applicant, competitor or eligible, and all disclosures thereof shall be disregarded. No discrimination shall be exercised, threatened or promised against or in favor of any applicant, competitor or eligible because of his or her political opinions or affiliations.

(c) Political Assessment. No employee of the unified court system shall, directly or indirectly, use his or her authority or official influence to compel or induce any other employee of the unified court system to pay or promise to pay any political assessment, subscription or contribution. Every employee who may have charge or control in any building, office or room occupied for any governmental purpose is hereby authorized to prohibit the entry of any person, and he or she shall not knowingly permit any person to enter the same for the purpose of making, collecting, receiving or giving notice therein, of any political assessment, subscription or contribution; and no person shall enter or remain in any such office, building or room, or send or direct any letter or other writing thereto, for the purpose of giving notice of, demanding or collecting a political assessment; nor shall any person therein give notice of, demand, collect or receive any such assessment, subscription or contribution. No person shall prepare or take any part in preparing any political assessment, subscription or contribution with the intent that the same shall be sent or presented to or collected from any employee subject to the provisions of this Part, and no person shall knowingly send or present any political assessment, subscription or contribution to or request its payment of any employee. Any person violating any provision of this subdivision shall be subject to the provisions of subdivision 3 of section 107 of the Civil Service Law.
(d) Prohibition Against Promise of Influence.
Any person who, while holding any public office, or in nomination for, or while seeking a nomination or appointment for any public office, shall corruptly use or promise to use, whether directly or indirectly, any official authority or influence, whether then possessed or merely anticipated, in the way of conferring upon any person, or in order to secure or aid any person in securing any office or public employment, or any nomination, confirmation, promotion or increase of salary, upon the consideration that the vote or political influence or action of the last-named person, or any other, shall be given or used in behalf of any candidate, officer or party, or upon any other corrupt condition or consideration, shall be subject to the provisions of subdivision 4 of section 107 of the Civil Service Law. Any public officer, or any person having or claiming to have any authority or influence for or affecting the nomination, public employment, confirmation, promotion, removal or increase or decrease of salary of any public officer, who shall corruptly use, or promise, or threaten to use any such authority or influence, directly or indirectly in order to coerce or persuade the vote or political action of any citizen or the removal, discharge or promotion of any officer or public employee, or upon any other corrupt consideration, shall also be subject to the provisions of subdivision 4 of section 107 of the Civil Service Law.

(e) Political Organizations. No employee of the unified court system may hold an elective office in a political party, or a club or organization related to a political party, except that an employee may be a delegate to a judicial nominating convention or a member of a county committee other than the executive committee of a county committee.

§ 50.6 Practice of Law

(a) A lawyer who is employed full-time in any court or agency of the unified court system shall not maintain an office for the private practice of law alone or with others, hold himself or herself out to be in the private practice of law, or engage in the private practice of law except as provided in this section.

(b) Subject to prior written application and approval as to each professional engagement, a person referred to in subdivision (a) of this section may engage in the private practice of law as to matters not pending before a court or a governmental agency, in uncontested matters in the Surrogate's Court, uncontested accountings in the Supreme Court and other extra-judicial matters, not preliminary or incidental to litigated or contested matters. Such approval shall continue only to the completion of the particular engagement for which permission was obtained, except that prior approval for the provision of pro bono services, authorized under subdivision (c) of this section, may be granted on an annual basis with respect to an organization or project that provides such services to persons unable to afford counsel. Prior approval must be obtained from:

(1) the Chief Judge of the Court of Appeals for lawyers employed in that court;

(2) the Presiding Justice of the appropriate Appellate Division for lawyers employed by an Appellate Division; and

(3) the Chief Administrator of the Courts for lawyers employed in every other court or court-related agency in the unified court system.

(c) (1) Persons referred to in subdivision (a) of this section may provide pro bono legal services, which do not interfere with the performance of their jobs, in contested or uncontested matters, except those brought in the courts of their own employment.

(2) Pro bono services in any contested matter shall be performed under such written terms and conditions as may be specified by the approving authority designated in subdivision (b) (1), (2) or (3).

(3) No provision of legal services or related activities authorized pursuant to this section may take place during usual working hours unless appropriate leave is authorized and charged. No public resources may be used in any such connection. Reasonable precautions must be taken in all cases by approving authorities and authorized employees to avoid actual and perceived conflicts of interest and the actual or perceived lending of the prestige or power of the public officers or positions of the employees and conveying the impression that such employees are in special positions to exert influence.

(d) An employee of the Unified Court System who is employed on a part-time basis shall not participate directly or indirectly as a lawyer in any contested action or proceeding in the court in which he or she serves, or in any other practice of law which is incompatible with or which would reflect adversely upon his or her position or the performance of his or her duties. Such employee may participate as a lawyer in uncontested actions or proceedings in the court in which he or she serves only with prior written approval of the Chief Administrator of the Courts.

(e) No partner or associate of a part-time law secretary or law clerk shall practice law before the justice or judge by whom such law secretary or law clerk is employed.

(f) Each approving authority or designee shall report annually to the Chief Administrator of the Courts the number of requests and approvals. With respect to pro bono representation, each approved employee shall report annually to the Chief Administrator the number of representations and pro bono hours performed.
AGREEMENT

between the

STATE OF NEW YORK -
UNIFIED COURT SYSTEM

and

CITYWIDE ASSOCIATION OF LAW
ASSISTANTS OF THE CIVIL,
CRIMINAL AND FAMILY COURTS

2003-2007
11.3 Meal Allowance.

(a) A meal allowance of $6.00 will be paid to any employee required to work at least three hours beyond his/her normally scheduled workday unless he/she is receiving cash compensation for such overtime work.

(b) An employee ineligible to receive cash compensation for overtime worked who is required to work at least seven hours on his/her regularly scheduled day off, shall be entitled to receive one overtime meal allowance. An employee required to work at least ten hours on his/her regularly scheduled day off, shall be entitled to receive a second overtime meal allowance.

ARTICLE 11

WELFARE FUND

11.1 (a) The State contribution to the Union's Welfare Fund in effect of April 1, 2003, shall remain in effect except as modified below.

(b) Effective April 1, 2004, the State shall contribute a pro rata annual sum of $1,040 per active employee for remittance to the Union's Welfare Fund. A pro rata contribution of $520 to such Fund shall be made by the State for part-time and per diem employees provided they are working on a regular basis at least half the regular hours of full-time employees in the same title.

(c) Effective April 1, 2005, the State shall contribute a pro rata annual sum of $1,080 per active employee for remittance to the Union's Welfare Fund. A pro rata contribution of $540 to such Fund shall be made by the State for part-time and per diem employees provided they are working on a regular basis at least half the regular hours of full-time employees in the same title.

(d) Effective April 1, 2006, the State shall contribute a pro rata annual sum of $1,130 per active employee for remittance to the Union's Welfare Fund. A pro rata contribution of $565 to such Fund shall be made by the State for part-time and per diem employees provided they are working on a regular basis at least half the regular hours of full-time employees in the same title.

(e) The State shall contribute a pro rata sum of $785 per employee retired since April 1, 1977, for remittance to the Union's Welfare Fund in each fiscal year of the Agreement.

(f) The State shall contribute an additional sum of $15 per full-time active employee for educational purposes.

ARTICLE 12

TRAVEL EXPENSES

12.1 Per Diem Meal and Lodging Expenses. The State agrees to reimburse, on a per diem basis, as established by the employee travel rules of the Chief Administrative Judge, employees who are eligible for travel expenses, for their actual and necessary expenses incurred while in travel status in the performance of their official duties for hotel lodging, meals and incidental expenses related thereto (hotel tips, etc.) for a full day at rates stated in the employee travel rules of the Chief Administrative Judge for managerial or confidential employees.

12.2 The State shall provide, subject to the employee travel rules of the Chief Administrative Judge, a maximum mileage allowance rate per mile equal to the maximum mileage allowance provided by the Federal Government to its employees for the use of personal vehicles for those persons eligible for such allowance in connection with official travel. The personal vehicle mileage reimbursement rate for employees in this unit shall be consistent with the maximum mileage allowance permitted by the Internal Revenue Service ("IRS").

ARTICLE 13

DISCIPLINARY PROCEDURES

13.1 Applicability. An officer or employee described in paragraph (a), (b) or (c) below shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section, unless such officer or employee is granted the option and elects to follow the alternative administrative disciplinary procedure set forth in Section 13.8 of this Article.

(a) An officer or employee holding a position by permanent appointment in the competitive class of the classified service, or,

(b) An officer or employee holding a position by permanent appointment or employment in the classified service, who is an honorably discharged member
of the Armed Forces of the United States having served therein as such member in time of war as defined in the Civil Service Law, or who is an exempt voluntary firefighter as defined in the General Municipal Law, except where the officer or employee described in this paragraph holds a position designated by the Chief Administrative Judge as confidential or requiring the performance of functions influencing policy, or.

(c) An officer or employee holding a position in the non-competitive class other than a position designated by the Chief Administrative Judge as confidential or requiring the performance of functions influencing policy, who since his/her last entry into the service of the Unified Court System has completed at least five years of continuous service in the non-competitive class in a position or positions not so designated as confidential or requiring the performance of functions influencing policy.

13.2 Procedure. An officer or employee against whom removal or other disciplinary action is proposed shall have written notice thereof and of the reasons thereof, shall be furnished a copy of the charges preferred against him/her and shall be allowed at least eight days for answering the same in writing. Service of a copy of the charges shall be made by personal service if possible. If service cannot be effectuated by personal service, it shall be made by certified mail return receipt requested. The Union shall be advised by certified mail, return receipt requested, of the nature and work location of the officer or employee against whom charges have been preferred. The charges shall be made by the Deputy Chief Administrative Judge (New York City Courts) and the hearing shall be held by a person designated by him/her for that purpose. The Deputy Chief Administrative Judge (New York City Courts) shall, upon consultation with the Union as provided in Section 13.9, establish a panel of qualified persons who may be designated to conduct the hearing.

The person or persons designated to conduct the hearing shall, for the purpose of such hearing, be vested with all the powers of the Deputy Chief Administrative Judge (New York City Courts) and shall make a record of such hearing which shall, with recommendations, be referred to the Deputy Chief Administrative Judge (New York City Courts) for review and decision. The Hearing Officer shall, upon the request of the officer or employee against whom charges are preferred, permit him/her to be represented by counsel, or by a representative of the Union and shall allow him/her to summon witnesses in his/her behalf. The burden of proving incompetency or misconduct shall be upon the State. Compliance with technical rules of evidence shall not be required. The officer or employee against whom charges are preferred shall, upon request, be entitled to a copy of the recommendations of the Hearing Officer and shall be allowed three days to comment upon them, in writing, to the Deputy Chief Administrative Judge (New York City Courts).

13.3 Suspension Pending Determination of Charges. Pending the hearing and determination of charges of incompetency or misconduct, the officer or employee against whom such charges have been preferred may be suspended without pay for a period not exceeding 30 days. In the sole discretion of the Deputy Chief Administrative Judge (New York City Courts) or his/her designee, such suspension without pay may be charged to an employee's annual leave accruals. Such decision to permit an employee to charge annual leave accruals shall not be grievable or otherwise reviewable in any other forum.

13.4 Determination of Charges. If such officer or employee is found guilty of the charges, the penalty or punishment may consist of a reprimand, a fine not to exceed $100 to be deducted from the salary or wages of such officer or employee, restitution, suspension without pay for a period not exceeding three months, demotion in salary and title, probation for up to six months, or dismissal from the service; provided, however, that the time during which an officer or employee is suspended without pay pursuant to Section 13.3 may be considered as part of the penalty and the officer or employee shall be entitled to continue health insurance, if the employee pays his/her own share of the premiums and shall be eligible to receive welfare fund benefits and have welfare fund payments made on his/her behalf during a period of suspension not exceeding three months. If he/she is acquitted, he/she shall be restored to his/her position with full pay for the period of suspension less the amount of compensation which he/she may have earned in any other employment or occupation and any unemployment insurance benefits which he/she may have received during such period. If such officer or employee is found guilty, a copy of the charges, his/her written answer thereto, a transcript of the hearing, and the determination shall be filed with the Office of Court Administration. A copy of the transcript of the hearing shall, upon request of the officer or employee affected, be furnished to him/her without charge.

13.5 Time for Removal or Disciplinary Proceedings. Notwithstanding any other provisions, no removal, disciplinary proceeding or alternative disciplinary procedure shall be commenced more than 18 months after the occurrence of the alleged incompetency or misconduct complained of and described in the charges; provided, however, that such limitation shall not apply where the incompetency or misconduct complained of and described in the charges would, if proved in a court of appropriate jurisdiction, constitute a crime.

13.6 Review of Penalty or Punishment. Any officer or employee believing himself/herself aggrieved by a penalty or punishment pursuant to the provisions of this Article, may appeal from such determination by petition to the Chief Administrative Judge or by an application to the courts in accordance with the provisions of Article 78 of the Civil Practice Law and Rules.
13.8 Alternative Disciplinary Procedure.

(a) Within 18 months of when an act of alleged misconduct or incompetency occurs, the Chief Administrative Judge (New York City Courts) shall determine whether such acts require the initiation of formal disciplinary charges pursuant to Section 13.2 of this Article or if the officer or employee shall be given the option of electing to follow the alternative disciplinary procedure to ensure that the decision to use the formal or informal proceedings is uniformly determined. For purposes of Section 13.8, only, an eligible officer or employee shall include all officers or employees who are not determined to be personal appointees of a judge by the appropriate appointing authority.

(b) If the Deputy Chief Administrative Judge (New York City Courts) determines that the alternative disciplinary procedure will be offered as an option, the employee shall be given an Initiation of Discipline form. This form shall specify in writing a description of the conduct alleged to constitute misconduct or incompetency. The employee shall make a written election whether or not to accept the alternative disciplinary procedure. An employee who otherwise is eligible for a formal hearing pursuant to Section 13.1 of this Article may opt to pursue a formal hearing or to accept the alternative disciplinary procedure. If such an employee fails to make a written election within ten days of receiving an Initiation of Discipline form, the employee may be served with written notice of the charges preferred against him/her and the procedures set forth in Section 13.2 shall be followed.

(c) An officer or employee who elects to follow the alternative disciplinary procedure shall meet with the designee of the Deputy Chief Administrative Judge (New York City Courts) who shall propose a penalty after reviewing the relevant facts which form the basis for discipline, the employment history of the employee listed on the Initiation of Discipline form and any facts or arguments submitted in defense or mitigation. The penalty shall be a written reprimand and/or no more than the forfeiture of up to ten days of annual leave, compensatory time or the loss of ten days pay, if appropriate. The Deputy Chief Administrative Judge (New York City Courts) shall review such proposed penalty to ensure that penalties are uniformly applied. The employee thereafter shall be informed in writing of the penalty assessed. The Initiation of Discipline form shall set forth the proposed penalty, the review of the Deputy Chief Administrative Judge (New York City Courts) and the penalty assessed. Such penalty assessed shall be implemented immediately. The determination of the designee of the Deputy Chief Administrative Judge (New York City Courts) and the Deputy Chief Administrative Judge (New York City Courts) shall be final, binding and not reviewable in any forum.
(d) A copy of such initiation or Discipline form upon completion of the
process shall be included in the personnel history folder of the officer or employee,
and shall be given to the officer or employee, the supervisor, payroll, the designee
of the Deputy Chief Administrative Judge (New York City Courts) and the Deputy
Chief Administrative Judge (New York City Courts).

13.9 Hearing Officer Panel. The State and the Union shall meet in a
Labor/Management Subcommittee to discuss the establishment by the State of a
panel to act as Hearing Officers on charges made against officers or employees
pursuant to this Article. The Subcommittee shall discuss and make
recommendations concerning the composition of, and selection from, a fixed panel
of persons who are qualified to act as Hearing Officers and from whom the Unified
Court System selects one or more persons to hear employee appeals of disciplinary
charges. Such recommendations shall be submitted to the Deputy Chief
Administrative Judge (New York City Courts) on whose behalf such Hearing
Officers are designated to hear such charges.

ARTICLE 14

PRINTING OF AGREEMENT

The State shall cause this Agreement to be printed and shall furnish the
Union with a sufficient number of copies for its use and distribution to current and
anticipated employees. The State agrees to provide each employee initially
appointed on or after the effective date of this Agreement a copy thereof as soon
as practicable following his/her first day of work.

ARTICLE 15

LABOR/MANAGEMENT COMMITTEE

15.1 To facilitate communication between the parties and to promote a
climate conducive to constructive employee relations, a Joint Labor/Management
Committee shall be established to discuss the implementation of this Agreement
and other matters of mutual interest. The size of the Committee shall be limited to
the least number of representatives needed to accomplish its objectives. Committee
size shall be determined by mutual agreement.

15.2 The Committee will be a standing committee and will meet as
necessary but at least twice a year. A written agenda will be submitted a week in
advance of regular meetings. Special meetings will be requested by either party.
An agenda will be submitted along with the request. Such special meetings will be
scheduled as soon as possible after requested.

15.3 Approved time spent in such meetings shall be charged as specified
in Section 4.7 of this Agreement.

15.4 Labor/Management Committee meetings shall be conducted in good
faith. The Committee shall have no power to contravene any provision of this
Agreement.

15.5 The UCS shall prepare, secure introduction and recommend passage
by the Legislature of such legislation as may be appropriate and necessary to obtain
the annual appropriation in the amount of $44,680, which shall be carried over from
one fiscal year to the next but which shall lapse on March 31, 2007, to fund the
operation and implementation of the Quality through Participation program or such
other educational initiatives which seek to improve, professionalize or cross-train
the workforce and to develop and train employees. All funding provided in this
section must be encumbered by January 31, 2007. The parties have agreed that the
available funding shall be used for programs that provide support to employees for
day care/elder care reimbursement, un-reimbursed medical expenses, educational
reimbursement and health and wellness programs.

15.6 The State and the Union shall establish a Labor/Management
Subcommittee which shall discuss modifications to the current performance
evaluation system including the performance evaluation forms and appeals process.
The Subcommittee shall be made recommendations to the Chief Administrative Judge
by October 1, 2006.

15.7 The State and the Union shall establish a Labor/Management
Subcommittee to discuss the disciplinary procedures including the creation of an
expedited time and attendance discipline procedure.

15.8 The State and the Union shall establish a Labor/Management
Subcommittee to discuss issues pertaining to court facilities and occupational,
safety and health concerns (OSHA).

ARTICLE 16

WORK/LIFE ASSISTANCE PROGRAM

A Labor/Management Committee shall continue, composed of
representatives from the State and the Union. The Committee shall meet as
necessary or upon demand of the State or the Union.
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Friday, September 16, 1994  

HOUSING COURT DISCIPLINE PLAN CREATED TO RESTORE CREDIBILITY  

By Matthew Goldstein  

OVER THE YEARS, court officials have relied on private admonitions to punish Housing Court judges for inappropriate behavior, rather than pursue more formal disciplinary steps, such as removal from office or a public censure.  

An attorney's complaint about Manhattan Housing Court Judge Arthur R. Scott Jr.'s handling of a landlord-tenant matter, for instance, ended in a private reprimand for the judge last summer. (See related story, page 4).  

Similarly in 1990, former Manhattan Housing Court Judge Dianne S. Gasworth was privately reprimanded by court administrators for soliciting lawyers to collect nominating petitions for her unsuccessful bid for a Civil Court seat. The reprimand became public during the election.  

In fact, in the 21-year history of the city's Housing Court system, not a single housing judge has been removed from office or publicly disciplined, even though court administrators say they receive hundreds of complaints each year from litigants and attorneys about housing judges.  

It was in light of this record that Chief Administrative Judge E. Leo Milonas instituted a plan earlier this year to reform the system for disciplining Housing Court judges, which he said would restore "credibility" to the process and demonstrate that complaints are taken seriously.  

Because the Housing Court system was created by statute in 1973 and not by amendment to the State Constitution, city Housing Court judges are the only state judges not subject to supervision by the state Commission on Judicial Conduct, an independent state agency. Instead, the discipline of Housing Court judges falls to the chief administrative judge for the state courts and to the administrative judge for the New York City Civil Courts, which include the Housing Courts.  

A key element of the new disciplinary process is the establishment of a permanent seven-member Housing Court Disciplinary Committee, which has been modeled after the State Commission on Judicial Conduct and will consider all formal charges brought against a housing judge and recommend possible penalties.  

In June, Judge Milonas named State Supreme Court Justice Fern Fisher-Brandveen as
the chairwoman of the new disciplinary committee, whose seven members were
selected by a group of court administrators, city bar association representatives
and the Appellate Division presiding justices of the First and Second Departments.

Under the previous disciplinary rules, court administrators would review and
evaluate complaints filed against a Housing Court judge and appoint a temporary
hearing officer to consider the merits of those allegations they felt warranted
serious consideration.

However, the new disciplinary committee also only swings into action after court
administrators have decided to draw up formal charges against one of the 35
Housing Court judges in the city. Under the new rules, court officials in the
State Office of Court Administration will continue to screen all incoming
complaints and will decide which allegations warrant further investigation.

"The way it is drafted, we [OCA] are the investigative body," said Michael
Colodner, OCA general counsel, in a recent interview.

In this regard the new disciplinary system is then similar to the previous
policy, since the decision to investigate and prosecute complaints is left to the
discretion of the administrative judges in the court system.

Some court observers argue that while the new rules are a decided improvement of
the previous system, there still could be more public accountability brought into
the process.

Paula Galowitz, a clinical professor at New York University Law School, whose
students frequently work on landlord-tenant cases, said permitting the
disciplinary committee to make its own determination about investigating a
complaint would provide an added level of accountability and independence.

Alan Beck, an assistant director of the Fund for Modern Courts, who has written
several reports on the Housing Court for the not-for-profit court monitoring
organization, said he would favor a disciplinary system that more closely
parallels the powers granted to the State Commission on Judicial Conduct, the
autonomous state agency that can unilaterally launch an investigation of a judge
based on the receipt of a complaint or press reports about a particular judge.

However, Gerald Stern, the commission's chief administrator, pointed out that
many of those investigations end up in private reprimands, such as the kind court
officials have used to discipline Housing Court judges, rather than public
censures of sitting state judges.
Coudert Brothers has lost an effort in Manhattan Supreme Court to win dismissal of a pregnancy-related bias claim by a former associate in its Tokyo office tied to her discharge after returning from a three-month maternity leave. Justice Sheila Abdus-Salaam denied the firm's motion to dismiss, while holding that its reason for terminating plaintiff Amy E. Cherry - a decline in business at the branch - "could support" a finding in its favor at trial. Coudert maintained she was one of four lawyers transferred because of "substantial financial losses." Ms. Cherry contended an "option" to transfer to Singapore but not New York was "retaliation" after she returned from her maternity leave. The decision will be published tomorrow.

CUNY School of Law in Queens, the city's only law school committed to public and community service, has found a compatible site for its new summer school program. It will be located at 99 Hudson Street in Manhattan, which is the headquarters for a number of public interest law organizations, including the NAACP, NOW, Puerto Rican, and Asian American Legal Defense and Education Funds and Lawyers Alliance for New York.

A New Jersey man is seeking to end his alimony obligations on the novel ground that his former wife has entered into a same-sex marriage. Although the state does not recognize such marriages, Robert Alston, in papers filed last week in Morris County Superior Court, contends that his former wife, Michele, considers herself remarried. Consequently, he argued, this frees him from having to continue paying her alimony.

Two years after the Housing Court Disciplinary Committee was established, only one housing judge has been the subject of hearings by the seven-member panel, said Michael Colodner, counsel for the Office of Court Administration. That official was former Housing Judge Arthur R. Scott Jr., who was sentenced last Wednesday to up to 7 1/2 years in prison on state bribery charges. Mr. Colodner said the committee, which recommends what kind of sanctions should be imposed against a housing judge, was not intended to have independent investigatory powers. He said the committee only acts on charges filed by court administrators.
The jurisdiction of the Commission on Judicial Conduct is limited to judges and justices of the New York State Unified Court System. It does *not* include jurisdiction over former judges, Judicial Hearing Officers or court employees. (Note: While the Commission has jurisdiction over Judges of the Civil Court of the City of New York, it does not have jurisdiction over Housing Court Judges who serve in that court.)

Complaints against non-judge employees of the New York State Unified Court System, may be made to:

Inspector General
New York State Unified Court System
26 Broadway
New York, New York 10004
646-386-3500
Rules of the Chief Administrative Judge

PART 101. Advisory Committee On Judicial Ethics

Commercial reuse of the Rules as they appear on this web site is prohibited.
The official version of the Rules published in the NYCRR is available on Westlaw.

Text is current through March 15, 2003

101.01 Establishment
101.02 Membership
101.03 Duties
101.04 Procedure
101.05 Compensation
101.06 Confidentiality
101.07 Publication

Section 101.01 Establishment.

There shall be an Advisory Committee on Judicial Ethics to issue advisory opinions to judges and justices of the Unified Court System concerning issues related to ethical conduct, proper execution of judicial duties, and possible conflicts between private interests and official duties.

Historical Note

Section 101.02 Membership.

(a) The Chief Administrator of the Courts, in consultation with the Administrative Board of the Courts and with the approval of the Chief Judge of the State of New York, shall appoint members to the committee in such numbers as deemed necessary to effectively carry out its duties and shall designate the chair.

(b) Each member shall be an active or former judge or justice of the Unified Court System.

(c) The members and the chair shall serve at the pleasure of the Chief Administrator and shall be appointed for terms of up to five years, provided that no member first appointed on or after November 1, 2000, shall serve for more than one five-year term.
Section 101.03 Duties.

(a) The committee shall issue advisory opinions, in writing, to the judge or justice making the request. The committee may decline to respond to any question it deems inappropriate for the exercise of its jurisdiction.

(b) The committee may respond to questions concerning judicial ethics posed by persons who exercise quasi-judicial duties in the Unified Court System but who are not judges or justices of the Unified Court System.

Section 101.04 Procedure.

(a) Unless the chair provides otherwise, all requests for advisory opinions shall be submitted in writing. Requests shall detail the particular facts and circumstances of the case. The committee may request such supplemental material as it deems necessary.

(b) The committee shall adopt procedures for the formulation and transmission of its advisory opinions.

Section 101.05 Compensation.

Members of the committee shall serve without compensation but shall be reimbursed for expenses actually and necessarily incurred in the performance of their official duties for the committee.

http://www.courts.state.ny.us/rules/chiefadmin/101.shtml
Section 101.06 Confidentiality.

Except as set forth in section 101.7 of this Part, requests for advisory opinions, advisory opinions issued by the committee, and the facts and circumstances on which they are based shall be confidential and shall not be disclosed by the committee to any person other than the individual making the request. Deliberations by the committee shall be confidential.

Historical Note

Section 101.07 Publication.

The committee shall publish its formal advisory opinions, at such times and in such manner as approved by the Chief Administrator, with appropriate deletions of names of persons, places, or things that might tend to identify the judge or justice making the request or any other judge or justice of the Unified Court System.

Historical Note
Opinion 88-70
June 13, 1988

Topic:
Consideration by the Advisory Committee on Judicial Ethics of requests for opinions by New York City Housing Part Judges.

Digest:
The Judges of the Housing Part of the Civil Court of the City of New York are entitled to request ethics opinions and receive the same consideration as other judges in connection with the Advisory Committee on Judicial Ethics.

Rules:
NYCCCA §102, §110; 22 NYCRR §208.43(a); Glass v. Thompson, 51 A.D.2d 69;

Opinion:

A New York City Housing Judge inquires whether this Committee will answer requests for opinions from Housing Judges of the Civil Court of the City of New York.

Section 102 of the New York City Civil Court Act established the Civil Court of the City of New York as a single city-wide court. The Civil Court Act also established hearing officers for the Housing Part, and provided for their appointment, qualification, term, powers and duties (N.Y. City Civil Court Act §110). The status of these hearing officers as referees rather than as duly elected judges was historically and extensively treated by the Second Department (Glass v. Thompson, 51 A.D.2d 69).

Section 110 of the New York City Civil Court Act was subsequently amended to provide that:
Actions and proceedings before the Housing Part shall be tried before Civil Court Judges, Acting Civil Court Judges, or Housing Judges. Housing Judges shall be appointed pursuant to subdivision (f) of the Section and shall be duly constituted judicial officers, empowered to hear, determine and grant any relief within the powers of the Housing Part in any action or proceeding except those to be tried by jury. Such Housing Judges shall have the power of Judges of the Court to punish for contempts. Rules of evidence shall be applicable in actions and proceedings before the Housing Part. The determination of the Housing Judge shall be final and shall be entered and may be appealed in the same manner as a judgment of the court.... (emphasis added).

In our view, the powers as enumerated by the Legislature make it clear that Housing Judges qualify as judges for our purpose and consequently, they are entitled to ethics opinions from this Committee.

This opinion is advisory only and does not bind either the Office of Court Administration or the Commission on Judicial Conduct.

SJS/job
THIRD NOTICE

Effective immediately (September 25, 2007): Because the Committee's former Chief Counsel, Raymond Hack, is retiring imminently, please hereafter address all written inquiries for formal ethics opinions to the Advisory Committee on Judicial Ethics as follows:

Advisory Committee on Judicial Ethics  
Attn: Maryrita Dobiel, Chief Counsel  
New York State Unified Court System  
4 Empire State Plaza, Suite 2001  
Albany, New York 12223-1450

If you wish to have informal guidance by telephone, you may contact any of the following three people, or any other member of the Committee:

Hon. George D. Marlow, Chair - (212) 340 0593 or (845) 486 2200  
Maryrita Dobiel, Chief Counsel - (518) 474 7469  
Edward P. Borrelli, Special Counsel - (914) 824 5329

The Advisory Committee on Judicial Ethics does not respond to email inquiries.
I. Introduction

Each year, thousands of adults suffering from physical, mental, or other incapacities are found incapable of adequately defending or prosecuting their rights in proceedings before New York City Civil Court, Housing Part, commonly called Housing Court. Many of these adults are elderly. Many suffer from physical debilitation, mental illness, and substance addiction. Many are victims of physical, mental, and financial abuse. Many are unable to receive benefits to which they are entitled. Many have no one who will help them. Many cannot even come to court.

As dictated by Civil Practice Law and Rules (CPLR) Article 12, Housing Court must appoint a guardian ad litem (GAL) to advocate for and assist the incapacitated person, who is then known as a ward. The standard under CPLR 1201 is that Housing Court must appoint a GAL for “an adult incapable of adequately prosecuting or defending his rights.” All involved must aid the incapacitated using the least restrictive means to intervene in their lives. Governmental agencies like Adult Protective Services (APS), a division of the New York State Department of Social Services (DSS), and the court itself affect the ability of GALs to advocate for their wards.

Consequences, including involuntary relocation and the eviction of those who deserve protective services, come not only from the merits of Housing Court litigation but also from incapacitated litigants’ lack of legal representation; the lack of affordable housing in New York City; tenants, landlords, charities, and government personnel scrambling over scarce resources; the poverty suffered by most Housing Court litigants with diminished capacity; and the hectic pace of Housing Court proceedings. Those who serve as GALs perform an invaluable service defending societal values and maintaining the integrity of the Housing Court and summary eviction proceedings by protecting those most in need. But simply appointing a GAL does not resolve all the problems for the incapacitated, the adverse

(Continued on page 2)

*Gerald Lebovits is a judge of the New York City Civil Court, Housing Part, in Manhattan and an adjunct professor at St. John’s University School of Law. Matthias Li is an associate at Greenberg Traurig, LLP. Shani R. Friedman, a guardian ad litem in Manhattan and Brooklyn, is a New York Law School graduate. For their generous research assistance, the authors thank law students Matthew Shapiro (Cardozo School of Law), Timothy Schmidt (Hofstra University School of Law), and Erin Olshesher (New York Law School).
parties, or the court itself. Frustrations and delays beset too many cases involving GALs.6

This article discusses the role GALs play in Housing Court and the law affecting GALs, wards, and potential wards.

II. The GAL’s Duties

Until 1962, when CPLR 1201 was enacted, GALs were called “special guardians” when they served in special proceedings like summary nonpayment and holdover proceedings. Whether in a special proceeding or a plenary action, a GAL is “an officer of the court with powers and duties strictly limited by law and he may act only in accordance with the instructions of the court and within the law under which appointed.”7 Translated from Latin, ad litem means “for the suit.”8

Housing Court may appoint a guardian on its own initiative,9 even when a potential ward opposes the motion. The CPLR contains no requirement that a prospective ward agree with the appointment, and case law permits the appointment. In the 1998 case of Anonymous v. Anonymous, for example, the Appellate Division, First Department, affirmed Supreme Court’s appointment of guardian ad litem despite the defendant’s objection.10 It is difficult in practical terms to appoint a GAL without the ward’s consent and cooperation, and it makes the GAL’s work challenging if the ward does not consent. The GAL will nevertheless help the court by presenting an objective assessment after an investigation. Due process will be satisfied by the GAL’s and the court’s always considering the ward’s best interests; by allowing the ward to speak and be heard, at least to an adequate extent, on whether to appoint a GAL and on any other relevant issue that might arise during the proceeding; and by permitting the ward to hire an attorney.

In appointing a GAL, the court may set out the GAL’s duties in a court order. Doing so can help assure that the GALs will do what they are required to do in each specific case, assuage the opposing (Continued on page 3)
party that the proceeding will move relatively expeditiously, and assure the public that appointing the GAL is appropriate.

The GAL’s primary obligation “is to act in his or her ward’s interest.” Although the scope of the GAL’s duties is narrow, the GAL takes on a variety of roles, acting simultaneously as an advocate, social worker, and liaison between the ward, APS, social-service agencies, the marshal, the ward’s family, opposing counsel, and the court. The GAL is often called upon to establish a relationship with the ward to understand the ward’s concerns and wishes.

The GAL might also engage in settlement negotiations, become familiar with what benefits the ward may receive, and assure that the ward receives required services from appropriate agencies. The GAL may not control the ward’s finances, but the GAL intervenes with social-services agencies, the Social Security Administration, the New York City Housing Authority, SCRIE, Section 8, and APS, among others. The GAL might hire an attorney for the ward, perhaps by seeking the aid of The Legal Aid Society, Legal Services for New York, MFY Legal Services, Northern Manhattan Improvement Corp. Legal Services, or a law-school clinic like Cardozo Bet Tzedek Legal Services. The GAL might also proceed to trial, with or without an attorney representing the ward.

A GAL’s role is limited to the action or proceeding before the court. The role of a Mental Hygiene Law (MHL) Article 81 guardian, often called a “community guardian,” is far broader. An Article 81 guardian can be appointed after a Supreme Court proceeding as a guardian of the ward’s property, person, or both, and not merely for a piece of litigation. GALs are also different from law guardians who represent children in Supreme Court matrimonial actions, from Family Court law guardians, and from Family Court and Surrogate’s Court guardians.

MHL Article 81 guardians have more expansive powers, such as the ability to relocate a ward, than Housing Court GALs. For an MHL Article 81 guardian to be appointed, the ward must be found incapacitated or agree that appointing a MHL Article 81 guardian is necessary. In MHL Article 81 proceedings, proof of the ward’s incapacity must be based on clear and convincing evidence that “the person is unable to provide for personal needs and/or property management; and the person cannot adequately understand and appreciate the nature and consequences of such inability.” Because MHL Article 81 guardians have greater powers over their wards than Housing Court GALs do, the law establishes the higher standard of competency to appoint an Article 81 guardian, as opposed to the lower standard of incapacity to defend or prosecute rights in order to appoint a Housing Court GAL.

The incompetency standard for a Housing Court GAL appointment is less than and different from the incompetency standard for an MHL Article 81 guardian. Were the law otherwise, GALs would be appointed only after Supreme Court declared an individual incompetent.

MHL Article 81 sets out a method for the courts to determine a litigant’s competency, and “until that is done the courts should not have to decide case by case whether a particular party is of sufficient mentality to be a suitor or defendant.”

Once appointed, a Housing Court GAL is assigned to a specific proceeding. In a nonpayment proceeding, a ward routinely has rental arrears, often sizeable by the time a GAL is appointed, and might also not be paying ongoing use and occupancy. A ward who meets APS guidelines and becomes an APS client is entitled to receive services. These services include APS’s applying on the ward’s behalf for a grant to cover arrears and for voluntary or involuntary financial management, a program by which APS will oversee paying the rent and housing bills with the ward’s funds to assure that the rent will be paid and not squandered or allowed to sit unused. If the ward is not an APS client, these applications may be made to another social-service agency like Self Help or the Jewish Association for Services for the Aged (JASA).

Holdover proceedings are often initiated because of alleged nuisances, sometimes caused by outstanding psychological or physiological conditions like obsessive-compulsive disorder, dementia, or Alzheimer’s. Common nuisances include having unmanageable pets or hoarding, called a Collyer’s

(Continued on page 4)
condition after the Collyer brothers, who hoarded in a New York townhouse in the 1950s. These nuisances might create a fire hazard, odors, or a rodent or garbage infestation. In cases of a tenant-ward’s unmanageable-pet problem, inappropriate behavior, or hoarding, the GAL, working with APS and the landlord, will coordinate with the necessary agencies or third parties, such as Animal Control, a psychiatrist, JASA, or a company to which APS contracts out for a cleaning to resolve the nuisance. Although the court has the power in a pending proceeding to grant access to a landlord to effect repairs, the Housing Court GAL does not, however, have the authority to allow cleaners into the apartment without the ward’s consent and may not force the ward to comply. Only an Article 81 guardian may force compliance.

Under a March 2007 Civil Court Advisory Notice and a March 2007 binding directive from the New York City Civil Court’s Administrative Judge, issued in response to a 2007 decision of the Appellate Term, First Department, in BML Realty Group v. Samuels, GALs must fill out a GAL Case Summary form, which they must retain in their files for three years. The Case Summary form documents the GAL’s contacts with the ward, the GAL’s advocacy efforts, and the steps the GAL took to follow through with the plan set forth in any stipulation of settlement. The court may require the GAL to submit the Case Summary form or may question the GAL on the record. If the court requires the GAL to submit the Case Summary form, the judge may direct on the GAL appointment order that the GAL submit it. The Case Summary form is not intended to be placed in the court file unless the file is sealed. The GAL might be asked to give the Administrative Judge a copy of the summary.

III. Conflicts Arising from the GAL’s Role

As an officer of the court, the GAL is required to investigate fully and fairly and to keep the court informed about the information obtained during the investigation of the ward. GALs who advocate for litigants with diminished capacities often face moral and ethical dilemmas arising from that investigation and from the tension between advocating for their wards and being officers of the court. Can the GAL both report objectively to the court and still always advocate in the ward’s best interests? May the GAL’s judgment be substituted for the ward’s?

If the GAL and the ward disagree on how to handle the case, should the GAL go forward if doing so means contradicting the ward’s wishes? If a ward is in a nursing home, hospital, or rehabilitative institute and is unlikely to resume tenancy at the location in dispute, should a GAL be allowed to enter into a stipulation of settlement on the ward’s behalf in which the ward surrenders the apartment if the ward opposes that settlement? If a landlord offers significant incentives for the tenant to surrender possession, may a GAL sign a stipulation to relocate the ward if the ward refuses to leave? If a ward wants a trial in a nonpayment case but has no valid defense and the GAL can get a stipulation of settlement offering the ward needed time to pay the arrears, may the GAL act contrary to the ward’s intentions and risk an eviction post-trial for failure to pay a possessory judgment in five days?

No apparent or uniform answer exists for these questions. Addressing these questions was a New York County Lawyers’ Association (NYCLA) Task Force on Housing Court Resources Subcommittee, which held a conference in October 2004 and issued a report on Housing Court GALs. NYCLA’s Board of Directors approved the Task Force’s final report, called the Report on Resources in the Housing Court, on February 5, 2007. The final report incorporates all the Subcommittee’s recommendations.

NYCLA’s final report, tracking its Subcommittee Report, advises that “[i]f there is no agreement between the GAL and the respondent (and counsel for the respondent, if any), the Housing Court Judge is to evaluate the respondent to determine whether the respondent has sufficient capacity to decide how the case should be resolved.” If the ward has sufficient capacity, NYCLA would urge the court to refer the case for trial or another proceeding. If not, NYCLA would urge the court and the GAL to refer the case to APS for an Article 81 proceeding. Only Article 81 guardians have the power to (Continued on page 5)
compel wards to accept settlements.

Other authorities and practitioners agree with NYCLA's position. According to those who hold this view, GALs are not vested with the authority to settle cases. CPLR 1207, they argue, "grants authority to the representatives of an infant or a person judicially declared incompetent to settle claims, but does not include guardians ad litem among the representatives with settlement authority." They contend that a fair reading of CPLR 1207 is that "the legislature did not authorize guardians ad litem to settle claims on behalf of the individuals they represent, unless the ward has been declared incompetent." For support, they cite In re Estate of Bernice B., in which the New York County Surrogate's Court found in 1998 "that a GAL cannot bind her adult ward to a settlement of which the ward disapproves unless the ward's incapacity to participate in the litigation (or in its settlement) has been established under the special procedural safeguards afforded by the [MHL]." They also cite Tudorov v. Collazo, in which the Appellate Division, Second Department, wrote, as to CPLR 1207, that if a ward objects to a GAL's attempt to settle a case, "a guardian ad litem is not authorized to apply for approval of a proposed settlement of a party's claim . . . ." They additionally note that the concept of a GAL's "stepping into the ward's shoes" appears in "training manuals" only and has no case-law support.

Others have a different opinion. They might agree that the GAL may not settle a proceeding without court approval. But, they argue, the court may approve a GAL's proposed settlement of any proceeding, including ones that surrender possession, and the ward's desires are relevant but not determinative. For proponents of this view, the relationship between a GAL and a ward is different from that of attorney-client, in which the attorney must follow the client's wishes but in which a GAL might be obliged out of necessity to act contrary to the ward's desires and to support a settlement position adverse to what the ward wants.

Some courts have allowed GALs to act contrary to their wards' wishes. The Appellate Division, Third Department, in In re Feliciano v. Nielsen, for example, quoting from dictum from the Court of Appeals in In re Aho, held that "a guardian ad litem is not to be viewed as an 'unbiased protagonist of the wishes of an incompetent' and may even act contrary to the wishes of its ward." Many judges agree with Feliciano. One, in a law-journal article, has written that "[t]he GAL steps into the shoes of the ward . . . ." Another, in a training outline, has explained that "although the ward's desires are relevant, they are not determinative. Thus, a guardian ad litem may have to act contrary to the ward's desires and maintain a position adverse to the ward." A third, Justice Fern A. Fisher, the New York City Civil Court Administrative Judge, whose office oversees the GAL program, submitted a Comment in opposition to the NYCLA Subcommittee Report, arguing that a GAL must act in the ward's interests but may act in opposition to the ward's preferences. The Comment notes the difference in the statutory procedure to settle claims by infants, judicially declared incompetents, and conservatoires and the role of the judge and GAL in settling claims against respondent-tenants not judicially declared incompetent but who nevertheless are incapable of adequately defending their rights. The Comment looks to the CPLR's legislative intent and argues that "the legislature considered and rejected CPLR 1207 and 1208's application to actions where the GAL is appointed to defend the interests of a party," including respondent-tenants in Housing Court. Justice Fisher argues that if the ward and the GAL disagree, and the judge does not find that an Article 81 proceeding is warranted, the case should not be sent out for a trial that can lead to an eviction.

Justice Fisher opines, therefore, that the judge should determine whether to order a settlement or recommendation if the ward disagrees with the settlement the GAL recommends. In making that determination, the court and the GAL should consider the least restrictive alternatives when intruding into the ward's autonomy.

Practical concerns underlie the belief that a GAL, supervised by the court and acting with the court's permission, should be allowed to urge a court to disregard a ward's irrational wishes. Just
because the court or a GAL wants to refer the matter for an Article 81 guardian does not mean that APS will accept the case or that Supreme Court will appoint an Article 81. GALs and Housing Court judges are not the wards' attorneys and do not prepare the papers for Supreme Court. The ward might be evicted if an Article 81 guardian is not appointed. Not accepting a fair stipulation that a GAL negotiates might also result in possible injustices because Article 81 proceedings are lengthy, drawn-out affairs. Even if the Housing Court matter is stayed pending an Article 81 proceeding, possible injustices might include denying landlords legitimate use and occupancy (which APS will not pay if it seeks an Article 81 guardian) and forcing the ward's neighbors to tolerate the ward's allegedly intolerable behavior.

After NYCLA issued its Subcommittee Report and Justice Fisher issued her Comment, the Subcommittee issued a Minority Report but adhered to its majority views. NYCLA's final report, approved, as mentioned above, in February 2007, considered and rejected Justice Fisher's Comment.

The reality is that GALs, to some valid extent, make decisions that affect their wards. In striving to "protect and assist a party, [GALs] do substitute their judgment and decisions for the decision making that the party otherwise would exercise in a proceeding and curtail the party's autonomy and freedom in that respect." This curtailment of the ward's autonomy ranges from invasions into the ward's financial independence in the form of APS involuntary financial management, to the GAL's coordinating a heavy-duty cleaning, to emergency hospitalization or institutionalization of the ward, to the GAL's recommending an MHL Article 81 guardianship proceeding. In an Article 81 guardianship proceeding, the Article 81 guardian is even more involved in the ward's life than a Housing Court GAL may ever be.

When a disagreement between the GAL and the ward's attorney arises over how to handle the ward's case, should the GAL, as an officer of the court, report this to the court, and whose position should prevail? One author has opined "that the lawyer can seek judicial removal of the present guardian [ad litem] and appointment of a new guardian ad litem . . . and then the attorney can seek judicial resolution of the disagreement with the guardian [ad litem], or can withdraw from the case." According to a Civil Court advisory opinion, "a GAL should allow the attorney to handle all the legal paperwork related to the case unless the attorney takes action contrary to the ward's welfare." If there is a conflict, or when the GAL believes that the attorney is not doing the work, the GAL should notify the judge, and the matter should be discussed and resolved on the record. Disagreements between the GAL and the ward's attorney might develop because they have different practical and ethical obligations toward the ward and might differ about what is in the ward's best interests.

Attorneys also experience conflicts. As the New Jersey Supreme Court in In re M.R. explained, "generally, the attorney should advocate any decision made" by the incapacitated person, and "on perceiving a conflict between that person's preferences and best interests, the attorney may inform the court of the possible need for a guardian ad litem." But if the client opposes a GAL, the attorney may move for a GAL only if the client is incapacitated and "if there is no practical alternative, through the use of a power of attorney or otherwise, to protect the client's best interests . . ." If that happens, the attorney may not be a witness at a contested hearing.

A question exists whether a GAL may perform purely legal work on the ward's behalf, such as drafting a memorandum of law. Some GALs who are attorneys will perform legal work out of kindness to their wards and generosity to the court. Although it is often difficult to find an attorney for the ward, the better practice is for GALs not to perform legal work and, instead, to do their best to retain an attorney. As three experts explain:

Even when the guardian ad litem is a lawyer, he or she cannot take on the dual role of acting as both guardian ad litem and legal counsel. Guardians ad litem and counsel for defendants perform different roles. The guardian ad litem is an officer of the court whose role is to protect the interests of the ward and (Continued on page 7)
report to the court. The attorney, while an officer of the court as well, must be a zealous advocate for the client in an adversarial process. The two roles are distinct, as are the obligations.46

It is difficult for an attorney-GAL to see a defect in the pleadings and not point it out to the court. Courts often tolerate GALs who do legal work. It would be unseemly for a court, having heard a GAL argue a meritorious legal issue for a ward, to disregard the argument, not because of its merits, but because the GAL perhaps should not have been the one to make it. The line between an attorney-GAL and an attorney is sometimes blurred.

Another issue arising out of the GAL’s role is whether private legal malpractice insurance will protect GALs. GALs need not be lawyers.46 GALs should be indemnified by legal malpractice insurance, some argue, because GALs are involved in legal proceedings and do at least quasi-legal, if not fully legal, work to protect their wards. The NYCLA Task Force on Housing Court Resources Subcommittee Report notes, however, that “[t]here is a diversity of opinion among private attorneys with regard to whether private legal malpractice insurance will cover work performed as a pro bono GAL in Housing Court.”47

The New York State Attorney General has issued an opinion stating that court-certified volunteer GALs are entitled to state indemnification under the Public Officers Law § 17(1)(a) because they are state-sponsored volunteers.48 Under Public Officers Law § 17(1)(a), GALs are entitled to state indemnification only if they are deemed an “employee” and not independent contractors. If the court determines that GALs, paid or unpaid, are independent contractors, then GALs would not be entitled to state indemnification. Under a New York State Attorney General Advisory Opinion dated October 24, 2006, paid GALs will not be indemnified under the Public Officers Law because they are not volunteers.49 Unless the Attorney General issues a different opinion or the Legislature amends the law, some compensated GALs, who are at risk of being sued by incapacitated, paranoid wards, might be disinclined to serve. Other GALs will serve but will be victimized by frivolous litigation. Several groups, including the New York State Bar Association’s Real Property Law Section’s Landlord and Tenant Proceedings Committee, have therefore proposed legislation to compel the state to indemnify Civil Court GALs.50

GALs have some protection, however, from lawsuits by their wards. The Civil Court in Lau v. Berman has held that a ward may not sue a GAL absent the ward’s first obtaining court approval and that the ward’s failure to do so must result in dismissing the action: “Once a court appoints a guardian to represent an incapacitated person, litigation against the guardian as representative of the incapacitated person may not proceed without permission of the court which appointed the guardian.”51 The court found that a suit against a GAL for breach of duty, conspiracy, and defamation for acting against the ward’s interests must be treated differently from other actions because “[a] guardian ad litem may be obliged to act contrary to the wishes of the incompetent and adopt a position that is adverse to the position of the ward.”52

IV. Who May Be Appointed to Serve as a GAL?

Because issues involving incapacitated litigants are critical to the court, the litigants, and the public, the New York City Civil Court has a GAL program in place. The court trains and certifies GALs, serves as a liaison to other agencies and stakeholders, and, in general administers the GAL program.

To become a certified Civil Court GAL, the appointee must undergo a court-approved day-long training program. The training, overseen by the Civil Court Administrative Judge’s office, is currently

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offered twice each year in two live training sessions, usually in January and June. Video replays of the trainings can be viewed in between the scheduled live sessions. Attorneys admitted to the bar for at least two years can receive a total of six free Continuing Legal Education (CLE) credits for completing the training.

Applications to serve as a Housing Court GAL are available online. Court certification is not necessary for trained pro bono professionals associated with social-service agencies or for students affiliated with a law school’s elder-law clinic.

Courts must take the proposed GAL’s financial ability into account under CPLR 1202(c) when determining whether the GAL can provide for the ward’s best interests. Before a court may make an appointment, the proposed GAL must sign an affidavit “stating facts showing his ability to answer for any damage sustained by his negligence or misconduct.” These facts include the GAL’s assets, income, and liabilities. CPLR 1202(c) is not always used in summary proceedings, in which Housing Court GALs have vastly fewer powers than Supreme Court Article 81 guardians and in which Housing Court monitors its GALs more closely than other courts do. GAL appointment orders in Housing Court sometimes provide that the GAL will serve without bond. Some appointment orders even provide that GALs need not comply with CPLR 1202(c) affidavit requirement. The fear is that compelling GALs to submit these affidavits is an onerous demand that might decrease the available pool of GALs who could assist Housing Court litigants. A Civil Court directive provides, however, that “Judges must insure that [a CPLR 1202(c)] affidavit is filed.”

Housing Court GALs need not file a notice of appointment under § 36.2(c) of the Rules of the Chief Judge, but judges, judicial hearing officers, and their spouses, children, and parents are disqualified from services as a GAL.

It is widely agreed that private law firms should be encouraged to serve as GALs, given the level of legal training and expertise that attorneys possess. Private attorneys serving as GALs increase the efficiency of the GAL appointment and training process, but a GAL need not be an attorney. Nor must a GAL be a doctor when the ward is mentally impaired.

V. How GALs are Appointed

A GAL may be appointed upon APS motion under CPLR 1202(a), or the court may appoint a GAL on motion or “at any stage of the action upon its own initiative.”

CPLR 1201 lists three categories of persons who must appear by a GAL: (1) certain infants; (2) certain adjudicated incompetents or conservatees; and (3) individuals “incapable of adequately prosecuting or defending [their] rights.” This paper addresses the third category.

As to potential wards who might be incapable of adequately defending their rights, the court should hold a hearing to ascertain the need to appoint a GAL for them even when they have competent counsel or when they and their attorneys object to appointing a GAL. The court in Fran Pearl Equities Corp. v. Murphy found that a hearing is required to determine whether to appoint a GAL. According to Silver & Junger v. Miklos, the court may appoint a GAL without a hearing if it relies on APS’s psychiatric documents and the petitioner’s letter to APS supporting the need for a GAL. A hearing is not required if the proposed ward and opposing party agree, on consent, that a GAL is needed or would be helpful to resolve the proceeding. No hearing is required when GAL appointment can be based on the court record and documentation that raise no issues of fact.

If the court before which the proceeding is pending does not appoint a GAL, an application for (Continued on page 9)
A GAL may also be made under CPLR 1202(a)(1) on motion by "an infant party if he is more than fourteen years of age." CPLR 1201 additionally provides that unless the court appoints a GAL, an infant shall appear by a parent having legal custody or, if there is no parent, by another person or agency having legal custody. The phrase "having legal custody" refers to judicially determined custody. Allowing a parent or legal guardian to appear without appointing a GAL eliminates an unnecessary application to the court. Appointing a GAL is required if "the right to custody exists neither by parenthood or by decree."70

CPLR 1202(a)(2) provides that a motion to appoint a GAL may be brought by a "relative, friend or a guardian, committee of the property or conservator." A government agency like APS or DSS has standing to move for a GAL, given its duties under Social Services Law § 473 and 18 NYCRR 457. APS has standing as a friend of the court to move to appoint a GAL without moving to intervene in the proceeding.71

Under CPLR 1012(a)(1), a court must permit a person to intervene as a party when a state statute confers the right to do so.72 A protective-service agency must have a network of professional consultants and service providers and may be involved with health, mental health, aging, and legal and law-enforcement agencies.73 The Social Services Law does not give a protective-services agency the right to intervene to seek a GAL for a party.74 In a special proceeding in the Housing Court, therefore, APS intervention is permitted only by leave of the court.75

CPLR 1202(a)(3) provides that a motion to appoint a GAL may be brought by "any other party to the action if a motion has not been made under paragraph one or two within ten days after completion of service."76 The "other party" may be the opposing one or the opposing party's counsel. Courts interpret CPLR 1202(a)(3) to require a party who knows, or believes, that the opposing party suffers from a mental condition to bring that condition to the court’s attention.77 This is especially true of the opposing side's attorney, who is an officer of the court. The opposing side has a duty to inform the court of an adversary's incapacity, especially when evidence in a prior proceeding between the two parties suggested that a guardian was required. In Jackson Gardens LLC v. Osorio, the court found that "[t]he fact that a guardian was found to be needed in a prior case, between the same parties, six months prior, clearly placed a duty on the petitioner to inform the court, and makes his failure to do same inexcusable."78

Even when a litigant has insufficient proof to move for a GAL, the litigant still has an obligation to bring the potential ward's mental disability to the court's attention.79 Securing a judgment and evicting a tenant the landlord knew was mentally incapacitated and in a nursing home can subject the landlord to claims for wrongful eviction and property damage.80 Not only does moral obligation require informing the court of a litigant's possible incapacity, but a legal one does as well.

Sometimes a landlord will have a duty to inform the court that the tenant might need a GAL if for no reason other than that the nuisance allegations that form the grounds for the holdover suggest a pattern of bizarre acts that might warrant a GAL. On the other hand, sometimes counsel will be only too glad to raise the matter of appointing a GAL so as to frazzle a nervous, unrepresented litigant or cause a court to question the litigant's rationality and good faith.

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A court-approved GAL is appointed when a Housing Court judge submits a Guardian ad Litem Request Form to the borough's Housing Court Supervising Judge or GAL coordinator, who maintains a list of court-approved GALs. The Housing judge may request a GAL who has particular experience or specialization. The Supervising Judge or GAL coordinator gives the appointing judge two or three names from the list, and the appointing judge's court attorney contacts the first of the two or three to assess availability and interest. The potential GAL may accept only if the court makes the initial contact; no other party to the case may arrange for the appointment. The court attorney informs the potential GAL of the basic facts of the case, including whether the ward is an APS client. If the potential GALs decline appointment, the Supervising Judge or GAL coordinator provides new names.

Once a person agrees to serve as a GAL, the appointing judge or court attorney prepares an order of appointment, which, when completed and signed by the appointing judge, is submitted to the Supervising Judge. The court attorney then mails the order and the papers in the court file to the GAL.

A judge may also directly appoint a potential ward's relative, friend, therapist, or social worker to serve as the GAL, although the judge should be on guard for the potential of a conflict of interests. A judge who makes a direct appointment need not submit anything to the Supervising Judge or GAL coordinator, and the Supervising Judge or GAL coordinator will not give the appointing judge a list of potential GALs. According to a Civil Court advisory notice, those non-court-certified individuals, "as a condition of the appointment, must participate in training specified by the Administrative Judge."81

CPLR 1202(c) provides that no GAL appointment is valid unless the GAL files written consent of the appointment with the court. A court may not appoint a GAL who is unwilling to serve.

VI. Housing Court's Authority to Appoint a GAL

The Civil Court, including its Housing Part, has the authority to appoint a GAL in a summary proceeding82 and need not refer a GAL motion to a Supreme Court judge. Under CPLR 1202(a), "[t]he court in which an action is triable may appoint a guardian ad litem at any stage in the action."83 Even if an adjudication of incompetency has not been made, the court must appoint a GAL if court intervention is required to protect the best interests of a litigant incapable of adequately asserting claims and rights.84

One Civil Court judge in three decisions published more than 15 years ago wrote that Housing Court does not have the jurisdiction to appoint GALs.85 All other courts have disagreed. These courts, from the Appellate Term down,86 have explained that Civil and Housing Court judges "ha[ve] the duty to protect a litigant who is incapable of protecting his or her interests"87 and "the inherent power to appoint a guardian ad litem."88

VII. When Can a GAL be Appointed?

Housing Court must appoint a GAL for litigants in a pending proceeding if the court finds, based on a preponderance of the evidence, that the litigants are incapable of adequately prosecuting or defending their rights.89 A determination of incompetency, unlike in an Article 81 proceeding, is not required.90 The Court of Appeals in the seminal Sengstack v. Sengstack found that although a GAL appointment should not be used to evade a formal declaration of incompetency, the court still has a duty to protect a litigant who might be incompetent but not formally declared incompetent.91

Under CPLR 1202, a GAL may be appointed at any stage of the action or proceeding. The Appellate Division, First Department, in In re Beyer confirmed in 1964 that CPLR 1202(a) allows (Continued on page 11)
courts to appoint GALs at any stage and “to a complex of situations, some of which may antedate the technical institution of the proceeding.” The court may, therefore, appoint a GAL before the action or proceeding begins. That might occur when a landlord’s attorney serves a petition and notice of petition and alerts the court to appoint a GAL rather than allow a tenant to be evicted for failing to answer the petition in a nonpayment proceeding or for being absent at an inquest in a holdover proceeding.

In actions or proceedings involving incompetents, the court should wait for the application of the persons entitled to move for the appointment of a GAL before the court appoints the GAL. If that procedure might endanger the incompetent’s interests, then the appointment can be made at the inception of the action or proceeding - for example, in an order to show cause before the petition and notice of petition are served. The court may also appoint a GAL after the parties have agreed on a settlement, or after a judgment is entered, or at the appeals stage.

An action or proceeding against litigants incapable of adequately protecting their interests may not proceed without notice to the court of the litigant’s incapacity and a court inquiry. Following the proposition set out in Vinokur v. Balzaretti that “[t]he public policy of this State, and of this court, is one of rigorous protection of the rights of the mentally infirm,” a hearing should be conducted whenever a question of fact arises about whether a GAL is required. Questions of fact might concern a potential ward’s alleged delusional behavior, poor judgment, and subclinical manifestations. The court in Weingarten v. State held that when a party eligible under CPLR 1202(a) applies for a GAL for an individual who resides in a mental institution, a rebuttable presumption arises that the individual is incapacitated.

CPLR 1201 dictates that a litigant’s mental impairment less than incompetency may support appointing a GAL. A GAL must be appointed if a potential ward does not understand the nature of the legal proceeding or the possible consequences of the court’s judgment.

The proposed ward’s physical impairments may also warrant appointing a GAL if the proposed ward is pro se and unable to appear in court to defend or assert a claim. A GAL will also be appointed when the litigant is unable to appear in court because of incarceration. In Leibowitz v. Hunter, the court granted a motion to appoint a GAL to aid a plaintiff in a coma due to injuries sustained in a car accident. Some courts will have declined to appoint a GAL if the potential ward’s physical incapacity was not linked to a mental incapacity.

The court will take a host of factors into account to determine whether a litigant requires a GAL. A litigant’s decreased mental ability or physical agility caused by advanced age, disease, or drug or alcohol abuse is relevant. Patients in psychiatric institutions presumptively require a GAL’s assistance. Courts will consider affidavits from neighbors, physicians, and others capable of attesting to the litigant’s mental and physical capabilities.

Not only are tenants eligible to receive a GAL, but landlords are as well. A GAL may also be appointed in any Housing Court proceeding, not just an eviction proceeding. Although GALs are seen most commonly in nonpayment and holdover proceedings, they serve in illegal lock-out and HP (repair) proceedings.

The GAL’s role ends when the case is dismissed, discontinued, settled, or otherwise resolved. A new GAL is required for every new proceeding, although the judge who believes that the GAL performed satisfactorily and developed a positive relationship with the ward may appoint the same GAL for the new proceeding.

VIII. Vacatur of Judgments

Most courts if pressed will vacate a final judgment of possession and warrant of eviction if it (Continued on page 12)
finds that an individual required a GAL during the action or proceeding but did not have one, regardless whether an attorney represented the tenant at the trial. In 124 MacDougall St. Assocs. v. Hurd, the court vacated a default judgment against a tenant who needed a GAL and an Article 81 guardian. Courts have vacated foreclosure, divorce, and money judgments, more than a year after the default, for mentally incapacitated defendants.

If the court, once notified that a tenant is incapacitated, fails to make the appointment or give careful consideration to the need for a GAL, it is "improvident and requires the reversal of the judgment." Most courts will similarly vacate a judgment and restore a party to possession if they find that the party was unable adequately to defend rights in the proceeding. Of import is a March 2007 Civil Court Advisory Notice stating that "if it appears that a respondent is incapable of adequately defending against a proceeding, the court should appoint a guardian ad litem and any default judgment entered prior to the appointment in most instances should be vacated. Failure to vacate the default judgment may be reversible error." When APS moves for a GAL, it will often tell the court on the landlord's application that the motion to vacate the judgment may be held in abeyance. Many GALs never move to vacate the judgment. They will use the judgment's nonvacatur as a bargaining tool, if the ward will not otherwise be prejudiced, to get more time to satisfy the judgment. Often landlords consent to giving wards time to satisfy the judgment if the judgment is not vacated. Landlords also consent to GALs in close cases on the condition that the court not immediately vacate the judgment.

An out-of-court stipulation signed by tenants incapable of adequately defending their rights will be vacated if the tenant required a GAL. If a tenant is "unable to address a particular topic without going off on a tangent" and otherwise is unable to defend legal rights, the default judgment should be vacated and a GAL appointed.

In Roe Corp. v. Doe, the court vacated a judgment of possession after finding that the petitioner-landlord, who knew about the respondent-tenant's incapacities, had a legal obligation to inform the court that the tenant was incapacitated. In V.K., the court went even further, holding that "a petitioner, in any proceeding, must be extremely diligent in determining whether a party may be under a disability requiring a guardian ad litem." If a party fails to notify the court of an adversary's disability before obtaining a default judgment, it is a fraud on the court and a basis to vacate the judgment.

IX. When GALs Are Not Required

Some courts will not vacate a judgment despite the ward's incapacitation. These courts will deny a motion to appoint a GAL even after a default and eviction, and even when the landlord knew about the tenant's infirmities. In Kalimian v. Driscoll, the court found that the fact that counsel represented the tenant played no role in determining whether the tenant was prejudiced by the absence of a GAL, but the court in Hertwig-Brilliant v. Michelotti found that failure to appoint a GAL was harmless because competent counsel represented the litigant, who was also helped by family. Some courts will not appoint a GAL when the respondent waits two years in the proceeding until the eve of the trial to move for a GAL. The court in 321 W. 16th St. Assocs. v. Wiesner, for example, refused to appoint a GAL late in the proceeding.

A court will deny a motion to appoint a GAL and vacate a judgment if the potential ward does not prove an incapacity to prosecute or defend rights. Thus, a motion will be denied if the letter of the

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psychologist who examined the tenant does “not state that [the] tenant was incapable of defending her rights or that appointment of a guardian was needed.”

When a motion to appoint a GAL is made, the court must balance the litigant’s interests with those of third parties, such as other tenants in the building, to assess whether to appoint a GAL. At first, litigants might appear unable to defend their rights adequately. After further assessment, the court might determine that the potential ward does not need a GAL.

Some courts have declined to appoint a GAL on the ground that appointing one will not help a recalcitrant litigant. Stratton Coop., Inc. v. Fenel was a nuisance proceeding in which the tenant repeatedly refused access to her home or to cure the hazardous accumulations. In that case, the Appellate Division, First Department, affirmed the final judgment and the decision finding that appointing a guardian (an Article 81 guardian in this instance) would not have resolved the issue of access and that the rights of the other tenants needed to be acknowledged. The court balanced the tenant’s needs with the rights of the other tenants in the building whose health and safety were at risk.

Similarly, in Pinehurst Constr. Corp. v. Schlesinger, a nuisance holdover proceeding, although the Appellate Term dissent argued that the final judgment after trial should be reversed because it appeared that the tenant was an “elderly, chronically sick, and apparently disturbed tenant,” the majority found no basis to conclude that appointing an Article 81 guardian, “even if warranted, would remedy the long-standing, acute problems posed by tenant’s aggressive, antisocial behavior.”

Having a history of mental impairment is insufficient by itself to require either the appointment or continued service of a GAL. The incapacity could have disappeared by the time the new action or proceeding began.

X. Removing a GAL

A court’s disagreement with a guardian’s choices is insufficient to warrant replacing the guardian. In Sutherland v. New York, the plaintiff’s mother accepted a lump-sum monetary offer from the city to settle her and her child’s claims, despite the trial court’s view that the child’s best interests required that payment be made over a period of years. The trial court entered an order removing the mother as guardian and replacing her with a GAL. The Appellate Division, First Department, reversed, finding that the disagreement was insufficient to warrant removing the natural parent as GAL.

Likewise, the court in Stahl v. Rhee found that a plaintiff’s mother’s refusal to accept a settlement on her son’s behalf was insufficient to replace the mother, acting as legal guardian, with a GAL. The plaintiff became severely mentally retarded from his exposure to antibacterial skin cleanser prescribed for him shortly after his birth. According to the Appellate Division, Second Department, Supreme Court improperly discharged the plaintiff’s mother as the plaintiff’s guardian and inappropriately replaced her with a court-appointed GAL when the plaintiff’s mother refused to accept a proposed settlement “under any circumstances” because it would not cover her son’s expenses. The Appellate Division held that the mother’s decision was not unreasonable, arbitrary, or capricious, especially absent proof of a conflict of interest between the mother and the infant plaintiff. The Second Department therefore reversed Supreme Court’s decision removing the child’s mother as his legal guardian.

Courts have the power to remove a GAL on their own motion if a GAL, in the GAL’s capacity as an officer of the court and as the person charged with protecting the ward’s rights, engages in conduct that prejudices or harms the ward. The court in De Forte v. Liggett & Myers Tobacco Co. found that “[t]he rights of an infant cannot and should not be lost through the obdurate, unreasonable and uninformed conduct and opinion of the guardian ad litem.” A judge who determines that the GAL is acting against the ward’s best interests should remove the GAL. If the Civil Court removes the GAL from its list of certified GALs, each Housing judge overseeing a particular case decides whether

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to remove the GAL while the proceeding is pending. A court may further vacate a warrant of eviction and restore a tenant to possession, even after the marshal executes the warrant of eviction, if the GAL’s ineffective assistance caused the eviction. 146

A court should be wary about defaulting a ward whose GAL did not appear. Under CPLR 1203, no default may be entered until 20 days after a GAL is appointed. 147 Even after that time passes, the court should not begin to consider a default judgment against the ward until the court inquires diligently into what caused the default. If the GAL is responsible for the default, the court should consider relieving the GAL, appointing a new GAL, and informing the Administrative Judge.

Sometimes a GAL behaves egregiously, although not necessarily toward the ward. In Hitchcock Plaza, Inc. v. Clark, a GAL spat on an associate of the opposing side’s law firm. 148 The law firm moved for sanctions against the GAL. The court denied the motion because the GAL was not a party or an attorney, sustained the spitting charge, and referred the GAL to the Administrative Judge. 149

When the judge or the Civil Court’s GAL program believes that a GAL is performing inadequately, they must do their best to investigate the matter promptly. A complaint against a GAL is triggered due-process rights. Under § 36.3(e) of the Rules of the Chief Judge, “The Chief Administrator [of the Courts] may remove any [GAL] from any list for unsatisfactory performance or any conduct incompatible with appointment from that list, or if disqualified from appointment pursuant to this Part. A [GAL] may not be removed except upon receipt of a written statement of reasons for the removal and an opportunity to provide an explanation and to submit facts in opposition to the removal.” The Chief Administrator’s duties to consider removing a Civil Court GAL are delegated to the Civil Court’s Administrative Judge.

XI. Proper Advocacy

The courts must determine whether a GAL has represented the ward’s best interests. Courts have the continuing responsibility to supervise the GAL’s work. 150 In a New York City Civil Court Advisory Notice dated March 2007, the court advised that judges must assess the adequacy of the GAL’s advocacy for the ward before it may so-order a stipulation that a GAL wishes to enter into. 151 The judge must assess whether the GAL has met with the ward and attempted to have a home visit, whether the GAL has determined what the ward desires as an outcome of the case, and whether the GAL has investigated and weighed all the factors in the case and recommends a settlement in the ward’s best interests. The GAL must also develop a plan to assist the ward in obtaining repairs, money, or other assistance to comply with the proposed stipulation and follow through with the plan to assist the ward. The GAL must inform the court whether the ward agrees with the proposed settlement. Finally, the GAL must try to locate a missing ward and take all possible steps to get the ward to come to court.

In making these assessments, the court must allocate on the record any significant stipulation, such as one that settles a proceeding. The court should not simply sign the stipulation as if were a two-attorney stipulation, even if the GAL is an attorney. 152

The court’s supervisory role limits a GAL’s advocacy. Once again, as three experts explain:

If a settlement does not compromise a ward’s property rights (e.g., if there is no provision that a default will result in the issuance or execution of a warrant of eviction, or that a property right will be surrendered), then the court may determine that a settlement is appropriate without further action to protect the ward, and the court — not the guardian ad litem — may approve the settlement. On the other hand, if the ward’s property rights are implicated (e.g., if the settlement provides for a warrant or surrender), the court must make an initial determination whether it can approve the settlement. 153

The GAL’s duties and the court’s obligations are fact-specific. The more the ward gives up in of terms a settlement, the more the GAL must investigate, advocate, and explain. And the more the court must assure the integrity of the proceedings and protect the

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XII. Service Issues

Before any action or proceeding may go forward, the ward or potential ward must receive the petition and notice of petition underlying the proceeding as well as any motion to appoint a GAL. The RPAPL and the CPLR require service so that the ward or the ward’s guardian, committee, or conservator will get notice of any pending action or proceeding.

a. Service of Petition and Notice of Petition

Under RPAPL 735, the petition and notice of petition must be personally delivered on the respondent, delivered and left with a person of suitable age and discretion who resides or is employed at the property sought to be recovered, or served by conspicuously placed service. Properly serving the petition, notice of petition, and any predicate notice is especially important when the landlord knows that the tenant resides in a hospital, nursing home, or other institution. The landlord’s failure to mail additional copies of the petition and notice of petition to this additional, alternative address will result in a dismissal of the proceeding.\(^\text{154}\)

In the nonpayment summary proceeding \textit{Parras v. Ricciardi},\(^\text{155}\) the court vacated the default judgment awarded to a petitioner-landlord who failed to mail additional copies of the petition and notice of petition to the nursing home where the tenant-respondent was residing. The court found that “when the landlord knows the tenant is living in a nursing home, the tenant must be served with the petition and notice of petition at the nursing home in order for the court to have jurisdiction over the summary proceeding.”\(^\text{156}\) The court also found that RPAPL 735(1)(a) forbids a default against tenants not served at their other residential address even if the petitioner does not learn about the other residence until the person preparing the affidavit of nonmilitary service discovers the tenants’ whereabouts in connection with preparing the affidavit of investigation.\(^\text{157}\)

In RPAPL 735(1)(a), “residence” “means the particular locality where the tenant is actually living at the time the summary proceeding is commenced.”\(^\text{158}\) This residence might be a location different from the premises of which the landlord seeks possession. Even proper service at the nursing home would not have been satisfactory in \textit{Parras}, though, because the landlord knew that the respondent was mentally incompetent and did not inform the court of that fact before it obtained a default judgment.\(^\text{159}\)

b. Service Upon the Ward of a Motion to Appoint a GAL

CPLR 1202(b) requires that a notice of motion to appoint a GAL “be served upon the guardian of [the ward’s] property, upon [the ward’s] committee or upon [the ward’s] conservator” or, if none exists, then “upon the person with whom [the ward] resides.” CPLR 1202(b) also requires personal service on the potential ward if that person is over the age of 14 and has not yet been judicially declared as an incompetent. The court must deny a motion not served on the potential ward.\(^\text{160}\) Unless there is a judicial declaration of incompetence or court determination of the litigant’s mental condition, the potential ward must be given an opportunity to be heard.\(^\text{161}\) The court in \textit{Beach Haven Apts. Assocs. LLC v. Riggs} held, in this regard, that “it is critical that the proposed ward be properly served so that he is aware of the motion and the basis upon which APS seeks the imposition of a guardian ad litem and so that he can appear in court and argue for or against the motion.”\(^\text{162}\)

XIII. Compensation for GALs

CPLR 1204 sets forth the compensation that GALs may receive for their services. In proceedings in which the ward is an APS client, APS, through the New York City Human Resources Administration (HRA), will provide compensation of $600.00 for the entire action or proceeding, whether

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or not the GAL is an attorney or has special skills. The GAL order should include a note that HRA will pay the GAL $600.00 in exchange for the GAL’s services. An exception to the normal APS compensation policy could entail the court’s asking HRA to approve a higher fee when the GAL provides more services than usually required. A court that believes that the ward is or will be an APS client may appoint the GAL immediately with the understanding that a determination whether APS will compensate the GAL will be made later.

Upon either the GAL’s or the GAL’s attorney’s filing an affidavit that shows the services rendered, the court may, in the case of a ward who is not an APS client, enter an order granting the GAL reasonable compensation. The compensation may “be paid in whole or part by any other party or from” the ward’s recovery or other property. If the GAL seeks more than $500 in compensation in a non-APS case, then the GAL or the GAL’s attorney “must file with the fiduciary clerk, on such form as is promulgated by the Chief Administrator, a statement of approval of compensation, which shall contain a confirmation to be signed by the fiduciary clerk that the [GAL or the attorney retained by the GAL] has filed the notice of appointment and certification of compliance.” No compensation may be awarded unless the GAL “has filed the notice of appointment and certification of compliance form.”

Details about compensation for Civil Court GALs are available on the court’s Web site. Compensation “shall not exceed the fair value of services rendered.” What qualifies as reasonable compensation varies from case to case. So long as a GAL can support the request for compensation with an application “supported by [an] itemized documentation showing the work performed and his hourly rate” and that the “fees are fair and reasonable,” the court will award the requested compensation. The GAL was able to meet this standard in C.F.B. v. T.B. and was awarded nearly $8000. In a different case, Bolsinger v. Bolsinger, the Appellate Division found that “[t]he fixing of the fee, the dollar value for nonlegal work performed by an attorney who is appointed a guardian ad litem pursuant to CPLR 1202 should not be enhanced just because an attorney does it.” Rather, other factors must be considered to determine the appropriate compensation. In Bolsinger, the court stated that these factors include fixing the compensation “with due regard to the responsibility, time and attention required in the performance of [the GAL’s] duties,” the result obtained, and the funds available to the person who must bear the cost of the guardian ad litem’s services.

A court that deems a GAL’s compensation excessive will reduce the amount. In In re First National City Bank (In re Springett’s Trust), the court found that the GAL “rendered extensive services for a period of almost five years” and that “his services were of considerable assistance to the court.” But the court relied on the other factors to reduce the amount awarded from the requested $8000 to $4000.

Courts will take the paying wards’ net worth into account to determine the reasonableness of the GAL’s compensation. In In re Becan, a 1966 case, the court determined the tenant’s net worth to be small because his estate totaled less than $2500. The court noted additionally that the appointed GAL expended a minimum amount of effort. The court reduced the original $250 award to the GAL to $100. The court found that because the GAL was a guardian of the court who was appearing in an accounting of the estate of an incompetent veteran, the GAL was “bound to conscientiously perform [his] respective duties, with the understanding that [he] may be asked to accept most moderate compensation for [his] services.”

CPLR 1204 permits GALs to be compensated from the proceeds of the ward’s award and allows payment to be made by “any other party,” including the party whom the GAL does not represent. In Perales v. Cutitta, the Appellate Division, Third Department, held that the Special Term had acted within its discretion when it required the Commissioner of Social Services to pay the attorney for services rendered as a GAL for residents of adult-care facilities. CPLR 1204 restricts the GAL’s compensation to be paid from a non-party. In In re Baby Boy O., the GAL went uncompensated because the mother did not receive a recovery from which the GAL could be paid. Because (Continued on page 17)
the Commissioner of Social Services was not a party to the proceeding, moreover, the Commissioner could not be directed to pay the GAL. A party can be ordered to pay the GAL if that party’s actions led to appointing the GAL. In In re Ault, the court found that CPLR 1204 directs that “a party may be charged with payment of the compensation of a guardian ad litem only where the actions of such party generated unnecessary, unfounded or purely self-serving litigation that resulted in the appointment of a guardian.”

XIV. The Role of Adult Protective Services

APS is a governmental agency created under New York’s Social Services Law § 473 for New York City’s five boroughs. To be eligible for APS services, individuals must be at least 18 years old, not reside permanently in a hospital, nursing home, or rehabilitation facility, and as a result of mental or physical impairments be unable to meet the following three criteria. The first of these criteria is that prospective clients be unable to “meet their essential needs for food, shelter, clothing, or medical care” or protect themselves from “physical, sexual, or emotional abuse, active, passive or self-neglect or financial exploitation.” The second criterion is that the individuals be “in need of protection from actual or threatened harm due to physical, sexual or emotional abuse, active, passive or self-neglect or financial exploitation, or by hazardous conditions caused by the action or inaction of either themselves or other individuals.” The third criterion is that the individuals have “no one available who is willing and able to assist.” APS does not consider the individuals’ income in determining whether to aid them.

Title 18 NYCRR 457 sets forth the criteria to determine whether someone needs APS services. Individuals and organizations may refer individuals to APS, either by telephone or the internet. APS then responds to the referral by conducting an assessment. APS will assist clients to get grants for rent arrears, medical and psychiatric care, services like Meals on Wheels and home care, public assistance, and other programs to enable clients to remain at home. APS’s mission is to provide services while using the least restrictive measures possible. APS occasionally needs to use more restrictive measures, such as putting the client on financial management, referring the case to its Office of Legal Affairs to appoint a GAL, and, if necessary, referring the case for an Article 81 guardian who can enforce an order to conduct a heavy-duty cleaning or to arrange to relocate a ward to a more affordable apartment or a setting with a suitable level of care.

From time to time APS will accept as a client someone whom the courts, landlords’ attorneys, and tenant advocates might agree does not need a GAL. Courts, landlords’ attorneys, and tenant

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advocates are also surprised occasionally to learn that APS will not accept someone they agree should have a GAL. One explanation for the incongruence is that the APS acceptance criteria as outlined above differ from the CPLR 1201 standard for appointing a GAL: that the person be an adult incapable of adequately prosecuting claims and defending rights.

APS assessments are designed to satisfy APS acceptance criteria and not CPLR 1201, even though APS will submit its assessment reports to Housing Court pursuant to a motion to secure a GAL under CPLR 1201 and to vacate a judgment if one exists. Judges and practitioners are occasionally stymied by APS reports that do not directly cover the factors helpful in deciding whether a potential ward has or had the physical or mental wherewithal to litigate. These factors, typically absent from APS assessments, include whether the potential ward understands the court process and the contours of the specific litigation.

When an APS assessment concludes that a potential ward is severely mentally retarded, one can assume that the potential ward is or was unable to prosecute claims and assert defenses. The ward is therefore entitled to a GAL and to vacate the judgment under CPLR 1201. Less clear is when the assessment finds the potential ward depressed. A valid assessment of clinical depression under DSM IV means that the potential ward was incapable of prosecuting and asserting claims and defenses. But mere non-clinical depression is different. Just because someone is depressed, a natural state for someone facing eviction, does not mean that the person is or was unable to prosecute claims and assert defenses, even if it might mean that the depressed person is entitled to APS services.

Similarly unhelpful is psychiatric terminology in reports that Housing judges often see using the words “rule out,” as in, “rule out bipolar disorder.” “Rule out” means that the psychiatrist does not rule something out — that the psychiatrist cannot say that the potential ward is not bipolar. This is different from ruling something in — that is, saying that the ward is bipolar. A “rule out” formulation is relevant, if at all, on the possibility that something cannot be or was not excluded. The formulation is inadmissible if offered as proof of a conclusion. Only if based on a reasonable degree of certainty or similar belief expressing a probability supported by a rational basis is expert medical opinion testimony admissible as a conclusion.186

If APS does not accept a client during the proceeding, the Housing judge who wants to appoint a GAL must find and appoint a volunteer. The typical ward cannot afford to pay for a GAL, and volunteers are hard to find.187 But the Civil Court’s GAL program makes prospective GALs aware that they are expected to accept at least three pro bono cases a year.

Sometimes, despite the court’s requests, APS will reject a client during the proceeding and, instead, seek a GAL and judgment vacatur only after the case has concluded with a final judgment, when the tenant is on the verge of an eviction. This problem also arises when the landlord or its counsel does not inform the court that a GAL might be needed or when the presiding judge or court staff abdicate their responsibility to inquire or do not possess the sensitivity to appreciate the need for a GAL.

When any of these things happen, or do not happen, cures that might have affected a proceeding at its early stage occur at the end of the proceeding and require the results to be undone and redone. That should not be the goal. The goal, as well-explained by three thoughtful commentators, is to “obviate the need for litigation at the back-end of the proceeding. Weaving a tighter safety net for tenants with diminished capacity in order to identify them earlier in the proceedings would result in: (1) greater integrity to the judicial process; and (2) judicial resources more rightfully expended at the onset of the litigation as opposed to the end, when the court is required to vacate a default or warrant (Continued on page 19)
and begin the proceedings again.\textsuperscript{188}

If APS determines that a potential ward is ineligible for its services, Housing Court may not compel APS to reverse its decision. As the Appellate Term, First Department, has written, "The landlord-tenant court is not authorized to direct a reinvestigation or reconsideration of tenant's case."\textsuperscript{189} To obtain a review under 18 N.Y.C.R.R. 404.1(f), the potential ward must contact the Fair Hearing Section at the New York State Office of Temporary and Disability Assistance (OTADA). The potential ward can either fill out the online fair-hearing request form at http://www.otda.state.ny.us/oah/default.asp or mail or fax the fair-hearing request form, also available on the OTADA Web site, to P.O. Box 1930, Albany, New York 12201. During the hearing, the potential ward presents reasons why APS should have accepted the case. A review of the fair-hearing determination is made by a CPLR Article 78 proceeding in Supreme Court.

APS's tool APS Search\textsuperscript{190} allows authorized individuals to look up APS clients by name and address. There has been a change in the APS Search Protocol in Housing Court. APS Search is now limited to cases that Housing Court refers to APS. This new limitation reflects confidentiality concerns over the names of APS clients not subjects of specific search inquiries. Previously, names of all APS clients close to the search terms would appear when searching by name or address. APS is required to keep these names and addresses confidential because they are not the subjects of the specific inquiry.

APS Eviction Units operate under an agreement with the New York City Department of Investigation and Marshal's Bureau. They visit and assess clients and potential clients threatened with imminent eviction. Shortly before or at the moment of eviction, marshals will alert APS to investigate if the court directs them to do so, perhaps on an order directing a landlord to direct the marshal to notify APS before an eviction, or if anyone else, including a tenant, makes a legitimate request.\textsuperscript{191} APS develops service plans for clients eligible for APS services. APS will petition, by order to show cause, the court to appoint a GAL to assist clients with eviction proceedings in Housing Court in cases referred by a marshal.

In 2006, APS referred 1751 clients for GALs.\textsuperscript{192} APS also petitions Supreme Court to appoint under Article 81 of the Mental Hygiene Law. In 2006, APS referred 768 clients for Article 81 guardians.\textsuperscript{193}

If APS seeks an Article 81 guardian, its representatives, or the GAL after speaking to APS representatives, will seek a Housing Court stay of the execution of the warrant. Much litigation arises at this point because, from the landlord's perspective, APS will not pay rent in the interim and because APS, a busy agency that does not quickly seek Article 81 guardians, will perform triage, handling its most pressing, eviction-ready cases first and the rest later. Landlords will suggest that judges deny applications to stay the warrant to force APS's Office of Legal Affairs to seek an Article 81 guardian faster, but that puts the judge in an untenable position, given the possibility that a disabled tenant might be evicted because the court wanted to push APS into action. And more delays ensue once an Article 81 guardian is sought.

If the person is eligible for APS assistance based on a preliminary determination, APS will evaluate the potential ward to determine whether a GAL is required. APS will make this determination by using such methods as a home visit and through a psychiatric evaluation by one of its staff medical personnel. If APS determines that a GAL is required, APS will request that a GAL be appointed. Determining whether APS will accept a case takes four to six weeks. Referrals in Housing Court are often made by the judges, who contact the borough APS representative, who acts as a liaison and friend of the court. This process often takes another two to four weeks for a GAL to appear in court on (Continued on page 20)
the ward’s behalf after the court signs the order appointing the GAL.

Although APS decisions affect Housing Court’s ability to address a ward’s needs, Housing judges lack the authority to compel APS to act or not act: “[A]n administrative determination regarding social services benefits is not reviewable in the Housing Court.”194 Consequently, the process in some cases will frustrate judges, GALs, and landlords, when APS does not initially accept a case when the court makes a referral and does so only much later, after a final judgment has been rendered

In Vega v. Eggleston, a 2002 action in Supreme Court, New York County, the New York Legal Assistance Group represented a class of plaintiffs against the commissioner of HRA and others, who were represented by the New York City Corporation Counsel and the New York State Attorney General.195 The court signed a so-ordered a consent stipulation in 2003 in which APS promised to improve its assessment and intake process in a wide range of matters, including eviction prevention and housing resolution. As relevant to Housing Court GALs, the consent order’s goal is two-fold. First to assure that “APS will address, promptly and appropriately, the eviction prevention and housing resolution service needs of clients who appear to be APS eligible while they are being assessed for APS services when delaying such services until after initial Assessment would be harmful to the client.”196 Second, to assure that APS, during the referral and assessment process, will “take all reasonable steps appropriate under the circumstances to prevent the eviction of, or to attempt to relocate, the client on or before the eviction date.”197

XV. Conclusion

New York’s adult population, especially the growing senior-citizen segment, will continue to require advocacy in Housing Court due to mental and physical impairments. The pool of qualified GALs must keep pace. What is best for the ward, landlords, GALs, the GAL program, and the court are expedient, fair resolutions. All involved in the process must strive to enable GALs to serve the ward, the court, and society and to minimize the disruptions and intrusions into the lives of incapacitated individuals with tenancies in jeopardy.

(Endnotes)

1 See N.Y.C. Dep’t of Aging, Quick Facts on the Elderly in New York City, available at http://home2.nyc.gov/html/dfta/downloads/pdf/quickfacts.pdf (last visited Aug. 11, 2007) (reporting that according to 2005 Census, approximately 943,000 New Yorker City dwellers are over 65; approximately 2.4 million individuals are over 65 in New York State).


4 Adult Protective Services is formerly known as Protective Services for Adults (PSA).


6 One Housing Court judge has written that “[a]n sense of concern and frustration is heightened at times by the perceived inaction, delay and bureaucratic impenetrability of government agencies and programs (Adult Protective Services (APS))

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...[and] the perceived delay in related matters in other courts (e.g., Supreme Court Article 81 proceedings) . . . “ Marc Finkelman, Guardians Ad Litem in Housing Court 4 (unpublished outline revised for N.Y. St. B. Ass'n Cttee. on Landlord and Tenant Proceedings, Sept. 14, 2006) (alteration adding "APS" in original).


10 See 256 A.D.2d 90, 91, 681 N.Y.S.2d 494, 494 (1st Dep't 1998) (mem.).


12 In the Family Court of the State of New York in the City of New York, law guardians are private practitioners or lawyers from The Legal Aid Society, Lawyers for Children, the Society for the Prevention of Cruelty to Children, or the Children’s Law Center whom the judge assigns to represent a child in Family Court under the Family Court Act. N.Y.C. Bar Ass’n, Introductory Guide to the New York City Family Court 4 (2006) (Gerald Lebovits, principal author), available at http://www.abcny.org/pdf/famguide_ms.pdf, (last visited Aug. 11, 2007). For the differences between guardians in Family Court and Surrogate’s Court, see id. at 38 (“The Family Court has similar jurisdiction and authority as the Surrogate Court about the guardianship of a minor, a child 17 years or younger. Normally, guardianship petitions of the person of a minor are filed in the Family Court. The Surrogate’s Court has the power to transfer the property of a minor and may appoint a guardian of the person, the property, or both.”). For an excellent piece on legal guardians and children, see Cross-Borough Collaboration, The Basics: Becoming a Legal Guardian in New York State (2002), available at http://www.brooklynbar.org/vlp/booklets/81441CBBCBasicGuardiansrbv.pdf (last visited Aug. 11, 2007).

13 See Mental Hygiene Law § 81.02(a)(2).

14 Id. § 81.02(b).


18 15 Misc. 3d 30, 31, 833 N.Y.S.2d 348, 349 (App. Term 1st Dep't 2007) (per curiam) (vacating judgment because GAL, despite not having met or visited tenant, entered into stipulation for judgment of possession to landlord, despite parties’ knowledge that APS intended to file for Article 81 guardianship).


23 Id. at 8-14 & 19-21.

24 Id. at 12; accord NYCLA Subcommittee Rpt., supra note 21, at 10.

25 Zelhof et al. supra note 3, at 745.

26 Id. This proposition has case-law support: “Although a guardian ad litem appointed for an incapacitated adult party may prosecute or defend the claims and rights of such a party, the guardian ad litem is the only CPLR 1201 representative who is not expressly authorized by statute to apply for court approval of a proposed compromise of the claims of such incapacitated party pursuant to CPLR 1207.” De Santis ex rel Quattariere v. Bruen, 165 Misc. 2d 291, 295, 627 N.Y.S.2d 534, 537 (Sup. Ct. Suffolk Co. 1995).


29 Zelhof et al. supra note 3, at 762 (“MFY [legal services] attorneys have heard references during court appearances, and

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have seen references in training materials for guardians ad litem, to the concept of ‘stepping into the shoes’ of wards. An electronic search of reported cases in New York State does not provide guidance as to the content of this phrase.”).  
31 Gische, supra note 3, at 290.
32 Finkelstein, supra note 6, at 21.
34 Id. at 1-2.
35 Id. at 2.
36 Id. at 6.
37 See NYCLA Subcommittee Rpt., supra note 21, at Addendum.
40 N.Y.C. Civ. Ct., Advisory Notice, GAL Cases Where There Is Also an Attorney of Record (eff. Apr. 18, 2007).
41 Id.
44 Id.
45 Zelhof et al., supra note 3, at 771.
46 Bolsinger v. Bolsinger, 144 A.D.2d 320, 321, 533 N.Y.S.2d 934, 934 (2d Dep’t 1988) (mem.).
50 The legislation, proposed by retired Housing Judge Bruce Gould and cowritten by Dov Treiman, Esq., both Committee members, would provide as follows: “Subdivision (j) of section 110 of the New York City Civil Court Act is added to read as follows: (j) In actions and proceedings before the Housing Part, guardians ad litem appointed by the court pursuant to Article 12 of the civil practice law and rules shall be deemed state employees solely for the purposes of the Public Officers Law Section 17, titled, “Defense and indemnification of state officers and employees.”
52 Id. (citing Smith v. Keteltas, 27 App. Div. 279, 50 N.Y.S. 471 (1st Dep’t 1898)).
54 Id.
58 See Backerma n v. Coccu la, 189 A.D. 235, 237, 178 N.Y.S. 423, 424 (1st Dep’t 1919).
59 CPLR 1202(c).
61 Finkelstein, supra note 6, at 20 (“Guardian ad litem orders do often provide that the guardian ad litem is to serve without bond . . . .”) & 21 (“[i]t might be argued that the specific affidavit requirement of 1202(c) is not necessary for GAL’s in Housing Court.”).
63 Id. at 1.

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(Guardians Ad Litem, continued from page 22)

66. NYCLA Final Rpt., supra note 22, at 9. For the benefits of serving as a Housing Court GAL, see William J. Dean, Pro Bono Digest, Service as a Guardian Ad Litem, N.Y.L.J., July 3, 2006, p. 3, col. 1 (quoting private practitioners who serve as volunteer GALs, including this: “My greatest accomplishment as a lawyer will always be my work on behalf of a mentally disabled indigent client, for whom I served as a guardian ad litem.”) (quoting Lisa E. Cleary, Esq.).

67. Bolsinger, 144 A.D.2d at 321, 533 N.Y.S.2d at 934.


69. See Kalimian v. Driscoll, N.Y.L.J., Mar. 6, 1991, p. 22, col. 3 (Civ. Ct. N.Y. Co.) (vacating jury verdict despite presence of counsel because tenant was “unable to effectively cooperate with [counsel] at trial, post-trial and on appeal and does not fully understand the legal and practical consequences of subject summary proceedings”), aff’d, N.Y.L.J., July 20, 1992, p. 23, col. 4 (App. Term 1st Dep’t) (per curiam).


73. N.Y. Life Ins., 184 Misc. 2d at 731, 711 N.Y.S.2d at 93.

74. CPLR 1012(a)(1).

75. Soc. Serv. L. § 473(2)(a).

76. N.Y. Life Ins., 184 Misc. 2d at 729, 711 N.Y.S.2d at 93.

77. See CPLR 401; N.Y. Life Ins., 184 Misc. 2d at 731, 711 N.Y.S.2d at 94.

78. CPLR 1202(a)(3).

79. See, e.g., Sarfany v. Sarfany, 83 A.D.2d 748, 749, 443 N.Y.S.2d 506, 507 (4th Dep’t 1981) (mem.) (“[P]laintiff had the burden to bring the condition of defendant’s mental state to the court’s attention so that it could make suitable inquiry and determine whether a guardian should have been appointed for her to protect her interests and before a default judgment could be entered against her.”); Barone v. Cox, 51 A.D.2d 115, 118, 379 N.Y.S.2d 881, 884 (4th Dep’t 1976); Parras v. Ricciardi, 185 Misc. 2d 209, 214, 710 N.Y.S.2d 792, 796-97 (Hous. Part Civ. Ct. Kings Co. 2000) (“When a creditor becomes aware that his alleged debtor is or apparently is incapable of protecting his own legal interests it is incumbent upon him to advise the court thereof so . . . the court may thereafter in its discretion appoint a guardian ad litem to protect the defendant’s interests.”).


85. CPLR 1202(a); accord Finkelson, supra note 6, at 8 (noting that Housing Court judges have authority to appoint GALs).


88. BML Realty Group, 15 Misc. 3d at 31, 833 N.Y.S.2d at 349; 83 E. Assocs. v. Mager, N.Y.L.J., Nov. 10, 1992, p. 21, col. 1 (App. Term 1st Dep’t) (per curiam) (finding, given documentation submitted supporting tenant’s mental condition, that “it was an abuse of discretion for [Housing Court] to have denied, without a hearing, the motion to ascertain whether tenant was capable of . . . adequately defending her interests in the litigation”).

89. Soybel, 132 Misc. 2d at 347, 504 N.Y.S.2d at 357.


91. N.Y. Life Ins., 184 Misc. 2d at 728-729, 711 N.Y.S.2d at 92 (“The standard of proof to establish the grounds for a guardian ad litem is a preponderance of the evidence.”).


93. See 4 N.Y.2d at 509, 176 N.Y.S.2d at 342.

94. 21 A.D.2d 152, 164, 249 N.Y.S.2d 320, 322 (1st Dep’t 1964).

95. See id. at 155, 249 N.Y.S.2d at 324.

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95 See, e.g., Parras, 185 Misc. 2d at 215, 710 N.Y.S.2d at 797.
96 See In re Application of King, 284 A.D. 748, 749, 135 N.Y.S.2d 495, 496 (2d Dep't 1954).
97 See id. at 214, 710 N.Y.S.2d at 796.
98 62 A.D.2d 990, 990, 403 N.Y.S.2d 316, 316 (2d Dep't 1978) (mem.).
101 94 Misc. 2d at 790, 405 N.Y.S.2d at 607.
104 Finkkelstein, supra note 6, at 10.
110 Anonymous v. Anonymous, 256 A.D.2d 90, 91, 681 N.Y.S.2d 494, 494 (1st Dep't 1998) (mem.) (appointing GAL due to defendant's "chronic irrational and agitated state attributable to alcohol and substance abuse and defendant's consequent and manifest inability to assist his attorney in his defense")
111 Weinigarten, 94 Misc. 2d at 790, 405 N.Y.S.2d at 607 ("When an application is made for appointment of a guardian ad litem to represent a person who resides in a mental institution, whether on a voluntary basis or pursuant to court commitment, such residence creates a presumption that the person involved is unable to adequately prosecute or defend his rights.").
112 See, e.g., 466 Assoc., 151 Misc. 2d at 474, 573 N.Y.S.2d at 361.
115 See, e.g., Kalinian, N.Y.L.J., July 20, 1992, p. 23, col. 4 (App. Term 1st Dep't) (per curiam) ("The fact that tenant was represented by counsel in the trial proceedings is of little, if any, relevance in determining whether she was prejudiced by the absence of a guardian ad litem.").
117 See Parras, 185 Misc. 2d at 218, 710 N.Y.S.2d at 797.
118 See, e.g., Rakciecki v. Ferenc, 21 A.D.2d 941, 942, 250 N.Y.S.2d 102, 103 (4th Dep't 1964) (mem.).
121 E.g., Grasso, N.Y.L.J., Apr. 8, 1998, p. 32, col. 3.
124 N.Y. Life Ins., 184 Misc. 2d at 737, 711 N.Y.S.2d at 97 (quoting In re Estate of Bacon, 169 Misc. 2d 858, 864, 645 N.Y.S.2d 1016, 1020 (Sur. Ct. Westchester Co. 1996)).
125 See, e.g., Hotel Pres. v. Byrne, N.Y.L.J., Mar. 12, 1999, p. 26, col. 1 (App. Term 1st Dep't) (per curiam) (vacating default judgment because petitioner knew or had reason to know that respondent was incapable of protecting her interests when judgment was entered); Jackson Gardens, N.Y.L.J., July 11, 2001, p. 25, col. 6 (vacating default judgment because petitioner knew that respondent-tenant had GAL in prior proceeding); Surrey Hotel Assoc. L.L.C. v. Sabin, N.Y.L.J., June 29, 2000, p. 28, col. 4 (Hous. Part Civ. Ct. N.Y. Co.) (vacating judgment because petitioner had accepted rent from APS and complained about tenant's behavior); Glick v. Quintana, N.Y.L.J., Nov. 30, 1992, p. 27, col. 4 (Civ. Ct. N.Y. Co.) (vacating default judgment because petitioner knew that respondent had a GAL in two prior proceedings).
126 See, e.g., Greene v. Resch, 114 Misc. 2d 780, 783, 452 N.Y.S.2d 314, 316 (Hous. Part Civ. Ct. Kings Co.)(denying vacatur of judgment even though opposing party knew about tenant's mental incapacity.).

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I. EXECUTIVE SUMMARY.

Question: Is there a statutory right in the estate, where a residential tenant dies during the pendency of a landlord-tenant summary proceeding?

Brief answer: Yes, there is a statutorily defined right in the estate to a brief stay and a follow-on procedure where there is a lease, but not for an oral month-to-month tenancy. Furthermore, the right is a limited procedural one that does not give the estate the right to assume the lease without the landlord's consent, or to tie up the leased premises until a final order of probate is granted by the Surrogate's Court.
This paper [FN1] focuses on the problems faced by pro se litigants in actually litigating, rather than settling their cases in New York City's Housing Court ("Housing Court"). [FN2] and the role of the court—particularly the role of judges—in assisting them in meeting these problems. It does not attempt a detailed theoretical analysis of the problems underlying the plight of pro se litigants in Housing Court, or of the solutions proposed here. Rather, its primary goal is to outline what has become generally recognized to be the underlying problem facing pro se litigants in most courts and particularly in New York City's Housing Court. I examine this issue in Part I. Part II then sketches a number of models and their theoretical bases by which that problem can be addressed. Accordingly, *660 this paper is not intended to be a destination, but rather a starting point.

However, I hope that this endeavor is more than just one more article in a series that have identified the underlying problem and proposed solutions, with little impact on the day-to-day experience of pro se litigants in New York City's Housing Court. Indeed, there is a depressing quality to reading the literature in this area. The plight of pro se litigants in New York City's Housing Court and the broad outlines of some solutions have been recognized for at least two decades. [FN3] In addition, numerous law review articles, judicial studies and reports have for some time reached a remarkable level of consensus regarding the nature of the problems faced by pro se litigants in our adversarial system in state and federal courts in every part of the country. [FN4]

Nevertheless, conferences on meeting the challenge of the pro se litigant (such as the one that gave rise to this paper) are convened, but appear to be reinventing the wheel, unfamiliar with the previous research and analyses. They then issue reports which have little or no effect. I hope that this paper and the conference reports published here will not meet a similar fate. In addition, although the focus of this article is on proposed reforms in New York City's Housing Court, I *661 would submit that the proposals outlined here may be applicable to other courts in

which pro se litigants predominate.

I. The Problem

Although it is clear that most cases in Housing Court are settled, particularly those involving pro se litigants, the fact is that in many instances, especially in holdovers, out of possession cases, warranty of habitability hearings, or motions/hearings to compel compliance with orders to correct housing violations, a pro se litigant is thrust into the role of litigator within an adversarial system which she does not understand, either procedurally or substantively, and which effectively silences her. [FN5]

The preceding description and the analysis that follows are based on a few working hypotheses which will be elaborated below:

1. Pro se litigants usually have only a very generalized understanding regarding both the defenses and claims relevant to their cases and regarding how to present those defenses or claims to a trier of fact. [FN6]

2. The fundamental problem for pro se litigants in having their defenses or claims heard is not primarily their lack of information or understanding, but the structural dynamics in Housing Court which work to silence the pro se litigant even when she has some knowledge regarding defenses or claims. [FN7]

*662 3. The root cause of this systemic silencing may be, in part, a slavish adherence to what is perceived to be the strictures of the adversarial system, including the resulting notions of the appropriate role of judges in such a system. [FN8]

Whatever may be the root causes of this systemic silencing, evidence of it is pervasive. In a seminal study of Baltimore’s Rent Court, Professor Barbara Bezdek found that even with an understanding of defenses and claims, including having received advice and, in some instances, papers prepared by attorneys to assist them, pro se litigants were systematically silenced in that court. [FN9] Professor Bezdek identifies one aspect as key in understanding this dynamic: the judicial process in housing and other courts rejects both the form and substance of the *663 inevitable manner in which pro se litigants speak, i.e., narrative. Indeed, it is obvious that narrative is the way in which most people, except perhaps lawyers, speak.

In our observations, when invited [to say why they are in court], . . . many tenants offer the court an explanation for their nonpayment. The judge either waits through the story or interrupts it, but at either point, tells the tenant that her remarks are irrelevant, and orders judgment for the landlord. This is the clash between the conventions for talking about troubles in noninstitutional settings and the law’s conventions for speech within legal institutions, which the judge learned through formal education in law school and observation of other legal professionals’ courtroom behavior. . . .

. . . My point is that the judge is structuring the discourse by leading the tenant into expression and then dismissing that which the judge elicited. Doing so in this way is both misleading and destructive.

It is misleading, because the rule-oriented court talk expected and privileged by judges in low-level courts bears little or no relation to people’s natural narratives. The rules of courtroom discourse are seldom explained to those witnesses expected to conform to them. . . . Rules of evidence disallow the ordinary discourse rules used when people talk as they ordinarily do. . . . Judges, however, expect parties to present their own case and abjure “acting as a party’s advocate” by frankly eliciting storylines. . . . As structured, [the judge’s approach] excludes virtually all tenants from meaningful participation in the conversation. This makes the legal process a charade. This is destructive of more than tenant’s statutory rights. For most tenants, such a court offers a stern lesson that formal rights are for somebody else and not for them. [FN10]

*664 But why is narrative rejected as an appropriate way of speaking in our judicial system, either in testimony or in oral argument? Primarily, as Professor Bezek's analysis demonstrates, because narrative is viewed as being an uneconomic, rambling mode of communication, and as an inappropriate means for raising or demonstrating cognizable legal claims on which legal relief may be given. Thus, the pro se litigant is continuously interrupted during that narrative either by the attorney's objecting "She's testifying in a narrative," or by the court's insisting that much of the narrative is "irrelevant" and, thus, cannot be dealt with in the context of the present case, motion, or hearing.

Indeed, Professor Bezek's observations and conclusions are confirmed in my own work with pro se litigants in New York's Housing Court. I have observed such litigants reduced to silence or at best incoherence in court, even after I had given them detailed advice and, in some instances, "pro se papers," with the advice or papers completely ignored and, thus, rendered ineffective. Indeed, I have observed judges and adversaries use the fact that the pro se litigant had received legal advice against her by raising the burden placed on her. I often hear judges and adversaries say, "Well, you clearly understand your rights!" but then deprive the litigant of the value of that imputed knowledge by not permitting her to articulate it in the only manner she knows, i.e., in narrative form.

This silencing occurs even in the face of the tremendous advances that have been made under Chief Judge Judith Kaye's Housing Court restructuring initiative, [FN11] especially as sensitively implemented by Judge Fern Fisher, the Administrative Judge of the Civil Court of the City of New York. It occurs even in the face of the laudable attempts of individual*665 Housing Court judges to "hear" the pro se narrative and to do "justice" in the few minutes given to each case. Indeed, success in eliciting pro se narratives, when it occurs, is particularly laudable given the fact that judges receive little or no training, guidelines, administrative support or peer assistance regarding how to assist pro se litigants by, among other things, eliciting narrative. The techniques for assisting pro se litigants in this way do not come naturally and may be counterintuitive, even to judges with a Legal Aid or Legal Services background.

In addition, the studies of The Fund for the Modern Court confirm that despite such ad hoc efforts by some judges, pro se litigants remain uncertain of both their claims and defenses, and how to articulate them in a way that the court will recognize or, indeed, permit. They fail to understand what is going on under the language and rubrics employed by legal professionals. [FN12]

This silencing occurs at each step of a pro se litigant's contact with the judicial process and each step reinforces the previous message: [FN13]

1. The papers the pro se litigant receives, in spite of "plain language" reforms, speak a language whose vocabulary and syntax are foreign to most people;

2. Answering in the Clerk's office, perhaps unavoidably, commences a rapid fire, assembly-line, verbal staccato modality: "next," "any defenses, conditions" (using a check-list answer), "why did you default?" "why do you need more time?" (again using a check-list order to show cause form) "next!"

3. In the Resolution Parts, court officers command: "find your calendar number; no, not the index number; go back outside and find the calendar number"; "you have to wait for the landlord's attorney"; "no talking in the courtroom!

4. Pro se litigants find that their primary "conversation" is with the landlord's attorney in the hallway, not with the judge; even if they actually get to talk to a law assistant or the judge, there is a rush to settle, with limited opportunity to spin out the story: "that's not relevant!" "I can't deal with that here, now," etc.

Throughout this process, which is understandably and appropriately settlement-directed, the pro se litigant is both seduced and dissuaded regarding her day in court: "You don't have to settle. You can go to trial." However, materials prepared by bar associations and the court system caution the pro se litigant by stating, "If you go to trial, the court cannot give you any legal advice. It can only give you information." [FN14] You will be held to the same evidentiary standards as an attorney." [FN15] Finally, either in a motion before the Resolution Part judge or on trial in a Trial Part, the pro se litigant's narrative is continuously interrupted by various objections, such as, calls for a narrative, hearsay, irrelevant, best evidence, foundation, asked and answered, dead man's statute, etc.

Even those within the court system who observe this silencing and who recognize something is amiss often feel powerless to intervene because of: (1) perceived constraints of role (e.g., "As a judge, I cannot be perceived to be an advocate for one side."); (2) the crush of the numbers of cases and the resulting limitations of time, energy and resources; or (3) a sense that the problems underlying the pro se litigant's inability to articulate her claims or defenses are social, educational or economic and, thus, outside the court's ability to address. [FN16]

However, if Housing Court is to function as a court of law like any other, [FN17] rather than as a largely one-sided eviction apparatus, the pro se litigant's constitutional right to be heard, i.e., to have access to justice, must be addressed. As early as 1971, in an early right-to-counsel case, the Appellate Term, First Department, quoted at length from the U.S. Supreme Court's decision in Boddie v. State of Connecticut, [FN18] acknowledging the fundamental constitutional necessity of meeting the challenge of the pro se litigant in New York City's Housing Court:

Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, [668] persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. Early in our jurisprudence, this Court voiced the doctrine that [w]herever one is assailed in his person or his property, there he may defend. . . .

The Appellate Term also quoted Justice Douglas' concurring opinion in which he observed:

Our decisions for more than a decade now have made clear that difference in access to the instruments needed to vindicate legal rights, when based on the financial situation of the defendant, are repugnant to the Constitution. . . . Here the invidious discrimination is based on one of the guidelines: poverty. . . .

The court went on to quote Justice Brennan's concurrence in which he stated:

Courts are the central dispute-settling institutions in our society. . . . Where money determines not merely the kind of trial a man [sic] gets, but whether he [sic] gets into court at all, the great principle of equal protection becomes a mockery.

The Appellate Term concluded:

If low, moderate or middle income individuals are not to be denied their constitutional right to the use of courts or legal assistance, society must face up to this problem and find an effective way to respond to it. [FN19]

In addition to such fundamental constitutional concerns regarding equal access to justice, decisions expanding the bases for vacating pro se stipulations beyond those articulated in C.P.L.R. § 5015 frequently point to the pro se litigant's not having had a fair opportunity to raise defenses. [FN20] Indeed, even judgments after trial have been reversed where the trial court did not permit [the pro se litigants] an adequate opportunity to present relevant evidence pertaining to [their defenses]. . . . As a result, the defenses were not developed and tenants were deprived of a fair trial. In the interests of justice, tenants should be given an opportunity to present their evidence upon a
new trial. [FN21]

However, these constitutional, statutory, and equitable admonishments will remain hollow indeed unless we develop methodologies by which pro se litigants are not merely thrown into the adversarial arena unassisted by the various players in our judicial system—most importantly by the judges presiding over their cases.

II. Models for Addressing the Problem

As daunting as the problems faced by pro se litigants may be, they are not insurmountable. While it may be that the underlying problems cannot be resolved absent the provision of counsel, models exist which can at least mitigate the most serious and constitutionally infirm consequences of appearing pro se in New York City’s Housing Court. I do not propose any one of these models as ideal solutions. Each of them presents problems, both theoretical and practical. Nor do I suggest that the following is an exhaustive list of all possible models. However, those included here suggest strategies regarding how the problem of assisting pro se litigants might be addressed.

A. More Active Judicial Role Within the Structures of the Present System

Studies of New York City’s Housing Court have consistently shown that some judges are “better” than other judges in mitigating the problems faced by pro se litigants appearing before them. [FN22] A more systematic survey of those strategies used by such judges, which has not been done to date, would provide invaluable ideas about addressing those issues. [FN23] At a minimum, such a study should look at what assistance, if any, judges and court personnel currently provide pro se litigants at motions and evidentiary hearings. It should evaluate whether such interventions are successful or ineffective. [FN24] In addition, this survey should make some evaluation regarding whether such interventions are appropriate to the role of judge as understood in our current adversarial system. If the answer to these questions is in the affirmative, recommendations for system-wide adoption should be made. If the answer is in the negative [FN25] and the intervention strategy is still deemed to be highly successful, then constitutional, statutory, or administrative reform should be proposed to allow such modalities of intervention.

Prior to a comprehensive survey of actual practices in New York City’s Housing Court, the reports and recommendations of other courts, organizations, and scholars suggest some strategies of assistance that should be implemented. For example, a protocol developed by the Pro se Implementation Committee of the Minnesota Conference of Judges [FN26] and a similar draft protocol of the Idaho Committee to Increase Access to the Courts [FN27] urge that judges, among other things, explain:

1. The order and protocols of an evidentiary hearing in detail at the beginning of the hearing;

2. The elements of claims or defenses that each side will need to demonstrate in order to get the relief they are seeking;

3. The burden of proof the party bringing the proceeding has;

4. The consequences of not demonstrating a necessary element or bearing one’s burden of proof; and

5. The kind of evidence that may or may not be presented and considered.

The committees also urge judges to question the pro se litigant to obtain general information about the litigant’s claims or defenses. [FN28] What is particularly important about these protocols is that they provide
specific examples of how a judge can provide her explanations and pose questions within the context of specific case types. [FN29]

In its survey of judges, the American Judicature Society has identified a number of similar strategies that appear to be effective in assisting pro se litigants; for example:

1. Conducting on-the-record preliminary conferences "to discuss procedure, deadlines" and "how to do things at trial;" [FN30]

2. Using detailed court forms for motions and providing clear notices regarding motions and hearings, which should particularize the issues to be presented, which party hears the burden, what the standard of proof will be at the argument/hearing, *672 and the consequences of not appearing or meeting one's burden; [FN31]

3. Giving "detailed explanations of trial procedures, as time permits;" and

4. "[A]llowing narrative testimony" and "actively asking questions and making objections." [FN32]

Regarding evidentiary matters, the Society notes that some judges explain to the pro se litigant:

1. How to identify evidence relevant to prevailing on or defeating claims;

2. Procedures for obtaining such evidence;

3. The form that evidence may take;

4. What facts must be demonstrated to make that evidence admissible (i.e., foundation);

5. The main objections to admissibility (hearsay, best evidence, etc.);

6. The consequences of not having such evidence;

7. Providing for a reasonable opportunity to obtain such evidence; and

8. Assisting the pro se litigant at trial in establishing the necessary foundational elements for admitting such evidence and in how to testify regarding the substance of such evidence. [FN33]

It is this last form of active judicial intervention which causes the greatest concerns regarding conduct that is deemed inappropriate to the passive, impartial role of the judge in our present system, and which gives rise to fears that the judge will appear partisan or as an advocate for one side. Although these concerns would appear to be less significant in judge trials (as distinct from the concerns raised in a jury trial, or where both sides are unrepresented), it is obvious that an appearance of partisanship could arise even there. However, as demonstrated above, [FN34] *673 given the constitutional dimensions of the problem, it is necessary to find some form of intervention that can be implemented without the appearance of partiality. This implementation, of course, will require heightened awareness by the judge of the danger of such an appearance, and clear indications by them on the record regarding why such interventions are being made. [FN35]

However, acknowledging such limiting factors, the American Judicature Society has nevertheless adopted as a
policy recommendation that "judges should assure that self-represented litigants in the courtroom have the opportunity to meaningfully present their case." [FN36] The Society has also recommended that "judges should have the authority to insure that procedural and evidentiary rules are not used to unjustly hinder the legal interests of self-represented litigants." [FN37] The proposals described above could be implemented within the strictures of the current system and do not require statutory authorization. Thus, these proposals should be explored and particularized regarding the appropriate modalities *674 for incorporation into the current structure and procedures in Housing Court, taking into consideration concerns about the appearance of partiality.

Similarly, it may also be profitable to consider a more liberal application of C.P.L.R. § 3017(a), under which "the court may grant any type of relief within its jurisdiction appropriate to the proof whether or not demanded, imposing such terms as may be just." [FN38] Accordingly, absent prejudice to the represented party and given the relatively limited subject matter jurisdiction of Housing Court, it may be appropriate for the court to assist the pro se litigant in articulating legal theories for relief supported by the facts adduced at trial, even if they were not raised in a pleading. Of course, prejudice to the adversary would have to be guarded against by, among other things, allowing the adversary sufficient opportunity to respond after the court gives clear notice of its intent to consider a claim and possibly grant relief on that claim. [FN39]

However, the measures described above may not be sufficent in themselves to prevent unjust results in cases involving pro se litigants. Thus, some commentators have urged reforms that would significantly enhance the role of the judge well beyond the parameters suggested by the proposals noted above and which, in fact, could require administrative, statutory, or constitutional authorization. [FN40] For example, it has been proposed that judges should freely ask questions of unrepresented parties and their witnesses. When judges make clear to the parties at the beginning of the hearing that they will ask questions—and explain why (to make sure they have the information they need to make a decision)—chances are minimal that their apparent impartiality could be impaired. [FN41]

*675 While such a proposal would not place an affirmative duty on the judge to develop the factual record, [FN42] it would authorize the judge to develop the record more actively than under the present regime. For example, the judge would be encouraged to ask questions to assure that she would have the facts necessary to do justice in the matter submitted to her for adjudication.

In order to avoid either interrupting the pro se litigant's narrative or the apparent anomaly of the represented party's attorney objecting to the judge's own questions, that same proposal urges the judge to insist on conducting the hearing in a more informal manner, particularly regarding the application of the rules of evidence. [FN43] Indeed, it recommends that the judge "convince the attorney of the benefits of proceeding informally," by, among other things, overruling an evidentiary objection "on the grounds that it would be a waste of judicial resources to proceed in formal compliance with the rules of evidence." [FN44] It further recommends that the judge require the attorney to include in his objection sufficient understandability so the pro se litigant can cure the defect and that the judge refuse to uphold objections merely on the grounds of the form of a question or testimony. [FN45] Similarly, Professor Goldschmidt proposes that:

The judicial role should be expanded by explicit rules authorizing judges to provide a reasonable degree of assistance to pro se litigants in presenting their claim or defense. . . . [T]he court should assist by making sure all evidence the pro se litigant wishes to introduce is properly offered and admitted (unless found to be inadmissible due to privilege, irrelevance, immateriality, or redundancy, . . .). It is common knowledge that judges often assist attorneys by suggesting the correct form of a question, a certain line of inquiry not being pursued, or the manner of properly offering a document or other item into evidence. This proposal would, therefore, authorize similar assistance to pro se litigants. It may seem to radically change the traditionally passive role of the adversarial judge, but it is really only a modest expansion of that role. [FN46]

*676 It is clear that the proposals described above would go a long way in meeting the challenge of the pro se litigant. Under those proposals, a judge would be expected, indeed required, to provide a reasonable degree of assistance to the pro se litigant in articulating her claims or defenses and in introducing the evidence required to support those claims or defenses. However, since these proposals "do not radically alter the adversarial system or the traditional role of the judge" in that system, [FN47] they do not address the root cause of the problem faced by the pro se litigant, i.e., her being thrust into an adversarial system that presumes representation by a zealous advocate skilled in the technicalities of evidentiary law and in the "impenetrable thicket" of New York's housing law. [FN48]

Thus, we must consider more radical, comprehensive and systemic reforms, even if they significantly change (1) the nature of our adversary system, based on its presumption of legal representation; and (2) the role of the judge in that system, presumed to be one of passivity and impartiality narrowly defined. [FN49] The next two subsections will discuss such proposals.

B. Incorporating the Simplified Evidentiary Procedures Applicable to Small Claims Actions

There is general agreement that "[w]hat many describe as the 'technicalities' of the law of evidence present a major barrier to making court processes open to all. They not only intimidate the parties, but also create significant barriers to the presentation of evidence to the fact finder." [FN50] Indeed, many judges view the strict application of the rules of evidence in hearings involving pro se litigants as impeding a judge's ability to do justice in such cases. [FN51] One court has succinctly summarized *677 the practical impact of the strict application of evidentiary rules on the ability of pro se litigants to present their cases to a judge:

It is simply unrealistic to expect lay litigants to understand and abide by the formal rules of evidence. How is a lay plaintiff to be made to understand that the bill for services which he presents to show the repair costs for his damaged property must be authenticated as a business record? Or that the police report of an accident proves nothing in the eyes of the law? . . . In the case of inexperienced pro se litigants, it is better to err on the side of admitting an ore-heap of evidence in the belief that nuggets of truth may be found amidst the dross, rather than to confine the parties to presenting assayed and refined matter which qualifies as pure gold under the rules of evidence. [FN52]

As demonstrated above in Part I, the primary reason why evidentiary rules frustrate and, indeed, silence pro se litigants in presenting their claims and defenses is our adversarial common law system's rejection of narrative as an appropriate modality for the introduction of evidence. [FN53] As we also saw above in Part I, the mere imparting of legal information to a pro se litigant, including regarding the rules of evidence, is generally insufficient to overcome the silencing effect of the imposition of the strictures of our formal adversarial system, including *678 evidentiary rules, which presumes representation by a trained zealous advocate. [FN54]

Thus, a number of commentators have recommended that evidentiary rules be relaxed, or indeed, be jettisoned completely in cases involving pro se litigants, using the model of Small Claims courts as a guide for such a reform. [FN55] Given that the imposition of evidentiary rules is a key element in the silencing of pro se litigants, I agree that consideration must be given to adopting the "informal and simplified procedures" used in Small Claims actions in proceedings involving pro se litigants in housing court, or at least to adapting some of those procedures to such proceedings. The New York City Civil Court Act, in establishing the procedures for Small Claims actions, provides: "The court shall conduct hearings upon small claims in such manner as to do substantial justice between the parties according to the rules of substantive law and shall not be bound by statutory provisions of rules of practice, procedure, pleading or evidence. . . ." [FN56]

Of course, one would have to ensure that the panoply of rights and protections guaranteed by the complex
body of substantive real property and rent regulation law are not compromised under the guise of doing "substantial justice." The few reported New York cases interpreting the notion of "substantial justice" indicate that that concept can be "a fluid criterion, and sometimes substantial justice is found by turning the judicial face slightly away from the technical rule of substantive law." [FN57] *679 Thus, it would have to be made clear that under this proposal a judge would be required to determine "substantial justice" strictly within the terms established by the substantive provisions of applicable housing law. [FN58]

One might also consider a modified application of Small Claims procedures. For example, one could relax the rules of evidence only where the unrepresented party bears the burden of proof, or only where both sides are unrepresented, or where the represented party consents to the relaxation. [FN59] One might also consider whether evidentiary rules should be relaxed only for the pro se litigant or also for the represented party. However, such shifting rules would appear to place an unnecessary burden on a judge to determine which rules should apply in the matter before the court and could lead to confusing and inconsistent or indeed arbitrary application. Thus, I would propose that a uniform approach be adopted in all cases where at least one party is pro se in which the same evidentiary rules apply to both parties, whether they are represented or not. [FN60] However, within such a uniform system, one could *680 jettison either in whole or in part all evidentiary rules or only those which might have a greater likelihood of excluding otherwise reliable evidence, e.g., hearsay or documentary foundations. [FN61]

Because Housing Court trials are predominantly judge trials, the judge's ability to disregard inadmissible facts ameliorates concerns about the judge's having before her facts that might be inadmissible in a formal evidentiary hearing. [FN62] The primary focus of the system would be to allow the pro se litigant's narrative to unfold with minimal interruptions *681 or objections. Perhaps objections, to the extent that they are allowed, could be reserved or raised in short hand form or be agreed to prior to trial. Thus, the goals would be to avoid interrupting the narrative with objections and to find another way of preserving technical evidentiary objections on the record to the extent that they would be incorporated into this model. [FN63]

In any event, the relaxing of the rules of evidence and procedure, which appear to be two significant determinants in silencing pro se litigants, will go a long way to address the problems identified above in Part I of this paper. However, adopting a Small Claims court model is not a guarantee that pro se litigants will be able to fully and adequately articulate their narrative before the court. As noted above, Professor Bezdek observed systemic silencing of pro se litigants in Baltimore's Rent Court, which is based on the Small Claims model with relaxed rules of evidence. [FN64] Thus, the mere relaxing of evidentiary rules will not in and of itself assure that the pro se litigant's narrative will be elicited and heard in any legally meaningful sense. [FN65] Rather, the court must also address three additional factors which contribute to the pro se litigant's *682 silencing even without the strictures of formal evidentiary rules of exclusion. [FN66]

First, a judge should not be seduced into believing that the mere relaxing of evidentiary rules, in and of itself, remedies the power imbalance between a pro se and a represented party. As noted above, the economic and often racial and gender status of the pro se tenant places her in a position of subordination within the legal system, and profoundly affects her ability to speak or to have her voice heard in any meaningful or persuasive way by the court. [FN67] This power imbalance is further exacerbated by the advantage resulting from the dominant party's usually being represented by a zealous advocate, skilled in both substantive and procedural law, and familiar with the culture and practices of the Housing Court in which he or she practices on a regular, indeed often on a daily basis. [FN68] Accordingly, the court must consistently and systematically "[r]emain alert to imbalances of power in the courtroom." [FN69]

Techniques for addressing this imbalance have been suggested by commentators. For example, a judge needs

to be sure to inquire about the pro se litigant's views on the issues before the court at each stage of the trial, hearing, or motion. [FN70] The court should also resist the temptation of allowing the attorney, who may be more facile in using the terminology and categories familiar to the court, to define the factual and legal issues before the court. [FN71] This is particularly important where the *683 pro se litigant bears the burdens of proof or persuasion, such as in pressing an affirmative defense, or in moving for relief by order to show cause. Accordingly, by employing techniques which signal to the pro se litigant that her view of the facts or the law is not being discounted simply because of her economic, racial, gender, or pro se status, but indeed is welcome and valued, the court will in some measure mitigate the silencing effects of such status-based subordination.

Second, a judge must construct appropriate modalities of intervention to assist the pro se litigant in telling her story or narrative to the court. As described above, the strictures of evidentiary rules, particularly in disallowing narrative and other ordinary forms of speech, significantly limit the pro se litigant's ability to speak and to be heard. However, if the court merely invites the pro se litigant to "tell your story," or "explain why you are here today," or "tell me why you think the landlord should not get a judgment of possession against you," the resulting narrative, free from evidentiary constraints but unassisted by judicial intervention, will generally be factually incomplete and legally insufficient. [FN72] Thus, judicial intervention is essential. O'Barr and Conley have catalogued some of the indicia in unassisted pro se narratives which signal the pro se's quandary regarding the sufficiency of her story and her need for intervention. [FN73] For example, pro se litigants will frequently ask where to begin or end the narrative, or otherwise indicate that they do not know the "relevant" time periods. They will also continue the narrative, *684 with segments linked with "ands" or pauses until they think they've told "enough." They frequently use "rising intonation" at the end of segments, which signals a request for "acknowledgment and understanding." [FN74] Without assistance from the judge, the pro se litigant will simply continue her narrative until she thinks what she has said is sufficient to defeat the landlord's claim or support her request for relief. [FN75] However, she will generally not have structured the narrative in a deductive manner, based on a theory of the case, which directly refutes the landlord's claim in a manner that is cognizable under the applicable law or which supports her defense, affirmative defense, or counterclaim. [FN76] Accordingly, unassisted, the pro se litigant's narrative will generally be seen to be legally inadequate. [FN77] In spite of the fact that they will often contain all of the elements which, if marshaled by a lawyer, would be legally adequate. [FN78]

Thus, the judge must assist the pro se litigant in structuring and developing her narrative so that its legal adequacy can be articulated and evaluated. O'Barr and Conley have documented the efficacy of judicial interventions which guide the pro se litigant in: (1) identifying narrative beginning and end points; [FN79] (2) emphasizing facts which are more probative than others regarding the primary legal issues before the court; (3) specifying the harm suffered or the relief sought; (4) identifying corroboration facts; (5) constructing facts according to the legal elements required *685 for relief; and (6) responding to the landlord's factual and legal claims or defenses. [FN80]

Accordingly, even in a system freed from the strictures of evidentiary rules, the role of the judge must be expanded to include "facilitating the unrepresented litigant's presentation of his or her own case—as the litigant has conceived it...." [FN81] However, this expansion of the role of the judge is perhaps a judge's most daunting challenge in dealing with pro se litigants, since it may challenge the judge's deeply-held notion of the appropriate judicial role as being one of a passive trier of facts presented to her by others. [FN82] It also requires a judge to acknowledge that her notion of her role significantly affects and, to some degree, determines the extent and nature of the interventions she is prepared to make to assist a pro se litigant. There is no question that most judges *686 have some general notion of what they believe to be role-appropriate interventions based on their understanding of current legal and ethical norms, [FN83] as well as their own practices. [FN84] However, in an empirical study of
more than eighty Small Claims cases in Colorado and North Carolina, Conley and O'Barr have documented five distinctive judicial role-types and their significant impact on each type's trial practices and decisions: [FN85]

Judges applying the same substantive and procedural law—and sometimes sitting in adjacent courtrooms—dispense justice in radically different ways. . . . Our examination of what judges say in rendering on-the-spot judgments suggests that this behavioral variation derives from divergent conceptions of the judge's role and the nature of legal decision-making. Thus, the law interpreter (Judge A), who rarely deviates from the straightforward application of legal rules, speaks of a process in which she is at the mercy of unyielding principles, even when she is disturbed by the results they produce. The law maker (Judge B), who adapts or even invents rules of law in pursuit of justice as she sees it, expresses herself in terms which suggest that the law is there to serve her ends, and not vice versa. The mediator (Judge C), who treats the adjudicative process as simply an opportunity to work out a compromise, puts similar emphasis on her central and highly discretionary role in the system. The authoritarian (Judge D), who renders definitive legal judgments and often involves himself in the personal affairs of the litigants, speaks in extraordinarily personal terms in exercising his authority. Finally, the proceduralist (Judge E), defined by his close, sometimes obsessive attention to procedural details, paints a verbal picture of a legal decision maker who is armed with discretionary power, yet protected from direct interaction with the litigants by several layers of legal formality. In each instance, there is a clear parallel between the judge's attitude as revealed in his unrehearsed speech and the individual's behavior on the bench. [FN86]

Accordingly, judges must reflect on whether their concept of judicial role-type, perhaps using the above typology as a guide, limits their ability to implement the interventions proposed in this section as necessary *687 to assure pro se litigants' equal access to justice. [FN87] As has been argued throughout this paper and by other commentators, a judge's individual concept of role must give way to assuring equal access to justice for the pro se litigant. [FN88] Absent such a refocusing and rearticulating of the role of the judge, even in a system not bound by the strictures *688 of formal evidentiary rules, "the effectiveness of changes such as these [ettisoning or, at least, significantly restricting the application of formal rules of evidence], will be limited, if not undercut. . . ." [FN89]

C. Adopting an Administrative Procedure or Inquisitorial Model in Which the Judge Bears an Affirmative Duty to Develop the Factual Record and to Identify Controlling Law

Both of the proposals described above involve an enhanced role for a judge in assisting the pro se litigant in articulating her theory of the case and in introducing evidence in support of that theory. It has been suggested that such an expansion of the judge's role is appropriate even within our present adversarial system. [FN90] However, my concern in this section is not with whether the reforms described above require statutory or administrative change, but whether those proposals are sufficient to assure the pro se litigant's equal access to justice. Unfortunately, I submit that the answer to that question must be in the negative. The studies and commentaries referred to above suggest that even with enhanced judicial assistance, the fundamental power imbalance between represented and unrepresented parties in Housing Court—both status-based and in terms of the pro se litigant's lack of familiarity and facility with legal categories—will not be redressed. Accordingly, some commentators have proposed that a judge should be given an affirmative duty to develop the factual record and to identify the controlling law, following the model of judges in administrative hearings or in jurisdictions using an inquisitorial model. [FN91]

*689 An administrative law judge in federal, state, and municipal administrative fora has an affirmative duty to assist a pro se claimant develop her case. [FN92] This duty to assist requires that the judge "probe into . . . and explore for all the relevant facts." [FN93] Consideration should be given to the implications of imposing this same duty on Housing Court judges. Such an imposition would directly address pro se litigants' inability to develop

factual records and present the facts in a way that demonstrates the legal sufficiency of their cases. [FN94]

However, merely imposing this duty on a judge by a rule change is no guarantee that the pro se litigant will receive the assistance she is promised by such a rule change. [FN95] Administrative judges frequently fail to fulfill their obligation to develop the factual record. [FN96] Accordingly, the interventions described in the preceding section [FN97] would have to be imported here as a mandated component of the judge's duty to develop the factual record.

The mandated role of the judge in developing the factual record proposed here also bears some similarity to the role of the judge in the *690 inquisitorial model followed in most jurisdictions outside of the United States. [FN98] Of course, adopting aspects of the inquisitorial model would have a significant impact on the adversarial nature of our existing judicial model and is, thus, unacceptable to some commentators. [FN99] Nevertheless, defenses of the adversarial system against incursions of inquisitorial-based reforms are rooted in the adversarial system's presumption that a zealous lawyer will represent each side in a case. [FN100] However, the primary landscape in Housing Court for the foreseeable future is one populated predominantly with pro se litigants. Thus, the incorporation of at least some aspects of the inquisitorial model, primarily by enhancing the role of the judge in developing the factual record, and in identifying and applying controlling law is essential in guaranteeing equal access to justice for pro se litigants.

*691 In the French civil (and criminal) systems, the judge has the responsibility for fact gathering, including developing facts pre-trial and at trial by questioning witnesses. [FN101] As in summary proceedings in Housing Court, discovery by the parties in the French system is extremely limited. Rather, the judge directs the development of the factual and legal issues in the case, and fixes time limits. Appeals are de novo. [FN102]

Obviously, the whole cloth incorporation of such a civil code-based inquisitorial approach raises significant statutory and potentially constitutional issues. [FN103] In addition, such an incorporation could give rise to practical considerations, since the French system relies on fairly well-developed dossiers to educate the judge regarding the factual and legal issues that she is expected to develop and on which she must rule. There are also theoretical considerations of such an incorporation given, for example, the almost exclusive reliance in the French system on documentary evidence due to a fundamental devaluation of the trustworthiness of testimony. [FN104] Nevertheless, some familiarity with a judicial system in which the judge plays a significant fact development role, particularly during the phase of the trial called the enquête, [FN105] may counter *692 a reflexive rejection of such a judicial role simply because American judges and advocates have little knowledge of or exposure to systems other than our own adversarial one. [FN106]

These preliminary explorations suggest that a more comprehensive investigation of such systems beyond the brief summary provided here may identify additional means by which the role of the judge can be enhanced to meet the challenge of pro se litigants in Housing Court. [FN107] In any event, one should investigate and evaluate the importation of at least some aspects of such a role for a judge. [FN108] For example, Professor *693 Strier has proposed a "middle ground" approach to expanding the inquisitorial role of the judge during trials involving attorneys in terms familiar to those versed in the adversarial model:

To gain the benefits of independent, judicial questioning during trial, we need not replace purely adversarial evidence gathering with the judge-dominated model of the inquisitorial system. An acceptable middle ground could be the same allocation of interrogating power employed during our voir dire: . . . [T]he judge might conduct the initial interrogation, after which the attorneys would be free to probe for additional details. But the judge could always ask supplemental questions which an incompetent or marginally competent attorney neglects to pose. The occasional need for this judicial "safety net" protection escapes few who are familiar with adversary system trials. [FN109]
Adapting this more active role of the judge to hearings involving pro se litigants could significantly assist the pro se litigant in developing the factual record.

In addition, as noted above, pro se litigants also face a daunting challenge in articulating a legal framework or theory of the case in which the merits of their claim or defense can be evaluated. [FN110] Thus, it could be productive to adapt the approach in German civil actions in which the "court's duty to discover the truth is matched by a cognate responsibility to ascertain and apply the law without prompting from the parties. In essence, the court seeks to ensure a decision based on the merits of the case." [FN111] Although this approach may seem at odds with the judge's role within the adversary system, [FN112] it is not unlike the role played by a judge in Small Claims court, who must not only apply substantive law to the facts presented by the pro se parties, but must also identify the substantive law to be applied to the facts since a Small *694 Claims judge generally does not have the benefit of lawyers to brief the law. [FN113] Such an approach could be adapted to Housing Court proceedings. Of course, if such a responsibility is imposed on the Housing Court judge, she must be provided both training in the substantive law most regularly at issue in the proceedings before her, [FN114] and a sufficient pool of court attorneys to assist in legal research and bench memos on the matters before her.

Professor Moynihan summarizes some of the considerations suggested by the French inquisitorial model that could guide evaluation of the advisability of incorporating other elements from such systems:

*695 [We] might want to consider the French experience when it considers the role that should be played by the housing court judge. The typical French trial and a housing court case share many similarities. Limited discovery is an obvious one. So is the summary or documentary nature of the proceeding. The questioning of those witnesses who need to be called in the French trial can apparently be done by judges without a loss of public confidence in judicial fairness.

The French system does assume a role for lawyers, but there are aspects of the French process that might be used to improve the lot of the pro se litigant. In fact, in many civil jurisdictions, the judge has a duty to assist the parties in clarifying their positions on factual and legal issues. In France, a judge may play such a role but it is not mandatory. It has been noted that, in practice, "this effectively rescues parties with poor counsel, reflecting the civil system's fundamental prejudice favoring the application of substantive law to obtain a just result rather than a reliance on technicalities and procedure that often leads to an unjust resolution." However, in a decision, the judge may include only those grounds and documents relied on or produced by the parties that have been available for inspection to both parties.

Major debate has occurred about importing many aspects of the French . . . procedure into common law traditions. . . . That debate would provide a rich background against which [we] might consider issues raised by suggestions that housing court judges roles be changed to more closely resemble the role of judges in France. [FN115]

It should be noted that contrary to the concerns expressed by some commentators, [FN116] adopting a more active, inquisitorial role for judges need not compromise judicial impartiality and fairness. Judges in inquisitorial systems engage in a mandated active role without a loss of impartiality. [FN117] Administrative law judges, who also develop the factual record and determine which law is applicable to the cases before them, do so without any loss of an appearance of fairness. [FN118] Accordingly, *696 such concerns should not preempt importing aspects of the inquisitorial model.

III. Conclusion

The proposals set forth above challenge our adversarial system's received traditions of judicial passivity and impartiality, narrowly understood. These traditions dramatically limit the role played by most judges in New York
City's Housing Court (and in most other courts) in assuring access to justice for pro se litigants. The consequences of this circumscription are devastating for a pro se litigant, particularly one who feels compelled to litigation her case rather than accept a settlement that she considers to be unfair or prejudicial. Warned by the court that she will be subject to the same mangling rules of evidence, trial procedure, and motion practice as a trained attorney, she soon realizes that the option of "going to trial" may forebode even worse consequences than the settlement she is resisting. If she opts to press her defenses or claim at a hearing or by a motion, she finds that the assistance provided to her even by a judge sensitive to the challenges faced by a pro se litigant is extremely limited in the strange land of our attorney-centric rule-bound adversarial system. Although the judge may try to explain trial or motion procedures, and to some extent relax evidentiary rules, or even allow her to testify to a limited degree in narrative form, she is left to figure out on her own when she has said enough to meet a legal standard regarding which she is largely ignorant.

Accordingly, I have proposed, as have other commentators, a more active, inquisitorial-based role for Housing Court judges. I submit that most of the models of such judicial intervention outlined above can be incorporated to some extent into the present adversarial system. However, the constitutional infirmity of the present system, which denies equal access to justice to most pro se litigants in Housing Court, i.e., to the vast majority of tenants and to a not insignificant number of small landlords, requires that we consider more far-reaching departures from the received construction of judicial role. Thus, I submit that at least two additional reforms, which may require statutory, administrative, and ethical reforms, are required: (1) jettisoning, in whole or in part, evidentiary rules; and (2) placing an affirmative duty on the judge to develop the factual record and to determine and apply relevant substantive law.

To some judges, lawyers, and commentators, such a transformation challenges their very notion of what constitutes a legal system and the role of a judge within such a system. Some may perceive the forum that may result from these proposals as nothing more than a delegazalized dispute resolution center overseen by a problem solver, not a court of law presided over by a judge. However, I agree with Professor Goldschmidt that:

"[t]he delegation proposed here consists of eliminating the secrecy regarding basic legal information, such as the elements of causes of action, and relaxing the rules of procedure and evidence. These do not effect changes in substantive law, only in the fairness of the proceedings for all litigants. Even if proceedings under these proposals turn out to be, in one commentator's words, "litigation lite" for pro se litigants and their adversaries, that is better than unfair litigation or no access to justice at all. [FN119]"

Indeed, one might note that in spite of the efforts of dedicated and well-intentioned judges and administrators, and in spite of recent Housing Court reforms, the current system can hardly be called a law-based system. An adversarial system in which one of the contestants enters the arena without arms or even armor, or in which she is given at best second-rate weapons, but no training on how to use even such inferior tools, bespeaks a system in which the powerful survive, irrespective of the demands and protections of substantive law. If a judge passively presides over such unequal combat, acquiescing to and enforcing its results, she reduces herself to being no more than a spectator to the proceedings, rather than functioning as a neutral arbiter of facts and a dispenser of justice. The proposals developed in this paper attempt to function interventions by which a judge can assist the parties in presenting to her both the nature of the legal conflict and the facts she needs to adjudicate that conflict based on applicable substantive law. In that way, a judge can more truly be said to be a person who is presiding over a system ruled by law and not by the accidents of status or legal representation.

Implementation of these proposals will not be easy. At a minimum, judges must be trained in the methods described above which are permissible within the present system and encouraged (or perhaps even persuaded) to apply them in their courtrooms. In addition, it is essential that experimental pro se parts be established in which to

test the proposals set forth here. Those judicial interventions proposed above that do not require statutory or other changes to be implemented would be used in all matters sent to those parts. Those interventions that do require such changes could be used where the parties consent to their usage. The workings of the parts should be observed, documented, and evaluated. The resulting experience-based conclusions would provide a rationale for replacing or refining the methodologies used, and for developing further interventions.

Whether or not the court system opts to adopt any of the proposals set forth in this paper, it must recognize the challenge thrust upon it by the large numbers of pro se litigants in the Housing Court, and identify and implement some forms of judicial intervention to meet that challenge. If it fails to do so, it will have failed in its fundamental constitutional and judicial task of assuring access to justice to pro se litigants in New York City's Housing Court.

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[FN1]. This paper is based on an earlier version prepared for the working conference: The Housing Court in the 21st Century: Can It Better Address the Problems Before It?, October 29, 2004, New York County Lawyers Association, to serve as a basis for the discussions of the “Adjudicative Process and the Role of the Court” working group. The Report of that working group - as well as those of other working groups - is also included in this issue of the Journal. I am indebted to the insights generated by the working group and to its chair, Hon. Marcy Friedman, who is currently a Justice of the Supreme Court of the State of New York and was previously a Judge in the Housing Court of the Civil Court of the City of New York.

[FN2]. The Housing Part of the Civil Court of the City of New York was established in 1972 by the passage of § 110 of the New York City Civil Ct. Act. See N.Y. City Civ. Ct. Act § 110 (1972). Subpart (a) provides:

A part of the court shall be devoted to actions and proceedings involving the enforcement of state and local laws for the establishment and maintenance of housing standards, including, but not limited to, the multiple dwelling law and the housing maintenance code, building code and health code of the administrative code of the city of New York ....

Id.


[FN5]. It is well-documented that pro se litigants in Housing Court are predominantly tenants. See, e.g., Galowitz, supra note 3, at 181-82 (noting that according to a 1993 study only 11.9% of tenants were represented). This figure has not changed significantly in the intervening years. Telephone Interview with Hon. Fern Fisher, Administrative Judge of the Civil Court of the City of New York (Mar. 3, 2005) (commenting that anecdotal evidence indicates that at most 15% of tenants are represented). However, there are also a not insignificant number of pro se landlords, particularly in the Housing Courts outside of Manhattan. Id. (noting that about 15% of landlords, primarily in the boroughs outside of New York County, may be unrepresented). Accordingly, the comments presented here are applicable with some modification to the challenges faced by pro se landlords.


[FN7]. Bezdek, supra note 6, at 561-62 (finding tenants in Baltimore Rent Court lost to landlord rent claims even when they had knowledge of or could prove defenses to those claims); id. at 591 (noting that poor tenants' relationship to law as one of subordination and not rights "renders dubious proposals that information-delivery responses could remedy dysfunctional conditions of the rent court's operation. ... In other words, knowledge of rights would not confer power. Our experience in the courthouse suggests as much."); Zorza, supra note 6, at 18 ("practitioners report that whatever resources are put into [providing pro se litigants with] information, in the end many [pro se] litigants cannot be prepared to handle the courtroom with information alone."). But see Helen B. Kim, Legal Education for the Pro Se Litigant: A Step Towards a Meaningful Right to Be Heard, 96 Yale L.J. 1641, 1642 (1987), “Experience has shown that providing general legal information to pro se litigants can significantly increase their chances of success both in court and in settlement negotiations.” Id.

[FN8]. See, e.g., Litigant's Struggle, supra note 6, at 41. Despite the modern trend toward a more active role for judges,

adversary theory requires the judge to remain passive until the conclusion of the actvates' presentations. He is not free to conduct an independent inquiry or otherwise accelerate the pace of the proceedings ... [this passivity is to ensure that the trier will remain neutral until he renders his decision ... [and neutrality is to ensure] the integrity of adversarial deliberations (quoting Stephan Landsman, The Adversary System: A Description And A Defense 34 (1984)) (emphasis added); see also Engler, supra note 3, at 2022-23.

The traditional notions of who should be giving legal advice, and what it means to be impartial, were developed within the framework of the adversarial system. The adversarial system purports that both sides will be represented by counsel ... The adversarial system purports to promote fairness and justice. Yet, the rules currently operate as barriers preventing unrepresented litigants from participating meaningfully in the legal system and thereby frustrate the goal of dispensing fairness and justice. ... One important barrier is the narrow conception of impartiality that typically permeates the discussions of the various roles [of the players in the system, including judges].

Id.

[FN9]. Bezdek, supra note 6. It should be noted that although Professor Bezdek's documentation and analysis focuses on Baltimore's Rent Court, the structural and systemic features she finds there that silence pro se litigants are present in most judicial settings and, thus, her conclusions, with some modification, are applicable to those settings as well. Id. at 533. See Engler, supra note 3, at 2047-69 (finding similar features in Family and Bankruptcy courts, and in Boston and New York City housing courts); see also Jane C. Murphy, Access to Legal Remedies: The Crisis in Family Law, 8 BYU J. Pub. L. 123, 124-27 (1993) (showing the same is true in Family Court).


In studies of self-represented litigants in small claims courts, Conley and O'Barr discovered two contrasting modes of organizing and presenting accounts of the dispute to the judge: rule-oriented and relation-oriented accounts. ... A rule-oriented account is directed to legal rules. A relational account is oriented with respect to social rules. The impact of the two story-presenting modes on small claims judges is significant. The courts typically treat relational accounts dismissively and regard their content as irrelevant and inappropriate. ... Bezdek, supra note 6 at 586-87. Professor Bezdek also argues that the court's rejection of the mode of discourse of the pro se tenant is exacerbated by (or perhaps even rooted in) the tenant's economic and often race- and gender-based position of subordination vis-à-vis the economically dominant, represented party and the court as an enforcer of that party's rights. Id. at 565-75, 583-85; see also Lucie E. White, Subordination, Rhetorical Skills and Sunday Shoes: Notes on the Hearing of Mrs. G., 38 Buff. L. Rev. 1, 4 (1990), demonstrating that mere access to formal adjudicatory rituals does not comport with due process if it does not provide a forum in which one can actually speak and be heard:

Familiar cultural images and long-established legal norms construct the subjectivity and speech of socially subordinated persons as inherently inferior to the speech and personhood of dominant groups. Social subordination itself can lead disfavored groups to deploy verbal strategies that mark their speech as deviant when measured against dominant stylistic norms. These conditions ... undermine the capacity of many persons in our society to use the procedural rituals that are formally available to them. Furthermore, bureaucratic institutions disable all citizens--especially from subordinated social groups--from meaningful participation in their own political lives. (emphasis in original).


[FN12]. Brooklyn, supra note 3, at 28-31; Bronx, supra note 3, at 25-29; New York County, supra note 3, at 33-38.

[FN13]. "The forfeiture of rights flows from the barriers facing unrepresented litigants at each stage of the proceeding and each encounter with the various players in the system. ... The difficulties at each stage are compounded, rather than corrected, as the case proceeds." Engler, supra note 3, at 1989.

[FN14]. See Committee on Housing Court, A Tenant's Guide to Housing Court, Ass'n of the Bar of the City of N.Y., (Mar. 2004), available at http://www.abny.org/Publications/tenant.htm ("The Judge cannot give you legal advice about your case, but he or she can explain what is going on, and the procedures and rules that must be followed at a trial."). For a more general discussion of the term "legal advice," see John M. Greacen, "No Legal Advice from Court Personnel! What Does That Mean?," 34 Judges' J. 10 (1995) (arguing that the term "legal advice" has no inherent meaning and proposing principles by which to define appropriate information from clerks and judges, which nevertheless would still exclude advising litigants to take a particular course of action, taking sides in a proceeding, or providing information to one side that one would not provide to the other side); John M. Greacen, Legal Information vs. Legal Advice - Developments During the Last Five Years, 84 Judicature 198 (2001) (summarizing critiques of his earlier proposals as being too limited and too general); see also Engler, supra note 3,
at 2026.

In redefining the roles of court personnel and those staffing assistance programs, the prohibition against the giving of legal advice by some of the actors in the system must be abandoned. The distinction between help that constitutes legal advice and help that does not provides little guidance to those on the front lines. Moreover, most assistance needed by unrepresented litigants is likely to involve what would fall within an intellectually honest definition of legal advice. While guidelines should be developed for what help a particular office or program may provide in a given context, the limits should not turn on what constitutes legal advice.

Id.


Furthermore, claimant's choice to proceed pro se had no effect on his burden to present legally competent evidence. Although courts will routinely afford pro se litigants some latitude, a pro se litigant 'acquires no greater right than any other litigant' and will be held to the same standards of proof as those who are represented by counsel.

Id. (internal citations omitted). But see Mosso v. Mosso, 776 N.Y.S.2d 599, 600 (N.Y. App. Div. 3d Dept. 2004) ("It is true that respondent, as a pro se litigant, represented herself at her own risk and acquired no greater rights than other litigants. Nevertheless, some latitude is appropriate, especially in a proceeding such as this where a pro se litigant wishes to present evidence in her defense, but is frustrated from doing so through her own 'inexperience and lack of legal training.'") (internal citations omitted).

[FN16]. See, e.g., Engler, supra note 3, at 2011-21, 2063-69; see also Meeting the Challenge, supra note 4, at 52-62, and Jona Goldschmidt, How Are Courts Handling Pro Se Litigants? 82 Judicature 13, 17-20 (1998) (summarizing results of surveys of judges regarding the difficulties involved in dealing with pro se litigants) [hereinafter Handling Litigants].

[FN17]. Chief Judge Judith S. Kaye of the New York State Court of Appeals has proposed that the Housing Court be reconstituted as a constitutional court, since the Court, in fact, functions in all respects save name and remuneration like a constitutional court. See Testimony Before Joint Legislative Session on Court Restructuring, Oct. 7, 1997, available at http:// www.courts.state.ny.us/press/old_keep/cjtestim.shtml. "The Civil Court, as you know, includes the Housing Part, which disposes of hundreds of thousands of matters annually yet isn't even a constitutional court. Consolidation would bring the status of this court in line with its important role in today's society." Id. But see Harvey Gee, Is a "Hearing Officer" Really a Judge? The Presumed Role of "Judges" in the Unconstitutional New York Housing Court, 5 N.Y. City L. Rev. 1 (2002) (arguing that the Housing Court was unconstitutionally created, violating both separation of powers and due process strictures, and that its present functioning deprives litigants of due process. Unfortunately, this intriguing analysis is marred by significant theoretical and factual errors, including the author's mistaken presumption, asserted without evidence or authority, that Housing Court judges currently have "the authority and the responsibility to investigate the facts and develop the record ... [even] where claimants are represented by attorneys. ... The housing judge performs an active investigatory role and shoulders an obligation to obtain evidence."). Id. at 30.


nonpayment case for appointment of counsel). But see In re Smiley, 36 N.Y.2d 433, 439-41 (N.Y. 1975) (rejecting constitutional claim for use of public money to provide counsel, but not the constitutional "access to the courts" analysis in Supreme Court decisions relied on in Hotel Martha Washington, 322 N.Y.S.2d at 139); see also NYCCHA v. Johnson, 565 N.Y.S.2d 362, 364 (N.Y. App. Term 1st Dept. 1990) (finding its prior determination in Hotel Martha Washington regarding appointment of counsel no longer controlling after Smiley, 36 N.Y.2d at 439-41). For an early discussion of the constitutional dimensions of access to justice in New York City's Housing Court, see Justice Evicted, supra note 3, at 1-7; see also Meeting the Challenge, supra note 4, at 19-24. For a comprehensive analysis of the problem of access to justice, particularly for persons without lawyers, see Deborah L. Rhode, Access to Justice (2004).

[FN20]. See, e.g., Solack Estates v. Goodman, 432 N.Y.S.2d 3, 4 (N.Y. App. Div. 1st Dept. 1980) ("the elderly tenant, in a state of extreme emotional distress, lacked a basic understanding of the situation confronting her and the significance of the settlement"); see also Thelma Realty Co. v. Harvey, 737 N.Y.S.2d 500 (N.Y. App. Term 2d Dept. 2001) (vacating pro se stipulation and final judgment in nonpayment proceeding where tenant was "unaware of the legal effect of the DHCR [rent reduction] order" and where tenant had "alerted the court to the existence of the DHCR order" prior to entry of a final judgment of possession and issuance of a warrant of eviction predicated on the unreduced rent); Engler, supra note 3, at 2018-21 (and cases discussed therein).

[FN21]. Wenjon Associates v. Morales, N.Y.L.J., Oct. 18, 1985, at 16:3 (App. Term 2d Dept.) (reversing final judgment in nonpayment proceeding; Mosso v. Mosso, 776 N.Y.S.2d 599, 599-600 (App. Div. 3d Dept. 2004) (reversing Family Court order incarcerating pro se parent for violating order because she "was not given an adequate opportunity to present evidence supporting her defense").

[FN22]. Brooklyn, supra note 3, at 8-26; Bronx, supra note 3, at 8-23; New York County, supra note 3, at 8-30.

[FN23]. Such surveys in other fora have proved to be invaluable in developing strategies for meeting the challenge of pro se litigants. See, e.g., Meeting the Challenge, supra note 4, at 52-56; see also Handling Litigants, supra note 16, at 17-20.

[FN24]. Of course, the criteria for determining "successful" or "ineffective" would have to be carefully articulated. The primary criterion of "successful," however, must be the extent to which the intervention assists the pro se litigant in being able to articulate her claims and defenses, and to understand the nature and the significance of the proceeding in which she is involved. See Engler, supra note 3, at 2022-31; see also Litigants Struggle, supra note 6, at 36-37; Rebecca A. Albrecht et al., Judicial Techniques for Cases Involving Self-Represented Litigants, 42 Judge's J. 16 (2003) [hereinafter Albrecht], "The law must produce a consistent outcome for all litigants, regardless of their legal representation, based on the law and facts of their case." Id. at 44. See also infra text accompanying notes 70-80 (discussing successful interventions).

[FN25]. For a discussion of the limitations placed on the role of the judge in assisting pro se litigants under current law, see Albrecht, supra note 24, at 17-23, 42-43 (surveying applicable Canons of Judicial Ethics and case law). See also Engler, supra note 3, at 2012-13 (same); Kerry Hill, American Judicature Society, Meeting the Challenge of the Pro Se Litigant: An Update of Legal and Ethical Issues (2002), available at http://www.ajs.org/prose/prolegal_ethical.asp (last visited Feb. 15, 2005); Litigant's Struggle, supra note 6, at 39-42 (locating origin of limitations on judicial role in assisting pro se litigants in the history of the common law adversarial system).


(FN28). Protocol, supra note 26; Proposed Protocol, supra note 27.

(FN29). Protocol, supra note 26; Proposed Protocol, supra note 27.

(FN30). Meeting the Challenge, supra note 4, at 56.

(FN31). Id. at 56-57. It has also been argued that "[a] rule mandating that [federal] judges inform pro se litigants of their obligations under Rule 56(c) is necessitated by a layman's inability to discern his obligations from reading the rule. Some courts ... derive the mandate from the Federal Rules of Civil Procedure. This practice, however, has been rejected entirely by other courts." Joseph M. McLaughlin, An Extension of the Right of Access: The Pro Se Litigant's Right to Notification of the Requirements of the Summary Judgment Rule, 55 Fordham L. Rev. 1109, 1114 (1987) (internal citations omitted).

(FN32). Meeting the Challenge, supra note 4, at 57.

(FN33). Id. at 57-58; see also Handling Litigants, supra note 16, at 19-20; Zorza, supra note 6, at 75-84.

(FN34). See supra text accompanying notes 18-21.

(FN35). A particularly interesting discussion of the competing interests of the need for a judge to develop the record and the judge's appropriate role in that process is found in People v. Arnold, 98 N.Y.2d 63 (N.Y. 2002). Although the Court reversed the trial judge under the facts of that case for calling a witness on its own in a criminal jury trial, it noted:

In our adversarial system of justice, the roles of the parties and the decision-maker are, in theory, separate and well defined. In actuality, however, our system has evolved into what commentators have called a 'modified' or 'regulated' adversarial system. As a practical matter, trial courts sometimes must take a more active role in the presentation of evidence in order to clarify a confusing issue or to avoid misleading the trier of fact. Typically, these cases arise in the context of jury trials.

While "neither the nature of our adversary system nor the constitutional requirement of a fair trial preclude a trial court from assuming an active role in the truth-seeking process," the court's discretion is not unfettered. The overarching principle restraining the court's discretion is that it is the function of the judge to protect the record at trial, not to make it. Although the law will allow a certain degree of judicial intervention in the presentation of evidence, the line is crossed when the judge takes on either the function or appearance of an advocate at trial.

There is no absolute bar to a trial court asking a particular number of questions of a seated witness or recalling a witness to the stand; or even allowing the People in narrow circumstances to re-open their case after a defense motion for a trial order of dismissal, when doing so advances the goals of truth and clarity. A court may not, however, assume the advocacy role traditionally reserved for counsel, and in order to avoid this, the court's discretion to intervene must be exercised sparingly.

Id. at 67-68 (internal citations omitted).


(FN37). Id. See also Albrecht, supra note 24, at 45-48 (discussing the general principles that should guide a judge in assisting the pro se litigant).
(Cite as: 3 Cardozo Pub. L. Pol'y & Ethics J. 659)


[FN39]. Such notice is not dissimilar to the notice requirements where a court decides to treat a motion to dismiss as one for summary judgment pursuant to N.Y. C.P.L.R. § 3211(c) (2005) or to the court's ability to search the record pursuant to N.Y. C.P.L.R. § 3212(b) (2005) and grant relief even to the non-moving party.

[FN40]. See, e.g., Engler, supra note 3. But see Litigant's Struggle, supra note 6, at 45 (arguing that such proposals "do not radically alter the adversarial system or the traditional role of the judge. Nor do they make the judge the feared gatherer of evidence who may unfairly side with the party whose theory of the case is consistent with his or her investigation ... ").

[FN41]. Albrecht, supra note 24, at 46 (emphasis added); see also Richard Zorza, The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When the Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications, 17 Geo. J. Legal Ethics 423 (2004) (arguing that a judge’s neutrality—in fact and in appearance—can be preserved if she explains on the record the reasons for and modalities of her assisting a pro se litigant) [hereinafter Disconnect].

[FN42]. See discussion infra Part II.C.

[FN43]. Albrecht, supra note 24, at 47-48.

[FN44]. Id. at 47 (emphasis added).

[FN45]. Id. at 47-48; see also Zorza, supra note 6, at 81-84.

[FN46]. Litigant's Struggle, supra note 6, at 48 (emphasis added).

[FN47]. Id. at 45.


[FN50]. Zorza, supra note 6, at 81.

[FN51]. See, e.g., Handling Litigants, supra note 16, at 18.

Surprisingly, some judges feel the rules of evidence become a hindrance in certain cases, as do the attorneys themselves. Several judges suggested a "need to relax the rules so that justice can be done." Sometimes, "the lawyer whines and complains that the other side doesn't follow the [evidentiary] rules. That is true to a point, but the [evidentiary] rule often gets in the way of the truth." One judge explained, "It's amazing how much evidence can be presented without attorneys. Much more effective. Lawyers try to hide evidence much of the time."

Id. See also John Sheldon & Peter Murray, Rethinking the Rules of Evidentiary Admissibility in Non-Jury Trials, 86 Judicature 227, 228 (2003) [hereinafter Sheldon] ("When [a pro se] litigant faces a party represented by counsel in a jury-waived proceeding, rules of admissibility become more than superfluous: They become weapons that the lawyer can use to gain an advantage that has nothing to do with the merits of the case."). Thus, in order to facilitate the admission of clearly relevant and important facts, judges sometimes relax strict evidentiary requirements, even when the party is represented by counsel. See, e.g., Meeting the Challenge, supra note 4, at 57-
58; Litigant's Struggle, supra note 6, at 48 (“It is common knowledge that judges often assist attorneys by suggesting the correct form of a question, a certain line of inquiry not being pursued, or the manner of properly offering a document or other item into evidence.”).


[FN53]. See also O'Barr, supra note 10, at 666-67.

Our analysis of our earlier data repeatedly confirmed the intuition that lay witnesses come to formal courts with a repertoire of narrative customs and strategies that are often frustrated, directly or indirectly, by the operation of the law of evidence. ... These restrictions and prohibitions are supported by the statutory or common law of evidence or by unwritten custom widely followed in formal courts. Yet reflection on how we ordinarily speak suggests that each [evidentiary] forbidden practice is common, if not essential, in everyday narration.

Id. (emphasis added).

[FN54]. See supra note 7 and accompanying text; see also O'Barr, supra note 10, at 672.

Witnesses' reactions to [evidentiary] objection sequences suggest that they have little understanding of the nature of this conflict [between the epistemological assumptions of the law of evidence and those of ordinary narrative speech] and that the explanations offered by the courts do little to enlighten them about why the law deems their narratives unacceptable.

Id. (emphasis added).

[FN55]. See Engler, supra note 3, at 2028; see also Litigant's Struggle, supra note 6, at 51-53; Zorza, supra note 6, at 81-83.


[FN57]. N.Y. City Civ. Ct. Act § 1804 (McKinney 2005) (Practice Commentary); see also David B. Siegel, New York Practice § 582, pp. 967-68 (3d ed. 1999) [hereinafter Siegel] (citing for the contrary position Gerald Lebovits, Small Claims Courts Offer Prompt Adjudication Based on Substantive Law, 70 N. Y. St. B.J. 6, 9 (1998) [hereinafter Lebovits] ("The dominant view, however, is that judges and arbitrators in small ... claims courts must strictly follow substantive law when deciding the merits of the claim."); emphasis added) (and cases cited therein)); see also Arthur F. Engoron, Small Claims Manual: A Guide to Small Claims Litigation in the New York State Courts 41-43 (Comprehensive Version, 5th ed., 2001) [hereinafter Engoron]. In support of his own position, Professor Siegel particularly notes the Small Claims court's decision in Bierman v. New York, 302 N.Y.S.2d 696 (N.Y. Civ. Ct., N.Y. Co. 1969), in which the court sua sponte applied strict liability in order to do "substantial justice," rather than negligence as required by the cause of action at issue in that case and applicable appellate law. However, the Appellate Term reversed this decision in part, holding that:

It being the mandate of the statute (CCA, § 1804) that the rules of substantive law are applicable to the Small Claims Court, the court below erred in departing from the traditional rules of negligence and in adopting a rule of strict liability without fault. Stability and certainty in the law requires adherence to precedents by courts of original jurisdiction, and the decisions of the Court of Appeals must be followed by all lower courts. If a rule of strict liability is to be adopted, the pronouncement should come from the Legislature or the Court of Appeals, and not from a court of original jurisdiction.

Bierman v. Consol. Edison Co., 320 N.Y.S.2d 331, 332 (N.Y. App. Term 1st Dept. 1970) (internal citations omitted). Thus, I agree with Judge Lebovits that the small claims model demonstrates that the provisions of substantive law must and can be preserved even in a system that relaxes evidentiary and procedural requirements.

[FN58]. This dual nature of the court—informal in procedure, but formal in applying substantive law—would have to be made clear to the pro se litigant. "If one party and the judge are procedurally informal and substantively legalistic while the other party proceeds informally in both respects, the latter is seriously disadvantaged, for only her opponent is addressing the normative issues that concern the court." Richard Lempert, The Dynamics of Informal Procedure: The Case of a Public Housing Eviction Board, 23 Law and Soc'y Rev. 347, 393 (1989).

[FN59]. Some commentators have suggested strategies by which a court might "convince the attorney of the benefits of proceeding informally." Albrecht, supra note 24, at 47 (emphasis added); see also Zorza, supra note 6, at 81-83.

[FN60]. See Albrecht, supra note 24, at 18 (recommending that the same protocols be applied whether the other party is represented or not).

[FN61]. See Sheldon, supra note 51, at 231; see also McCormick on Evidence, 1, at § 327 (John William Strong ed., 4th ed. 1992) [hereinafter Strong]. Of course, in general, the issue of exclusion does not arise unless the represented party raises an evidentiary objection. See Zorza, supra note 6, at 81 ("In theory then, in most jurisdictions, in the absence of objection, most evidence comes in and may be given what weight the fact finder finds appropriate.") (citing Strong, supra, at § 52 ("The general approach, accordingly, is that a failure to object to an offer of evidence at the time the offer is made, assigning the grounds, is a waiver upon appeal of any ground of complaint against its admission."))); see also Michael M. Martin et al, New York Evidence Handbook § 1.3 (2003) (discussing same result under New York law).

[FN62]. Sheldon, supra note 51, at 228.

When judges sit without juries, however, there is no point either in trying to screen evidence or in issuing limiting instructions. Screening is impossible, because the person who does the screening is the very person from whom the evidence is supposed to be screened, and it makes no sense to ask judges to instruct themselves.

Id.; Strong, supra note 61, at § 60 ("[J]udges possess professional experience in valuing evidence greatly lessening the need for exclusionary rules."). But see Andrew J. Wistrich, Chris Guthrie, Jeffrey J. Rachlinski, Can Judges Ignore Inadmissible Information?, 153 U.P.L.R. 1251, 1251-52 (2005) (arguing that "judges are generally unable to avoid being influenced by relevant but inadmissible information of which they are aware."). Nevertheless under our current system, [appellate] courts have said that in reviewing a case tried without a jury the admission of inadmissible evidence [even] over objection will not ordinarily be a ground of reversal if there was admissible evidence received sufficient to support the findings. The judge will be presumed to have disregarded the inadmissible and relied on the admissible evidence.

Strong, supra note 61, at § 60; see also Richard T. Farrell, Prince, Richardson on Evidence § 1-103 (1995). Of course, a finding of plain error, where the substantial rights of a party are affected by admitting inadmissible evidence, can result in reversal. Strong, supra note 61, at § 52; cf. N.Y. C.P.L.R. § 2002 (2005) ("An error in a ruling of the court shall be disregarded if a substantial right of a party is not prejudiced."). For a summary of the arguments for abolishing the rules of evidence in all non-jury trials, whether or not they involve pro se litigants, see Sheldon, supra note 51, at 229 (noting that in other common law countries "the common law of admissibility of evidence ... has little practical impact in civil trials before judges. In England, the admissibility of most forms of evidence in civil cases is left to the trial justice's sound discretion."); see also Franklin Srier, Reconstructing Justice: An Agenda for Trial Reform 157-58 (1994) [hereinafter Srier] (proposing the elimination of exclusionary rules, particularly the hearsay rule, even in jury trials); but see Jeremy A. Blumenthal, Shedding Some Light on Calls for Hearsay Reform: Civil Law Hearsay Rules in Historical and Modern Perspective, 13 Pace Int'l. L.Rev. 93 (2001) (arguing that evidentiary rules are essential to our common law adversarial system).
See supra notes 43-44 and accompanying text; see also Litigant's Struggle, supra note 6, at 48.

See supra notes 7-10 and accompanying text; see also Bezdek, supra note 6, at 588 ("In small claims courts, where many such evidentiary constraints are relatively relaxed, we might expect there to be more tolerance for ordinary speech," finding that such is not the case); O'Barr, supra note 10 (documenting the factors in Small Claims courts which limit the legal adequacy of pro se narratives); Litigant's Struggle, supra note 6, at 42 (and works cited there).


Informal justice is also a process created to protect individual rights. Small claims courts were conceived in part to enable consumers, tenants, and others with limited power to assert rights inexpensively and expeditiously. As our data demonstrate, however, there is no such thing as the process of informal justice. It is, rather, a broad range of different processes, with the differences deriving in significant part from the role perceptions of those [i.e., judges] who administer it. ...

We can only reiterate our concern about the discrepancy between the ideal of a system of informal justice designed to help certain types of litigants and the reality of many systems, each of which meets some needs but may ignore others. We are troubled that this variation is effectively concealed from litigants and beyond their control.

The concerns and techniques set forth below are also applicable even where the rules of evidence are in full effect. See discussion supra Part I.A.

See supra notes 9-10 and accompanying text.

See Engler, supra note 3, at 2068-69.

Albrecht, supra note 24, at 47; see also Beatrice A. Moulton, The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California, 21 Stanford L. Rev. 1657 (1969) (describing effects of power imbalance in spite of the Small Claims judge's statutory power to conduct an informal hearing, raise objections or defenses for a party, conduct independent investigation of facts, disregard technical rules of evidence, and exercise equitable powers).

Albrecht, supra note 24, at 47; see also Disconnect, supra note 41, at 439 ("Judicial inquiry of the parties as to whether they understand what is expected of them, what the judge is doing, what has been decided, and the consequences of that decision ... serve[ ] justice by making it possible to obtain more information when misunderstanding has led to lack of information, and serve[ ] the appearance of justice by showing the interest of the judge in justice.")

Bezdek, supra note 6, at 569-70 (describing how even unrepresented landlords are often allowed to establish the terms of the court's inquiry of the pro se litigant). It is my own experience in Housing Court that a judge will more frequently than not turn to the attorney and inquire, "So, what's going on here counselor?" Of course, where the landlord bears the burden to make out a prima facie case, it is customary for that party to present its case first. The issue here is not essentially one of chronology. Rather, the primary issue is one of dominance by the represented party and the court's deference to or reliance on that party's presentation of the issues as the sole
lens through which the evidentiary hearing or motion is seen.

Invariably, the judge starts the hearing with the landlord's claim ... So the tenant starts her comments with [that claim]. Most often, only [the landlord's claim] has been spoken of when the judge dismisses the tenant's speech and rules for the landlord. As structured, it excludes virtually all tenants from meaningful participation in the conversation. This makes the legal process a charade.

Bezdek, supra note 6, at 589.

[FN72]. O'Barr, supra note 10, at 676-77 (describing how pro se litigants in Small Claims courts "invariably responded [to such invitations] not by answering the questions in a narrow sense but by commencing a chronological narrative of the dispute as they perceived it. The scope of these narratives often went far beyond the facts that the court was empowered to adjudicate."); id. at 662 ("unassisted lay witnesses seldom impart to their narratives the deductive, hypothesis-testing structure with which judges are most familiar and often fail to assess responsibility for events in question the way that the law requires.") (emphasis added); Bezdek, supra note 6, at 588 (describing how by asking the pro se litigant "Is there anything you want to tell me?" the judge "is structuring the discourse by leading the tenant into expression and then dismissing that which the judge elicits. Doing so in this way is both misleading and destructive").

[FN73]. O'Barr, supra note 10, at 683-84.

[FN74]. Id.

[FN75]. Id. at 685 ("When [the pro se litigant] concludes, he apparently believes that he has given the court an adequate basis for finding against [the other party].").

[FN76]. Id. at 685-86 ("It may be significant that in his narrative, the [pro se litigant] proceeded as if the facts would speak for themselves. ... He does not lay out a theory of the case for testing. Rather, he presents the facts he considers relevant and expects them to lead to a conclusion.").

[FN77]. Id. at 684 ("The most significant problems faced by small claims litigants relates to the legal adequacy of their narratives. ... Legally inadequate narratives are for our purposes narratives that differ substantially in form and content from the accounts judges are accustomed to dealing with by training and experience.").

[FN78]. Id. at 678.

The narrator provides three types of evidence within his account. First, he produces documents that support his story. Second, he calls 'witnesses' by performing their parts. Third, he introduces physical evidence. ... In an everyday account, some of these might not have been included. Their inclusion in the [pro se's] testimony hints at his conception of legal adequacy. ... Analyzed in this manner, relatively unconstrained narratives offered as evidence to the court reveal lay models of the kinds of accounts that are appropriate and sufficient to prove a [claim or defense].

Id. (emphasis in original).

[FN79]. O'Barr, supra note 10, at 683.

[FN80]. Id. at 693-94 (describing a pro se litigant who "had the benefit of a referee who was willing and able to develop a theory of [the case], frame the case in deductive terms, and then test the hypothesis developed against the evidence."); see id. at 696 (describing magistrates who "intervene sometimes to restructure testimony for the apparent benefit of the witness and sometimes to resolve an issue that the witness seems determined to avoid."). The techniques by which any interviewer, including, with some modification, a judge, can obtain information from

a witness in a non-leading, "non-suggestive" manner are well-documented in the literature on client and witness interviewing. See, e.g., Richard C. Wydick, The Ethics of Witness Coaching, 17 Cardozo L. Rev. 1, 41-52 (1995) (describing (1) the "simple" techniques of "cognitive interviewing" which help the witness remember and narrate the full facts of her narrative, i.e., assisting the witness in reinstating the context in which the events took place; urging the witness to tell all of the facts, not those which she believes to be "relevant"; assisting the witness in remembering events in different orders and from different perspectives; and (2) the stages of such an interview, i.e., inviting an open-ended narration; probing for details by directing the witness's attention back to each significant topic, beginning with open-ended questions, followed-up with narrower questions for each topic; and reviewing with the witness all of what is judged to be relevant information culled during the prior stages); see also Disconnect, supra note 41, at 443-45 (describing techniques for assisting a pro se litigant during direct examination and in making out a prima facie case). Little or no judicial training is currently in place for Housing Court judges regarding these interventions and techniques. Accordingly, judicial training and continuing legal education must include exposure to and an opportunity to practice such modalities of assistance.

[FN81]. Albrecht, supra note 24, at 44 (noting that such assistance does not transform the judge into an advocate, but simply a facilitator); Litigant's Struggle, supra note 6, at 48-51 (describing the court's role in facilitating admission of evidence and "bringing out facts"); Lebovits, supra note 57, at 10 ("[T]he American judge's image and functions as those of a mere moderator of a contest ... have left his seemingly powerful figure (and with him the parties) at the mercy of the professional combatants."") (quoting Albert Ehrenzweig, Psychoanalytic Jurisprudence 265 (1971)).

[FN82]. See supra notes 8, 15, 16, 25, 35; see also Strier, supra note 62, at 84, ("[T]he Anglo-American judge's image and functions as those of a mere moderator of a contest ... have left his seemingly powerful figure (and with him the parties) at the mercy of the professional combatants."") (quoting Albert Ehrenzweig, Psychoanalytic Jurisprudence 265 (1971)).

[FN83]. See supra note 25.

[FN84]. See supra notes 30-33 and accompanying text.

[FN85]. Conley, supra note 65, at 481-504 (describing conclusions of their study of more than eighty Small Claims proceedings, which included observation of each proceeding, review of transcripts, and conversations with the judges involved).

[FN86]. Id. at 504.

[FN87]. There are, of course, considerations other than that of "role" that may deter a judge from assisting a pro se litigant. Related to considerations of "role" is the court's concern about an appearance of partiality. See Engler, supra note 3, at 2011-21; see also Litigant's Struggle, supra note 6, at 48-49 (noting that "assistance [to pro se litigants] is only perceived as unfair by the represented litigant who already has an unfair advantage over the pro se litigant."). Disconnect, supra note 41, at 437.

If what happens [during trial] is analyzed only in moment to moment terms it may seem non-neutral, when, for example, a judge asks a question of one party. But if that question is established as part of a process in which all [witnesses] are asked questions when needed for the judge to understand what happened, then a process that is seen to be neutral in an overall sense has been created ... even if it may help more those who need to be helped because they lack counsel or education or both.

Id. (emphasis added). In addition, judges have legitimate political concerns regarding their reappointment to the bench if their assistance to the unrepresented litigant is perceived to be contrary to the interests of the economically, and thus politically, dominant party in the proceeding. This concern was expressed a number of
times during the discussions of the "Adjudicative Process and the Role of the Court" working group. See supra note 1.
Fostering the notion that the judge is 'above the fray,' exercising her authority solely in accord with her conscience and interpretation of the law, is more appealing to the judge if she must stand for election to retain her seat. Election creates a potential conflict of interest: Political considerations may influence a judge's actions. Passivity serves to buffer elective judges against public recriminations from unpopular decisions, particularly in non-jury cases.
Strier, supra note 62, at 84.
Housing Court judges are subject to reappointment every five years at the discretion of the administrative judge. N.Y. City Civ. Ct Act § 110(f)–(i) (2005). Although Housing Court judges are not elected, they face the same "conflict of interest" concerns outlined by Professor Strier, supra, as part of the reappointment process. As part of the reappointment process, a Housing Court judge must be put forward by the Housing Court Advisory Committee, which contains representatives from the real estate industry. Id. § 110(g). The judge must then be interviewed by various bar associations, which also contain members from the landlords' bar and others sympathetic to their interests. Finally, the Housing Court judge is reappointed solely "at the discretion of" the Chief Administrative Judge of the Courts, who is usually elected or appointed by an elected official, and thus is also subject to the same political pressures noted above. Accordingly, the concerns expressed by Housing Court judges about the implications for their reappointment should they assist pro se litigants in the enhanced manner proposed here is not without merit. Thus, statutory or administrative enactments legitimizing these forms of judicial intervention would go a long way in shielding Housing Court judges from the political and reappointment pressures described above that may limit their assistance to pro se litigants.

[FN88]. Engler, supra note 3, at 2022-23.

The adversarial system purports to promote fairness and justice. Yet, the rules currently operate as barriers preventing unrepresented litigants from participating meaningfully in the legal system and thereby frustrate the goal of dispensing fairness and justice. Given a choice between clinging to the rules at the expense of the goal, or modifying the rules to further the goal, the rule must be modified.
Id. (emphasis added); Litigant's Struggle, supra note 6, at 51 ("Both rules of court and judicial ethics must be modified accordingly to free judges to engage in these activities [i.e., asking questions, calling witnesses, and conducting limited independent investigations] and determine the 'truth' in every case.").

[FN89]. Engler, supra note 3, at 2069.

[FN90]. Litigant’s Struggle, supra note 6, at 45 (arguing that such proposals "do not radically alter the adversarial system or the traditional role of the judge. Nor do they make the judge the feared gatherer of evidence who may unfairly side with the party whose theory of the case is consistent with his or her investigation ...."). However, even Goldschmidt acknowledges that some of his proposals may require some statutory or administrative reforms. See id. at 51.

[FN91]. See Engler, supra note 3, at 2017-18, 2028-31; Litigant's Struggle, supra note 6, at 51; Russell G. Pearce, Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help, 73 Fordham L. Rev. 969, 975-80 (2004); see also Strier, supra note 62, at 283-84 (proposing incorporating aspects of the inquisitorial model even where both parties are represented and even in jury trials).

[FN92]. See, e.g., Shaw v. Chater, 221 F.3d 126, 134 (2d Cir. 2000) ("[T]he rule in our circuit [is] that the ALJ, unlike a judge in a trial, must [her]self affirmatively develop the record in light of the essentially non-adversarial nature of a benefits proceeding ...." [E]ven when, as here, claimant is represented by counsel.") (quoting Pratts v.
(Cite as: 3 Cardozo Pub. L. Pol'y & Ethics J. 659)

Chater, 94 F.3d 34, 37 (2d Cir. 1996)) (quoting Echevarria v. Sec'y of Health & Human Serv., 685 F.2d 751, 755 (2d Cir. 1982); Diaz v. Wing, N.Y. L.J., Feb. 6, 2003, at 18:1 (N.Y. App. Div. 1st Dept.) (illustrating that the same is true regarding New York state and municipal administrative judges).

[FN93]. Echevarria, 685 F.2d at 755.
Where, as here, the claimant is unrepresented by counsel, the ALJ is under a heightened duty to scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts. A reviewing court must determine whether the ALJ adequately protect[ed] the rights of [a] pro se litigant by ensuring that all of the relevant facts [are] sufficiently developed and considered.
Id. (quoting Hankerson v. Harris, 636 F.2d 893, 895 (2d Cir. 1980)) (quoting Gold v. Sec'y of HEW, 463 F.2d 38, 43 (2d Cir. 1972)) (internal quotations omitted).

[FN94]. See supra notes 72-80 and accompanying text.

[FN95]. See supra note 65.

[FN96]. See, e.g., supra note 93 and cases cited therein; see also Paul R. Verkuil, An Outcomes Analysis of Scope of Review Standards, 44 Wm. & Mary L. Rev. 679, 704-09 (2002) (documenting reversal rates of more than 50% for Social Security administrative law judge disability determinations, but arguing that this reversal rate is in part explainable by courts engaging in a too close review of the factual record under a substantial evidence standard of review). But see Anthony Taibi, Politics and Due Process: The Rhetoric of Social Security Disability Law, 1990 Duke L.J. 913 (1990) (arguing that judicial timidity restrains judges from identifying and rectifying underlying systemic flaws which result in wrong decisions and injury to personal dignity and autonomy).

[FN97]. See supra notes 70-80 and accompanying text.

[FN98]. See, e.g., Litigant's Struggle, supra note 6, at 41.
In this system, the professionally trained judge takes an activist role and ensures a solution based on the merits of the case by calling witnesses, asking most of the questions, and conducting hearings ... Narrative testimony is invited and, with some exceptions, most evidence offered by the parties is admitted .... With greater judicial involvement in fact finding, "the threat of one-sided distortions of misinformation appears less immediate, and the need to subject means of proof to testing becomes less compelling."
Id. (citation omitted); Strier, supra note 62, at 16 ("[T]he judge controls and conducts the court's investigation, calling witnesses and establishing the scope of the inquiry.").

[FN99]. See, e.g., Litigant's Struggle, supra note 6, at 53 ("[W]e would be sacrificing some important elements of popular control over the legal system.") (quoting David Luban, Lawyers and Justice: An Ethical Study 103 (1988) [hereinafter Luban]); see also Luban, at 98 (noting that "despite its numerous attractions, the German [inquisitorial] procedure requires other changes in the legal system and the nexus of values enveloping it that would make the trade-off unacceptable").

[FN100]. Luban, supra note 99, at 239-41 (arguing that access to the adversary system and the rules by which that system functions presume representation by an attorney). Professor Luban, although a staunch defender of the adversarial system against inquisitorial-based reforms, further notes that our adversarial system not only presumes representation by a lawyer, but is constructed to require such representation.

The design of a legal system that cannot be operated by laypeople is surely the result of state decisions, indeed, of the accretion of hundreds of millions of state decisions. Moreover, the inability of poor people to afford lawyers is also the result of choices made by the state, both formally as a matter of law and also as a
matters of plain fact....

[T]he selective exclusion of the poor from the legal system does not simply fail to confer an advantage on them—it actively injures them.

Id. at 246-47. Professor Luban's solution to this constitutional infirmity is limited to the deregulation of some routine legal services, mandating pro bono representation, and funding of legal services, all of which preserve the lawyer-centric and resulting judicial passivity models of our adversary system, and provide little relief for those who, in spite of these reforms, will appear in court, including Housing Court, without attorneys. Id.


[FN102]. Moynihan, supra note 101. For a summary of similar elements in the German system, see Luban, supra note 99, at 94-97; see also Strier, supra note 62, at 213-18 (comparing the French and German systems).

[FN103]. Moynihan, supra note 101, at 2; see also Luban, supra note 99.

[FN104]. Beardsley, supra note 101, at 467, 469-70, 480 (claiming that the French system's almost exclusive reliance on documentary evidence results in "fact avoidance," i.e., the failure of the judge to use the full range of powers and methods available to her to develop the factual record). In fact, an over-reliance on documentary evidence might severely prejudice a pro se litigant in Housing Court. Thus, that aspect of the French system may be not only theoretically, but also practically unsuitable both to the American system in general, but also to the goal of assisting the pro se litigant in presenting her narrative evidence.

[FN105]. Id. at 478-79:

In the enquête the witness is asked by the magistrate to state discursively what he knows about the case. He will be interrupted from time to time by the magistrate either so that specific questions may be put to or to enable the magistrate to dictate to his clerk (greffier) a summary of what the witness has said. ... During this exercise the lawyers are seated in the back of the room, out of the line of sight of the witness, and are only asked at the end of the enquête if there are other questions which they would like to have the investigating magistrate [not the lawyer] put to the witness. The magistrate may decide not to restate the question; he may simply ask the witness to respond or to clarify his earlier statements. There is, however, none of the psychological pressure associated with cross-examination as practiced in common law procedure. Immediately upon the end of the interrogation, the magistrate's summary is handed to the witness for review and signature.

(emphasis added). See also Ngwasiri, supra note 101, at 176-85.

[FN106]. Indeed, Professor Luban's rejection of inquisitorial-based reforms is premised primarily on what he calls "a pragmatic argument: if a social institution does a reasonable enough job of its sort that the costs of replacing it outweigh the benefits, and if we need that sort of job done, we should stay with what we have." Luban, supra note 99, at 92. However, as Professor Luban acknowledges, the system we have "cannot be operated by laypeople." Id. at 246. Thus, even on a pragmatic analysis, the present system does not do "a reasonable enough job" for pro se

litigants and should be changed accordingly. As Professor Strier has noted, "What is prevalent is not necessarily what is functional or fair. We must be wary of a misplaced complacency that our trial procedures are optimal, and therefore inviolable. The adversary system is not sacrosanct. By eschewing labels, we can bring to our table the option to adopt the best features of foreign systems." Strier, supra note 62, at 287. Indeed, Professor Ellen E. Sward, has concluded that "Adversarial ideology has failed. The adversary system is transforming itself into a more inquisitorial, less individualistic methodology even as apologists debate the various justifications for adversarial adjudication. The transformation seems to be bringing about a system that is more effective at fairly complex fact-finding, socially significant rule-making, and behavior-modifying litigation. The less individualistic, more communitarian ethic that is reflected in the transformation should be recognized and encouraged. That recognition may entail abandoning adversarial ideology, but a focus on our goals and values is more helpful in evaluating and modifying our adjudicatory system than any rigid ideology could be." Values, Ideology and the Evolution of the Adversary System, 64 Ind. L.J. 301, 355 (1988/1989).

[FN107]. "An understanding of the inquisitorial system trial is essential to a broader appreciation of the adversary system. Each system puts the other in context, setting a baseline for comparison and contrast of the representative features." Strier, supra note 62, at 16.

[FN108]. As Strier has explained:
I do not suggest wholesale adoption of the inquisitorial philosophy that a trial is a vehicle for the implementation of state policy. Instead, I prescribe a departure from our self-imposed enslavement to the principle that (except for the relatively rare jury nullification) procedure is all-important in trial and outcome is irrelevant. We will not compromise the integrity of our trial system if we occasionally drop the blindfold of Justice to avert gross inequities. If we do not, if we continue to abide by a blind, quasi-religious faith in adversary procedure, then the means to justice will have swallowed the ends.

Id. at 283.

[FN109]. Id. at 265.

[FN110]. See supra notes 72, 77, and 80.

[FN111]. Strier, supra note 62, at 217 (emphasis added).

[FN112]. Id. (noting that "A contrary dynamic obtains in the adversary system. The general premise of adversary procedure is that the court has no independent knowledge of the law and must therefore be informed of it by argument.").

[FN113]. See Lebovits, supra note 57, at 9 (establishing that small claims judge is required to adhere strictly to the requirements of substantive law and may not merely speculate or compromise under the guise of doing substantial justice). Professor Siegel has inquired, in response to Judge Lebovits' argument,

With no lawyers representing the parties ..., we must ask how the substantive law can be applied at all, much less 'strictly'. ... [T]he requirement to apply the substantive law strictly when there are no attorneys present to argue the law would put on the small claims judge the same duties imposed on a Court of Appeals judge to whom talented and well paid attorneys argue the law in cases with high stakes, and for whom two law clerks offer ready assistance and counsel.

Siegels, supra note 57, § 582, at 968. The answer to Professor Siegel's inquiry, I would submit, is that the small claims judge must use whatever knowledge or assistance is at her disposal to identify the substantive law applicable to the facts put before her by the pro se litigant or that were developed by the judge. See Lebovits, supra note 57. Only by assuming that responsibility can the small claims judge "do substantial justice ... according to the rules of

substantive law." N.Y. City Civ. Ct. Act § 1804 (emphasis added). Indeed, The Small Claims Manual admonishes judges that this statutory requirement:

... serves as a clarion call to apply New York's hallowed statutory and common law, lest the Small Claims forum develop a reputation for second-class justice that it has heretofore resolutely avoided. ... [I]f the technical rule of law is unclear, Judges (even non-lawyer Town and Village Court justices) should do what they do when (or would do if) sitting in other court parts: determine the rule of law as best they can, with whatever review, research, and reflection are necessary.

Engoron, supra note 57, at 41 (emphasis added).

[FN114]. A candidate for a Housing Court judgeship must "have been admitted to the bar of the state for at least five years, two years of which shall have been in active practice." N. Y. City Civ. Ct Act § 110(i). In addition, the candidate must also be "qualified by training, interest, experience, judicial temperament and knowledge of federal, state and local housing laws and programs." Id. § 110(f) (emphasis added). These statutory requirements are intended, among other things, to assure that a Housing Court judge has a sufficient level of knowledge and possibly practice in substantive housing law. Accordingly, requiring such judges to identify and apply applicable substantive law for pro se litigants does not present the Herculean challenge feared by Professor Siegel. See supra note 113. However, these statutory qualifications for appointment, and indeed for reappointment to the Housing Court bench, will have to be rigorously applied to ensure that persons sitting in Housing Court will be able to meet their responsibility to assist pro se litigants in the manner proposed here.

[FN115]. Moyrihan, supra note 101, at 8-9 (citation omitted).

[FN116]. See Engler, supra note 3, at 2023-24 (summarizing concerns about appearance of partiality if a judge assists a pro se litigant); see also Litigant's Struggle, supra note 6, at 42-44; see also Stier, supra note 62, at 37 (summarizing impartiality concerns arising from a judge's taking a more active role in fact finding).

[FN117]. Id. at 83-84, 266-67; but see Luban, supra note 99, at 99 (describing the dominance of prosecutors over the examining magistrate in the pre-trial phase in the French criminal system) (citing Tomlinson, supra note 101, at 150-64).


The precedents from small claims courts and administrative agencies serve as an important reminder that impartiality does not require judges to be passive. Like other judges, small claims judges must remain impartial. ALJs in Social Security, welfare, and unemployment benefits cases must also remain impartial. Judges may therefore be active in assisting unrepresented litigants without compromising their impartiality.

Id. (citations omitted).

Even within the United States, the trial judge's passivity is unique among those serving in formal dispute resolution roles. In administrative hearings ... arbitrators play an active role without the loss of impartiality. In collective bargaining, federal mediators rescue sessions of sessions from stalemates. And at the local and private sector levels, conciliators of all kind successfully function as neutral but active third-party facilitators in quasi-judicial roles. Clearly, impartiality and passivity are not necessarily corollaries.

Stier, supra note 62, at 84.

[FN119]. Litigant's Struggle, supra note 6, at 53-54 (internal citations omitted).

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NEW YORK COUNTY LAWYERS' ASSOCIATION
REPORT ON PROTOCOLS FOR JUDGES IN THE
SETTLEMENT AND TRIAL OF CASES INVOLVING
UNREPRESENTED LITIGANTS IN HOUSING COURT

This Report was approved by the Board of Directors of the New York County Lawyers' Association at its regular meeting on December 4, 2006.

1. Background

On October 28-29, 2004, the Justice Center of the New York County Lawyers’ Association (NYCLA), chaired by former dean of Fordham Law School, John Peerrick, hosted a conference, “The New York City Housing Court in the 21st Century: Can It Better Address the Problems Before It?” occasioned by the Court’s 30th anniversary. Conference participants considered how the Housing Court is facing the challenges of the new century in light of ever-changing social and economic conditions, and whether it is well prepared to meet the challenges of the coming decades. Conferences examined the Court’s role in responding not only to the legal questions that come before it, such as housing conditions, holdovers and non-payment of rent, but also to the myriad social and financial problems that underlie many Housing Court cases—problems that if unaddressed can and do lead to homelessness. Recognizing that the preeminent challenge facing America’s legal system is to ensure universal access to justice, conference participants focused extensively on the challenges of making that access a reality in a court in which the overwhelming majority of cases involve pro se parties.

After the Conference, NYCLA issued a Report (available on the NYCLA website at http://www.nycla.org/siteFiles/Publications/Publications195_0.pdf),1 which contained recommendations and proposals for reform, including establishment of a right to counsel in Housing Court for parties unable to afford counsel, as a means to reduce homelessness in New York City; improved resources, especially for litigants of diminished capacity; and establishment of Protocols and Best Practices (or standards) for more active oversight by judges of cases in

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1 The report of the Conference, the recommendations of the working groups at the Conference and significant articles authored by Conference participants are published in the January 2006 publication of the Cardozo Public Law, Policy and Ethics Journal (3 Cardozo Pub. L. Policy & Ethics J. 591 [2006]).
which a pro se party is opposed by a represented party. NYCLA subsequently created the NYCLA Task Force on the Housing Court (hereinafter “Task Force”), co-chaired by Professor Paula Galowitz and Hon. Marcy S. Friedman, to work towards the implementation of some of the reforms recommended at the Conference.

The Task Force produced three reports: Report on Right to Counsel in Housing Court, Report on Protocols for Judges in the Settlement and Trial of Cases Involving Unrepresented Litigants in Housing Court, and Report on Resources in the Housing Court, which were adopted by the NYCLA Board of Directors on December 4, 2006, December 4, 2006, and February 5, 2007, respectively. This Report was prepared by the Task Force Subcommittee on Protocols.

2. **Introduction**

The Protocols Subcommittee, chaired by Lynn M. Kelly and Professor Russell Pearce, with the active participation of the Task Force co-chairs, Hon. Marcy S. Friedman and Paula Galowitz, undertook to draft Protocols and Best Practices for allocation of stipulations, as well as for motions and trials. At the request of the Task Force, two distinguished ethics professors, Russell Engler and Stephen Gillers, prepared a background memo (appended to this Report) addressing ethical issues about the proper role of judges in cases involving unrepresented litigants.

Protocols and Best Practices are important tools that should offer helpful guidelines to Judges in providing meaningful access to justice in the Housing Court — a high-volume court with numerous pro se litigants. New York City Housing Court is one of the busiest courts in the State (and probably in the country). According to the 2006-2007 Budget Request of the Office of Court Administration:

In 2004, a total of 314,367 actions were filed in Housing Court. There were 268,812 dispositions. Those dispositions included, among other things, thousands of evictions of individuals and families.²

Approximately 90 percent of the tenants in Housing Court appear without a lawyer, whereas approximately the same percent of the landlords are represented by counsel.³ Most pro se

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² Office of Court Administration, Judiciary: 2006-2007 Budget Request at 170. There are 50 Housing Court Judges, with 33 Judges assigned to Resolution Parts and 17 to Trial Parts. *Id.*

³ According to the report recently issued by the Office of the Deputy Chief Administrative Judge for Justice Initiatives, “[w]hile precise data do not exist, informal surveys of court managers have revealed that most litigants (...[in] Housing Court, approximately 90%) appear without a lawyer for critical types of cases....” Self-Represented Litigants: Characteristics, Needs, Services; The Results of Two Surveys: Self-Represented Litigants in the New York City Family Court and New York City Housing Court, Office of the Deputy Chief Administrative Judge for Justice Initiatives (December 2005) [hereinafter “Self-Represented Litigants”] at 1. See New York County Lawyers' Association, Report: The New York City Housing Court in the 21st Century: Can It Better Address the Problems Before It? (October 2005) [hereinafter “NYCLA Report”] at 5, 22, n. 9.
litigants are unable to obtain legal representation due to economic, language and other barriers.\textsuperscript{4} The vast majority of the cases are eviction proceedings,\textsuperscript{5} and the connection between the lack of representation and eviction, with resulting homelessness, has been well documented.\textsuperscript{6}

As noted in the Report of the NYCLA Conference, “[i]n most Housing Court cases, pro se parties are opposed by represented parties. The disparity in access to representation results in the parties’ unequal access to information about their legal rights and unequal ability to assert legal claims, and thus presents unique challenges for the Court in the delivery of justice.”\textsuperscript{7} “If Housing Court is to function as a court of law like any other,... the pro se litigant’s constitutional right to be heard, i.e., to have access to justice, must be addressed.”\textsuperscript{8}

The Task Force recognizes and applauds advances that have been made in the Housing Court under initiatives of Chief Judge Judith Kaye and Justice Fern Fisher, Administrative Judge of the Civil Court of the City of New York. The Court has made notable progress, in particular, in providing greater resources and assistance to pro se litigants, including informational materials, forms for answers and motions, on-site procedural assistance from Court staff, on-site assistance with rent grants from the Human Resources Administration staff, and a Guardian Ad Litem program.\textsuperscript{9} However, the provision of such resources, without more, cannot address the difficulties in delivering justice in courts with large numbers of pro se litigants. Thus, as discussed more fully below, courts and groups involved in the administration of justice throughout the country have increasingly recognized the importance of addressing the judge’s role in the process, and of developing protocols and best practices to aid judges in handling cases with pro se litigants.

\begin{itemize}
\item \textsuperscript{4} As stated in the report of the Administrative Office of the Courts, Family Administration, State of Maryland, “[t]he overwhelming majority of self-represented litigants are constrained from obtaining legal representation by economic, language or other barriers.”
\item \textsuperscript{5} A court system study found that 98 percent of the Housing Court filings in 1996 were for eviction proceedings (90 percent due to allegations of non-payment of rent and 8 percent due to holdover allegations). New York State Unified Court System, \textit{Housing Court Program: Breaking New Ground} (1997), cited in \textit{Self-Represented Litigants, supra} note 3, at 3, n. 3.
\item \textsuperscript{7} \textit{Id.} at 12.
\item \textsuperscript{8} Paris R. Baldacci, \textit{Assuring Access to Justice: The Role of the Judge in Assisting Pro se Litigants in Litigating Their Cases in New York City’s Housing Court}, 3 Cardozo Publ L. Policy & Ethics J. 659 (January 2006) at 666. In that article, Professor Baldacci refers to recommendations to expand the role of the judge in assisting pro se litigants within the limits of the current system and the canons of judicial ethics and also suggests further changes that might require statutory change.
\item \textsuperscript{9} See, \textit{NYCLA Report on Resources in Housing Court, adopted December 4, 2006}, for recommendations about the Guardian Ad Litem program and other resource issues. \textit{The Report is available at: http://www.nycla.org/News/Publications/Board Reports and Resolutions.}
\end{itemize}
3. **Report and Recommendations**

In developing Protocols and Best Practices for the New York City Housing Court, the Task Force has drawn on the experience of its members who include practitioners in the landlord-tenant bar, counsel with government agencies, bar leaders, academics and Housing Court Judges. As discussed in more detail below, the Task Force also obtained extensive input from Housing Court Judges throughout New York City.

The Task Force recognizes the difficult position that Housing Court Judges hold, particularly given the volume of the cases they must resolve, the imbalance in representation of the parties and the need for representation of all parties. The Protocols and Best Practices that the Task Force developed adopted procedures that some Housing Court Judges already follow in handling cases with *pro se* litigants, and also build on such procedures.

The Task Force notes that there may be concern that implementation of the Protocols and the Best Practices will increase the time it takes to resolve cases. While the Task Force believes that such implementation is feasible even with existing resources, the Task Force strongly recommends that the Office of Court Administration provide additional resources that may prove necessary to ensure that Housing Court Judges are able to perform their function of judicial oversight in accordance with these Protocols and Best Practices.\(^\text{10}\) If additional resources are needed, the Task Force recommends that NYCLA support efforts to obtain those resources. However, implementation of these Protocols and Best Practices should not be delayed pending such resources. As discussed later in this Report, Protocols and Best Practices will be significant tools in providing more meaningful access to justice for *pro se* litigants in Housing Court. The need for the Protocols and Best Practices is simply too important to put their adoption on hold indefinitely while awaiting resources that may not be allocated to the Housing Court. Implementation of the Protocols and Best Practices, to the extent feasible within the limits of existing resources, even if not perfect, can only help to advance the cause of justice in the Housing Court.

A. **Growing Trend Towards More Active Role for Judges Where Litigants Are *Pro Se***

There is a growing trend around the country toward a more active role for judges in cases involving *pro se* litigants. Many jurisdictions and associations of judges and court

\(^{10}\) The Task Force did not attempt to quantify the effect of these Protocols and Best Practices on the resources of the Court. To the extent that the implementation of the Protocols and Best Practices results in some delays, the public can and should be educated as to the importance of the Protocols as a means to improve access to justice in the Housing Court for *pro se* litigants. If the delays in fact prove excessive or unmanageable, adjustments can be made. Moreover, the Best Practices for the Allocation specifically state that they “are not intended to be mandated detailed scripts or to limit judicial discretion to adapt allocations to particular cases and litigants.”
administrators have recommended an enhanced role for judges in dealing with pro se litigants, and have recognized that this enhanced role is fully consistent with the canons of judicial ethics. For example, there are resolutions from the Conference of Chief Justices and Conference of State Court Administrators,\(^{11}\) best practices recently proposed by the American Judicature Society and State Justice Institute,\(^ {12}\) and recommendations of the American Judicature Society and State Justice Institute that states should adopt judicial protocols to guide judges assisting pro se litigants.\(^ {13}\) In addition, protocols have been developed in other jurisdictions for judges who deal with pro se litigants.\(^ {14}\) These include the Guidelines for state court judges in Massachusetts adopted last year.\(^ {15}\) In the spring of 2006, the National Center for State Courts and other partners established the National Self-Represented Litigation Network to promote and share best practices and innovations in service of the self represented.\(^ {16}\)

As discussed in the attached “Background Memo on Judicial Ethics: The Role of Judges in Settlement and Trial in Cases Involving Unrepresented Litigants” by Professors Stephen Gillers and Russell Engler, a “more active role for judges at trial and in the settlement process is consistent not only with the growing body of scholarly opinion that has emerged over the past decade, but with recent Resolutions that generally call on the courts to insure meaningful access for unrepresented litigants in civil cases.”\(^ {17}\) This memo, as well as the developing literature, recognizes that a more active role for judges is consistent with the duty of impartiality. The memo concludes that there is “ample authority for the proposition that judges may play an active role in handling cases

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\(^{14}\) For example, there are protocols in Idaho, Minnesota and Idaho.

\(^{15}\) Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants were approved by the Justices of the Supreme Judicial Court in April 2006 (hereinafter “Massachusetts Judicial Guidelines”). The Guidelines were “developed to assist judges in recognizing those areas in which they have discretion and to assist them in the exercise of that discretion.” Id. The Guidelines apply to all courts in the state.

\(^{16}\) The Network receives support from the state court administrative offices of Maryland and California, the National Center for State Courts and the State Justice Institute. One of the projects of the Network is to develop a bench guide for judicial officers on effectively handling cases where litigants are pro se. Richard Zorza, 2006 Trends in Self-Represented Litigation Innovation.

involving unrepresented litigants to avoid forfeiture of rights and allow unrepresented litigants meaningful access to the courts.\textsuperscript{18}

The recommended Protocols and Best Practices provide for allocation of stipulations of settlement as well as procedures for motions and trials. The vast majority of Housing Court proceedings are settled.\textsuperscript{19} As noted above, approximately 90 percent of the tenants are unrepresented, whereas approximately the same percent of landlords are represented.\textsuperscript{19} As stated in the Report of the NYCLA Conference, \textit{pro se} litigants “have difficulty in articulating or presenting their claims or defenses” due to their unfamiliarity with their legal rights, and are frequently “willing to sign stipulations of settlement, no matter how unbalanced, rather than face the daunting formality of a trial.”\textsuperscript{20}

The Protocol for Allocation of Stipulations requires the Housing Court Judge to review all stipulations to which a \textit{pro se} litigant is a party to try to ensure that the \textit{pro se} litigant understands and agrees with the terms of the stipulation, and understands the alternatives to settlement, including the right to a trial. The Protocol provides for mandatory allocation of all stipulations of settlement involving \textit{pro se} litigants, and leaves the manner in which the allocation is conducted and the substance of the allocation to the sound discretion of the Judge. The Protocol recommends that allocations be conducted in accordance with the Best Practices, which are more detailed guidelines for conducting allocations. The Best Practices are not intended to be mandated detailed scripts or to limit judicial discretion to adapt allocations to particular cases and litigants. The Protocol is patterned on an Advisory Notice issued in 1997 by Hon. Fern A. Fisher, Administrative Judge of the Civil Court.\textsuperscript{21} Recently expanded Advisory Notices AN-LT-10, issued on October 26, 2006, and AN-I-LT-10, issued on April 6, 2007, by Justice Fisher, are consistent with our Protocol.\textsuperscript{22} The Advisory Notices recognize the propriety and necessity for the Court to review stipulations involving \textit{pro se} parties to try to ensure that the stipulations are meaningful, voluntary agreements. The recent Massachusetts Judicial Guidelines for Civil Hearings provide for the Court to explain the settlement process, including alternatives to settlement, to unrepresented litigants.\textsuperscript{23} The Protocols of the Task Force provide the most detailed guidelines to date for allocations.

The Protocols for Motions and Hearings/Trials require the Housing Court Judge to

\textsuperscript{18} Id. at 12.

\textsuperscript{19} See note 3, supra.

\textsuperscript{20} NYCLA Report, supra note 3, at 13.

\textsuperscript{21} Advisory Notice AN-LT-10, issued Sept. 4, 1997.

\textsuperscript{22} Advisory Notice AN-LT-10, Allocations of Stipulations in Landlord and Tenant Cases Amends AN of 9/4/1997, issued October 26, 2006.

\textsuperscript{23} Massachusetts Judicial Guidelines, supra note 15, at §2.2 at 5-6.
explain the process and take measures to ensure that the *pro se* litigant has an opportunity to be heard. The Protocols are not envisioned as a script to be imposed on Housing Court Judges that would limit their discretion in determining the individualized matters before them. The Best Practices are accompanied in some instances by comment or examples that could be adopted or adapted in the discretion of the Housing Court Judges. Examples are based on forms and educational materials distributed by the Housing Court on its website, in the Clerk’s Office and in the Resource Center.

A substantial body of literature supports protocols and best practices to ensure that *pro se* litigants have a meaningful opportunity to be heard. For example, the Revised Policy Recommendations of the American Judicature Society (AJS), which were approved by the AJS Executive Committee in March 2002, recommend the following approach at trial:

**Recommendation 7.** Judges should assure that self-represented litigants in the courtroom have the opportunity to meaningfully present their case. Judges should have the authority to insure that procedural and evidentiary rules are not used to unjustly hinder the legal interests of self-represented litigants.

Judges have a duty to maintain impartiality with respect to the parties in litigation. Judges also have a duty to ensure litigants’ rights to a meaningful opportunity to be heard. One of the major challenges to courts from *pro se* litigation is to balance these rights and obligations appropriately. In the case of self-represented litigants who are unfamiliar with the law, the rules of procedure and the rules of evidence, out-of-court assistance programs alone may be inadequate to assure their right to a meaningful hearing. Judges should insure that procedural and evidentiary rules are not used to hinder the legal interests of self-represented litigants. For example, in order to protect a self-represented litigant’s legal interests, a judge may need to directly question witnesses for *pro se* litigants more frequently than for those represented by counsel, and may be more lenient in the content of opening and closing statements. Ultimately, judges should determine the limits of such assistance in light of their duty to remain impartial and the litigants’ right to represent themselves in a meaningful hearing.24

Similarly, “The Future of Self-Represented Litigation: Report from the March 2005 Summit, the National Center for State Courts and the State Justice Institute,” notes:

> It is fundamental that judges must be impartial and neutral. Some

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judges therefore express concerns that following recommendations ... to explain the law, rules, and process to self-represented litigants or to ask direct questions to obtain needed evidence might violate these core principles. Academics and practitioners are coming to understand that there is no inconsistency between the demands of neutrality and forms of judicial engagement designed to make sure that the judge hears the full facts from both sides before coming to a decision. Yet nationally, court cultures still vary greatly in their level of comfort with changing the traditional court environment. Empirical observations suggest that courts that have faced large numbers of self-represented litigants on a regular basis for several years have moved further along the continuum of changing the traditional courtroom environment.  

The Task Force strongly believes that the Protocols and Best Practices submitted as part of this Report are not only permissible under current law and judicial ethics, but are also necessary to bring greater fairness to a Court that has a large number of pro se litigants. These Protocols and Best Practices are based in part on and adopt terms and concepts contained in protocols developed in other jurisdictions, but also more specifically address the needs of litigants in the settlement process, which resolves the vast majority of cases in the Housing Court.

B. The Necessity for Protocols and Best Practices

Protocols and Best Practices are necessary to promote greater consistency and fairness in cases involving unrepresented litigants. "The use of uniform court protocols to guide judges in the management of pro se litigation will serve to make case processing more efficient, and will assure uniformity and fairness in the treatment of self-represented litigants among all the judges of a given court."  

As stated in the Report of the New Hampshire Supreme Court Task Force on Self-Representation:

Promulgating written guidelines for judges would help them tackle the ethical dilemmas presented when people try to present their own case without any formal legal education or experience. Guidelines could enable judges to be more confident about what information to provide to self-represented parties and how to provide it. Guidelines would also result in more uniform treatment of self-represented parties throughout the State.

25 Future of Self-Represented, supra note 11, at 46-47.

26 Guidebook for Judges and Court Managers, supra note 13.

Protocols for Housing Court Judges serve many purposes. "Protocols will help to provide useful guidance without undermining the proper exercise of judicial discretion. Second, protocols will enhance public confidence in the Court by promoting more consistent treatment of similarly situated litigants and, more specifically, by helping to ensure that the oversight of a case will not depend, to the significant extent that it does currently, on the particular Resolution Part to which a case has been assigned."28

At the NYCLA Conference in October 2004, one of the working groups discussed the need for best practices or standards for judges in Housing Court. The reasons that were cited for articulating best practices included:

- Uniformity of practice would counter concerns about the appearance of partiality on the part of individual judges or court attorneys.

- The failure of the Court to provide appropriate assistance to such large numbers of pro se litigants presents special problems for a court system committed to the delivery of justice.

- The failure of the court system to deal with the problems presented by pro se litigation raises significant constitutional implications regarding all citizens' fundamental right to access to justice.

- Articulation of best practices would improve public confidence in the legal system as a mechanism for delivering justice and providing access to justice that is not limited to those who can afford private counsel or have the good fortune to obtain free legal representation.

- Best practices will foster the expeditious and economic final resolution of cases, free from the current uneconomic cycle of pro se litigants returning repeatedly to Court to modify or vacate judgments and stipulations approved without the appropriate level of Court review or oversight.29

New York should join the growing number of jurisdictions that have adopted protocols in order to promote equal access to justice for all litigants, including those who are unrepresented.

28 NYCLA Report, supra note 3, at 14.

29 Id. at 17.
C. Feedback on the Draft Protocols and Best Practices

In September 2006, the Subcommittee on Protocols distributed earlier drafts of Protocols and Best Practices to all Housing Court Judges. Then the Subcommittee met with the Housing Court Judges in each borough, except Staten Island, to request their feedback on the drafts. Those documents were:

1. Protocol for Allocation of Stipulations in Housing Court Proceedings Involving Pro Se Litigants;

2. Best Practices for Allocation of Stipulations of Settlement Involving Pro Se Litigants;

3. Protocols to be Used by Housing Court Judges During Motions and Trials/Hearings Involving Pro Se Litigants; and

4. Non-Payment Stipulation of Settlement Form.

The background memo on legal ethics applicable to the handling of pro se cases was also distributed to the Housing Court Judges. These meetings provided invaluable feedback about the drafts and about Housing Court Judges’ own procedures and concerns in dealing with pro se litigants.

D. The Documents Adopted by NYCLA

Included as part of this Report, which was adopted by NYCLA, are:

1. Protocol for Housing Court Judges for Allocation of Stipulations in Proceedings Involving Pro Se Litigants;


3. Protocols for Housing Court Judges for Motions and Trials/Hearings Involving Pro Se Litigants; and


The “Background Memo on Judicial Ethics: The Role of Judges in Settlement and Trial in Cases Involving Unrepresented Litigants,” prepared by Professor Russell Engler and

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30 The Subcommittee on Protocols had previously distributed a survey to all Housing Court Judges to obtain their views about pro se litigants’ experiences in Housing Court.
Professor Stephen Gillers, at the request of the Task Force, is also included as Appendix A.

The Task Force also drafted a stipulation form for use in settling non-payment proceedings but did not develop a consensus on the contents of the form. However, the Task Force recommends that the Court create, and require use of, a form for settlements of non-payment proceedings. The form should make provision for claims by petitioners, defenses and alternative enforcement remedies. The form should be written in plain language and include information that has an educative function (e.g., a plain language explanation of the meaning of a final judgment).

One of the reasons the Task Force recommends the Court's creation of a stipulation form is the concern about the recent proliferation and use of pre-printed forms by attorneys for petitioners, which might appear to have the imprimatur of the Court. The Task Force urges that pre-printed form stipulations by attorneys for petitioners be discontinued. Until that happens, Housing Court Judges should undertake heightened scrutiny of the pre-printed forms to try to ensure that they are not unduly one sided and that unrepresented respondents understand the alternatives to accepting the pre-printed terms.

E. Other Proposals

The Task Force was charged primarily with drafting Protocols and Best Practices for cases involving pro se litigants. However, it identified other important issues, beyond the scope of its work, that affect access to justice for unrepresented litigants.

Most importantly, “hallway justice” continues to be a significant concern. The current practice in most cases in Housing Court is for the attorney for the represented party to discuss the terms of the stipulation of settlement with the pro se litigant prior to any appearance of the parties before the Housing Court Judge. While the Protocols and Best Practices for the allocation of stipulations assume this scenario, this assumption should not be construed as condoning this practice. In cases in which one party is pro se and one party is represented by an attorney, the Court should provide an opportunity for the parties to discuss the terms of a proposed settlement only in the presence of the Housing Court Judge or Court Attorney.

The elimination of “hallway justice” is consistent with Chief Judge Kaye’s 1997 Housing Court initiative, which, among other changes, created Resolution Parts.31

As stated by Judge Kaye:

31 The 1997 Housing Court initiative stated that “[s]ettlements in the hallway, which currently take place outside of the Court’s direct oversight, will be eliminated...” New York State Unified Court System, Housing Court Program: Breaking New Ground (September 1997) at 8.
For matters that appear to the Court to be appropriate for settlement, the actual negotiations will take place in the Resolution Parts under the Court’s direct supervision. Court attorneys will conduct settlement conferences and oversee the drafting of stipulations of settlement whose terms address the outstanding issues and can reasonably be fulfilled. In cases involving the termination of public assistance benefits or Federal housing subsidies, or where an application for emergency assistance must be made, a designated court staff member will act as a liaison to determine the status of pending matters and, where possible, to accelerate the process.

The signed stipulation will then be presented to the judge in the courtroom, in the presence of the parties, for an allocation and “so ordering.” The allocation will ensure that the parties fully understand the terms and consequences of signing the stipulation, which should limit the numbers of tenants returning to court for Orders to Show Cause.32

It is also consistent with the Commentary in the Massachusetts Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants, which recently discussed the problems presented by the resolution of pro se cases without court supervision. As stated there:

It may be particularly helpful for the judge to provide the opportunity for the parties to discuss settlement in the presence of the judge in cases where one party is self-represented and the other party has an attorney. In such cases, the self-represented litigant may be afraid to deal with the attorney for the opposing party outside of court, and the attorney for the opposing party may be reluctant to negotiate with the self-represented litigant for fear of being accused of overreaching or misleading the self-represented litigant.33

The Task Force recommends that the Court continue to study ways and devote further resources, if needed, to promote the goal of eliminating “hallway justice” and ensuring that negotiations of stipulations take place in the Resolution Parts under the Court’s direct supervision.34

32 Id. at 9.

33 Massachusetts Judicial Guidelines, supra 15, Commentary to 2.2 Settlement.

34 Other suggestions for reform that were beyond the scope of this Report include:
1. It would be very helpful to have written materials that lay out the elements of the causes of actions and defenses (comparable to the Pattern Jury Instructions).
4. Conclusion

Recognition of a right to appointed counsel for low-income litigants in Housing Court is the single most important means to improve access to justice for unrepresented litigants in the Court. Until this right is recognized, the Court should adopt the proposed Protocols and Best Practices to guide Housing Court Judges in performing enhanced judicial oversight of proceedings involving pro se litigants. In addition, the Court should provide training and support necessary to ensure that the implementation of the Protocols and Best Practices will be a success.

TASK FORCE ON THE HOUSING COURT

The members of the Task Force and of its Subcommittees served in their individual capacities. Their affiliations are listed for identification purposes only. Although there was substantial consensus on many of the recommendations, individual members of the Task Force may have views that differ from those presented in this report. For those members of the Task Force who are also members of the judiciary or employed by government agencies or other organizations, their participation in this project should not be understood as constituting any official endorsement of the conclusions or recommendations in the report.

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2. There should be more of a focus on educating tenants. (It should be noted that there has already been much focus on education, and it cannot substitute for initiatives that address the proper role of the Housing Court Judge when dealing with pro se litigants.)

3. In some ways, focusing on the allocation is too late in the process; more should be done earlier. (This suggestion is subject to the same caveat as [2] above.)

4. The “Speak Your Language” chart that was previously used should be re-done and used again.

The Task Force has recommended that there should be a right to counsel for litigants in Housing Court. The Task Force Report on Right to Counsel in Housing Court is available at: http://www.nycla.org/News/Publications/Board Reports and Resolutions.
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PROTOCOL FOR HOUSING COURT JUDGES FOR ALLOCATION OF STIPULATIONS IN PROCEEDINGS INVOLVING PRO SE LITIGANTS

1. Introduction

The overwhelming majority of eviction proceedings in Housing Court are resolved by agreements known as stipulations of settlement. It is estimated that approximately 90 percent of the tenants in Housing Court are pro se, while approximately the same percent of landlords are represented by counsel. Thus, it is the norm in Housing Court for a settlement to be made between an unrepresented party and a represented party. This imbalance in the parties’ knowledge about their legal rights presents a difficult challenge for Housing Court Judges in providing meaningful access to justice for all litigants. A Protocol is needed to provide guidance for Housing Court Judges in meeting this challenge, and to promote greater uniformity and fairness in the treatment of pro se litigants.36

The Protocol that follows is largely based on Advisory Notice AN-LT-10, issued on September 4, 1997 by Hon. Fern A. Fisher, Administrative Judge, Civil Court. Recently expanded Advisory Notices AN-LT-10, issued on October 26, 2006, and AN-1-LT-10, issued on April 6, 2007, by Justice Fisher, are consistent with this Protocol. The Protocol is also based in part on, and adopts terms and concepts contained in, protocols developed in other jurisdictions such as Massachusetts, Minnesota and Idaho.

The Protocol provides for mandatory allocation of all stipulations of settlement to which a pro se litigant is a party. The Protocol leaves the manner in which the allocation is conducted and the substance of the allocation to the sound discretion of the Judge.

The Protocol requires allocation by the Judge of all stipulations of settlement, including those that have been reviewed by a court attorney, as it is the Judge’s ultimate responsibility to try to ensure that the pro se litigant understands and agrees to the terms of the stipulation.

The Protocol requires allocation by the Judge of all stipulations of settlement, including those without judgments, as stipulations without judgments may impose binding obligations which, if unsatisfied, may result in serious consequences such as eviction.

It is strongly recommended that the allocation be conducted in accordance with separate, more detailed guidelines that follow, entitled Best Practices for Housing Court Judges for Allocation of Stipulations in Proceedings Involving Pro se Litigants.

36 The Office of Court Administration should provide additional resources that may prove necessary to ensure that Housing Court Judges are able to perform their function of judicial oversight in accordance with these Protocols. However, implementation of these Protocols should not be delayed pending additional resources for the Court.
PROTOCOL

I. No stipulation of settlement to which a pro se litigant is a party shall be approved unless:
   a. the Judge conducts an allocation of the pro se litigant on the record; and
   b. the Judge is reasonably satisfied that:
      1. the pro se litigant understands the alternatives to signing the particular agreement proposed by the opposing party, and the alternatives to signing an agreement (i.e., the pro se litigant understands that (s)he is not required to agree to the term(s) proposed by the opposing party and that (s)he has a right to trial if she does not wish to sign an agreement);37
      2. the pro se litigant understands and agrees to all of the terms of the stipulation;
      3. the pro se litigant understands the effects of non-compliance with the stipulation by either side; and
      4. the pro se litigant understands that entry into the stipulation is a waiver of the right to trial.

II. Prior to approval of a stipulation to which a pro se litigant is a party, the Judge should also ascertain whether the pro se litigant’s claims or defenses are adequately addressed.

III. While all stipulations to which a pro se litigant is a party must be allocated by the Judge, the manner in which the allocation is conducted and its substance are matters within the sound discretion of the Judge.

It is strongly recommended that the allocation be conducted in accordance with the Best Practices for Housing Court Judges for Allocation of Stipulations in Proceedings Involving Pro Se Litigants.

37 Unless the pro se litigant has knowledge of available alternatives, the Judge cannot be sure that the pro se litigant’s waiver of alternative rights and remedies is, in fact, a knowing and intelligent waiver.
BEST PRACTICES FOR HOUSING COURT JUDGES FOR ALLOCATION OF STIPULATIONS IN PROCEEDINGS INVOLVING PRO SE LITIGANTS

It is strongly recommended that Housing Court Judges adopt the following Best Practices when allocating stipulations of settlement involving one or more pro se parties. These Best Practices are not intended to be mandated detailed scripts or to limit judicial discretion to adapt allocations to particular cases and litigants. Instead, they are intended to provide Housing Court Judges with useful guidelines for conducting allocations.38

I. General Procedures

A. Explain the Purpose of the Court Appearance:

At the beginning of every allocation, the Judge should explain the purpose of the appearance before the Judge. The Judge’s explanation should include, at a minimum, that:

1. the Judge will review the proposed stipulation of settlement to try to make sure that the parties understand and voluntarily agree to its terms;

2. a settlement is a voluntary agreement to resolve the case and, therefore, a party is not required to agree to settlement terms requested by the other party; and

3. if either party does not wish to agree to the terms of the settlement, the party has a right to trial at which a Judge (or a jury, if the parties have a right to a jury trial) will decide the parties’ claims and defenses.

The above explanation of the settlement process is not intended to preclude the Judge from encouraging settlement, if appropriate, or from explaining that a settlement may give the litigant more control over the outcome of the case.

B. Explain the Process:

1. At the beginning of every allocation, the Judge should also explain that the Judge will hear first from the petitioner (or, if the petitioner is represented, the lawyer for the petitioner), because the usual practice is

38 The Office of Court Administration should provide additional resources that may prove necessary to ensure that Housing Court Judges are able to perform their function of judicial oversight in accordance with these Best Practices. However, implementation of these Best Practices should not be delayed pending additional resources for the Court.
to hear first from the party who brought the case, and the Judge will then hear from the respondent. The Judge should further explain that each party will have the opportunity to bring to the Judge's attention any problems with the stipulation or any claims, defenses or other issues that the party wishes to address, and that each party will also have the opportunity to ask questions.

2. If the other side is represented by an attorney, the Judge should explain the adversarial nature of the proceeding. In particular, the Judge should explain that the attorney for the opposing party does not work for the Court and is responsible for representing the interests of the party that the attorney represents, not the interests of the pro se litigant. The Judge should explain that the lawyer for the other side may not advise the pro se litigant, other than to suggest that the pro se litigant secure independent counsel. The Judge should also explain that the pro se litigant is not required to agree to the terms suggested by the lawyer for the other side.

C. Use Plain Language:

1. The Judge should conduct the allocation in plain language.

2. The Judge should explain, in plain language, the meaning of the terms that are included in the stipulation (e.g., final judgment, possession, warrant, order to show cause).

D. Invite Narrative:

In order to ascertain whether the pro se litigant understands and agrees to the terms of the stipulation, and whether the claims or defenses of the pro se litigant are adequately addressed, the Judge should not merely ask questions that call for a yes or no answer. Rather, the Judge should ask open-ended questions and invite the pro se litigant to speak in narrative form. The Judge should ordinarily ask the pro se litigant to explain the substance of the stipulation in his or her own words.

E. Provide a Reasonable Opportunity to Obtain Counsel:

At the first court appearance in the proceeding, the Judge should confirm that the pro se litigant understands the right to seek to retain an attorney. The Judge should ensure that the pro se litigant understands his or her right to request an adjournment to seek an attorney and, if an adjournment is requested for this purpose, should provide the litigant with a list of free legal services, if
needed. The Judge should also explain that no rent deposit may be required for such an adjournment if requested on the return date of the petition.

If a litigant proceeds without counsel and it appears at any point during an allocation that the litigant wishes to obtain counsel, the Judge should give the litigant an opportunity to do so if the court appearance is the first in the case or if the litigant has not previously requested an adjournment; otherwise, the Judge should determine whether the request is reasonable, taking into account the number of prior appearances, the complexity and/or seriousness of the claims or defenses, and any prior requests for adjournments to obtain counsel.

This best practice is not intended to preclude the Judge from recommending that a pro se litigant obtain counsel prior to entering into a stipulation where circumstances warrant, e.g., where the pro se litigant raises claims or defenses during the allocation that may defeat all or part of the relief sought by the other side, or where the stipulation provides for the surrender of possession.

F. Address Language Barriers:

The Judge should be attentive to language barriers experienced by pro se litigants. The Judge should provide qualified interpreters for pro se litigants who are not fully fluent in English or who are hearing impaired.

G. Address Mental Incapacity:

If the Judge has reason to believe that the pro se litigant may be suffering from a mental impairment, the Judge should take appropriate steps to determine whether such an impairment exists and, if so, to obtain appropriate assistance for the litigant. The Judge should not allocate a stipulation until the appropriate assistance is obtained.

H. Maintain Courtroom Decorum:

The Judge should maintain courtroom decorum, taking account of the effect it will have on everyone in the courtroom, including pro se litigants. The Judge should ensure that proceedings are conducted in a manner that is respectful of all participants, including pro se litigants.

I. Explain the Alternatives:

The Judge should ensure that the pro se litigant understands the alternatives to signing a particular agreement suggested by the opposing party and the alternatives to signing any agreement (i.e., the pro se litigant understands that
(s)he is not required to agree to the term(s) proposed by the opposing party, and that (s)he has a right to trial if she does not wish to sign an agreement.

Unless the pro se litigant has knowledge of available alternatives, the Court cannot be sure that the litigant's waiver of alternative rights and remedies is in fact a knowing and intelligent waiver.

II. Allocating the Particular Provisions of the Stipulation

A. Ascertain Whether the Pro Se Litigant Understands and Agrees to the Stipulation:

1. In determining whether the pro se litigant understands and agrees to the terms of the stipulation, the Judge should not merely ask a general question to this effect, but should ascertain whether the litigant understands his or her specific obligations under the stipulation, as well as the consequences of failure to meet such obligations.

One way to make this inquiry is to ask the litigant to summarize his or her obligations under the stipulation, and the consequences of failure to meet such obligations. For example, in a non-payment settlement, a pro se tenant or pro se landlord could be asked whether (s)he agrees with the amount of rent required to be paid, as well as what payments must be made by what date, and what will occur, or what the remedy will be, if any payment is missed. In a stipulation providing that a pro se landlord must make repairs, the landlord could be asked what repairs must be made by what date and what will happen if the repairs are not made. In a holdover settlement providing for a pro se tenant's retention of possession, the tenant could be asked what he or she must do, by what date, to stop the eviction, and what will occur if the tenant misses the date. In a holdover settlement providing for a pro se tenant's surrender of possession, the Judge could ask the tenant the reason why (s)he has agreed to vacate, the date by which (s)he must vacate, and the consequences of failure to do so on time.

Another way to inquire as to the pro se litigant's understanding of the stipulation is for the Judge to summarize the pro se litigant's specific obligations under the stipulation and to ask the litigant whether (s)he understands that this is what the stipulation provides for. For example, in a non-payment settlement, a pro se tenant could be asked if (s)he understands that X dollars must be paid by Y dates, and that a warrant for eviction may be issued if any of the payments is not made by the required date. If this approach is used, the Judge should still ask open-ended
questions in order to determine whether the pro se litigant understands and agrees to the terms of the stipulation. (See I [D] above.)

The preferred approach will depend on the particular circumstances of the case.

2. Whatever approach is used, the Judge should explain in plain language the meaning and effect of legal terms in the stipulation, including enforcement remedies such as the judgment and warrant, and other provisions that may have a significant impact on substantive rights, such as waivers of claims or defenses, provisions involving attorney's fees (e.g., waiving or reserving such fees), and provisions that call for payments to be applied first to future rents and then to arrears that must be paid in order to stop the eviction.

3. In order to determine whether the stipulation is voluntary, the Judge should ask whether the pro se litigant is agreeing to the stipulation of his or her own free will, and/or whether anyone has forced or pressured the pro se litigant to agree to the stipulation.

4. In order to determine whether an agreement is understood, the Judge should also undertake specific questioning on issues that commonly arise.

As disputes often exist on certain issues (e.g., the amount of rent owed or the deadlines for payment), such questioning is appropriate. This questioning can be conducted in a non-leading way designed to elicit whether there is a knowing, voluntary agreement to the terms.

The following are examples of issues that should be specifically addressed:

a. In a non-payment case where a landlord or tenant is pro se, the Judge should ensure that a breakdown of the rents owed is attached to or part of the settlement, and that the pro se litigant understands and agrees with the breakdown.

b. In a non-payment case where there is a payment schedule and the tenant is pro se, the Judge should ensure that the pro se tenant understands the payment schedule, and should determine whether the payment schedule is feasible for the tenant.

c. In a non-payment case, where a pro se landlord or tenant is involved, the Judge should ask if the pro se litigant receives
government assistance that could affect the payment or collection of rent. If so, the Judge should consider appropriate referrals. The Judge should, where appropriate, advise a pro se tenant to seek information about the availability of emergency assistance from the Human Resources Administration, Rental Assistance Unit, in the courthouse.

d. In a holdover case, where the tenant is pro se and is not surrendering possession, the Judge should explain the obligations, if any, that the tenant must satisfy to retain possession, the consequences of failing to comply with the terms of the stipulation and the provisions, if any, for curing a default under the terms of the stipulation.

e. In a holdover case, where the tenant is pro se and where the tenant is surrendering possession, the Judge should ensure that the tenant understands the date for vacating the apartment and the consequences of failure to timely vacate. The Judge should also explain whether the tenant may apply for an extension of time, whether an extension is mandatory or discretionary, and the maximum extension that can be granted.

f. In all cases, the Judge should ensure that the pro se litigant understands the substantive effects of the various enforcement remedies (i.e., judgment, judgment with a warrant forthwith, judgment with a stay of the issuance of a warrant).

g. In a non-payment case, where the tenant is pro se, the Judge should ensure that the pro se tenant understands the consequences of a final judgment for the tenant’s credit rating.

B. Ascertain Whether the Pro Se Litigant’s Claims or Defenses Have Been Adequately Addressed by the Stipulation:

1. The Judge should ask an open-ended question, calling for a brief narrative, to ascertain whether the pro se litigant has any claims or defenses that have not been addressed by the stipulation, or any questions about the stipulation or other matters relevant to the case.

2. In all cases, prior to “so ordering” a stipulation, the Judge should ensure that the HPD online database has been checked to determine whether a hazardous violation exists at the premises; if such violation exists, the Court should require that the stipulation provide for
correction of the violation and for an enforcement remedy in the event of non-compliance.

To the extent that concerns exist about the feasibility of implementing this Best Practice, the Court should provide Judges with additional research assistance, if needed, and a working computer terminal on each Judge's bench.
PROTOCOLS FOR HOUSING COURT JUDGES FOR MOTIONS AND TRIALS/HEARINGS INVOLVING PRO SE LITIGANTS

These Protocols are supplemented by "Best Practices for Housing Court Judges for Motions and Trials/Hearings Involving Pro Se Litigants." The Protocols are based in large measure on Protocols developed in other jurisdictions, such as Idaho, Minnesota and Massachusetts.

It should be noted that some of the Protocols are repeated in each of the subsections below since they are applicable in the three phases of litigation addressed in the Protocols: (1) Protocols for Motions in a Resolution Part (II, A); (2) Protocols in a Resolution Part Prior to Referring Cases to Part X for Trials/Hearings (II, B); (3) Protocols for Trials/Hearings in a Trial Part (III).

These Protocols are not envisioned as a script to be imposed on Judges that would impermissibly limit their discretion in determining the individualized matters before them. Section I of the following Protocols sets forth general procedures that Housing Court Judges should follow in handling cases in Resolution and Trial Parts. Sections II and III set forth specific procedures that should be addressed by Housing Court Judges in handling motions and presiding over trials and hearings. While the Protocols should be followed so that fundamental due process and access to justice are provided to pro se litigants, the Protocols do not mandate the amount of time, weight or scope to be afforded to each element of the Protocols. Those matters are left to the sound discretion of individual Judges. 39

Housing Court Judges shall use the following protocols when hearing motions and/or conducting trials/hearings involving at least one pro se party.

I. Resolution and Trial Parts

A. Use plain English and minimize the use of complex legal terms in written materials when conducting court proceedings and when explaining court procedures and the other matters described below.

B. Be attentive to language barriers experienced by pro se litigants. Judges should take the necessary steps to provide qualified interpreters to pro se litigants who are not fully fluent in English or who are hearing impaired.

C. Where possible, give all instructions and explanations to pro se litigants in writing as well as orally.

39 The Office of Court Administration should provide additional resources that may prove necessary to ensure that Housing Court Judges are able to perform their function of judicial oversight in accordance with these Protocols. However, implementation of these Protocols should not be delayed pending additional resources for the Court.
D. Verify that the party is not an attorney and that the party understands that (s)he has a right to be represented by an attorney if (s)he can retain one.

E. Determine whether the pro se litigant is opting to proceed without an attorney because (s)he chooses to proceed pro se or because (s)he has not been able to retain counsel from Legal Services, Legal Aid or other pro bono entities. Explain the risks and difficulty of self-representation to a pro se litigant who is able to retain counsel, but chooses to proceed pro se.

II. Resolution Parts

A. Motions

1. Whenever possible, provide the pro se litigant with a copy of the Judge’s written motion rules and procedures sufficiently in advance of argument on a motion so the pro se litigant has an opportunity to review them prior to oral argument on the motion.

2. Ask the pro se litigant about her/his understanding of the issue(s) before the Court, particularly if the pro se litigant is the movant, rather than relying solely on the represented party’s articulation of the issue(s) and facts.

3. Explain the process that will be followed in hearing the motion and confirm that each side understands the process.

4. Unless undue prejudice will result that cannot otherwise be mitigated, or unless otherwise prohibited by law, permit the pro se litigant to interpose oral, rather than written, opposition to the other side’s motion.

5. Explain the elements that the person making the motion must meet in order to get the relief (s)he seeks and the elements that the person opposing the motion may have to meet to avoid an order in the movant’s favor, and confirm that each side understands the elements and burdens. If possible, the list of elements should be provided in advance in writing in a checklist format given by the Judge or the Court Attorney, or by directing the pro se litigant to the Resource Center for such assistance.

6. Explain that the Judge may ask each side some questions during argument, but that such questioning should not be interpreted to indicate that the Judge agrees with either party.

7. Questioning by the Judge during argument should be directed at
obtaining information from each side necessary for the Judge to decide the motion and should be done in a way that does not create an appearance of partiality or of advocacy for one side.

8. Whenever possible, the motion should be decided and an order prepared immediately upon the conclusion of the motion so that the order can be served on the parties while they are still in Court and its terms explained to the pro se litigant, including what, if anything, the order requires her/him to do and when, the consequences of not doing those things, and what the pro se litigant may be able to do if (s)he cannot comply with Court’s order. However, in matters that require that a decision be reserved, pro se litigants should be directed in the written decision to go to speak with the pro se attorneys in the Resource Center if they require assistance in understanding the terms and requirements of the written decision.

B. Prior to Referring Cases to Part X for Trials/Hearings

1. Inquire whether the pro se litigant understands the issues that will be involved at the trial/hearing and what (s)he will have to demonstrate in order for the landlord to get a judgment or for the tenant to avoid a judgment.

2. Provide the pro se litigant with trial preparation materials prepared and/or distributed by the Court or posted on its website or refer the pro se litigant to the Resource Center for such materials.

3. Inquire whether the pro se litigant has the evidence (s)he will need for the trial/hearing and, if not, explain to her/him how to obtain such evidence. If production of evidence requires a judicial subpoena, refer the pro se litigant to the court attorney for assistance in having the subpoena issued and for an explanation regarding the process for service of the subpoena and how documents will be produced pursuant to the subpoena.

4. Unless undue prejudice to the other side will result that cannot otherwise be mitigated, adjourn the trial/hearing to a date sufficient for the pro se to obtain necessary evidence and witnesses and to review trial preparation materials.

5. If possible, provide the pro se litigant with a copy of the written trial/hearing rules and procedures of the Judge to whom the case will be referred for trial/hearing.
III. **Trial Parts, Trials and Hearings.**

A. Inquire regarding the matters set forth at II, B, 3-4, and take appropriate action unless undue prejudice to the other side will result that cannot otherwise be mitigated.

B. Explain the process that will be followed in the trial/hearing and verify that each side understands the process. If possible, the list of elements should be provided in advance in writing in a checklist format given by the Judge or the Court Attorney, or by directing the pro se litigant to the Resource Center for such assistance.

C. Explain the elements of the case and verify that each side understands the elements.

D. Explain that the party bringing the case has the burden to present evidence in support of the relief(s)he seeks and verify that the parties understand the burdens.

E. Explain that the Judge may ask each side some questions during the trial/hearing, but that such questioning should not be interpreted as indicating that the Judge agrees with either party.

F. If evidentiary objections are not waived:

1. Explain the kinds of evidence that may be presented and the procedure for admitting exhibits and inquire whether the parties understand the kinds of evidence that can be admitted.

2. Explain the limits on the kind of evidence that can be considered and confirm that the parties understand the limits.

3. Require that the objector provide the pro se litigant with sufficient information regarding the grounds of her/his objections so that the pro se litigant can cure the defect if possible.

4. Explain the foundational facts that must be established by the pro se litigant in order to make her/his evidence admissible.

5. Ask questions of the pro se litigant or her/his witness to determine whether the evidentiary defect can be cured.

6. Explain the reason for any evidentiary ruling.
7. Assist the pro se litigant in objecting to otherwise inadmissible evidence regarding the essential elements of the case to avoid undue prejudice to the pro se litigant.

G. Allow the pro se litigant to testify in a narrative style and limit as much as possible evidentiary objections during the narrative unless undue prejudice to the rights of the other party would result.

H. Questioning by the Judge during the trial/hearing should be directed at obtaining information from each side necessary for the Judge to decide the issue(s) raised at the trial/hearing and should be done in a way that does not create an appearance of partiality or of advocacy for one side.

I. Whenever possible, the trial/hearing should be decided and a judgment/decision prepared immediately upon the conclusion of the trial/hearing so that the judgment/decision can be served on the parties while they are still in Court and its terms explained to the pro se litigant, including what, if anything, the judgment/decision requires her/him to do and when, the consequences of not doing those things, and what the pro se litigant may be able to do if (s)he cannot comply with the Court's judgment. However, in matters that require that a decision be reserved, pro se litigants should be directed in the written decision to go to speak with the pro se attorneys in the Resource Center if they require assistance in understanding the terms and requirements of the written decision.
BEST PRACTICES FOR HOUSING COURT JUDGES FOR MOTIONS AND TRIALS/HEARINGS INVOLVING PRO SE LITIGANTS

The Best Practices that follow expand on the Protocols for Housing Court Judges for Motions and Trials/Hearings Involving Pro se Litigants. Those Protocols are incorporated in full below in **boldface** type. It should be noted that some of the Protocols are repeated in each of the subsections below since they are applicable in the three phases of litigation addressed in the Protocols: (1) Protocols for Motions in a Resolution Part (II, A); (2) Protocols in a Resolution Part Prior to Referring Cases to Part X for Trials/Hearings (II, B); (3) Protocols for Trials/Hearings in a Trial Part (III).

It is strongly recommended that Housing Court Judges adopt the following Best Practices when hearing motions and trials/hearings involve pro se litigants. These Best Practices are not intended to be mandated detailed scripts or to limit judicial discretion to adapt practices during motions and trials/hearings to particular cases or litigants. Instead, the Best Practices are intended to provide Housing Court Judges with useful guidelines.

The Protocols are accompanied in some instances by comments regarding and/or examples of Best Practices that might be adopted or adapted in the discretion of a Judge in implementing the Protocols themselves. Examples are based on forms and educational materials presently distributed by the Office of Court Administration (OCA) on the Housing Court part of the OCA website, in the Clerk’s Office and in the Resource Center. It should be noted that examples given below regarding elements of causes of action and defenses (II, A, 5 and III, C) are not necessarily complete statements of all required elements, but are given as examples of the style and format in which such information might be given in a manner understandable to a pro se litigant. It is suggested that a Best Practice would be for the Court to develop model instructions, similar to Pattern Jury Instructions, which could be adopted and adapted by Judges in particular cases.

I. Resolution and Trial Parts

A. *Use plain English and minimize the use of complex legal terms in written materials, when conducting court proceedings, and when explaining court procedures and the other matters described below.*

B. *Be attentive to language barriers experienced by pro se litigants. Judges should take the necessary steps to provide qualified interpreters to pro se litigants who are not fully fluent in English or who are hearing impaired.* Information

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40 The Office of Court Administration should provide additional resources that may prove necessary to ensure that Housing Court Judges are able to perform their function of judicial oversight in accordance with these Best Practices. However, implementation of these Best Practices should not be delayed pending additional resources for the Court.
regarding the availability of translation services should be readily available. A multi-language poster notifying litigants of the availability of translation services, currently being revised by OCA, should be posted in each courtroom, the Clerk’s Office, the Resource Center, and in other public areas in the courthouse.

C. Where possible, give all instructions and explanations to pro se litigants in writing as well as orally. Oral instructions may not be remembered when the litigant leaves the courtroom. The litigant may have difficulty explaining the Court’s instructions to family members or service providers. Written instructions and explanations will address this problem. Some Judges currently provide such information, at least in shorthand form, in stipulations settling Orders to Show Cause.

D. Verify that the party is not an attorney and that the party understands that (s)he has a right to be represented by an attorney if (s)he can retain one. Provide information regarding possible attorney representation by Legal Services, Legal Aid or other pro bono representation to litigants who cannot afford an attorney. Suggest that such litigants contact the Court’s Resource Center for further information regarding pro bono representation. Litigants who can afford an attorney should be advised to retain counsel and referred to the landlord or tenant information desks or to Bar Association Attorney Referral Services for further information.

E. Determine whether the pro se litigant is opting to proceed without an attorney because (s)he chooses to proceed pro se or because (s)he has not been able to retain counsel from Legal Services, Legal Aid or other pro bono entities. Explain the risks and difficulty of self-representation to a pro se litigant who is able to retain counsel, but chooses to proceed pro se.

II. Resolution Parts

A. Motions

1. Whenever possible, provide the pro se litigant with a copy of the Judge’s written motion rules and procedures sufficiently in advance of argument on a motion so the pro se litigant has an opportunity to review them prior to oral argument on the motion.

It is advisable for each Judge to develop, post and distribute written motion rules and practices so that pro se (and represented) litigants have some understanding of the Judge’s basic ground rules and procedures of courtroom practice. Unlike lawyers and some parties who regularly use the court system, pro se litigants may be intimidated by not knowing where to sit at counsel table, who speaks first, when and how papers can be submitted to the Court,
etc. Motion rules and procedures should contain sufficient information of that type to avoid undue surprise and its potential effect on the ability of the pro se litigant to participate as fully as possible in presenting her/his position on the motion before the Court.

2. Ask the pro se litigant about her/his understanding of the issue(s) before the Court, particularly if the pro se litigant is the movant, rather than relying solely on the represented party’s articulation of the issue(s) and facts.

3. Explain the process that will be followed in hearing the motion and confirm that each side understands the process. For example: “I will hear both of you on this motion. First, I will listen to what the person making the motion wants me to know about this motion — why (s)he is making this motion and what (s)he wants me to do for her/him. Then I will listen to what the other person has to say about the motion — whether (s)he will agree to what the person making the motion wants or why (s)he thinks the motion should not be granted. Then I will give the person making the motion a chance to respond to what the other side said. I will give each of you enough time to tell me your side of the motion, but you must proceed in the order I have indicated. So please do not interrupt each other. Address all of your comments to me, not to each other.”

4. Unless undue prejudice will result that cannot otherwise be mitigated, or unless otherwise prohibited by law, permit the pro se litigant to interpose oral, rather than written, opposition to the other side’s motion.

5. Explain the elements that the person making the motion must meet in order to get the relief (s)he seeks and the elements that the person opposing the motion may have to meet to avoid an order in the movant’s favor, and confirm that each side understands the elements and burdens.

As noted above, examples given below regarding elements of causes of action and defenses are not necessarily complete statements of all required elements, but are given as examples of the style and format in which such information might be given in a manner understandable to a pro se litigant. It is suggested that a Best Practice would be for the Court to develop model instructions, similar to Pattern Jury Instructions, which could be adopted and adapted by Judges in particular cases.

For example, in a landlord’s motion for a judgment of possession based on the tenant’s breach of the terms of a stipulation of settlement in a nuisance holdover case: “You are making this motion for a judgment of possession because you say that the tenant has not complied with the terms of the stipulation you both signed and I ordered on [date] by [summarize what is
alleged in the moving papers]. If you want me to give you a judgment, you must explain to me how the tenant has not complied with a term of the stipulation. You are claiming [this should be taken, if possible, from the allegations in the moving papers] that the tenant is once again making loud noises and disturbing other tenants. You need to tell me when (s)he did this, specifying dates and times as much as you can, and how you know this tenant is making those noises. You also need to tell me which tenants have complained to you about this problem and what they have complained about. If the tenant denies these facts, I may need to send you to another Judge for a hearing on your claims, but first I want you to tell me what you claim the tenant has done since the stipulation was signed and how you know it was the tenant who did these things.

For another example, in a tenant’s motion to vacate a default judgment in a non-payment case: “You are making this motion to set aside the judgment that was entered when you did not come to Court on [date]. If you want me to do that, you must explain to me why you did not come to Court on that date. You need to show me that your reason for not coming to Court is reasonable. In your Order to Show Cause, you said that you did not come to Court because [take allegation from moving papers]. Explain this in more detail. Just as important, you must also show me that if you had come to Court, you could have shown that the landlord was not entitled to a judgment for the amount of rent (s)he was suing you for. Tell me in detail why you claim you don’t owe the rent.”

If possible, the list of elements should be provided in advance in writing in a checklist format given by the Judge or the Court Attorney, or by directing the pro se litigant to the Resource Center for such assistance. A Best Practice might be to follow the practice of some Judges who currently include such information when signing an Order to Show Cause or in a prior stipulation of settlement in the paragraph providing for restoration of the case on a breach of a term of the stipulation.

6. **Explain that the Judge may ask each side some questions during argument, but that such questioning should not be interpreted to indicate that the Judge agrees with either party.** “I may ask each of you some questions to be sure I understand the case and that I have all of the information I need to make a decision. You should not take anything I say as indicating that I am taking sides in this case.”

7. **Questioning by the Judge during argument should be directed at obtaining information from each side necessary for the Judge to decide the motion and should be done in a way that does not create an appearance of partiality or of advocacy for one side.** However, merely asking a pro se litigant why
(s)he has made a motion is generally inadequate to elicit sufficient information. Accordingly, it may be necessary for the Judge to ask open-ended questions regarding specific elements of the motion or opposition to the motion to assist the pro se litigant in articulating the elements of her/his motion or opposition. For example, in a pro se tenant’s motion to vacate a default judgment in a non-payment proceeding in which the meritorious defense is breach of warranty of habitability: “You say that you have conditions in your apartment that your landlord has not repaired. Tell me what those conditions are, going room by room. Also tell me if and when you last contacted your landlord about each of those conditions, how you contacted the landlord, and what happened after that.” For another example, in a landlord’s motion for a judgment in a nuisance holdover: “You say that the tenant has been making noises that disturb other tenants. Tell me what kinds of noise (s)he is making, what the noise sounds like, how loud it is, and what time of the day or night and the dates when (s)he made these noises.”

8. Whenever possible, the motion should be decided and an order prepared immediately upon the conclusion of the motion so that the order can be served on the parties while they are still in Court and its terms explained to the pro se litigant, including what, if anything, the order requires her/him to do and when, the consequences of not doing those things, and what the pro se litigant may be able to do if (s)he cannot comply with Court’s order. However, in matters that require that a decision be reserved, pro se litigants should be directed in the written decision to go to speak with the pro se attorneys in the Resource Center if they need assistance in understanding the terms and requirements of the written decision.

B. Prior to referring Cases to Part X for Trials/Hearings

1. Inquire whether the pro se litigant understands the issues that will be involved at the trial/hearing and what (s)he will have to demonstrate in order for the landlord to get a judgment or for the tenant to avoid a judgment. For example, in a breach of lease holdover: “The landlord claims that the tenant did not follow a part of the lease [specify the lease provision]. The landlord claims that tenant [specify landlord allegations in the predicate notices]. The landlord may be able to get a judgment against the tenant and possibly evict the tenant from her/his home if (s)he can show (1) that (s)he is the landlord or someone else who is allowed by law to evict you; (2) that (s)he gave the tenant all of the papers the law required her to give to the tenant; (3) that the tenant actually did the things the landlord claims in those papers; and (4) that the lease says that the tenant can be evicted if (s)he does those things.” This example should be reworded if only one party is pro se, substituting personal pronouns for the unrepresented party so (s)he hears the instruction as being directed to her/him.
2. Provide the pro se litigant with trial preparation materials prepared and/or distributed by the Court or posted on its website or refer the pro se litigant to the Resource Center for such materials. Currently, such materials include trial preparation materials on the Court's website and "A Tenant's Guide to The New York City Housing Court" (Association of the Bar of the City of New York and The Civil Court of the City of New York). The pro se litigant should also be referred to the Resource Center to consult with a pro se attorney regarding trial preparation and to the landlord or tenant information desks.

3. Inquire whether the pro se litigant has the evidence (s)he will need for the trial/hearing and, if not, explain to her/him how to obtain such evidence. If production of evidence requires a judicial subpoena, refer the pro se litigant to the court attorney for assistance in having the subpoena issued and for an explanation regarding the process for service of the subpoena and how documents will be produced pursuant to the subpoena.

4. Unless undue prejudice to the other side will result that cannot otherwise be mitigated, adjourn the trial/hearing to a date sufficient for the pro se to obtain necessary evidence and witnesses, and to review trial preparation materials.

Cases referred to Part X for trial/hearing are deemed to be "trial ready." Thus, a Best Practice would be for the Resolution Part Judge to make an inquiry into such readiness. The two preceding Protocols are included to address that issue. Of course, nothing in these Protocols would impinge on a Judge's discretion to send a matter out for trial or hearing if in her/his judgment the party - represented or not - has not taken the opportunity to prepare for trial during prior adjournments, absent a reasonable explanation that (s)he is not ready for trial in spite of her/his best efforts; nor do the Protocols seek to limit a Judge's discretion to send a matter out for trial if the Judge determines that the litigant is simply seeking to delay trial or that such a delay would cause undue hardship to the other party. Nevertheless, a Best Practice would be to make a sufficient inquiry to determine these matters prior to referral to Part X.

5. If possible, provide the pro se litigant with a copy of the written trial/hearing rules and procedures of the Judge to whom the case will be referred for trial/hearing.

Under the current system, such advance determination regarding the specific Trial Part and Judge is generally not available in the Resolution Part. However, a Best Practice would be for the pro se litigant to have some advance knowledge of the rules and procedures to which (s)he will be
expected to conform. Thus, to the fullest extent possible, such information should be distributed in advance to the pro se litigant. At a minimum, the written part rules and procedures should be distributed in Part X prior to the case being referred to a Trial Part.

III. Trial Parts, Trials and Hearings

A. Inquire regarding the matters set forth above at II, B, 3-5, and take appropriate action unless undue prejudice to the other side will result that cannot otherwise be mitigated.

As indicated above (II, B, 3-4), cases referred to Part X and then referred to a Trial Part are deemed to be “trial ready.” However, for the reasons set forth above, a Best Practice would ensure that a pro se litigant is not required to try her/his case without the basic evidence (s)he will need to prevail or defend. Thus, absent undue prejudice to the other side, a Best Practice would be to incorporate to the fullest extent possible the three preceding Protocols to avoid undue prejudice to the pro se litigant’s ability to present her/his case to the Court. At a minimum, a Best Practice would be to allow the pro se litigant a brief period immediately prior to commencing the trial/hearing to review the trial preparation materials and to have questions regarding those materials answered.

B. Explain the process that will be followed in the trial/hearing and verify that each side understands the process. If possible, the list of elements should be provided in advance in writing in a checklist format given by the Judge or the Court Attorney, or by directing the pro se litigant to the Resource Center for such assistance.

As noted above, examples given below regarding elements of causes of action and defenses are not necessarily complete statements of all required elements, but are given as examples of the style and format in which such information might be given in a manner understandable to a pro se litigant. It is suggested that a Best Practice would be for the Court to develop model instructions, similar to Pattern Jury Instructions, which could be adopted and adapted by Judges in particular cases.

For example, in a breach of lease holdover: “In this case, the landlord claims that the tenant did not follow a part of the lease [specify the lease provision]. The landlord claims that the tenant [specify landlord allegations in the predicate notices]. In the tenant’s answer (or from what the tenant has said in Court, it is my understanding that the tenant denies that (s)he did any of those things or that they are not as serious as the landlord claims. I will listen to both of you. First I will listen to the landlord because (s)he brought this case against the tenant and
because (s)he has the burden to show that the tenant did not follow the requirements of the lease. Then I will listen to the tenant. The witnesses for each side, including the parties if you choose to testify, will come up to the witness stand and be asked to swear or affirm that they will tell the truth. All witnesses will answer questions put to them by the side that called them, then by the other side, and perhaps by me. [To the pro se landlord]: If you testify, you can tell me in your own words why you think that the tenant's behavior is serious enough that I should let you evict her/him. [To the pro se tenant]: If you testify, you can tell me in your own words why you think the landlord's claims are not correct and why you think (s)he should not be allowed to evict you. [To either the pro se landlord or pro se tenant]: I will ask questions of either side if I think I need more information to understand the case and to have all of the information I need to make a decision. You should not take anything I say as indicating that I am taking sides in this case. I will give each of you enough time to tell me your side of the case, but you must proceed in the order I have indicated. So please do not interrupt each other. Address all of your comments to me, not to each other. Everything that is said in Court is recorded on this tape recorder; in order to be sure that the Court record is accurate, only one person can talk at a time. Wait until the other person asking a question finishes before answering and the person asking the question should wait until the person answering the question finishes before asking the next question. The only exception to this is when either of you objects to a question or an answer. I'll explain that later. After the trial/hearing is over, I will decide what should happen. I may give you my decision immediately or I will mail it to each of you as soon after the trial/hearing as possible. Do you understand the procedure we will follow during the trial/hearing? This example should be reworded if only one party is pro se, substituting personal pronouns for the unrepresented party so (s)he hears the instruction as being directed to her/him.

C. Explain the elements of the case and verify that each side understands the elements. Elements that have been stipulated to or not raised in a pleading (where required to be so raised) may be omitted. In addition, as noted above, examples given below regarding elements of causes of action and defenses are not necessarily complete statements of all required elements, but are given as examples of the style and format in which such information might be given in a manner understandable to a pro se litigant. It is suggested that a Best Practice would be for the Court to develop model instructions, similar to Pattern Jury Instructions, which could be adopted and adapted by judges in particular cases.

For example, in a breach of lease holdover: "The landlord claims that the tenant did not follow a part of the lease [specify the lease provision]. The landlord claims that the tenant [specify landlord allegations in the predicate notices]. The landlord claims that (s)he served the tenant with a written notice on [date] by [specify service method] specifying the things the tenant supposedly did and giving the tenant a chance to stop doing them before the landlord terminated the
tenancy. [Show Notice to Cure to pro se litigant.] The landlord claims that (s)he served the tenant with a written notice on [date] by [specify service method] specifying that the tenant had not stopped doing those things and telling the tenant that (s)he was terminating the tenancy. [Show Notice of Termination to the pro se litigant.] The landlord claims that (s)he served the tenant with a Notice of Petition and Petition on [date] by [specify service method] telling the tenant to come to Court on [specify original return dates]. [Show Notice of Petition and Petition to pro se litigant.] The landlord may be able to get a judgment against the tenant and possibly evict the tenant from her/his home if (s)he can show (1) that (s)he is the landlord or someone else who is allowed by law to evict the tenant; (2) that (s)he gave the tenant all of the papers I just described, (3) that the tenant actually did the things the landlord claims in those papers, and (4) that the lease says that the tenant can be evicted if (s)he does those things. Based on that judgment, the landlord can get a warrant and have a Marshal evict the tenant from the apartment. However, even if the landlord proves her/his case, I can give the tenant ten days to stop doing the things the lease prohibits. If the tenant stops doing those things within ten days, then the landlord may not be able to evict the tenant. If the tenant doesn’t stop doing those things, the tenant can be evicted. Do both of you understand the issues in the case as I have just described them?”

This example should be worded if only one party is pro se, substituting personal pronouns for the unrepresented party so (s)he hears the instruction as being directed to her/him.

D. **Explain that the party bringing the case has the burden to present evidence in support of the relief (s)he seeks and verify that the parties understand the burdens.** For example, in a breach of lease holdover: “Because the landlord has brought this case and is requesting a judgment and warrant to evict the tenant, the landlord must present evidence to show that (s)he is entitled to a judgment and warrant. I will not consider anything that the landlord has said in Court today before the trial begins or in the Court papers. I can only consider evidence that is presented in Court today. If the landlord is not able to present evidence that is needed, then I must dismiss the case. However, if the landlord is able to present evidence that the tenant [specify claim], I will give the landlord a judgment and warrant to evict the tenant.”

E. **Explain that the judge may ask each side some questions during the trial/hearing, but that such questioning should not be interpreted as indicating that the judge agrees with either party.** “I may ask each of you some questions to be sure I understand the case and that I have all of the information I need to make a decision. You should not take anything I say as indicating that I am taking sides in this case.”

F. The Judge should encourage the parties to conduct the trial/hearing in as informal a manner as possible to facilitate the pro se’s ability to participate fully in the
proceeding. The Judge should follow the rules of evidence that go to reliability, but use discretion and overrule objections on technical matters, such as establishing a foundation for introducing documents and exhibits, and the form of questions or testimony. However, the Judge should explain that some evidence may be given greater weight and that evidence that is not based on direct personal knowledge or is in some other manner determined to be unreliable may be given lesser or no weight.

If evidentiary objections are not waived:

1. **Explain the kinds of evidence that may be presented and the procedure for admitting exhibits and inquire whether the parties understand the kinds of evidence that can be admitted.** For example: “Evidence can be in the form of testimony from the parties, testimony from other witnesses, or exhibits (e.g., documents, photographs, etc.). In general, a witness can only testify to something that (s)he has personally observed. If you use exhibits, the exhibit must first be given a number or letter and then the witness who can identify the exhibit must briefly describe it. The exhibit is then shown to the other side and they can object to the exhibit. If you don’t understand the objection, you should ask me to explain. I will then let you know whether the exhibit can be used as evidence.”

2. **Explain the limits on the kind of evidence that can be considered and inquire whether the parties understand the limits.** For example: “I have to make my decision based on the evidence that is admissible under the Rules of Evidence. If either party starts to present evidence that is not admissible, the other party may object. If I agree with the objection, I will sustain the objection, which means that I cannot consider that type of evidence. Some examples are irrelevant evidence and hearsay. Irrelevant evidence is testimony or exhibits that have nothing to do with the case or that do not help me to understand or decide issues involved in the case. Hearsay is a statement made outside of Court by a person who is not the opposing party that you want me to consider to be true; hearsay can be an oral statement that you overheard or a written statement such as a letter, even if it is notarized. Most hearsay is considered unreliable and is inadmissible.”

3. **Require that the objector provide the pro se litigant with sufficient information regarding the grounds of her/his objections so that the pro se litigant can cure the defect if possible.**

4. **Explain the foundational facts that must be established by the pro se litigant in order to make her/his evidence admissible.**
5. Ask questions of the pro se litigant or her/his witness to determine whether the evidentiary defect can be cured. For example, to a pro se tenant regarding a warranty of habitability defense: “You say that your neighbor says that she has seen rodents in the building. I cannot admit a statement by someone who is not in Court and testifying under oath. However, have you ever seen rodents in the building yourself? If so, tell me when, starting with the most recent incident and tell me what you saw.” For another example, to a pro se landlord or tenant: “You want me to accept this copy of [name document]. In general, I can only accept the original of a document. Can you tell me why you do not have the original with you in court today?” For another example, to a pro se landlord: “You want me to accept this lease. Whose signature is this? How do you recognize it?” For another example, “You want me to accept this photograph. What is it a photograph of? Does it accurately picture the way your kitchen looked on [specify relevant time period].”

6. Explain the reason for any evidentiary ruling.

7. Assist the pro se litigant in objecting to otherwise inadmissible evidence regarding the essential elements of the case to avoid undue prejudice to the pro se litigant.

G. Allow the pro se litigant to testify in narrative and limit as much as possible evidentiary objections during the narrative unless undue prejudice to the rights of the other party would result.

Under FRE 611(a), adopted in many state jurisdictions, narrative testimony is permitted as a means of making “the presentation effective for the ascertainment of the truth.” Id. Also, the anomaly of a witness asking herself/himself questions is self-evidently an inefficient means of eliciting information. Thus, a Best Practice would be to allow narrative testimony unless undue prejudice to the rights of the other party would result. For example: “You can tell me your story just the way you would tell anyone what happened on a particular occasion. You do not have to use formal language or technical terms. Just tell me your version of what happened based on what you have observed yourself.” A Best Practice would also incorporate instruction to the pro se litigant regarding the weight that will be given to the types of evidence that may be contained within her/his narrative. See above III, F, 1-2 and 5.

H. Questioning by the Judge during the trial/hearing should be directed at obtaining information from each side necessary for the Judge to decide the issue(s) raised at the trial/hearing and should be done in a way that does not create an appearance of partiality or of advocacy for one side. Merely asking a pro se litigant what (s)he wants to tell the court about the landlord’s claims is
generally inadequate to elicit sufficient information. Accordingly, it may be necessary for the Judge to ask open-ended questions regarding specific elements of the landlord's claims or the pro se tenant's defenses or counterclaims to assist the pro se litigant in articulating the elements of her/his claims, defenses or counterclaims. For example, in a pro se tenant's affirmative defense to a non-payment proceeding based on breach of warranty of habitability: "You say that you have conditions in your apartment that your landlord has not repaired. Tell me what those conditions are, going room by room. Also tell me if and when you last contacted your landlord about each of those conditions, how you contacted the landlord, and what happened after that." For another example, to a pro se landlord in a nuisance holdover: "You say that the tenant is causing water to leak into other apartments. Tell me when that happened, how you know the water came from this tenant's apartment, and what damage, if any, was done by these water leaks."

I. Whenever possible, the trial/hearing should be decided and a judgment/decision prepared immediately upon the conclusion of the trial/hearing so that the judgment/decision can be served on the parties while they are still in Court and its terms explained to the pro se litigant, including what, if anything, the judgment/decision requires her/him to do and when, the consequences of not doing those things, and what the pro se litigant may be able to do if (s)he cannot comply with Court's judgment. However, in matters that require that a decision be reserved, pro se litigants should be directed in the written decision to go to speak with the pro se attorneys in the Resource Center if they need assistance in understanding the terms and requirements of the written decision.
APPENDIX A

BACKGROUND MEMO ON JUDICIAL ETHICS:
THE ROLE OF JUDGES IN SETTLEMENT AND TRIAL
IN CASES INVOLVING UNREPRESENTED LITIGANTS

by Russell Engler\(^1\) and Stephen Gillers\(^2\)

1. **Introduction**

This memorandum examines a range of authorities in demonstrating that an active role of judges in the New York City Housing Court in the settlement and trial phases of their cases involving unrepresented litigants is consistent with the strictures of judicial ethics. Part I discusses the relevant Canons of Judicial Ethics. Part II discusses court decisions generally applying those Canons, identifies specific contexts in which the active judicial role is mandated and examines relevant New York authority regarding settlements in New York City Housing Court. Part III summarizes recent law review articles and other commentary calling for judges to play an active role in cases involving unrepresented litigants and explaining how the active role is consistent with the governing Canons of Ethics and caselaw. Part IV discusses the growing trend across the country toward the more active role of courts generally, and judges specifically, in cases involving unrepresented litigants, as reflected in resolutions from the Conference of Chief Justices and Conference of State Court Administrators, the Best Practices recently proposed by the American Judicature Society and State Justice Institute, and the Guidelines for state court judges adopted in Massachusetts in 2006.

2. **The Canons of Judicial Ethics**

The Canons of Judicial Conduct provide only general guidance to judges handling cases involving unrepresented litigants. As with other cases, Judges are required to uphold the Integrity and Independence of the Judiciary (Canon 1) and Avoid Impropriety and the Appearance of Impropriety (Canon 2). The concept of avoiding the appearance of impropriety is intertwined with the concept of carrying out judicial responsibilities with Integrity, Impartiality and Competence. (Canon 2A, including Comment [2]). Canon 3 requires Judges to perform their duties Impartially and Diligently. These concepts include the obligation to be “patient, dignified and courteous,” and to perform judicial duties without bias or prejudice; the failure to do so undermines the fairness of the proceeding (Comments [1] & [2]).\(^3\)

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\(^2\) Vice Dean and Professor of Law, New York University School of Law.

\(^3\) The Canons are Codified in New York at 22 NYCRR §100 et seq.
The text of the Canons and Commentary provides little direct guidance as to how active or passive a judge may, or must, be in handling cases involving unrepresented litigants. In the words of one set of authors trying to provide guidance as to appropriate judicial techniques:

In sum, the Canons of Judicial Ethics require judges to remain fair and impartial and to maintain the appearance of fairness and impartiality, but give no further guidance about the meaning of those terms when unrepresented persons appear in court.⁴

Moreover, our understanding and application of the basic notions embedded in the judicial canons change over time. When the American Bar Association announced in 2003 the appointment of a Joint Commission to Evaluate the Model Code of Judicial Conduct, the ABA President observed: “Judicial ethics are not static....It has been 12 years since the ABA took a good, hard look at the code....”⁵ What is appropriate, or necessary, in 2006 in a particular context might be different from what was generally accepted 15 years ago, even without amendment to the relevant Canons.⁶

3. Case Law and Statutory Authority

A. Decisions Generally Discussing the Role of the Judge

The cases interpreting the judicial role where unrepresented litigants are involved draw from the basic principles reflected in the Canons, requiring that judges remain impartial and neutral, while being fair and providing justice. Some cases interpreting these basic principles emphasize that unrepresented litigants must play by the same rule as represented parties, and caution that the judge may not play the role of advocate or attorney for the unrepresented litigant. Others suggest that judges must provide some measure of assistance to the unrepresented litigant to avoid a miscarriage of justice.⁷


⁵ Comments of ABA President Dennis W. Archer Jr., available online at: http://www.abanet.org/judicialethics/about.html (visited June 1, 2006).

⁶ Subsequent to the adoption of this memo, the ABA House of Delegates at its February 2007 meeting added a new comment to Rule 2.2: “It is not a violation of this Rule, however, for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.” The language continues a consistent trend to encourage judges to make reasonable accommodations to unrepresented litigants as a matter of fairness. See, http://www.abanet.org/judicialethics/ABA MCJC approved. pdf (Visited March 5, 2007).

⁷ For a summary of appellate decisions involving unrepresented litigants, see Judicial Techniques, supra note 4, 19-23 & 42-43.
“Uncertainty among trial judges about how to treat self-represented litigants is understandable given the mixed signals sent by appellate courts.”

Some commentators have organized the cases into competing visions of "strict" or "liberal" approaches in cases involving unrepresented litigants, with the strict approach emphasizing that unrepresented litigants will be treated no differently from represented ones, and the liberal approach urging trial judges to ensure fairness and therefore make reasonable accommodations for unrepresented litigants that do not prejudice the opposing party.

Other commentators attempt to reconcile the decisions, reading the cases to hold that courts should be lenient to both attorneys and self-represented litigants when appropriate to promote the goal of deciding cases on the merits, or synthesizing the holdings into a series of propositions, with the results varying based on whether "soft" or "hard" procedural bars, such as vacating defaults in contrast to statute of limitations, are at issue, but still with a goal of producing consistent outcomes for represented and unrepresented parties.

An effort to draw lessons from the cases is complicated further by two problems in analysis. First, the cases tend to recycle general language, without regard to the context or facts of the case. As a result, language uttered in the context of a criminal proceeding, where there is a constitutional right to appointed counsel, or an extreme case involving a vexatious plaintiff, is applied to other fact patterns without any analysis as to whether it is appropriate to do so. Thus, while one synthesis above focuses on the nature of the accommodation at issue, other relevant factors relate to the court, the nature of the proceeding and the understanding and capabilities of the litigants. Second, although most cases settle, the published decisions tend to focus on the judge’s role in either construing pleadings or conducting trials, providing very little guidance to daily tasks that occupy the attention of judges in many civil cases.

Over 25 years ago, one court concluded that “[t]he proper scope of the court’s responsibility to a pro se litigant is necessarily an expression of careful exercise of judicial discretion and cannot be fully described by specific formula.” As with the judicial canons, the governing cases fail to provide a clear vision of how active or passive

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10 *Reaching Out or Overreaching*, supra note 8 at 6.

11 *Judicial Techniques*, supra note 4, at 44-45.

12 Austin v. Ellis, 408 A.2d 784, 785 (N.H. 1979).
judges should be. Yet, despite the range of decisions, the words of one Illinois Appellate Court continue to ring true:

The heavy responsibility of ensuring a fair trial in ... a situation [involving a pro se litigant] rests[s] directly on the trial judge. The buck stops there....In order that the trial proceed with fairness...the judge finds that he must explain matters that would normally not require explanation and must point out rules and procedures that would normally not require pointing out.  

B. Small Claims Courts, Administrative Agencies and Problem-Solving Courts

Precedent from Small Claims Courts, administrative agencies and, more recently, the so-called “Problem-Solving Courts,” serves as an important reminder that impartiality does not require passivity on the part of judges. Like other judges, Small Claims Court Judges must remain impartial. Yet, Small Claims Court judges typically are also required to conduct trials in a manner best suited to discover the facts and secure substantial justice, assisting the litigant with the presentation of material, questions of law and the procedures to be followed.  

Administrative Law Judges (ALJ’s) in Social Security, welfare and unemployment benefits cases must also remain impartial. Yet, in Social Security cases, the ALJ’s have a “basic obligation to develop a full and fair record,” which “rises to a special duty when an unrepresented claimant unfamiliar with hearing procedures appears before him.”

\[\text{To satisfy this special duty, the ALJ must scrupulously and conscientiously probe into,}\]

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13 *Oko v. Rogers*, 446 N.E.2d at 661.

14 See, e.g., New York City Civil Court Act, §1804 [New York]; Unif. Small Claims R. Of the Mass. Trial Cts. 7(c)[Massachusetts]; In re Amendments to the Florida Small Claims Rules, 601 So. 2d 1201, 1209 (Fla. 1992)[Florida]; Ill. S. Ct. R. Ch. 110A, Rule 286(b)[Illinois].

15 See, e.g., 5 U.S.C. Sec. 556(b) (“The functions of presiding employees and of employees participating in decisions ... shall be conducted in an impartial manner.”).

16 In Massachusetts, for example, welfare hearings are “conducted by an impartial referee...” 106 C.M.R. sec. 343.110. See also, Goldberg v. Kelly, 397 U.S. 254, 271 (1970) (“And, of course, an impartial decision maker is essential”).

17 For example, Article 29 of the Massachusetts Declaration Of Rights, guaranteeing the right to have cases heard by impartial judges, applies to administrative agency officials as well. See, e.g., *Police Commissioner of Boston v. Municipal Court*, 368 Mass. 501, 507, 332 N.E.2d 901, 905 (1975); see generally, Alexander J. Cella, 38 *Massachusetts Practice: Administrative Law and Procedure*, Sec. 313, 585 (1986).

inquire of, and explore for all the relevant facts.” The obligation for administrative judges to provide extensive assistance to litigants extends beyond Social Security law, to areas such as welfare and unemployment benefits cases.

More recently, an array of “Problem-Solving Courts,” such as Drug Courts, Mental Health Courts, Domestic Violence Courts and Community Courts, have emerged in New York and across the country, creating new challenges—and modified roles for the judges who preside in those courts. In discussing New York’s experiment with the new courts, Chief Judge Judith Kaye discussed the interplay between the active judicial role and the need to remain impartial:

Gauging the fairness of problem-solving courts is a far more challenging task. ... Does it shake the foundation of the adversarial system or compromise courts’ ability to make fair and impartial decisions? ....

It should be clear that a judge's engagement with drug court defendants in no way diminishes or obscures the court's responsibility at all times to retain the role of impartial, independent decisionmaker and guardian of legal rights.

Whatever differences may exist between the Housing Courts and contexts of Small Claims Courts, administrative agencies and Problem-Solving Courts, the larger principle remains that judges may, and in certain contexts must, be active in assisting litigants without compromising impartiality.

C. Stipulations in New York City Housing Court

Decisional law in New York City housing cases allows judges to exercise their discretion to vacate stipulations that are unduly harsh or one sided, particularly where an

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19 Id., 708 F.2d at 1052.

20 See, e.g., 106 C.M.R. 343.450(A)(2)(describing the Powers and Duties of Hearing Officials in Massachusetts welfare benefits hearings as including the duty “[t]o assist all those present in making a full and free statement of the facts in order to bring out all the information necessary to decide the issues involved and to ascertain the rights of the parties”).

21 In Massachusetts unemployment hearings, for example, the hearing officer, called a “Review Examiner,” has obligations set forth at 801 C.M.R. 1.02. The specific obligations include: “2. [t]o assist all those present in making a full and free statement of the facts in order to bring out all the information necessary to decide the issues involved and to ascertain the rights of the Petitioner ... 3. [t]o ensure that all Parties have a full opportunity to present their claims orally, or in writing, ...; [and to] 10. Examine witnesses and ensure that relevant evidence is secured and introduced.” Id.

unrepresented litigant waives important rights. Relief may be granted to prevent injustice, upon a showing of good cause. A party’s lack of representation at the time of entry into the stipulation is a significant factor to be considered in determining whether good cause exists to vacate the stipulation. Unfairness includes a pro se tenant’s failure to assert a substantial defense to the landlord’s claims in the proceeding, particularly where substantial prejudice results.

If the controlling authority provides for the vacatur of one-sided, unfair and unduly harsh stipulations where unrepresented litigants are involved, the judges necessarily should not be approving such stipulations in the first place. Thus, a 1997 Administrative Notice (AN LT-10), applicable to the Housing Court, advised that “[n]o stipulation in which any party is pro se should be approved by the Court unless the Judge is convinced that a pro se litigant understands the terms of the stipulation and an allocation is conducted on the record.” The same Administrative Notice also provided that “[t]he judge should also ascertain if a pro se litigant’s claims or defenses are adequately addressed prior to so ordering any stipulation,” and that review of stipulations by court attorneys “should be in addition to the allocation.”

D. Understanding the Resistance to the Active Role

Before turning to the recent commentary that increasingly calls for a more active role for judges, it is important to acknowledge the resistance to that notion that emerges from some cases, reports and anecdotes. The New York County Lawyers’ Association’s Report from its October 2004 Conference captures the concern of the working group that judges not “cross the line” into advocacy, that they remain “evenhanded while performing a more active role,” and that the more active role be “consistent with the duty of impartiality.” These concerns mirror language in some cases warning that the judge

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26 See, e.g., 144 Woodruff Corp., v. LaCrate, supra note 25, at 958.


28 The New York City Housing Court in the 21st Century, supra note 27, at 16, 18.
may not play the role of advocate or attorney for the unrepresented litigant, practice law on their behalf or give legal advice.\textsuperscript{29} Other objections to the more active role expressed by judges include the opinion that assisting unrepresented litigants amounts to giving them a “free lunch,” that some unrepresented litigants will try to use their unrepresented status to a tactical advantage, and that steps to assist unrepresented litigants will increase the likelihood that they choose to bypass counsel even when they have the means to retain counsel.\textsuperscript{30} Supporters of the more active role worry that “judges who undertake more active oversight of pro se cases may face problems with reappointment.”\textsuperscript{31}

Each of these points deserves consideration in any initiative designed to support the more active role. However, not all of the concerns are rooted in concerns of judicial ethics. The concerns about litigants attempting to manipulate the system, bypass counsel and obtain a free lunch are policy considerations; whether they even are factually correct or, where valid, describe the exception rather than the rule in Housing Court, might be explored should the factual issues alarm those in a position to make policy. The concern from supporters about individual judges seeking reappointment is a strategy decision, and one that can be addressed by the adoption of protocols, removing the decision to play the active role from isolated judges.

The remaining concerns, while related to judicial ethics, relate to the interpretations of the general notions articulated in the canons and caselaw regarding impartiality, neutrality and partisanship. They merit serious attention in considering the implementation of the active role, but they raise no additional issues of judicial ethics from the ones fleshed out above. The question remains whether, and how, the active role can be implemented in a way that is consistent with the fundamental duties of impartiality and neutrality. The next two sections discuss recent authority supporting the conclusion that not only may the active judicial role be performed in an impartial manner, but that the failure to perform the active role might yield a partial system that is biased against unrepresented litigants.

4. **Commentary**

Over the past decade, a growing number of scholars have articulated the position that the need for judges to be impartial and fair requires them to play a more active role where unrepresented litigants are involved. The landmark volume, *Meeting the Challenge of Pro se Litigation*, produced in 1998 by the American Judicature Society (AJS) and State Justice Institute (SJI),

\textsuperscript{29} See, Engler, supra note 9, at 2013.

\textsuperscript{30} Id. at 2015; Jona Goldschmidt et al., Meeting the Challenge of Pro se Litigation: A Report and Guidebook for Judges and Court Managers 52 (1998)(hereinafter “Meeting the Challenge”).

\textsuperscript{31} The New York City Housing Court in the 21\textsuperscript{st} Century, supra note 27, at 16.
reported a wide range of practices among judges and the absence of general policies guiding the judges; the Report’s recommendations included that “judges should provide reasonable assistance to self-represented litigants in the courtroom and states should adopt judicial protocols to guide judges assisting self-represented litigants.” Professor Engler argued in an article published in 1999 that because the buck stops with the judge, and the judge bears the heavy responsibility for presiding over a fair proceeding, “the judge ... must be as active as necessary to ensure that the legal system’s promise of fairness and substantial justice is not frustrated by the litigant’s appearance without a lawyer.”

Dr. Jona Goldschmidt’s 2002 article rejects the notion that impartiality should be equated with passivity, and urges judges to be far more active in the adversary process. Writing on the same topic, Richard Zorza wrote that his core thesis is that our focus on the appearance of judicial neutrality has caused us improperly to equate judicial engagement with judicial nonneutrality, and therefore to resist the forms of judicial engagement that are in fact required to guarantee true neutrality.

Professor Deborah Rhode urges courts to assist unrepresented litigants as part of the goal of providing access to justice. Professor Russell Pearce of Fordham urges a model of the judge’s role closer to the inquisitorial system, if that is what is required to provide access to justice for those without counsel:

Rather than serving as a passive umpire, judges should be active umpires responsible for remediying process errors that would deprive the court of relevant evidence and arguments and that would ensure informed consent to settlements.

Beyond the commentary in law review articles, extensive guidance also appears in the 2005 publication of the AJS and SJI, titled Reaching Out or Overreaching: Judicial Ethics and Self-

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32 Meeting the Challenge, supra note 30, at 52-61, 110-11.
33 Engler, supra note 9.
36 Deborah L. Rhode, ACCESS TO JUSTICE, 81-86 (2004).
Represented Litigants. The document offers guidance at all stages of the proceeding, including explaining the process, instructing self-represented litigants regarding procedural actions, asking questions and handling evidence. The underlying premises of the recommended practices are that 1) the judge is more than a mere arbitrator, referee or moderator; 2) the judge can control the orderly presentation of evidence; 3) cases should be decided on the merits; and 4) the rules of procedure should work to do substantial justice. The document concludes:

Without raising reasonable questions about impartiality, judges should exercise discretion:

- To make equitable, procedural accommodations
- To provide self-represented litigants reasonable opportunity to have cases fully heard.

5. Resolutions, Best Practices and Guidelines

The more active role of the judge at trial and in the settlement process is consistent not only with the growing body of scholarly opinion that has emerged over the past decade, but with recent resolutions that generally call on the courts to insure meaningful access for unrepresented litigants in civil cases. In 2000, the Conference of State Court Administrators (COSCA) addressed the general question of the obligation to assist unrepresented litigants as follows:

The threshold question in determining how to respond is whether the courts have an obligation to address the needs of self-represented litigants at all. The answer should be yes.

The following year, the Conference of Chief Justices (CCJ) promulgated Resolution 23, titled "Leadership to Promote Equal Justice," which resolved in part to "remove impediments to access to the justice system, including physical, economic, psychological and language barriers...." In 2002, the CCJ and COSCA jointly issued Resolution 31, resolving that "courts have an affirmative obligation to ensure that all litigants have meaningful access to the courts, regardless of representation status."

Beyond the general language in the resolutions, specific guidance regarding settlement and at

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38 Reaching Out or Overreaching, supra note 8.

39 Id., at 89 (emphasis in original).


41 Resolution 23.

42 Resolution 31. The joint resolution also endorsed COSCA's Position Paper on Self-Represented Litigation. Id.
trial appears in the proposed Best Practices published by the AJS and SJI in Reaching Out or Overreaching.\textsuperscript{43} Regarding settlement, the Best Practices advise judges to encourage, but not coerce, settlement or mediation. Once a settlement is presented to the court for approval, judges should “engage in allocation to determine whether the self-represented litigant understands the agreement and has entered into it voluntarily”; this process includes determining “that any waiver of substantive rights is knowing and voluntary.”\textsuperscript{44}

Regarding hearings, the Best Practices first advise pre-hearing practices that include explaining the process and ground rules, explaining the elements and the burden of proof, explaining the kinds of evidence that can and cannot be considered, and trying to get all parties to agree to relaxed rules of procedure so the hearing can proceed informally.\textsuperscript{45} At the hearing itself, the proposed Best Practices advise judges to question witnesses when the facts are confused, undeveloped or misleading, follow the rules of evidence generally but use discretion and overrule objections on technical matters, not allow counsel to bully or confuse self-represented litigants and take other steps necessary to prevent obvious injustice.\textsuperscript{46}

The most recent guidance comes from the comprehensive Guidelines promulgated by Massachusetts in 2006.\textsuperscript{47} The Massachusetts Guidelines constituted the first new set of state guidelines protocols to appear in a decade, with Minnesota’s Protocols having been promulgated in 1996. The Minnesota Protocols focus exclusively on the hearing process, providing ten procedures for hearing officers to follow, including explaining the process, explaining the elements, explaining the burden of proof and the kinds of evidence that can and cannot be presented, and asking questions to obtain general information.\textsuperscript{48}

The Massachusetts Guidelines apply to all phases of the court’s operation. While the Guidelines, which are advisory, apply to all the courts in the state, the drafters recognize that the “issues and challenges presented by self-represented litigants may vary in different court departments” and judges, therefore “are encouraged to use the Guidelines in a way that best suits the needs of their court and the litigants before them.”\textsuperscript{49} Regarding pre-hearing interaction, the Guidelines encourage judges to make reasonable efforts to insure litigants understand the trial process, and

\begin{itemize}
    \item \textsuperscript{43} Reaching Out or Overreaching, supra note 8.
    \item \textsuperscript{44} Id., at 54 (Proposed Best Practices 25 & 26).
    \item \textsuperscript{45} Id., at 55 (Proposed Best Practices 27-30).
    \item \textsuperscript{46} Id., at 55 (Proposed Best Practices 34-38).
    \item \textsuperscript{47} Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants (April 28, 2006)(hereinafter “MA Guidelines”).
    \item \textsuperscript{48} For the text of the Minnesota guidelines, see Judicial Techniques, supra note 4, at 18.
    \item \textsuperscript{49} MA Guidelines, supra note 47, at 5.
\end{itemize}
authorize judges to explain the elements of claims and defenses as they would to a jury.\textsuperscript{50} At trial, judges may provide self-represented litigants with the opportunity to meaningfully present their cases, and may ask questions to elicit general information and obtain clarification; where all parties are self-represented, judges may have the parties stipulate to proceed informally.\textsuperscript{51} Finally, in approving settlements:

Judges should review the terms of settlement agreements, even those resulting from ADR, with the parties. Judges should determine whether the agreement was entered into voluntarily. If there are specific provisions through which a self-represented litigant waives substantive rights, judges should determine, to the extent possible, whether the waiver is knowing and voluntary.\textsuperscript{52}

The Commentary provides that when assessing whether a waiver of substantive rights is “knowing and voluntary,” the judge may consider how the phrase is used in the context of informed consent, i.e., the agreement by a person to a proposed course of conduct after receiving adequate information and explanation about the material risks and reasonably available alternatives to the proposed course of conduct.\textsuperscript{53}

6. **Recognizing the Limits of the Active Role**

While compelling authority supports the principle that Housing Court judges may, and should, be performing their roles more actively to maintain the court’s impartiality, it does not follow that there are no limits to the active role. It remains critical for judges to avoid taking steps that favor one side over the other, that put the judge in the role of lawyer or advocate for one side, and that prejudice one side or reflect partisanship for one side, whether represented or not. For these reasons, the New York County Lawyers’ Association’s Report from its October 2004 Conference acknowledged “the importance of the judge remaining evenhanded while performing the more active role in pro se cases.”\textsuperscript{54} The Massachusetts Guidelines, while fleshing out the more active role for judges, cautions that “[t]his does not mean that a judge must become a lawyer for a self-represented litigant.”\textsuperscript{55} The Guidelines capture the importance of explanations

\textsuperscript{50} Id., at 8 (Guideline 2.1 & Commentary).

\textsuperscript{51} Id., at 13-14 (Guideline 3.2 & Commentary).

\textsuperscript{52} Id., at 16 (Guideline 3.4).

\textsuperscript{53} Id., at 16 (Commentary to Guideline 3.4, citing ABA Model Rules of Professional Conduct 1.0(e)(2003)).

\textsuperscript{54} The New York City Housing Court in the 21st Century, supra note 27, at 16.

\textsuperscript{55} MA Guidelines, supra note 47, at 13 (Commentary to Guideline 3.1).
as a tool for judges performing the active role without appearing to favor one side:

To avoid the appearance of partiality, judges should explain that the questions are being asked to clarify testimony and that they should not be taken as any indication of the judge's opinion of the case. This is particularly important in cases involving one self-represented litigant and one represented party.\textsuperscript{56}

Trainings and other forms of guidance for judges become crucial tools to assist judges in employing techniques that allow for the more active role without the appearance of partiality.\textsuperscript{57} These points underscore the important role that perception plays in our sense as to what it means to be impartial, allowing us to recognize a growing trend toward accepting the more active role as an important component of maintaining impartiality.

The more routine [the more active] practices become, in all cases involving self-represented litigants and indeed most cases involving individual litigants regardless whether represented, the more likely they will be accepted and the less likely they might be construed as evidence of partiality.\textsuperscript{58}

7. Conclusion

This memorandum provides ample authority for the proposition that judges may play an active role in handling cases involving unrepresented litigants to avoid forfeiture of rights and allow unrepresented litigants meaningful access to the courts. For the most part, however, the authority speaks in terms of the discretion afforded to individual judges to play the active role. Simply restating the extent of an individual judge's discretion, however, will not respond to the problems currently facing the New York City Housing Court, as reflected in the New York County Lawyers' Association's recent Report on the New York City Housing Court.\textsuperscript{59} Those problems included:

1) the lack of information available to pro se's about their legal claims or defenses, compounded by their difficulties in "negotiating the system" to articulate or present such claims; and

\textsuperscript{56} Id., at 15.

\textsuperscript{57} See, e.g., Reaching Out or Overreaching, supra note 8 at 50; The New York City Housing Court in the 21st Century, supra note 27, at 17.

\textsuperscript{58} Reaching Out or Overreaching, supra note 8, at 50.

\textsuperscript{59} The New York City Housing Court in the 21st Century, supra note 27, at 12.
2) inconsistent or insufficient protocols for the Court's oversight of cases in which pro
se's have represented adversaries.\textsuperscript{60}

Unless and until the Court adopts and enforces protocols providing for an active role for the
judge both at trial and in approving settlements, the problems will persist.

\textsuperscript{60} /d., at 12.
Introduction

The unmet legal needs of the poor and middle-class in New York State and throughout the country are well documented. [FN2] Nearly three-fourths of low-income Americans and two-thirds of moderate-income Americans with identified legal needs either ignore their problem or try to resolve it without assistance. [FN3] For many of these individuals, timely legal help could prevent unemployment, eviction, or the failure of a small business. Despite this fact, legal services budgets continue to be cut and thousands of potential clients*1108 are turned away each year. [FN4] This occurs in New York State, which has the seventh highest poverty rate in the United States. [FN5] Legal services offices cannot meet the need of the indigent, and a sizable middle-income population cannot afford private attorneys. [FN6]

A legal right is meaningless without access to the judicial system. Civil justice leaders, therefore, have looked for new ways to deliver legal services including "unbundling."

Unbundled legal services is a practice in which the lawyer and client agree that the lawyer will provide some, but not all, of the work involved in traditional full service representation. Clients choose the legal assistance according to their needs and perform the remaining tasks on their own. Unbundling has been described as ordering "a la carte," rather than from the "full-service menu." [FN7] A client might hire a lawyer for trial representation, but not for court filings, discovery, and negotiations. Unbundled services can take many forms, including telephone, Internet, or in-person advice; assisting clients in negotiations and litigation; assistance with discovery; or limited court appearances. [FN8] For many clients, these limited engagements make a lawyer's services affordable.

Unbundled legal services is touted as a new concept, although lawyers have been providing it for years in estate planning and mediation. [FN9] Outside the courtroom, unbundled legal services are commonplace. Clients often seek a lawyer's advice before negotiating agreements, or ask a lawyer to draft a document based on an agreement reached without the lawyer's assistance, or bring an *1109 agreement prepared by an opposing counsel to a lawyer for review. In each of these scenarios, the lawyer is asked to perform a discrete legal task, rather than handle the entire matter. Business lawyers have provided unbundled services to sophisticated clients for decades. These clients are often either repeat players with some knowledge of the law [FN10] or in-house
lawyers who require the specialized expertise of outside counsel. The concept is more recent in the litigation context. [FN11] A variety of players provide unbundled services, including pro se clinics, community education programs, and some courthouses. [FN12]

Unbundling has received a great deal of attention. Everyone concerned with access to justice is looking at it, talking about it, holding a conference about it, or implementing it. In October 2000, the Maryland Legal Assistance Network convened a national conference on unbundled legal services, with attendees from thirty-four states, the District of Columbia, Canada, and Russia. [FN13] The American Bar Association's Standing Committee on the Delivery of Legal Services has an "unbundled" website to educate lawyers, court administrators, and the media. [FN14] In Arizona, at the Maricopa Self-Service Center, litigants can consult a list of attorneys who provide unbundled legal services. [FN15] In May 2001, the American Bar Association's Ethics 2000 Commission submitted its proposed changes to the Model Rules of Professional Conduct, which will clarify and encourage the use of unbundled legal services. [FN16] Although changes to the rules will not become binding until they are *1110 adopted by the individual states, many states are looking into changing their rules. [FN17] In fact, Maine and Colorado have already adopted such changes. [FN18]

Unbundled legal services are still relatively unknown in New York. In a statewide survey of New York judges, conducted in 2001, approximately seventy-five percent of the responding judges were unfamiliar with unbundled legal services. [FN19] New York, usually a forerunner in access to justice circles, [FN20] has only recently begun to examine the issue. In 1996, a New York State Bar Association commission recommended that the Bar Association explore segmented legal services. [FN21] Although the House of Delegates approved the commission's report and authorized further exploration,*1111 [FN22] the commission has not revisited the issue. [FN23] The New York State Bar Association Legal Aid Committee has, however, recently formed a subcommittee to look into unbundled legal services. [FN24] In addition, the New York City Bar Association is starting to look into the topic. [FN25] In September 2001, the New York State Unified Court System sponsored its first Access To Justice Conference, which included an unbundling workshop. [FN26] Many of New York State's judges, court administrators, bar leaders, academicians and advocates joined together to exchange ideas and develop partnerships.

The bench and bar in New York can expect to hear a lot more about unbundled legal services in the future. The debate surrounding its widespread use focuses on several issues. Advocates believe that unbundling increases access to justice, promotes efficiency in the courtroom, and furthers business opportunities for attorneys. [FN27] Critics contend that unbundling does not extol any of these virtues, but rather raises malpractice and ethical concerns. [FN28] Untying the bundle in New York State requires a cautious and considerate balancing of the pros and cons.

I. Increased Access to Justice

Proponents of unbundling view it as a sound mechanism to provide poor clients greater access to the justice system. [FN29] Advocates of unbundling recognized that providing legal assistance through a neighborhood law office is not adequate. [FN30] Segmentated legal assistance would allow these legal services offices to assist more clients by bypassing slow legal tasks and time intensive administrative *1112 functions, such as multiple intake interviews and considering whether the client fits within financial parameters. [FN31]

Segmented legal assistance would also allow moderate-income clients to afford various services provided by private attorneys. Unbundling would improve the client's ability to obtain legal advice, help with drafting legal documents, limited representation, or other legal services. [FN32] Access to affordable legal assistance may encourage those who would otherwise forego an opportunity to present their claims in court and exercise their
right to be heard.

II. Efficient Justice

Some advocates contend that a litigant is more likely to successfully complete a matter with limited help than with none at all. [FN33] The unbundled services of an attorney may be just the boost a self-help litigant needs. The availability of segmented legal services may help pro se litigants overcome their unfamiliarity with procedural and evidentiary litigation rules. [FN34] Unbundled legal services benefit the court system because educating and assisting more pro se litigants about civil procedure and evidentiary rules reduce demands on court personnel. [FN35]

This view is not shared by all members of the judiciary. A number of New York State judges have expressed concern that unbundled legal services in the courtroom would place an unfair burden on the court and cause greater delay. [FN36]

Some judges assert that pro se litigants will not follow through properly and will miss deadlines due to misunderstandings or poor communication. [FN37] Other judges feel that litigants will be confused over the lawyer's limited role. [FN38] A number of judges believe pro se litigants will not be able to understand or articulate claims and defenses prepared by an attorney not present at trial. [FN39]

United States senior district court judge John L. Kane, Jr., one of the more outspoken opponents of unbundling, believes that the "insurmountable problem" for a pro se trial litigant is the "lack of competence in understanding and using the rules of evidence." [FN40] "It is ludicrous," Kane writes, "to suggest that in the present system, a layperson armed with a few discrete sticks from the advocate's bundle can emerge from the trial thicket unscathed or that others will not be put to unnecessary expense." [FN41] While most commentators are more reserved than Judge Kane, there are many who question the effectiveness of segmented legal assistance. The concern is that clients may be left partially prepared, confused, and without enough assistance to make informed choices. [FN42]

III. Client Empowerment

Forrest S. Mosten, the California attorney credited with coining the term "unbundled legal services," believes that clients often feel empowered by the unbundled process. [FN43] "They feel that they can control their own destiny with the comfort of knowing that the lawyer can be brought in for future full-service representation if the client so chooses." [FN44] Through their enhanced role in resolving their own legal problems, clients may be better able to avoid future problems and address issues in their lives more independently.

Opponents of unbundling see the empowerment theory as a justification for providing limited legal assistance. [FN45] Self-representation is foisted on poor people, "who have more than enough demands on their time and energy without being told that their denial of legal service is really an opportunity for empowerment." [FN46]

*1114 IV. Lawyer Opportunity

Some proponents of unbundled legal services stress the business opportunities such services provide members of the bar. As clients increasingly represent themselves, turn to non-lawyer providers, or just live with their legal problems, [FN47] unbundled legal services provide a tremendous opportunity to reach this otherwise unrepresented market. [FN48] Some argue that rapid developments in technology, particularly the Internet,
make unbundled legal services a practical alternative to traditional representation. [FN49] Telephone hotlines, web pages, and brief e-mail advice reduce geographical barriers that otherwise limit access to legal assistance. [FN50] Unbundled legal services may also appeal to lawyers who find it intellectually rewarding to concentrate on resolving selected areas of a legal problem. [FN51]

Lawyers who are resistant to unbundling may fear it would require them to expand their pool of clients and convert to a high-volume practice. [FN52] For example, a lawyer who usually provides one hundred litigants with full service representation each year may need to represent several hundred litigants each year in unbundled cases to generate an equivalent amount of revenue. [FN53]

V. Traditional Lawyering: Malpractice and Ethics

Lawyers tend to resist providing piecemeal legal services to their clients. They are concerned about how such representation fits within the traditional role of the lawyer. [FN54] Attorneys may hesitate to relinquish control of their cases. They may worry about boosting their malpractice risks when they perform only those parts of a job that the client asks them to. If the client makes a bad decision and something goes wrong, attorneys are fearful that they will end up being scapegoats in a lawsuit. [FN55] Forrest S. Mosten, Esq., who has managed a thriving "unbundled" practice for many years, argues that there is a lower risk of malpractice for lawyers who perform discrete tasks because fee disputes are minimized where lawyer and client have less opportunity for disagreement. [FN56]

According to Mosten, "Malpractice exposure exists for lawyers who render incomplete advice or who fail to give needed advice in areas ancillary to the client's presenting a problem." [FN57] In Nichols v. Keller, [FN58] the California Court of Appeals held that the plaintiff had a cause of action for malpractice. Despite the plaintiff's limited contract with his lawyer in pursuing his workman's compensation claim, the court found malpractice where the attorney did not advise the plaintiff of the availability of third-party claims. [FN59] In finding a duty of care, the court stated that "A trained attorney is more qualified to recognize and analyze legal needs than a lay client, and, at least in part, this is a reason a party seeks out and retains an attorney to represent and advise him or her in legal matters." [FN60]

Substantial ambiguity exists regarding the ethical issues pertinent to providing unbundled legal services that may lead to increased exposure to malpractice. [FN61] Unbundled legal services raise questions concerning the existence and adequacy of client autonomy, confidentiality, competence, continuity of representation, communication with represented parties, and court. [FN62] An attorney engaging in unbundled legal representation is treading on uncertain ethical territory and may be committing malpractice. [FN63] especially where the scope of the representation is not clear and the client and lawyer share different expectations about the lawyer's responsibilities. [FN64]

*1116 Unbundling advocates contend that the malpractice risk can be minimized if the client signs a limited representation agreement. [FN65] Attorneys can prepare a carefully worded engagement letter outlining exactly what the lawyer has been hired to do, what services will be performed, and what issues the lawyer will address. [FN66] Such an engagement letter should clearly identify what the client should handle and disclose how difficult the client's portion of the work will be. [FN67] When the unbundled service is concluded, the attorney should send the client a disengagement letter stating that the representation is over, identifying any remaining work that the client must do, including any deadlines and explaining the consequences if the client fails to follow through. [FN68] As contractual parties, the lawyer and client should be able to determine the scope of their relationship.
Advocates further stress that proper case and client screening minimize malpractice exposure. [FN69] When faced with ethical dilemmas, the lawyer must use his or her best judgment to determine whether to offer unbundled services. The lawyer should question whether the conduct is legally permissible and if so what he or she ought to do. [FN70] If the lawyer reasonably believes that the client can adequately represent himself or herself in the balance of the matter and understands the limited scope of the representation, then ethical issues should not be a problem. [FN71]

VI. Ghostwriting

The ethics of unbundled legal services is most often questioned when attorneys draft court documents for clients who represent themselves in court, and the court papers do not reveal that an attorney assisted in their preparation. [FN72] This practice is known as *1117 ghostwriting. Ghostwriting assistance can differ greatly by degree of attorney involvement: it can range from drafting a single complaint to behind-the-scenes writing throughout the proceeding. Nonetheless, the attorney never technically enters an appearance. Attorneys who have ghostwritten pleadings for pro se litigants have been chastised or reprimanded by courts that have labeled such conduct as unethical and improper. [FN73]

One of the chief arguments raised by opponents of ghostwriting is that it is unfair in light of the special leniency afforded pro se pleadings in court. [FN74] Pro se pleadings are generally held to a less stringent standard than formal pleadings drafted by lawyers. [FN75] This preferential treatment is meant to compensate for the pro se litigant's lack of counsel. A litigant filing an apparent pro se pleading receives the unwarranted advantage of a liberal standard, while the represented adversary's submissions are held to more demanding scrutiny. [FN76] Indeed, in a recent survey of New York State judges, approximately forty percent said that they would treat self-represented litigants differently if they knew that an attorney drafted their documents. [FN77] On a motion to dismiss for failure to state a claim, for example, pro se complaints are often construed to give the facts their maximum effect and to even find causes of action that may not have been specifically delineated. Pro se litigants are *1118 often granted wide leeway to amend deficient complaints. Courts are frequently more tolerant of substantial procedural errors, more likely to grant adjournments, and less likely to impose monetary sanctions for frivolous complaints with respect to self-represented litigants. [FN78] As one district court judge stated, ghostwriting "causes the court to apply the wrong test in its decisional process," leaving the opposing party at a distinct disadvantage. [FN79]

Another argument against unbundled ghostwriting is that it violates various rules of professional conduct, such as the duty of candor toward the court, the duty of fairness to the opposing party, and the duty to avoid bringing non-meritorious claims. [FN80] According to one commentator, "Agreeing to author, but not sign, pleadings undoubtedly creates an attorney-client relationship and requires that the attorney fulfill all the duties normally owed to a client, even though the scope of representation is limited." [FN81] One court has said that ghostwriting is "ipso facto lacking in candor." [FN82] The American Bar Association Standing Committee on Ethics and Professional Responsibility has stated that whether or not the lawyer's actions are appropriate depends on the extent of the ghostwriter's participation. An undisclosed lawyer who renders extensive assistance to a pro se litigant is involved in the litigant's misrepresentation contrary to the Model Code of Professional Responsibility DR 1-102(A) (4), which provides that a lawyer shall not, "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." [FN83]

Ghostwriting has been addressed by two ethics opinions in New York. The first, issued by the New York City Bar Ethics Committee in 1987 found that ghostwriting inappropriately affords a party the "deferential or preferential treatment" customarily given other pro se litigants. [FN84] As a solution, the opinion suggests that the ghostwriting attorney endorse the pleading with the words, "Prepared by Counsel." [FN85] The opinion does
not require the disclosure of the attorney's identity and requires no disclosure if the attorney *1119 provided only some legal advice and did not draft any court papers. [FN86] The opinion requires disclosure of legal assistance only if the attorney rendered "active and substantial assistance." [FN87]

The New York State Bar Association Committee on Professional Ethics issued an opinion on ghostwriting in 1990. [FN88] In accord with the New York City Bar, the opinion holds that the "preparation of a pleading, even a simple one, for a pro se litigant constitutes 'active and substantial' aid requiring disclosure of the lawyer's participation." [FN89] However, unlike the City Bar, the New York State Bar opinion requires the disclosure of the ghostwriting attorney's identity. [FN90]

The New York State Bar opinion also recognizes that the provision of advice and counsel, including the preparation of pleadings to pro se litigants can be an ethically acceptable practice if the attorney complies with the Code of Professional Responsibility. [FN91] Disclosing legal assistance prevents misrepresentation and ensures fairness to opposing counsel and candor to the court. [FN92] Ghostwriting creates an attorney-client relationship and requires that the attorney act competently, diligently and zealously, even though the scope of the representation is limited. [FN93] Most importantly, no pleading should be drafted for a pro se litigant where there is no merit to the claim and the pleading cannot be prepared in good faith. [FN94]

Courts have also found that it is unlawful for an attorney not to sign a pleading the attorney has substantially prepared, as it violates Rule 11 of the Federal Rules of Civil Procedure [FN95] and New York State's equivalent statute, section 130-1.1(a) of the Rules of the Chief Administrator, which provide that an attorney's signature constitutes a certification that the submitted court papers are not frivolous. [FN96] Opponents of ghostwriting contend that an attorney's*1120 failure to sign pleadings and other court documents undermines the purpose of signature certification requirements, because attorneys bypass their obligations to represent to the court that every document prepared is well grounded in fact and law. [FN97] Who should the court sanction when the complaint proves to be legally or factually frivolous? Ghostwriting pleadings for a pro se litigant has been condemned by one court as "both unethical and contemptuous, a deliberate evasion of the responsibilities imposed on attorneys by Federal Rule of Civil Procedure 11." [FN98]

Advocates of unbundling argue that ghostwriting does not violate Rule 11 [FN99] and New York State's equivalent statute. [FN100] The language of these rules provide that an attorney's signature is a certification that the submitted court papers are not frivolous, not that an attorney must sign every pleading he or she has had a hand in preparing. [FN101] In addition, certification is meant to ensure that every court document is well grounded in fact and law. [FN102] If a document turns out to be frivolous and the court wishes to sanction a party, it can require that the identity of the ghostwriting attorney be revealed. [FN103]

A final argument against ghostwriting is that it circumvents civil practice laws and rules regarding attorney withdrawal. [FN104] In New York State, pursuant to CPLR section 321(b), an attorney must first seek leave of court by order to show cause for permission to withdraw as counsel. [FN105] The purpose of this and similar rules is to "provide for communication between the litigants and the court, as well as [to] ensure[e] that the court is able to fairly and efficiently administer the litigation." [FN106] When an attorney never formally enters an appearance, the attorney need not seek leave to withdraw, thus evading the court's rules concerning withdrawal with leave of court. [FN107]

*1121 attorneys are understandably wary of unbundled ghostwriting. A judge may demand that the attorney come to court, if the judge learns that the attorney drafted the pro se litigant's court papers. [FN108]

Conclusion: Unbundling the Bundle in New York State

The concerns that unbundled legal services cannot be ethically implemented and can lead to malpractice are valid. The practical reality, however, is that traditional lawyering is not giving low and middle-income people access to justice. Lawyers are also increasingly vulnerable in the marketplace as legal consumers look elsewhere for their needs. Both lawyers and clients need alternative delivery methods for legal assistance. "Untying the bundle" can be beneficial for New York, if certain ethical and malpractice barriers are removed, and changes to New York State's ethical code, court rules, and civil practice laws are implemented.

To lower the risk of malpractice exposure, the New York State legislature can approve a model retainer agreement for the use of unbundled legal services. [FN109] Insurance companies can rewrite malpractice policies to specifically cover the practice of unbundled law. [FN110] Forrest S. Mosten, [FN111] suggests granting civil immunity to lawyers who are sued for not performing tasks outside the scope of a legislatively approved discrete task engagement letter agreement signed by the client. [FN112] Since statutory immunity may be extreme, courts can give greater weight to a limited engagement letter signed by the client when considering a claim for malpractice.

None of the ethical concerns are insurmountable if the lawyer conducts the unbundled representation properly. To work well, the courts, lawyers, and clients should understand from the outset that attorney involvement is limited. Providers of unbundled legal services must then determine if unbundling is appropriate in relation to the complexity of the matter. They must assess each client's experience and sophistication on a case-by-case basis. The mere fact that legal assistance is limited cannot justify disregarding ethical standards of attorney conduct. At the same time, the Code of Professional Responsibility needs to clarify the ethical requirements when a client and lawyer contract for representation limited in *1122 scope. It must be made clear that a lawyer's duties of competence and diligence are still required, though limited to the small piece of the representation and not extending to every ancillary issue.

In addition, New York State's ethical requirement of candor to the court should be made clear with respect to disclosing legal assistance when ghostwriting. The ethical concerns surrounding the ghostwriting of litigation papers should not preclude unbundled representation. Both the New York City Bar and New York State Bar ethics opinions recognize that ghostwriting furthers the lawyer's duty to meet the legal need of the public. [FN113] Once ghostwriting assistance is revealed to the court and opposing counsel, whether or not the identity of the ghostwriting attorney is revealed, the court can moderate any possible lenient reading of the pro se's documents to avoid unfairness. [FN114] As the New York State Bar Committee stated, "the creation of barriers to the procurement of legal advice by those in need and who are unable to pay in the name of legal ethics ill serves the profession." [FN115]

Accordingly, the bar must be encouraged to offer unbundled legal services to litigants by addressing justified concerns. The legislature and the chief administrative judge of New York State should consider enacting a number of changes to the CPLR and court rules. Disclosure that an attorney has drafted a court document whenever the attorney has rendered "active and substantial assistance," seems to be necessary. [FN116] However, the New York State legislature should make it clear that disclosing that counsel has prepared a pleading does not constitute an entry of an appearance. Section 321(b) of the CPLR [FN117] should be amended to clarify that attorneys do not enter an appearance when they help prepare documents submitted to court. Therefore, they need not seek leave for permission to withdraw as counsel when the limited representation is concluded. [FN118] The rules of withdrawal also need to be clear that *1123 when an attorney appears in court to perform limited tasks pursuant to an agreement with the client, the attorney may withdraw from the case when the limited tasks have been completed. In addition, the rules should be amended to permit an attorney to enter a limited appearance pursuant to a written agreement with the client. Finally, Rule 130 of the NYCRR [FN119]
should be modified to allow for a limited representation signature certification by the attorney. [FN120]

“If justice is to be practically available for all, if the litigation is not to become literally ‘the sport of kings,’ unbundling legal services must apply to [sic] litigation services, too.” [FN121] Judges must be restricted from commanding the revelation of a ghostwriting attorney’s identity in order to require the appearance and representation of a pro se litigant because it may assist the court or speed proceedings along. Similarly, judges must be precluded from keeping an attorney in the case, once his or her limited role has been completed. More importantly, the court system cannot view the self-represented litigant who has had limited legal assistance in the same light as a fully represented litigant. Limited assistance is less than full representation. Once the unbundled legal service is completed, there is no guarantee that the self-represented litigant understood the advice or is capable of following it through. [FN122]

*1124 Some access to justice advocates are concerned that clients who receive unbundled services may not be getting the help they need to get the best results. Whether the recipients of unbundled legal services are able to accomplish their goals is difficult to assess, given the limited data available. [FN123] Unbundling may indeed establish lower standards of representation for low-income individuals. [FN124] However, the practical reality is that as funding for traditional legal services continues to dwindle and fall short of demand, clients must assume the inevitable risks entailed in not being fully represented, particularly in court. “A better-educated pro se litigant may still fare better if she were represented by counsel, but the alternative—leaving the litigant in total ignorance—is clearly much worse, for both the litigant and the court.” [FN125]

To encourage ethical and effective unbundling in New York State, model retainer agreements must be approved for discrete task representation. Changes should be made to our ethical code, disciplinary rules, and court rules to permit unfettered unbundling. The New York State Bar Association should list unbundled law as a practice area and provide an attorney referral service for lawyers who perform unbundled legal services. Ethical training should be provided for attorneys who wish to provide unbundled legal services. Though not a complete cure-all for lack of access to our justice system, unbundling certainly has medicinal possibilities.

[FN1]. Justice Fern Fisher-Brandven is the Administrative Judge of the Civil Court of the City of New York. Rochelle Klemper is the court attorney to Justice Fern Fisher-Brandven.


[FN2]. Susan R. Martyn, Justice and Lawyers: Revising the Model Rules of Professional Conduct, 12 Prof. Law. 20, 21 (2000) (stating that studies for the past thirty years have consistently found that only about one in five low-income persons with legal problems receive legal assistance); Roy W. Reese & Carolyn A. Eldred, ABA, Legal Needs Among Low-Income and Moderate-Income Households: Summary of Findings from the Comprehensive Legal Needs Study 22 (1994) (surveying low and moderate-income households in 1992 to assess their legal needs); Russel Engler, And Justice for All-Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks, 67 Fordham L. Rev. 1987 (1999) (discussing barriers faced by represented litigants inside and outside the courthouse); William Hornsby, Improving the Delivery of Affordable Legal Services Through the Internet: A Blueprint for the Shift to a Digital Paradigm, Tech. & Legal Prac. 1, 2 (Nov. 1999), available at 20hornsby.pdf (“The unmet legal needs of consumers are well documented and tragic.”).
[FN3]. Reese & Eldred, supra note 2, (citing the reasons given for not consulting an attorney when needed including the beliefs that legal assistance would not help, the cost, that the problem was not serious enough or legal, the desire to avoid confrontation, and the desire to handle the problem on one's own).

[FN4]. See Mary Helen McNeal, Redefining Attorney-Client Roles: Unbundling and Moderate-Income Elderly Clients, 32 Wake Forest L. Rev. 295, 297-98 (1997); see also Legal Servs. Corp., LSC Statistics: Annual LSC Appropriations 1980-2001, at http://www.lsc.gov (last visited Jan. 18, 2001). In 1981, the annual Legal Services Corporation budget was around $320,000,000. In 2001, the annual LSC budget was at most $330,000,000. Id. The budget, inadequate at inception, has not kept current with inflation and the cost of living. Id.


[FN7]. Dianne Molvig, Unbundling Legal Services Similar to Ordering a la Carte, Unbundling Allows Clients To Choose From a Menu the Services Attorneys Provide, Wis. Law., Sept. 1997, at 10.


[FN10]. McNeal, supra note 4, at 334.


[FN14]. A list of articles, books, and other materials related to unbundled legal services can be found at http://www.abanet.org/legalservices/delunbund.html.


[FN16]. Margaret Colgate Love, Update on Ethics 2000 Project and Summary of Recommendations to Date, Prof. Law., Winter 2000, at 2. The Commission on Evaluation of the Rules of Professional Conduct conducted a four year comprehensive study before submitting its final report. Id. at 2. Any changes to the rules will not
become effective until adopted by the ABA House of Delegates. Id.


[FN18]. See amendments to the Maine Bar Rules 3.4(i), 3.5(a)(4), 3.6(a)(2), 3.6(f), & 3.4(j) (effective July 1, 2001) (Docket No. SJC-51) and amendments to the Maine Rules of Civil Procedure Rule 3(b) & Rule 11 (effective July 1, 2001) (Docket No. SJC-11); changes to the Colo. RPC and C.R.C.P, effective July 1, 1999; see also Raymond P. Micklewright, Discrete Task Representation a/k/a Unbundled Legal Services, 29 Colo. Law. 5, 11 (2000). The Colorado Supreme Court rules permitting unbundled legal services in litigation matters are not applicable in the United States District Court for the District of Colorado. The district court issued Administrative Order 1999-6 on June 30, 1999, stating that the changes are not consistent with their views concerning the ethical responsibilities of members of the federal bar. Amended Administrative Order 1999-6 was issued on April 10, 2000. Id.

[FN19]. Judicial Survey: Unbundled Legal Services (July-Aug. 2001) [hereinafter Judicial Survey] (on file with the authors in the Civil Court of the City of New York) (compiling results from an anonymous survey conducted by Justice Fern Fisher-Brandven of 150 judges within New York State from all courts).

[FN20]. Chief Judge Judith S. Kaye has endeavored to increase equal access to the justice system. For example, in May 1997, the Administrative Board of the Unified Court System adopted a resolution urging every attorney to provide at least twenty hours of pro bono legal services annually and to contribute financially to organizations that provide legal services to the poor. In October 1997, Chief Judge Kaye established a Legal Services Project to identify funding sources for civil legal services programs. After months of investigation, the project recommended that the legislature establish an access to justice fund and transfer $40 million each year to that fund from the abandoned property fund. In June 1999, Chief Judge Kaye and Chief Administrative Judge Jonathan Lippman announced the appointment of the Honorable Juanita Bing Newton to the newly created position of deputy chief administrative judge for justice initiatives in an effort to bring statewide leadership to the task of ensuring access to justice for all New Yorkers.


[FN23]. Telephone Interview with Frank M. Headley, Jr., Esq., chair, Commission on Providing Access to Legal Services for Middle Income Consumers (Oct. 5, 2001).

[FN24]. Telephone Interview with Alan S. Harris, Esq., president and chief executive officer of the Legal Aid Society of Rochester (Aug. 2, 2001).


[FN26]. The workshop was entitled Unbundled Legal Services: Protecting Rights for Low and Middle Income Consumers. The workshop was moderated by Hon. Stephen Crane, along with Ayn Crawley, Esq., Frank M.
Headley, Jr., Esq., and William Hornsby, Esq. on the panel.

[FN27]. See infra notes 29-53 and accompanying text.

[FN28]. See infra notes 54-71 and accompanying text.

[FN29]. Rothermich, supra note 6, at 2689.

[FN30]. Houseman, supra note 12.

[FN31]. Id.


[FN33]. Id.

[FN34]. Micklewright, supra note 18, at 6. Pro se litigants save attorney fees, but often give away valuable legal rights without ever knowing it. Id. at 5.


[FN37]. Id.

[FN38]. Id.

[FN39]. Id. (according to one judge, "[F]ew people are capable of adequately representing themselves in a truly contested matter.").


[FN41]. Id. at 16.

[FN42]. See Engler, supra note 2, at 2005-06; McNeal, supra note 4, at 333; McNeal, supra note 11, at 356.

[FN43]. Forrest S. Mosten, a Los Angeles attorney, is also the author of Unbundling Legal Services: A Guide to Delivering Legal Service a la Carte, published by the ABA Law Practice Management Section, and the president of Mosten Mediation Centers. Widely regarded as a trailblazer in unbundled legal services, Mosten is sometimes called the "father of unbundling." In addition to writing books and articles on the topic, he is one of the first attorneys to put unbundling into practice, and to run centers across the country that implement unbundling. See http://www.mostenmediation.com for a description of these centers.

[FN44]. Mosten, supra note 8, at 430.


[FN46]. Id. (citing Elizabeth McCulloch, Let Me Show You How: Pro Se Divorce Courses and Client Power, 48 Fla. L. Rev. 481, 491 (1996)).

[FN48]. Hornsby, supra note 2, at 4.


[FN50]. Hornsby, supra note 2, at 15.

[FN51]. McNeal, supra note 11, at 352.

[FN52]. Hornsby, supra note 2, at 4.

[FN53]. Id.


[FN56]. Id.


[FN59]. See id.

[FN60]. Id. at 609.

[FN61]. Hornsby, supra note 2, at 4.

[FN62]. Stevens, supra note 54, at 25.

[FN63]. McNeal, supra note 11, at 354; see also McNeal, supra note 4, at 307 (arguing that technically no formal relationship exists between malpractice and violation of the ethical provisions, but noting that courts are increasingly willing to recognize that violations of ethics codes are relevant in malpractice cases).

[FN64]. Stevens, supra note 62, at 25.


[FN66]. Stevens, supra note 62, at 27.

[FN67]. Id.

[FN68]. Michaelis, supra note 65, at 36.

[FN69]. See McNeal, supra note 4, at 336; Michaelis, supra note 65, at 35; Stevens, supra note 54, at 27. These
authors provide lists of questions to ask when deciding whether unbundling is appropriate in a particular case.

[FN70]. McNeal, supra note 4, at 303; Mickelwright, supra note 18, at 7.

[FN71]. Stevens, supra note 54, at 27; Vauter, supra note 15, at 1688.

[FN72]. See Carol A. Needham, Permitting Lawyers to Participate in Multidisciplinary Practices: Business as Usual or the End of the Profession as we Know it?, 84 Minn. L. Rev. 1315, 1334-35 (2000) (stating that ghostwriting can be an ethical problem associated with the unbundling of legal services); Rothermich, supra note 6, at 2689.


[FN78]. Laremont-Lopez, 968 F. Supp. at 1078; Rothermich, supra note 6, at 2699.


[FN80]. Rothermich, supra note 6, at 2697.

[FN81]. Luce, Jr., supra note 74.


[hereinafter City Bar Opinion].

[FN85]. Id.

[FN86]. Id.

[FN87]. Id.

[FN88]. Committee on Prof'l Ethics, N.Y. State Bar Ass'n, Opinion 613 (1990) [hereinafter State Bar Opinion].

[FN89]. Id.

[FN90]. Id.

[FN91]. Id.

[FN92]. Id.

[FN93]. Id.

[FN94]. Id.


[FN97]. Luce, Jr., supra note 74.

[FN98]. Clarke, 955 F. Supp. at 598.

[FN99]. Luce, Jr., supra note 74.


[FN101]. Luce, Jr., supra note 74.


[FN103]. Luce, Jr., supra note 74.


[FN107]. Id.
[FN108]. McNeal, supra note 4, at 301.


[FN110]. Molvig, supra note 7, at 49.

[FN111]. See supra note 8, 43, and accompanying text.

[FN112]. Mosten, supra note 57, at 17.

[FN113]. See City Bar Opinion, supra note 84; State Bar Opinion, supra note 88, at 5.

[FN114]. Luce, Jr., supra note 74; Rothermich, supra note 6, at 2711.


[FN116]. See id.


[FN118]. C.P.L.R. Section 321 presently does not contemplate a limited appearance. The section requires an attorney to either file a consent to change attorney, or seek leave to withdraw by motion if the client does not consent. N.Y. C.P.L.R. § 321(b) provides as follows:

  Change or withdrawal of attorney. (1) Unless the party is a person specified in section 1201, an attorney of record may be changed by filing with the clerk a consent to the change signed by the retiring attorney and signed and acknowledged by the party. Notice of such change of attorney shall be given to the attorneys for all parties in the action or, if a party appears without an attorney, to the party.

  (2) An attorney of record may withdraw or be changed by order of the court in which the action is pending, upon motion on such notice to the client of the withdrawing attorney, to the attorneys of all other parties in the action or, if a party appears without an attorney, to the party, and to any other person, as the court may direct.


[FN120]. Rule 130 currently does not provide for limited representation or ghostwriting. It states as follows:

  (a) Signature. Every pleading, written motion, and other paper, served on another party or filed or submitted to the court shall be signed by an attorney, or by a party if the party is not represented by an attorney, with the name of the attorney or party clearly printed or typed directly below the signature. Absent good cause shown, the court shall strike any unsigned paper if the omission of the signature is not corrected promptly after being called to the attention of the attorney or party.

  (b) Certification. By signing a paper, an attorney or party certifies that, to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of the paper or the contentions therein are not frivolous as defined section 130-1.1(c) of this Subpart.

[FN121]. Luce, Jr., supra note 74 (citing Colo Bar Ass'n, Op. 101 (1998)).

[FN122]. Engler, supra note 2, at 2006-07.

[FN123]. McNeal, supra note 11, at 356 (citing to the limited data available, an evaluation of the University of
Maryland School of Law’s Pro Se Family Law Clinic and a study in housing court by Professor Gary Blasi).

[FN124]. Id. at 344-45 (stating that unbundling may encourage a natural evolution toward dual standards of ethics and justice for the poor and the rich).


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ETHICAL ISSUES RAISED BY ADVISING UNREPRESENTED ADVERSARIES

By Raun J. Rasmussen

The Housing Court program proposed by Chief Justice Judith S. Kaye promises to bring the most dramatic changes to the structure of Housing Court since it was created in 1972. [FN1] The program is designed to provide "modern technology and services" and has been described as a "set of operational initiatives that will bring modern and efficient case management" to the Housing Court. [FN2]

While the program acknowledges that the plight of unrepresented litigants, approximately 90 percent of the tenants who appear in Housing Court, has made special demands on the administration of justice, the problems these litigants face have less to do with the court's lack of efficiency than they do with one of the most fundamental interactions that occurs there: that between a lawyer and an unrepresented adversary.

Many litigants in Housing Court are tenants who although working do not earn enough to afford a lawyer, but earn too much to be eligible for Legal Aid or Legal Services representation. It is common for these tenants, attempting to negotiate the system on their own, to be approached before they appear before the judge by the landlords' attorneys. The lawyers attempt to negotiate agreements between the parties in which tenants usually agree to some kind of payment schedule in return for a promise of apartment repairs some time in the future.

Tenants, eager to be out of court and back to work, often sign these agreements in the hopes they can keep up the payments.

This scenario, including the apparently harmless conduct of the lawyer, is replicated hundreds of times a day. But according to Russell Engler, associate professor of law and director of clinical programs at New England Law School, the behavior of the lawyer in this and similar situations violates ethical rules against giving advice to pro se litigants. [FN3]

Since the vast majority of litigants in "poor people's courts" in New York are unrepresented, this is a potentially huge problem, and one with dramatic consequences: tenants routinely settle cases without any consideration of their

defenses; consumers routinely agree to pay debts they do not fully owe; and 
unrepresented litigants in Family Courts agree to unfair settlements because they 
fear the consequences of further litigation against a represented spouse.

Neither the ethical rules nor legal textbooks on negotiations or ethics pay much 
attention to unrepresented adversaries. In New York, the only Disciplinary Rule 
that directly addresses the issue states that a lawyer, during representation of 
his or her client, shall not "[g]ive advice to [an adversary] who is not 
represented by a lawyer, other than the advice to secure counsel ... . " [FN4]

The rule does not make clear what kind of behavior is prohibited. As all lawyers 
should know, the Disciplinary Rules prohibit misrepresentations of law, fact or 
the identity and interests of the attorney. [FN5]

In addition, the decisional authorities uniformly prohibit attorneys from giving 
any legal advice to an unrepresented adversary, even if it is correct advice.
Professor Engler points out that, "at a minimum, a lawyer must not give an opinion 
as to the law applicable to the subject matter."

This means that a landlord's lawyer must to tell an unrepresented tenant that, 
for example, she is not being overcharged based on the attorney's review of his 
client's records or the rent history; an unrepresented landlord should not be told 
by tenant's lawyer that the law requires that the tenant be given a renewal lease.

Either of these "legal opinions" may or may not be correct. But they are 
prohibited because they will influence, even if not intended to do so, the 
litigation decisions of the unrepresented party.

No General Advice

It is not only the giving of legal advice that is prohibited, but advice in 
general. A lawyer must not advice an unrepresented adversary what she should do; 
nor should the unrepresented party to hold her case is likely to turn out.

A landlord's lawyer must not tell an unrepresented tenant that a pay-out 
agreement is the best way to prevent eviction. A tenant's lawyer must not tell an 
unrepresented landlord that she should settle because, if the case goes to trial, 
she will be liable to the tenant for substantial counterclaims.

Of course, this is the kind of posturing and colloquy that goes on in all 
"hallway" negotiations. But while this type of discussion is acceptable where 
there are lawyers on each side, it is prohibited when one side is unrepresented.
Professor Engler concludes: "Faced with a legal problem, the unrepresented party 
may be influenced as much by the lawyer's opinion or proposal as to what the 
unrepresented party should do as by the lawyer's opinion as to how the law applies 
to the matter at hand. Prohibiting a lawyer from proposing a course of conduct 
for the unrepresented adversary to take therefore goes to the heart of DR 
7-104(A)(2) .... ."

Good Intentions

Even seemingly benign comments about the course of the litigation are prohibited, since they are most always designed to induce an unrepresented adversary to settle a case on particular terms. As Professor Engler notes, if a landlord's attorney reassures the tenant that the lawyer is a "good guy" and "not out to get her," or suggests to the tenant that she should not act "doubtful" before the judge when a stipulation is being allocuted, these comments "all amount to proposing a course of action: that the tenant sign the stipulation," and agree to its terms in front of the judge.

Even well-meaning lawyers routinely violate the ethical rules. Professor Engler describes a "typical" nonpayment case in which the lawyer tells the tenant how much rent is due, requires the tenant to prove payments that have not been credited, agrees too get the landlord to inspect and repair "as needed," and tells the tenant that the rent must be paid regardless of conditions.

The lawyer also tells the tenant that, if the case goes to trial, she will have only five days to pay the rent arrears. These "seemingly innocuous comments are riddled with the lawyer's opinion as to the applicability of the law to the facts, and therefore constitute legal advice."

Comments about the amount of rent due include legal opinions about the landlord's ability to prove the amount of arrears, the legality of the monthly rent, and the merit of the tenant's breach of warranty of habitability claims. The prediction about what the court will do includes the lawyer's opinion about the merits of the landlord's case, the merits of the tenant's case, and the way the judge will weigh the facts and law in the case.

"Each comment ... may ... be a misleading presentation of the law or the facts," Professor Engler writes. "Moreover, the comments ... are intended to push the tenant toward settlement on the proposed terms. The comments constitute improper advice-giving and underscore the extent to which the typical landlord's lawyer, conducting routine negotiations with an unrepresented tenant, may engage in impermissible attorney conduct."

These problems would not exist if poor people had lawyers. If the ethical problem described here is faced directly by lawyers and the courts, the "settlement mills" in Housing Court and elsewhere will have to grind to a halt.

Judges will have to take a more active role in supervising settlement negotiations. They must make certain this kind of conduct does not occur, and that unrepresented litigants are aware of their rights and options when they settle cases.

Any attorney who has litigated against an unrepresented party knows that knowledge of the law, the court system or a particular judge, presents an opportunity to take advantage of the adversary's lack of representation and inexperience. But although "zealous advocacy" might require an attorney to exploit this kind of superior expertise when an adversary is represented, Professor Engler's article encourages us, and the Disciplinary Rules require us, not to influence our unrepresented adversaries, whether by giving them legal or any other kind of advice.
It is hoped that the new Housing Court proposal results in more litigants settling cases before judges who monitor the process and the outcome for fairness. If that happens, the lawyer misconduct may be partly addressed. Otherwise, the speed and efficiency with which the misconduct occurs will only increase.


FN2. Id. at 3.


FN5. Engler, supra note 3, at 95. See also DR 1-102(A)(2) (dishonesty, deceit, and misrepresentation are prohibited); DR 7-102(A)(5) (false statements of law or fact are prohibited).

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Legal information vs. legal advice — Developments during the last five years

by John M. Greacen, Director of the Administrative Office of the Courts for the state of New Mexico.

In 1995 my article "No Legal Advice From Court Personnel! What Does That Mean?" was the first published attempt to examine critically the standard court instruction to staff not to give legal advice. It explored legal and practical definitions of the term "legal advice" and suggested guidelines a court could give staff members on what answers they can and cannot provide. This article reviews that article's discussion and recommendations, as well as developments during the past five years.

"No Legal Advice" argued that the phrase "legal advice" had no inherent meaning to the courts or to court staff who were required to interpret it. The use of a vague term has negative consequences for the courts and the public; it causes staff to limit unnecessarily the flow of information to the public about court operations and it creates opportunities for discrimination among different categories of court users. The article addressed the concerns that cause courts to prohibit their staffs from providing information about court processes to the public—concerns about their "practicing law," about their giving incorrect information, and about their binding the judge by such incorrect information. It articulated five general principles that court staff should keep in mind in answering questions:

- Court staff have an obligation to explain court processes and procedures to litigants, the media, and other interested citizens.
- Court staff have an obligation to inform litigants, and potential litigants, how to bring their problems before the court for resolution.
- Court staff cannot advise litigants whether to bring their problems before the court, or what remedies to seek.
- Court staff must always remember the absolute duty of impartiality. They must never give advice or information for the purpose of giving one party an advantage over another. They must never give advice or information to one party that they would not give to an opponent.
- Court staff should be mindful of the basic principle that neither parties nor their attorneys may communicate with the judge ex parte. Court staff should not let themselves be used to circumvent that principle by conveying information to a judge on behalf of a litigant, or fail to respect it in acting on matters delegated to them for decision.

Finally, the article suggested 11 guidelines for staff to use in responding to questions. The first six are positive statements. All staff are expected to perform the following tasks:

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- Provide information contained in docket reports, case files, indexes and other reports.
- Answer questions concerning court rules, procedures, and ordinary practices. Such questions often contain the words "Can I?" or "How do I?"
- Provide examples of forms or pleadings for the guidance of litigants.
- Answer questions about the completion of forms.
- Explain the meaning of terms and documents used in the court process.
- Answer questions concerning deadlines or due dates.

The last five are negative statements. In providing information, staff will not:

- Give information when you are unsure of the correct answer. Transfer such questions to supervisors.
- Advise litigants whether to take a particular course of action. Do not answer questions that contain the words "Should I?" Suggest that questioners refer such issues to a lawyer.
- Take sides in a case or proceeding pending before the court.
- Provide information to one party that you would be unwilling or unable to provide to all other parties.
- Disclose the outcome of a matter submitted to a judge for decision until the outcome is part of the public record, or until the judge directs disclosure of the matter.

**Responses to the article**

Many judges and court managers used the article and its recommendations in creating policies and training for court staff. And a court manager from Canada reported that it is the standard reference point for the courts of Canada as well. I have conducted training sessions for court administrators and court staff based on the principles set forth in the article in both federal and state courts throughout the country. The guidelines have been included in the curriculum of the "Litigator Without Lawyers" seminars presented by the Maricopa County Superior Court and in educational sessions at conferences of the National Association for Court Management and its Mid Atlantic Association for Court Management.

The Michigan Court Support Training Consortium, under a grant from the Michigan Judicial Institute, developed an interactive training program using compact disk interactive technology, called the Legal Advice CD+ program, based on the principles set forth in the article. That training program has been widely used by courts in other states and received the Justice Achievement Award from the National Association for Court Management in 1998.

Several states have adopted their own guidelines derived from those suggested in the article.

- In 1997, the Michigan Judicial Institute prepared and distributed a booklet entitled, Legal Advice v. Access to the Courts: Do YOU Know the Difference? The booklet provides general guidelines, together with specific applications of those guidelines through the use of questions and answers. The booklet was endorsed by the Michigan Supreme Court as a model for providing information to the public and access to the Michigan court system.
- In June 1998, the New Mexico Supreme Court adopted a standard notice entitled "Information Available from the Clerk's Office." It requires all courts to post that notice "in lieu of any other notice pertaining to the topic of information or advice that court staff may or may not provide." The notice sets forth the information that court staff can and cannot provide and includes information on how to find a lawyer. New Jersey has created a similar notice.
- In November, 1998, the Ventura County Superior Court adopted guidelines for its employees staffing its Self Help Legal Access Center.
- The Supreme Court of Florida, with one dissent, has adopted a rule of court, Florida Family Law Rule 12.750, entitled "Family Self Help Programs," that sets forth the services that court "self help" staff can and cannot provide.
- A Customer Service Advisory Committee for the Judicial Branch, created by order of the Iowa Supreme Court, has developed Guidelines for Clerks Who Assist Pro Se Litigants in Iowa's Courts. The Iowa Supreme Court recently approved the guidelines. The Advisory Committee also developed a guidebook for clerks containing 25 pages of model responses to frequently asked questions.

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• A Task Force on Unrepresented Litigants of the Boston Bar Association conducted a comprehensive study of the needs of self-represented litigants in all levels of courts in Massachusetts. Its August 1998 Report on Pro Se Litigation is one of the most thorough treatments of the topic, including extensive recommendations to the courts and the bar for improving their programs. Exhibit F of that report is a set of "Sample Staff Guidelines" for Massachusetts courts.

• Finally, in 2000, the Utah Judicial Council adopted guidelines for all court staff in that state.

Critiques

Jona Goldschmidt and his colleagues have criticized the suggested guidelines on two grounds. First, they believe that the article does not go far enough in its analysis of the court's obligation to provide information to the public. The United States Constitution, through the privileges and immunities clause, the First Amendment, or the due process or equal protection clauses of the Fourteenth Amendment, may create a fundamental right of access to the courts for persons representing themselves.2

The closest that any U.S. Supreme Court opinion has come in articulating such a broad right of access is Justice Brennan's concurring opinion in Doe v. Connecticut (1971), finding that Connecticut's mandatory filing fee for divorce cases violated an indigent person's right to due process. Justice Brennan objected to language in the majority opinion limiting the reach of the decision to divorce proceedings - "the exclusive precondition to the adjustment of a fundamental human relationship." Justice Brennan wrote:

I cannot join the Court's opinion insofar as today's holding is made to depend upon the factor that only the State can grant a divorce and that an indigent would be locked into a marriage if unable to pay the fees required to obtain a divorce. A State has an ultimate monopoly of all judicial process and attendant enforcement machinery. As a practical matter, if disputes cannot be successfully settled between the parties, the court system is usually ... the only forum effectively empowered to settle their disputes. Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court. ... I see no constitutional distinction between appellants' attempts to enforce this statutory right and an attempt to vindicate any other right arising under federal or state law. ... The right to be heard in some way at some time extends to all proceedings entertained by courts.

If there is such a right of access to the courts, then, argues Goldschmidt and colleagues, the courts must provide information sufficient to enable self-represented persons to exercise that right.

The significant and as-yet-unanswered question is whether self-represented litigants' rights obligate the state to take affirmative steps to provide them with some form of "adequate" legal assistance. Until a definitive ruling on this question is made, courts should—if only for efficiency reasons—begin (or continue) to develop creative means of guiding the increasing number of self-represented litigants through the legal process.3

Second, Goldschmidt and colleagues argue that the guidelines are too general in nature. They believe that court staff need explicit direction on the answers to be given to specific questions, not just general direction differentiating legal information from legal advice. All courts owe their staff the support of an operating manual, describing basic court operations and instructing them how to handle routine matters. These materials, in turn, serve as a reference for staff in answering questions from the public. The most extensive manual of this sort that I have seen is the Clerk's Practice and Procedure Guide developed by the United States Bankruptcy Court for the District of New Mexico. The judges of the court instructed the clerk to develop the manual in order to give lawyers who did not specialize in bankruptcy law the basic information they would need to practice before the court. With the help of a committee of the local bankruptcy bar, the court prepared a manual detailing the court's procedures with respect to all parts of the bankruptcy process. The manual is available to the public. It also serves as a resource for court staff in answering questions posed by the public.
A knowledgeable staff

My experience in providing training on this topic all over the country has convinced me that lack of staff knowledge of procedures is not a significant impediment to the ability of court staff to provide information to the public. In training sessions I ask participants to write down the questions they have the most difficulty answering and use them as the basis for the discussion. I ask for volunteers to answer the questions, following my suggested guidelines. Experience has shown that court staff are extraordinarily knowledgeable about court procedures, requirements, and practices. With one exception, some participant in every seminar has been able to provide the procedural or substantive information needed to answer a question. The exception was in Delaware, where all participants agreed there was no answer to a particular question—their case management information system did not provide the requested information.

My experience suggests, therefore, that court staff throughout this country know the correct answers to the questions they are asked by the public. Consequently, courts should not delay authorizing their staff to provide procedural information until they develop detailed guidebooks or reference materials.

As additional courts develop rules and guidelines, they are becoming more detailed. See, for instance, the elaboration provided by the Florida rule of court and the draft Iowa guidelines. In addition, the drafters of the Iowa guidelines have included a substantial number of standard answers to frequently asked questions. Some such standard answers, based on the most common questions that recur in training sessions on this subject, appear at the end of this article.

A just outcome

Russell Engler, Professor of Law and Director of Clinical Programs at the New England School of Law, has written a thought-provoking article arguing that judges, mediators, and court staff should provide legal advice to self-represented litigants. Engler argues that most persons representing themselves in court do so because they cannot afford to retain counsel. Without competent advice concerning available options and their advantages and disadvantages, litigants cannot obtain a just outcome. He argues that principles underlying the concept of the court's impartiality must be reconsidered. Instead of giving no advice to either side, Engler believes that the court must give whatever help is needed to both sides, giving more help to one side than to the other where needed. He argues that true impartiality exists when both parties are fully informed of their rights, their procedural options, and the benefits and detriments arising from exercising them.

The most obvious instance in which the court has an obligation to provide different levels of help to one side than to the other is when one side is represented by counsel and the other is not. In order for the courts to do justice, Engler argues, the courts must be prepared to provide whatever assistance is needed to both sides in order for them to understand their rights and remedies and make a reasoned, informed judgment of their best interests. Current restrictions on court staff, mediators, and judges inhibit their ability to ensure justice. He poses the problem of the mediator who is prohibited from informing one party that his proposed settlement terms are foregone a remedy to which he is clearly entitled by law. His article goes on to argue that the type of advice needed, and who should provide it, depends on the context—the nature of the legal proceeding and the type of dispute.

Professor Engler's analysis is thought-provoking. He forcefully points out the injustices that can result from imbalances in the power and knowledge of self-represented parties. However, his view that a dispute cannot be resolved justly without fully informing both parties of every substantive and procedural right and option available is not one to which I am willing to subscribe. It is neither necessary nor realistic to expect the courts to serve not only as dispute resolvers but also as counselors and advocates for both sides.

Unauthorized practice of law

Much of the concern about court staff providing information arises from apprehension they will be practicing law without a license. In my view, laws or court rules prohibiting the unauthorized practice of law do not apply to court staff performing tasks at the direction of the court. Preoccupation with the topic of unauthorized practice of law focuses attention on the wrong issues and provides
either too much or too little guidance to the courts on what information their staff should and should not provide.

First, as a matter of law, when court clerks are providing information that the courts direct them to provide, they cannot be engaged in the unauthorized practice of law. The courts have authorized them to do what they are doing. When the authorization comes from the state court of last resort, which is the body responsible for deciding what constitutes the practice of law, there can be no doubt that court staff are insulated from any statute or rule prohibiting the unauthorized practice of law. The Supreme Court of Florida recognized this principle in its family court rule on self-help programs. Section (e) of Rule 12.750 reads:

(e) Unauthorized Practice of Law. The services listed in subdivision (c), when performed by nonlawyer personnel in a self-help program, shall not be the unauthorized practice of law.

A committee of the Washington State Bar Association has reached the same conclusion. The Committee to Define the Practice of Law worked for almost a year and a half to develop a comprehensive definition of the practice of law for the State Bar Association to recommend to the state supreme court for adoption. Section (b) (2) of its Definition of the Practice of Law excludes "...serving as a court house facilitator pursuant to court rule..." whether or not it constitutes the practice of law."

The attorney general of Vermont has applied this reasoning to court staff activities authorized by the trial court, not the court of last resort. In Vermont, the unauthorized practice of law is prohibited by rule of the state supreme court. An attorney wrote to the Vermont attorney general asking if it were criminal contempt proceeding to enforce that rule, complaining about an advertised job description that included the following duties of a court case manager: "assist litigants to complete court documents and to understand the judicial process" and ensure "that all persons involved in child support actions understand the court process, their rights under the law and all documents that they are asked to file or agree to." The complaint also questioned the court's production and distribution of various booklets that define legal terms and discuss the divorce process. While expressing his opinion that the activities set forth in the job description did not constitute the practice of law, Chief Assistant Attorney General William Griffin noted that "even if they did, since the activities are authorized by the Court and performed on its behalf, the Attorney General would be hard pressed to argue that they are unauthorized."

Analyzing this issue in terms of the unauthorized practice of law focuses attention on what lawyers do, not on what courts must, and must not do. First, courts must provide self-represented litigants with the information they need to bring their cases before the court. Whether or not there is a constitutional right to access to the courts, there are overwhelming policy reasons for the courts to provide effective access. That is what courts are for—to serve as the forum for resolving disputes. For the courts to enjoy the public trust and confidence of the people, they must make their services practically, as well as theoretically, available to the public. So, the focus of the courts must be on providing the information that citizens need in order to avail themselves of the courts' dispute-resolving services.

The limitations on the court staff in answering questions from the public arise not from what lawyers do, but from the principle of impartiality central to public trust and confidence in the courts. Court staff should not advise a person accused of crime whether to plead guilty—not because lawyers give such advice, but because that advice causes the court staff, and hence the court itself, to be taking sides in the outcome of the case.

An example where courts are misled by looking to unauthorized practice of law principles, rather than to the needs of the courts, is with respect to court forms. Some courts consider the choice of the appropriate form for a litigant to use to be a function that lawyers perform for their clients and therefore restrict the role that staff can play in pointing out the correct form to a litigant requesting assistance. See, for instance, the discussion of this issue by Goldschmidt and colleagues.

As a practical matter, court staff are fully competent to direct litigants to the correct form. This service constitutes an essential part of the information a litigant needs in order to be able to present his or her case to the court. And, because the court provides equal services to all litigants—e.g., to petitioners as well as respondents—
the court does not depart from its impartial role in providing forms and directing litigants to their proper use.

By focusing on the issue of the unauthorized practice of law, courts may not go far enough in limiting the role that staff can play. For instance, does the fact that a particular court staff member is a lawyer free the court from concerns arising from the court's need to remain impartial? Or, in Arizona, where there is no unauthorized practice of law statute, can the courts decide that there are no limitations on the role that their staff should play in assisting litigants?

Finally, the ethical opinions analyzing the functions that clerks can and cannot perform from the standpoint of the unauthorized practice of law draw the same line in the same place as does my analysis based on the principle of maintaining the court's impartiality. The Massachusetts Advisory Committee on Ethical Opinions for Clerks of the Court reviewed five scenarios that regularly occur, approving clerk conduct in three and disapproving it in the remaining two. In summarizing its opinion, it stated:

[Providing assistance with filling out forms and offering procedural advice clearly do not run afoul of the prohibition on the practice of law. Drafting documents, taking over a case and becoming an advocate on behalf of a litigant would clearly violate the prohibition.]

Suggested answers to recurring questions

Here are some of the most common questions presented by participants in seminars on this topic, and suggested answers:

**Do I need a lawyer?**

You are not required to have a lawyer to file papers or to participate in a case in court. You have the right to represent yourself. Whether to hire a lawyer must be your personal decision. You may want to consider how important the outcome of this case is to you in making that decision. A lawyer may not cost as much as you think. I have information on the Lawyer Referral Service if you want help in finding a lawyer who specializes in your kind of case. [Lawyers participating in the Albuquerque Bar Association lawyer referral service offer one half hour of consultation for $25 plus tax.]

**Should I hire a lawyer?**

Same as above.

**Can you give me the name of a good lawyer?**

The court cannot recommend a particular lawyer. I have information on the Lawyer Referral Service if you want help in finding a lawyer who specializes in your kind of case.

**Should I plead guilty?**

You need to decide that for yourself.

**What sentence will I get if I plead guilty [or do not plead guilty]?**

The judge will decide what sentence to impose based on the facts and the law that apply to your case. I cannot predict what the judge will do.

**What will happen in court?**

Suggested answer to a plaintiff in a small claims case: The judge will call on you to present your evidence first. Then [he/she] will call on the other side to present its evidence. The judge will ask questions if [he/she] needs clarification. When the judge has heard all the evidence, [he/she] will announce [his/her] decision.

**What should I say in court?**

You must tell the truth.

How do I get the money that the judge said I am entitled to?

You are responsible for taking the steps necessary to enforce a judgment (or an award of child support). Here is a pamphlet that describes the procedural options available to you. When you decide what option to pursue, I can provide you with the appropriate forms. [It may be appropriate to refer a litigant to an agency for help, e.g., with child support enforcement.]

What should I put in this section of the form?

You should write down what happened in your own words.

What should I put down here where it says "remedy sought"?

You should write in your own words what you want the court to do.

Would you look over this form and tell me if I did it right?

You have provided all of the required information. I cannot tell you whether the information you have provided is correct or complete; only you know whether it is correct and complete.

I am not able to read or write. Would you fill out the form for me?

In that case, I am able to fill out the form for you, but you have to tell me what information to put down. I will write down whatever you say and read it back to you to make sure what I have written is correct.

What do I do next?

Describe the next step in the court process.

I want to see the Judge. Where is his office?

The judge talks with both parties to a case at the same time. You would not want the judge to be talking to the [police officer][landlord] about this case if you were not present. Your case is scheduled for hearing on _____ at ___. That is when you should speak with the judge.

The judge heard my case today but did not make a decision. When will he decide?

There is no way for me to know when the judge will issue a decision in your case. In general, judges try to reach a decision within [90] days of taking a case under advisement. But there is no guarantee that the judge will decide your case within that time.

Footnotes

The increase in numbers of self-represented litigants throughout the nation heightens the need to provide them with information. Court staff are the first people litigants come into contact with, and there are many ways they can assist. Recognizing this, courts are developing guidelines and providing the staff training necessary to ensure access to justice for all.


2. See the discussion on pages 19 to 24 in Goldschmidt, Mahoney, Solomon and Green, Meeting the Challenge of Pro Se Litigation: A Report and Guidebook for Judges and Court Managers (American Judicature Society, 1998). Editor's note: To order, see page 205.
3. Id. at 24.


6. Meeting the Challenge, supra n. 2, at 43.

7. It is clear that the New Mexico Supreme Court, the state in which an ethics opinion questioned the propriety of a judge's providing litigants with forms he drafted, finds it acceptable for court staff to provide approved court forms to litigants. See the New Mexico legal information form.
National Business Institute
How to Avoid Litigation and Tenant Problems in Residential and Commercial
Eviction in New York
2005

*67 ETHICAL CONSIDERATIONS
Paul A. Lanni
Dan M. Blumenthal

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*68 Paul A. Lanni

General Statement about Ethics and Ethical Obligations

The ethical practice of law in New York is governed, amongst other things, the Disciplinary Rules found under the Judiciary Law. Under such rules, there are specific rules which come into play in a typical landlord tenant proceeding which an attorney should be aware of to avoid the unintentional violation of the ethical constructs of the profession. This part of the course will examine some of these rules, give suggestions on how to identify the danger areas and how to avoid such problems.

A- ATTORNEYS FEES

First and foremost concerning legal fees, all attorneys should be aware of the most recent developments regarding retainer agreements and letters of engagement. Under such new guidelines, any time an attorney is engaged to provide legal services which the attorney should reasonably believe will amount to more than $3,000, the attorney is obligated to enter into a duly executed retainer agreement, or must send to the client a letter of engagement.

In addition to such new regulations, there are also new rules regarding an attorney's efforts to collect upon unpaid legal fees from their client. The new guidelines require that an attorney offer the client in such fees disputes arbitration to settle the issue of unpaid legal fees.

In connection with litigation of landlord tenant disputes, an attorney should be mindful that it is not a good practice to have any legal fees payable to such attorney from their client be dependant upon the outcome of the landlord tenant case.

Legal fees paid to the attorney in advance of billing should be placed in the attorneys escrow account, only to be withdrawn upon the attorney earning such fees. To do otherwise may be a violation of the code of professional ethics.

Most leases, both residential and non-residential, have some provision for the payment of legal fees to the landlord upon the landlord's success in such landlord tenant proceeding. According to statutes, in residential matters, such awards of legal fees are reciprocal for the tenant even if not expressly stated in the lease. This is not so for
non-residential leases. The non-residential tenant may, by the terms of the lease, be precluded for seeking legal fees even if successful. Such provisions have been held up in various court proceedings of this nature.

In addition, the legal fee provision must be scrutinized to differentiate between legal fees to be determined on fees actually paid to the successful party's attorney or whether the awards of legal fees are just based upon the reasonable value of the services provided. In some cases, unless payment has actually been made by the successful party to litigation to their attorney, they cannot make an application to recover attorney's fees.

An attorney should never put themselves in a position of promising the recovery of attorneys fees, even in seemingly clear-cut cases. Although there are provisions in the law providing for legal fees, the Court does have the discretion to award what it believes to be appropriate. You don't want to guarantee recovery of all such fees and only have the court award part of the legal fees incurred. This can be most embarrassing and injurious to the client-attorney relationship.

B- CONFLICTS OF INTEREST

Although the code of ethics is clear on this point, it is always worth repeating: avoid entering into agreements to represent two parties in a landlord tenant proceeding whose interests are diverse. This is just not limited to conflicts between landlords and tenants, but also between two or more tenants in a particular proceeding.

If a tenant is representing themselves pro se, be very careful. You could violate the code of ethics even where you believe you are doing some good to resolve a landlord tenant dispute in a fair and efficient manner. It is a violation of the ethical code to give any legal advice or any legal opinion that a pro se party may rely upon in attempting to resolve a landlord tenant dispute. Always advise the pro se party to obtain a lawyer. It is in the party's best interests and also the attorneys best interest.

If you are aware that the party is represented by an attorney, speak only to such attorneys, unless the attorney gives you specific authorization to contact his client directly. Even if the party states his attorney was discharged, don't bite unless they produce a consent to change attorneys or a court order discharging the attorney. An attorney should know better than to take the word of a party without more.

C- UNAUTHORIZED PRACTICE/USE OF PARA-PROFESSIONALS

The unauthorized practice of law by non-attorneys must be guarded against by the practitioner, as well as being mindful of avoiding assisting others in the unauthorized practice of law. The Model Code of the ABA and the New York Code of Professional Ethics counsel that an attorney must avoid such circumstances and inform the appropriate authorities of the unauthorized practice of law.

In the use of para-professionals in the practice of law, such persons must be supervised by an attorney who delegates the work undertaken by the para-professional and must take full responsibility for the matter worked on by such non-attorney. The paraprofessional must advise of their role as non-attorneys, must not hold themselves out to be attorneys, must advise of their non-attorney roles, and advise of the attorney with whom they are employed and working for. The attorney responsible must be the party directing the actions of the non-attorney, must be consulted by the non-attorney on determining the appropriate actions to be taken when legal decisions must be made, and the attorney must be responsible for anything the para-professional does. Any malpractice committed by the non-attorney is attributed to the supervising attorney.

Generally, the use of para-professionals to handle ministerial and administrative duties in the practice of law are encouraged as a savings to the client in terms of legal fees. However, such services rendered must not escalate to
the para-professional acting as a defacto attorney. No legal advice may be given to a client by the para-professional that has not been done under the direction of a supervising attorney.

A lawyer must likewise not assist a person who is illegally practicing law, however, the attorney may assist other professionals whose employment requires the use and knowledge of law to complete their employment. Such types of professionals include claims adjusters, social workers, employees of financial or commercial *72 institutions, accountants and government employees.

Any unauthorized practice of law must be reported to the appropriate authorities in order to protect the integrity of the legal system.

D- SOLICITATION/ADVERTIZING ISSUES

Advertising by attorneys is permitted by most states, provided the advertising is limited to disseminate information concerning the attorneys name, address, telephone number, the kind of services the attorney will provide, the basis of how the attorneys fees are determined, payment and credit arrangements, references and other information which might be of interest to an individual seeking legal services.

Advertising is generally limited to print, radio and television. Practices which are prohibited are advertising by direct telephone solicitation or in-person solicitation. Mailings are no permitted in all jurisdictions, but may be made in New York provided that the advertisement meets the strict criteria of what can be included in such writings.

Any type of solicitation used cannot be false or misleading, cannot involve coercion, duress or harassment, or may not be made to an individual how has asked that such attempts not be made to such person. Any advertisement must be prepared in such a way as to be acceptable within the subjective taste of the jurisdiction where such advertisements are distributed.

E- COMMINGLING OF SECURITY DEPOSITS WITH OTHER ASSETS

An attorney should never co-mingle client funds with their own assets. This remains true with security deposits from a client landlord. Furthermore, you should *73 counsel a landlord to abide by General Obligations Law §§ 7-101 et seq. which governs the holding of security deposits of a landlord.

The law on security deposits requires that a landlord maintain a separate bank account for the holding of security deposits for a tenant. Such an account prevents the commingling of assets of the landlord with the security deposits of the tenants of such landlords. Such bank account is set up for the benefit of the tenant in an interest-bearing account from which the landlord may keep a portion of the earned interest as an administrative fee. Each year, the landlord is required to give the tenant less such administrative fees.

A landlord must be counseled to comply with the provisions of the General Obligations Law because failure to properly comply can cause the landlord to lose the ability to keep such funds for reimbursement of damages to the leased premises by the tenant, amongst other things.

As a practice tip, if confronted with a landlord tenant litigation where such issue is brought up before the court, do not try to hide the fact. Be up front with the Court. If the Court finds that you are trying to avoid disclosing a noncompliance, it could destroy your client's credibility in the case and may also damage your credibility with the Court in this and future cases. Furthermore, if your client discloses to you that he has failed to comply with this provision, counsel him to comply as soon as possible. Better that your client complies late than not at all.
Late compliance at least shows that the client is attempting to abide by the law.

*74 Your client should also be counseled to keep good records of compliance with the General Obligations Law, especially if the landlord maintains a number of rental units or store fronts. Such good record keeping can only save him headaches and legal fees later on.

D- APPLYING THE RULES OF PROFESSIONAL CODE OF ETHICS TO YOUR CASE

The Rules of Professional Responsibility should be applied and referred to as vigorously in a landlord tenant case as in the largest case in your office. There should be no slack off due to the nature of the proceeding involved in. Be zealous in your representation, but remember to be reasonable.

Don't represent adverse interests in a landlord tenant proceeding. It can only cause you a problem in the end. Don't counsel a pro se tenant or landlord. Advise them to seek counsel or advise the court of a pro se adversary that is unable to understand the proceedings.

*75 Dan M. Blumenthal

With the possible exception of the Small Claims Parts, few courtrooms see as many self-represented litigants as the landlord-tenant parts. Whether you represent a landlord seeking to evict an unrepresented tenant or appear on behalf of a tenant defending against the unrepresented landlord. In each case, the attorney must confront the ethical rules and balance them against the realities of a court which is dependent on the majority of the caseload resolving with minimal court staff input.

ATTORNEY RESPONSIBILITY TO PRO SE LITIGANTS:

The Disciplinary rules in New York prohibit "advice" to an unrepresented party except to advise that they retain counsel. [FN1] In 1997, the New York State Unified Court System published the "Housing Court Initiative" which proposed a requirement in the New York City Civil Court Housing Parts that all cases with pro se party (about 90%) be conferenced solely in the presence of the Judge or a court attorney. [FN2] This comports with the view of some commentators that an advocate should never speak to an unrepresented party without the presence of a court official [FN3] in strict compliance with the Disciplinary Rules. When the courts attempted to implement the plan as written, the system ground to a near halt. Despite the intent of the Housing Initiative to provide a *76 shield to pro se litigants against overbearing attorneys, the Legal Aid Society/Legal Services for New York City Housing Task Force (the "Task Force") insists that the Initiative has actually harmed the self-represented tenant. [FN4] The Task Force asserts that the Courts are emphasizing speed over opportunity for tenants to gather their defenses and using the threat of trial as a tool to push settlement. Simple math illustrates the problem. On a typical day, a New York City Civil Court Housing "Resolution" Part will have a morning calendar of 40-50 cases. Many also have an afternoon calendar. The court will try to conference every case before 1:00 P.M. allowing less than seven minutes per case. On most days in Brooklyn and Queens, unless you are sent to the "Trial Expeditor" before 11:00 A.M., the possibility of a same-day trial is slim. The Chief Administrative Judge for the Civil Court, Fem Fisher-Brandveen blames any assembly-line approach to settle cases as a factor of limited resources, not the Initiative. [FN5]

The Bar Association Ethics Committee has recognized that "just say go (get yourself a lawyer)" is not realistic and has allowed that an attorney can give "non-controversible" information about law or issues to an unrepresented party, essentially framing the issues that the party might want a lawyer to review. [FN6] An attorney striving to live up to the highest ethical standards is left to determine what conversation can be had.
1. to insuire that the unrepresented party understands the "nature and content" of a stipulation; and

2. to recommend housing assistance resources to an adverse Tenant who claims to be unable to afford to move or "doesn't know what to do."

An attorney cannot function in this system without negotiating with pro se litigants. The court demands it. Attempt to keep all explanations as factual as possible and urge adverse litigants to confirm the law with the court. Explain that you are an advocate for your client and your role is to best protect your client with the bounds of the law. Complete neutrality is impossible. In NYC you can use the Court Attorneys as the final interpreters of the law. NEVER try to "sneak in." The Courts give great respect to the honest negotiator, ranging from expediting your cases to get you out of the courthouse quicker to a presumption of proper and complete papers. You don't want to be the lawyer the Judge holds to last on the calendar and then checks for every comma.

The problem of speaking with a pro se adverse party is compounded outside the courthouse. Can you propose a settlement? It is probably a technical breach of the ethical rules.

Employees of a Corporate party:

When the named party is a corporation, things can get even stickier. The corporation must appear by an attorney. [FN7] Is the person within the corporate hierarchy to *78 whom you wish to speak a 'party' within the scope of the prohibition against direct communications? The Court of Appeals has held that even if the corporate employee is a "client" of the corporation's attorney so as to be protected by attorney-client privilege, he is not necessarily "party" for purposes of communicating directly with "party" known to have counsel. [FN8] A corporate employee is protected from direct communications if his "acts or omissions (in the matter under inquiry) are binding on the corporation" or imputed for corporate liability. [FN9]

Confused? Take some solace in the fact that, unlike statutes which are "enactments of [a] coequal [to the courts] branch of government and expressions] of public policy of state" which the courts are obligated to enforce ...as they are written or interpreted to effectuate legislative intention," [FN10] "the Code of Professional Responsibility does not have the force of law." [FN11]

Presuming we have made our peace with speaking to pro se parties, what about the party that claims to be represented? This can be indicated at an initial appearance or pre-appearance contact. Sometimes the pro se party used an attorney in a prior matter or has retained someone for a related matter. Often the adverse party doesn't fully appreciate *79 the distinction between the matters (such as a summary holdover proceeding after a foreclosure) and may believe that the representation carries through. Once you become aware of possible representation, you are obligated to make a "complete and thorough investigation" to confirm that the attorney is not representing the party in the instant proceeding before you can talk to the party directly. [FN12] Other times the alleged representation is merely an attempt at intimidation by name dropping (no matter what the adversary says, Johnnie Cochran rarely appears in landlord-tenant matters).

**COACHING THE PRO SE OR LAWYERING ON THE MENU PLAN** Every lawyer (or law student for that matter) will be asked to "just look over" a pleading or answer a "quick question." While this may ripen into retention, more often than not, one question leads to another or to a complaint that the inquirer can't afford a lawyer. Similarly, you may recognize that a party may need some assistance but can't afford a "full-service" retention. This can be particularly problematic as, once you formally appear for the client, you cannot exit the case without leave of the court. [FN13] While the New York ethics code is silent on so-called "unbundled services," the American Bar Association model rules [FN14] recognize that an attorney may limit the scope of his services.

after consulting and getting the consent of the client. Even presuming that the client *80 understands the limitations, anything more than the most general advice may create an attorney/client relationship and possible exposure for malpractice. The New York State Bar has broadened the scope of undisclosed "coaching" to include assistance in completing forms which are specifically intended for pro se litigants. [FN15] For other pleadings, the client has an obligation to reveal your assistance to the court and your adversary. [FN16] If you become aware that the client failed to disclose, you are, at a minimum, obligated to discontinue further assistance. The Bar Association has suggested that you prepare a cover letter to the adversary and to the court revealing your role and deliver it prior to papers being filed or any reliance by the court or a party. [FN17]

Guardian ad litem

The court may appoint a Guardian ad litem [FN18] for an adult party who is "incapable of adequately prosecuting or defending his rights." [FN19] While a GAL may be appropriate, the case may proceed and the court is not deprived of jurisdiction over the party absent a *81 judicial declaration of incompetence. [FN20] The question arises as to who has the duty to report incapacity to the court? It is also important to distinguish inability to defend from other hardship. "Housing problems" are sometimes "due to "a lack of affordable housing," [FN21] not incapacity, rendering a guardian inappropriate. When confronted with a pro se adversary demonstrating some incapacity beyond mere idiosyncratic behavior, [FN22] counsel is obligated to be "extremely diligent" and report to the court "if there is any question, giving the court the opportunity for an investigation and report." [FN23] The test to be applied by the court is that a preponderance of the evidence indicates that a disability impedes the litigant's "ability to protect her rights." [FN24] Failure to reveal knowledge of an infirmity is likely to result in any default judgment [FN25] and perhaps even some stipulations being set aside. The court may dish out further sanctions as this can be viewed as a "fraud upon the court." [FN26] It is certain to occasion [FN27] delay as the court can then appoint a GAL.

*82 Appointment of a GAL will cause some delay to a summary proceeding but, except for the procedural delay, may help bring your case to resolution. Unlike the presumptively impaired and sometimes irrationally intractable litigant you started with, the GAL is not a blind "protagonist of the wishes of an incompetent." [FN28] rather he may act against the expressed wishes of his ward if he believes that he is working in the litigant's best interest. [FN29]

ATTORNEY ADVERTISING AND PROMOTION IN THE INTERNET AGE:

The internet has given us a tool by which we can instantly bring a new or existing client 'into' our office. You may promote and solicit clients over the 'net in your areas of concentration [FN30] and, over four million dollars was spent on attorney internet advertising in 2004. [FN31]

The New York State Bar Association has analogized use of the internet for a potential client to contract for your services, whether completing a form or asking you to render legal opinions, to use of telephone or facsimile machines [FN32] with certain unique *83 qualifications, as a general rule, the State Bar recognizes websites as the internet as "an electronic form of public media[,] permissible as long as the advertising is not false, deceptive or misleading, and otherwise adheres to the requirements set forth in the Code. [FN33] The guidelines suggested include:

1. Post a Statement of Clients Rights and Responsibilities on your website - Court rules [FN34] require every law office in New York to post a Statement of Clients Rights and Responsibilities. [FN35] If your initial and possibly sole contact with a client is through a 'virtual office' on the internet, prudence suggests that the Statements be posted on your site.

2. Except for general advice, check conflicts before responding to an internet client - Every attorney is required to track prior clients and check for conflicts before undertaking a new matter. [FN36] It is permissible to give limited advice, akin to pre-packaged answers, provided the limitations are fully disclosed. [FN37] For more complicated issues, conflicts must be checked before rendering legal services. clients billed predetermined amounts via credit card.

*84 3. Use an e-mail disclaimer - E-Mail and any other form of electronic communication (such as cell phones) carry an enhanced risk of third party interception and loss of attorney-client privilege. As attorneys you are under an affirmative duty to exercise reasonable care to prevent disclosure of your clients' confidences. [FN38] While Federal law makes it a crime to intentionally intercept non-public electronic transmissions. [FN39] Both Federal [FN40] and New York law expressly state that a privileged communication remains privileged when transmitted electronically. [FN41] Except in extraordinary instances where you suspect a high risk of non-party interception, or where the information itself is highly sensitive, use of unencrypted e-mail is reasonable [FN42] but a disclaimer or client waiver may be advised.

4. Identify the jurisdiction you are advising for - The ethics rules don't confine your promotional efforts to the States where you are admitted and, since a question regarding a New York tenancy will ordinarily involve New York law, there is minimal *85 possibility of running afoul of the unauthorized practice rules of a state in which you are not admitted. However, any Internet solicitations, including your website, should state where you are licensed [FN43] and any jurisdictional limitations on the general advice given or your expertise (i.e. New Jersey has very different landlord-tenant laws and, even if an attorney is admitted there, he may not be qualified to advise on the New Jersey rules).

Promotional e-mail:

The Supreme Court has held that direct solicitations (presumably including mass e-mails) are permissible. [FN44] However, caution is advised as Shapero was a Justice Brennan opinion in a sharply divided court where Justices Scalia, O'Connor and Rehnquist dissented. The dissenting Justices expressed concern over unsolicited legal advice and the "inherently misleading" nature of advice which fails to distinguish if a potential client's situation can be addressed by "routine" legal services. [FN45] These dissents could well indicate the High Court's direction in deciding between general website content and legal spam.

*86 LETTERS OF ENGAGEMENT:

Effective March 4, 2002, you are required to provide every client whose total legal fee is expected to be $3,000 or more with a "Letter of Engagement." [FN46] The letter should be provided before commencing the representation, or within a reasonable time thereafter [FN47] (particularly, in the landlord-tenant arena, short time periods between retention and first action or appearance may occasionally make the preferred pre-retention letter burdensome). The three essential components of every retention letter should be:

1. An explanation of the scope of services (i.e. is retainer limited to advising?, trial?, appeal?)

2. Explain the fees (flat or hourly?, is preparation time or travel time included?), disbursements and billing methods and frequency; and

3. The clients' right to arbitration of any fee dispute in a civil matter of $1,000 or more (up to $50,000). [FN48]

Once you have given a client such a letter, you need not re-send for each subsequent case where your services and terms are of the same general type as previously rendered to that client.

FN1. Disciplinary Rule 7-104 (A)(2).

FN2. "The actual negotiations will take place in the Resolution Parts under the Court's direct supervision."


FN5. Id.


FN7. CPL §321.


FN9. Id.

FN10. Id.

FN11. Id.


FN13. CPL §321(2).

FN14. ABA Model Rules of Professional Responsibility §1:2c.


FN16. Id.

FN17. Id.

FN18. Literally, "guardian at law," a court-appointed party to protect the best interests of a party legally or mentally incapable of prosecuting or defending the action, appointed for the limited duration and purpose of that particular legal proceeding.

FN19. CPL §1201.


FN24. Id.
FN25. Id.

FN26. Id.

FN27. CPLR §1202(a).


FN31. TNS Media survey of advertising expenditures January through Sept. 2004 (4.1 million)

FN32. New York State Bar Association ("NYSBA") Committee on Professional Ethics Opinion 709 - 9/16/98, An attorney sought to establish a web site to take orders for trademark searches and other services to be fulfilled via unencrypted e-mail with

FN33. Id., citing to DR 2-101, DR 2-102, EC 2-10.

FN34. 22 NYCRR 1210.1.

FN35. The NYSBA text (in English and Spanish) can be found at http:// www.nysba.org

FN36. DR5-105(E)

FN37. NYSBA Committee on Professional Ethics Opinion 664 - 6/3/94 (60-93)

FN38. DR 4-101


FN40. 18 U.S.C. § 2517(4)

FN41. CPLR §4548 "No communication privileged under [NY Evidence rules] shall lose its privileged character for the sole reason that it is communicated by electronic means or because persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication."

FN42. NYSBA Committee on Professional Ethics, Opinion 709 (cited above, but also states that, "It is also sensible for lawyers to discuss with clients the risks inherent in the use of Internet e-mail).

FN43. DR2-102(D)


FN45. Id (Rehnquist, J. dissent)

FN46. 22NYCRR §1215

FN47. 22NYCRR §1215.1(a)
FN48. Rules of the Chief Judge (22 NYCRR) §137.01(b)(2)

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Wednesday, March 5, 2003

DOI

CIVIL COURT

DECISION OF INTEREST

HUDSON TOWER HOUSING CO., INC. v. WEISSBROD

New York County

Judge Schneider

HOUSING PART N

This summary holdover proceeding was filed in March 1997, almost six years ago. Petitioner claimed that its tenant, Amy Weissbrow, had sublet her apartment to Patrick Lynch without the landlord's consent, in violation of her lease. The case was settled by a one page handwritten stipulation, signed by the attorneys representing Weissbord and the petitioner and by Ms. Weissbord herself, and filed with the court the first time the case appeared on the calendar, March 21, 1997.

From this deceptively simple beginning has followed six years of vituperative litigation in this and two other cases in five different courts with no apparent end in sight. It is in this context that both petitioner and respondent Lynch seek the imposition of sanctions under Rule 130 of the Rules of the Chief Administrator of the Courts against respondent Amy Weissbord and her counsel, Jay Stuart Dankberg.

History of the Case

In early 1997, petitioner Hudson Towers Housing Co., Inc., owner and landlord of an apartment complex in Battery Park City, served upon one of its tenants, Amy Weissbord, a notice terminating her tenancy effective February 14, 1997, based upon an alleged illegal sublet. Hudson Towers then commenced this proceeding.

Ms. Weissbord, an admitted attorney herself, retained the services of an experienced landlord-tenant attorney, Alan Goldberg. On March 13, 1997, according to Ms. Weissbord's own testimony before me, Ms. Weissbord and Mr. Goldberg, who were together at Mr. Goldberg's office, signed a stipulation settling the proceeding. The stipulation, a hand written document, was drafted by Elliot

Cherson, then the attorney for Hudson Towers. Mr. Goldberg delivered the stipulation, signed by himself and Ms. Weissbrod, to Mr. Cherson. Having done so, Mr. Goldberg and Ms. Weissbrod elected not to go to court on March 21, 1997, the date when the case was scheduled to be heard by Hon. Bruce Gould, then a judge of this court, leaving it to Mr. Cherson to appear and to file the stipulation with the court. The stipulation specifically provided that it could be filed in court by Mr. Cherson alone, and he did so. Mr. Lynch did not sign the stipulation.

The stipulation, which has been the subject of so much intense litigation, is a simple document. It provides for the entry of judgment for possession in favor of Hudson Towers and against respondents Weissbrod and Lynch, with forthwith issuance of the warrant of eviction. It states that Ms. Weissbrod vacates and surrenders the apartment effective January 31, 1997. It states that Mr. Lynch will vacate the apartment by June 30, 1997, and that he alone will pay use and occupancy to the petitioner from February through June, 1997. The stipulation gives Mr. Lynch the right to apply to rent the apartment in his own name, and gives Ms. Weissbrod the right to the return of her security deposit once Mr. Lynch has either vacated or become a tenant, provided the apartment has not been damaged. And that is all it says.

On August 27, 1997, more than five months after the stipulation was signed, Ms. Weissbrod, appearing without counsel, sought an order to show cause from this court. Her claim was that Mr. Lynch, who now had a lease for the apartment in his own name, was denying her access to the apartment for the purpose of removing her furniture and medication. The request for an order to show cause was declined, as Ms. Weissbrod indicated that she was not seeking, reinstatement to possession of the apartment but only the return of her belongings. See, e.g., Third City Corp. v. Lee, 41 AD 2d 611 (1st Dept. 1973).

Shortly thereafter, in the fall of 1997, Ms. Weissbrod, still without counsel, commenced an action in the Supreme Court against Hudson Towers, Lynch, Elliot Cherson, and Mr. Cherson's law firm, seeking damages for fraud in connection with the March 1997 stipulation as well as return of her furniture. All of the claims in that case against Hudson Towers, Cherson, and the law firm were dismissed in 1999, leaving only Ms. Weissbrod's claim against Lynch for the return of the furniture. Ms. Weissbrod's motion for rearraignment and renewal was denied in April 2000. The Appellate Division, First Department, affirmed both the June 1999 and the April 2000 orders in April 2001. Ms. Weissbrod's remaining claims against Lynch in the Supreme Court case were dismissed in 2002.

In August 1998, while the Supreme Court action was pending, Ms. Weissbrod, now represented by Walter Jennings, moved in this court to vacate the March 1997 stipulation on several grounds. First, she asserted that Mr. Cherson had made two unilateral changes in the stipulation after she signed it, one changing the date of the agreement, and the other covering over the signature line set aside for Mr. Lynch. Second, Ms. Weissbrod charged that two key provisions had been omitted from the agreement, one giving her a right to rent another apartment in the same complex, and the other allowing her to retrieve furniture she had left in the apartment.

By Decision and Order dated November 5, 1998, Hon. Martin Shulman denied
respondent's motion, holding that the changes made in the stipulation by Mr. Cherson were "non-substantive, ministerial, and "de minimus in nature" and that if Ms. Weissbrod was dissatisfied with the terms of the stipulation as written, neither she, nor her counsel ought to have signed it. Judge Shulman noted that neither Ms. Weissbrod nor her attorney had offered an explanation for having signed the stipulation without the inclusion of what Ms. Weissbrod asserted were key provisions. Judge Shulman also denied a cross-motion for sanctions, holding that the respondent's motion had not been entirely frivolous. The Appellate Term, First Department, affirmed Judge Shulman in all respects in 2002.

Following the dismissal of most of her claims in the Supreme Court, and the denial of her reargument motion there in April 2000, Ms. Weissbrod retained Mr. Dankberg to represent her. Beginning in May 2000, Mr. Dankberg pursued an appeal to the Appellate Division, First Department, from the dismissal of the Supreme Court case, pursued an appeal to the Appellate Term, First Department, from Judge Shulman's 1998 denial of Ms. Weissbrod's motion to vacate the stipulation, and, in August 2000, made the Motion in this court that is the subject of the current application for sanctions.

The August 2000 motion is an extraordinary document. It seeks not just reargument or renewal of the motion to vacate the stipulation denied by Judge Shulman almost two years earlier but also, among other things, "mandatory treble damages pursuant to Judiciary Law Section 487" against Elliot Cherson and his law firm; 1 "a strict liability damage award" against Cherson and his firm under Sections 135 and 135-a of the Executive Law; 2 punitive damages against Cherson and his firm for "willful non-disclosure and misrepresentations, fraud in the inducement, fraud in the execution and subsequent in-court misconduct"; sanctions against Cherson, the law firm, and the petitioner, for "frivolous litigation practices; and reinstatement of Weissbrod's tenancy in the apartment" that is the subject of the litigation.

Ms. Weissbrod's affidavit in support of the motion, which Mr. Dankberg testified was drafted by Ms. Weissbrod and then edited and approved by him, charges that Mr. Cherson committed "fraud ... a collusive scheme of misrepresentation, willful nondisclosure, perjury, document tampering, and frivolous litigation practices." (See Paragraph 13.) Factually, Ms. Weissbrod alleges that Cherson deliberately signed his name to the March 1997 stipulation in a way that obscured the signature line intended for Lynch, and that he improperly engaged in ex parte contact with Judge Gould in order to get the stipulation "So Ordered." She ignores the fact that the stipulation specifically provides that Cherson can present the stipulation for judicial signature without the presence of the other side, and she does not explain how the absence of Lynch's signature on the document harms her or changes her rights and obligations under the stipulation in any way.

But the heart of Weissbrod's argument in the August 2000 motion is her claim that petitioner had already signed a lease with Lynch for the subject apartment before Weissbrod signed the stipulation in the case, and that this somehow constituted a fraud on Weissbrod and on the court. In support of this argument, Weissbrod submitted a copy of a lease between Hudson Towers and Lynch dated February 14, 1997 and effective February 1, 1997 (attached to the moving papers as Exhibit 11), and certain receipts and checks from Lynch to Hudson Towers Inc. (attached to the moving papers as Exhibit 12). Weissbrod characterizes Exhibit 12 as containing
"checks in large amounts that [Lynch] issued to petitioner ... some that incredibly even predate the February 25, 1997 holdover petition."

Weissbrod argues that the lease is fraudulent because it was signed while she was still a tenant of the apartment at issue, and that petitioner and Cherson defrauded her by inducing her to give up the apartment without telling her that they had already rented it to Lynch. She argues that the checks establish that the deal was done prior to the March 1997 stipulation by which she gave up the apartment.

In opposition to the August 2000 motion, petitioner and respondent Lynch asserted that the Lease submitted to the court by Ms. Weissbrod as the basis for her argument that she had been defrauded, was not a complete document. The lease, they said, included several riders, and the riders were dated April 2, 1997. Petitioner and respondent Lynch both contended that the lease and the riders were signed on April 2, 1997, almost two weeks after the stipulation of settlement had been filed in court and "So Ordered." Petitioner and respondent Lynch also pointed out that the checks which Weissbrod contended were dated prior to February 25, 1997 were, actually dated exclusively in 1998, long after the stipulation had been signed and filed. The receipt for what Ms. Weissbrod characterized as a large sum of money was dated April 2, 1997, the date that Mr. Lynch contended he signed the lease, and the other receipt, dated February 5, 1997, appears to be a $60.00 fee for a credit check in connection with Mr. Lynch's application to rent an apartment from the petitioner in his own name.

On March 2, 2001, Hon. Laurie Lau of this court denied the August 2000 Motion in its entirety. Judge Lau noted that there was no legal basis for reargument. She denied renewal as well, as the "newly discovered evidence" submitted by the respondent, the February 1997 lease between Lynch and petitioner, was incomplete, in that the riders were not submitted. Judge Lau also directed that the matter be set down for a hearing on whether Ms. Weissbrod and her counsel should be sanctioned for deliberately attempting to mislead the court by not including the April 2, 1997 riders as part of the lease they submitted to the court.

Undeterred, Ms. Weissbrod, still represented by Mr. Dankberg, brought on another motion, initially returnable August 30, 2001. In this motion, Ms. Weissbrod sought Judge Lau's mandatory recusal, the vacatur of Judge Lau's March 2, 2001 Decision and Order on the grounds of "extra-judicial bias and prejudice," and various other relief. After Judge Lau's voluntary recusal, the motion was referred to me.

This new set of motion papers contained even more intemperate language than the one before. Ms. Weissbrod's affidavit alleged "an illegal criminal cover-up instituted by Cherson and petitioner in the Civil and Supreme Courts to prevent discovery of subtenant's covert and illegal lease to my apartment..." (Paragraph 2), accused Cherson not just of fraud and perjury but of forgery (Paragraph 3), and specifically denied that she had seen copies of the April 2, 1997 riders prior to the August 2, 2000 motion (Paragraphs 36 and 37). I denied the motion in all respects by Decision and Order dated January 15, 2002, and directed that the parties proceed with the hearing on sanctions already ordered by Judge Lau.
Following the Appellate Division's 2001 decision affirming the dismissal of most of Ms. Weissbrod's claims in the Supreme Court, Ms. Weissbrod, still represented by Mr. Dankberg, moved in the Supreme Court to reinstate those claims. The motion was denied in all respects by Hon. Harold Tompkins in April 17, 2002 and he also directed the imposition of sanctions under Rule 130 against Ms. Weissbrod.

Finally, just before the sanctions hearing before me, Ms. Weissbrod commenced an action in the Federal District Court for the Southern District of New York, reasserting all of her claims against Hudson Towers, Lynch, and Cherson, and adding claims against the New York City Civil Court, Judge Lau, and various other court personnel.

The Hearing On Sanctions

Parties then came before me on November 12, 13, and 14 for a hearing on sanctions. Both Ms. Weissbrod and Mr. Dankberg testified at the hearing.

On the basis of the evidence at the hearing I find that both Ms. Weissbrod and Mr. Dankberg were fully aware of the existence of the lease riders dated April 2, 1997, before the August 2000 motion. Both Ms. Weissbrod and Mr. Dankberg testified at the hearing that they were unaware of the riders until they were submitted in opposition to the August 2000 motion, in October 2000. However, Petitioner's Exhibit 10, the affirmation in opposition to Ms. Weissbrod's 1999 motion to reargue and renew in the Supreme Court, contains the full lease with riders as Exhibit G. The affirmation also alleges clearly, at Paragraph 24, that the lease was executed on April 2, 1997, and that this fact was evident from an examination of the entire lease. Finally the affirmation explains the assertion by Hudson and Lynch that the lease was dated February 15, 1997 because Ms. Weissbrod's tenancy had been terminated effective on that date, by the predicate notice served in connection with this proceeding. The entire document was served on Ms. Weissbrod in November 1999.

Petitioner's Exhibit 3, Lynch's response to Ms. Weissbrod's first set of interrogatories in the Supreme Court, dated in July 1999, also contains a complete copy of the lease with the riders dated April 2, 1997.

Mr. Dankberg, of course, did not become involved in the litigation until 2000. However, in September 2000 he certified Volume III of the Appendix on Appeal to the Appellate Division, First Department, admitted in evidence as Exhibit 6 at the hearing before me. That record contains a Reply affidavit by Ms. Weissbrod dated November 10, 1999, in which, at Paragraph 8, Ms. Weissbrod specifically addresses the issue of the riders dated April 2, 1997. It is obvious from this document that Ms. Weissbrod was fully aware of the existence of the riders, then, nearly a year before the August 2000 motion in which she submitted the body of the lease without the riders. It is also clear, though, that Mr. Dankberg was aware of the riders prior to October 2000 when he testified he first saw them. Although Mr. Dankberg testified that Ms. Weissbrod actually signed the certification for him, he also testified that he himself had examined the entire Appendix and authorized her to sign his name. Mr. Dankberg also testified that Ms. Weissbrod provided him with all of the documents from the Supreme Court case when he was retained, that he reviewed the documents in connection with the appeal and in connection with

preparing the August 2000 motion in this court, and that he was fully aware that
Ms. Weissbrod's theory rested upon the need to establish that the Lynch lease was
signed in February 1997, before the stipulation in this proceeding in March 1997.

Also telling is the fact that the reply papers Ms. Weissbrod and Mr. Dankberg
prepared after receiving the October 2000 opposition containing the lease riders
do not even mention the riders. They simply reassert the claims made in the
original motion papers, with the addition of further intemperate language
asserting, for example, that the evidence "demonstrates to a legal certainty" that
Cherson has committed fraud, Exhibit 4, at Paragraph 6.

Unbelievably, in the motion submitted to this court in August 2001, papers
prepared and submitted by Dankberg and Weissbrod together several months after
Judge Lau's decision, Ms. Weissbrod once again asserts in her sworn affidavit that
she did not receive the Lynch riders in the Supreme Court litigation (Paragraphs
36 and 37), and Mr. Dankberg's affirmation once again asserts that the Lynch lease
was signed in February, 1997 without so much as mentioning the April 2, 1997
riders to the lease.

I also find, based simply on an examination of the papers in support of the
August 2000 motion, that the motion papers baldly misrepresented the contents of
Exhibit 12 to the moving papers. Exhibit 12 did not contain checks dated prior to
the commencement of this proceeding. In fact, it contained only documents entirely
consistent with the account given by Hudson and Lynch with respect to the signing
of the lease between them and the payment of rent by Lynch.

Applicable Law

The court may impose sanctions, in addition to or in lieu of awarding costs for
frivolous conduct, under 22 NYCRR 130-1.1(a). Such may be made against an attorney
or a party or both under 22 NYCRR 130.1.1(b), either upon motion to the court or
upon the court's own initiative after a reasonable opportunity to be heard. 22
NYCRR 130-1. [FN1] provides:

(a) The court, in its discretion, may award to any party or attorney in any civil
action or proceeding before the court, except where prohibited by law, costs in
the form of reimbursement for actual expenses reasonably incurred and reasonable
attorneys' fees, resulting from frivolous conduct as defined in this Part. In
addition to or in lieu of awarding costs, the court in its discretion may impose
financial sanctions upon any party or attorney in a civil action or proceeding who
engages in frivolous conduct as defined in this Part, which shall be payable as
provided in section 1.30-1. [FN2] of this Subpart. This Part shall not apply to
town or village courts, to proceedings in a small claims part of any court, or to
proceedings in the Family Court commenced under article 3, 7 or 8 of the Family
Court Act.

(b) The court, as appropriate, may make such award of costs or impose such
financial sanctions against either an attorney or party to the litigation or
against both. Where the award or sanction is against an attorney, it may be
against the attorney personally or upon a partnership, firm corporation,
government agency, prosecutor's office, legal aid society or public defender's
office with which the attorney is associated and that has appeared as attorney of
record. The award or sanctions may be imposed upon any attorney appearing in the
action or upon a partnership, firm or corporation with which the attorney is
associated.

(c) For purposes of this Part, conduct is frivolous if: (1) it is completely
without merit in law and cannot be supported by a reasonable argument for an
extension, modification or reversal of existing law; (2) it is undertaken
primarily to delay or prolong the resolution of the litigation, or to harass or
maliciously injure another, or (3) it asserts material factual statements' that
are false.

Frivolous conduct shall include the making of a frivolous motion for costs or
sanctions under this section. In determining whether the conduct undertaken was
frivolous, the court shall consider, among other issues the circumstances under
which the conduct took place, including the time available for investigation, the
legal or factual basis of the conduct, and whether or not the conduct was
continued when its lack of factual basis was apparent, should have been apparent,
or was brought to the attention of counsel or the party (d) An award of costs or
the imposition of sanctions may be made either upon motion in compliance with CPLR
2214 or 2215 or upon the court's own initiative, after a reasonable opportunity to
be heard. The form of the hearing shall depend upon the nature of the conduct and
the circumstances of the case.

Thus, if this court concludes that Ms. Weissbrod or Mr. Dankberg has made
material false assertions, or has engaged in conduct primarily to delay or prolong
the resolution of this proceeding or conduct devoid of legal merit and
unsupportable by a reasonable argument for extension, modification or reversal of
existing law, the Court can impose sanctions against Ms. Weissbrod and Mr.
Dankberg, or require that they pay reasonable attorneys' fees, or both.

The rule "permits a court, in the exercise of discretion, to award costs in
reimbursement of actual expenses reasonably incurred, as well as attorneys' fees,
resulting from frivolous conduct ... (22 NYCRR 130-1.1[c][1])." Pahl Equip. Corp.
v. Kassis, 182 A.D.2d 22, 32 (1st Dep't 1992, 589 N.Y.S.2d 8, 1v denied in part
and dismissed in part, 80 N.Y.2d 1005 (1992)). Frivolous conduct includes the
assertion of material factual statements that are false. It has been held that
"[n]othing could more aptly be described as conduct "completely without merit in
fact" than the giving of sworn testimony or providing an affidavit, knowing the
same to be false, on a material issue." Sanders v. Copley, 194 A.D.2d 85, 88, 60-5
N.Y.S.2d 281, 293 (1st Dep't 1993).

In addition to, or in lieu of imposing costs, the Court has the discretion to
impose financial sanctions payable, when against an attorney, to the Lawyer's Fund
for client protection. Such sanctions are "retributive, in that they punish past
conduct. They are also goal oriented, in that they are useful in deterring further
frivolous conduct not only by the particular parties, but also by the bar at
large. The goals include preventing the waste of judicial resources, and deterring
vexatious litigation and dilatory or malicious litigation tactics." Levy v. Carol
If the court finds after a reasonable opportunity to be heard that a person has engaged in frivolous conduct, it can impose a sanction not exceeding $10,000.00. The award must be in the form of a written decision setting forth the conduct on which it is based, the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount awarded to be appropriate. 22 NYCRR 130-1.2; Spinnell v. Toshiba America Consumer Products, Inc., 239 A.D.2d 175, 657 N.Y.S.2d 635 (1st Dep't 1997); Gossett v. Firestar Affiliates, 224 A.D.2d 487, 637 N.Y.S.2d 779.

Discussion

It is obvious to me, after an examination of the voluminous court file in this case and the documents submitted in evidence at the hearing, and after listening to Ms. Weissbrod's extensive testimony at the hearing, that she long ago became so emotionally invested in this litigation that she no longer has the ability to recognize that it is over. She has lost three motions in this court and has lost her appeal to the Appellate Term in this case. Her case in the Supreme Court has been dismissed. The dismissal has been affirmed by the Appellate Division. Her motion after the appeal to reinstate her claims in the Supreme Court has been denied and she has been sanctioned for that motion. Yet, on the eve of the sanctions hearing before me she commenced a new action in Federal Court, repeating the same claims again, and adding various complaints about the court.

In the August 2000 motion, she elected to submit to the court only those portions of the agreement between Hudson and Lynch as suited her purposes and withheld from the court those portions that did not. She lied repeatedly about whether or not she had seen the lease riders before October 2000. And she misrepresented to the court the contents of Exhibit 12, the checks and receipts she had obtained from Lynch. No reasonable person could doubt that her actions were deliberate and that they were intended to mislead the court.

Justice Tompkins found, on the sanctions motion before him in the Supreme Court, that the frivolous motion made there was made at the instigation of Ms. Weissbrod, and that her counsel, Mr. Dankberg, should not be sanctioned for it. I cannot see Mr. Dankberg's actions here in a similarly benign light.

Rule 130 was adopted in part to impose upon attorneys an obligation to investigate thoroughly the cases brought to them by their clients before presenting those cases and claims to the court. Rule 130-1.1(b) provides that "by signing a paper, an attorney or party certifies that, to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of the paper or the contentions therein are not frivolous as defined in subsection (c) of section 130.1.1."

Here, Mr. Dankberg had an obligation not just to submit to the court whatever Ms. Weissbrod wanted submitted, not just to sign off on whatever wild charges she chose to make, but to review her evidence, to scrutinize her documents, to review and revise her drafts, and then to submit to the court only that which was properly supportable. Rule 130.1. [FN3] (c).

There is no evidence here that he did so. Any careful review of the documents in
the case would have revealed to Mr. Dankberg that the Lynch lease had riders, and that the riders bore a date consistent with the petitioner's theory of the case. He certainly knew, and he testified before me that he knew, that the date of the lease was critical. He could not have imagined that the riders were not relevant. Nor could he have missed, after even a cursory review, the misrepresentation in the motion papers with respect to the contents of Exhibit 12.

Yet Mr. Dankberg has, for more than two years, submitted to this court document after document containing the gravest of charges against petitioner, Lynch, and Elliot Cherson, without even taking the care to examine the documents readily available to him to see if they support the charges.

While the driving animus behind the litigation is clearly Ms. Weissbrod's, and not Mr. Dankberg's, Mr. Dankberg had an obligation as an attorney to investigate, and then to insure that his papers contained complete rather than partial documents, and that he made only supportable claims in the litigation. He did not do so.

Accordingly, I assess a sanction of $5000.00 against Ms. Weissbrod, and a sanction of $2500.00 against Mr. Dankberg. The amounts, in part, are retributive in that they address Ms. Weissbrod's and Mr. Dankberg's abuse of the judicial process. As a result of their conduct, the time and attention of this court, as well as other courts have been repeatedly diverted unnecessarily. Bell v. New York Higher Education Assistance Corp., 76 N.Y.2d 930, 563 N.Y.S.2d 54. In addition, Ms. Weissbrod has manifested a pattern of frivolous conduct in presenting these same baseless claims to several other courts. She, however, continues to ignore the decisions of this court which have clearly advised her of the baseless nature of her claims. Moreover, she remains undeterred despite the imposition of a sanction by the Supreme Court. Jason v. Chusid 78 N.Y. 2d 1099, 578 N.Y.S.2d 867. Similarly, Mr. Dankberg knowingly advanced these same baseless claims when it was obvious that such action would serve merely to prolong this proceeding and inconvenience and harass his adversaries. Thus, the amounts also represent the need to deter both Ms. Weissbrod and Mr. Dankberg from engaging in further vexatious litigation and dilatory litigation tactics. Levy v. Carol Mgt. Corp. supra.

Ms. Weissbrod and Mr. Dankberg are directed to deposit the award of sanctions with the Lawyers' Fund for Client Protection within 30 days of this order. The court will forward a copy of this order to the Lawyers' Fund for Client Protection.

This constitutes the decision and order of the court.

FN1. The cited section makes any collusion or deceit by an attorney with intent to deceive the court or a party a misdemeanor and, in addition, provides for treble damages to any party harmed by the deceit or collusion.

FN2. ??

FN3. ??
1. Introduction

Any discussion of legal ethics must, of necessity, be something of a grab bag of various unrelated situations. When one looks at the Code of Professional Responsibility, one sees dozens of individual rules, grouped together in sometimes rather artificial ways. This article will by no means seek to address all of those rules, but only those which come into play most frequently in landlord-tenant law. Even as to landlord-tenant law, the discussions had here will focus on landlord-tenant litigation rather than landlord-tenant transactions.

Both in crafting the rules and in enforcing them, there has to be a certain understanding that lawyers are expected merely to act as moral human beings, not as omniscient deities. This immediately factors “good faith” into both the formulation and the enforcement of the rules. Nearly any of the rules could give rise to situations where the attorney fully aware of the facts her ethical obligations would be different from what they are with the information that she actually has in her possession. However, for some of the rules, the question of “knowledge” or “notice” will be more obviously present than in others. Indeed, some of the rules create a duty of inquiry and others are content to allow the attorney to work with the knowledge that is readily at hand.

2. Definition

Black’s Law Dictionary defines “Legal Ethics” as follows:

1. The standards of minimally acceptable conduct within the legal profession, involving the duties that is members owe one another, their clients, and the courts. – Also termed etiquette of the profession. 2. The study or observance of those duties. 3. The written regulations governing those duties.

Examining this definition at all, one is immediately struck by the conflict inherent in it. Right within the definition itself we see three sets of duties:

1. To clients
2. To other attorneys
3. To the courts.

Most frequently the conflict will arise between the duties owed one’s clients and the duties owed elsewhere. But all of the possible permutations occur in the day to day practice of the law. That there will be such conflicts is inevitable. Resolving them ethically is entirely within our control, however.¹

¹ The realist must understand that ethical behavior is as much a matter of culture as it is anything else. There are some firms where ethics never weigh into the considerations of the firm’s leadership, except when trying to retain somebody’s law license. There are other firms which use ethics as part of the general weighing of considerations of the issues that come before the firm. And then there are firms like the one I have the good fortune to hold a partnership in, in which ethical breaches are grounds for automatic summary termination.
It is, however, worthy of note that one's duty to oneself is not part of the definition. This automatically means that the economic considerations entailed in ethical decision making cannot be part of the equation.\(^2\)

3. Etiquette

It is probably unfortunate in our society that with the rise of equality between the genders came a loss of language to describe acting with good manners. Both the words "gentleman" and "lady" are so freighted with sexist stereotyping, that it becomes exceedingly difficult to characterize someone as acting in a mannerly manner without invoking all the negatives associated with it. Consider the problem of opening doors. Half a century ago, a gentleman opened a door for a lady. Now it is rare for anyone to open a door for anyone else. While some follow the rule that the first one to reach a door is the last one to pass through it, there is still some tension associated with it in mixed-gender company.

Admittedly, the door thing appears to be a digression. However, it is not. Part of the problem in observing etiquette is the risk that being mannerly may be misperceived as being condescending. Thus, it becomes a matter of etiquette not to impose etiquette.

Adjournments

In observing etiquette for a colleague, one must often weigh the harm it will engender to one's client. Consider the problem of adjournments. With all the talk there is in the legal literature about summary proceedings meant to be a speedy recovery of property for the landlord, it becomes readily apparent that nearly any adjournment is against a landlord and in favor of a tenant. Of course, that is not always the case. Some adjournments are side-neutral. Others could even favor the landlord, such as when the landlord is waiting for a necessary document to show up from some governmental agency. But, in the overwhelming majority of cases, the landlord wants the case resolved as quickly as possible and the tenant wants it resolved as slowly as possible.\(^3\)

Yet, there is the broader picture. A client is ill served when one gratuitously makes one's adversary an enemy sworn to battle to the death. Often small concessions cheerfully granted can have the effect of inspiring other such courtesies on the other side. Indeed, I have observed that my initiating the exchange of courtesies often leads to my adversary becoming most cooperative in resolving the matter efficiently. We do

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Perhaps the most amazing firms are those who promote breaches of ethics because they believe that a higher moral calling justifies it. I recall in my early years of practice the firms who specialized in tenant defense who routinely stole the files from the Courthouse because of their misbegotten belief that they "had to do something to level the playing field." The truly sad part about that was that they honestly believed that what they were doing was morally right, even if "technically" forbidden.

Since the culture of the firm is such a strong part of the processing of ethical conflicts, every attorney has to choose whether or not to remain with that firm. The Code of Professional Responsibility recognizes the difference between associates and partners and casts the responsibility more heavily on the partners. But for most of the rules, the so-called "Nuremberg" defense, "I was just following orders," simply does not cut the mustard, nor any other condiment.

\(^2\) That is a really tough one for young associates.

\(^3\) Note, of course, the exception for a tenant who loses a day of work every time the case is adjourned or perhaps even worse an impoverished tenant who loses car fare with each trip to the courthouse.
not advocate our clients' positions any less strongly, but we do tend to focus on the substantive issues that the client is vastly more interested in than procedural questions like whether a Bill of Particulars can be served a day later than ordered. In short, when one takes the broader view, consenting to an adjournment can have the net effect of speeding the case along rather than delaying it.  

Stipulations

Stipulations present their own issues of etiquette. Many times the stipulations are about fairly humdrum things like adjournments or a motion schedule. If such stipulations are worked out over the telephone, there is little justification for both attorneys having to schlep over to the courthouse just to get the stipulation into the court's files. If one attorney handles the filing of the stipulation for both sides, we have a schlepping attorney and a non-schlepping attorney. This is entirely proper, but oddly gives rise to certain ethical requirements. After all, the stipulation needs two signatures, but only the schlepping attorney is available to do the signing. The way many attorneys handle this is to sign the stipulation with their regular signature for the part they are supposed to sign and with an illegible scrawl for their adversary's signature. As they phrase it, "Who will know? Who will care?"

Yet, they seem to fail to notice that by doing it that way, they have just committed forgery. Here, the adversaries have done a fine job of fulfilling their duties to each other, but their duty to the court got buried under the imperative of convenience.

There is no excuse for that. Done properly, the schlepping attorney should recognize that he has become the agent of the non-schlepping attorney and he should sign clearly as such. Specifically, when he signs his side of the stipulation as "Joseph Gotlaws" and his adversary is "Archibald Ordinance," he should clearly sign the other side of the stipulation "Archibald Ordinance by Joseph Gotlaws." There is nothing wrong with saying to the judge, "Your honor, my adversary asked me to sign for him." If the court has a problem with that and defaults the non-schlepping attorney, it is the schlepping attorney's ethical duty to attempt to refuse the default and failing that, to note his protest.

Depositions

Depositions can, but need not be a battleground. One hopes that prior to going into a deposition, one has acquired a sense of how accommodating and how aggressive an adversary is going to be. Since the taking of a deposition is closely akin to cross-examination in a trial, there is nothing wrong with the examiner trying to make the witness sweat a little. A certain amount of pressure does tend to bring out the truth. However, that is not a license to be cruel or to rant at or be otherwise abusive of the witness.

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4 I was recently served with a set of motion papers in which the copy I received was missing several pages at the end of the affirmation, several pages at the end of the affidavit, and some of the exhibits. While I could have engaged in motion practice about the motion malpractice, it seemed a better idea to call up the adversary and request a decent copy of the papers. Why bill my client for a motion about a motion when I can bill my client for a five minute phone call instead?

5 My spell check flagged "shlep" as a spelling error and corrected it to "schlep." I was amazed.

6 In landlord-tenant litigation, depositions or "EBT's" as they are commonly known, are relatively rare animals, except in nonprimary residence litigation where they have almost become the rule rather than the exception.
The witness's attorney has her own obligation to abide by rules of courtesy. While few attorneys can recite them, nearly all will consent to the "usual stipulations" at the beginning of a deposition. These "usual stipulations" include the right to reserve all objections except as to form. Since objections as to form are so relatively rare, it means that in the course of a normal deposition, very few should be registered. One sees, unfortunately frequently, attorneys who constantly object at depositions with no real basis other than the unethical desire to break the examiner's rhythm. This is a breach of ethics. While it would be a rare case indeed that would rise to the level of filing a complaint with a disciplinary committee, the examiner should, at the very least, adjourn the deposition to the courthouse where the Judge sitting in Special Term Part II can impose a bit of order and restraint. There is, of course, the option of motion practice, including motions for sanctions, if things get really out of hand.

_Conditio Nervorum_ Letters_

When dealing with an adversary, often one will reach an agreement for one side to forebear on exercising a procedural right or even a minor substantive one. This is an entirely proper practice which deserves encouragement. However, simply letting it go at a verbal handshake can be imprudent. To cover situations where a writing is necessary, there are two devices available: the confirmation letter and the counter-signed confirmation letter. In the simple confirmation letter, one merely sends a letter to one's adversary "confirming our conversation in which we agreed to the following." Such a letter may be regarded as entirely "self-serving" and therefore it is the weakest instrument possible for the purpose, but is of at least some use in convincing the court that you acted the way you did because your adversary said you could. In the counter-signed confirmation letter, one leaves a space at the bottom of the letter for the adversary to sign below the words "agreed to" and one furnishes a stamped self-addressed envelope with the copy to be signed by the adversary. The stamp, envelope, signature, and mailing are all courtesies that we can and should be demanding of ourselves.

_CYA Letters_

When dealing with one's own client, it is fairly common for the situation to arise when the client insists upon acting against your advice. Sometimes, you may even find yourself saying to the client, "As your attorney, I must advise you" while you are sending a signal to your client that while this must be the formal advice, were you the recipient of that advice you would not follow it yourself. Readers of this article will no doubt leap to the conclusion that we are speaking at this point about illegal behavior. Of course, there can be such situations and depending on the level of illegality involved, it may or may not be a breach of ethics to imply advice to your client to proceed illegally. Lincoln is quoted to have said, "The Constitution is not a suicide pact." The point of remark is

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7 Most typically.
8 This varies with the level of importance of the concession. If one is getting permission to have an additional couple of days to file an amended answer, the purely oral concession may be entirely adequate. Getting permission to have the case marked off the calendar should always be supported by a writing setting forth not only the marking, but the terms of the marking, such as payments of use and occupancy.
9 For reasons of delicacy, we will leave an exact interpretation of this abbreviation behind and render it here euphemistically as "cover your anatomy." This is not to be confused with the internet abbreviation "eyy" which means "I will be seeing you."
10 But never actually did.
that even a lawyer has to recognize a situation when a law should be broken. Consider the situation where there was litigation between the landlord and the tenant regarding possession of the apartment and during the course of that litigation, the tenant moved out and out of sheer malice changed the locks while moving out. Because of the legal ambiguity of the situation, the lawyer cannot advise the client to drill the lock and take possession, but were the lawyer the landlord himself, that is precisely what he would most likely do.

In other situations, what the client proposes to do is not illegal but merely imprudent. Let us say, for example, the lawyer has just succeeded in evicting the tenant and the client wants to restore the tenant for a few days because the tenant is having difficulty finding somewhere to live. Such restoration is humanitarian and legal, but certainly imprudent. The lawyer has to advise the client not to do it. If the client says he is going to do it anyhow, this situation calls for a CYA letter which says in essence, “Dear Client, I told you not to do this thing and you told me you were going to do it anyhow. Very truly yours, etc.” CYA letters can have two beneficial effects: They can prevent the client from suing the lawyer for malpractice when the imprudent move blows up in the client’s face. They can also sometimes throw cold water in the client’s face and get him to take seriously the advice from the lawyer not to follow the proposed course of action.

3. Morality

“Morality” and “ethics” are not strictly synonymous. The Stanford Encyclopedia of Philosophy defines “morality” as follows:

The term “morality” can be used either

1. descriptively to refer to a code of conduct put forward by a society or,
   a. some other group, such as a religion, or
   b. accepted by an individual for her own behavior or

2. normatively to refer to a code of conduct that, given specified conditions, would be put forward by all rational persons.

They are partially synonymous in that the third definition of legal ethics, given above, was (essentially), “The written regulations governing those duties lawyers owe one another, their clients, and the courts,” and the first definition of morality immediately above, stating in essence, “a code of conduct put forward by a society or some other group.” Clearly these two definitions both describe The Code of Professional Responsibility.

A now deceased lawyer of my acquaintance used to tell me that morality consisted in its entirety of the laws that have been promulgated by those who have the authority to promulgate them. Thus, according to his view, the Jewish Bible and the Vehicle and Traffic Law of the State of New York were both places where one could find one’s moral duties. I questioned him rather closely on this and he informed me that,

11 Let no reader think I accept one iota of the purported justification of the routine violation of our Constitution at Guantanamo Bay.

12 I have on many occasions seen CYA letters over my signature or over the signature of those seeking my advice have the effect of preventing the imprudent conduct. Folks tend to believe what they read more than what they hear.
according to his view, if one runs a red light in the middle of the light when one can clearly see that there is no traffic that could possibly be affected in either direction, one has committed a moral offense. I have called this theory, "The Divine Right of Traffic Lights."

While tempted to say that this theory is plainly preposterous, it becomes clear that it was not plainly preposterous to him. So, to make it plainer, it appears that we need some kind of yardstick by which to measure those things which the law requires as part of ethics or morality, and those things which the law requires as part of the mere administration of a complex society.

The sources or moral authority are easy enough to find. The Bible, the Koran, the Bhagavad Gita, and the writings of Aristotle are all examples that come readily to mind. Yet, we note that in each of these examples, there are stories or other items which may frame a moral issue without being the moral issues themselves. Thus even in sources of moral authority like these, not everything in the source is a moral issue. In this regard, the Code of Professional Responsibility differs. It is nothing but ethical rules. The various other statutes and ordinances passed by local, state, and federal authority may or may not be ethical rules and indeed may or may not be intended as such.

In order to measure what is and what is not an ethical rule found in a source of moral authority, we may borrow from the criminal law which distinguishes between malum prohibitum and malum in se. Malum prohibitum is a thing society chooses to disallow as part of the orderly running of that society. In landlord-tenant law, we would find the requirement that a notice be posted setting forth the inspection dates of an elevator would have as its violation a malum prohibitum. Nobody gets hurt if the notice is missing. It is just harder for governmental inspectors to keep track of the elevator's maintenance schedule in the absence of such a notice. It is a matter of administrative convenience. That is why in this article we have impliedly referred to such items as "administrative prohibitions."

Malum in se is something that is intrinsically evil, like theft or murder. It is what our definition of morality refers to as an item to be proscribed "in a code of conduct that, given specified conditions, would be put forward by all rational persons."

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13 Which he opined to be the only morally correct view. This proved rather interesting as I subsequently found out that he made a regular practice of using his escrow funds as kind of a capital reserve fund for his own financial needs.

14 The Bhagavad Gita, for example, takes place as a conversation between divine beings, Krishna and Arjuna, while in chariots overlooking the progress of a battle. The moral question attached to the chariot itself is, for example, never addressed, that being the exploitation of horses to draw the chariot. As a result, the Bhagavad Gita might have been written very differently if its text had come straight from the horse's mouth, so to speak.

15 One could strongly argue that the anti-profiteering regulations in the Rent Stabilization Code prohibiting a tenant from charging a roommate more than a proportionate share of the rent is not only a legal but indeed a moral principle. Yet, we would be surprised to find anyone who would choose to swear on a Rent Stabilization Code rather than a Bible when about to give testimony. In short, ethical principles may sometimes wander into otherwise entirely administrative documents.

16 Of course, that leaves us with the undefined term "rational," which in the ultimate analysis, often seems to come down to marching to the most popular drummer. According to the standard joke, poor people are "crazy" and rich people are "eccentric" when judged for their deviation from usual patterns of behavior.
We should note that the presence of a particular rule in a particular place will not guarantee that it is one kind of "malum" or the other. An attorney can be subjected to disciplinary proceedings for failing to register biennially, but one would be hard pressed to find that failure evil.

It might be tempting to try to come up with a list of everything that is evil for a lawyer to do and simply forbid it. Yet, mathematics has what it calls "the incompleteness theorem" which states that in any system of propositions, you will find a new proposition whose truth or falsity cannot be proven from the list you have already accepted. You must therefore either add that proposition to the list or add its negative. But once you do so, you still have another incomplete list. We have certainly seen this to be true in human experience and in the legal profession. The whole reason we have a system of stare decisis is that somebody is always doing something new and we have a "case of first impression" to figure out what to do about it.17

And so, even with our yardstick, we still have to figure out what is and what is not intrinsically evil without having anything that can tell us in an authoritative way.18

4. Why Be Ethical?

There are several leading theories as to why an attorney should be ethical. These can be broadly characterized as:

a. Feel good theory.
b. Rules are rules.
c. The value of a good night's sleep.
d. Earning a living.

The Feel Good Theory

The feel good theory is the easiest one to explain. It is also probably the easiest one to follow. Its practitioners are people who feel good about being moral and acting morally. It is not that they feel superior to others. It is all about their feeling good about themselves. It is, from the male point of view, often characterized as the ability to look at

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17 Sometimes society will adapt an old set of rules to an entirely new situation. Being old enough to remember an era when there was no such thing as an ATM, I could not help noticing how rapidly the culture developed for using them. The culture was a direct adaptation of that used for the much older urinal in a men's room. These rules, although unwritten, are universally accepted and are as follows: One stands at one's own device. One looks neither to the left nor to the right. One does not look at someone else's device. One does not make eye contact with someone using a different device. One does not speak to one using a different device. One does not assist someone at a different device. When waiting for a free device, one stands approximately four feet behind the people standing at the bank of devices and one takes the first device available. When coming to a bank of completely unused devices, one selects neither the first nor the last nor the one at the exact center.

18 There was a time when it really was regarded morally required to take a day off from work one or more days a week. Now, it is just seen as a good idea. Ideas of what is and what is not moral undergo evolution, just like anything else.
oneself comfortably while shaving. We cannot ignore the existence of lawyer jokes, but only the practitioner of the feel good theory can laugh at them without hearing her own life reflected in the punch line.

Rules Are Rules
Under Rules are Rules theory, there is nothing to think about. The rules are there and they have to be followed. One has a duty to obey. That is the beginning and end of the question. In the end, we often find that “rules are rules” practitioners find ways around the rules. These people are characterized by the story we shared earlier about The Divine Right of Traffic Lights. It is sublimely ironic that these people may also be the ones most devoted to breaking the rules. The same attorney who pronounced the principle of the Divine Right of Traffic Lights routinely used his escrow account for his private financial purposes and divulged client confidences in absolutely social settings. While he hid behind not actually naming the client whose secrets he was publishing, he had no such compunction in front of his wife and children. Since he kept a closely guarded secret of how he managed in his own mind to justify such conduct according to the rules he claimed to cherish, I am in no position to set it forth. Yet, I am certain he found a way. After all, rules are rules.

The Value of a Good Night’s Sleep
It might be easy to mistake the Good Night’s Sleep theory for the Feel Good Theory. But they are different. The practitioner of feel good theory feels good about the way he is leading his life. The practitioner of good night’s sleep theory does the right thing out of fear of the consequences of violation. Such a person does the right thing because he is afraid of getting caught doing the wrong thing. He knows that the consequences of getting caught can include fines, jail, disbarment, disgrace, and the inability to earn a decent income. He knows that if he follows the rules, he has no need to fear any of these things. In the absence of such fear, he crawls into bed and night and sleeps soundly, unhaunted by the Ghost of Violations Past. This is no small matter. Below we will be discussing a story that entailed the suicide of one who lost everything because he was an attorney who allowed his greed to become his god.

Earning a Living
Earning a living theory treads a middle ground between the warm fuzzies of feel good theory and the fear of night’s sleep theory. It is simply the pragmatic point of view that one can only earn a living as a lawyer if one remains a lawyer. We are an unusual business for being self-policied at all, but the level of our self-policing is probably some of the most severe of any American profession. A single infraction of our rules can, under the right circumstances lead to the permanent removal of our license. When other professionals forfeit their licenses, it may be with a simple sense of incompetence of clumsiness. But when we lose our licenses, it is with shame and disgrace. It is therefore simple enlightened self-interest rather than fear that drives these people to be strict in playing by the rules. They see that as, in the end, the most profitable way of behaving rather than the least.

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19 Although male, I don’t normally shave. But I do trim my beard every few weeks. I do try, however, to act morally with much greater frequency than I trim my beard.

20 It is a technical violation of the rules for us to tell them. However, from my point of view that is neither a malum prohibitum nor a malum in se. It’s just plain dumb. Even ethicists need to lighten up. There are attorneys who specialize in legal ethics. It is all they do day in day out. There are also proctologists. I confess finding it difficult to picture any child wanting to grow up to be either.
Having considered things in a general sort of way, it is now time to look at some relatively common specific situations.

5. What to do when you receive a set of papers from an adversary where it obvious that the paper was presigned in blank, the affidavit typed in around the signature, and the papers thereafter notarized?

This is an unfortunately common situation. It arises when the client comes into the office and tells the attorney a story. The attorney has some idea of how to tell that story and decides to generate an affidavit in order to support some kind of motion, often an order to show cause. The attorney can, of course, simply type up the affidavit while the client waits, but it could take a number of hours to craft such an affidavit. So, the attorney could ask the client to come back to sign the affidavit. Then there is the other alternative, clearly forbidden by law. The lawyer has the client sign three blank sheets of paper, one of them one-third from the top, one of them, half way from the top, and one of them one-third of the way from the bottom. The attorney then sends the client home. Left alone with the papers, the attorney now drafts the affidavit and sees where it falls out on its last page. Once he has made that determination, he has the printer use the best fitting pre-signed last page and prints the affidavit around the signature, which he thereupon notarizes.

Often these fraudulent notarizations are easy to detect, often not. The question we ask here is what you do when you find an obvious fraudulent notarization.

The problem with this question is that you are reasonably assuming that the attorney was party to the notarial fraud, but it is conceivable that the attorney is not. Further, while it is obvious that the fraud has taken place, if you are familiar with the process, it does not mean that it is provably fraudulent. So, whatever your inclination to call "foul," your ability to establish it is at most limited.

The rule, however, is clear. A lawyer has an enforceable obligation to root out and reveal breaches of ethics. Some know this as "The Rat Rule" and may state the rule as follows: "A lawyer who knows another lawyer is violating the rules of ethics has an obligation to rat out the violator on pain of being prosecuted himself." It is also called the "stool pigeon rule."

How is it that the rules of ethics contain a rule which itself has such distasteful nicknames? It is simply because our society has a cultural aversion to informants. When thinking of governance by informants the images that come to mind are easy enough to summon: The Third Reich, Stalinist Russia, The Regime of the Shah of Iran, and The French Revolution, to name but a few. There are to this day many people who prohibit their sons from getting involved with the Boy Scouts of America because of the reputation for the Boy Scouts to have been used as an informant program during World War II against scouts' parents who were violating the rationing laws.21

Hand in hand with this cultural distaste for informing is the superstitious belief that informing is "bad karma" and that "what goes around comes around." This is otherwise expressed as "There but for the grace of God, go I" and "If I inform, others will inform on me, even if I'm not doing anything wrong."

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21 Our use of ethnic concentration camps on the West Coast is only the most infamous example of our using the tactics we said we were fighting. There were others.
In short, both culture and belief oppose the rule which we find in New York’s Code of Professional Responsibility. Ethical Consideration 1-4 reads:

The integrity of the profession can be maintained only if conduct of lawyers in violation of the Disciplinary Rules is brought to the attention of the proper officials. A lawyer should reveal voluntarily to those officials all knowledge, other than knowledge protected as a confidence or secret, of conduct of another lawyer which the lawyer believes clearly to be a violation of the Disciplinary Rules that raises a substantial question as to the other lawyer’s honesty, trustworthiness or fitness in other respects as a lawyer. A lawyer should, upon request, serve on and assist committees and boards having responsibility for the administration of the Disciplinary Rules.

Disciplinary Rule 1-103 reads:

DR 1-103. Disclosure of Information to Authorities

A. A lawyer possessing knowledge, (1) not protected as a confidence or secret, or (2) not gained in the lawyer’s capacity as a member of a bona fide lawyer assistance or similar program or committee, of a violation of DR 1-102 that raises a substantial question as to another lawyer’s honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

B. A lawyer possessing knowledge or evidence, not protected as a confidence or secret, concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges.

Of all the principles of ethics, there is none we hate so much as this one. There is no use lying about it. _We hate this rule!_ Yet that does not diminish our obligation to obey it.

In _Wieder v. Skala_, 80 N.Y.2d 628, 609 N.E.2d 105, 593 N.Y.S.2d 752 (Ct of Appeals 1992), the Plaintiff, a member of the Bar, had sued his former employer, a law firm. He claimed that he was wrongfully discharged as an associate because of his insistence that the firm comply with the governing disciplinary rules by reporting professional misconduct allegedly committed by another associate.

The plaintiff asked the firm partners to report the misconduct of one of its associates to the Appellate Division Disciplinary Committee, but they refused to do so. He was then threatened with firing if he made the report himself. Eventually they did fire him.

The Court wrote:

The particular rule of professional conduct implicated here, DR 1-103[A]), it must be noted, is critical to the unique function of self-regulation belonging to the legal profession. Although the Bar admission requirements provide some safeguards against the enrollment of unethical applicants, the Legislature has delegated the responsibility for maintaining the standards of ethics and competence to the Departments of the Appellate Division.
Note that this is a reference to the Committees on Character and Fitness and to a lesser extent, to the Bar Exam itself. It is true that the Bar Exam now contains questions regarding ethics, but one cannot help observing that knowing the law of ethics is hardly a safeguard that there will be obedience to those laws. Of course, this article is written for you, not on the theory that your knowledge of the rules will guarantee your adherence to them, but rather on the theory that if you are so inclined, it is easier to obey the rules if you know what they are and what their nuances are. I also try, throughout, to give you some practical advice on things that you can do to make living within these rules reasonably easy.

The Court went on to say:

To assure that the legal profession fulfills its responsibility of self-regulation, DR 1-103(A) places upon each lawyer and Judge the duty to report to the Disciplinary Committee of the Appellate Division any potential violations of the Disciplinary Rules that raise a "substantial question as to another lawyer's honesty, trustworthiness or fitness in other respects". Indeed, one commentator has noted that, "[t]he reporting requirement is nothing less than essential to the survival of the profession." 22

While that, no doubt, is a noble expression of thought, it is probably a bit naïve. The decision looks at the failure to report breaches of ethics as themselves a breach of ethics. But we are inclined to think of people who breach ethics to be evil. We are also inclined to regard tattle tales as evil. So, while there may be no statistics to back this up, it would seem that this is the very most broken ethical rule. Common experience teaches us that somehow the legal profession is surviving in spite of it – but then again, one must admit that the general public does not think much good of us.

The Court went on to say:

Moreover, as plaintiff points out, failure to comply with the reporting requirement may result in suspension or disbarment (see, e.g., Matter of Dowd, 23 160 A.D.2d 78, 559 N.Y.S.2d 365). Thus, by insisting that plaintiff disregard DR 1-103(A) defendants were not only making it impossible for plaintiff to fulfill his professional obligations but placing him in the position of having to choose between continued employment and his own potential suspension and disbarment. We agree with plaintiff that these unique characteristics of the legal profession in respect to this core Disciplinary Rule make the relationship of an associate to a law firm employer intrinsically different from that of the financial managers to corporate employers.

The critical question is whether this distinction calls for a different rule regarding the implied obligation of good faith and fair dealing from that applied in the corporate setting. We believe that it does in this case, but we, by no means, suggest that each provision of the Code of Professional Responsibility should be deemed incorporated as an implied-in-law term in every contractual relationship between or among lawyers.

22 Gentile, Professional Responsibility-Reporting Misconduct By Other Lawyers, N.Y.L.J., Oct. 23, 1984, at 1, col. 1; at 2, col. 2.

23 We will discuss Matter of Dowd at length, infra.

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Of course, what we are really talking about in this case is not "every contractual relationship," but rather, every employment relationship. Clearly from the case, the obligation to report misconduct which itself encompasses the entire Code is implied by the Court of Appeals into the employment relationship. We are talking about the duty to report misconduct. That means we are talking about the duty to report any breach of the Code of Professional Responsibility. And so all of the provisions of that Code, at least all of the Disciplinary Rules, are indeed of necessity incorporated by reference into the employment relationship.

We must, of course, note that Wieder v. Skala, supra, is about the employer-employee relationship. However, we began this section with an examination of the adversary relationship which is entirely different and presumably has a somewhat different set of rules.

In theory, of course, it should be easier if the breach of ethics is by an adversary. One would not be afraid of getting fired for turning him in. Right? The answer is "yes" only in theory. Even in the adversary relationship we bump into cultural considerations that make one loath to turn someone in. And in all candor, if one does turn in a colleague, the social opprobrium in the rather tightly knit landlord-tenant community can be substantial. However, the fact that we are speaking only about the landlord-tenant litigation community throws another factor into the equation. In nearly all the work in this community, there is a judge involved. So, while our colleagues may be loath to report a misdeed to a disciplinary committee or to a District Attorney, they are all too happy to report flaws in the papers when opposing them with other papers. This becomes, under these circumstances, a very neat way to abide by the ethical obligation, by simply using the judge as the authority to whom the misdeed is reported in the form of legal argument. Where the judge takes it from there is up to the judge. The judge's power in such matters is substantial indeed.

This now brings us to the undeniably tragic case of Pennisi and Dowd. For those who practiced in Queens, they were universally known. In those days, Queens was pretty much sewn up by four or five firms. One of these was Pennisi and Dowd.

In Matter of Dowd, supra, we find out that in addition to a landlord-tenant practice, they had a flourishing collections practice. They had managed to obtain the extremely lucrative contract to collect the many millions of dollars owed the New York City Parking Violations Bureau. However, landing that contract entailed being shaken down by the Borough President of Queens County, Donald Manes, himself an attorney. When the scandal broke, Manes committed suicide, but this was not to end Pennisi and Dowd's problems. The fact that he was an attorney and not a mere common thug was to work their undoing. Pennisi and Dowd received five year suspensions for their failure to report Manes's breaches of the Code of Professional Responsibility for shaking them down.

They were brought up on charges before the Appellate Division Second Department. As is so often the case in disciplinary proceedings, one really has to read between the lines -- and that hidden text in this case is simply that this firm was known for its arrogance. We may therefore assume that there were many who welcomed their downfall, perhaps even some at the Appellate Division itself.

Interestingly, the Court wrote, "The Special Referee sustained the charges and noted in mitigation that the respondents had not been previously disciplined by this court or by a grievance committee and that the respondents cooperated throughout these proceedings." While it cannot be denied that a five year suspension is more mild than

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outright disbarment, for many practical purposes, it is the equivalent. It still leaves these folks with little more to do for gainful employment than flip hamburgers at the local fast food joint.

The court wrote:

The second charge alleged that on or about May 8, 1983, Donald Manes, then President of the Borough of Queens, directed Dowd to make future kickback payments to Geoffrey Lindenaumer, that Dowd informed the respondent Pennisi of his conversation with Donald Manes, and although both were aware that Donald Manes was an attorney admitted to the practice of law in the State of New York, they did not report their knowledge of Manes's unethical conduct to any tribunal or other authority empowered to investigate or act upon it, but rather continued to make the unlawful kickback payments to the newly designated recipient, and that by reason of the foregoing, the respondents violated Code of Professional Responsibility DR 1-103 (A).

One has to love the understatement in this case describing Manes's shakedown as "unethical conduct." It is also intriguing that there was no prosecution against Pennisi or against Dowd for bribery. One has to wonder about that one.

6. How to handle your own witness who is obviously perjuring himself, especially a process server.

We find in the Code of Professional Responsibility Disciplinary Rule 7-102 reads:

DR 7-102. Representing a Client Within the Bounds of the Law

A. In the representation of a client, a lawyer shall not:

4. Knowingly use perjured testimony or false evidence.

The first thing we have to notice about this is that it is not merely a ban on eliciting perjured testimony. It is a ban on using it. So, while you cannot prevent people from lying on the stand, when you know that they are lying, you may not refer to it in your summation. You have to ignore it. You can't use it – at all!

You may see that there is an inherent conflict between this and the ethical obligation to "represent a client zealously." But, there is a difference between zeal and over-zeal. That difference, simply put, in this context, is that you cannot use illegality to practice law.

We in landlord-tenant, because we are so driven by litigation, encounter an unusually high amount of perjury. Those who sit and write contracts all day long probably encounter less of it. We are bathed in it and it is largely the job of the court in every case to assess whether perjury is happening. If you think about it, it is pretty amazing. Perjury is expected to be a daily occurrence in what we do for a living. And we are not allowed to use it.

In a most informative entitled, "Reflections on Client Perjury" by Bennett Gershman, we find a reflection by Mr. Gershman on the implications of anticipated perjury in criminal law. Of course, there are present in criminal law special due process considerations not found in landlord tenant law, but many of these question see ready adaptation to our field:
1. Is a criminal defense lawyer required to play the dual roles of loyal 'champion' of his client, and 'gatekeeper' of the temple of justice? Are these roles really compatible? If so, what are the rules of the game?

This question, we can see, ports over immediately to landlord tenant practice. Indeed, we need only leave out two words:

Is a lawyer required to play the dual roles of loyal 'champion' of his client, and 'gatekeeper' of the temple of justice? Are these roles really compatible? If so, what are the rules of the game?

2. How far, if ever, can a lawyer cooperate in his or her client's decision to commit perjury?

To this, the answer is simple: Not at all.

3. Under what circumstances, for instance, does the lawyer ever really 'know' that his client's proposed testimony is false?

This, of course, applies with the same rigor to witnesses who are not the client. And oddly, in our field we are likely to have the same witnesses in dozens of cases even though the clients come and go – notably process servers. Those of us who do landlords’ work tend to employ the same process servers for years on end. Many firms encourage process server perjury. Firms such as mine, forbid it.

4. Is it sufficient if the lawyer simply disbelieves his client's story, or that of his client's witnesses?

Well, that really depends on what you mean by “sufficient.” There is disbelief, after all, and there is disbelief. If you are entertaining your doubts, there is no genuine ethical issue. But if you are reasonably certain that the testimony is perjured, then there indeed is an ethical issue there.

5. Does it make any difference if the attorney learns of the plan during the trial, as opposed to prior to the trial?

Frankly, it makes all the difference in the world. If there is a plan to commit perjury, you have to do the best you can to thwart the plan. But if it comes at you by surprise, you have to do the best you can to minimize its effect. Ironically, you have a better chance of winning your case if you can plan ahead of time what to do than if the client or witness surprises you. It is easier to protect the client’s interests if you honestly face the bad news before having it revealed in court and you devise an ethical way of doing the best you can for the client.

Consider the case in which you are representing a landlord only to find out that the supposed deed by which he holds title from the tenant is a forgery. You may not know who the forger is, but you certainly have your suspicions. Ethical alarmists would say that it is immediately incumbent upon you to withdraw from all further representation. However, so long as you never do anything that relies upon the validity of that deed, there are still things you can do for your client. Chief amongst them is negotiating a deal with the tenant. There are many nonfelonious, perfectly ethical deals that can be arranged. It just takes wisdom and patience. In the end, both the landlord and the tenant make out better than if the landlord’s attorney simply panicked and fled.

6. What actions can the lawyer properly take when he believes that his client intends to commit perjury?
The first step is to dissuade the client. But dissuasion can fail. So that leads us to the question of what to do if you have given that your best shot. Views on this differ. Some hold that one can still put the witness on the stand, but get leave from the court to proceed in narrative form. Others opine that the witness cannot be called to the stand at all.

7. Is the prevention of perjury more important than loyal and aggressive representation?

Yes. The way to think of it is that one is employed by the court system, but retained by the clients. So one's first duty is to one's employer — the courts. This is, of course, a metaphor, but a useful one. Our first loyalty is to the truth, however much we like to forget that.

8. Can the lawyer simply remain silent, and passively permit the perjury to occur? Can he threaten to impeach his client's testimony? Withdraw from the case? Report his client's actions to the judge?

If a lawyer tells the court that the testimony is going to be in narrative form, then effectively speaking, he has informed the court. And if it's a bench trial, as they most usually are, the impeachment of one's own witness is air tight. The court is not about to believe your witness whom you label for the court as a liar.


The court wrote:

Moreover, as perjury is a criminal offense, defense counsel has a duty to refrain from participating in the client's commission of it. Thus, we stated that while counsel must pursue all reasonable means to reach the objectives of the client, counsel must not in any way assist a client in presenting false evidence to the court.

Indeed, New York's Code of Professional Responsibility specifically addresses an attorney's ethical obligations in providing lawful representation. DR 7-102 expressly states that an attorney may not "[k]nowingly use perjured testimony or false evidence" "[k]nowingly make a false statement of law or fact"; participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false"; "[c]ounsel or assist the client in conduct that the lawyer knows to be illegal or fraudulent"; or "[k]nowingly engage in other illegal conduct".

In light of the ethical obligations of an attorney in this state, and in accordance with United States Supreme Court jurisprudence, an attorney faced with a client who intends to commit perjury has the initial responsibility to attempt to dissuade the client from pursuing the unlawful course of action. Should the client insist on perjuring himself, counsel may seek to withdraw from the case. If counsel's request is denied, defense counsel, bound to honor defendant's right to testify on his own behalf, should refrain from eliciting the testimony in traditional question-and-answer form and permit defendant to present his testimony in narrative form. However, in accordance with DR 7-102(a)(4), counsel may not use the perjured testimony in making argument to the court.
We will leave it to others to determine whether this holding is limited to the due process rights of a criminal defendant to testify or whether it applies with equal rigor to the due process rights of a civil litigant to call witnesses on his own behalf.

7. Citation to authority in briefs and memos: What is your obligation to have actually read what you are citing to?

Disciplinary Rule 7-102 reads:

Representing a Client Within the Bounds of the Law

A. In the representation of a client, a lawyer shall not:

2. Knowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

5. Knowingly make a false statement of law or fact.

It is important to recall that the ethical obligation not to make an argument of fact or law that cannot be sustained as an extension of current law, a modification of it, or a reversal of it appears not only as a disciplinary rule, but also the basis for the monetary imposition of sanctions. We shall see below where attorneys have been collaterally estopped from defending a disciplinary proceeding when they have already been sanctioned in a civil proceeding for frivolous arguments.24

It is therefore important to be able to stand behind one's legal arguments. That does not mean that you have to have a case to back up every assertion of law you make. Some assertions simply can't find such a case. After all, everything in the law starts somewhere. But it does mean that if you cite to a case, you have to have read it. It is too easy to rely on the summaries of cases prepared by legal editors.25 It is the individual attorney's job to ascertain what a case says and not to rely on reports of reports of what the case purports to say.

It is perhaps worthy of note that there was a Housing Judge who was renowned for his vast command of the legal literature. It was a well deserved reputation, but it was also one that he abused off the record. When the tape was not actually running, an attorney would make an argument to him in favor of a particular position the Judge disfavored. In the course of that argument, the Judge would challenge the attorney who had failed to take into account the holding of some case the Judge cited to, giving name, publication, and page number. The only problem was that the citation was completely fictitious and was only being used to bully the attorney into backing down from his position. This was, of course, a breach of ethics. Although that was judicial misconduct, it is no better when a lawyer does it.

This rule against improper citation is not however a rule requiring hunting down the last possible obscure source of authority. Legal research in landlord-tenant work remains complicated by the fact that the Housing Court Reporter may be the only reliable source of landlord-tenant case law, but even it lacks a big maroon citator that


25 The materials prepared by Treiman Publications are no exception. While we try to get things as perfect as we can manage, we are not blessed with infallibility.
enables one to check what other courts have had to say about a particular case. That remains a problem without a solution.

However, there are any number of decisions still being written, particularly in the suburban counties, where the court claims it to be a matter of first impression and the identical issue had in fact long previously been reported in the Housing Court Reporter. The point of this observation is not to tout my own company’s product, but rather to point out that you cannot rely upon a court’s claim that something is a matter of first impression. You still need to hit the books yourself.

8. Representing vindictive clients who are in it only for the blood of the adverse party.

Disciplinary Rule 7-102 reads:

Representing a Client Within the Bounds of the Law

A. In the representation of a client, a lawyer shall not:

1. File a suit, assert a position, conduct a defense, delay a trial, or take action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

This is eerily reminiscent of the medical profession’s Hippocratic Oath, the first principle of which is to do no harm.

In December 10, 2006 issue of the New York Times, there appeared an article called “A House Divided” that traced the history of a particular controversy in a particular building in Manhattan. As the author of the article was unaware before he did his research, but as he learned in time, landlord-tenant relations are second only to those matters dealt with in Family Court for the level of angst, anger, and spite that the courts and the attorneys must process on a daily level.

However, we, as attorneys, are obliged not to make these spite fights, our fights. We are not hired guns, but are supposed to keep our rational perspective on things, assisting the court in arriving at justice, not just serving our clients’ will to see the other side get its cumpanion.

In Matter of Babigian26, an attorney was famously disciplined for bringing this kind of vexatious litigation. In that one, it was not a matter of representing another client. It was a matter of representing himself in suing for the wrongs of society. While in truth, he was right about some of the issues he raised, he was wrong to refuse to let go when he lost.

Mr. Babigian’s basic beef was with the constitutionality of the Housing Court which was only sustained by the Court of Appeals, because it chose to see Housing Judges as mere referees who may therefore be appointed by the Judiciary itself.

This is what the Supreme Court New York County had to say of his original suit:

This action, commenced by an unsuccessful applicant for the position of Housing Judge in the New York City Civil Court alleges that Housing


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Judges of the New York City Civil Court are full-fledged judges. Plaintiff claims that the power to appoint judges is a function of the executive branch of government yet Section 110(f) of the New York City Civil Court Act (hereinafter NYC Civil Ct. Act) provides for the appointment of Housing Judges by a member of the Judiciary, the administrative judge. This, plaintiff contends, is a violation of the doctrine of separation of powers.

However, it was clear to all concerned that the Court of Appeals argued around this by saying that Housing Judges are mere referrees. Of course, the Housing Judges are treated as real judges in all respects, including the right to perform marriages, by the way. But that was not the problem with Mr. Babigian. The problem was that he just couldn't let go. And for that, his license was suspended and he was ordered by a number of courts to file no further suits without their permission.

9. What is the scope of a landlord's attorney obligation in dealing with tenants with emotional and physical handicaps? How far does a landlord's attorney have to go in ascertaining if the tenant needs a guardian ad litem?

Although utterly absent from the Code of Professional Responsibility on an explicit basis, there is an implication in the Code as a whole that attorneys have an obligation to avoid oppressive conduct. The closest rule we find to that is the one we just finished considering from the point of view of blood lust suits. It is this:

Disciplinary Rule 7-102 which reads:

Representing a Client Within the Bounds of the Law
A. In the representation of a client, a lawyer shall not:

1. File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

When dealing with the mentally disabled, it is not necessarily a matter of "maliciously injuring another." It may be more simply, allowing the system to injure one who is incapable of protecting himself from injury. Here in New York, we have a provision of the CPLR which speaks to the needs of these special persons. It is CPLR 1201 which says,

§1201. Representation of infant, incompetent person, or conservatee.

Unless the court appoints a guardian ad litem, an infant shall appear by the guardian of his property or, if there is no such guardian, by a parent having legal custody, or, if there is no such parent, by another person or agency having legal custody, or, if the infant is married, by an adult spouse residing with the infant, a person judicially declared to be incompetent shall appear by the committee of his property, and a conservatee shall appear by the conservator of his property. A person shall appear by his guardian ad litem if he is an infant and has no guardian of his property, parent, or other person or agency having legal custody, or adult spouse with whom he resides, or if he is an infant, person judicially declared to be incompetent, or a conservatee as defined in section 77.01 of the mental hygiene law and the court so directs.
because of a conflict of interest or for other cause, or if he is an adult incapable of adequately prosecuting or defending his rights.27

However, we note in the statute that it says "A person shall appear" and it does not tell us who it is who is supposed to make the court aware of the problem and to ask the court to make an appointment of a guardian ad litem. However, there is now substantial case law that looks at this section of the CPLR and at least implicitly the cited section of the Code of Professional Responsibility. This body of authority says that we attorneys do indeed have an obligation to point out to the Court that the other party, if unrepresented, is in need of a guardian ad litem.28

In Oneida Nat'l Bank and Trust Co. v. Unczar, 326 N.Y.S.2d 458 (App. Div. 1971), one of the first cases to interpret a plaintiff's obligations under CPLR Article 12, the Fourth Department read CPLR 1201 and 1203 together to require "the appointment of a guardian ad litem in every case where the defendant is an adult incapable of adequately protecting his rights, before a default judgment may be entered against him." According to the court, "this places the burden upon a plaintiff who has notice that a defendant in his action is under a mental disability, to bring that fact to the court's attention and permit the court to determine whether a guardian ad litem should be appointed to protect such defendant's interests."

As we read this case, it becomes apparent that the consequences were for the plaintiff litigant itself. That is to say that its judgment was vacated. This is not the same as a finding of a breach of ethics by the attorney, even though, of course, it was the attorney who was entirely responsible for the misstep of failing to inform the court of the adverse party's mental disability. It would seem that the worst the court could accuse the attorney of was incompetence, but not to the point of a breach of an ethical obligation.

So, we have to ask ourselves, "Are our ethical obligations really co-extensive with the Code of Professional Responsibility, or is the Code really the base line and our ethical obligations really go further than the Code. The preferable, if not necessarily prosecutable, point of view is that the Code is just the starting place.

The mere fact that the Code does not mandate behavior you are refraining from, nor prohibit behavior in which you are engaged is no guarantee that you are acting correctly in an absolute sense. Rather, it would seem that even if the penalty for your breach of the rules falls entirely on your client and not on you, you can still be violating legal ethics.

Other appellate decisions have uniformly applied the Oneida court's holding that a plaintiff who is aware or has reason to be aware that a defendant is incapable of defending his or her interests at the time when the action was begun and when the default judgment was entered has the burden of disclosing this information to the court.

In an often-cited and closely-reasoned decision, the Housing Court in New York Life Insurance Co. v. V.K., 711 N.Y.S.2d 90, 97 (N.Y. Civ. Ct. 1999) (citing In re Bacon,

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27 I emphasize that last phrase because this is one of those unfortunate statutes that waits until the very end to get to the point for which one is citing it. Perhaps the statute was written by James Joyce. I really don't know.

28 The major bar associations in New York City and the New York State Bar Association are all working on statutes which will protect guardians ad litem from suits by their wards. I wound up becoming the principal author of that legislation.

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169 Misc. 2d 858, 864 (Sur. Ct. 1996) stated the "need for 'a petitioner, in any proceeding, to be extremely diligent' in determining whether a party may be under a disability requiring a guardian ad litem and, if there is any question, giving the court an opportunity for an investigation and report regarding that need." The petitioner's obligation is triggered as soon as the petitioner has notice that a tenant is under a mental disability, even if the petitioner determines that he or she lacks sufficient proof to make a motion for the appointment of a guardian ad litem.

The better practice is to make the motion. You are, after all, a lawyer, not a psychologist. Once you have made the motion, you have satisfied your ethical obligation. Let the court determine how far to take it and how.

When the adverse party needing a guardian ad litem is himself an admitted attorney, we need to return to the idea that of not having enough evidence to know that the adverse party needs a guardian ad litem and see what special considerations there are. At early stages in the proceedings, typically a Petitioner will have neither specific information nor legal access to information other than the reports it has received with respect to the tenant's apartment and the wild and erratic civil procedure methods the pro se attorney tenant has employed. Based on that information alone, the landlord cannot establish that the Tenant is in need of a guardian ad litem. The Petitioner's counsel can only abide by its ethical obligation to advert the Court that this appears to be a matter worth the Court's inquiry. If, however, the Court determines that there is no need for a guardian ad litem, the very least the Petitioner's counsel should expect to achieve is that the Court will direct the pro se respondent to abide by the rules of litigation on pain of sanctions.

10. What is the ethical scope of a nonmilitary investigation?

There were in the early days of the Housing Court a certain corps of landlord-tenant practitioners who had been doing business the same way for years. It was a sleepy little practice where attorneys issue petitions in their own names. It was not a highly regarded field until much later in time. Indeed, you can question whether it has ever achieved high regard, but we shall leave that question for another time.

Back in those days, though, there was no question about how things were done. Everybody did it the same way. That same way included non-military investigations which per completely pro forma, done by the process server who had sewer served the original process. It was not about due process. It was not about obedience to law. It was not about ethics. It was about getting the job done. And, in truth, nobody cared. There were, at the time, very few reported cases in the entire field. In short, it was a collection agency instead of the real practice of law.

In amongst this crop of ordinary guys, was Arthur Siegel who stood out from the crowd, not for his manner of practice of law, but for his kindly gentlemanly manner. He was soft spoken, knew how to make a point, gracious in defeat, and equally gracious in victory. Indeed, he was gracious in everything. And everybody knew and liked him. He had no enemies.

The United States Attorney's Office became aware of the fact that nonmilitary investigations were bearing no relation to protecting the military forces of this country and indeed bearing no relation to the requirements of law. It decided to do something about it. So, essentially at random, it selected a process server who had filed a fraudulent affidavit that they were able to catch him at and they put the squeeze on him. He reacted, naturally enough, by implicating the attorney who had retained his services,
Arthur Siegel. And thus came to be Matter of Siegel in which the nicest of the landlord-tenant bunch was sent to jail for six months and censured in a disciplinary proceeding. The jail, by the way, was one of the more pleasant federal facilities and it was only for weekends. In an odd sense, the punishment fit the crime. Arthur’s pro forma nonmilitary affidavits were punished with a pro forma jail sentence.

Why was he just censured instead of disbarred for getting caught with fifty-six counts of fraudulent filing? Because he was the nicest guy in landlord-tenant and he got the affidavits to prove it.

The problem of fraudulent filings of nonmilitary affidavits has not gone away. It is with us as much as ever. Interestingly, it is these affidavits that often unmask the fraud that was present in the initial service of process. There are any number of reported cases in which the process server was unable to speak to the tenant personally to serve the tenant with process, but had no difficulty reaching the tenant to find out that he is not in the military service. The courts smell fraud in these cases and rightly so.

So what are the ethical obligations in these things? It is simply not enough to see that the affidavit appears to be sufficient on its face. The attorney, or her staff, has to take the time to see that the Affidavit is likely to be telling the truth and that the circumstances of obtaining the information were likely to have occurred as described.

So, the matter came before the First Department on a disciplinary proceeding known as Matter of Siegel, 47 A.D.2d 461, 367 N.Y.S.2d 294 (1st Dept. 1975) and, of course, for all these convictions, we would expect that Arthur would have gotten disbarred.

However, the court noted:

The record indicates that this is the first and only complaint or matter charged against respondent in his years of practice. While the non-military affidavits contained false statements with respect to investigations made to ascertain if the particular tenant involved was in military service, it does not appear that any of the tenant-respondents were in fact in the military during any portion of the proceedings against them. Respondent frankly admitted the charges during the hearing, and detailed steps taken in his office to prevent a future recurrence of such incidents.

Numerous letters were submitted attesting to the writer’s personal or professional regard for respondent and to the good reputation of respondent in the community. However, the conduct of respondent cannot be condoned, for such actions tend to bring disrepute to the profession. A consideration of all the circumstances, bearing in mind that this is the first complaint against respondent, persuades us that censure is an adequate punishment.

The only rational way to characterize this decision is as a slap on the wrist. If it were a guy any less nice than Arthur, it would undoubtedly have led to a disbarment.

So, how shall we rationalize this?

Remember that when we first sought to define ethics we looked at it as a complex of our duties to each other, to our clients, and to the courts. That Arthur let down the Courts cannot be denied.
But contrast this with the morality play we saw in Matter of Dowd, in which the attorneys who were victims were suspended for fully five years from the practice of law. What did we say about them at the time? That they were arrogant. By contrast, Arthur Siegel was the consummate gentleman.

So, sub silentio, there appears to be a lesson here. We can understand that in disciplinary proceedings, if you are perceived as arrogant, you are going to be slammed down. If, as in Arthur's case, you are regarded as the perfect gentleman, a delight to be around, the court is going to give you considerable leeway.

This does not condone Arthur's illegal behavior, but it does mitigate the punishment. From that, we return to the early part of this article when we emphasized the importance of observing courtesies. It may well be that courteous people receive less severe punishments. Judges are, after all, human beings. If they are made to like a defendant, they are apt to be gentler in sanctioning them in their missteps.

11. When dealing with an adverse party pro se, how far must one go in reminding the other person whom you represent?

The very essence of practice in the Housing Court requires that landlord's attorneys most frequently and HPD attorneys less frequently communicate with unrepresented adverse parties and try to convince them to enter some kind of deal. When having such a conversation, the use of phrases such as "if I were you, I would," and "this is about the best deal you can hope to get" are clearly outside acceptable limits.

But, how do we know that?

Any conversation on this topic has to start with Disciplinary Rule 7-104 which reads:

Communicating with Represented and Unrepresented Persons

A. During the course of the representation of a client a lawyer shall not:

2. Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of the lawyer's client.

This rule would appear on its face to bar all conversations with pro se people except for the repeated statement, "Get a lawyer." However, if you have spent any time in a courtroom, you know that the last thing the Court will require is that you not speak to the other side. Quite to the contrary, they routinely require that you do speak to the other side and that you say something more substantive than "get a lawyer."

It is crucial to understand that no matter what a judge orders you to do, the judge does not have the authority to lift the rules of ethics. So, if it were only because the judge ordered you to have the conversation that you were doing so, this would not get you off the hook. Just like the associate in a firm cannot say, "I was just following orders," neither can an attorney defend his speech to a pro se by saying, "The Judge ordered me to." No judge has the authority to order one to violate the law, least of all the ethical laws.

On the other hand, according to NYSBA Ethics Opinion 728 (2000), a lawyer may make a statement to a pro se about a legal principle if that principle is "non-
controvertible.” An example of such a statement would be, "If a lease terminates and no rent is accepted after the termination, there is no need for a termination notice before bringing a holdover proceeding.” An example of a violation of this principle would be, "I don't believe you and the judge won't believe you either."

An attorney is also permitted to explain the nature and content of a stipulation and to recommend housing assistance resources to a pro se tenant who proclaims ignorance of what to do to relieve his situation.

To summarize, a lawyer may say to a pro se:

1. Get a lawyer.
2. This is the deal I have prepared and am offering you.
3. I represent the other side. I do not represent you.
4. The following is a true statement of the law.
5. The following is an indisputable fact in this case.
6. If you have any questions about what I am saying to you or don't believe something I am saying, ask the Judge or her assistant.
7. A stipulation is an agreement between the parties resolving the issues between them. It is enforceable both as a contract, and if the judge signs it, as a court order.
8. If you need help getting money or getting relocated, these are resources you can consider contacting.
9. This is what my client wants and what she proposes we should do.

A lawyer must not say to a pro se:

1. This is a good deal for you.
2. This is the best deal you can hope to get.
3. I'm not here to hurt you.
4. If you don't agree to this, I will make matters tough for you.
5. Anything that is inaccurate or possibly inaccurate.

Other matters are more subtle. Indeed, the literature on questions of prohibited legal advice is full of subtlety because the ethical rules as written appear to say that the only thing the lawyer can say is "get a lawyer" and the courts insist that the lawyer be open to negotiation. It is therefore the court itself which is at odds with the strictest interpretation of the ethical rules.

Amongst these subtleties, a lawyer may ask to see receipts, but it appears that he may not express his opinion on how genuine they look. This immediately raises the question of non-verbal communication, which it would appear, is also prohibited. But what if that non-verbal communication is involuntary, such as an eyebrow that shoots up? Is the lawyer expected to have total control of his body parts? Probably not.

12. What are your obligations with respect to paraprofessionals?

In New York City over the course of the past couple of decades, there has been a rash of self-appointed advocates who purport to know the ins and outs of landlord tenant court and who take on clients for pay. All of these people are practicing law without a license. All of them deny doing so.

With regard to these leeches and with regard to our own paralegal staffing, we need to be looking at the Code of Professional Responsibility, specifically:
Ethical Consideration 3-6

A lawyer often delegates tasks to clerks, secretaries, and other lay persons. Such delegation is proper if the lawyer maintains a direct relationship with the client, supervises the delegated work, and has complete professional responsibility for the work product. This delegation enables a lawyer to render legal service more economically and efficiently.

And Disciplinary rule 3-101

A. A lawyer shall not aid a non-lawyer in the unauthorized practice of law.

So, what is a lawyer to do?

As to the so-called advocates, the answer to the question is very clear. The lawyer is to have no dealings with them whatsoever, no matter what they say. The lawyer is to turn to such persons’ clients and advise them to get a real lawyer. Further, the lawyer should be contacting the District Attorney’s Office to report any unauthorized practice of law he has observed. This is the duty he owes to the profession. This is the duty he owes to the public.

As to his own staff, the Ethical Consideration 3-6 is eloquent and to the point: Such delegation is proper if the lawyer maintains a direct relationship with the client, supervises the delegated work, and has complete professional responsibility for the work product.

This summarizes both his right and his duty.

13. Final Thoughts

Earlier in this article we learned about the attorney who believed in The Divine Right of Traffic Lights. One of his other preposterous observations was, “There is no need for a course in legal ethics. The only rule is ‘Don’t steal from your clients.’” As we noted, he was not good at observing that one either. However, if you find value in his observations as a reliable indicator of the opposite of what one should actually do, there is a valuable observation lurking in his crass remark. That is that we cannot be content to assume that we know the rules. We cannot assume that our instincts will always direct us in the right direction. We really do have to study the rules, not only to refresh our recollections, but also to learn the details of the rules. Those details may not have seemed significant in law school, but when one is facing the daily challenges of landlord-tenant litigation, many of those details become painfully apparent.

And in the end, behaving well is a lot more pleasant than taking sleeping pills.
Legal-Writing Ethics — Part I

Ethics permeate every part of a lawyer's professional life, including legal writing.\(^1\) Few law schools teach ethics in the context of legal writing for more than a few moments here and there, but all should.\(^2\) A lawyer's writing should embody the profession's ethical ideals. Courts and disciplinary or grievance committees can punish lawyers who write unethically. This article notes some of the ethical pitfalls in legal writing.

Rules Lawyers Must Know
Most lawyers know the American Bar Association's Model Rules. Law students in ABA-approved law schools learn them, and New York State Bar applicants study them to pass the Multistate Professional Responsibility Examination (MPRE). But New York, together with California, Iowa, Maine, Nebraska, Ohio, and Oregon, has not adopted the Model Rules. New York lawyers must be familiar with the New York State Bar Association's Lawyer's Code of Professional Responsibility, first adopted in 1970 and last amended in 2002, which differs from the Model Rules.\(^4\)

The State Bar's Code is divided into three parts: the Disciplinary Rules as adopted by the four departments of the New York State Supreme Court's Appellate Division, the Canons, and the Ethical Considerations. The Disciplinary Rules set the minimum level of conduct to which lawyers must comport, or face discipline. The Canons contain generally accepted ethical principles.\(^5\) The Ethical Considerations provide aspirations to which lawyers are encouraged to strive but that are not mandatory.\(^6\) The Disciplinary Rules, the Canons, and the Ethical Considerations, together with court rules, guide lawyers through ethical issues that affect their writing as advocates and advisors.

New York's Disciplinary Rules are promulgated as joint rules of the Appellate Division,\(^7\) which is charged with disciplining lawyers who violate the Disciplinary Rules. A lawyer whose writing falls below the standards set in the Disciplinary Rules might face public or private reprimand, censure, or suspension or disbarment. The Disciplinary Rules are not binding on federal courts in New York State.\(^8\) But because the federal district courts in New York have who assert meritless claims. Courts also sanction to make whole the victims of harassing or malicious litigation.\(^12\)

Lawyer’s Role as Advocate
The first question lawyers must ask themselves is whether they should handle a particular case or client. New York lawyers have a gatekeeping role to prevent frivolous litigation. Lawyers must decline employment when it is “obvious” that the client seeks to bring an action or argue a position to harass or injure or when the client seeks to argue a position without legal support.\(^13\)

When is it “obvious” that a claim lacks merit? One factor is whether the lawyer claims to specialize in a practice area and therefore should have known

The duties to client and court might create a conflict lawyers must resolve before putting pen to paper — or finger to keyboard.

incorporated by reference the Disciplinary Rules into their local rules,\(^9\) federal courts will discipline lawyers who violate them.

Courts, too, can sanction lawyers for misconduct.\(^10\) To avoid being sanctioned for deficient legal writing, lawyers must know the pertinent law and facts of their case, the court's rules about the form of papers, and the Disciplinary Rules.\(^11\) Court-ordered sanctions differ from disciplinary action. They can range from costs and fines on lawyers or their clients, or both, to publicly rebuking lawyers. Courts sanction lawyers to discourage wasting judicial resources on litigation that lacks merit and to punish lawyers that an action was meritless. One New York court sanctioned for making frivolous arguments two defense lawyers who had held themselves out as specialists.\(^14\) The court stated that sanctions were appropriate because the lawyers knew that their arguments were frivolous but still wasted the court's time and their client's and the plaintiff's time and money.\(^15\) The Appellate Division, Third Department, eventually disbarred one of the defense attorneys for making the same frivolous arguments in eight cases.\(^16\)

Lawyers whose potential client litigates for a legitimate purpose must

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then decide whether they can represent the client effectively. Lawyers have an ethical responsibility to be prepared and competent to represent a client. A lawyer incompetent to represent a client may decline employment, associate with a lawyer competent to represent the client, refer the matter to a competent lawyer, or tell the client that the lawyer needs to spend time studying a legal issue or practice area. This rule has teeth. For not verifying contrary fact and law to insure that the court commits no injustice.25

Failing to find controlling cases reflects poorly on the lawyer’s skill as an advocate and jeopardizes the client’s claims.26 Courts are unsympathetic to lawyers who bring claims that, in light of controlling authority, should not be brought. The case law on this point is legion.27

Lawyers must cite cases that continue to be good law. They may not conceal from the court that a case they cite has been reversed or overruled, even if it was on other grounds. Citing reversed cases or overruled principles is a sure way to lose the court’s respect. In one example, a federal district court in Illinois chastised the lawyers for failing to make sure that the cases they cited still controlled.28 In response to the lawyers’ statement that the court’s public disapproval would damage their reputation, the court stated that the reprimand’s effect on their reputations “is perhaps unfortunate, but not, I think, undeserved.”29

Research

Lawyers must avoid the pitfalls of under-preparation. Poor research wastes the court’s time and the taxpayer’s money. It also wastes the client’s time and resources.30 Lawyers must know the facts of the case and the applicable law. Knowing fact and law adverse to their clients’ interests helps lawyers advise their clients and argue their cases. Lawyers must know adverse facts and law for ethical reasons, too. A lawyer must cite controlling authority directly adverse to the client’s position if the lawyer’s adversary has failed to cite that controlling authority.31

Lawyers who move ex parte or seek an order or judgment on a default must further inform the court fully about

sanctions from a New York federal district court.32 The court scheduled a hearing to determine whether the lawyer’s misstatement occurred intentionally or due to her “extremely sloppy . . . reading” of the case.33 To make a point, and possibly to humiliate, the court ordered the lawyer to bring her supervisor to court “to discuss the overall poor quality of the defendants’ brief.”34

Lawyers must cite cases honestly.35 They must cite what they use and use what they cite.36 They mustn’t pass off a dissent for a holding.37 The cases

To make a point, and possibly to humiliate, one court ordered the lawyer to bring her supervisor to court “to discuss the overall poor quality of the defendant’s brief.”

another’s writing and research, local counsel,38 co-counsel,39 and supervising attorneys40 risk court sanction and discipline.

A lawyer who accepts employment must represent the client zealously.41 Lawyers also owe a duty to the court to be candid about the law and the facts of a case.42 The duties to client and court might create a conflict lawyers must resolve before putting pen to paper — or finger to keyboard.

Argument

Ethical writing is more persuasive than deceptive writing.43 Disclosing adverse authority, even when the lawyers’ opponents haven’t raised it, can diffuse its effects and increase confidence in the lawyers’ other arguments. Lawyers who don’t address adverse authority risk the court’s attaching more significance to that authority than it might otherwise deserve. The more unhappy a lawyer is after finding adverse authority, the wiser it is to address it.44

It’s not enough to find controlling authority. To argue competently, a lawyer must also know what the case or statute stands for. One defense lawyer who misinterpreted an important case in her brief faced possible
To embody the profession’s ethical ideals, lawyers’ writing must be accurate and honest: Citing authority is common sense; authority bolsters argument. But citing can be a must; some lawyers have incurred sanctions and reprimands for arguing positions without citing legal authority at all.43

Civility

Lawyers should be courteous to opposing counsel and the court.44 Appellate lawyer arguments may attack the lower court’s reasoning but not the trial judge personally.45 Never may a lawyer make false accusations about a judge’s honesty or integrity.46 Many courts have sanctioned lawyers for insulting their adversaries or a lower court. In one case, the Appellate Division, First Department, sanctioned a lawyer for attacking the judiciary and opposing counsel.47 The court found that the lawyer’s behavior “pose[d] an immediate threat to the public interest.”48

Ghostwriting

The American Bar Association, while condemning “extensive ghostwriting for pro se litigants,” found that disclosing ghostwriting is not required if the lawyer only “prepare[s] or assist[s] in the preparation of a pleading for a litigant who is otherwise acting pro se.”49 But the Association of the Bar of the City of New York’s Committee on Professional and Judicial Ethics has concluded that lawyers may not prepare papers for a pro se client’s use in litigation “unless the client commits . . . beforehand to disclose such assistance to both adverse counsel and the court.”50 At least two federal district judges in New York have disapproved of ghostwriting.51

So many judicial opinions trash lawyers for their writing that until The Legal Writer resumes next month with Part II of this column, it’s apt for lawyers and judges to consider this:

Reading these cases, we might experience a bit of schadenfreude — being happy at the misfortune of some other lawyer (especially a prominent or rich one). We might feel a bit superior, if we are confident that we would not have made that particular mistake. Then again, we might be humbled if we realize that we could, very easily, have made that very same mistake. And then we wonder: did the judge have to be so very clever in pointing out the lawyer’s incompetence? Was the shaming necessary?52

GERALD LEBOVITS is a judge of the New York City Civil Court, Housing Part, in Manhattan and an adjunct at New York Law School. He thanks court attorney Justin I. Campbell for assisting in this research. Judge Lebovits’s e-mail address is glebovits@aol.com.

1. For an excellent review of ethical legal writing for New York practitioners and judges, see Gary D. Spivey & Maureen L. Clements, The Ethics of Legal Writing, an unpublished two-part manuscript for CLEs the authors gave at the New York Court of Appeals in April 2002 and June 2003. Several citations in this two-part column are taken from that manuscript. For a text on ethics and legal writing, see Drake Law University Law School Professor Melissa H. Weresh’s Legal Writing: Ethical and Professional Considerations, which Lexis/Nexis will publish in late 2005.


3. ABA Standards of Approval of Law Schools 302(b) (2001).

4. The New York Code differs from the ABA’s Model Rules in substance and style. The Model Rules, for example, allows lawyers to reveal a client’s confidential information to prevent “death or substantial bodily harm”; New York’s Code doesn’t. Another difference is that the New York Code includes the Canons and the Ethical Considerations but the Model Rules don’t.


6. See, e.g., id. EC 2-2 (“[A] lawyer should encourage and participate in educational and public relations programs . . . .”).

7. See 22 NYCRR 1201.1(b).


9. E.D.N.Y. L.R. 1.5(b)(5); N.D.N.Y. L.R. 8.3-46; S.D.N.Y. L.R. 1.5(b)(6); W.D.N.Y. L.R. 8.10(b)(6).


13. DR 2-106(a)(1), (2) (22 NYCRR 1200.14(a)(1), (2)).


15. See id., 687 N.Y.S.2d at 866.


17. DR 6-106(a)(2) (22 NYCRR 1200.3(a)(2)).


20. DR 1-102(a)(2) (22 NYCRR 1200.3(a)(2)).

21. DR 7-101 (22 NYCRR 1200.32).


24. DR 7-106(b)(1) (22 NYCRR 1200.3(b)(1)).

25. id; DR 1-102(a)(6) (22 NYCRR 1200.3(a)(5)).


29. Id. at *4, 1995 U.S. Dist. LEXIS 14102, at *13.


33. Id.

34. Id. at *14 n.11, 1997 U.S. Dist. LEXIS 620, at *43 n.11.


46. DR 8-102(b) (22 NYCCR 1200.43(b)).

47. See In re Truong, 2 A.D.3d 27, 30, 768 N.Y.S.2d 450, 453 (1st Dep't 2003) (per curiam).


Legal-Writing Ethics — Part II

The Legal Writer continues from last month, discussing ethical legal writing.

The Facts
Lawyers must set out their facts accurately. They may never knowingly give a court a false fact, especially a false material fact. Giving a court a false material fact can subject the lawyer to court-ordered and disciplinary sanctions. In an illustrative case, the Appellate Division, Second Department, suspended a lawyer for five years for repeatedly providing courts with false facts.

To write ethically and competently, lawyers must communicate the factual basis of their clients’ claims and defenses. One federal district court in New York noted that two types of standard fact pleadings can lead to dismissal or denial: (1) a pleading written so poorly it is “functionally illegible” and (2) a pleading so “baldly conclusory” it fails to articulate the facts underlying the claim. As the Ninth Circuit explained, “[a] skeletal ‘argument,’ really nothing more than an assertion, does not preserve a claim. Especially not when the brief presents a passel of other arguments . . . . Judges are not like pigs, hunting for truffles buried in briefs.”

Lawyers must choose which facts to include in their pleadings. Omitting important adverse facts is not necessarily dishonest. Lawyers may omit facts adverse to the client’s position and focus on the facts that support their arguments. It might be poor lawyering or even malpractice to inform the court of all the cases’ pertinent facts. A criminal-defense lawyer, for example, can be disbarred for telling the court the client is guilty without the client’s consent.

But lawyers who omit facts lose an opportunity to mitigate adverse facts. Being candid with the court about facts adverse to the client’s position, moreover, gives credibility to the lawyer’s arguments. And the court is more likely to consider the lawyer’s other arguments credible.

To prove they are using facts honestly, lawyers must cite the record. They may not add to their record on appeal new facts not part of the record before the trial court. Thus, the Appellate Division, Second Department, sanctioned two lawyers for including new information in their record on appeal and then certifying that their record was a “true and complete copy of the record before the motion court.”

Writing Style
A lawyer’s writing must project ethos, or credibility and good moral character: candor, honesty, professionalism, respect, truthfulness, and zeal. To evince good character, lawyers should write clearly and concisely. They should avoid using excessively formal, foreign, and legalistic language. They should also avoid bureaucratic writing. Bureaucratic writers confound their readers with the passive voice and nominalizations.

The active voice: “The plaintiff signed the contract.” The passive voice: “The contract was signed by the plaintiff.” The double-passive voice: “The contract was signed. Think: ‘Mistakes were made.’ A lawyer who uses that phrase is hiding the name of the person who made the mistake. The passive voice is wordy. The double-passive voice omits an important part of a sentence — the “who” in “who did what to whom” — a necessary feature unless the object of a sentence is more important than the subject.

Nominalizations are verbs turned into nouns. Nominalization: “The police conducted an investigation of the crime.” No nominalization: “The police investigated the crime.” Nominalizations are wordy and make sentences difficult to understand. They can also make writing abstract and conclusory.

Lawyers who combine the passive voice with nominalizations are poor communicators. Worse, they might be trying to disguise, confuse, or warp. The following illustrates how vague writing damages a lawyer’s effectiveness and credibility: “The court clerk has a preference for the submission of documents.” To correct the sentence, the lawyer writer must do three things. First, remove the two nominalizations. The sentence becomes: “The court clerk prefers that documents be submitted.” Second, remove the double-passive. Who submits? The judge? The police? Without the double passive, the sentence becomes: “The court clerk prefers that litigants submit documents.” Third, explain. What documents? Submit them where? With the explanation, the sentence might read: “The court clerk prefers that litigants file motions in the clerk’s office.”

Subject complements also deceive readers. They appear after the verb “to be” and after linking verbs like “to appear” and “to become.” “Angry” is the subject complement of “The judge became angry.” This construction hides because it does not explain how the judge became angry. Compare “Petitioner’s claim is procedurally barred” with “Petitioner is procedurally defaulted because he did not preserve his claim.”

Lawyers shouldn’t use role reversal to disguise what happened. A lawyer who reverses roles moves the object of the sentence to the first agent or subject in the sentence. Compare “Police Shoot and Kill New Yorkers During Riot” with “Rioting New Yorkers Shot Dead.”

Skeptical courts can easily spot obfuscation. In one such case, the Tenth
Circuit noted that the appellees’ “creative phraseology border[ed] on misrepresentation.” The court also noted that incoherent writing is “not only improper but ultimately ineffectiv...”

Lawyers shouldn’t use adverbial excesses like “obviously” or “certainly.” Overstatement is unethical while understatement persuades. In that regard, shouting at readers with bold, italics, underlining, capitals, and quotation marks for emphasis raises ethical concerns of overstatement. Nor should lawyers use cowardly qualifiers like “generally” or “usually” to avoid precision.

Courts must dispose of motions and cases quickly. Courts might sanction lawyers for wasting the court’s time with poor writing. As one court sarcastically put it when faced with incoherent pleadings, “the court’s responsibilities do not include cryptography.”

Plagiarism

Lawyers must not present another’s words or ideas as their own. Doing so deceives the reader and steals credit from the original writer. Plagiarism, prohibited in academia, can affect a lawyer’s ability to practice. In one case, the Appellate Division, Second Department, censured a lawyer dismissed from law school for plagiarizing half his LL.M. paper who failed to disclose his dismissal in his bar application. In another, the Appellate Division, First Department, censured a lawyer who plagiarized the writing sample he submitted as part of his application for the Supreme Court (18-B) criminal panel for indigent defendants.

Lawyers reuse form motions and letters, law clerks write opinions for their judges, and some judges incorporate parts of a litigant’s brief into their opinions. But plenty remains of the obligation to attribute to others their contributions, thoughts, and words.

To avoid plagiarizing, lawyers should cite the sources:

- From which they paraphrased language, facts, or ideas;
- That might be unfamiliar to the reader;
- To add relevant information to the lawyer’s argument;
- For specialized or unique materials.

Courts don’t forgive lawyers who plagiarize. A federal district court in Puerto Rico, for example, reprimanded a lawyer who copied verbatim a majority of his brief from another court’s opinion without citing that opinion.

Lawyers must quote accurately. A reader who checks a quotation and finds a misquotation will distrust everything the lawyer writes. To quote accurately, lawyers must use quotation marks, even if the lawyer omits or changes some words. Lawyers must use ellipses to note omissions and put changes in brackets. The key to honest writing is to use quotation marks when quoting even a few key words and then to cite. That’s the difference between scholarship and plagiarism.

Lawyers must not substitute practice forms for their professional judgment. While not plagiarism, it’s bad lawyering to rely on forms or boilerplate. One federal district court in New Jersey sanctioned a lawyer for reproducing without analysis a complaint from a Matthew Bender practice form. As part of the sanction, the court ordered the lawyer to attend either a reputable continuing-legal-education class or a law-school class on federal practice and procedure and civil rights law. The court concluded that despite the availability of practice forms and treatises, lawyers are “expected to exercise independent judgment.”

Court Rules

Most courts have rules that govern the length and format of papers. Under the Second Circuit’s Local Rule 32, a brief must have one-inch margins on all sides and not exceed 30 pages. New York State courts have their own rules. State and federal courts in New York and elsewhere may reject papers that violate the courts’ rules regarding font, paper size, and margins.

Lawyers shouldn’t cheat on font sizes or margins. And they must put their substantive arguments in the text, not in the footnotes. In one illustrative case, the Second Circuit declined to award costs to a successful appellant whose attorney “blatantly evaded” the court’s page limit for briefs by including 75 percent of the substantive arguments in footnotes. Lawyers must edit and re-edit their work to set forth their strongest arguments in the space allowed. A court may, in its discretion, grant a lawyer leave to exceed page limits. Conversely, lawyers shouldn’t try to meet the page limit with irrelevancies or unnecessary words for bulk.

Lawyers who ignore court rules risk the court’s disdain. Worse, the court can dismiss the case. The Ninth Circuit did just that when an appellant disregarded its briefing rules. The appellant’s lawyers submitted a brief that didn’t cite the record or provide the standard of appellate review. Instead, the brief exceeded the court’s word-count limit and cited cases without precedential value. The lawyers also submitted a reply brief that had no table of contents or table of authorities. The court stated that despite the appellant’s poorly written briefs, it examined the papers and decided that appellants were not entitled to relief on the merits. Other than to comment on the lawyers’ ethics and briefing errors, the court didn’t explain its reasoning for dismissing the appeal.

Even if a court doesn’t have rules about a brief’s format and length, lawyers shouldn’t burden the court with prolix writing. In a 1975 New York Court of Appeals case decided before the court instituted rules to regulate brief length, the court sanctioned a lawyer who submitted a 284-page brief about issues “neither novel nor complex.” To illustrate the brief’s absurdity, the court broke down the number of pages it devoted to each issue, including 50 pages for the facts,
126 for one argument, and 4 to justify the brief’s length.41

Lawyer’s Role as Advisor
Lawyers must mind the Disciplinary Rules when advising a supervising attorney or a client. Lawyers are often asked to prepare memorandums for a supervising attorney or a client directly. A memorandum is intended to predict objectively how the law will be applied to the facts of the client’s case, not to persuade the reader what the law should be. A memorandum must take a position, but it must also provide the strongest arguments for and against the client’s position. A skewed memorandum is no strategic or planning tool.

Lawyers mustn’t give unsolicited advice to non-clients. Publicly discussing the law, however, is essential to understanding how the law works and applies. The Disciplinary Rules allow lawyers to write about legal topics, but they forbid lawyers to give unsolicited advice to non-clients.32 A lawyer who participates in an on-line chat, for example, should notify the other participants that the discussion doesn’t create a lawyer-client relationship, that none of the communications are confidential, and that the advice is general in nature and not intended to provide specific guidance. The notice should contain unequivocal language that non-lawyers will understand.

Clients pay the bills. They can use their economic influence to pressure lawyers to break the law, or violate a Disciplinary Rule. A lawyer is prohibited from assisting a client to engage in unlawful or fraudulent conduct.43 A lawyer can choose to refuse to aid or participate in conduct the lawyer believes is unlawful, even if there’s some support for the argument that the conduct is legal.44 The Disciplinary Rules recognize that when clients place their lawyers in an ethical quandary, and when it is unclear whether the lawyer will be advising a client to commit legal or illegal conduct, the lawyer should err on the side of not advising rather than face possible disciplinary action.

Conclusion
Ethics permeates all aspects of the legal profession. The way a lawyer writes can establish the lawyer’s reputation as ethical and competent. Reputation is a lawyer’s most precious asset. By embodying the profession’s ethical ideals in their writing, lawyers will insure that their reputation remains positive and increase the possibility that their clients will prevail in litigation.

Gerald Lebovits is a Judge of the New York City Civil Court, Housing Part, in Manhattan and an adjunct at New York Law School. He thanks court attorney Justin J. Campoli for assisting in researching this column. Judge Lebovits’s e-mail address is glebovits@aol.com.

1. DR 7-102(A)(5) (22 NYCRR 130.3(a)(5)).
2. 22 NYCRR 130-1(c)(5).
6. United States v. Duncan, 927 F.2d 955, 956 (7th Cir. 1991) (citation omitted).
7. Except when the other side is absent. See Part I of this Article.
14. Daniel W. Melsch, 52 F.3d 1547, 1558 (10th Cir. 1999).
15. id.
16. See United States v. Soldier, 976 F.2d 1249, 1251 n.1 (9th Cir. 1992) (Kozinski, J.) (referring to brief’s bold-faced font, capital letters, and quotation marks for emphasis, the court wrote that “[w]hile we realize counsel had only our welfare in mind in engaging in these creative practices, we assure them that we would have paid no less attention to their briefs had they been more conventionally written”).
19. In re Steinberg, 206 A.D.2d 232, 233, 620 N.Y.S.2d 345, 346 (1st Dep’t 1994) (per curiam) (citing DR 1-102(A)(4) (22 NYCRR 1200.3(a)(4)); see also

King’s County Bar Ass’n, 83 F.Supp. 2d 914, 916 n.4 (W.D. Tenn. 2000) (noting that lawyer failed to give credit to source).
Commission on Judicial Conduct
State of New York

IN THE MATTER OF THE PROCEEDING PURSUANT TO SECTION 44, SUBDIVISION 4, OF THE
JUDICIARY LAW IN RELATION TO GEORGE C. SENA, A JUSTICE OF THE CIVIL COURT OF THE
CITY OF NEW YORK, NEW YORK COUNTY

DATED: January 18, 1980

Before: Mrs. Gene Robb, Chairwoman, Honorable Pritz W. Alexander, II, Honorable
Richard J. Cardamone, Dolores DelBello, Michael M. Kirsch, Victor A. Kovner,
William V. Maggipinto, Honorable Isaac Rubin, Honorable Felice K. Shea, Carroll L.
Wainwright, Jr.

DETERMINATION

The respondent, George C. Sena, a justice of the Civil Court of the City of New
York, was served with a Formal Written Complaint dated January 23, 1979, alleging
in 29 charges that respondent's manner was impatient, undignified, discourteous
and inconsiderate toward attorneys and litigants during the course of 30 different

The administrator of the Commission and respondent entered into an agreed
statement of facts on October 23, 1979, pursuant to Section 44, subdivision 5, of
the Judiciary Law, waiving the hearing provided for by Section 44, subdivision 4,
of the Judiciary Law, and stipulating that the Commission make its determination
on the pleadings and the facts as agreed upon. The Commission approved the agreed
statement on October 25, 1979, determined that no outstanding issue of fact
remained, and scheduled oral argument with respect to determining (i) whether the
facts establish misconduct and (ii) an appropriate sanction, if any. The
administrator and respondent submitted memoranda prior to oral argument.

The Commission heard oral argument on November 13, 1979, thereafter considered
the record of this proceeding, and upon that record makes the findings and conclusions
herein.

With respect to Charges I through XXII and Charges XXIV through XXIX of the Formal
Written Complaint, the Commission makes the findings of fact set forth in the
annexed appendix.

Upon those facts, the Commission concludes as a matter of law that respondent
violated Sections 33.1, 33.2(a), 33.3(a)(1), 33.3(a)(3) and 33.3(a)(4) of the
Rules Governing Judicial Conduct, Canons 1, 2A, 3A(1), 3A(2), and 3A(3) of the
Code of Judicial Conduct, and Sections 604.1(e)(1), 604.1(e)(2), 604.1(e)(3),
604.1(e)(4) and 604.1(e)(5) of the Rules of the Appellate Division, First Judicial Department. Charges I through XXII and Charges XXIV through XXIX of the Formal Written Complaint are sustained, and respondent’s misconduct is established.

Charge XXIII is not sustained and is dismissed.

The facts set forth in the appendix constitute an extremely serious record of judicial misconduct. The obligation of a judge to conduct himself in a dignified, courteous manner is essential to the effective administration of justice. The very purpose of the judicial process is thwarted by intemperate, judicious and discourteous conduct, such as that repeatedly shown by respondent.

The record of this proceeding is replete with instances of rude and arbitrary behavior by respondent. On numerous occasions he (i) raised his voice in addressing litigants and attorneys, (ii) questioned the competence, honesty and good faith of attorneys, (iii) commented unfavorably on the motivations of those before him and the merits of their claims, (iv) without provocation announced that a litigant or attorney either was “in contempt” of court or would be held “in contempt”, (v) directed individuals to “shut up” as they attempted to address the court, (vi) directed the physical removal or restraint of litigants, without apparent justification, as they attempted to address the court, and in one instance required an attorney to stand in a corner of the courtroom for several minutes, and (vii) inappropriately ascribed racial prejudice to those before him.

*2 Respondent’s misconduct was not an isolated instance of discourtesy that might be excused as a lapse in judicial temperament. It occurred over the 26-month period between July 1975 and November 1977, while respondent was sitting in the housing part of Civil Court or otherwise adjudicating landlord-tenant matters.

It is improper for a judge to evince discourtesy and rudeness, even if occasionally provoked by a difficult litigant or lawyer. It should be noted that many of the attorneys whom respondent chastised in the matters before him are experienced litigators, and it would have been more appropriate for him to have exhibited more patience with the young and inexperienced attorneys who appeared before him. Moreover, Part 604 of the Rules of the Appellate Division, First Department, entitled “Special Rules Concerning Court Decorum”, sets forth rules by which a judge must be guided in response to provocative conduct.

The judge should be the exemplar of dignity and impartiality. He shall suppress his personal predilections, control his temper, and emotions, and otherwise avoid conduct on his part which tends to demean the proceedings or to undermine his authority in the courtroom. When it becomes necessary during trial for him to comment upon the conduct of witnesses, spectators, counsel, or others, or upon the testimony, he shall do so in a firm and polite manner, limiting his comments and rulings to what is reasonably required for the orderly progress of the trial, and refraining from unnecessary disparagement of persons or issues. [Section 604.1(e)(5), Rules of the Appellate Division, First Judicial Department.]
In Matter of Waltemade, the Court on the Judiciary noted that "[r]espondent's excoriation of lawyers and witnesses alike was frequently accompanied by angry threats of 'sanctions' and sometimes of contempt proceedings in particular... [though] not one of these violent denunciations was ever followed by a contempt citation or any other disciplinary action." Matter of Waltemade, 37 NY2d (nn), (iii) (Ct. on the Judiciary 1975).

In Matter of Mertens, the Appellate Division stated that "[s]elf-evidently, breaches of judicial temperament are of the utmost gravity," and went on as follows:

As a matter of humanity and democratic government, the seriousness of a Judge, in his position of power and authority, being rude and abusive to persons under his authority-litigants, witnesses, lawyers-needs no elaboration.

It impairs the public's image of the dignity and impartiality of courts, which is essential to their fulfilling the court's role in society.

One of the most important functions of a court is to give litigants confidence that they have had a chance to tell their story to an impartial, open-minded tribunal willing to listen to them. And lawyers must feel free to advance their client's cause-within the usual ethical limitations-without abuse, or threats. Parties must not be driven to settle cases out of such fear. [Matter of Mertens, 56 AD2d 456, 470 (1st Dept. 1977].

*3 It is deplorable that respondent's misconduct violated specific standards of judicial behavior. Moreover, the fact that this behavior continued long after the censures in Waltemade and Mertens, supra, indicates a disregard of judicial directives regarding courtroom demeanor. Such conduct undermines public confidence in the judiciary.

With respect to sanction, removal under the circumstances would be too severe and the Constitution does not provide for a more appropriate sanction, such as a suspension from office. Suspension would have impressed upon respondent the severity with which we view his conduct while affording him an opportunity to reflect on his conduct before returning to the bench. Absent such option, the Commission has concluded that a severe censure should be imposed.

All concur.

Albany, New York


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Commission on Judicial Conduct  
State of New York  

IN THE MATTER OF THE PROCEEDING PURSUANT TO SECTION 44, SUBDIVISION 4, OF THE JUDICIARY LAW IN RELATION TO ARTHUR BIRNBAUM, A JUDGE OF THE CIVIL COURT OF THE CITY OF NEW YORK, NEW YORK COUNTY  

Dated: September 29, 1997  


Appearances:  
Gerald Stern for the Commission  
Hoffinger Friedland Dobrish Bernfeld & Stern, P.C. (By Jack S. Hoffinger) for Respondent  

DETERMINATION  

The respondent, Arthur Birnbaum, a judge of the Civil Court of the City of New York, New York County, was served with a Formal Written Complaint dated June 5, 1997, alleging improper campaign activity. Respondent did not answer the Formal Written Complaint.  

On June 23, 1997, the administrator of the Commission, respondent and respondent’s counsel entered into an agreed statement of facts pursuant to Judiciary Law § 44(5), waiving the hearing provided by Judiciary Law § 44(4), stipulating that the Commission make its determination based on the agreed upon facts, jointly recommending that respondent be censured and waiving further submissions and oral argument.  

On July 10, 1997, the Commission approved the agreed statement and made the following determination.  

1. Respondent has been a judge of the Civil Court of the City of New York since January 1, 1997.  

2. Respondent, who was then serving as a housing judge in the Civil Court, was a candidate for Civil Court judge in the Democratic primary on September 10, 1996. He had one opponent.  

3. Respondent’s campaign spent only a small amount on paid advertising; mailings
to potential voters constituted the most significant part of the campaign. About two weeks before the primary, respondent's campaign mailed a brochure to approximately 8,000 voters, all of whom had been identified as tenants.

4. The brochure asserted that voters had a "clear choice" between respondent, who was identified as a tenant, and his opponent, who was identified as a landlord. The brochure contained photographs and quotations that were favorable to respondent from tenants who had appeared before him in the Housing Part of the Civil Court, including tenants in a case that was pending before him at the time.

5. It was respondent's idea to refer in the brochure to litigants in his cases. He directed his campaign staff to prepare the brochure, and he approved it before it was mailed.

6. Respondent selected the tenants whose photographs and quotations appeared in the brochure, contacted them and asked them to participate and accompanied the photographer to the building where the tenants lived.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2, 100.5(A)(4)(a), 100.5(A)(4)(d)(i) and 100.5(A)(4)(d)(ii), and Canons 1, 2 and 7B(1) of the Code of Judicial Conduct. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

*2 The campaign activities of judicial candidates are significantly circumscribed. (See, Matter of Decker, 1995 Ann Report of NY Commn on Jud Conduct, at 111, 112). A judicial candidate must "maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary...." (Rules Governing Judicial Conduct, 22 NYCRR 100.5[A][4][a]). The candidate may not "make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office," (22 NYCRR 100.5[A][4][d][i]) and may not "make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court," (22 NYCRR 100.5[A][4][d][ii]).

Respondent's campaign literature gave the unmistakable impression that he would favor tenants over landlords in housing matters, which are often the subject of Civil Court proceedings. Respondent identified himself as a tenant and his opponent as a landlord. He selected, solicited and used testimonials from tenants speaking of his favorable handling of their cases, including quotations from tenants in a case that was pending before him at the time. In doing so, he compromised his impartiality and failed to maintain the dignity expected of a judicial officer.

By reason of the foregoing, the Commission determines that the appropriate sanction is censure.

Mr. Berger, Mr. Coffey, Ms. Crotty, Judge Luciano, Judge Marshall, Judge Newton,
Mr. Pope, Judge Salisbury and Judge Thompson concur.

Mr. Goldman was not present.

Ms. Brown was not a member of the Commission when the vote was taken in this matter.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct, containing the findings of fact and conclusions of law required by Section 44, subdivision 7, of the Judiciary Law.

Henry T. Berger, Esq.
Chair
New York State
Commission on Judicial Conduct


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Opinion 96-103

Digest: A Housing Court judge who is a candidate for another judicial office must disqualify himself/herself, during the pendency of the campaign, from presiding over cases in which one of the attorneys is a candidate for city council seeking to defeat another candidate who appears on the same nominating petition and is on the same slate of candidates as the judge.

October 11, 1996

Rules: 22 NYCRR 100.3(E)(1), 22 NYCRR 100.3(F)

Opinion:

A Housing Court judge who is currently a candidate for another judgeship asks whether it is appropriate to preside over a matter in which the attorney representing one party is a candidate for city council in opposition to the candidate for city council who appears with the judge and others on the judge’s designating petition and is part of the slate of candidates that includes the judge.

A judge must recuse himself/herself from presiding over cases in which his/her impartiality might reasonably be questioned. (22 NYCRR 100.3(E)(1)). The Rules of the Chief Administrator provide that a judge disqualified by the terms of this section may disclose on the record the basis of disqualification and participate in the proceeding with the agreement of all parties and their lawyers. (22 NYCRR 100.3(F)). In the present posture of the case before the enquiring judge the respondent has objected to the judge’s continuing to preside in this matter. In the opinion of the Committee, under the circumstances presented, the avoidance of the perception of impartiality requires the judge to disqualify himself/herself from presiding over cases in which this attorney appears during the period that the judge, the attorney and the candidate for city council on the judge’s slate, are engaged in that campaign for elective office.
Opinion 03-90

September 4, 2003

Digest: A Housing Court judge, who is seeking election to the Civil Court of New York City, may circulate campaign literature which displays a photograph of himself or herself in judicial robes and which refers to the candidate as “judge.”

Rule: 22 NYCRR 100.5(A)(2)(ii); 100.5 (A)(4)(a); Opinion. 99-117 (Vol. XVIII); 98-89 (Vol. XVII).

Opinion:

A Housing Court judge is seeking election to the office of judge of the Civil Court of New York City, and inquires whether he or she may circulate campaign literature which has a photograph of himself/herself in judicial robes and refers to the candidate as “judge.”

Although a Housing Court judge is not a judge of the Unified Court System, he or she is a judge. The term “housing judge” is used in sections 110(a), (e), (f) and (i) of the New York City Civil Court Act, setting forth the authority, qualifications and method of appointment of housing judges. The functions performed and the statutory designation entitle such persons to use the title “judge” and to wear judicial robes in campaign photographs.

A judge who is a candidate for election to judicial office (and this includes the inquirer) may distribute pamphlets and other promotional campaign literature supporting his or her candidacy. 22 NYCRR 100.5(A)(2)(ii). The Committee has previously acknowledged the use of the title of judge in campaign literature and other permissible areas, e.g. to promote a law book written by the judge, as proper conduct. Opinions 99-117 (Vol. XVIII); 98-89 (Vol. XVII). The Committee has also advised that the use of a photograph of a judge in his or her judicial robe in materials promoting a law book written by the judge was also permissible. Opinion 98-89 (Vol. XVII). Accordingly, in our view, there is no ethical barrier to a judge circulating campaign literature with a photograph of himself or herself in judicial robes and using the title of judge. 22 NYCRR 100.5 (A)(4)(a).
A TOP CITY administrative judge, who presided over an investigation into charges of corruption in Manhattan Housing Court, has urged a change in the way housing judges are appointed.

Deputy Chief Administrative Judge Joan B. Carey said she is not satisfied with the performance of the Housing Court Advisory Council, a 14-member volunteer board that screens potential Housing Court candidates.

Judge Carey said she is naming a seven-member search committee to recommend new council members. The terms for all but two of the advisory council's 14 members expire by the end of next year. The council's members, aside from two appointed by the Mayor and Governor, are selected by court administrators.

Reflecting on her experience supervising an undercover investigation that led to the conviction of former Manhattan Housing Judge Arthur R. Scott Jr. for taking bribes, Judge Carey said she has developed a keen interest in the city's Housing Courts.

She said the criminal investigation, which began a year after Mr. Scott was reappointed to a third term, led her to question the thoroughness of the screening and investigation of Housing Court judicial candidates.

As deputy administrative judge for the city courts, Judge Carey is one of four court administrators involved in the appointment and reappointment of Housing Court judges.

Currently, the advisory council compiles a list of potential nominees from which court administrators select appointees. All nominees are reviewed by the Judiciary Committee of the Association of the Bar of the City of New York. Housing judges seeking reappointment are reviewed by both the advisory council and the City Bar before court administrators decide whether to reappoint.

David Rosenberg, the advisory council chairman, said he agreed improvements could be made to ensure the integrity of the appointment process, but said there are limits on a volunteer board with financial resources.

Mr. Rosenberg said Judge Carey told him she was particularly concerned about the
lack of "safeguards" to uncover deception or corruption among those seeking appointment or reappointment.

But Mr. Rosenberg, a partner with Marcus, Borg, Rosenberg & Diamond, said a new procedure in which the Inspector General for the Office of Court Administration will conduct background checks on sitting judges and nominees should aid the screening process.

END OF DOCUMENT
Opinion: 98-123

December 3, 1998

Digest: (1) A judge may serve on the board of directors of not-for-profit youth organizations that are of an educational, charitable, cultural, fraternal or civic nature, subject to the limitations and prohibitions set forth in the Rules Governing Judicial Conduct. (2) A judge may write a letter on behalf of another judge seeking reappointment only at the written request of the screening panel or selection committee. (3) A letter of complaint about the judge sent to the Supervising Judge should not be responded to publicly, but the judge may respond to the Supervising Judge and provide a copy of that response to a screening panel considering the judge's reappointment to the bench.

Rule: Jud. Law 212 (1); 22 NYCRR 100.2(C); 100.2(D); 100.3(B)(8); 100.4(C)(3); Opinions 88-63 (Vol. II); 89-73 (Vol. III); 94-22 (Vol. XII); 95-33 (Vol. XIII); 95-75 (Vol. XIII).

Opinion:

A judge of the Housing Court of the City of New York submits to the Committee the following questions:

1. Can a judge be a member of the Board of Directors of a not-for-profit youth organization, e.g. "Boys
Club of America," "Pathways for Youths" or "Girls Club?"

2. Can a judge write a letter on behalf of another judge who is seeking re-appointment? What if the request comes from an article in the New York Law Journal ...? What if a written request is made from the screening panel or committee? Can a judge respond to an oral request, and from whom should the request come from?

3. A letter of complaint against "Judge X" is written to the supervising judge of the court. The supervising judge sends a copy of the complaint to "Judge X" and asks him to comment on the complaint.

   a. Is the letter of complaint considered a formal complaint against the judge? (Keep in mind that the public write complaint letters against judges often.)

   b. Should the judge respond to the letter?

   c. To whom can the judge distribute copies
of the letter? In this hypothetical, the complainant sent copies of the letter to public officials, other attorneys in the courthouse, newspapers and other legal organizations.

d. If asked by a screening panel for re-appointment about the incident can the judge produce a copy of the response?

In response to question "1," the Committee is not aware of any reason why the judge may not serve on the board of directors of the not-for-profit youth organizations mentioned. Section 100.4(C)(3) permits a judge to be a member and serve as a director of an "educational, religious, charitable, cultural, fraternal or civic organization not conducted for profit," subject to the limitations set forth in the Rules Governing Judicial Conduct. Presumably the organizations cited fall into one or more of the categories specified. But, since the judge did not provide any details concerning the organizations, the Committee declines to speculate concerning the possibility that some prohibitory rule (e.g. 22 NYCRR 100.2[D]), may be drawn in issue.

As to question "2," concerning a judge's reappointment to the bench, it is the view of the Committee that a judge may respond to a written request from a screening panel, selection or nominating committee concerning the reappointment of the individual. A judge, however, should not on his/her own initiative, or at the request of the applicant or another individual, or in response to a public solicitation in the local legal newspaper, write a letter on behalf of a person seeking reappointment. 22 NYCRR 100.2(C); Opinions 88-63 (Vol. II); 89-73 (Vol. III); Opinion 95-33 (Vol. XIII); 95-75 (Vol. XIII).
In regard to question "3," the Committee notes that a judge may not publicly comment on a proceeding, pending or impending in any court. 22 NYCRR 100.3(B)(8); Opinion 94-22 (Vol. XII). This would include matters which were formerly before the judge and which may be subject to appeal. The judge may respond to the Supervising Judge. But, the response should only be to the Supervising Judge and should not be forwarded to public officials, attorneys, the press or legal organizations, even if those individuals or organizations received copies of the original letter of complaint. The judge may, in response to an inquiry from a screening panel considering the potential re-appointment of the judge, provide the screening committee with a copy of any response that may have been sent to the Supervising Judge.

Whether such a "letter of complaint" is to be "considered a formal complaint against the judge" is not a question that can be answered by the Committee. The question posed raises no issue relating to judicial ethics or the performance of judicial duties and thus is outside the mandate of the Committee's authority. Jud. Law 212 (l).
THIS OPINION WAS RECONSIDERED BY THE COMMITTEE WHICH ISSUED NEW JOINT OPINION 03-93/04-32. PLEASE REFER TO THE NEW OPINION BEFORE RELYING ON THE CONTENTS OF THIS PRIOR RESPONSE.

Opinion 03-93

January 29, 2004

Digest: A New York City Housing Court judge whose term expires in less than one year (1) must exercise recusal when a member of the Advisory Council for The Housing Part appears as a lawyer for a party in a case before the Judge and the adversary party is self-represented; and (2) must offer to recuse, subject to remittal, in other cases before the judge where all parties are represented by counsel, unless the lawyer/ member’s non-renewable term on the Advisory Council expires before it passes on the judge’s reappointment.

Rules: Civil Ct. Act §110; 100.2(A); 100.3(E)(1), (F); 100.6(A); Opinions 88-17(b) (Vol.II); 88-41 (Vol.II); 88-70 (Vol. II); 88-126 (Vol. II); 89-93 (Vol.IV); 90-175 (Vol. VI); 91-63 (Vol.VII); 94-61 (Vol. XII); 94-86 (Vol. XII); 97-65 (Vol.XV).

Opinion:

A judge of the Housing Court of the New York City Civil Court (“housing judge”) inquires whether recusal is required in a landlord-tenant dispute if the landlord’s attorney is a member of the Advisory Council for the Housing Part. The case was transferred to the inquiring judge after another housing judge exercised recusal because he/she had just appeared for a reappointment interview before a sub-committee of the Advisory Council that was chaired by the landlord’s attorney. The tenant, appearing pro se, has asked the inquiring judge whether the judge will be recused. The attorney will still be on the Advisory Council when the inquiring judge is up for reappointment.

The New York City Civil Court Act provides that housing judges “shall be appointed by the administrative judge from a list of persons selected annually as qualified...by the advisory council for the housing part”( §110[f]). Housing judges serve full-time for five years. The Advisory Council also recommends whether a housing judge should be reappointed. Under the governing statute, reappointment “shall be at the discretion of the Administrative Judge and on the basis of the performance, competency, and results achieved during the preceding term” (110[i]). The Advisory Council “shall be composed of two members representative of each of the following the real estate industry, tenants’ organizations, civic groups, and bar associations;” four members from the public at large; the Commissioner of Housing and Community Renewal; and one member appointed by the Mayor. Members serve for non-renewable 3-year terms (110[g]).
Under the Rules Governing Judicial Conduct a judge is obligated to avoid impropriety and the appearance of impropriety and must “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” Rule 100.2(A). Further, a judge shall recuse himself/herself in a proceeding in which the judge’s impartiality might reasonably be questioned. Rule 100.3(E)(1). These requirements apply to housing judges. Rule 100.6(A); see also Opinion 88-70 (Vol. II).

This Committee has had occasion to determine whether recusal is required in cases when a lawyer or a party is a member of a group or body that, for various purposes, evaluates the judge. As always, the initial and fundamental factor for a judge to consider in deciding whether to preside in such a case is whether the judge believes that he/she can be impartial. But even where the judge is confident in his/her impartiality, the judge must also consider whether, under the circumstances, “the judge’s impartiality might reasonably be questioned...” (Rule 100.3(E)(1)), or whether there is a reasonable basis for concluding that continued participation might give rise to an appearance of impropriety. The Committee’s response to these concerns has depended on the closeness of the relationship between the evaluating body and the judge, the number of voting members on the evaluating body, and the significance of the action of that body for the judge’s future.

For example, the Committee has determined that when a member of a town council who participates as a council person in setting the town justice’s salary, and who also appears as a private attorney or a litigant before a town justice in the same town, the town justice should exercise recusal because that situation necessarily creates an appearance of impropriety. Recusal is subject to disclosure and remittal pursuant to Rule 100.3(F).


However, a county or state level judge in a state-financed court need not exercise recusal when a state senator or assemblyman appears as an attorney. As the Committee has stated, "There is a major difference in salary-setting, between judges of courts of record and town and village justices. The legislative body of the entire State acts on the salaries of all judges of courts of record, while a small body of council persons, trustees, or supervisors act on the salary of, normally, two town or village justices. The relationship between the judge and the salary-setting attorney is rightly perceived by the public to be much closer in a town or village". Opinion 89-93 (Vol. IV).

The 14-member Advisory Council, in the instant matter, is more akin to a town council than the much larger state legislature with its relationship to hundreds of judges statewide. The role of an Advisory Council member is at least as important as that of a town council member, for the advisory council takes part in determining not the judge’s salary, but it has the authority to recommend whether the judge shall remain on the bench at all.

Admittedly, this Committee has stated that a full time judge seeking re-election, who appears before a bar association’s judicial screening committee, need not exercise recusal when a member of the screening committee appears as an attorney before the judge. Nor, must the judge disclose that fact to opposing counsel. Opinion 94-86 (Vol. XII).

But the two situations are, in our opinion, markedly different. The bar association in question in Opinion 94-86 - the New York Trial Lawyers Association - is a private non-
governmental body whose members are likely to have a particular focus in litigation involving a particular area of the law, although the duties of the inquiring judge in that inquiry were not confined to that area of the law. Significantly, its evaluations do not carry the consequence of virtually determining whether an appointed judge remains on the bench. On the other hand, the Advisory Council is a statutorily-created body assigned specific duties related to the appointment and retention of housing judges. It thus has legal responsibilities which, as a practical matter, are virtually determinative on the questions of appointment or reappointment. Indeed, its membership comprises the entire spectrum of different points of view and interest in the landlord-tenant arena, thus adding to the weight to be given to its collective recommendations.

Accordingly, the Committee is of the opinion that, in contrast to Opinion 94-86 (Vol. XII), the situation now presented to the Committee does call for consideration of the desirability of disclosure and recusal. Taking into account all of the circumstances presented - including and balancing all the obvious ethical, practical, and administrative issues - we are of the view that the avoidance of appearances of impropriety and partiality in this particular instance is best accomplished in the following manner:

Whenever a member of the Advisory council appears before a housing judge whose term is due to expire within 12 months of the attorney’s court appearance before the housing judge, and the attorney will be eligible to vote on the recommendation for or against the housing judge’s reappointment, the judge must disclose these facts to both sides and if all parties are represented by counsel, the judge should offer to recuse. The judge may preside then only if all parties consent on the record or in writing.

However, where one of the parties is a non-lawyer appearing pro se within 12 months prior to the judge’s reappointment and his/her opponent is represented by a lawyer-member of the Advisory Council eligible to vote on the judge’s reappointment, the judge must sua sponte exercise recusal, and cause the matter to be transferred to another judge of the housing part.

We emphasize that this opinion is limited to the facts and circumstances of a housing judge’s situation where he/she is seeking reappointment and the lawyer appearing is a member of the Advisory Council eligible to vote on the judge’s reappointment within 12 months of the attorney’s appearance in the case. We specifically do not intend to have it presumed that our conclusion in this instance applies to any other advisory, evaluative, or other screening body which has input regarding a judge’s nomination, re-nomination, election, re-election, appointment, or re-appointment to a judicial position.
Joint Opinion 03-93/04-32

June 28, 2004

Digest: A Housing Court judge is not required to recuse or offer to and recuse, solely because an attorney appearing before the judge is also a member of the Advisory Council of the Housing Part of the Civil Court of the City of New York.

Rules: 22 NYCRR 100.3(E)(1).

Opinion:

In Opinion 03-93, the Committee addressed the question posed by a judge of the Housing Court of the Civil Court of the City of New York as to the obligation, if any, of a Housing Court judge to disqualify him/herself in proceedings where one of the attorneys is a member of the Advisory Council for the Housing Part of the Civil Court.

The Committee concluded that, under such circumstances, there should be an offer to recuse, subject to remittal, unless the lawyer/member’s three year non-renewable term on the Advisory Council expires before it “passes” on the judge’s reappointment; except that if the adversary party is self-represented, the recusal should be sua sponte and the case transferred to another judge. In Opinion 04-32 the Committee concluded that the same restrictions applied to the lawyer-member’s law firm itself.

However, upon further consideration of the matter, we are now of the opinion that neither recusal nor the offer to recuse should be regarded as mandatory. Our change of view flows from a more precise understanding of the multiple roles of the Advisory Council and of its composition. As pointed out in Opinion 03-93, the Advisory Council does make recommendations as to reappointments, but it does not “pass[es] on the judge’s reappointment” as stated in the digest to Opinion 03-93. Indeed, it is but one entity that has an advisory role in reappointment along with bar associations and other interested parties, including, of course, the administrative judge who is charged with ultimate responsibility to oversee the operation of the Housing Court. In short, although recommendation by the Advisory Council for one’s initial appointment to the Housing Court is required before the initial appointment may be made, a favorable recommendation is not required for reappointment, nor once a recommendation is made, favorable or not, is it determinative of whether reappointment will be granted.

Thus, the weight to be given to its recommendation on the question of reappointment cannot be regarded as virtually dispositive of the issue, as we indicated in our original opinion. Indeed, the Advisory Council itself, by virtue of its broad membership, cannot be regarded as a monolithic entity. The influence of advocates for any particular point of view in landlord-tenant disputes is diffused and cannot be regarded as decisive of whether the Council as a whole will recommend reappointment in any particular instance.

Taken together, the clearly limited role of the Advisory Council in the reappointment process, and the even more limited influence that any particular attorney might have on the
deliberations and decisions of the 14 member Advisory Council itself, compel us to alter our earlier views.

Accordingly, we now conclude that neither recusal nor the offer to recuse is mandatory when appearances are made by attorneys who also happen to be on the Advisory Council. In short, the fact of membership alone does not give rise to a necessary inference that the judge’s impartiality and independence are compromised or might be reasonably perceived to be compromised in such a situation. 22 NYCRR 100.3(E)(1).
Opinion: 98-85

September 10, 1998

Digest: (1) A judge must disqualify himself or herself in any proceedings in which the judge's nephew appears as an attorney for a party, subject to remittal of disqualification pursuant to section 100.3 (F) of the Rules Governing Judicial Conduct. (2) The judge may preside over proceedings in which other lawyers in the nephew's firm appear as attorneys for a party, provided that the judge feels he or she can be impartial.

Rule: 22 NYCRR 100.3 (E) (1) (e); 100.3(F); Opinions 94-01 (Vol. XII); 96-42 (Vol. XIV).

Opinion:

A judge of the Civil Court of the City of New York advises that the judge's nephew has become associated with a large firm that has a substantial practice in the Housing Part of the judge's court, and inquires whether it is permissible to continue to preside over cases in which partners or other associates of the firm appear as attorneys for one of the litigants.

Section 100.3 (E) (1) of the Rules of the Chief Administrator provides:

A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
(e) The judge knows that the judge or the judge's spouse, or a person known by the judge to be within the fourth degree of relationship to either of them, or the spouse of such a person, is acting as a lawyer in the proceeding.

The judge has acknowledged the requirement of the Rule, and expects to disqualify himself/herself in any case in which the nephew appears as an attorney for a party.

Section 100.3 (F) of the Rules provide that the judge's disqualification can be waived upon consent obtained and placed on the record as set forth therein:

(F) Remittal of Disqualification. A judge disqualified by the terms of subdivision (E), except subparagraph

(1) (a) (i), subparagraph (1) (b) (i) or (ii) or subparagraph (1) (d) (i) of this section, may disclose on the record the basis of the judge's disqualification. If following such disclosure of any basis for disqualification, the parties who have appeared and not defaulted and their lawyers, without participation by the judge, all agree that the judge would not be disqualified, and the judge believes that he or she will be impartial and is willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.
Thus, the open inquiry is whether partners or other associates of the nephew's law firm may properly appear as attorneys in cases in which the judge presides. That question has been before this Committee on several prior occasions. In Opinion 94-01 (Vol. XII) the Committee stated:

The judge may sit in cases where associates of the [relative] appear, provided the judge feels that he or she can be impartial. There is no affirmative duty to disclose the relationship when the associate appears.
Opinion 94-01 (Vol. XII); see also, Opinion 96-42 (Vol. XIV).

Thus, assuming that the inquirer believes that he or she can be impartial, it is not ethically improper for the judge to preside in cases where partners or associates of the nephew's law firm appear.
Opinion 91-150

Digest: A housing judge may enter into a residential lease with a landlord who was the judge’s former client, but may not sit on any matters affecting the landlord or the building.

Rules: 22 NYCRR §100.3(c)

Opinion:

A recently appointed housing judge asks whether it is permissible to rent an apartment in a building owned by a landlord, who is a former client of the judge.

Nothing in the rules of judicial ethics prevents the inquirer from renting the apartment. The judge, however, may not preside over any matters involving the landlord or the building.
Opinion 02-21
April 18, 2002

Digest: A judge may allow his or her name, photograph and biography to be used by the university of which he or she is a graduate, in an advertising campaign to encourage the recruitment of students, subject to the judge’s oversight as to the content and presentation of such material.

Rule: 22 NYCRR 100.2(C); Opinions 88-79 (Vol. II); 91-19 (Vol. VIII); 96-75 (Vol. XIV); 97-11 (Vol. XV).

Opinion:

The inquiring Housing Court judge of the Civil Court of the City of New York has been invited by the university of which he/she is an alumna/us to participate in an advertising campaign by the university, the purpose of which is primarily to “encourage and recruit students to [its] colleges and law school.” The advertisement includes the judge’s picture in judicial robes and outlines his/her “colleges and law school pathways . . . degrees and . . . position as a judge.” The advertisements are appearing in the subway, newspaper educational sections, the university’s television channel, “and its website, in college newspapers and in high schools.” The judge is one of six alumnae/i being highlighted and seeks the Committee’s guidance as to the inclusion of his/her name, position and biography in connection with the campaign to promote the university.

On a number of occasions, the Advisory Committee has considered similar questions. In Opinion 88-79 (Vol. II), the Committee stated that the inclusion of a judge’s resume and photograph in a brochure prepared by the university which the judge had attended, for the purpose of advertising “to the public and prospective employers of the university’s students and graduates the high caliber and high career achievements of the university’s alumni.” was not improper. Opinion 88-79 (Vol. II). Nor, in Opinion 91-19 (Vol. VIII), was there any impropriety seen in a judge writing to prospective college students a letter which outlines the judge’s feelings about the school and details personal information about the judge’s legal career. Opinion 91-19 (Vol. VIII). See, also Opinions 97-11 (Vol. XV); 96-75 (Vol. XIV).

It follows, in our view, that the inquiring judge’s participation in such recruitment in the manner described is not an improper extra-judicial activity, nor does it violate the prohibition on the use of the prestige of judicial office to advance the private interests of others. 22 NYCRR 100.2(C). Indeed, to require a judge to seek to bar his or her college or law school from pointing to the achievements of particular alumni/ae as reasons for considering enrollment would, we believe, contravene the mandate that the Rules Governing Judicial Conduct are to be regarded as rules of reason. 22 NYCRR Part 100-Preamble.

This does not mean, however, that caution need not be exercised by the judge in this instance. Here, the use of the judge’s name, photograph, status and biography are being presented in a variety of different outlets and formats, and it is not entirely certain that all are being used for the same purposes. Fund-raising, for example, would not be a permissible purpose for allowing the publicizing of details of the judge’s accomplishments. Accordingly,
the judge should seek to insure that his/her participation in the advertising program meets such concerns, and thus should exercise oversight as to use and presentation of the materials.
Opinion 02-85

September 4, 2003

Digest: Whether, on the facts presented, the altering of a copy of a stipulation of settlement by the attorneys involved requires reporting the matter to the appropriate attorney disciplinary committee is to be determined by the judge.

Rules: 22 NYCRR 100.3(D)(2). Opinions 98-95 (Vol. XVII); 98-65 (Vol.XVII); 97-84 (Vol. XVI).

Opinion:

A judge of the Housing Court in New York City seeks the advice of the Committee concerning his/her obligation, if any, to report to the attorney disciplinary committee two attorneys who had appeared before the judge for conduct involving an altered copy of a stipulation of settlement that had been signed by the judge.

It appears that immediately following the signing of the stipulation by the judge, and outside the courtroom, the attorneys added language requiring the tenants to move from the premises in six days. (Language to that effect had been in the original stipulation that was rejected by the judge.) Signatures to the new language were affixed on the tenant’s copy of the stipulation below the signature of the judge. The judge’s stamp does not appear on the stipulation containing the additional language.

At issue is the applicability of section 100.3(D)(2) of the Rules Governing Judicial Conduct which provides 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). Essentially, as the Committee has repeatedly stated, the determination of whether there is a substantial likelihood of a substantial violation rests with the judge. See, Opinions 98-95 (Vol. XVII); 98-65 (Vol. XVII); 97-84 (Vol. XVI). This does not mean that guidance can never be provided. If, for example, the judge concludes that, the attorneys involved engaged in a deliberate deception intended to perpetrate a fraud and deceive the parties and/or the court as to whether the additional language was now an order of the court, the appropriate action is clear: the matter should be reported to the attorney disciplinary committee. If, on the other hand, the judge concludes that the action taken by the attorneys, albeit improper, was not intended to deceive the parties and/or the court and do not disclose a lack of fitness to serve as attorneys, the course to be taken by the judge is discretionary. Whether this would involve reporting it to the disciplinary committee, or a judicial reprimand, or possible sanctions, if available, is for the judge to determine. The Committee, based on what is before it, reaches no conclusion in this regard, other than to articulate the guidelines stated.
In the Matter of Joseph Burden, an Attorney, Respondent. Departmental Disciplinary Committee for the First Judicial Department, Petitioner

Supreme Court, Appellate Division, First Department, New York

February 17, 2004
CITE TITLE AS: Matter of Burden

SUMMARY
Disciplinary proceedings instituted by the Departmental Disciplinary Committee for the First Judicial Department. Respondent was admitted to the bar on March 7, 1975, at a term of the Appellate Division of the Supreme Court in the Fourth Judicial Department.

HEADNOTE
Attorney and Client
Disciplinary Proceedings

Respondent attorney, who abused the judicial subpoena process (CPLR 408), is guilty of professional misconduct. Under the totality of circumstances, including the fact that respondent's misconduct was a deliberate circumvention of court rules, and that respondent made false statements to a court and the Grievance Committee in an attempt to conceal his misconduct, respondent is suspended from the practice of law for a period of three months.

TOTAL CLIENT-SERVICE LIBRARY REFERENCES
Am Jur 2d, Attorneys at Law §§ 38, 45, 46, 55, 114.

McKinney's, CPLR 408.


ANNOTATION REFERENCE
See ALR Index under Attorney or Assistance of Attorney; Discipline and Disciplinary Actions.

FIND SIMILAR CASES ON WESTLAW
Database: NY-ORCS

Query: susp s/ s & trial judicial /3 subpoena /s 408

APPEARANCES OF COUNSEL

Thomas J. Cahill (James T. Shed of counsel), for petitioner.
Michael S. Ross for respondent.

OPINION OF THE COURT

Per Curiam.

Respondent Joseph Burden was admitted to the practice of law in the State of New York by the Fourth Judicial Department on March 7, 1975, and, at all times relevant to this proceeding, has maintained an office for the practice of law within this Department.

On August 13, 2002, the Departmental Disciplinary Committee (Committee) served respondent with a notice and statement of charges containing 11 counts alleging that respondent violated Code of Professional Responsibility DR 1-102 (a) (4) (conduct involving dishonesty, fraud, deceit or misrepresentation), (5) (engaging in conduct prejudicial to the administration of justice) and (7) (conduct that adversely reflects on the lawyer's fitness as a lawyer) (22 NYCRR 1200.3). These charges arose out of respondent's abuse of trial subpoenas he issued in a special proceeding.
pending in housing court. In particular, respondent, as landlord's counsel, issued various trial subpoenas
to third parties seeking the financial and medical
records of a tenant without complying with CPLR
408. CPLR 408 requires, in pertinent part, leave of
court for such discovery in a special proceeding and
further requires that these subpoenaed documents
be delivered directly to the court and made
available only after a court's express approval.
Previously, the housing court denied respondent's
request for certain information it had deemed
private and unavailable. Using letter requests,
respondent improperly urged that the
subpoenaed documents be sent directly to him
rather than the court, subverting the court's
procedure for receiving, maintaining and releasing
subpoenaed records. Upon learning of respondent's
abuse of the trial subpoenas, counsel for the tenant
moved to quash and for sanctions. Respondent
submitted an affirmation in response falsely
claiming that the subpoenaed documents were sent
to his office without solicitation or suggestion by
him. In its decision, the housing court found that
respondent's use of the subpoenas was an abuse of
process and that respondent had made a false
statement to the court. Accordingly, the subpoenas
were quashed, respondent sanctioned in the amount
of $1,000 and the matter referred to the Committee.

In response to the Committee's letter regarding
the matter, respondent again falsely stated that the
subject documents were voluntarily sent to his
office without his urging. In his answer to the
Committee's formal charges and in a prehearing
stipulation, however, respondent later
acknowledged violating Disciplinary Rules in
connection with each of the 11 counts of the
charges. At the hearing held before a Referee, the
Committee recommended a one-year suspension
and respondent urged a public censure. The Referee
subsequently sustained all 11 counts and
recommended a three-month suspension with
automatic reinstatement after the suspension. A
Hearing Panel unanimously agreed with the
Referee's report and the recommended sanction.

The Committee now petitions this Court for an
order pursuant to 22 NYCRR 603.4 (d) and 605.15
(e), (2), confirming the determination of the Hearing
Panel, and suspending respondent from the practice
of law for a period of three months.

Inasmuch as respondent had admitted and
stipulated to violating Disciplinary Rules in
connection with each of the 11 counts of the
Committee's charges, which were independently
supported by the evidence adduced at the hearing,
the petition should be granted. We find that
respondent's misconduct was a deliberate
circumvention of the housing court's rules and
procedures by soliciting and obtaining documents
by the abuse of judicial subpoenas. Further, we find
that respondent's false statements to the housing
court and to the Committee were calculated to
conceal respondent's unethical behavior. Under
these circumstances, respondent's suspension for a
period of three months is warranted.**2

Accordingly, the Committee's petition should be
granted and the determination of the Hearing Panel
should be confirmed to the **4 extent of suspending
respondent from the practice of law in the State of
New York for a period of three months and to be
reinstated pursuant to 22 NYCRR 603.14 (a) (1).

Tom, J.P., Saxe, Sullivan, Lerner and Friedman,
JJ., concur.

Respondent suspended from the practice of law in
the State of New York for a period of three months,

Copr. (c) 2007, Secretary of State, State of New
York.


MATTER OF BURDEN

END OF DOCUMENT

Digest: A full-time City Court Judge may not serve as an officer or board member of a Legal Services for the Elderly organization.

Rule: 22 NYCRR 100.4(C)(3)(a)(i),(ii); Opinion 88-130 (Vol. III).

Opinion:

A full-time City Court Judge inquires whether the judge can serve as an officer or board member of a Legal Services for the Elderly, Disabled or Disadvantaged organization. In connection with the inquiry, the judge attaches a letter from the organization which indicates that it provides legal services in the judge's court in defending low income, elderly landlords in owner-occupied one and two-family homes who have been charged with Housing Code violations and in representing elderly tenants and low-income elderly landlords in eviction cases. The letter further states that, in the past, if a sitting judge was a board member of the organization, such advice was imparted to the litigants with an offer of recusal.

This Committee has previously issued an opinion which advised that a judge should refrain from serving as a director of a legal services bureau which represents clients in the judge's court. Opinion 88-130 (Vol. III). That opinion cautioned against activity which is in violation of former section 100.5(b)(1) of the Rules Governing Judicial Conduct, now set forth in section 100.4(C)(3)(a)
(i) and (ii) which states:

a. A judge shall not serve as an officer, director, trustee or non-legal advisor if it is likely that the organization

(i). will be engaged in proceedings that ordinarily would come before the judge, or

(ii). if the judge is a full-time judge, will be engaged regularly in adversary proceedings in any court.

In the opinion of the Committee this provision applies and therefore the judge should refrain from acting as an officer or director of the organization about which the judge inquires.
Opinion: 98-123

December 3, 1998

Digest:  (1) A judge may serve on the board of directors of not-for-profit youth organizations that are of an educational, charitable, cultural, fraternal or civic nature, subject to the limitations and prohibitions set forth in the Rules Governing Judicial Conduct (2) A judge may write a letter on behalf of another judge seeking reappointment only at the written request of the screening panel or selection committee (3) A letter of complaint about the judge sent to the Supervising Judge should not be responded to publicly, but the judge may respond to the Supervising Judge and provide a copy of that response to a screening panel considering the judge's reappointment to the bench.

Rule:  Jud. Law 212 (1); 22 NYCRR
100.2(C); 100.2(D); 100.3(B)(8);
100.4(C)(3);
Opinions 88-63 (Vol. II); 89-73 (Vol. III);
94-22 (Vol. XII); 95-33 (Vol. XIII); 95-75 (Vol. XIII).

Opinion:

A judge of the Housing Court of the City of New York submits to the Committee the following questions:

1. Can a judge be a member of the Board of Directors
   of a not-for-profit youth organization, e.g. "Boys
Club of America," "Pathways for Youths" or "Girls Club?"

2. Can a judge write a letter on behalf of another judge who is seeking re-appointment? What if the request comes from an article in the New York Law Journal ...? What if a written request is made from the screening panel or committee? Can a judge respond to an oral request, and from whom should the request come from?

3. A letter of complaint against "Judge X" is written to the supervising judge of the court. The supervising judge sends a copy of the complaint to "Judge X" and asks him to comment on the complaint.

a. Is the letter of complaint considered a formal complaint against the judge? (Keep in mind that the public write complaint letters against judges often.)

b. Should the judge respond to the letter?

c. To whom can the judge distribute copies
of the letter? In this hypothetical, the complainant sent copies of the letter to public officials, other attorneys in the courthouse, newspapers and other legal organizations.

d. If asked by a screening panel for re-appointment about the incident can the judge produce a copy of the response?

In response to question "1," the Committee is not aware of any reason why the judge may not serve on the board of directors of the not-for-profit youth organizations mentioned. Section 100.4(C)(3) permits a judge to be a member and serve as a director of an "educational, religious, charitable, cultural, fraternal or civic organization not conducted for profit," subject to the limitations set forth in the Rules Governing Judicial Conduct. Presumably the organizations cited fall into one or more of the categories specified. But, since the judge did not provide any details concerning the organizations, the Committee declines to speculate concerning the possibility that some prohibitory rule (e.g. 22 NYCRR 100.2[D]), may be drawn in issue.

As to question "2," concerning a judge's reappointment to the bench, it is the view of the Committee that a judge may respond to a written request from a screening panel, selection or nominating committee concerning the reappointment of the individual. A judge, however, should not on his/her own initiative, or at the request of the applicant or another individual, or in response to a public solicitation in the local legal newspaper, write a letter on behalf of a person seeking reappointment. 22 NYCRR 100.2(C); Opinions 88-63 (Vol. II); 89-73 (Vol. III); Opinion 95-33 (Vol. XIII); 95-75 (Vol. XIII).
In regard to question "3," the Committee notes that a judge may not publicly comment on a proceeding, pending or impending in any court. 22 NYCRR 100.3(B)(8); Opinion 94-22 (Vol. XII). This would include matters which were formerly before the judge and which may be subject to appeal. The judge may respond to the Supervising Judge. But, the response should only be to the Supervising Judge and should not be forwarded to public officials, attorneys, the press or legal organizations, even if those individuals or organizations received copies of the original letter of complaint. The judge may, in response to an inquiry from a screening panel considering the potential re-appointment of the judge, provide the screening committee with a copy of any response that may have been sent to the Supervising Judge.

Whether such a "letter of complaint" is to be "considered a formal complaint against the judge" is not a question that can be answered by the Committee. The question posed raises no issue relating to judicial ethics or the performance of judicial duties and thus is outside the mandate of the Committee's authority. Jud. Law 212 (l).
Digest: A Housing Court judge is permitted to serve as a co-recording secretary of the Parent Teachers Association of the school attended by the judge's child.

Rule: 22 NYCRR 100.4(C)(3)(i) and (iv).

Opinion:

A Housing Court judge inquires whether it is permissible to continue to serve as the recording secretary, together with two others, of the board of the Parent Teacher's Association of the school attended by the judge's child. The duties of that office involve the taking of minutes at the monthly meetings of the board and dissemination of the minutes to the parent body of the school. The judge recognizes that the judge may not participate in fund-raising activities which the Association may undertake in support of the school's extra-curricular activities.

Section 100.4(C)(3) of the Rules Governing Judicial Conduct provides that a judge may serve as an officer of an educational or civic organization not conducted for profit subject to certain limitations including a prohibition against personally participating "in the solicitation of funds or other fund-raising activities." 22 NYCRR 100.4(C)(3)(b)(i). Further, as stated in section 100.4(C)(3)(b)(iv), a judge shall not:
use or permit the use of the prestige of judicial office for fund-raising or membership solicitation, but may be listed as an officer, director or trustee of such or organization. Use of an organization's regular letterhead for fund-raising or membership solicitation does not violate this provision, provided the letterhead lists only the judge's name and office or other position in the organization, and, if comparable designations are listed for other persons, the judge's judicial designation.

In our opinion, there is no ethical reason to prevent the judge from serving as recording secretary of the PTA.
Joint
Opinion: 95-14  95-21

January 19, 1995

Digest: A bar association directory and a listing of attorneys on a notice providing information about lawyers' referral services may be made available in the court provided that the judge does not recommend the use of any particular lawyer or law firm, and it is clear that the court is not making an official recommendation.

Rule: 22 NYCRR 100.2(c)

Opinion:

In Inquiry 95-14, a town justice states that the county bar association is planning to publish a directory listing the names, addresses, telephone numbers and types of matters handled by the attorneys listed. The judge asks whether it is permissible for copies of the directory to be located and made generally available in the court.

In Inquiry 95-21, a Housing Court judge asks whether a handout sheet of a county bar association's lawyer referral service may be made available to litigants. The sheet would state the address and telephone number of the service and that the cost of "an immediate consultation with a private attorney in his or her nearby office for up to 1/2 hour" is $25. It would
also state that there is no obligation to retain the attorney 
consulted or pay any fees beyond the $25.

The Committee is of the opinion that, in both in-
stances, making the materials available in the court is per-
missible as long as the judge does not recommend particular 
lawyers or law firms, and makes clear that the availability of 
the materials does not constitute an official recommendation by 
the court.
Opinion: 98-121

October 22, 1998

Digest: A full-time judge may teach a course in real property law at 
a non-profit educational institution but may not teach a course in civil 
litigation at a commercial, for-profit proprietary educational 
institution.

Rule: 22 NYCRR 100.4(D)(3); 100.4(H)(1)(c); 100.6(D). 
Opinions 92-05 (Vol. IX); 94-57 (Vol. XIII); 96-143.

Opinion:

A recently appointed Housing Court judge has been teaching in 
the evening at two educational institutions. The inquirer teaches a 
course in real property law at a non-profit educational institution, i.e., 
at a college that is part of the City University of New York 
("CUNY"), and a course in civil litigation at a for-profit proprietary 
educational institution that trains paralegals. The judge asks "whether 
it is appropriate to continue teaching at either or both of these 
institutions."

The Committee has previously advised that judges may teach 
law (and other subjects, e.g. dance) at non-profit institutions and be 
compensated for such teaching. See, e.g. Opinions 94-57 (Vol. XIII), 
92-05 (Vol. IX). Further, section 100.4(H)(1)(c) of the Rules 
Governing Judicial Conduct specifically allows a judge to receive 
compensation for teaching at a New York State public college or 
university. Accordingly, the judge may continue to teach a course of 
study at the CUNY college mentioned in the inquiry.
Our opinion is different, however, with respect to teaching the course in civil litigation at the for-profit school for paralegals. That entity is a commercial proprietary educational institution, i.e., profit-making. Section 100.4(D)(3) of the Rules forbids a full-time judge from, among other things, serving as an "employee or other active participant of any business entity . . . ." The school in question is a "business entity." It therefore follows that the judge may not continue to teach at that institution. See Opinion 96-143 [a full-time judge may not serve as an instructor at a commercial entity formed to assist pre-law students in applying to law school].

The judge also asks the permission of the Committee to complete the present teaching assignment should the Committee find either position objectionable. But, the Committee is not empowered to grant such permission. That authority rests with the Chief Administrative Judge. Section 100.6(D) of the Rules allows for the making of an "application to the Chief Administrator for additional time to comply [with section 100.4(D)(3)], in no event to exceed one year, which the Chief Administrator may grant for good cause shown." Accordingly, any request in that regard should be directed to the Chief Administrative Judge.

http://www.nycourts.gov/ip/judicialethics/opinions/98-121.htm
Joint Opinion 03-84 and 03-89

September 4, 2003

Digest: Judges may participate in legal educational programs sponsored by advocacy organizations provided that the judges do not seek to instruct on questions of strategy or tactics in support of the litigation engaged in by members of such groups, and do not comment publicly on pending or impending cases.

Rule: 22 NYCRR 100.3(B)(8); 100.4(A)(1).

Opinion:

Two judges seek the Committee's advice concerning their participation in certain professional educational events, involving lawyers who specialize in particular areas of the law on behalf of certain groups of litigants.

In one instance (03-84) the judge has been asked to give a lecture conference sponsored by the National Consumer Law Center. The overall focus of the conference is consumer rights litigation, and, in particular, a symposium on class actions. The audience is described as composed of "consumer lawyers."

In the other instance (03-89) the judge who sits in Housing Court has been invited to participate in a Continuing Legal Education program sponsored by a legal services group that appears in Housing Court. It is anticipated that most attendees will be tenant advocates from legal service organizations but there are no bars to attendance. Both judges inquire as to the appropriateness of their participation.

Clearly, judges may speak, lecture, and participate in educational programs, conferences, symposia and the like on the law, the legal system and administration of justice; and the fact that the lawyers who constitute the audiences for such events may be advocates on behalf of particular groups, e.g. tenants, or consumers, does not render such participation suspect. Nevertheless, in such situations caution must be exercised. For a judge must not be perceived as giving what amounts to partisan advice on questions of strategy or tactics as to how the lawyer is best likely succeed in such cases on behalf of their particular clients. Otherwise, the judge could well be perceived as acting in a manner that casts doubt on his or her capacity to act impartially a judge, in violation of section 100.4(A)(1) of the Rules Governing Judicial Conduct. 22 NYCRR 100.4(A)(1). This would be especially so in the event cases involving the very subject matter of the programs are likely to come before the judge. Further, care must be taken to avoid public comment on pending or impending cases, as required by section 100.3(B)(8) of the Rules. Subject to such limitations, the inquiring judges may participate in the conference and the Continuing Legal Education program, respectively.

http://www.nycourts.gov/ip/judicialethics/opinions/03-84.htm
Opinion: 98-123

December 3, 1998

Digest:  (1) A judge may serve on the board of directors of not-for-profit youth organizations that are of an educational, charitable, cultural, fraternal or civic nature, subject to the limitations and prohibitions set forth in the Rules Governing Judicial Conduct (2) A judge may write a letter on behalf of another judge seeking reappointment only at the written request of the screening panel or selection committee (3) A letter of complaint about the judge sent to the Supervising Judge should not be responded to publicly, but the judge may respond to the Supervising Judge and provide a copy of that response to a screening panel considering the judge's reappointment to the bench.

Rule:  Jud. Law 212 (1); 22 NYCRR
100.2(C); 100.2(D); 100.3(B)(8); 100.4(C)(3);
Opinions 88-63 (Vol. II); 89-73 (Vol. III);
94-22 (Vol. XII); 95-33 (Vol. XIII); 95-75 (Vol. XIII).

Opinion:

A judge of the Housing Court of the City of New York submits to the Committee the following questions:

1. Can a judge be a member of the Board of Directors
   of a not-for-profit youth organization, e.g. "Boys
Club of America," "Pathways for Youths" or "Girls Club?"

2. Can a judge write a letter on behalf of another judge who is seeking re-appointment? What if the request comes from an article in the New York Law Journal ...? What if a written request is made from the screening panel or committee? Can a judge respond to an oral request, and from whom should the request come from?

3. A letter of complaint against "Judge X" is written to the supervising judge of the court. The supervising judge sends a copy of the complaint to "Judge X" and asks him to comment on the complaint.

   a. Is the letter of complaint considered a formal complaint against the judge? (Keep in mind that the public write complaint letters against judges often.)

   b. Should the judge respond to the letter?

   c. To whom can the judge distribute copies
of the letter? In this hypothetical, the complainant sent copies of the letter to public officials, other attorneys in the courthouse, newspapers and other legal organizations.

d. If asked by a screening panel for re-appointment about the incident can the judge produce a copy of the response?

In response to question "1," the Committee is not aware of any reason why the judge may not serve on the board of directors of the not-for-profit youth organizations mentioned. Section 100.4(C)(3) permits a judge to be a member and serve as a director of an "educational, religious, charitable, cultural, fraternal or civic organization not conducted for profit," subject to the limitations set forth in the Rules Governing Judicial Conduct. Presumably the organizations cited fall into one or more of the categories specified. But, since the judge did not provide any details concerning the organizations, the Committee declines to speculate concerning the possibility that some prohibitory rule (e.g. 22 NYCRR 100.2[D]), may be drawn in issue.

As to question "2," concerning a judge's reappointment to the bench, it is the view of the Committee that a judge may respond to a written request from a screening panel, selection or nominating committee concerning the reappointment of the individual. A judge, however, should not on his/her own initiative, or at the request of the applicant or another individual, or in response to a public solicitation in the local legal newspaper, write a letter on behalf of a person seeking reappointment. 22 NYCRR 100.2(C); Opinions 88-63 (Vol. II); 89-73 (Vol. III); Opinion 95-33 (Vol. XIII); 95-75 (Vol. XIII).
In regard to question "3," the Committee notes that a judge may not publicly comment on a proceeding, pending or impending in any court. 22 NYCRR 100.3(B)(8); Opinion 94-22 (Vol. XII). This would include matters which were formerly before the judge and which may be subject to appeal. The judge may respond to the Supervising Judge. But, the response should only be to the Supervising Judge and should not be forwarded to public officials, attorneys, the press or legal organizations, even if those individuals or organizations received copies of the original letter of complaint. The judge may, in response to an inquiry from a screening panel considering the potential re-appointment of the judge, provide the screening committee with a copy of any response that may have been sent to the Supervising Judge.

Whether such a "letter of complaint" is to be "considered a formal complaint against the judge" is not a question that can be answered by the Committee. The question posed raises no issue relating to judicial ethics or the performance of judicial duties and thus is outside the mandate of the Committee's authority. Jud. Law 212 (l).
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Friday, September 16, 1994

IRREGULARITY LED TO PRIVATE REPRIMAND

By Matthew Goldstein

MANHATTAN Housing Court Judge Arthur R. Scott Jr., an 11-year veteran of the Housing Court bench, was privately reprimanded by court administrators for apparent procedural irregularities in his handling of a landlord-tenant case, according to a number of court officials and housing attorneys.

The court system’s admonishment, which included a warning to Judge Scott and the removal of about 30 pending cases from his docket, stemmed from a written complaint filed by a Manhattan attorney on June 23, 1993, with State Supreme Court Justice Jacqueline W. Silbermann, the administrative judge for the New York City Civil Courts, who oversees the Housing Court system.

Allegations in the complaint suggest that the standard Housing Court procedure for issuing an eviction warrant against a tenant was not followed by Judge Scott in the case, which effectively shortened the time for a landlord to get a warrant from about one month to one week.

Meanwhile, in a move that may or may not be related to the allegations in the June 1993 complaint, the Manhattan District Attorney’s Office has been investigating Judge Scott since late last year, several court officials and law enforcement sources have confirmed. Officials have declined to discuss the status or scope of the District Attorney’s probe.

Gerald McKelvey, the chief spokesman for the Manhattan District Attorney, said he could not comment on the status or subject of the investigation.

The admonishment, which was imposed late in the summer of 1993, came less than a year after Judge Scott’s reappointment to a third five-year term in January 1993, despite concerns that had been raised by some court officials about his repeated absences from the bench.

David Rosenberg, a partner with Marcus, Borg, Rosenberg & Diamond, who chairs the Housing Court Advisory Council, a panel which reviews housing court judicial nominees, said his committee was aware of problems with Judge Scott’s court attendance when he came up for reappointment in late 1992, but declined to comment further on the counsel’s actions.
City Housing Court judges, who earn $95,000 a year, are appointed by the chief administrative judge of the courts.

Bias Asserted

In an interview conducted several weeks ago, Judge Scott, 47, charged there is a double standard in the way court administrators treat complaints lodged against minority versus non-minority judges. While not directly addressing the allegations in the June 1993 complaint, Judge Scott, who is black, said "We're treated differently. They don't give us the same kind of consideration that white judges get."

Judge Scott said he was unaware of any criminal investigation surrounding his activities.

Top court administrators, including Justice Silbermann and Chief Administrative Judge E. Leo Milonas, declined to comment on the incident or on the court system's handling of the matter. A court official, however, confirmed that a private reprimand and warning had been issued to Judge Scott.

A copy of the complaint, signed by the tenant's attorney, William J. Gribben, a partner with Himmelstein, McConnell & Gribben, was obtained by the Law Journal. The complaint concerned a Brooklyn landlord-tenant case, 180 Prospect Place Realty v. Johnson, that was still pending before Judge Scott when he was transferred to Manhattan from Brooklyn Housing Court in February 1993.

Mr. Gribben complained after learning that a 72-hour notice of eviction had been served on his client, even though he had not received an order from Judge Scott finalizing the eviction.

A number of housing attorneys and court personnel, interviewed over the past several weeks, said the procedural irregularities, if true, could be seen as having given preferential treatment to the owner of the residential building, which was in the hands of a court-appointed receiver when the eviction warrant was issued.

A separate review of the court file and documents in the case by the Law Journal showed the following:

. the eviction warrant, obtained from the City Marshal's office, was signed personally by Judge Scott, rather than by a warrant clerk;

. there was no record of the eviction warrant having been requested or issued;

. the eviction warrant was issued one week after Judge Scott's final decision in the case, instead of the usual one month which would have occurred under the court system's first-in, first-out policy.

Judge Scott's handling of the case apparently was serious enough that it prompted
court officials to reassign the case to Brooklyn Housing Judge Laurie L. Lau, who stayed Judge Scott's eviction order and subsequently reduced the monthly rent for the apartment from $1,350 to $200.
New York Law Journal
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Thursday, December 15, 1994
COURT OFFICIALS MOVE TO SUSPEND JUDGE SCOTT
DISCIPLINARY CHARGES SEEN IMMINENT; MOTION FORMS PREPARED FOR PRO SE PARTIES

By Matthew Goldstein

STATE COURT ADMINISTRATORS moved yesterday to suspend immediately without pay Manhattan Housing Court Judge Arthur R. Scott Jr., charged Monday with taking bribes to fix landlord-tenant cases.

State Supreme Court Justice Barry Cozier, deputy chief administrative judge for the city court system, said Judge Scott would be notified of the suspension by Friday.

He said court officials also were planning to file disciplinary charges with the newly-instituted Housing Court Disciplinary Committee.

The charges against Judge Scott would be the first disciplinary action to be considered by the seven-member panel, established in June to recommend whether a sitting housing judge should be publically admonished, sanctioned or removed from office. The panel’s recommendation, which follows a public hearing on the charges, are subject to the approval of Chief Administrative Judge E. Leo Milonas.

Frank J. Loverro, Judge Scott's attorney, said court officials had succumbed to political pressure in deciding to suspend his client without pay. He said such action is prejudicial and contrary to the presumption of innocence.

"There are political overtones to this whole thing," said Mr. Loverro. "The implication is that there is something to these charges."

Meanwhile, Judge Scott, 47, remained on Rikers Island yesterday afternoon after failing to post a $10,000 bond. The judge, who has been on the Housing Court bench for nearly 12 years, was arraigned Tuesday morning on bribery, criminal fraud and attempted grand larceny charges.

Mr. Loverro said the delay in making bail was due to the fact that Judge Scott's wife temporarily lives in New Orleans and had yet to arrive in the city.

At Judge Scott's arraignment in Manhattan Criminal Court, Mr. Loverro explained that his client, who lived in New Orleans from 1979 to 1981, visits his wife and child in Louisiana on most weekends. Judge Scott, who resides in Kew Gardens,
Queens, also has two children from a prior marriage.

On another front, court administrators announced a plan yesterday to handle requests from litigants and attorneys who had cases before Judge Scott to have their decisions reviewed for possible bias and potential wrongdoing.

Acting State Supreme Court Justice Salvador Collazo, the supervising judge for the Manhattan Civil Court, said his office has prepared a standard form, which attorneys and litigants should use to bring either a motion to vacate or to review a case. The form, which will be available this morning in the Housing Court Clerk's Office on the Second Floor of 111 Centre Street, specifically names Judge Scott in the body of the text.

Court officials are expecting a large number of such requests because the Manhattan District Attorney's Office has seized hundreds of old cases handled by the judge.

A court official, who declined to be named, said after reviewing those old cases, prosecutors expect to bring additional corruption charges against other housing court attorneys and landlords.
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Thursday, February 9, 1995

FORMS FILED BY HOUSING JUDGE CONTAIN APPARENT DISCREPANCIES

By Matthew Goldstein

MANHATTAN HOUSING Court Judge Arthur R. Scott Jr., who was charged in December
with taking bribes to fix landlord-tenant cases, has apparently omitted material
information or provided incorrect information on several forms he was required to
submit to court officials over the years, the Law Journal has found.

Discrepancies and omissions appeared on Judge Scott’s 1992 judicial nominating
form and his 1994 financial disclosure statement. The nominating form, which all
Housing Court judges and candidates must complete, is used by court administrators
and the Housing Court Advisory Council to assess the qualifications of judicial
candidates.

A review of the forms and related court documents and interviews with housing
attorneys and court officials reveals that Judge Scott neglected to disclose his
personal involvement in a controversial 1987 landlord-tenant dispute; provided an
inflated description of a job he held with the New York City Housing Authority;
and failed to report $14,000 in debts owed by his wife on a 1994 state financial
disclosure form.

Additionally, the Law Journal has confirmed through court papers and sources that
in 1985 Judge Scott used a Social Security number that is not his own on a lease
application for a Bronx apartment.

Judge Scott is due to appear today in Manhattan Criminal Court on the unrelated
bribery charges. Those charges evolved from an 18-month undercover investigation
by the Manhattan District Attorney’s office. A grand jury is currently
considering whether to indict Judge Scott, who was arraigned on Dec. 13, one day
after his arrest outside his Kew Gardens, Queens apartment.

Judge Scott, 48, speaking through his attorney Frank Loverro, declined on several
occasions to comment for this article. He is on a paid leave from his
$95,000-a-year job. He was first appointed to the Housing Court bench in 1983 and
was reappointed to a third five-year term in January 1993.

Tenant Lawsuit

On a 1992 judicial nominating form, a copy of which was obtained by the Law
Journal, Judge Scott omitted any mention of a 1987 lawsuit brought by him and his
wife, LeVerne, in Bronx Supreme Court against their former landlord.

Housing Court judges and judicial applicants are required in the nomination and reappointment process to disclose on the forms, submitted to court officials and evaluating panels, the details of any landlord-tenant litigation in which they have had a personal interest.

The Scotts had sought a court declaration that a rent-stabilized apartment, which they had leased in the Bronx in 1985, was their principal residence and that they were entitled to a new two-year lease. According to court papers in Scott v. 5700-5800-5900 Arlington Avenue Associates, Index #006521/87, the couple initiated the lawsuit after the building's owner refused to offer them a new lease on the grounds that they had been subletting the apartment and had no intention of using it as their primary residence. The Scotts were then living in an apartment in Kew Gardens, Queens.

Under the state's Rent Stabilization Law, a tenant generally is entitled to an automatic lease renewal barring a breach of the lease agreement.

The landlord, according to court papers, claimed the Scotts had obtained permission to sublet the apartment by telling the former owner that Judge Scott needed to sublet because he was being transferred temporarily to Queens Housing Court, but he and his wife intended to return in 1987, when he was reassigned to the Bronx. Included in the court file is a copy of the sublet agreement, allegedly filled out by Judge Scott, in which he asserts that Housing Court judges are required to live in the borough in which they preside.

According to several court officials, city Housing Court judges are free to live anywhere within the five boroughs, regardless of where they preside. In addition, court officials confirmed that Judge Scott, who sat in Bronx Housing Court from 1983 to 1990, was never transferred to Queens Housing Court.

The litigation concluded in February 1987 with the Scotts signing a stipulation in which they agreed to relinquish the Riverdale apartment and conceded that it was not their primary residence.

David Rosenberg, chairman of the Housing Court Advisory Council, one of two independent groups that reviews the qualifications of Housing Court candidates, said if his committee had known of the lawsuit in 1992 when Judge Scott came up for reappointment, it would have raised questions about his fitness to remain on the bench.

The advisory council recommended Judge Scott's reappointment. But Mr. Rosenberg, a partner with Marcus Borg Rosenberg & Diamond, said it was lukewarm endorsement because the council was troubled by the judge's habit of working half-days and taking an unusual number of sick days, a problem which also concerned court administrators.

Job Description
Another discrepancy on Judge Scott's 1992 judicial nominating form involved his prior work experience with the city Housing Authority. On the form, Judge Scott claimed that he was "chief of litigation" for the Housing Authority from 1981 to 1982, the years immediately prior to his appointment to the bench.

Judge Scott, however, was a staff attorney in the agency's law department, working first in the litigation division and then in the Tenant Administration Hearing and Appeals Bureau, according to Housing Authority employment records obtained through a freedom-of-information request and several current and former Housing Authority lawyers. The actual chief of litigation during his tenure was Godfrey R. DeCastro.

State Form

There is also a discrepancy in some of the information provided by Judge Scott on his 1994 state financial disclosure form.

Janice Howard, executive director of the State Ethics Commission for the Unified Court System, said that on a 1994 disclosure statement, Judge Scott reported that neither he nor his wife had any outstanding debts or liabilities exceeding $5,000. However, an electronic search of the recorded liens and judgments on a state court data base found that there are $14,000 in outstanding judgments against Judge Scott's wife LeVerne.

The liens, which date from 1989 and 1992, were filed by two different creditors, one of which was a credit union for the now defunct Eastern Airlines Company. Ms. Scott was a flight attendant for Eastern Airlines, according to court documents and several sources, who were friendly with the couple.

Ms. Howard said that under the guidelines, Judge Scott was required to report his wife's debts on the disclosure statement. He also failed to report the debts on his 1993 financial statement, she said.

Judge Scott and his wife separated several years ago and she has since moved to Louisiana with their 5-year-old son. His wife could not be reached for comment.

Social Security Number

Meanwhile, court papers from the Bronx suit also show that in 1985, when Judge Scott and his wife signed a two-year lease for the Riverdale apartment, he provided the building's owner a different Social Security number than the one he had used as a law student at New York University from 1969 to 1972 and has since supplied to court officials.

Federal law prohibits the use of another person's Social Security number.

The federal Social Security Administration confirmed that both numbers were issued by its New York office. A source within the agency, speaking on condition of anonymity, said the Social Security number used by Judge Scott on the 1985
lease application was issued in 1938 to a person who presumably is a close relative, possibly his father. Judge Scott was born Dec. 29, 1946. His father, Arthur Scott, died on May 11, 1989, in Oxford, N.C.

A computer search of several public data bases shows that both Social Security numbers are listed to an "Arthur R. Scott Jr." The number Judge Scott used as an NYU student was issued in either 1962 or 1963 and has appeared on recent documents listing his Kew Gardens address.

The 1938 number has appeared on forms that list Judge Scott's address, at various times, at the Riverdale and Kew Gardens apartments, as well as at a post office box in Henderson, N.C., a small town located north of Raleigh and near Oxford.

Sherrill Spatz, a prosecutor in the Manhattan District Attorney's Office, who has been investigating the bribery allegations against Judge Scott, said her office was unaware of the judge's use of different Social Security numbers.

Mr. Rosenberg said the Housing Court Advisory Council, which has 14 volunteer members, does a minimal background check on information provided by candidates, but lacks resources to perform a more comprehensive review.

The City Bar judiciary committee also makes background checks on judicial applicants, but Alvin K. Hellerstein, the committee chairman and a partner at Stroock, Stroock & Lavan, said he could not discuss what action his panel took on Judge Scott's reappointment without abrogating confidentiality guidelines.
Merrill Lynch announced a reorganization of its general counsel's office into four organizational units. They are corporate law, litigation and compliance, corporate and institutional business and private clients. The general counsels managing each unit are, respectively, Rosemary Berkery, George Schieren, Carlos Morales and Donald Gershuny. Stephen L. Hammerman, the vice chairman and general counsel to the investment banking and brokerage firm, also said Raymond Vass will be the director of regulatory policy. In an unrelated personnel move, the Better Business Bureau of Metropolitan New York has named Ronna D. Brown as its general counsel; she had been deputy bureau chief of the State Attorney General's Consumer Frauds and Protection Bureau.

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Francis T. Murphy, the Presiding Justice of the Appellate Division, First Department, has announced the appointment of Emily Olshansky as the Law Guardian Director for the First Department. A member of the Family Court Assigned Counsel Panels since 1990, Ms. Olshansky succeeds Denis Sheil, who recently retired from the position. Elsewhere, Vincent Ravaschiere, general counsel of H.E.L.P., which develops housing for the homeless, has been named chairman of the City Council's Legislative Advisory Commission on the Homeless.

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Leonard Joy, of the Legal Aid Society's Federal Defender's Office, will receive the annual Norman Ostrow Award for excellence in criminal defense from the New York Council of Defense Lawyers at a March 21 luncheon at the Grand Hyatt.

The Supreme Court agreed yesterday to use a Colorado case to decide whether states can forbid laws designed to protect homosexuals from discrimination. The court said it will consider reinstating to the Colorado Constitution an anti-gay-rights amendment approved by voters that was struck down by state courts, Romer v. Evans, 94-1039. In a second case, the Justices made it easier for some convicted criminals to win federal court orders granting them new trials in state courts. In a 5-3 decision in an Ohio case, Justice Steven G. Breyer wrote that federal judges who have "grave doubt" about whether a state trial error was harmless or not should not treat it as harmless, O'Neal v. McAnich, 93-7407.
State court officials said last week they are investigating whether to bring additional disciplinary charges against Manhattan Housing Judge Arthur R. Scott Jr., following a Law Journal article that reported that Judge Scott provided inaccurate and incomplete information on several forms he was required to submit to court officials (NYLJ, Feb. 9). Court officials said the new disciplinary charges, if filed, would be unrelated to the pending criminal bribery charges against Judge Scott.

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A federal judge yesterday dismissed a conservative group's challenge to President Clinton's legal defense fund, ruling it was a private effort that provides no public policy advice to the President. U.S. District Judge Royce Lamberth of Washington, D.C., in noting that the case was unprecedented, found no merit to Judicial Watch's claim the fund violated the Federal Advisory Committee Act.

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Monday, March 20, 1995

Behind the Headlines

JUDGE GISCHE BATS CLEAN-UP IN HOUSING COURT REVIEW

By Matthew Goldstein

FOR THE PAST THREE months, Manhattan Civil Court Judge Judith J. Gische has been performing one of the more unusual tasks in the state judiciary - looking for signs of judicial impropriety by one of her colleagues.

In the wake of the arrest in December of Manhattan Housing Court Judge Arthur R. Scott Jr. on bribery charges, Judge Gische has been charged with reviewing dozens of motions brought by tenants and landlords involving claims of impropriety against Judge Scott.

"I've never heard of another situation like this. [It is] an enormous task," said Acting State Supreme Court Justice Salvador Collazo, administrative judge for the Manhattan Civil Court, who explained that Judge Gische was tapped because of her prior experience as a Housing Court judge in Brooklyn. She was elected to Civil Court in 1993.

Most of the litigants appearing in her cramped courtroom at 111 Centre Street have sought to vacate recent rulings by Judge Scott and restore their cases to the trial calendar. But the question of when to grant a new trial presents a tricky problem.

Judge Gische explained that while she appreciates the difficulty in establishing a corruption claim, she has limited authority to overturn a ruling on an error of law and cannot vacate rulings due to mere allegations.

In the approximately 15 cases in which Judge Gische has so far ordered new trials, she has spotted procedural irregularities that cast doubt on the overall fairness of the original proceeding. In some cases, she has come to a decision solely by reviewing the court file, while in others she has conducted hearings to gather testimony and read the transcripts from the prior proceedings.

"For me to vacate a decision I don't have to find criminal conduct," said Judge Gische. "What I've seen in some of these cases are irregularities, but what was the cause of those irregularities I couldn't say."

Judge Gische, also presiding over more than a hundred open cases that were on
Judge Scott's docket at the time of his arrest, said she views her primary job as "sanitizing" the court record and making sure the proceedings were above-board.

It is important that the court be viewed "in an appropriate light," she said, adding, "If there is any taint on the Judiciary because of Judge Scott's problems, then that taint should be removed."

But several lawyers who have opposed motions for a new trial complained that the criminal charges against Judge Scott have opened the door to permitting disgruntled litigants to delay the judicial process.

"It's been a difficult situation. What was going to trial in November has now been delayed until March," said Michael J. Berman of Laufer and Berman, representing a landlord in a case in which Judge Gische vacated a default judgment entered against a tenant by Judge Scott. "This is a problem for a landlord who hasn't collected rent and a tenant who may not have saved money during the past year."

Number Is Lower

Overall, the number of motions involving claims of impropriety have been lower than court officials had anticipated. One explanation is that evicted tenants may have since found other apartments or do not have the money to raise a challenge.

Judge Scott, on a paid leave from his $95,000-a-year job, was arrested Dec. 12 as a result of an undercover operation by the Manhattan District Attorney's Office and charged with taking $10,000 in bribes to fix results in several fictitious and real landlord-tenant cases. Investigators seized between 100 and 150 court files from his courtroom, chambers and the Housing Court clerk's office.

A grand jury was empaneled recently in the investigation and landlord-tenant attorney Barry Goldrod has pleaded guilty to giving a bribe to Judge Scott, sources said.

Although Judge Gische said she has had little contact with the District Attorney's Office, she regularly notifies the prosecutors after deciding a case involving claims of impropriety.

No Pattern Found

So far, Judge Gische said she has discerned no particular pattern to the procedural irregularities, which have included a unilateral decision made by Judge Scott to move a trial date without properly notifying one of the parties and his failure to tape-record some important court proceedings.

Housing Court rules require the judge to insure the proceedings are tape recorded. As a cost-saving measure, the court favors recording over a court reporter. In cases in which Judge Gische has requested a transcript, the parties are spending between $200 and $400 to have the tapes transcribed.
By her own account, the most bizarre case Judge Gische has ruled on involved a dispute between a primary tenant and a subtenant, who each claimed first rights to a Lower East Side apartment. When the case, Williams v. Peterson, L&T Index No. 08452/94, came before Judge Scott last year, he ruled initially in favor of the subtenant. But four months later on a motion for reargument, he inexplicably reversed himself and ruled for the original tenant.

After ordering a new trial, Judge Gische discovered that both parties were squatters in a city-owned building and neither had a legal right to the apartment. In settling the case, she ruled that the primary tenant lacked standing to bring the suit and the city could lawfully evict either tenant.

Judge Gische, who is still conducting hearings on 15 motions for retrial, said she hopes to wrap up her work within the next two months. But court officials said she could soon be presented with a fresh batch because the Legal Aid Society is reviewing Judge Scott's docket from the past year and attempting to locate tenants who may have been wrongfully evicted.
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SCOTT BRIBERY CASE UNDERSCORES FLAWS IN ASSIGNMENT OF HOUSING COURT CASES

By Matthew Goldstein

JONATHAN JACOBS, a landlord charged with bribing Housing Court Judge Arthur R. Scott Jr. to get his case restored to the court calendar, does not understand why the Manhattan District Attorney's Office wants to prosecute him.

In a recent interview, Mr. Jacobs said he was simply trying to get an edge on his adversary when he called Judge Scott last September and asked him to sign an order to show cause restoring the case, which another judge had dismissed when Mr. Jacobs failed to appear in court.

At worst, Mr. Jacobs said, the call to Judge Scott's chambers, which was picked up on a state wiretap, was an inappropriate form of judge shopping, but it was not criminal. He shrugged off the incident as nothing more than business as usual.

"All I was trying to do was expedite it a little," said Mr. Jacobs, 51, who is not an attorney.

To some degree, the procedural rules in Housing Court do permit a savvy attorney or litigant to make a lawful attempt to get a case assigned to a particular judge, but blatant judge shopping is frowned upon and can result in sanctions. Still, several housing lawyers said, the incident involving Mr. Jacobs, who was arraigned Aug. 10 on the bribery charge, illustrates that the system for assigning cases in Housing Court can be easily manipulated.

David Rosenberg, chairman of the Housing Court Advisory Committee, which monitors the operations of the Housing Courts, said he recently recommended that Supreme Court Justice Jacqueline W. Silbermann, the administrative judge for the city's Civil Courts, examine the method for assigning landlord-tenant cases.

Mr. Rosenberg, a partner with Marcus, Borg, Rosenberg & Diamond, said he does not believe the system was designed "with the goal of making it possible to judge shop ... but I don't think anyone thought of all these by-products."

For instance, getting a case restored after a default, such as Mr. Jacobs did, requires the moving party to demonstrate that he had an "excusable default and a meritorious defense."

Mr. Jacobs, the owner of a five-story building at 527 West 46th Street, denied
paying Judge Scott, but acknowledged that he had established a prior rapport with the judge. Judge Scott, also arraigned on Aug. 10, is charged in an 85-count superseding indictment with taking payoffs to fix 24 cases.

According to sources, prosecutors from the Manhattan District Attorney's Office are scrutinizing the method for assigning housing cases to determine whether court personnel may have played a role in improperly steering cases to Judge Scott. Assistant District Attorney Sherrill Spatz, the lead prosecutor in the bribery probe, declined to comment.

Working the System

When a landlord-tenant case is filed in any city Housing Court it is referred to a main calendar court called Part 18, where a civil court judge issues rulings on preliminary motions made by either side. Once the case is ready for trial or a final disposition, it is assigned to the next available housing judge.

But lawyers said an alert attorney who pays close attention to the calendar call and the order in which cases are assigned can manipulate the system through procedural techniques.

For example, a lawyer can move for a discontinuance if a case has been assigned to a judge with a perceived pro-tenant or pro-landlord bias. The action can then be refiled and the process started anew with the purchase of another index number for $35.

Or, an attorney can try to predict which judge will be assigned to the case and ask for an adjournment before the assignment is made if they do not want that judge.

Mr. Rosenberg said he does not fault attorneys for lawfully taking advantage of flaws in the system, noting that lawyers have an ethical obligation to get the best result for their clients. But court officials, he said, must be concerned with how the assignment of cases is perceived by unrepresented litigants who may not understand the process.

In about 90 percent of the 300,000 landlord-tenant cases filed in the city each year, only the landlord is represented by an attorney. Judith M. Whiting, a Brooklyn Legal Aid Society attorney, said many unrepresented litigants get "lulled into thinking" they can manage in Housing Court, but "it is not meant for pro se people."

Meanwhile, Mr. Rosenberg pointed to Queens Housing Court, where a separate set of rules exists for several large landlord-tenant firms, as an example of how the system for assigning cases can give the appearance of favoring one side.

Court officials explain they developed the separate rules because the courtrooms in Queens Housing Court are spread out and located at opposite ends of Borough Hall, with two housing judges stationed in the building's east wing and another
three judges relegated to the west wing. As an accommodation to the firms with a heavy landlord-tenant practice, court officials often assign the firms' cases to housing judges that sit on the same side of the building.

The result is that a firm may have its new cases assigned to only two or three different judges, while other firms have their cases assigned to one of five judges.

Acting State Supreme Court Justice Joseph J. Risi, the administrative judge for Queens Civil Court, said the practice is merely a function of the Housing Court's physical layout and intended to prevent lawyers from the large firms wasting time racing between both sides of the building.

But Carl Peterson, the Queens coordinator for the Citywide Taskforce on Housing Court, an advocacy group for unrepresented tenants, said the assignment of cases should involve a degree of chance and that the separate rules for some firms skews the process and could leave tenants with the wrong impression.
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In the Courts

QUESTIONS REMAIN IN HOUSING COURT PROBE

By Matthew Goldstein

A YEAR AFTER former Manhattan Housing Court Judge Arthur R. Scott Jr. was arrested for taking bribes to fix landlord-tenant cases, questions remain about whether he was simply a rogue judge or whether he had help.

Whether prosecutors file charges against any other housing judges or employees, court officials said some employees may face administrative disciplinary charges after the Manhattan District Attorney’s Office completes its investigation and prosecution of Mr. Scott.

Up to a dozen court clerks and court attorneys who work in Housing Court at 111 Centre Street were interviewed by prosecutors this summer, and several testified before the grand jury that filed an 85-count indictment in August against Mr. Scott and three co-defendants.

Several court officials, who requested anonymity, said they want to know what employees told prosecutors and whether any were granted immunity. So far, prosecutors have been unwilling to share that information.

Mr. Scott, who was fired in October from his $95,000-a-year job for filing false statements on his 1992 judicial renomination form, is set to go on trial Feb. 26.

While Justice Jacqueline W. Silbermann, the administrative judge for the city’s Civil Courts, said she believes the allegations involving Mr. Scott stem from an isolated affair, the investigation has prompted court administrators to pay close attention to employees who were contacted by prosecutors. "We know who was called and we’re watching," said Justice Silbermann, during a recent interview.

However, some administrators, including Justice Silbermann, said they are concerned that if Mr. Scott takes a guilty plea, as did two of his co-defendants, the breadth of the criminal investigation may never be known.

Assistant District Attorney James Burke, noting that he is operating under the assumption that Mr. Scott will go to trial, declined to comment. Mr. Burke took over the investigation after the former lead prosecutor, Sherrill Spatz, left the District Attorney’s Office in September.
But from interviews conducted over the past few months with nearly a dozen potential trial witnesses, it is clear the investigation's scope extended beyond Mr. Scott.

Several likely prosecution witnesses said investigators not only grilled them about Mr. Scott and his alleged accomplice, Euclid Watson, but also inquired about other housing judges and employees. Those witnesses, all of whom requested anonymity, said they told prosecutors they were not aware of wrongdoing by others.

Mr. Watson, a self-described "legal consultant," who allegedly began working with Mr. Scott shortly after the former judge was assigned to Manhattan Housing Court in February 1993, pleaded guilty to one count of grand larceny by extortion on Dec. 4. He is awaiting sentencing.

But from the moment prosecutors began planning in December 1993 for the year-long undercover investigation, which included the filing of several phony landlord-tenant cases before Mr. Scott to determine if he could be bribed, they were plagued by troubling leaks. The inquiry had become such an open topic of discussion at 111 Centre Street that one source close to the investigation said a person had to be "stupid or greedy" to get caught.

Two months before Mr. Scott and Mr. Watson were arrested, prosecutors brought a fictitious case before Judge James Grayshaw, whose courtroom and chambers were adjacent to Mr. Scott's. According to sources, two undercover operatives claiming to represent a landlord, offered Judge Grayshaw money if he would transfer the case to Mr. Scott. The judge refused and tried the case to its conclusion, ultimately finding for the fictitious tenant.

Judge Grayshaw, who moved to Queens Housing Court earlier this year, said it was not until after Mr. Scott's arrest that he learned the case had been part of the investigation. "The case was a complete set-up by the D.A.," he said. "I don't take it personally, but I didn't like it."

Computerized System

Meanwhile, the investigation has sparked some changes. Ernesto Belzaguy, deputy city clerk for the Housing Court, said there are plans to install a computerized case-assignment system to assign landlord-tenant cases to judges randomly to prevent lawyers, litigants and clerks from steering cases to a judge.

Additionally, David Rosenberg, chairman of the Housing Court Advisory Board, a 14-member volunteer committee that reviews the qualifications of judicial candidates, said he is exploring the use of investigators from the Inspector General's Office for the Office of Court Administration to conduct background checks on potential nominees and housing judges who have applied for reappointment.

Mr. Scott, first appointed to the Housing Court bench in 1983, was fired in October for submitting false information on his 1992 judicial nominating form,
while awaiting trial on the bribery charges. Those who appointed Mr. Scott for a third five-year term in January 1993, relied on the forms in considering his reappointment.

Mr. Rosenberg said the advisory council has revised its nominating forms to require applicants and sitting judges to submit an affidavit vouching for the veracity of their answers.

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HOUSING COURT JUDGE ADMITS TAKING BRIBES  
UNDERCOVER PROBE ENDS IN GUILTY PLEA  

By Matthew Goldstein

FORMER MANHATTAN Housing Court Judge Arthur R. Scott Jr., 49, pleaded guilty yesterday to taking bribes in return for issuing favorable rulings. The plea came one week before he was set to go on trial.

Mr. Scott, charged with taking bribes in at least 25 landlord-tenant cases, pleaded guilty to 11 counts of bribery, grand larceny and fraud and could spend a minimum of 2 1/2 years in state prison.

As a result of pleading guilty to three felonies, he will be automatically disbarred.

Mr. Scott was arrested 14 months ago following an undercover investigation by the Manhattan District Attorney's Office and was fired as a housing judge in October. He is the fifth and final defendant to plead guilty in the bribery case that rocked Housing Court and the landlord-tenant bar.

"I don't think anyone has any feelings of glee about this," said Daniel J. Castleman, chief of the District Attorney's investigation division. "It is always disturbing to find corruption whether it be in the police department or the courthouse."

Prosecutors launched an investigation in December 1993, after court administrators went to District Attorney Robert M. Morgenthau with allegations that Mr. Scott was working with a middleman to solicit bribes from litigants, building agents and lawyers.

Mr. Castleman said prosecutors are continuing to investigate allegations of wrongdoing, but sources familiar with Mr. Scott's case said it is unlikely charges will be filed against other housing judges or court employees.

In accepting Mr. Scott's plea, Supreme Court Justice Richard D. Carruthers said he will likely sentence him to 2 1/2 years to 7 1/2 years when he appears in court on May 22. The top charge, grand larceny by extortion, normally carries a sentence of 5 years to 15 years in jail.
Responding to questions from Justice Carruthers, Mr. Scott, who was first appointed to the bench in 1983, said several times he had "agreed to take money to decide a case," and "used my position and influence as a Housing Court judge to take money and influence my decision." He offered few details, however.

Mr. Scott, who wore a checkered blue and green sweater, sat next to his court-appointed attorney Joseph T. Klempner. The former judge is not cooperating with authorities.

By all accounts, Mr. Scott, who was earning $95,000-a-year on the bench, is destitute and asked to have an 18-B lawyer assigned to his case. Last summer he was evicted from his Queens apartment for failure to pay rent.

"He did not get rich off of this," said Mr. Castleman, who noted that Mr. Scott received at least $14,000 in bribes.

Fictitious Cases

As part of the investigation, prosecutors brought several fictitious cases before the judge. In three cases, he accepted bribes from two undercover operatives posing as a building agent and a landlord's attorney.

In the past two months, the prosecution had strengthened its case when three of Mr. Scott's co-defendants, including his former middleman, Euclid S. Watson, pleaded guilty to bribery-related charges.

Mr. Watson pleaded to one count of grand larceny by extortion on Dec. 4, 1995, and is expected to be sentenced to one year in prison on April 2. Two landlords also have pleaded guilty to bribery charges and are expected to receive probation.

Barry Goldrod, the only attorney charged, began cooperating with prosecutors shortly after his arrest and has since been disbarred. Mr. Goldrod, according to sources, was given probation in return for identifying cases in which he paid bribes to Mr. Scott.

Background Examined

Meanwhile, court administrators are moving ahead with a plan to use investigators from the office of the Inspector General for the Office of Court Administration to conduct background checks on prospective Housing Court judges. Chief Administrative Judge Jonathan Lippman said he is discussing the proposal from the Housing Court Advisory Council with OCA Inspector General William Gallagher and other administrators.

David Rosenberg, chairman of the 14-member volunteer council, made the recommendation after Mr. Scott was fired for filing false and misleading information on his 1992 judicial renomination form and several financial disclosure statements. The committee reviews the qualifications of all Housing Court judicial candidates and provides administrators with names of acceptable
nominees. It also reviews the applications of housing judges seeking reappointment.

Similar background checks are made on applicants to become court officers.

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Respondent-undertenant, Dolores Moya, seeks to set aside court ordered stipulations and all judgments, orders and determinations made by Housing Court Judge Arthur A. Scott in this proceeding. She seeks a new trial on the underlying holdover petition. The petition alleges that there are unauthorized occupants living in apartment #2-A ("apartment") located at 12 Arden Street, New York, New York ("Building"). Ms. Moya is the sister of Mercedes Vasquez, the tenant of record. Ms. Moya claims that she lived in this rent stabilized apartment with Elys Vasquez, her niece and daughter of the lease tenant, for more than two years (since 1991) and she, therefore, is entitled to succession rights. Ms. Moya claims that she occupied the apartment with her niece as a family unit. [FN1]

On August 23, 1993 this proceeding was tried before Judge Scott who issued a decision and judgment of possession and a money judgment for $1,540.00. The court stated in its decision, "Tenant's claim on succession rights is non-meritorious. No documentary proof."

Ms. Moya claims that the "trial" took place without her participation. She claims that she went to court on August 23, 1993, expecting to work out an agreement. There had been prior discussions between petitioner and Mercedes Vasquez about making Ms. Moya and Elys Vasquez the lease tenants. Instead of reaching a settlement, from the back of the courtroom, Ms. Moya heard Judge Scott enter judgment against her. At that time she presented herself to the Judge who allowed her to speak and then issued judgment against her. No transcript of the trial record was put before the court on this motion.

Two days later respondent returned to court, seeking to set aside the trial decision. Ms. Moya claims that she was approached by Mr. Watson who told her that he was a lawyer related to Judge Scott and that he could help her stop the eviction if she paid money. Ms. Moya paid Mr. Watson $150.00. The Order to Show cause was thereafter signed.
On September 28, 1993 Judge Scott granted the Order to Show Cause and the judgment after trial was vacated. Mr. Watson then arranged for a lawyer, Mr. Harry Bernstein, to further represent Ms. Moya in the proceeding.

On November 29, 1993 the parties settled the case. The stipulation of settlement provided that Ms. Moya would pay all outstanding arrears and that petitioner would then consider her application to become the tenant of record. The stipulation reflected that $2,310.00 of the $2,715.00 then due and owing was paid. Ms. Moya states that she had given Mr. Watson all the rent monies due and owing but that Mr. Watson failed to give all of the rent money to the landlord. Although the agreement bears Ms. Moya's signature, Ms. Moya does not speak, read or write English. There is no indication that the stipulation had been read to respondent in the Spanish language.

Respondent claims that in December 1993 Mr. Watson asked her for another $405.00 dollars, which she gave him to pay the landlord. Ms. Moya claims that Mr. Watson did not turn over such money until March 1994 and that he improperly retained other rent monies that she gave him to pay the landlord.

A further stipulation was made on July 15, 1994. Petitioner states that this second stipulation had been made after negotiation with Ms. Moya's attorney. Ms. Moya claims that she did not know about the stipulation. It was not signed by her. The second stipulation concerned the payment of monies. Certain monies were paid under the stipulation and certain monies were to be paid in the future. According to the stipulation certain funds were tendered that day by personal check. Ms. Moya states that she did not give Mr. Watson any personal checks to give the landlord. The check delivered to the landlord bounced. Ms. Moya states that Mr. Watson again failed to deliver all of the money she gave him intended for rent.

In September 1994 petitioner moved to restore the judgment of possession for non-compliance with the payment stipulation made in July 1995. By decision and order dated September 28, 1994 that motion was granted. Respondent did not hear from Mr. Watson or Mr. Bernstein again. In November 1994 Ms. Moya moved pro se before Judge Scott to vacate the Judgment of possession. The motion was denied. Respondent, now represented by a new attorney, brings the instant Order to Show Cause.

Discussion

a. Standard of Review

In reviewing decisions and orders of a judge of coordinate jurisdiction, this court does not act as an appellate court. Mere errors of law are not sufficient for the court to vacate another judge's determination. Such errors are correctable by way of appeal. NYCCA article 17; Public Service Mut. Ins. v. McGrath, 56 AD2d 812 (1st Dept., 1977).

On the other hand there are circumstances in which a judge can vacate his own decisions, orders and/or judgments. CPLR sec. 4404; CPLR sec. 5015. There are also circumstances in which the court should set aside court ordered agreements.

Motions to set aside the court's determination are usually made before the judge who made such determination. CPLR sec. 4405. Judge Scott's suspension from his duties as Housing Court Judge makes him unavailable to determine this motion. This court has been assigned to preside over Judge Scott's pending cases and therefore, has the power and discretion to review Judge Scott's decisions and orders on any of the grounds on which Judge Scott could review such decisions and orders had he been available. See e.g. CPLR sec. 2221.

CPLR sec. 5015(a) sets forth a list of circumstances when a motion to set aside a judgment should be granted. This list, however, is not exhaustive. It is in addition to the inherent power of the court to control its own judgments and orders. Paramount Communications v. Gibraltar Casualty Co., 1 AD2d ___ (1st Dept., 1995); NYLJ March 2, 1995 p.25 c.1; McKinney's Practice Commentary sec. C5015:11.

It is also well settled that, although stipulations of settlement are not lightly set aside by the court, they may be set aside based upon fraud, collusion, mistake, accident or another ground of a similar nature. 606 Operating Corp. v. Dunn, NYLJ 1/20/95 p.25 c.3 (AT 1st Dept.).

It is black letter law that a litigant in a civil action or proceeding is entitled to a fair trial. If a party is denied a fair trial, then a new trial may be ordered. Rohring v. City of Niagara Falls, 192 AD2d 228 (4th Dept., 1993); Scala v. Greyhound Lines, Inc., 149 AD2d 327 (1st Dept., 1989). [FN2] The right to a fair trial exists regardless of the merits of the underlying case. Habenicht v. R.K.O. Theatres, Inc., 23 AD2d 378 (1st Dept., 1965).

A review of the fairness of a trial may be made at the trial court level. A presiding judge may mistry a case before its conclusion where it is apparent that misconduct by either an adversary or some third party makes it impossible to get a fair determination. CPLR sec. 4402. Misconduct or intemperate comments by a judge may also be the basis for the trial court to order a new trial. Bisner v. Daich Dairies, 27 AD2d 921 (1st Dept., 1967); Habenicht v. R.K.O. Theatres, Inc., supra. McKinney's Practice Commentary sec. 4402. This court can, therefore, review the proceedings before Judge Scott and if it finds for any reason whatsoever that a fair trial did not occur, it can vacate the judgment and order a new trial.

b. The Facts of This Case

This case arises in the aftermath of the arrest and indictment of Judge Scott and Euclid Watson in connection with claims that Judge Scott with the assistance of Mr. Watson took bribes to influence the outcome of proceedings. Neither Judge Scott nor Mr. Watson have been tried and/or found guilty of the charges against them.

It is undisputed in this record however that Mr. Watson, who is not an attorney, took money from Ms. Moya on the representation that he was an attorney and that by
virtue of his special relationship with Judge Scott he could get the judge to sign an Order to Show Cause stopping Ms. Moya's eviction. The court finds that Mr. Watson's improper solicitation of funds on the false assertion that he was an attorney and upon the further assertion that he could influence the outcome of the court's decision based upon his personal relationship with the judge, an egregious perversion of our American system of jurisprudence and completely antithetical to basic notions of fairness and due process. See, Scala v. Greyhound Lines, Inc., et al., 149 AD2d 327 (1st Dept., 1989). Such actions indelibly taint and render inherently unreliable all court proceedings thereafter.

Petitioner argues that because Ms. Moya participated in bribery, she has unclean hands and she is not entitled to the relief that she requests here. Ms. Moya, instead, portrays herself as a victim of Mr. Watson and possibly others in connection with her efforts to save her home. Criminal prosecution of Ms. Moya is for the district attorney's office to consider. Regardless of whether Ms. Moya is a victim or a participant, the court cannot knowingly let stand a determination that was paid for and/or the product of improper influence. The court reaches this conclusion regardless of whether Judge Scott would have otherwise signed and ultimately granted the original Order to Show Cause. Even legally correct decisions, if bought, cannot be tolerated. While the court is mindful that petitioner may have been an innocent party, it would be improper for the court to let such decision stand.

Mr. Watson's actions taint not only the August 25, 1993 Order to Show Cause, but all subsequent proceedings as well. The subsequent stipulations, orders and judgments are all suspect because they are the consequence of improper action.

The further issue before the court is whether the trial decision, granting petitioner a judgment of possession should stand, because it was made prior to Mr. Watson's involvement. For the reasons set forth below this court holds that the judgment of possession should likewise be vacated.

Ms. Moya's account of the proceedings suggest that there was no trial at all. Ms. Moya claims that petitioner did not prove a prima facie case in her presence, that she was never given an opportunity to hear or cross-examine petitioner's witnesses (if indeed any witnesses testified) and that she was not given an opportunity to present her proof. Ms. Moya indicates that she was late in getting to Judge Scott's courtroom and there is some indication that Judge Scott may have handled the proceeding as a default. Petitioner, who presumably was present at the time of trial, does not confirm or dispute respondent's account. If Ms. Moya's account is accurate, then respondent was denied a fair trial. [FN3]

Silvestris v. Silvestris, 24 AD2d 247 (1st Dept., 1965) (pro se litigant should be advised of right to cross-examination); Ajaeb v. Ajaeb, 276 AD 376 (2d Dept., 1950) (party has a right to be present at trial of civil case); Sullivan v. Sullivan, 246 AD 55 (1st Dept., 1935) (a litigant is entitled to cross-examine witnesses who testify against him or her).

In any event even if the trial that took place before Judge Scott on August 23, 1993 was entirely fair and proper, the subsequent improper actions permanently effected the parties' rights that otherwise follow a trial decision. The August 25, 1993 Order to Show Cause prevented respondent from timely exercising any right.
to appeal, which is now permanently lost to her. NYCCA Art. 17; CPLR Art. 55. Moreover respondent may have otherwise been entitled to have the August 25, 1993 Order to Show Cause granted. There are circumstances in which the trial court should reopen a case after trial for the introduction of additional evidence. Park Ave. South Associates v. Olnowich, NYLJ 7/24/95 p.29 c.3 (AT 1st Dept.). If the "trial" was really a default, respondent could have had her Order to Show Cause evaluated under the less stringent standard of excusable default and meritorious defense. CPLR sec. 5015. The default at the time the Order to Show Cause was brought would have been de minimis. Now over two years have passed and rights have been lost and circumstances changed.

Petitioner argues that respondent's underlying defenses have no merit. As previously stated the right to a fair trial exists regardless of the merits of the underlying case. Habenicht v. R.K.O. Theatres, Inc., supra. In any event the court does not agree that respondent failed to show any "meritorious defense". If Elys Vasquez has succession rights, then Ms. Moya, if she can establish that she lives with Ms. Vasquez, may have derivative rights of occupancy. RSC sec. 2523.5(b); Real Property Law sec. 235-f. The court does not believe that there is any "standing" problem as suggested by petitioner.

Conclusion

Respondent's motion to set aside all proceedings before Judge Scott is granted and the proceedings are hereby set aside in their entirety. The underlying holdover proceeding is set for trial on September 19, 1995 at 9:30 a.m. room 421. This constitutes the decision and order of the court.

FN1. In December 1994 Elys Vasquez joined the armed forces. A person engaged in active military duty who temporarily relocates does not lose their status as a rent stabilized tenant. Rent Stabilization Code ("RSC") 2523.5.

FN2. Petitioner does not claim that this motion is untimely and therefore the court finds that such argument has been waived. CPLR sec. 4404.

FN3. The court would have been greatly assisted by the trial transcript to evaluate Ms. Moya's claims of what occurred at trial. Because petitioner does not really dispute respondent's account, the court will accept it as accurate.
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Monday, March 17, 1997

CHARGES FILED FOR JUDGE'S ALLEGED SLAP

PENDING REAPPOINTMENT TO HOUSING COURT AT ISSUE

By Matthew Goldstein

COURT OFFICIALS have filed disciplinary charges against a Manhattan Housing Court judge in connection with an incident in December in which the judge allegedly slapped a female court attorney on her backside, sources confirmed last week.

The charges lodged against Housing Court Judge Bruce Gould come as court administrators are considering his reappointment to a third five-year term. While his term expired Feb. 8, under state law he can remain on the bench until a final decision on his reappointment.

Judge Gould is the longtime president of the Housing Court Judges Association and a member of several committees of The Association of the Bar of the City of New York.

Office of Court Administration spokesman David Bookstaver said, "We don't disclose and we don't discuss internal disciplinary matters."

Judge Gould, who said Friday he intends to pursue his bid for reappointment despite the charges, has retained former Corporation Counsel Victor Kovner. Mr. Kovner was out of the country and unavailable for comment. But Teresa Scott, an associate with Lankenau, Kovner & Kurtz, said, "We've reviewed the charges ... and we are confident that they will be dismissed because we believe there is no basis for the complaint."

The alleged slap apparently was prompted by a disagreement between the judge and his former court attorney. There is some dispute, according to sources who declined to be identified, over whether the hit was intentional or inadvertent. There were no eyewitnesses.

The court attorney has declined repeated requests for comment. She was transferred from Judge Gould's courtroom shortly after the incident and is assigned to a Brooklyn housing judge.

Judiciary Committee

The disciplinary charges were filed a few weeks after a Feb. 6 vote by the City
Bar's Judiciary Committee to approve Judge Gould's bid for reappointment. Sources said the judge had been questioned by the committee about the incident, and that the committee, in an unusual move, had met twice to discuss his reappointment. The court attorney declined the committee's request to recount her side of the story.

The Housing Court Advisory Council, the other panel that evaluates appointments, is scheduled to meet April 3 to discuss Judge Gould's candidacy.

One attorney familiar with the matter questioned why administrators had waited so long to take formal action. "The real question is whether there is an abuse of the process," he said.

Under the procedure for disciplining housing judges, the charges against Judge Gould will be heard by a disciplinary committee led by Manhattan Supreme Court Justice Joan Lobis. The seven-member panel of judges and lawyers considers the merits of the allegations and makes a recommendation to the four administrative judges who decide on reappointment as to whether disciplinary action is warranted.

Since the panel was established in 1994, the only other judge to appear before it was former Housing Judge Arthur R. Scott Jr., who was convicted of taking bribes.

The city's 34 housing judges, who are considered "hearing officers," are not subject to oversight by the State Commission on Judicial Conduct.
Court administrators have withdrawn disciplinary charges against Housing Court Judge Bruce Gould, according to Michael Colodner, counsel for the Office of Court Administration. Mr. Colodner said the decision was made by Chief Administrative Judge Jonathan Lippman but he declined to elaborate. He noted, however, that court administrators have not decided whether to reappoint Judge Gould to a new term. The charges arose from an incident in which the judge allegedly struck a female court attorney on the buttocks. Victor Kovner, Judge Gould's attorney, called the withdrawal a "vindication," and said the judge does not intend to retire.
Housing Judge Bruce Gould has decided to retire from the bench after a decade of service and has abandoned his attempt to win reappointed to a third five-year term. Judge Gould, 69, said he informed Chief Administrative Judge Jonathan Lippman of his decision last Thursday. Judge Gould's last day in Brooklyn Housing Court will be Oct. 1. His quest for reappointment had been a rocky one. Earlier this year, court administrators filed disciplinary charges against him, but the charges were later dismissed. The Housing Court Judges Association, of which Judge Gould is president, will now have to elect a new leader.
In the Matter of REYNOLD N. MASON, a Justice of the Supreme Court, Kings County, Petitioner. STATE COMMISSION ON JUDICIAL CONDUCT, Respondent.

Argued April 3, 2003; decided May 1, 2003

SUMMARY

PROCEEDING, pursuant to NY Constitution, article VI, § 22 and Judiciary Law § 44, to review a determination of respondent State Commission on Judicial Conduct, dated June 21, 2002, that petitioner was guilty of misconduct and should be removed from the office of Justice of the Supreme Court in the Second Judicial District.

HEADNOTES

Appeal — Court of Appeals — Review of Determination of State Commission on Judicial Conduct — Effect of Federal Court Decision

1. In a proceeding to review a determination of the State Commission on Judicial Conduct that petitioner Supreme Court Justice was guilty of misconduct and should be removed from office, petitioner’s argument that the proceeding must be dismissed and the determination vacated due to a decision of the United States District Court for the Northern District of New York that invalidated two of the Rules Governing Judicial Conduct petitioner was determined to have violated, is rejected. Petitioner did not raise a constitutional challenge to the validity of the Rules either before the Commission or in his brief to the Court of Appeals. In any event, the Court of Appeals is not bound by the Federal District Court’s decision.


2. Petitioner Supreme Court Justice was properly removed from office by the State Commission on Judicial Conduct due to his misuse of his attorney escrow account while he was a practicing attorney and after he became a Civil Court Judge. Petitioner commingled funds over a substantial period of time and repeatedly used his attorney escrow account to pay personal expenses—conduct that continued after petitioner was elected to the bench. This misconduct was significantly compounded by petitioner’s persistent failure to cooperate with the Commission investigation and his marked lack of candor as evidenced by the inconsistent and evasive explanations he offered at different points in the proceeding. Because judges must be held to a higher standard of conduct than the public at large, removal is the appropriate sanction.

Appeal — Court of Appeals — Review of Determination of State Commission on Judicial Conduct

3. In a proceeding to review a determination of the State Commission on Judicial Conduct that petitioner Supreme Court Justice was guilty of misconduct and should be removed from office, the determined sanction is
accepted. Petitioner claimed that the Commission determination is tainted based on his allegation that a Commission member made statements to a third party indicating prejudgment of the case, but chose not to timely raise the issue and instead moved to reopen the proceeding after the determination had been issued, which motion was denied. A Commission decision denying a motion for reconsideration is not reviewable by the Court of Appeals, nor may the Court of Appeals review materials submitted in connection with a postdetermination motion that were not considered by the Commission.

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By the Publisher's Editorial Staff

Am Jur 2d, Administrative Law §§ 59, 60; Attorneys at Law §§ 94, 95; Judges §§ 17, 18, 20.


ANNOTATION REFERENCE
Power of court to remove or suspend judge. 53 ALR3d 882.

POINTS OF COUNSEL

Gentile & Dickler, New York City (Paul T. Gentile and Kevin P. Claffey of counsel), for petitioner. I. The egregious conduct in which petitioner is alleged to have engaged was a landlord/tenant dispute settled in a court of competent jurisdiction. (Darob Holding Co. v. House of Pile Fabrics, 62 Misc 2d 899; Becar v. Flues, 64 NY 518; P & R Realty Corp. v. Hagel, 191 Misc 732; 59 Madison Ave. Corp. v. Bauer, 15 Misc 2d 780; Davis v. Williams, 92 Misc 2d 1051; Century Apts. v. Yalkowsky, 106 Misc 2d 762; Benjamin v. Benjamin, 5 NY 383.) II. This Court has the jurisdiction and authority to review the conduct of a Commission member. (Matter of Shaw, 96 NY2d 7; Matter of LaBelle, 79 NY2d 350; Matter of Lenney, 70 NY2d 868; People v. Brown, 48 NY2d 388; Matter of Nicholson v. State Commn. on Jud. Conduct, 72 AD2d 48, 49 NY2d 701, 737, 50 NY2d 597.) III. The sanction of removal is not warranted under the facts and circumstances in this case. (Matter of Gelfand, 70 NY2d 211; Matter of Kuehnle, 49 NY2d 465; Matter of Conti, 70 NY2d 416; Matter of Reedy, 64 NY2d 299; Matter of Intemann, 73 NY2d 560; Matter of Kiley, 74 NY2d 364; Matter of Shilling, 51 NY2d 397; Matter of Steinberg, 51 NY2d 74; Matter of Cunningham, 57 NY2d 270.)
Gerald Stern, New York City, and Alan W. Friedberg for respondent. I. Petitioner has engaged in egregious misconduct warranting removal. (Matter of Gelfand, 70 NY2d 211; Matter of Kuehnel, 49 NY2d 465; Matter of Conti, 70 NY2d 416; Matter of Intemann, 73 NY2d 580.) II. Petitioner's defenses are unavailing. III. Petitioner waived his right to allege that an unknown Commission member had prejudged petitioner's misconduct, and, in any event, that issue is not properly before this Court. (Matter of Shaw, 96 NY2d 7; Matter of LaBelle, 79 NY2d 350; Matter of Lenney, 70 NY2d 863.)

OPINION OF THE COURT

Per Curiam.

The Commission on Judicial Conduct sustained five charges of misconduct and determined that petitioner, a Justice of the Supreme Court, should be removed from office (see NY Const, art VI, § 22; Judiciary Law § 44). Based on our review of the evidence, we conclude petitioner has engaged in misconduct warranting removal.

[1] As a preliminary matter, we reject petitioner's argument that this proceeding must be dismissed and the Commission determination vacated due to a decision of the United States District Court for the Northern District of New York that invalidated two of the rules petitioner was determined to have violated in this case, sections 100.1 and 100.2 of the Rules Governing Judicial Conduct (22 NYCRR) (see Spargo v New York State Comm'n. on Jud. Conduct, 244 F Supp 2d 72 [US Dist Ct, ND NY 2003]). Petitioner did not raise a constitutional challenge to the validity of the Rules either before the Commission or in his brief to this Court. In any event, we are not bound by the Federal District Court's decision (see People v Kin Kan, 78 NY2d 54, 59-60 [1991]; New York R.T. Corp. v City of New York, 275 NY 258, 265 [1937], aff'd 303 US 573 [1938]).

Petitioner was elected Judge of the Civil Court of the City of New York and served in that capacity from January 1995 through December 1997. In November 1997, he was elected to Supreme Court in the Second Judicial District for a term commencing January 1, 1998. The five charges of misconduct sustained by the Commission centered on petitioner's misuse of his attorney escrow account while he was a practicing attorney and after he became a Civil Court Judge. Evidence received at the hearing established that petitioner vacated a rent-stabilized apartment in 1992 and installed his brother-in-
law in the apartment over the objection of the landlord. After the brother-in-law's attempts to pay rent directly to the landlord failed, he forwarded his rental payments to petitioner, making all but two of the checks payable to petitioner "as attorney." This continued each month for several years resulting in petitioner receiving more than $15,000 in rent from his brother-in-law.

Petitioner deposited at least $7,000 of the rent money in his attorney escrow account. The record reveals that petitioner used a portion of the funds to pay personal expenses, writing checks directly from his escrow account to "cash," to himself, and to various creditors. As of December 1994, shortly before petitioner took the bench, his attorney escrow account had a balance of approximately $1,900. While a sitting judge, petitioner continued using the account for personal purposes, including writing checks to cash, his wife, an automotive finance company, a support collection unit, a church, an extermination firm and a political club.

During the Commission investigation, petitioner stated he had no legal right to retain the rent money. Rather, he claimed he was holding the rent for the landlord with the intent to deliver it at a future time. At the hearing, however, petitioner contended he had lawfully sublet the apartment to his brother-in-law and therefore had a right to personally collect rent on the apartment and to use the rent proceeds to pay personal expenses. This explanation contradicted petitioner's earlier statement that he was holding the money for the landlord and was not consistent with petitioner's decision to deposit the money in his attorney escrow account. In addition to offering contradictory statements, petitioner failed to respond to six written requests for information forwarded to him by Commission attorneys, which delayed and impeded the investigation.

It is well settled that an attorney may not commingle personal funds with those held in trust for clients or others, nor may an attorney use an escrow account to pay personal expenses (see Matter of Kadish, 299 AD2d 78 [2d Dept 2002]; Matter of Land, 299 AD2d 83 [1st Dept 2002]; Matter of Lasher, 296 AD2d 163 [2d Dept 2002]; Matter of Stevens, 294 AD2d 1 [1st Dept 2002], lv denied 98 NY2d 611 [2002]; Matter of Crook, 277 AD2d 871 [3d Dept 2000]; Matter of Summer, 238 AD2d 86 [4th Dept 1997]). Indeed, as this case demonstrates, confusion regarding the legal interests of an attorney and third parties ensues when an attorney fails strictly to segregate personal or business funds from trust funds or to identify and properly
safeguard funds deposited in an escrow account. Whether petitioner was holding the funds in trust for the landlord (as he maintained during the investigation) or collecting the rent under a sublease (as he contended during the hearing), the fact remains that petitioner deposited a significant portion of the rent proceeds in his attorney escrow account. He then commingled those monies with his clients' funds and improperly made disbursements directly from the escrow account to satisfy myriad personal obligations.

2 Misuse of an attorney escrow account constitutes serious misconduct that may, in some instances, result in disbarment (see generally Matter of Fitzgerald, 100 NY2d 52 [2003]). Here, petitioner commingled funds over a substantial period of time and repeatedly used his attorney escrow account to pay personal expenses—conduct that continued after petitioner was elected to the bench. This misconduct was significantly compounded by petitioner's persistent failure to cooperate with the Commission investigation and his marked lack of candor as evidenced by the inconsistent and evasive explanations he offered at different points in the proceeding (see Matter of Intemann, 73 NY2d 580 [1989]; Matter of Cooley, 53 NY2d 64 [1981]). Upon our review of the record, giving "due regard to the fact that Judges must be held to a higher standard of conduct than the public at large" (Matter of Going, 97 NY2d 121, 127 [2001]), we conclude that removal is the appropriate sanction.

Petitioner claims that the Commission determination is tainted based on his triple-hearsay allegation that a Commission member made statements to a third party indicating prejudgment of petitioner's case. Although petitioner apparently learned of the allegations prior to his appearance before the full Commission, he chose not to timely raise the issue but instead moved to reopen the proceeding after the determination had been issued. The Commission denied petitioner's motion.

3 A Commission decision denying a motion for reconsideration is not reviewable by this Court, nor may we review materials submitted in connection with a postdetermination motion that were not considered by the Commission (see Matter of Shaw, 96 NY2d 7, 12 [2001]). Thus, our review is limited to assessing "the record as it was before the Commission at the time of the original determination" (id.). In this regard, however, we note that this Court does not merely echo the Commission's analysis but conducts its own plenary review of
the facts and law to determine whether a finding of misconduct should be sustained and sanction upheld (see Judiciary Law § 44 [9]). The evidentiary record on which we rely in this case was developed at the hearing conducted by a referee prior to petitioner's appearance before the members of the Commission.

Accordingly, the determined sanction should be accepted, without costs, and Reynold N. Mason removed from his office as Justice of the Supreme Court.

Chief Judge Kaye and Judges Smith, Ciparick, Wesley, Rosenblatt, Grappeo and Read concur in per curiam opinion.

Determined sanction accepted, without costs, and Reynold N. Mason removed from the office of Justice of the Supreme Court, Kings County.
In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law, in Relation to DUANE R. MERRILL, a Justice of the Hamden Town Court, Delaware County.

APPEARANCES:

Gerald Stern (Stephen F. Downs, Of Counsel) for the Commission

O’Leary & Van Buren (By Terence P. O’Leary) for Respondent

The respondent, Duane R. Merrill, a justice of the Hamden Town Court, Delaware County, was served with a Formal Written Complaint dated August 8, 1997, alleging that he improperly handled a housing dispute. Respondent filed an answer dated September 15, 1997.

On January 9, 1998, the administrator of the Commission, respondent and respondent’s counsel entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), waiving the hearing provided by Judiciary Law §44(4), stipulating that the Commission make its determination based on the agreed upon facts, jointly recommending that respondent be admonished and waiving further submissions and oral argument.

On January 29, 1998, the Commission approved the agreed statement and made the following determination.
1. Respondent has been a justice of the Hamden Town Court since 1988.

2. In the Fall of 1996, Ed Barbieri called respondent by telephone several times and asked about evicting Charles and Wilhelmina Wright from their home, which Mr. Barbieri had bought at a tax sale.

3. Although no proceeding had been initiated in respondent’s court, respondent went to the Wright home on October 5, 1996, and asked the Wrights and their son, Kevin, when they would vacate the property.

4. In this conversation, respondent:

a) identified himself as the town justice;

b) stated that he had come to the house because Mr. Barbieri had called him several times;

c) told Mr. and Ms. Wright and their son that they did not have to have counsel and that it would be best not to bring lawyers into the dispute but that they could do so;

d) stated that, because he was a judge, he would decide how much time they had to move out if they could not resolve the dispute with Mr. Barbieri; and,

e) became embroiled in a heated discussion with Kevin Wright and implied that the family would be evicted if a proceeding were commenced.

5. Mr. Barbieri later brought an eviction proceeding against Charles, Wilhelmina and Kevin Wright in respondent’s court, and respondent presided when the parties appeared in court. Respondent did not offer to disqualify himself. The parties agreed to a settlement before the matter was tried.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2(A), 100.2(C) and 100.3(B)(6). Charge I of the Formal Written Complaint is sustained insofar as it is consistent with the findings herein, and respondent’s misconduct is established.
Respondent acted as an advocate for one of the parties to a dispute, using the prestige of his judicial office to advance that party’s position. Respondent discouraged the other parties from obtaining representation and implied that he would decide against them if the matter came to court. In doing so, he abused his judicial power and conveyed the appearance of favoritism. (See, Matter of Kristoffersen, 1991 Ann Report of NY Commn on Jud Conduct, at 66; Matter of Colf, 1987 Ann Report of NY Commn on Jud Conduct, at 71).

Having engaged in ex parte communications and having compromised his impartiality, respondent should have offered to disqualify himself when the matter did come to court. (See, Matter of LaMountain, 1989 Ann Report of NY Commn on Jud Conduct, at 99).

By reason of the foregoing, the Commission determines that the appropriate sanction is admonition.

Mr. Berger, Ms. Brown, Ms. Crotty, Mr. Goldman, Judge Luciano, Judge Marshall, Judge Newton, Mr. Pope, Judge Salisbury and Judge Thompson concur.

Mr. Coffey was not present.

Dated: March 17, 1998
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In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to EDWARD J. WILLIAMS, a Justice of the Kinderhook Town Court and Valatie Village Court, Ulster County.

THE COMMISSION

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<th>Henry T. Berger, Esq., Chair</th>
<th>Christina Hernandez, M.S.W.</th>
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<td>Honorable Frederick M. Marshall, Vice Chair</td>
<td>Honorable Daniel F. Luciano</td>
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<td>Honorable Frances A. Ciardullo</td>
<td>Honorable Karen K. Peters</td>
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<td>Stephen R. Coffey, Esq.</td>
<td>Alan J. Pope, Esq</td>
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<td>Lawrence S. Goldman, Esq.</td>
<td>Honorable Terry Jane Ruderman</td>
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APPEARANCES

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<th>Gerald Stern (Cathleen S. Cenci, Of Counsel) for the Commission</th>
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<tr>
<td>Gerstenzang, O'Hern, Hickey &amp; Gerstenzang (By Thomas J. O'Hern) for Respondent</td>
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The respondent, Edward J. Williams, a justice of the Kinderhook Town Court and Valatie Village Court, Columbia County, was served with a Formal Written Complaint dated September 5, 2000, containing four charges. Respondent filed an answer dated September 25, 2000.

On June 8, 2001, the Administrator of the Commission, respondent and respondent’s counsel entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, jointly recommending that respondent be admonished and waiving further submissions and oral argument.

On June 18, 2001, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Valatie Village Court since 1982 and a justice of the Kinderhook Town Court since 1984. He is not a lawyer. Respondent has attended and successfully completed all required training sessions for judges.

As to Charge I of the Formal Written Complaint:

http://www.scjc.state.ny.us/Determinations/W/williams, edward (1).htm
2. In or about September 1998, respondent conveyed the appearance that he was engaged in partisan political activity by providing transportation for his court clerk, although respondent knew that his court clerk was delivering posters for John Sweeney’s campaign for the U.S. House of Representatives to the Republican booth at the Columbia County Fair. Respondent transported his court clerk and the posters in his van to the Republican booth at the County Fair, where the political posters were unloaded by others. Respondent parked his vehicle and waited until the delivery was completed.

As to Charge II of the Formal Written Complaint:

3. In or about March 1999, in People v. Bruce Kruppenbacker, after the defense attorney rejected an offer of a plea bargain whereby the defendant would plead guilty to the charge of Sexual Misconduct in satisfaction of that charge and a charge of Unlawfully Dealing With A Child, respondent stated in court to the assistant district attorney in a loud voice that he was tired of the district attorney’s office’s refusal to offer adequate plea bargains and, without a basis for the comment, alleged that the district attorney’s office was making prosecutorial decisions for political reasons.

As to Charge III of the Formal Written Complaint:

4. On or about April 12, 1999, without basis and in violation of Section 4 of the Judiciary Law, respondent ordered the victim’s attorney to leave the courtroom during the public trial of People v. Walter Baker, Jr. and Kelly Baker. The victim’s attorney wanted to attend the trial only as an observer, but respondent refused to permit him to be in the courtroom.

As to Charge IV of the Formal Written Complaint:

5. On or about January 18, 2000, in Patricia Betar v. Mary Ballard and Kirt George, respondent held a summary proceeding on the plaintiff landlord’s petition for eviction and back rent. The plaintiff was represented by counsel, but the defendants were pro se. After a discussion at the bench, in which the defendants agreed to leave the premises but raised a defense that the past due rents should be abated due to inadequate heat, respondent signed a judgment, awarding the plaintiff possession and $6,300 plus costs, which was the full amount of the claim, without according the defendants full opportunity to be heard on the issue of the abatement of the rent. The defendants did not agree to the judgment, and respondent failed to conduct a hearing on the contested issues.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(B)(1), 100.3(B)(3), 100.3(B)(6), 100.5(A)(1)(c), 100.5(A) (1)(d) and 100.5(A)(1)(e) of the Rules Governing Judicial Conduct. Charges I through IV of the Formal Written Complaint are sustained insofar as they are consistent with the above facts, and respondent’s misconduct is established.

By his actions both on and off the bench, respondent failed to observe high standards of conduct and violated well-established ethical precepts (Section 100.1 of the Rules Governing Judicial Conduct).

By providing transportation for his court clerk, who was delivering campaign posters in support of a candidate for public office, respondent conveyed the impression that he was engaged in partisan political activity, which is prohibited by Section 100.5(A)(1)(c) of the Rules. Respondent, who was
aware that his clerk was delivering campaign materials, drove his van to the Republican booth at the County Fair and waited in the van while the political posters were unloaded. Under such circumstances, an observer might reasonably conclude that respondent himself was engaging in political activity in support of the candidate. As the Court of Appeals has stated: "...judges must hold themselves aloof and refrain from engaging in political activity, except to the extent necessary to pursue their candidacies during their public election campaigns." Matter of Maney v. State Commn on Jud Conduct, 70 NY2d 27, 30 (1987); see also Matter of Rath, 1990 Ann Report of NY Comm. on Jud Conduct 150.

Respondent's unwarranted public criticism of the prosecutor in the Kruppenbacker case was also inappropriate. By ascribing political motives to the prosecutor, apparently because of his dissatisfaction with a plea offer he deemed inadequate, respondent himself injected politics into the case and failed to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary, in violation of Section 100.2(A) of the Rules. Such conduct also violated his obligation to be patient, dignified and courteous to an attorney with whom he dealt in an official capacity (Section 100.3[B][3] of the Rules).

It was also improper for respondent to bar an attorney from the courtroom in a criminal case. "The sittings of every court within this state shall be public, and every citizen may freely attend the same..." (Jud Law §4). The right to public proceedings belongs not only to a defendant, but to the public and press as well. Westchester Rockland Newspapers v. Leggett, 48 NY2d 430, 437 (1979). Only when public proceedings would jeopardize a defendant's right to a fair trial may they be closed (Ibid. at 438).

In Betar v. Ballard, respondent failed to comply with the law by signing a judgment without holding a hearing on the contested issues or according the pro se defendants full opportunity to be heard. Every judge -- lawyer or non-lawyer -- is required to be competent in the law and to insure that all those with a legal interest in a proceeding have a full opportunity to be heard according to law. Matter of Curcio, 1984 Ann Report of NY Comm. on Jud Conduct 80. As a judge since 1982, respondent should be fully familiar with basic procedures of law as well as the ethical rules.

By reason of the foregoing, the Commission determines that the appropriate sanction is admonition.

Mr. Berger, Judge Ciardullo, Mr. Coffey, Mr. Goldman, Ms. Hernandez, Judge Luciano, Judge Peters and Judge Ruderman concur.

Judge Marshall and Mr. Pope were not present.

Dated: November 19, 2001