



2017 Ethics Update for Court Attorneys and Law Clerks

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**OCTOBER 23, 2017
NEW YORK, NY**

What Rules Govern

- All employees: Rules Governing Conduct of Nonjudicial Court Employees (Part 50)
- “Direction and control”: portions of Rules Governing Judicial Conduct (Part 100)*:
 - Patience, dignity, and courtesy;
 - Bias and prejudice;
 - Public comment*;
 - Fidelity and diligence

What Rules Govern (Cont'd)

- All attorneys: Rules of Professional Conduct (Part 1200)
- Quasi-judicial officials: Parts 50 & 100
- Judicial candidates: portions of Part 100:
 - definitions (e.g., *candidate*, *window period*);
 - political activity

Which rules apply?

- Opinion 13-133 Are principal law clerks who are appointed to serve part-time as SCAR hearing officers during regular court hours as part of their job responsibilities subject to the same restrictions as sitting judges with respect to political activities?

Avoiding an appearance of impropriety

- Part 50.1(I): court employees shall avoid impropriety and the appearance of impropriety in all their activities.
 - (A.) shall respect and comply with the law;
 - (B.) shall not use or attempt to use their positions or the prestige of judicial affiliation to secure privileges;
 - (C.) shall not request or accept any gifts or gratuities from attorneys or other persons having or likely to have any official transaction with the court system...

What do you think?

- A former judge, who is now a practicing attorney before a judge, would like to give the judge and his/her staff a food platter. (See Opinion 15-122).
- Can the judge accept this food platter?
 - * What if the former judge sends the food platter as a gift from a local bar association?

What do you think?

- May a judge accept free admission to a CLE seminar offered by a private legal training organization that is owned and/or operated by an attorney who has not appear, and is not likely to appear, in the judge's court; and may the judge's court attorney accept the same offer?

(See Opinion 14-74). Part 100 and Part 50 differ on gifts.

Appearance of Impropriety: the “No Gift Rule”

- Can you accept gifts from friends and relatives? What if your mom is a big-time litigator?
- May a court attorney attend a holiday dinner party hosted by a law firm?
 - Part 50 vs. Part 100.

Appearance of Impropriety

- May a court attorney who is a party in a civil litigation voluntarily disclose his/her position to the tribunal?
 - Consider Opinion 07-18
- Best practices if you become involved in litigation in your own court?

Outside Activities – Observed Appearances of Impropriety

- Social Media & Commenting Online
 - NJ Law Clerk Resigns After FB Comments on State Trooper's death (N.Y. Daily News, June 4, 2015).
 - *Florida Bar v. Conway*, No. SC08-236, 996 So.2d 213 (Fla. 2008).
 - *In re Peshek*, M.R. 23794 (Ill. 2010); 798 N.W.2d 879 (Wis. 2011).
- Best practices for avoiding the appearance of impropriety:
 - The “Mom test”
 - The “tabloid test”

Letters of Reference

- May a court attorney write a letter of reference?

22 NYCRR § 50.1(II)(D): Confidentiality

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;
- Use such information for personal gain or advantage.

Confidentiality

- Best practices for maintaining confidentiality?
- Common sense / awareness:
 - Care of records and documents;
 - Conversations in public areas;
 - Double-checking emails (to, cc, bcc) and attachments.

Appearance of Impropriety: Confidentiality

- Access for an improper purpose:
 - “All three candidates’ files breached” (Mar. 2008)
 - “IRS employee arrested for snooping” (Aug. 2008)
 - “Vegas court to O.J.: Sorry for the candid camera” (Sept. 2007)

22 NYCRR § 100.3(B)(8): Public Comment

- Judge may not publicly comment about a pending or impending proceeding in any court within the United States or its territories.
- Judge must “require similar abstention on the part of court personnel subject to the judge’s direction and control”

Public Comment Rule (cont'd)

- Permissible:

Public statements “in the course of [the judge’s] official duties”

- “explaining for public information the procedures of the court”

- May a judge repeat or summarize courtroom testimony to the media?

- *Compare* Opinion 00-65 *with* Opinion 12-146

Public Comment Rule

- Best practices if you are contacted by the media

22 NYCRR § 50.1(II)(B): Demeanor

Court employees:

- Shall be patient and courteous to all persons who come in contact with them;
- Shall not discriminate or 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.

See also 22 NYCRR 100.3(B)(3)-(4); 100.3(C)(2).

Demeanor

- Best practices:
 - No comment on race, gender, etc., unless directly related to legal issues in case.
 - Avoid racist, sexist, vulgar, xenophobic (etc.) jokes or remarks.
- Courtesy and politeness:
 - How to handle difficult situations?
 - Focus is on fundamental fairness to litigants.
 - *Cautionary tale: Judge removed for indiscriminately committing 46 defendants into custody after a cell phone rang in his courtroom. 10 NY3d 577 (2008)*

22 NYCRR § 50.1(III)(B) & 50.5(e)

Political Activities

- Not during scheduled work hours or at the workplace; no court resources.
- No elective office in a political party (or related club or organization), except
 - May be delegate to judicial nominating convention;
 - May be member of a county committee, other than the executive committee of a county committee.

22 NYCRR § 50.2(c) & 100.5(C)

Political Activities

- Personal appointees:
 - \$500 aggregate calendar year limit on political contributions
 - * Exception: contributions to own campaign for public office
 - No personal solicitation of funds for partisan political purpose
 - No promoting a fund-raising activity of a political candidate or party.

Political Activity

- If a court attorney works exclusively for one judge, is he/she the judge's "personal appointee" for the purposes of the political activity restrictions?
- Opinion 01-32

Political Activity

- May a personal appointee serve as treasurer for a political candidate's campaign?
- *Compare* Opinion 03-48; Rule 100.5(C)(3) *with* Opinion 04-10

Political Activity

- May a law clerk who works on criminal matters:
 - Actively support the D.A.'s opponent in an upcoming election?
 - Personally run against the D.A.?
- Does it matter if the law clerk is the personal appointee of a judge?
- Opinions 07-11; 04-104

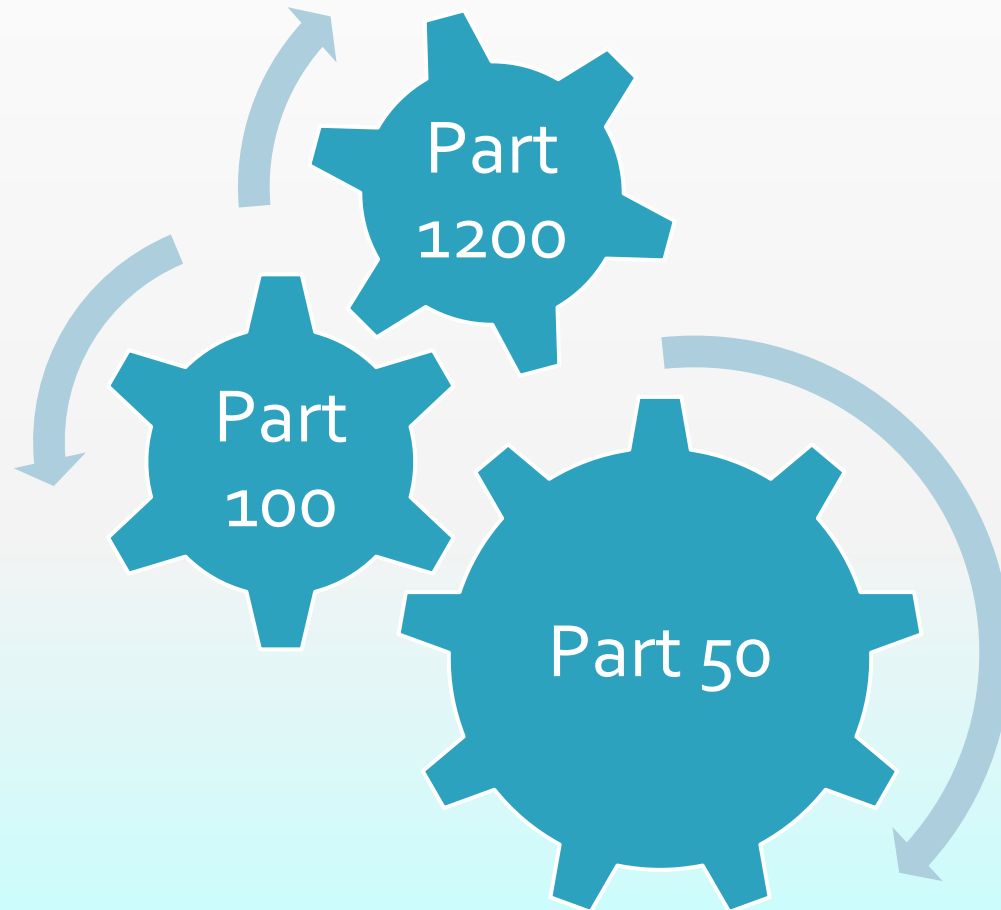
Searching for ACJE Opinions

- Go to <http://www.nycourts.gov/ip/acje>
- Click on “Search ACJE Opinions”
- Type in an opinion number or search term(s)
- Click “Go”

Where to Get Help

- Judge or supervisor
- Nonjudicial Ethics Helpline (Part 50)
 - 888-28-ETHIC (888-283-8442)
- Advisory Committee on Judicial Ethics (Part 100)
 - 866-79-JUDGE (866-795-8343)

Conclusion of Part I



22 NYCRR § 100.3(E)(1) : Disqualification

- A judge shall disqualify him/herself in a proceeding in which the judge's impartiality might reasonably be questioned.
 - Also required in specific circumstances by statute, rule or advisory opinion.
- Often subject to remittal after full disclosure (22 NYCRR 100.3[F])

What do you think?

- Opinion 16-166 Is a judge disqualified from presiding in matters involving the District Attorney's office where (i) his/her law clerk is a former assistant district attorney and (ii) the law clerk's second-degree relative is currently an assistant district attorney?

What do you think?

- Opinion 16-144 May a judge whose law clerk becomes the District Attorney preside over criminal cases in veterans court?

What do you think?

- Opinion 13-26 Is a judge required to disqualify him/herself when an attorney, who represents the judge's law clerk or secretary or who has a personal relationship with the judge's law clerk or secretary, appears in the judge's court?

Disqualification

- Is a judge disqualified from presiding over matters involving a law firm that has contacted his/her law clerk about post-clerkship employment?
 - See Joint Opinion 07-87 and 07-95
- May you appear before a judge you've worked for after you've returned to private practice?
 - See Opinion 07-04

Job Seeking Court Attorneys and Law Clerks

- Section 50.1(I) – Shall avoid impropriety and the appearance of impropriety in all their activities.
 - Section 50.1(I)(A) – Shall not use or attempt to use their positions or the prestige of judicial affiliation to secure privileges or exemptions for themselves or others.
 - Section 50.1(1)(C) – 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.
- ACJE Opinions: 15-14 (appellate judge); 07-174 (trial judge); Joint Opinion 07-87/07-95 (keep detailed records of job search and communications)

What do you think?

- Opinion 15-43 What are a judge's obligations when a case that comes before the judge is one that the judge's law clerk had been personally involved in during the law clerk's former employment in a government law office? What are the judge's obligations with respect to other cases that were pending in that government law office during the law clerk's former employment, where the law clerk was in a non-supervisory role and had no personal involvement in the case?

The “Revolving Door” Rule

- On return to private practice, you cannot represent a client in connection with a matter in which you **participated personally and substantially** as a public employee. RPC 1.11(a).
- To avoid disqualification, your new firm must act promptly and reasonably to screen you from the matter, and give notice to the court system. RPC 1.11(b).

The “Revolving Door” Rule – Cont’d

- On return to private practice, you cannot represent a client whose interests are adverse to a person about whom you have **confidential gov’t info**, in a matter in which that info could be used to the material disadvantage of such person. RPC 1.11(c).
- Law firm is disqualified unless there is timely and effective screening under RPC 1.11(b).

The “Revolving Door” Rule – Cont’d

- As a government employee, you must not participate in a matter in which you **participated personally and substantially** while in private practice. RPC 1.11(d).

Disqualification / Insulation

- Best practices if you (or your spouse) have a relationship with any of the lawyers, litigants, witnesses, etc. in a case to which you have been assigned?

22 NYCRR § 50.1(III): Outside Activities (*in general*)

- Court employees shall conduct their outside activities in a manner that does not conflict with their employment duties.
 - *Things to consider: might there be possible conflicts of interest or appearance of impropriety, possible scheduling conflicts?*

What would you do?

- Opinion 17-16 Must a new judge, who previously served as law clerk to his/her current supervising judge and attended multiple events at the judge's home, disclose the relationship in cases involving the supervising judge's spouse's law firm? What if a party appears without counsel?

22 NYCRR § 50.1(III)(A)

Outside Employment

- Court employees shall not engage in outside employment or business activities that
 - interfere with the performance of their official duties, or
 - create an actual or appearance of conflict with those duties.

22 NYCRR § 50.3

Dual Employment

- Any paid employment “in another department or agency of the State or a political subdivision, or in the Legislature or the Judiciary”
- Approval process for employees in trial courts
 1. Must get “previous consent in writing” of your “appointing authority,” and
 2. “Subject to approval by the Chief Administrator of the Courts”

Dual Employment

- May a full-time court attorney in County Court serve as:
 - A town justice in a town within the county? 10-98
 - A part-time city court judge? 07-194
- May a Supreme Court Justice's law clerk serve:
 - On the County Legislature? 05-38
 - As a village trustee? 11-90
- Rule 50.3(a)

22 NYCRR § 50.6: Practice of Law

Full-time court employees:

- No private practice of law, unless an exception applies.
- Part 50 vs Part 100

Practice of Law: Rule 50.6(b) Exceptions

- Subject to prior written permission for each specific engagement:
 - Matters not pending before a court or governmental agency;
 - Uncontested matters in Surrogate's Court;
 - Uncontested accountings in Supreme Court;
 - Other *ex parte* applications not preliminary or incidental to litigated or

Practice of Law: Rule 50.6(c) Exceptions

- Subject to prior written permission, may provide *pro bono* legal services.
 - Must not interfere with your job.
 - Contested or uncontested matters... but not in court of your own employment.
 - Not during working hours.
 - No use of public resources.
 - Avoid actual and perceived conflicts etc.

Practice of Law: Approval Process

For court attorneys in the trial courts...

1. Discuss with your judge or supervisor.
2. Check in with your District Administrative Office.
3. Ultimate approval from the Chief Administrative Judge or CAJ's designee:
 - 50.6(b) matters: Judge Marks.
 - Pro bono projects: Judges Mendelson and

22 NYCRR § 50.2: Additional Rules

- Part 36: Court employees may not be employed as guardians, guardians *ad litem*, attorneys for alleged incapacitated persons, receivers, referees to sell real property.
- Part 40: Some court employees must file annual financial disclosure statements.

Reporting Obligations

- Judges and Quasi-Judicial Officials:
 - 22 NYCRR § 100.3(D)
- Lawyers:
 - 22 NYCRR § 1200.57 [Rule 8.3]

Judge's Reporting Obligation

Attorney or judge

Substantial Likelihood

Substantial Violation

"Appropriate Action"*

Attorney's Reporting Obligation

Attorney

Knowledge*

Raises Substantial Question

"Shall Report"

Reporting Obligations

- Must a judge report
 - An acquaintance who stole money from an employer? Opinion 07-144
 - A litigant appearing before the judge who
 - offered a false instrument for filing? Opinion 09-171
 - admitted under oath facts constituting a violation of federal law? Opinion 08-155 (disability benefits)
 - Statutory rape (when teen petitions to marry man who impregnated her)? Opinion 05-84
 - Medical doctor who failed a drug test? Opinion 06-13

Judiciary Law § 90(4): Attorneys Convicted of Crimes

- Attorney who is convicted of any “crime” must notify appellate division
 - Crime vs. violation
- If convicted of felony in NYS court then automatic disbarment
- If convicted of a “serious crime” then immediate suspension + hearing in mitigation

Wrap-Up

For questions about your conduct as a . . .	Resource
Court employee (Part 50)	Nonjudicial Ethics Helpline 888-283-8442
Candidate for elective judicial office (Part 100.5)	Judicial Campaign Ethics Center 888-600-5232
Personal appointee of a judge (portions of Part 100)	Advisory Committee on Judicial Ethics 866-795-8343
Court employee in a quasi-judicial title (Part 100)	Advisory Committee on Judicial Ethics 866-795-8343