

## Opinion 10-38

June 10, 2010

Digest: A judge who receives correspondence from the New York State Commission on Judicial Conduct during an on-going trial concerning a complaint filed by a party to the trial, including the complainant/party's letter to the Commission, need not disqualify him/herself from the on-going trial unless the judge believes he/she can no longer be impartial.

Rules: 22 NYCRR 100.1; 100.2; 100.2(A); 100.3(B)(6); 100.3(E); Opinion 98-69 (Vol. XVII); 97-102 (Vol. XVI); 96-114 (Vol. XV); 94-94 (Vol. XII); *People Moreno*, 70 NY2d 403 (1987).

### Opinion:

A judge who is “in the midst of trial” involving “a hotly contested custody issue” received a letter from the New York State Commission on Judicial Conduct (Commission) notifying the judge that he/she is the subject of an investigation because a party to the trial filed a complaint against the judge. The Commission's letter includes the following questions, which we quote with the inquiring judge's permission:

“1. Did you preside over the case of [ ]? If so, please answer the following additional questions.

2. Please provide a brief chronology of substantial events in the case, including when the matter first came before you and what dispositions you rendered.

3. At some point in the case, did you dismiss [ ]'s petition for visitation and/or custody of [ the party's children]? If so, please state the reason for your action, including whether the tardiness of [ ] and [his/her] attorney, . . . , was your basis for such dismissal.

4. If [ ]'s petition was dismissed, please indicate whether the petition was restored to the calendar. If so, please describe who and what prompted the restoration.

5. While presiding over [ ], did you repeatedly refuse to accommodate the attorneys' schedules? For example, did you refuse to adjourn the

case to accommodate an attorney's vacation schedule and/or adjourn a hearing at 7 P.M. so that the attorney could attend [his/her] child's extracurricular activity?

6. Please indicate whether you consider your conduct to be consistent with Sections 100.3(B)(3) and (6) of the Rules Governing Judicial Conduct, which require a judge to be patient, dignified and courteous to litigants and lawyers with whom the judge deals in an official capacity, and to accord every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.

Please include any relevant information or material that you may wish the Commission to consider in connection with this matter.”

In addition, the Commission enclosed a copy of the complainant's letter.

The judge asks whether the judge must disqualify him/herself, having seen the complainant's letter to the Commission that describes the writer's numerous complaints about the judge.

A judge must avoid impropriety and the appearance of impropriety in all the judge's activities (see 22 NYCRR 100.2) and must act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary (see 22 NYCRR 100.2[A]). Therefore, a judge must disqualify him/herself in any proceeding in which the judge's impartiality might reasonably be questioned (see 22 NYCRR 100.3 [E]).

The Committee previously has advised that a judge need not disqualify him/herself solely because the District Attorney, or (as in the instant inquiry) a party to a proceeding pending in the judge's court, files a complaint against the judge with the Commission, as long as the judge believes that he/she can be impartial, and the Commission has not formally charged the judge with misconduct (see Opinions 98-69 [Vol. XV]; 97-102 [Vol. XVI]; 94-94 [Vol. XII]). Similarly, the judge in the present inquiry need not disqualify him/herself if the judge believes that he/she can be impartial and the Commission has not formally charged him/her with misconduct (see *People v Moreno*, 70 NY2d 403 [1987]).

While the foregoing is sufficient to answer the inquiring judge's question, the Committee feels compelled to comment on the timing and nature of the Commission's written communication to the judge. The Committee cannot ignore an important

concern, namely, that a complainant/litigant may be acting in retaliation for adverse rulings a judge has made, perhaps to influence the judge's future rulings or to secure the judge's removal from the case. Should any complainant so motivated accomplish either of these goals, he/she would disrupt and essentially undermine the judicial process, threaten the judge's independence, and defeat the purpose of the Commission.

The provisions of law that created the Commission and this Committee dictate that both entities work to prevent any such deplorable result. While the Committee previously has advised that a judge need not disqualify him/herself solely because a party who is dissatisfied with the progress of his/her judicial proceeding files a complaint with the Commission (see Opinion 96-114 [Vol. XV]), the Commission also must ensure that a complainant does not use the Commission's procedures to retaliate against a judge or otherwise manipulate the judicial process. Therefore, with respect to complaints about how a judge is handling an ongoing matter, it is the Committee's view that the Commission should ordinarily wait until the matter is concluded before confronting the judge with or about a complaint, or otherwise involving the judge in a Commission investigation -- especially where, as here, the ongoing matter is a non-jury trial. The Committee strongly endorses such an approach, regardless of the merits of any particular complaint, while at the same time acknowledging that in some highly exceptional or emergent instances, intervention may be necessary to prevent irreparable harm. Otherwise, litigants could easily disrupt ongoing judicial proceedings and threaten a judge's independence.

Moreover, the Rules Governing Judicial Conduct (Rules) explicitly provide that an independent and honorable judiciary is indispensable to justice in our society (see 22 NYCRR 100.1). In furtherance of this principle, the Rules prohibit a judge from initiating, permitting, or considering *ex parte* communications, or other communications made to the judge outside the presence of the parties or their lawyers concerning a pending or impending proceeding (see 22 NYCRR 100.3[B][6] [emphasis added]). Yet, according to the inquiring judge, "in the midst of trial" involving "a hotly contested custody issue," the Commission sent correspondence to the judge, including a copy of an 8 page letter of complaint that one of the parents involved in the trial filed with the Commission, and furthermore asked the judge to respond to the questions quoted above. The Committee is concerned that doing so has enhanced the risk that the complainant's and his/her adversary's due process rights will be compromised when the judge responds to the Commission, *ex parte*, about decisions he/she made during the ongoing, non-jury custody trial.

At the very least, the fact that the Commission communicated with the judge

during such a trial leaves the judge in the unenviable position of choosing one of the following alternatives: (1) assuming he/she can remain impartial, going forward with the trial; (2) disqualifying him/herself from the trial; or (3) declaring a mistrial. In the latter two instances, all the parties to this proceeding would be inconvenienced by the resulting delay, and they would incur significant added expenses as the consequence of assigning a new judge and conducting a new trial.

These alternatives could have been avoided if the Commission had simply waited until after the judge completed the trial and rendered a decision before it involved the judge in the investigation. Moreover, all of the concerns mentioned in the Commission's letter, especially those articulated in question 6, are matters of record, fully reviewable after the trial is concluded and the judge renders a decision.

Finally, the Committee also cannot ignore its equally serious concern about the contents of questions 3, 4 and 5, which appear to involve substantive or procedural legal matters that, except in the most extraordinary of circumstances, should be addressed by an appellate tribunal as opposed to a disciplinary body.