



**NEW YORK STATE**  
**Unified Court System**

OFFICE OF COURT ADMINISTRATION

**MEMORANDUM**

LAWRENCE K. MARKS  
CHIEF ADMINISTRATIVE JUDGE

JOHN W. McCONNELL  
COUNSEL

October 24, 2017

To: All Interested Persons  
From: John W. McConnell  
Re: Request for Public Comment on the Proposed Amendment of Various Non-discrimination Rules of the Unified Court System

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The Administrative Board of the Courts is seeking public comment on a proposal, proffered by the Richard C. Failla LGBTQ Commission of the New York Courts, to amend the various court rules – including attorney rules of professional conduct, rules of judicial conduct, and rules governing the conduct of employees of the Unified Court System -- to prohibit discrimination based upon “gender identity” and “gender expression.” As described by the Commission in a supporting memorandum (Exh. A), the Unified Court System’s current non-discrimination rules and policies address discrimination based on sexual orientation but not discrimination related to gender identity and gender expression. The principal aim of the rule changes is to “aid in the public efforts to institutionalize the Judiciary’s commitment to eradicating discrimination and bias against all persons regardless of their sexual orientation, gender identity, or gender expression” (Exh. A, p. 2).

The proposed rule changes are as follows (new material underlined; deleted material ~~stricken~~):

**Attorney Rules of Professional Conduct (22 NYCRR Part 1200)**

22 NYCRR Part 1200, Rule 8.4(g):

Misconduct

A lawyer or law firm shall not:

\* \* \*

(g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status, ~~or~~ sexual orientation, gender identity, or gender expression. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as

to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding ....

### **Rules of Judicial Conduct (22 NYCRR Part 100)**

22 NYCRR § 100.2(D):

(D) A judge shall not hold membership in any organization that practices invidious discrimination on the basis of age, race, creed, color, sex, sexual orientation, gender identity, gender expression, religion, national origin, disability or marital status. This provision does not prohibit a judge from holding membership in an organization that is dedicated to the preservation of religious, ethnic, cultural or other values of legitimate common interest to its members.

\* \* \*

22 NYCRR § 100.3(B)(4), (5):

(4) A judge shall perform judicial duties without bias or prejudice against or in favor of any person. A judge in the performance of judicial duties shall not, by words or conduct, manifest bias or prejudice, including but not limited to bias or prejudice based upon age, race, creed, color, sex, sexual orientation, gender identity, gender expression, religion, national origin, disability, marital status or socioeconomic status, and shall require staff, court officials and others subject to the judge's direction and control to refrain from such words or conduct.

(5) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon age, race, creed, color, sex, sexual orientation, gender identity, gender expression, religion, national origin, disability, marital status or socioeconomic status, against parties, witnesses, counsel or others. This paragraph does not preclude legitimate advocacy when age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, or other similar factors are issues in the proceeding.

### **UCS Code of Ethics for Nonjudicial Employees (22 NYCRR Part 50)**

22 NYCRR § 50.1(II)(C):

C. Court employees shall not discriminate, and shall not manifest by words or conduct bias or prejudice, on the basis of race, color, sex, sexual orientation, gender identity, gender expression, religion, creed, national origin, marital status, age or disability.

**Rules of the Chief Judge, Career Service (22 NYCRR Part 25)**

22 NYCRR § 25.16(a)

(a) It is the policy of the New York State Unified Court System to ensure equal employment opportunity for all employees and applicants for employment, without regard to race, color, national origin, religion, creed, sex (including freedom from sexual harassment), sexual orientation, gender identity, gender expression, age, marital status, disability, or, in certain circumstances, prior criminal record. No person shall be prevented from qualifying for employment in any position in the Unified Court System because of any of these factors, unless these factors are bona fide occupational qualifications.

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Persons wishing to comment on the proposed amendments should e-mail their submissions to [rulecomments@nycourts.gov](mailto:rulecomments@nycourts.gov) or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004. **Comments must be received no later than February 2, 2018.**

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

# **EXHIBIT A**

THE RICHARD C. FAILLA  
  
LGBTQ COMMISSION  
*of the New York Courts*  
25 Beaver Street, Room 970  
New York, NY 10004

Hon. Elizabeth Garry  
*Co-Chair*

Hon. Marcy Kahn  
*Co-Chair*

Marc Levine  
*Executive Director*

Commission Members

Thomas J. Burrows, Esq.  
Margaret Canby, Esq.  
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Richard Tsai, Esq.  
Michael D. Violando, Esq.  
Hon. Margaret T. Walsh  
Hon. Joanne Winslow

August 29, 2017

Hon. Lawrence Marks  
Chief Administrative Judge of the New York State  
Courts  
25 Beaver Street  
New York, NY 10004

Re: Proposal on Changes to Ethics Rules

Dear Judge Marks:

In announcing the formation of the LGBTQ Commission, the distinctions between sexual orientation, gender identity, and gender expression were clearly delineated. However, as presently written, the Unified Court System's non-discrimination policies are addressed solely to discrimination based on sexual orientation. This is not inclusive of all the members of the LGBTQ communities, and we are therefore writing to request some specific changes.

Every person has a sexual orientation, meaning a physical and emotional attraction to persons of one gender or another. A gender identity means an internal psychological sense of being a man or a woman. Finally, we each have a form of gender expression, meaning how people reflect their gender identity in their dress, mannerisms, behavior, appearance and roles.

Our Commission is recommending that this terminology be adopted and that you initiate the process to expand the protections against discrimination beyond sexual orientation in the following:

Honorable Lawrence Marks  
August 23, 2017  
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\* Rules of the Chief Administrator of the Courts, Judicial Conduct [22 NYCRR Parts 100.2(D), 100.3(B)(4) and 100.3(B)(5)],

\* Joint Appellate Rules Governing Attorneys, Rules of Professional Conduct, Misconduct (22 NYCRR Part 1200, Rule 8.4),

\* Rules of the Chief Administrative Judge, Rules Governing Conduct of Nonjudicial Employees, Code of Ethics (22 NYCRR Part 50.1), and

\* Rules of the Chief Judge, Career Service, Equal Opportunity [Part 25.16(a)]

Extending these provisions to include "gender identity" and "gender expression" will aid in the public efforts to institutionalize the Judiciary's commitment to eradicating discrimination and bias against all persons regardless of their sexual orientation, gender identity, or gender expression.

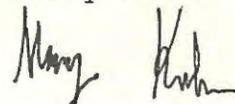
We hope you will agree that the time is right for implementing these revisions and we are prepared to address any questions or concerns you may have. Thank you for your attention to this matter,

Sincerely,

Elizabeth Garry



Marcy Kahn



Co-Chairs

The Richard C. Failla LGBTQ  
Commission of the New York Courts