

**THE JUDGE'S ADVOCATE:  
WHEN DOES A JUDGE NEED AN ATTORNEY  
AND  
WHAT WILL HE DO FOR YOU?**

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**Continuing Judicial Education  
Administrative Office of the Courts**

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## **RESPONDING TO AN INQUIRY FROM THE JUDICIAL CONDUCT COMMISSION**

Every inquiry from the Judicial Conduct Commission should be taken seriously. However, that does not mean that the allegations are themselves serious or even provable. In short, all allegations should be seriously and aggressively addressed. In some instances, what you consider to be a small point may be considered a big point to the Commission, and, by the same token, there may be instances where you think something is very serious but that concern is not shared by the Commission. As discussed in more detail below, your problems in perception concerning inquiries from the Commission may come from your subjective view of the allegations and how you believe you should respond.

Proper response to Commission inquiries, in which you respond either orally before the Commission or in any written presentation, share certain common elements. The practicalities of a given case, such as time constraints, access to information, and other related matters may curtail, to some degree, your ability to fully address all of the following elements for a proper response to the Commission. However, to the extent possible, an effort should be made to incorporate the following approach in any such response:

1. Address all facts relevant to the inquiry.
2. Response should be as complete as reasonably possible.
3. “Embrace” the facts.

4. Place allegations in proper legal and factual perspective so that allegations are not viewed out of context by the Commission.
5. Tone of response should be objective.
6. Personal subjective attacks should be avoided.

Part of the problem in responding to preliminary inquiries from the Commission during the informal stage of a proceeding is that the allegations may very well be broad and very general. The typical approach in responding to very broad and general allegations is to give a broad and general response. The response should nevertheless be complete. However, the response should not anticipate a particular issue in responding to a general inquiry. For example, if the Commission sent a Judge a letter generally raising questions concerning the conflict of interest conduct of the Judge, an improper response from the Judge would be, “Oh, you must mean the Smith case where I did not disqualify myself.” However, what if the Smith case was not on the “radar screen” of the Commission until you mentioned it as a specific response to a general question.

In many instances, the Judge will feel compelled to provide specific answers to general questions in an effort to quickly resolve the Commission’s inquiry. Such an approach has a potential of creating more problems than originally existed and being counter-productive, to say the least.

In responding to allegations made by the Commission, a working knowledge of the Judicial Code is critical. A response to the Commission, either orally before an informal

meeting of the Commission or in a written memorandum submitted to the Commission, should not set out a factual defense which actually is a confession to a violation of another portion of the Judicial Code. Obviously, asserting a “defense” to one allegation, which actually constitutes a confession to another Canon violation, does not make much sense.

Every communication you have with the Commission, from the very first contact you have with the Commission asking questions as to procedure, meeting dates, etc., up through and including any formal proceedings before the Commission, should reflect your candor and honesty in addressing the substance of the allegations raised by the Commission.

Contemporaneously generated documentation which was created during the relevant time period of the Commission’s allegation is very important. Such contemporaneous documentation will convert a “he said/he said” situation, which you want to avoid, into a situation where documents which were filed, written, etc., during the relevant time period when there was no Commission inquiry, support your position as to what occurred, and establish no ethics violation. As a result, the documentation will confirm the accuracy and honesty of the information you are providing to the Commission.

Documentation should not be submitted to the Commission without attaching a memorandum of explanation as to why a particular document is relevant and summarizing the document’s contents. Properly handled, a substantial volume of supporting documentation may be summarized within a short memorandum.

Affidavits from support staff or other attorneys may be helpful. However, sole reliance on affidavits should be avoided since the use of affidavits would merely reinforce that the case is a “he said/he said” situation.

Procedural bars, such as allegations regarding delay in proceedings, alleged due process violations on the part of the Commission, or similar “affirmative defenses” which do not go to the merits of the allegations, should generally be avoided. Defenses which seek to “short circuit” the Commission’s inquiry may very well be viewed by the Commission as the “defense of the guilty.” Moreover, as a practical matter, such procedural bars are rarely successful.

Lack of objectivity in responding to a Commission inquiry has the capacity to poison every action you take, including, but not limited to, what you say, what you write, who you talk to, what you tell them, who you seek legal counsel from, when you seek that counsel, when you formally retain an attorney, and who you retain as an attorney. Lack of objectivity is the “gift that keeps on giving,” when dealing with an ethics allegation.

Subjectivity concerning ethics allegations made against you is not an inherently bad thing nor does it reflect a lack of character on your part. Subjectivity is a normal human response to an attack on your character, ethics and reputation. The only question is whether you will recognize that subjectivity or delude yourself into thinking that you are able to view the allegations objectively, without outside input or advice.

Some third party input is essential in responding to any Commission inquiry. However, the selection of that third party counselor is itself a critical step in the process. Picking an advisor who is a close personal friend is generally a mistake, since such a person may be more of a “cheerleader” than an objective advisor. Such an “advisor” may tell you things that you want to hear, not what you should hear. Even worse, your subjective attitude in selecting a close friend may also reflect your conscious or subconscious desire to have someone advise you by essentially confirming the approach you have already decided to take with the Commission.

The intelligence and judicial ability of a Judge responding to a Commission inquiry does not give that Judge the ability to objectively investigate, analyze and present the Judge’s response to the allegations which have been made by the Commission.

If, for whatever reason, you do not want to have an attorney appearing on your behalf before the Commission, at least have someone else prepare, proofread or edit any written Response which you submit to the Commission. If you do not want to have any lawyer review your work product before submitting it to the Commission, at least discuss the allegations and your proposed response with another attorney. And, if you do not want to do any of the above, at least talk to a person you trust to give you candid advice. Even if you do not tell that person the substance of the actual allegations, at least give that person the opportunity to convince you to obtain some form of meaningful third party advice before you respond back to the Commission.

## **JUDICIAL CONDUCT COMMISSION**

A detailed review of the Judicial Conduct Commission is beyond the scope of this handout and is better left to being addressed by the Commission. However, a brief review of some core matters is appropriate.

The Judicial Conduct Commission is a constitutionally-created body as set forth in Kentucky Constitution §121. The actual Rules concerning its operation, including the Code of Judicial Conduct, are set forth in SCR 4.00 et seq.

Decisions of the Judicial Conduct Commission concerning a Judge, as are decisions of the Kentucky Bar Association regarding attorneys, are subject to judicial review by the Supreme Court. Such review by the Supreme Court is by no means a “rubber stamp” of what either the Judicial Conduct Commission decides or the Kentucky Bar Association decides.

Attached to this handout is a copy of a Information Pamphlet from the Judicial Conduct Commission for persons seeking to file a Complaint against a Judge.



## JUDICIAL ETHICS COMMITTEE

The Judicial Ethics Committee provides a mechanism for a Judge to obtain an Ethics Opinion concerning the propriety of any action or conduct of the Judge regarding the construction or application of the Judicial Code.

The Judicial Ethics Committee is not directly involved in the judicial disciplinary process. However, a Judge's reliance on an Ethics Opinion may be considered by the Commission and the Supreme Court in a subsequent disciplinary proceeding. As such, such opinions are deemed advisory only. By comparison, an Ethics Opinion provided by the KBA to an attorney would be a bar to subsequent disciplinary action if the attorney relied on the KBA Ethics Opinion.

A Formal Ethics Opinion from the Judicial Ethics Committee is subject to judicial review by the Supreme Court pursuant to SCR 4.310(4). Such review must be sought before the Supreme Court within 30 days after the end of the month in which the Opinion was published.

At the present time, the Supreme Court has proposed a change to this Rule which would authorize the Supreme Court to sua sponte review a Judicial Ethics Opinion at any time.

Judicial Ethics Opinions are available online through the Court of Justice website, State Library Section.