

**ADVISORY COMMITTEE ON JUDICIAL ETHICS**  
**c/o OFFICE OF COURT ADMINISTRATION**  
**187 WOLF ROAD, SUITE 103**  
**ALBANY, NEW YORK 12205-1138**

**Opinion 15-85 Amended**

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845-454-2125

**April 23, 2015**

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**Amended July 27, 2015**

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THOMAS J. SHEERAN  
MARGARET T. WALSH

**CHIEF COUNSEL**  
MARYRITA DOBIEL  
518-453-8650

**SPECIAL COUNSEL**  
EDWARD P. BORRELLI  
914-824-5329  
RAYMOND S. HACK

**STAFF COUNSEL**  
ADINA C. GILBERT  
JULIANA MAUGERI  
JOHN SULLIVAN

**TOLL FREE 1-866-795-8343**

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**JUDICIAL CAMPAIGN  
ETHICS CENTER**

**STAFF COUNSEL**  
LAURA L. SMITH  
**TOLL FREE 1-888-600-5232**

**Digest:** A judge may review a defendant's driving history before accepting or rejecting a proposed plea agreement. The judge is not ethically required to disclose the contents of the driving history if he/she has reviewed the document under legally appropriate circumstances.

**Rules:** Criminal Procedure Law §510.30(2)(a)(i)-(viii); Judiciary Law §212(2)(l); 22 NYCRR 100.2; 100.2(A); 100.3(B)(6); 100.3(B)(6)(e); 101.1; Opinion 09-96; *People v Selikoff*, 35 NY2d 227 (1974); Joseph R. Carrieri, Practice Commentaries, McKinney's Cons Laws of NY, Book 62A, VTL 1805; NY Bill Jacket, 2001 SB 1992, Ch 406, Memorandum in Support.

**Opinion:**

The inquiring judge, who serves in a Town or Village Court, asks whether he/she may review a defendant's driving history before accepting or rejecting a proposed plea agreement in a Vehicle and Traffic Law matter. The judge explains that, without this information, he/she could end up "accepting or rejecting the prosecutor and the defendant's proposed agreement without any information other than what is contained on the ticket or supporting deposition."

A judge must always avoid even the appearance of impropriety (see 22 NYCRR 100.2) and must always act to promote public confidence in the judiciary's integrity and impartiality (see 22 NYCRR 100.2[A]). Therefore, a judge must accord every person with a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law (see 22 NYCRR 100.3[B][6]); and generally is prohibited from initiating, permitting, or considering ex parte communications or other communications made to the judge outside the presence of the parties or their lawyers concerning a pending proceeding (*id.*). However, a judge may initiate or

consider ex parte communications when authorized by law to do so (see 22 NYCRR 100.3[B][6][e]).

The Committee has previously advised that a judge may consider a defendant's criminal record and/or driver's abstract during an arraignment for the purpose of setting bail if the judge is authorized by law to do so (see Opinion 09-96, citing CPL §510.30[2][a][i]-[viii] [defendant's criminal record is one factor court must consider when determining whether to set bail and amount of such bail]).

The Committee notes that the current motorist's abstract or driving history was a modern, computer based replacement for the previous "conviction stub" portion of the driver's license. The conviction stub was a separate piece of paper to be surrendered to the court, upon conviction, for both review of the defendant's driving record for enhanced fine, license suspension, license revocation or other sentencing determination and for recording, in ink, the current conviction so that any future judge would be aware of this conviction as a potential predicate conviction for future sentencing purposes (see Joseph R. Carrieri, Practice Commentaries, McKinney's Cons Laws of NY, Book 62A, VTL 1805; NY Bill Jacket, 2001 SB 1992, Ch 406, Memorandum in Support). By contrast, the current driver's abstract is available to any individual as a Department of Motor Vehicles public record.

The Committee further notes that the Court of Appeals stated: "Thus, any sentence 'promise' at the time of plea is, as a matter of law and strong public policy, conditioned upon its being lawful and appropriate in light of the subsequent presentence report or *information obtained from other reliable sources*" (*People v Selikoff*, 35 NY2d 227, 238 [1974] [emphasis added]).

From an ethical perspective, therefore, the Committee concludes that reviewing a driver's abstract, for bail and sentencing purposes and before accepting or rejecting a proposed plea agreement, is not an impermissible ex parte communication under the Rules Governing Judicial Conduct (22 NYCRR 100.3[B][6]). Therefore, a judge is not ethically required to disclose the driver's abstract to parties or counsel before taking the abstract's contents into consideration in legally appropriate circumstances.

The Committee cannot, however, comment on any legal questions (see Judiciary Law §212[2][1]; 22 NYCRR 101.1).