JUDGES REPORTING ATTORNEYS: ETHICAL ISSUES FOR THE BAR

Hon. Richard A. Dollinger

Acting Supreme Court Justice

New York Court of Claims

University at Buffalo School of Law/Monroe County Bar Association

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A judge who has information indicating a "*substantial likelihood*" that a lawyer has committed a "*substantial violation*" of the Rules of Professional Conduct must take "*appropriate action*."

If the misconduct is so serious that it calls into question the attorney's *honesty, trustworthiness, or fitness* as a lawyer, the judge *must report* the conduct to the appropriate disciplinary authority.

THE GOLDEN RULE

JUDGES AND ATTORNEYS 22 NYCRR 100.3[D][2]

Finer Print in the Golden Rule

- Reporting is mandatory if a judge concludes that an attorney has threatened to file a complaint against the judge in an effort to unduly influence the judge's judicial determination or that an attorney deliberately sought to deceive the court and acted extremely unprofessionally in defiance of court directives.
- Each individual judge is, of course, in the best position to assess whether he/she has received information that is sufficiently reliable to meet the "substantial likelihood" prong. Indeed, if a judge has "no direct personal knowledge whatsoever" about an attorney's purported misconduct and believes the information he/she has is mere rumor, gossip, or innuendo, or is otherwise not sufficiently reliable or credible to warrant further consideration, the "substantial likelihood" prong is not met, and the judge is *not ethically required* to take any action at all, although he/she may do so in his/her sole discretion.
- However, if an inquiring judge concludes the "substantial likelihood" prong is met, in our view, the overall conduct described seriously implicates the lawyer's honesty, trustworthiness and fitness to be a lawyer and is thus "of a kind best sorted out by an independent agency with investigative capability" Therefore, if an inquiring judge believes the facts as presented to the Committee are true, that judge should *report his/her own knowledge of the attorney's conduct to the appropriate disciplinary committee* for investigation, unless he/she is satisfied that this specific conduct has already been reported (see Opinions 14-162[A]; 09-49).

Finer Print in the Golden Rule

- If any judge decides to make a report, that judge must *disqualify him/herself* in all matters where that attorney appears while the disciplinary matter is *pending and for two years thereafter*. During this period, remittal is not available unless the attorney waives confidentiality or the grievance committee issues a published opinion
- Even if a judge concludes that he/she is not ethically required to report the attorney, he/she may nonetheless exercise his/her discretion to report the attorney, if he/she wishes to do so, even if this will result in disqualification of some or all judges in the specialized part.

QUICK NOTES ON REPORTING

- SAME STANDARD FOR JUDGES REPORTING OTHER JUDGES . . .
  - The substantial likelihood of substantial violation, then appropriate action.
- Practical consideration – reporting by a judge vs. reporting by a fellow attorney
  - Greater weight to a complaint from a judge?
  - Impact on other judges – the complaint may be confidential, the circumstances underlying the complaint may not be confidential because a judge, and perhaps other judges may know, and other members of the Bar may know – the Hall of Justice has never been described a citadel of silence.
  - Impact on reputation – of both attorney and judge?
  - Judges tend to err on the side of caution?
  - Disqualification.

SUBJECT TO JUDICIAL DISCRETION

- Note the intensely subjective nature of the rule:
  - What "information" is required? First hand? Courtroom facts? Pleadings? Off the record conferences? Private discussions?
  - "Substantial likelihood?" When does that occur? "Likelihood" is an term of art but, what does it really mean? Does it mean" might have" or does it mean, like preponderance of the evidence, the "occurrence: is more "likely than not?
  - "Substantial violation?" Does that mean that the conduct explicitly violates a rule – perjury – or a statute or that it directly contradicts some other professional standard?
  - *Bottom line: no different than any other decision by a judge -- these are fact intensive decisions by judges in an exercise of discretion, often without truth finding proceedings as a precedent.*

Opinion 10-85 – Attorney as Notary

- In the course of a proceeding, an attorney admitted to a judge that he/she improperly notarized his/her client's signature, purportedly as a matter of convenience. There appears to be no evidence that the attorney did so for any other reason or on any other occasion.

What constitutes “appropriate action?”

- When a judge receives information indicating a substantial likelihood that a lawyer has committed a substantial violation of the Rules, but the conduct does not rise to such an egregious level that it seriously calls into question the attorney’s fitness as a lawyer, the judge has the discretion to take less severe, appropriate measures
- Such measures may include, but are not limited to, counseling and/or warning a lawyer, reporting a lawyer to his/her employer, and sanctioning a lawyer.
- Assessment of whether the lawyer, if confronted by the judge, shows genuine remorse, contrition, or ignorance of a rule; whether the lawyer has any history of unprofessional or other conduct in violation of the Rules; or any other relevant conduct or factor known to the judge . . . . a judge is under no ethical obligation to conduct investigations to determine how serious or minor any misconduct may be.

“Appropriate action?” Judge investigation?

- As an interim measure, the judge may interview the attorney and caution him/her, and may take into consideration how the attorney responds during this interview, in addition to other factors, including any made evident during that conversation. Ultimately, the judge must exercise his/her discretion to determine the appropriate action to take.
- Questions: Should the attorney participate in the interview/questioning? Should the judge advise the attorney beforehand of the investigation? Should the conversation be “on the record?”
- Judges have this power: should they exercise it?

The Committee Addendum to 10-85 – "egregious" v. "seriously calls into question"

- . . . the Committee has come to believe that its prior use of the phrase "*substantial violation*" as a defined term or term of art *may be confusing*.
- For example, judges may feel that an ethical violation is "substantial" simply because it is clear and unambiguous that an attorney has violated a rule, regardless of whether the violation calls into question the attorney's fitness to practice law. And under the circumstances of the present inquiry, *a falsely notarized signature might be said to "implicate" an attorney's honesty to some degree, even though - under the specific circumstances presented - it might not seriously call into question the attorney's fitness to practice law.*
- To address these issues, the original version of this Opinion introduced the term "egregious" to describe which violations must be reported. However, after further consideration, the Committee believes that it is *clearer simply to explain what it means by egregious, i.e., a violation that seriously calls into question an attorney's honesty, trustworthiness or fitness to practice law.*
- The purpose of the reporting requirement is not to punish attorneys for the slightest deviation from perfection, but to protect the public from attorneys who are unfit to practice law. This purpose is satisfied when judges report attorneys after receiving information indicating a substantial likelihood of a violation which is not only "substantial" in a general sense of the word, but which seriously calls into question the attorney's fitness as a lawyer.

Opinion 18-29

Numerous factual allegations about the judge's conduct that the judge knows to be false. The affirmation also contains numerous additional assertions which the judge believes are likely false, and the judge further believes that the attorney, apart from the perjury, may also have separately violated the Rules of Professional Conduct by failing to familiarize himself/herself with applicable court rules and procedures.

Opinion 18-29

[W]hen a judge has substantial knowledge that an attorney has intentionally made false material statements under oath, such conduct calls into question the attorney's honesty, trustworthiness, or fitness as a lawyer, and must be reported to the appropriate attorney disciplinary committee.

Here, where the judge has personal knowledge that the attorney made perjurious statements in an affirmation, the judge must report the attorney to the appropriate attorney disciplinary committee.

Opinion 17-90

- [T]he conduct as described is also clearly serious and egregious because it
- implicates the lawyer's honesty, trustworthiness and fitness to be a lawyer.
- Indeed, this scenario raises the troubling possibility that ... the law firm, through
- one or more of its employees, deliberately sought to deceive the court, law
- enforcement, and the individual in whose favor the order of protection was
- granted, in defiance of court directives, and/or one or more responsible attorneys
- allowed this situation to occur through extreme carelessness in failing to
- supervise their subordinates. While you are, of course, in the best position to
- assess whether your observations and conclusions about the situation are
- accurate, the seriousness of the conduct is "of a kind best sorted out by an
- independent agency with investigative capability."

Opinion 17-90

- A judge learns that a law firm altered an order of protection you issued against their client. At a hearing on the issue, a partner stated the client asked a paralegal to fill out a “form” requested by the police so he/she could access his/her belongings.
- Without ever looking at the document, the associate handling the case told the paralegal to fill out the “form”.
- Since the “form” was, in fact, the judge’s order of protection, the paralegal then altered the order by handwriting a clause allowing the client access.
- The partner acknowledged the seriousness of the misconduct and has revised firm procedures to prevent any recurrence

Opinion 17-90

- The judge inquires:
  - Whether he must report this conduct to the DA's office and, if so, whether this is satisfied by the ADA's presence at the hearing
  - Whether he must report the law firm, partner, and/or associate to the grievance committee and
  - Whether he must take further action

QUESTION NO. 1

- The Rules Governing Judicial Conduct are silent regarding a judge's obligation to report a non-attorney for misconduct (22 NYCRR part 100). Accordingly, we have previously advised that a judge is "under no obligation to report [a non-attorney's] misconduct to any authority, but may do so in his/her discretion" (Opinion 07-144). Because the individuals most directly responsible for altering the order (the client and the paralegal) are not attorneys, you have no obligation to report them to any authority

QUESTION NO. 2

- Conduct as described is also clearly serious and egregious because it implicates the lawyer's honesty, trustworthiness and fitness to be a lawyer. Indeed, this scenario raises the troubling possibility that (a) the law firm, through one or more of its employees, deliberately sought to deceive the court, law enforcement, and the individual in whose favor the order of protection was granted, in defiance of court directives, and/or one or more responsible attorneys allowed this situation to occur through extreme carelessness in failing to supervise their subordinates.
- If you believe the facts as presented to the Committee are true, you should report the conduct to the appropriate disciplinary committee for investigation.

Question No. 3

- A judge has no obligation to investigate the truth of allegations of misconduct.
- Therefore, no further action, other than set forth herein, is required.

Opinion 13-77

- Attorney filed a verified complaint swearing that he/she advised the client that the law suit was settled, when in fact, he/she had discontinued it and paid the purported settlement amount from the attorney's own, personal funds.
- Deception of Client re Settlement Offer.
- The attorney's conduct, as you have described it, seriously calls into question the attorney's honesty, trustworthiness or fitness as a lawyer.
- Therefore, unless you know that the specific conduct you have described has already been reported, you should report the attorney to the appropriate attorney discipline

Opinion 13-61
Attempt to Influence Judge

- The inquiring judge states that an attorney accused the judge of having engaged in improper ex parte communications in a particular case, and threatened to report the judge to the Commission on Judicial Conduct if the judge did not "undo" the judge's judicial decision and "expunge the record" by the end of the day. The attorney characterized the judge's conduct as "illegal and unethical." *On the record?*
- The judge attempted to explain that no such ex parte communications had taken place, but the attorney "continually interrupted" the judge, until the judge finally agreed to "look into it" and to "give [the attorney] a return call later that day if [the judge] found something was amiss." The judge has subsequently reviewed his/her notes and records, and feels confident in his/her judicial decision and the manner in which it was reached.

“Unduly Influence” + “Unprofessional?”

- Reporting is mandatory if a judge concludes that an attorney “has attempted to unduly influence the judge’s decisions and has acted extremely unprofessionally”; “[s]uch conduct, if it occurred as described, directly implicates the attorney’s honesty, trustworthiness, and fitness to be a lawyer”.
- The circumstances set forth here raise strikingly similar concerns. Therefore, if the inquiring judge concludes that the attorney has in fact attempted to unduly influence the outcome of a matter before the judge, *and* has acted in an extremely unprofessional manner, by threatening to file an apparently baseless complaint against the judge, the judge *must report* the attorney to the appropriate disciplinary committee for investigation.

Opinions 05-105,108,109

- Attorney, as officer of a political party, signed an affidavit containing false accusation for use against judge in election campaign.
- An acting justice alleged that a city court judge who was seeking election to the Supreme Court had called the lawyer up to the bench during court proceedings and asked the lawyer to lend the lawyer's name to the judge's election committee list. The allegation is also that the judge persisted with the solicitation after the lawyer objected and reminded the judge that the lawyer was appearing in a case before the judge that day. Around the same time, a different lawyer complained to the district administrative judge that this additional lawyer had been the target of identical conduct by the same city court judge just outside the judge's courtroom. Both lawyers stated the solicitation had persisted until the lawyers acquiesced and allowed their names to be used, fearing that by refusing, their clients' cases would suffer. When the administrative judges met with the city court judge in a "counseling session," the judge "adamantly" denied any solicitation of lawyers in the courthouse and asserted that the judge had "scrupulously avoided" such conduct.

JUDICIAL POLITICS AND "FITNESS?"

- Shortly thereafter, the lawyer who was allegedly solicited outside the courtroom signed an affidavit describing the claimed improper solicitation, which the county chairperson of a political party, who also holds higher office in the state party, read at a press conference. According to the city court judge, this lawyer is a member of the party's county committee, and the affidavit was false
- According to the inquiring city court judge, a lawyer has *lied under oath regarding a judge's conduct associated with the lawyer's case to discredit the judge for political purposes*. This accusation directly implicates the lawyer's honesty and trustworthiness. In addition, the judge's allegation is one of two sets of sharply conflicting, serious accusations ... best sorted out by an independent agency with investigative capability.
- Under the circumstances of this particular case, the Committee, without passing on the truthfulness of the inquiring judge's allegation, believes the judge should refer it to the appropriate grievance committee

WHEN NOT REPORTING IMPLICATES THE JUDGE

- Respondent knew in 2006 that attorney had been accused of taking unauthorized legal fees and the FBI was investigating him, and disbelieved the attorney's explanation. [W]ith the knowledge respondent had in 2006 that his appointee as counsel to the public administrator, had committed acts that "strongly pointed to larcenous conduct" and had "overcharged estates, cheated the PA's office, lied to him and breached his trust"
- Under Rule lO0.3(D)(2), the Judge should have fired the PA and reported him to disciplinary and law enforcement authorities. Instead, respondent failed to report Mr. Lippman's misconduct and permitted him to remain in a position of public trust for three years under an ill-conceived plan to repay the unauthorized monies he had collected, thereby putting the estates under his care at further risk and conveying the appearance of favoritism. Respondent's abdication of his ethical responsibilities, which was influenced by his long and close professional relationship with the PA constitutes serious misconduct.
- CJC PENALTY TO THE JUDGE – CENSURE -- The information in respondent's possession in 2006 also strongly pointed to larcenous conduct on the part of PA. The judge was aware that law enforcement entities were investigating the PA's office and had performed audits of the office. He had a duty to share the information he had with law enforcement authorities. Matter of Holzman, 2013 CJC @ 175

REPORTING OPTIONAL
NOT BAD ENOUGH? How Bad? You Decide.

- All the judges regularly assigned to a specialized part in a multi-part court write to ask about “any ethical issues” involving the misconduct of an attorney who regularly appears in that part.
- Each judge is at least generally aware of the attorney’s extremely rude, malicious and belligerent behavior toward judges and other lawyers; some have personal experience as the target of such behavior . . . one judge has obtained police protection at his/her residence due to apparent stalking. The attorney has also made formal or informal complaints against one or more of the judges. Although their direct personal experience of the attorney differs, all are willing to disqualify themselves, if appropriate. They also note that a judge with administrative or supervisory responsibilities wishes to transfer the attorney’s cases to another county for disposition.

Is the information "Sufficiently reliable?" Opinion 19-35

- Here, each individual judge is, of course, in the best position to assess whether he/she has received information that is sufficiently reliable to meet the "substantial likelihood" prong. Indeed, if a judge has "no direct personal knowledge whatsoever" about an attorney's purported misconduct and believes the information he/she has is mere rumor, gossip, or innuendo, or is otherwise *not sufficiently reliable or credible to warrant further consideration, the "substantial likelihood" prong is not met,* and the judge is not ethically required to take any action at all, although he/she may do so in his/her sole discretion.
- No obligation to report unless "reliable information?" First-hand?

Opinion 18-58 – Reporting on Attorney Health Issues

- The inquiring judge has serious concerns about an attorney appearing before him/her pursuant to a fiduciary appointment, as the attorney seems unable to perform basic functions necessary to discharge his/her responsibilities and is "*disorganized and occasionally distraught" and admittedly "struggling to keep up."*
- For example, the attorney submitted "wholly inadequate" accountings that failed to address issues as directed in a prior court order. The judge and his/her court attorney met with the attorney several times to provide guidance, but the attorney failed to file an amended accounting.
- Further, once the judge suspended the attorney's fiduciary appointment and directed that an accounting be completed and served upon all interested parties, the *attorney failed to comply with the judge's detailed written and verbal instructions on proper service*. The judge has now contacted a bar association's lawyer assistance program about the attorney's condition and, at their recommendation, urged the attorney to seek assistance from the program.

Opinion 18-58 – Reporting on Attorney Health Issues

- The purpose of the reporting requirement is not to *punish attorneys for the slightest deviation from perfection*, but to protect the public from attorneys who are unfit to practice law. Thus, if the misconduct, if true, seriously calls into question the attorney's honesty, trustworthiness or fitness as a lawyer, the only fitting action is to report him/her to the appropriate disciplinary authority.
- But in all other instances, the judge has *discretion to take appropriate measures* short of referral for disciplinary action (see id.). Such measures may include, but are not limited to, counseling and/or warning a lawyer, reporting a lawyer to his/her employer, and sanctioning a lawyer.

Opinion 18-58 – Reporting on Attorney Health Issues

- Here, the judge has taken significant affirmative steps, by suspending the attorney's fiduciary appointment, giving guidance and direction to the attorney, consulting with the lawyer assistance committee, and suggesting the attorney seek assistance from a lawyer assistance committee to rectify his/her apparent problematic condition. Such steps will ordinarily satisfy the judge's obligation to take "appropriate action" but we believe the *described conduct is serious enough* for the judge to also carefully consider if the attorney's conduct rises *to the level of mandatory reporting.*

- To determine this, the judge should assess all the known facts, including but not limited to the judge's *impression of whether this is a single anomalous situation or an ongoing prevailing condition.* If the judge concludes the attorney's condition or conduct seriously calls into question his/her fitness as a lawyer, the judge must report him/her to the grievance committee.

Misprision of felony -- 8 U.S.C. § 4.

Misprision of Felony: Whoever having knowledge of the actual commission of a felony cognizable by a court of the United States conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States shall be fined not more than $ 500 or imprisoned not more than three years, or both.

- the elements of misprision of a felony as the following: 1) the principal committed and completed the felony alleged; 2) the defendant had full knowledge of that fact; 3) the defendant failed to notify the authorities; and 4) the defendant took an affirmative step to conceal the crime

Misprision of felony – applied to attorneys

- Used against attorneys: attorney pled guilty, 4 years probation, large fine – despite his defense that he was bound by attorney-client privilege not to divulge the information
- "A literal reading of the misprision of felony statute leaves open the possibility that one could be prosecuted for having knowledge of the commission of a felony, which one willfully withholds from investigating authorities because that knowledge was obtained under the attorney-client privilege . . . a conviction for misprision of felony could conceivably be based upon an attorney's refusal to divulge privileged information . . .
- While the willful concealment of non-confidential information would involve moral turpitude, the refusal to divulge privileged information is an entirely different matter. A lawyer has a solemn obligation not to reveal privileged and other confidential client information, except as permitted or required in certain limited circumstances as provided in the rules.
- Duncan v. Board of Disc.App., 1995 Tex. LEXIS 14 (Tex. 1995)

How misprision comes to roost against attorneys and judges

- Attorney gets involved in a heated custody case as an advisor to the husband, a restaurateur – he has ex parte communications with the judge in the case, he advises the judge on tactics and decisions, gives the judge information on the husband's business operations to help the judge get a lucrative seafood contract with the restaurateur and he comps the judge for a party at the restaurant
- When questioned by the FBI, he fails to disclose the conspiracy that he and the judge were secretly conspiring against the restaurateur's wife -- judge was not his client
- Later, attorney admitted that he had actual knowledge of the conspiracy by the judge and others to deprive the of her civil rights and failed to report it to a judge or someone in civil authority, and in fact, affirmatively concealed the full extent of his knowledge when he was questioned by the FBI in June 2002.
- Pled guilty, year in jail, supervised parole and $10,000 fine. In re White, 996 So. 2d 266 (La. 2008)

Beware – 8 U.S.C. § 4.

- Beware – attorneys with knowledge of a felony and a failure to disclose it.
- Implication for immigration attorneys? Criminal lawyers? Tax lawyers?
- Used against attorneys and judges:
  - *See* United States v. Scruggs, 691 F.3d 660 (5th Cir. 2012)(lawyers attempting to bribe a judge by, among other moves, offering him a post-retirement job and the associate at the firm was prosecuted because he knew of the scheme)
  - United States v. Baumgartner, 581 Fed. Appx. 522 (6th Cir. 2014)(scheme to bribe a judge and the judge's involvement with a criminal defendant).
  - *See Judicial Ethics: The Obligation to Report Tax Evasion in Support Cases*, 27 AAML Journal 1 (2015)(Dollinger, J.)

QUESTIONS AND MAY BE ANSWERS.