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## Caveat Arbiter: Judicial Conduct and the ACJC

Marc Garfinkle, New Jersey Law Journal

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Whenever trial lawyers swap war stories, you'll hear tales of nightmarish cases, evil clients and bad judges—jurists whose incompetence or impropriety somehow figured into the outcome of a matter. Of course, almost all attorneys have some bad outcomes, bad cases and bad clients over the course of their careers. These come with the turf. We accept them as part and parcel of our profession. Not so with bad judges.

Old-timers will tell you that judicial impropriety is more common than it ever was, and they try to take it in stride. New lawyers, experiencing it for the first time, don't know how to react. Both usually roll with the punches. Dealing with bad judges is awkward at best. When you have a bad case, or even a good case that turns bad, you find a way to withdraw without harming your client. When you have a bad client, or a client that turns bad, you terminate the attorney-client relationship, provided you don't injure your client. When you have an unscrupulous adversary, you seek penalties and sanctions. In rare instances, you may have to report an unfit colleague to the Ethics Committee per RPC 8.3. We have ways to handle such problems.

But what do you do when you have a bad judge? The impact of inferior or corrupt jurisprudence can be astounding and far reaching. The repercussions can undermine or impugn the entire court system. A bad judge can ruin your entire day, along with your client's life or business. But take heart! You need not sit in silence as some rogue, unfit or substandard judge wreaks havoc upon justice or treats you or your client unfairly. There is a remedy close at hand.

Sometimes, the judge's gaff is extraordinary—atypical, out-of-character, surprising. Other times, the offending judge is widely known for intemperate remarks or some other misconduct. Most of the people who are aware of, or even those impacted by, the misconduct, are waiting for someone else to report the judge. No one wants to pull the trigger. Litigants have that option. Lawyers do not.

RPC 8.3, the so-called "squeal rule" that requires us to report misconduct by attorneys, also demands that we report misconduct by judges. Traditionally hesitant to report misconduct by attorneys, we lawyers are even more reluctant to report wayward judges. Perhaps we are friendly with the offending judge. Maybe we feel peer pressure to let it be, or we fear retaliation. Maybe it's knowing that we'll be coming to that same courthouse for the next 20 years, running into that judge and her friends all the time. We avoid reporting judges for many reasons.

Despite our reluctance to report, here is the law that controls: "RPC 8.3 Reporting Professional Misconduct [...] (b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority."

The appropriate authority is the Supreme Court Advisory Committee on Judicial Conduct, known almost universally as "ACJC." It was created by the Supreme Court to implement N.J.S.A. 2B-2A-10, which provides for suspension of judges prior to a hearing, "and to assist otherwise in fulfilling and the administrative responsibilities of the Court ...." Like the Disciplinary Review Board and the Committee on Character, whose nature we have explored here in earlier columns, this august body keeps a low-profile. A creature of the Supreme Court, it consists of nine members who serve without pay, at least two of which are retired Justices or judges of the Supreme or Superior Court, and at least three of which must be members of the bar. No more than four can be members of the public. When they vote, a quorum is five. The present chair is retired Justice Virginia A. Long; the present vice chair is the retired judge Stephen Skillman.

The ACJC reviews all written statements, criticisms and grievances directed to it concerning judges of the Superior Court, Surrogate's Court, Tax Court and the municipal courts, which contain allegations that the judge may be guilty of one or more of the following enumerated offenses: 1) misconduct in office, 2) willful failure to perform judicial duties, 3) incompetence, 4) intemperate conduct, 5) engaging in partisan politics, and 6) engaging in conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

The broadest of those categories, misconduct in office, generally refers to behavior which violates New Jersey's Code of Judicial Conduct. Here are the canons comprised by the Code, heavily excerpted to reflect the provisions that seem to get a lot of judges into trouble:

- *Canon 1.* A Judge Should Uphold the Integrity and Independence of the Judiciary. "A judge ... should personally observe ... high standards of conduct so that the integrity and independence of the judiciary may be preserved.
- *Canon 2.* A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities. "A judge ... should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."
- *Canon 3.* A Judge Should Perform the Duties of Judicial Office Impartially and Diligently. "The judicial duties of a judge take precedence over all other activities ...." "(A)(3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and should not permit lawyers, court officials, or others subject to the judge's direction and control to display impatience or discourtesy or to detract from the dignity of the court."
- *Canon 4.* A Judge May Engage in Activities to Improve the Law, the Legal System, and the Administration of Justice.
- *Canon 5.* A Judge Shall so Conduct the Judge's Extra-Judicial Activities as to Minimize the Risk of Conflict with Judicial Obligations.
- *Canon 6.* A Judge Shall Not Receive Compensation for Quasi-Judicial and Extra-Judicial Activities.
- *Canon 7.* A Judge Shall Refrain from Political Activity.

Sometimes, upon review of a matter brought to its attention, the committee may determine that it has all the information it needs. Other times, it needs more information, in which case it conducts a preliminary investigation, resulting in one of three outcomes. The committee may dismiss the matter, initiate formal proceedings, or it may "communicate to the judge its private censure, reprimand, admonition, caution or guidance." (Note the many forms of discipline that remain private, as distinguished from the very public disciplinary hierarchy which pertains to the bar.)

As a result of its preliminary investigation, the ACJC may require the judge to appear at an informal conference. The grievant may or may not be invited. The judge may have counsel.

If the committee concludes that there is probable cause for public discipline, it files a formal complaint, which is served on the judge, who has 20 days in which to file an answer. The judge is entitled to review the "factual information in the committee's file that is related to the complaint." The ACJC may request discovery from the judge, as well.

The matter then proceeds to a private, formal hearing where sworn testimony is taken and recorded. The secretary of the ACJC usually presents the case. The Rules of Evidence are relaxed. If a judge refuses to testify, the ACJC may draw any reasonable inference. Following the formal hearing, the committee may order that the complaint be amended to conform to the proofs.

The ACJC does not take direct action against a judge; it is an advisory committee. It makes recommendations to the Supreme Court. If there is not clear and convincing evidence to establish probable cause, or if the conduct does not warrant public discipline, it will recommend to the Supreme Court that the matter be dismissed. If the ACJC determines that there is clear and convincing evidence that the charges are true and that the judge should be reprimanded, censured, suspended or removed, it files a presentment with the Supreme Court setting forth its findings and recommendation.

On review of the presentment, the Supreme Court may issue a complaint for removal or allow the judge the opportunity "to show cause why a sanction less than Removal should not (*sic*) be imposed." Removal proceedings are usually prosecuted by the Attorney General. Where probable cause exists to conclude that the judge has violated the law or an applicable rule and that the judge's continued service presents a "potential threat of serious harm to the administration of justice," the Supreme Court may order the judge suspended (with or without pay) during the pendency of the proceedings. At this point, the ACJC's job is done.

It is unlikely, dear reader, that you will ever report a judge to the ACJC. Relatively few lawyers ever do. Reporting judges is against our nature and, perhaps, against our short-term interest. As a result, there are too many judges who need correction or discipline still sitting on the bench. The rules are there for a reason. Lawyers should never have to tell tales about enduring a bad judge, when a remedy is so close at hand. •

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