
DISQUALIFICATIONS

**2015 New York State Magistrates Association Conference
Niagara Falls, New York**



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Employment

2004-May 2011 (part-time): Special Counsel to the Judicial Institute of the New York State Office of Court Administration, and Senior Faculty to the Town and Village Justices Education Program

1975-2003: Administrator and Counsel, New York State Commission on Judicial Conduct

1968-1974: Deputy Director of Administration of the Courts in the First Judicial Department, and then Director of Administration, Appellate Division, First Judicial Department

1967-1968: Assistant Corporation Counsel for the City of New York (Appeals)

1965-1967: Staff Attorney, President's Commission on Crime and the Administration of Justice

1965: Director of a legal services agency in the poverty program, Syracuse, NY

1963-1965: Assistant District Attorney, New York County

Teaching

1981-1990: Adjunct Professor of Law, Pace Law School, teaching Professional Responsibility and Ethics

Early 1970's: Adjunct Professor in the New York City University system, teaching Government and Constitutional Law

Education

New York University School of Law (LLM Criminal Justice 1970)
Syracuse Law School (JD 1963)
Brooklyn College (BA 1958)

Publications

More than 40 articles on criminal justice, judicial discipline and judicial conduct commissions, including:

- “*Judicial Error That Is Subject to Discipline in New York*,” 32 Hofstra Law Review 1547 (2004)
- “*The Changing Face of Judicial Elections*,” 32 Hofstra Law Review 1507 (2004)
- “*Is Judicial Discipline in New York State a Threat to Judicial Independence?*,” 7 Pace Law Review 291 (1987)
- “*Violations of Basic Rights May Constitute Judicial Misconduct*,” NY Law Journal, Nov. 15, 2004
- “*Judicial Elections and Restricting Campaign Rhetoric*,” NY Law Journal, Oct. 18, 2004
- “*New York’s Approach To Judicial Discipline: The development Of A Commission System*,” 54 Chicago-Kent Law Review 137 (1977)
- “*The State Commission on Judicial Conduct: A New Approach To An Ancient Problem*,” 28 Syracuse Law Review 1 (1977).
- “*Civil Liberties and Civil Disorders: Are They Reconcilable?*” 14 New York Law Forum (1968).

Committee Memberships and Related Public Service

- Governor’s Advisory Council on Alcoholism, Member (1969-1971)
- Committee on Alcoholism and Drug Reform of the American Bar Association Section on Individual Rights and Responsibilities, Chair (1969-1974)
- Advisory Council to the Center on Judicial Conduct Organizations, American Judicature Society, Member (1977-1980)
- Association of Judicial Disciplinary Counsel, Founding Member, Member of the Board of Directors (1980-1993) and *ex-officio* Board Member since 1993
- White Plains Ethics Board, Chair (1978-1990 and 1999-2005)
- Various committees of the American Bar Association, New York State Bar Association and Association of the Bar of the City of New York, Member over the past 30 years

**Disqualification Under The Rules Governing Judicial Conduct:
How to Avoid The Long Arm of The Commission**

Gerald Stern

When should a judge recuse (disqualify himself or herself) from a matter?

1. Judiciary Law, Sec. 14 (Summary)

Judge should not preside when judge: (a) is a party, (b) has been counsel in the matter, (c) has an interest in the matter, or (d) is related to any party within the sixth degree.

2. Moreno Issue (NYS Court of Appeals)

People v Moreno, 70 NY2d 403, 405-06 (1987): Absent a legal disqualification under **Judiciary Law § 14**, a Trial Judge is the sole arbiter of recusal.

(If only the law were that simple.....)

3. Section 100.3 [E] [1] of Rules Governing Judicial Conduct

A judge shall be disqualified when **“the judge’s impartiality might reasonably be questioned**, including but not limited to instances where ...”

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

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

(c) judge knows that **he or she (or spouse or minor child in the judge’s household) has an economic interest in the matter that could be substantially affected by the proceeding**; (but “economic interest” is defined in the rules as not including a *de minimis* interest, deposit in a bank, policy holder of mutual savings association or member of a credit union, etc);

(d) judge knows that **judge or spouse is a party** or a **person** known by the judge to be **within the sixth degree of relationship to the judge or judge's spouse or the spouse of such a relative (i) is a party, (ii) is an officer, director or trustee of a party, (iii) or has an interest that could be substantially affected by the proceeding;**

(e) judge knows that the **judge or judge's spouse is either a lawyer or material witness** in the proceeding, or a **person known by the judge to be within the 4th degree of relationship to the judge or to the judge's spouse is a lawyer in the proceeding or likely to be a material witness in the proceeding;**

(f) **judge, while a judge or 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) if judge learns that the judge (or spouse or child living in judge's home) has an economic interest in a party to the proceeding, the judge need not disqualify if the judge (or spouse or child) divests himself or herself of such interest.

Judge must keep informed about his or her personal and fiduciary economic interests and make a reasonable effort to keep informed about such economic interests of spouse or child living with judge. In other words, this may not be a valid defense to a charge of misconduct: "When I presided over the corporation's liability, I did not know that my spouse (or I) owned 15% of the shares of the corporation."

4. Section 100.3 (F) Remittal of Disqualification

Can the parties waive the judge's disqualification? Sometimes.

In the summary of those sections of the Disqualification rule (**in 3 above**) that are underscored, there can be no remittal (waiver) of disqualification.

In all other disqualifying situations, (a) following judge's full disclosure of the basis for disqualification, (b) when **all parties and their lawyers** agree that the judge should not recuse, the judge may participate in proceeding if judge believes he or she will be impartial and wishes to continue.

Judge may not participate in the parties' agreement discussion. Implicitly, judge should not apply pressure on parties to agree that he or she should stay on the case

Judge must incorporate the remittal agreement in the record.

5. Degrees of Relationship

How does a judge know which relatives are covered by 4th or 6th degree of relationship? Have a chart handy. Ask the Resource Center. Remember some shortcuts.

1. Parents, Children
2. Brothers, Sisters, Grandparents, Grandchildren
3. Great-grandchildren, Great-grandparents, Nephews, Nieces, Uncles, Aunts
4. Grand Nephews and Nieces, First Cousins, Grand Uncles and Aunts
5. Great-Grand Nephews and Nieces, First Cousins Once Removed (first cousins' offspring), Great-Grand Uncles and Aunts
6. First Cousins Twice Removed, Second Cousins

6. NYS Court of Appeals

Misconduct:

Judge presided although a party had made a loan to the judge that was still outstanding. *Matter of Scacchetti*, 56 NY2d 980 (1982).

Judge presided over his dentist's case. *Matter of Fabrizio*, 65 NY2d 275 (1985).

Judge presided over his relatives' cases (nephew, niece or cousin of judge or his spouse in traffic cases). *Matter of Wait*, 67 NY2d 15 (1986).

Judge presided over his lawyer's speeding case. *Matter of Conti*, 70 NY2d 416 (1987).

Judge presided over a criminal case although he had witnessed a key event in the case. *Matter of Vonderheide*, 72 NY2d 658 (1988).

Judge presided over a case in which his close friend and business associate was a lawyer in the case. *Matter of Intemann*, 73 NY2d 580 (1989).

Judge presided over a case in which a party had made loans to the judge that were allegedly repaid. *Matter of Murphy*, 82 NY2d 491 (1993).

Judge presided over cases that had been brought by close friends who were law enforcement personnel. *Matter of Robert*, 89 NY 745 (1997).

Judge presided over cases of a lawyer who shared law office space with the judge (who was permitted to practice law). *Matter of Assini*, 94 NY2d 27 (1999).

Judge presided over misdemeanor cases of his step-grandchildren. *Matter of LaBombard*, 11 NY3d 294 (2008).

Judge presided over cases involving his "Paramour's" relatives. Judge lived with his "paramour." Since they were not married, may he defend on

the claim that the rule only bars presiding over a *spouse's* close relatives?
Matter of Young, 19 NY3d 621 (2012).

Judge presided over seat belt charge against his friend and former employer. *Matter of George*, 22 NY3d 323 (2013).

7. Disclosure

Is there a standard in the rules for a judge to disclose a potential conflict or reason to recuse? (See Remittal section.)

When a judge does not recuse in a close case, would the failure to disclose be cited against the judge?

8. Players in this drama: Advisory Committee on Judicial Ethics and
Commission on Judicial Conduct

For any explanation, contact Gerald Stern: gstern42@mac.com