

John Caher: Welcome to "Amici," News and Insight from the New York Judiciary and Unified Court System. Today we are fortunate to have as our guest the Honorable George D. Marlow, a retired Appellate Division justice who has been chairman of the New York State Advisory Committee on Judicial Ethics since 1996, and a committee member since the committee was formed back in 1987.

Judge Marlow served as an associate justice of the Appellate Division, First Department from 2001 to 2008 and before that was a state Supreme Court justice, a county court judge, a family court judge, and a Poughkeepsie town justice. He has also served as statewide judicial director of ethics, education, and counsel. Judge Marlow was a prosecutor in Dutchess and Queens counties and currently practices with the Poughkeepsie firm of Gellert, Klein, and MacLeod. Today we will be speaking with Judge Marlow about the Advisory Committee on Judicial Ethics.

Judge, thank you so much for taking the time to speak with me today. Let's start at the beginning. What exactly is the Advisory Committee on Judicial Ethics, or as it's commonly known, ACJE?

Judge Marlow: Well, the Advisory Committee on Judicial Ethics is a committee of now 27 judges. We have been in existence since 1987, and we were formed by the then Chief Administrative Judge Albert Rosenblatt. Our only mission and purpose in this effort is to help judges stay out of trouble. When they have an ethics issue that confronts them and they're not sure how to handle it, they contact us and we help them through it. We've been doing this for almost 30 years now, and no judge that I'm aware of, and I've been on the committee since the second meeting in the fall of 1987, no judge that I know of who contacted us and followed our advice, whether it be on the phone or in writing, ever got in trouble with the Judicial Conduct Commission. We're very proud of that record.

John Caher: Do you know if there was any precipitating event that prompted Judge Rosenblatt to do this?

Judge Marlow: I used to be his law clerk before he was made Chief Administrative Judge early in my career. When I got elected to Family Court, I was at a seminar and I asked a question of the person who was talking about judicial ethics. The question was: "Am I allowed to discuss my cases with other judges in the courthouse?" He wasn't a judge, this fellow, he was a lawyer. He said, "You were elected by the people of your county, and you are presumed to know the law. The only person you can talk to about it is your law clerk."

There were groans in the audience. There were about 60 brand new judges in the audience, and they couldn't believe that there was a rule that you couldn't talk to other judges. Doctors talk to other doctors, lawyers talk to other lawyers. It's commonplace amongst professional people to get input from people they respect.

John Caher: Sure.

Judge Marlow: I came back from the seminar after it was over, it was a week-long seminar, and I'm very friendly with Judge Rosenblatt, so I went into his chambers and I told him that whole story. He said, "That sounds ridiculous." We looked at the rules and the rules said you can only talk to your law clerk, basically. That was just one thing.

Another time, when I was a town judge about 5 or 6 years before this incident, I didn't know how to handle an ethics issue, so I called up the Judicial Conduct Commission because that was the only entity I could think of that might help me with the ethics issue. The administrator said: "I'm sorry, I can't help you. I'm a prosecutor."

I was really put off by that. I said, "I have two choices how to react to this situation. One is probably going to be right and one is probably going to be wrong. I just don't know which one. I'm asking for some advice from you so I don't make the wrong choice, and you're telling me you can't. What's going to happen here is if I make the wrong choice, then you're going to come after me." He said, "That's true."

Again, I had a discussion with Judge Rosenblatt about that. When he became Chief Administrative Judge, he formed this committee so that judges had a place to go where they could get confidential ethics advice, and we've been doing that for 29 years now.

John Caher: It seems like there was a real need. As you pointed out, you could not consult with your colleagues, nor could you consult with the Commission on Judicial Conduct. There was a real void, wasn't there?

Judge Marlow: About eight years after the committee was formed, so in the mid-'90s, the rules went under some revision, and we decided to amend that rule and say that you can talk basically with your law clerk and other judges. Now it's within the rules and it's fine to do it, and judges talk to each other all the time. I'm sure they did before that, because nobody knew that that

was the case. I think most judges didn't realize they couldn't talk to each other about their cases, but obviously now they know they can.

John Caher: How and why did you get involved in this endeavor?

Judge Marlow: Well, Judge Rosenblatt created the committee and they held their first meeting, I think it was in September of 1987, and about a week or two after the meeting, he called me up and he said, "You know, I formed this committee, and I think you would really enjoy this work." I said, "Well what do they do?" He explained it to me. He says, "I think you would love being on this committee." I said, "You know something? I think I would too," so he appointed me. I've been on the committee ever since.

John Caher: Apparently he was right.

Judge Marlow: Yes. I have to tell you, I retired from the bench in 2009 and the Chief Judge asked me if I wanted to stay on as chair of the committee, and I said to him, "Well, what would the salary be?" He started to laugh. I said, "You know, I didn't have enough time to do community service when I was a busy judge, and with a large family, but now that I'm going to be retired, I'd be happy to serve the judges of the state of New York and their wonderful community and I'd be honored to serve them pro bono," which is what I've been doing.

John Caher: Now, do other states, or even the federal judiciary have similar committees?

Judge Marlow: Yes, they do. Federal judiciary has something for federal district court judges, which is the trial court in the federal system, and for the US Court of Appeals. The Supreme Court, they're not governed by the same rules that the lower courts are in the federal system. I don't know if Supreme Court judges consult this committee. They probably have the right to do that if they have an ethics issue that they're not sure about, but the committee, I think is set up for the Court of Appeals judges and the federal district court judges.

I think the Supreme Court pretty much make their own rules as to what they think is proper for them. One of the reasons for that is, for example, if a judge needs to recuse himself in the Court of Appeals or the federal district court, there's always another judge that can take over. In the US Supreme Court, only the US Supreme Court judges can hear cases and make decisions. If somebody recuses themselves, that means there's going to be one less judge. That's obviously a negative thing if it's not a full

complement of nine judges deciding a case. They recuse themselves I think less frequently than other judges do because they realize nobody can stand in and hear the case for them.

John Caher: That's interesting. I hadn't thought about that. Of course, I know that with the New York Court of Appeals, if it's shorthanded they can always vouch someone in from the Appellate Division, but the Supreme Court cannot elevate someone from the federal Court of Appeals.

Judge Marlow: That's right. My understanding is that cannot happen, and so they are very, very careful about when they're going to recuse themselves. I think it's a rarity when they do. I really never kept statistics or read anything about it, but I would suspect that it's a rare thing.

John Caher: I think it is very rare. Now, turning back to your committee, do you offer any training programs for judges?

Judge Marlow: Sure we do. We used to do more training years ago before the budget crisis in 2009, but we still do some. We do some in different districts around the state, we do broadcasts from the Judicial Institute and we do a training program for brand new judges —I call it the “Rookie Judge Seminar.” It used to be in December, about a month after the election, but now they've moved it to the first business day in January, usually on a Monday. Usually, it's about a three or four day program, and usually the ethics piece is on the first day.

Then we also have a program for those newly elected judges who have to close down a law practice, and there are special ethics rules with respect to that. We do a seminar the end of November, usually a few weeks after the election, so that the lawyers who are going to become judges in a few weeks know how to handle the winding down of their law practice and what to watch out for, and how to transfer cases to other people, and escrow accounts, and all that kind of stuff.

John Caher: Now, you don't have any enforcement or disciplinary powers, do you?

Judge Marlow: No, we're the exact opposite of the Judicial Conduct Commission. Their role is to investigate judges and discipline them if it's appropriate, and they don't give out ethics advice to people, as I explained to you before. That's the reason why our committee was formed, because with a commission like the Judicial Conduct Commission that that is very active, judges need to have another reason to be more careful about complying with the ethics rules. Our sole function is to encourage judges to contact

us whenever they're unsure about an ethics issue that confronts them, and we give them ethics advice. Sometimes we have to do some research in order to give them an answer.

We have two ways of giving them advice, other than by conducting seminars. One is if they write to us — this is all on our website about how to contact us. We get, I would say, an average of 200 inquiries a year asking us ethics questions, and we respond to almost every single one of them with a written opinion, which gets published. It's available online and anyone can look at our opinions, whether they're judges, lawyers, or anyone else.

There's a presumption written into the Judiciary Law, which basically says if a judge contacts our committee in writing and we respond to them with ethics advice in writing, and they follow that ethics advice, they are presumed to be acting ethically, and the Judicial Conduct Commission will cease to investigate them for the conduct that they're talking about if they followed our advice.

Now, the Judicial Conduct Commission has said they will honor that presumption because of the statute, but the facts have to be identical in order for them to feel bound to follow it. I've always told judges when they call me, even if we have an opinion that sounds like it's appropriate for them to follow, if the facts aren't identical, I always advise them, "Just write us a brief letter, and then the committee will decide whether your facts are covered by a prior opinion and we'll send you that in the mail, and that will cover you for the presumption."

John Caher: Now, with a committee that large addressing issues which, by their nature, are probably a close, close call a lot of times, there must be times when the committee members disagree.

Then what happens? Is it just a majority rules deal?

Judge Marlow: Yes. The committee is set up with 27 people. It used to be less, but as the committee's work grew, more people were added. It started off with 17 judges, and over the last 29 years they added a few here and there and now it's 27. At any given meeting, as long as there are at least 14 judges, which is a majority, as long as there's 14 judges there, they can vote to say yes or no to whatever the question is. Then of course, if there are only 14 people there, then it has to be unanimous among the 14.

John Caher: I understand.

Judge Marlow: But normally, I never really kept track of this, but my sense is ... I've gone to almost every single meeting over the last 30 years. I probably missed about 8 or 9 meetings. We meet 7 times a year, so if you multiply 30 times 7, it's 210 meetings when it becomes 30 years. I've probably missed maybe 7 or 8 meetings over that period of time. My sense is that we have an average of anywhere between 18 to 22 people at any given meeting. Usually we get somewhere between 25 and 35 inquiries at each meeting and we have to try to vote on all of them.

Sometimes we can't reach a conclusion and we have to defer it to the next meeting. Let's assume there's 20 people at the meeting. If we don't get 14 votes, then we can't publish an opinion because there's a stalemate. I think that has only happened perhaps twice in the history of the committee. It could be three or four times, but it's very rare because what I try to do as chair. If I see that they're at loggerheads with each other and we can't get a majority, I try to offer compromises to them that might be comfortable for them to agree to. That often works.

John Caher: But if there is a stalemate, I guess the best course of action for the judge is to not do whatever he or she was asking about, if possible.

Judge Marlow: Occasionally, it happens on the committee where at least at first, there's a stalemate. It's my job as chair, and of course other people in the committee can suggest ways of compromising, and usually that works. It's a very, very unusual situation where we have to tell a judge who wrote to us that, "We can't reach a majority, I'm sorry." Then my advice to them is, "You'd probably be taking at least a small risk if you do what you asked us to do in a situation that's this controversial."

John Caher: Now, after 200 meetings and some 5,000 inquiries, I imagine you've seen some recurring themes or similar issues that judges confront, maybe with different nuances.

Judge Marlow: That's true. One of the biggest ones is when judges become judges, usually they were either public lawyers first or in private practice before they became judges, and over the years they've been maybe active in a bar association, and they have friends who are lawyers. All of a sudden, they put on a robe and they go to court and they have a calendar, and people who are lawyers that they may have had some sort of a relationship with, whether it's their former partner or an associate that

worked in their law office, or somebody they have a close personal friendship with, those kinds of things are probably among the most common questions we get asked, because judges are nervous about that.

One of the things I always tell them is that when you're not sure about whether or not you should disclose this relationship or disqualify yourself, the best thing to do is to be open with the parties in open court and explain to them whatever the relationship is so that they can decide whether you should remain on the case. You have to realize that friendships take so many thousands of forms and can vary a little bit from one to the next that it is very hard for them sometimes to figure out whether they had to recuse themselves.

In 2011, we got an inquiry from somebody and we decided that we were going to write a comprehensive opinion, and we set out three categories of friendships with lawyers that either didn't require recusal or did require recusal or something in between. They were divided into three categories, these relationships.

Number one, which was the most mild form of relationship, we called an "acquaintance." We defined that basically as somebody that you have had dealings with on a sort of an accidental basis, like you would go to the same church as they do and you would see each other once in a while and say hello, or you would see each other at bar association meetings and maybe you sat at the same table having lunch at the meeting with them, and that might've happened once a year or something like that.

The fact that they appeared in front of you frequently as a lawyer probably doesn't require recusal because that's what judges and lawyers do. That's not part of it. It's when the outside coincidental encounters create a situation where judges are not sure exactly where they stand. The way we defined it is if the relationship is the result of coincidences, like the ones I described to you, and certainly many others — you see each other in the supermarket and you say hello — that kind of stuff is not the kind of thing that you even have to disclose at all. You just go about your business as a judge and do what you think is right with the case.

The second category is social friends, close social friends. These are people that you may have some kind of a relationship with. For example, you may have gone out to dinner with two couples once or twice over the last ten years, or you may play golf together once or twice a year, things like that where it's not coincidental, but it's also not on a regular basis and it certainly doesn't involve the exchange of confidences or anything like

that. In that situation, we tell judges to make a disclosure and then see what the parties want to do, and then, based upon what you hear them say, you can decide whether you should stay on the case or not.

Then of course there's close personal friendships, where your spouses may be very close friends who exchange confidences with each other, or you and the lawyer are very close friends. To me, the key part of that is either some sort of financial relationship with a lawyer or some confidential relationship with a lawyer where you share family issues with them and ask their advice, that sort of thing. Those are situations where you must disqualify yourself, but it's called a "disqualification that's subject to remittal."

The expression "subject to remittal" means that the parties can, if they wish, waive any objection because they trust the judge. If both sides agree that this is not something that they want to change judges for, they feel this judge is trustworthy and that he'll do the right thing or she'll do the right thing regardless of the friendship with one of the lawyers, then as long as the clients and the lawyers agree to that on the record, then the judge can sit on the case, assuming, and the rule says, even after all that, even after there's a consent, the rule also says "*and the judge is willing to serve.*"

Now, judges sometimes ask me, "What does that mean?" I'll say to them, let's suppose you have a neighbor two doors away from you, and every morning you walk your dog. Some mornings you see this lawyer who lives two doors away from you and you have conversations with him because you're neighbors. You talk about common neighborhood issues. You may talk about your families, and you have sort of a close relationship with that person. You raise that in court, you let both sides hear it all, and then they say, "Well, we trust you judge."

You think to yourself, "You know, if I rule against this neighbor, I'm going to feel very uncomfortable walking by his house every morning with my dog because he lost a \$1 million lawsuit over my decision." You're just not willing to have that neighbor relationship interfere with your job and your relationship with him, because he's a neighbor and he's not going away. As long as you don't do this frequently, you can say, "I'm still recusing myself regardless. I feel uncomfortable sitting on a case." As long as you don't do that frequently, it's okay. Judges understand that. That's basically the way we put it.

John Caher: What if you do do it frequently? Is that a problem?

Judge Marlow: Then that's an act of misconduct if it's willy-nilly. Let's suppose somebody writes the Commission [on Judicial Conduct] and makes a complaint about a judge who they claim recuses himself for no good reason. If it happens once, I think they'll not bother with it, but if they see a trend in the judge's career where he recuses himself willy-nilly for silly reasons ...

I'll give you an example. I once encountered a situation when I was a Supreme Court judge where nine lawyers all of a sudden appeared on my doorstep, and they had a case pending in another court. The judge recused himself because one of the lawyers, when they were both young lawyers in private practice, had separate offices, completely separate firms, but in the same building. The judge said, and this was the only thing the judge wrote in the recusal order, "Lawyer X occupied an office in the same building as I was when I was practicing law and I'm therefore recusing myself." They had no other relationship.

Now, so far as I know, that was the only time I ever knew that there was a silly recusal, but if that kind of thing happened on a frequent basis where judges were recusing themselves and shifting people around to different judges, that would be an act of misconduct that the Commission would investigate.

John Caher: Interesting. What are the most potentially treacherous waters for judges? When should they be especially cautious?

Judge Marlow: I'm going to give you what I call "Marlow's Seven Rules." I tell judges when I do seminars that if you follow these Seven rules, you'll probably never get investigated by the Commission on Judicial Conduct. Here's the way it goes:

If you're confronted with a situation where whether or not you should recuse yourself involves money, business, or commerce, meaning your own money and financial dealings that you may have in your private life, or business dealings that you may have in your private life, or commerce, it doesn't mean that that's completely unethical to engage in it. There's certain types of things you can do involving money, business, or commerce, but it's very limited. If it involves that, that's rule number one.

If it involves politics in any form whatsoever, that activity is the second activity that's a red light that goes on. Three, if the activity that you want to engage in involves extrajudicial activities in the community, like being on the board of directors of various organizations, or let's say you're on

the board of directors of a hospital and you're a Supreme Court judge who does malpractice cases where hospitals are often involved, that kind of thing can create a conflict of interest for you. If it involves any kind of extrajudicial activities in the community outside of your judicial role, you should stop and think about that also.

Four, if you're being asked to recommend anybody or anything in writing, or even orally, or to be a character witness for anybody, that's another caution light that should go on. The fifth rule, if you would not want to see or hear yourself saying it or doing it on the 6 o'clock news, or if you would not wish to have the world hearing or seeing you say or do it on the internet or on YouTube, you better stop and think about it.

If it just doesn't feel right in your gut, you should check the rules, you should do a little research on our opinions, and if you don't find an answer in a relatively short period of time, here's our phone numbers and we have a group of four people who answer phone calls from judges. Usually in less than 24 hours, we give them an answer that they can trust.

Sometimes the answer is, "Yes, you can do it, we have old opinions that say it's okay." Or, "You cannot do this, we have old opinions that say you can't do it or the rules say you cannot do it." Or, if we're not sure because there's no opinion in the roughly 5,000 opinions we've written over the years, then we say to them, "The best thing to do if you have the time is to write to us and we'll give you a written answer. If you need the answer as quickly as possible, you can call us the day after our next meeting and we'll tell you what the committee voted." Then you'll get a formal opinion several weeks or a few months later.

One of the reasons why it takes a while to get the opinions out is because we don't have a huge staff, so some opinions go out relatively quickly, and some that require more work will take a little longer. If a judge tells us that he or she needs a written answer right away because they have to show it to somebody, then we will try our best to put it on the top of the pile and get it out in a few days.

John Caher: I think number two was politics, and I believe there's a whole subcommittee, the Judicial Campaign Ethics Center, devoted to that issue, right?

Judge Marlow: You are correct. I appointed five judges, who are regular members of the Committee, to the subcommittee, and their job is to answer judicial

campaign ethics questions. The way the procedure works is really very simple. They have a phone number they can call, and Sandy Buchanan is the director of this program. She's a lawyer on our committee. The judge gets instructions on how to email a question to her, and then she quickly distributes it to the five members of that subcommittee. Usually within 24 hours, she gets a response, a vote, and as long as three out of five say you can do it or you should not do it, that's the end of it and she writes a short opinion and distributes it by email. The whole process usually takes two or three days.

John Caher: That's very quick.

Judge Marlow: Yes. Judith Kaye, when she was Chief Judge, appointed me to what was called the "Feerick Commission," which was set up to reform judicial election laws and rules. One of the reforms that was raised at one of our meetings in the Feerick Commission was to have a campaign ethics committee answer questions just like the regular ethics committee does.

I raised my hand during that discussion and I said, "Look, I'm chair of the Advisory Committee, and I don't want to have a separate committees writing decisions that are going to be at odds with our decisions. It's going to just create confusion." I said, "We can set up a subcommittee that can handle this very well. I would hope that the recommendation will be that the ethics committee will have a subcommittee to deal only with this exclusively." That's what they decided, and we set it up in 2003.

The final thing about it that's really good is not only that they get quick answers, because you have to get quick answers in a campaign, but I entered into a written agreement with the Commission on Judicial Conduct, because after this recommendation was adopted by the OCA, I called up the administrator, Robert Tembeckjian, and I told him about it. I said, "I would like to enter an agreement in writing with the Commission and our Committee. The judges who get a written response by email from this subcommittee will also get a presumption that they are acting ethically if they follow that opinion."

He said, "Well, but that's not a full committee opinion." I said, "Well, that's true. But, it is a group of five responsible people who are experienced in ethics now and I think we ought to try to make a compromise here." The written agreement was that if a judge follows one of these email opinions that he or she herself asked for, it only applies to the judge who asked the question. When the judge gets the answer by an email, the judge is entitled to a presumption that during that same

election cycle, he or she is presumed to be acting ethically if they follow that email opinion.

If they have another campaign in the future, even if it's the following year, they have to ask the question all over again because the email opinion only protects them during that specific election cycle.

John Caher: I know there are a million variables in this, but just broadly, what can judges do and what can they not do while seeking re-election? And are the rules any different for someone who is not an incumbent and not yet a judge?

Judge Marlow: First of all, the rules are the same for them. There aren't any significant exceptions that are imposed upon lawyers who are trying to become a judge as opposed to judges who are running for re-election or who are running for a higher judicial office. Basically, it's almost all the same. The big, big questions are this: Number one, you cannot ask people for money as a judge. You have to set up a committee — the rules say "of responsible adults" — who will open a bank account, and the committee of responsible people will, in whatever way that's appropriate, they can ask the public for donations.

Obviously, they can ask lawyers because lawyers have the greatest interest in the selection of judges because they appear before the judges all the time, and the lawyers who are acting in good faith want somebody who's competent and polite and all the qualities that we would like in a judge, and knowledgeable. That motivates most lawyers to contribute to judicial campaigns. However, there are also opinions from our committee that say that the campaign committee cannot share with the judge who the contributors are. You might ask the question, "Well, judges have fundraisers. They have gatherings, cocktail parties, and things like that."

John Caher: Right, and presumably they can have their eyes open when they're there.

Judge Marlow: Exactly. That's true, but the answer to that is that it would be extraordinarily impolite, in my opinion, to tell judges that they can't come to their own fundraiser and publicly thank the people who came to the event. That's number one. Number two, judges would probably learn who came to the event anyway because people will tell them that they came to the event. They're going to learn about it somehow. Maybe not everybody who's there, but certainly some people. They will at some point learn that certain people were there.

Finally, in my own experience, I had five campaigns. I won two campaigns as town judge, and then I ran for Family Court, got elected, ran for County Court, got elected, ran for Supreme Court and got elected. If you asked me a few months after the election season was over who was at my fundraisers, I probably could count on one or two hands who I remember being there, because it's all a blur. You go to so many functions when you're running for judicial office, or any office for that matter, it's very hard to keep straight who was at your event and who was at some other event unless something peculiar happens. But as time goes by, after six months or a year, if somebody asks me who was at my fundraisers, it was a blur. It was just a blur because I went to probably 100 or 200 events during my Supreme Court race, for example. I had to cover five counties, and it was a year-long project.

As a practical matter, I think it's a non-issue. They did reform the rules in one respect. The clerk of the court will have a list of who gave a particular judge \$2,500 or more. If that lawyer brings a case to court or an individual suing somebody and is represented by a lawyer but the individual donated that kind of money to a campaign, there's a rule that says the clerk cannot assign that case to the judge who received the money for his campaign. They have to give it to a different judge. That rule lasts for two years, and after two years, then whoever's next in line will get the case, regardless of contributions.

John Caher: Are there any particularly timely hot button judicial ethics issues right now?

Judge Marlow: Yes. As you may know, there's a constitutional convention being considered.

John Caher: Indeed. There will be a vote in November 2017 on whether to hold a constitutional convention.

Judge Marlow: Yes. We've gotten a few questions about what they're allowed or not allowed to do. There is a rule that says judges can run to be a delegate to the constitutional convention. Judges have been asking us, "When can you get started?" And things like that. "What am I allowed to say publicly? What am I not allowed to say publicly?"

We've been reminding judges that at this point that there hasn't been any finality to the notion that there's actually going to be a constitutional convention.

John Caher: Not at all. In fact, that's what we will vote on in November of 2017, and until and unless we say yes then, then the delegate issue doesn't arise.

Judge Marlow: Exactly. At some point we're going to get a question, "When does it arise?" We'll answer the question, and most likely it'll be once the vote of the public is in favor, then that would probably be the time that they can start campaigning to become a delegate. Then we'll have to grapple with the issues of what issues can they discuss in public? What is off-base, if anything? I don't think there's any rules about that, so we'll have to deal with that when the time comes.

John Caher: If the time comes. Of course, I think the last time, the last couple of times there was a call for a constitutional convention it got voted down resoundingly.

Judge Marlow: Yes. I would say that the subject that probably gets more phone calls and written inquiries is the whole subject of disqualification and recusal because every judge faces that issue, and usually on a relatively frequent basis. By that I mean at least between six and 10 times a year, depending on the community. Obviously if you're in Manhattan and you're a judge where there's so many people that live there, it's going to happen probably less frequently.

John Caher: Oh, sure, and in a small, insular legal community like Albany, it's going to happen often.

Judge Marlow: Or even smaller. Suppose you have a place like where I went to college at St. Lawrence University in St. Lawrence County. There was only 4,800 people in the whole town.

John Caher: And six lawyers.

Judge Marlow: Probably. It's really amazing because this is one of the beauties of the committee. When it was first formed in 1987, fortunately the people that were appointed by the administration of the courts appointed upstaters

and New York City people and suburban judges. There's only judges on the committee, by the way.

Anyway, when the committee was first formed, there was a sprinkling of judges from around the state in different types of communities. When we started getting inquiries and we started talking about recusal, the New York City judges would be the first to say, "You have to recuse yourself if somebody comes in the court that you know." The upstate judges would say to them, "We can't observe that kind of a restriction because we know so many people in the community. It's not like New York City."

We had these conversations at least two or three times a year, and of course we resolved it one way or the other each time, but they were much more nervous about knowing somebody who was involved in a case than we would. If I had to recuse myself just because I saw a familiar face when I was a Town of Poughkeepsie judge, I would be recusing myself all over the place.

John Caher: Sure.

Judge Marlow: The standard, it's an unwritten thing, but the standard is a little bit more liberal in small communities. Judges in New York City, if they feel uncomfortable, and they don't do it frequently, it's okay, because the worst thing that's going to happen is that the people are going to get an impartial judge instead of the judge who first got the case.

By the way, there's another situation here that I want to mention. That is sometimes, not often, but sometimes, a judge will know that he has to recuse himself and wishes to do so, but because there is some factual scenario that he or she wants to keep private for whatever reason, we've told judges that the best way to handle a disclosure is to disclose the salient facts and let the parties decide whether they want you to stay on the case.

But, and this is the example I give at every seminar I do, I say to them, let's suppose that you were dating a lawyer. All of a sudden, you have an unhappy breakup. Six months later or eight months later, all of a sudden he or she walks into court representing a client and you feel very uncomfortable presiding over that case because of that unhappy breakup, but you don't want to disclose it in public. You can't disclose it in private because you're supposed to do things in open court.

What's the solution here? You don't want to compromise the privacy of the lawyer's life and your life. In a small number of cases, there's no reason why they need to know your private business, because you're going to recuse yourself anyway. The worst thing that's going to happen if you don't disclose the reasons is that they're going to get another judge who will be impartial. Nobody's suffering except maybe a two week delay.

I tell judges when you draft the order, just say, "I hereby recuse myself in the above captioned case. Period." If they ask you the reason, you tell them, "Look, the ethics committee has said that if it's a private matter, the worst thing that's going to happen is you're going to get another judge, and I feel very uncomfortable sitting on this case, but I'm not going to disclose the reasons because in a situation like this, the committee has said I need not disclose it. I normally have to disclose the reasons, but when I know I'm not going to sit on the case, and I'm not going to sit on this case, I don't need to give the reason if it's embarrassing or so private that it shouldn't be disclosed."

John Caher: Sure. I noticed the Court of Appeals judges recuse themselves occasionally and never give an explanation.

Judge Marlow: Exactly, and when I was in the Appellate Division, we used to circulate a memo, "I hereby recuse myself from the above case. Period." Nobody ever knew the reason, and we never disclosed it to each other.

In one instance, my daughter was going to argue a case in front of the panel I was on that day, and so I circulated a memo saying I recuse myself from the above case, and as soon as her case was called, I just got up and walked out of the room. As soon as the case was over, I came back and I sat for the rest of the calendar.

One of the judges asked me at lunch that day, "Why did you recuse yourself in that case?" I said, "Well, didn't you see the lawyer's middle name? Her name is Lisa *Marlow* Wolland. She's my daughter."

Well, it turned out that one of the judges really gave her a hard time. It was on a Friday, and when he saw me on Monday morning as he was walking into the courthouse, he said to me, "Somebody told me that one of the cases Friday was being argued by your daughter." I said, "That's correct. That's why I got up and left the room."

He says, "You know, I really gave her a hard time." I said, "Well, you did what you did."

He said, "You should've told me it was your daughter." I said, "No, I should not have told you it's my daughter because you would then think I wanted you to treat her differently from however you want to treat lawyers. That's improper and I wasn't going to do it. She's a big girl, she can take care of herself, and she did."

That's the reason why we don't give a reason. We don't want the other judges to think when we recuse ourselves that we're giving the reason so they can take that into account when they make their decision. It's none of their business and it shouldn't be at all in their mind. They'll do what they have to do based on the law and the facts and that's it.

John Caher: We don't have much time left, so why don't we just wrap it up with one more question. How would you like to see the committee evolve and develop going forward?

Judge Marlow: Well, one of the things that really is important to us is that over the years the committee will have new people coming in on a regulated basis. So the committee always has a vibrancy to it, so we get new and fresh ideas in the committee with younger people. That's very important to me, but it's also important to me as the chair of the committee that we have institutional memory. I want judges to be able to stay on the committee long enough so that they develop institutional memory and we don't make mistakes when an issue comes up and nobody in the room knows

about our prior discussion. We can do the research and see what we've written in the past, but sometimes people remember the discussions and why we did what we did, and it may not be clear in the opinion that we wrote. So, it's important to retain institutional memory. Those are two competing goals, fresh blood and institutional memory. They're two competing goals that are basically balanced now and should continue that way.

John Caher: You've certainly got the institutional memory.

Judge Marlow: The other thing is that we would love ... Ever since the budget crunch in 2009, we've been trying to get another full-time lawyer so we can get the opinions out faster, and we've had to tolerate the fact that the budget is the budget, and someday when the budget is in better shape than it was in 2009 and the administration can give us another lawyer, they will. We're doing pretty well now. We've caught up. We were very far behind a few years ago, and now pretty much within three to five months, all the judges who ask the question at a particular meeting will have their opinion. A great majority of them will be well before three months.

John Caher: That's terrific. That's a great record.

Judge Marlow: Well, I'd like the record to be better. When we were first in business back in the late '80s, they used to circulate all the opinions that were written from the last group of inquiries, they would circulate them with the new inquiries for the next meeting, so all of the opinions were done within six weeks.

John Caher: Wow!

Judge Marlow: It was terrific, but they were shorter opinions at that time, they weren't quite as detailed, but they gave the judges the answers they needed. Now we write a little bit more to do a better job of explaining it to the judges. I'd say our average opinion is about 2 pages, maybe 2.5 pages, which is not too long for people to read.

One of the things I always tell judges is that we have a digest on the top of the page which basically gives you a blurb as to what the opinion is about, and I always caution them. If they need to rely on that opinion, they'd better read the whole opinion because not everything is in that digest. That digest only tells you you're on the right street. It doesn't tell you about all the houses on the street. It just tells you you're in the right place.

Now start reading!

John Caher: Thank you for listening to this edition of Amici. If you have a suggestion for a topic on Amici, call John Caher at 518-453-8669 or send him a note at jcaher@nycourts.gov. In the meantime, stay tuned.