

Committee on Judicial Ethics
Teleconference
Thursday, January 15, 2015

Members present via teleconference: Judge Christine E. Keller, Chair, Judge Barbara M. Quinn, Professor Sarah F. Russell, Judge Angela C. Robinson and Judge Thomas J. Corradino, Alternate. Staff present: Attorney Martin R. Libbin, Secretary and Attorney Viviana L. Livesay, Assistant Secretary.

MINUTES

- I. With the above noted Committee members present, Judge Keller called the meeting to order at 9:32 a.m. Although publicly noticed, no members of the public were in attendance.
- II. The Committee members present, (with the exception of Judge Corradino who abstained), approved the minutes of the December 18, 2014 meeting.
- III. The Committee discussed **Informal JE 2015-01**. The issue presented in this inquiry is as follows: What is the nature of a Judicial Official's obligation when a Judicial Official receives information that an attorney may have committed a violation of the Rules of Professional Conduct?

The attorney reported the following scenario to a Judicial Official in the course of a judicial pretrial hearing and in the presence of opposing counsel:

A client informed his/her attorney about criminal drug activity in the client's home. The client informed the attorney that evidence of the drug activity was in the client's home and had been there continuously for approximately one year. Upon hearing this information, the attorney immediately instructed the client to "get rid of" all evidence in the home related to the drug activity and to "clean out" any evidence of drug activity, including the drugs, from an automobile used by the client's spouse, based on the attorney's understanding that there may have been drug-related evidence in the vehicle.

It appears that the Judicial Official lacks any first-hand knowledge of the circumstances of the suspected criminal activity. There was no indication, under the facts presented, that the attorney was aware of any pending case or criminal investigation related to the drug activity.

Rule 1.2 of the Code of Judicial Conduct states that a judge “shall act at all times in a manner that promotes public confidence in the ... impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge’s honesty, impartiality, temperament, or fitness to serve as a judge.”

Subsection (b) of Rule 2.15 of the Code of Judicial Conduct states as follows:

(b) A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects shall take appropriate action including informing the appropriate authority.

Subsection (d) of Rule 2.15 provides:

(d) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct shall take appropriate action.

Comment (1) to Rule 2.15 explains that subsection (b) “impose[s] an obligation on the judge to report to the appropriate disciplinary authority the known misconduct of ...a lawyer that raises a substantial question regarding the honesty, trustworthiness, or fitness of that ...lawyer.” The Comment states further: “Ignoring or denying known misconduct among ... members of the legal profession undermines a judge’s responsibility to participate in efforts to ensure public respect for the justice system. This Rule limits the reporting obligation to those offenses that an independent judiciary must vigorously endeavor to prevent.”

Comment (2) to Rule 2.15 explains that “[a] judge who does not have actual knowledge that another judge or a lawyer may have committed misconduct, but receives information indicating a substantial likelihood of such misconduct, is required to take appropriate action under subsections (c) and (d), except as otherwise provided in subsection (e).”

Comment (3) to Rule 2.15 provides that “actions to be taken in response to information indicating that a lawyer has committed a violation of the Rules of Professional Conduct” may include, but are not limited to, “communicating directly with the lawyer who may have committed the violation or reporting the suspected violation to the appropriate authority or other agency or body.”

Finally, the Terminology section of the Code provides: “‘Knowingly,’ ‘knowledge,’ ‘known,’ and ‘knows’ mean actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.”

Accordingly, subsection (b) of Rule 2.15 applies where the judge has *actual knowledge* that a lawyer has committed a violation of the Rules of Professional Conduct (“RPC”). In those instances, the judge must report the known misconduct to the appropriate authority if the violation raises “a substantial question regarding the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects.”

In contrast, subsection (d) applies where the judge has “received information indicating a substantial likelihood” that the lawyer has committed a violation of the RPC. Thus, this subsection applies where the judge has received information about a lawyer’s conduct, but does not have actual knowledge of the conduct. In those circumstances, the judge considers whether there is a “substantial likelihood” that the lawyer committed a violation of the RPC. If there is a substantial likelihood of a violation, the judge must take “appropriate action,” which need not necessarily involve a report to the appropriate authority.

Rule 1.2 (d) of the RPC states: “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or applications of the law.”

The Commentary to Rule 1.2 of the RPC entitled “Criminal, Fraudulent and Prohibited Transactions” states that the prohibition in subsection (d):

... does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client’s conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed.

When a client’s course of action has already begun and is continuing, the lawyer’s responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent *or by suggesting how the wrongdoing might be concealed.* (Emphasis supplied.)

Rule 3.4 (1) of the RPC states that a lawyer shall not: “[u]nlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do such act.” The Commentary to this rule notes that “[a]pplicable law in many jurisdictions makes it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen.”

Rule 8.4 of the RPC states, in relevant part, that it is professional misconduct for a lawyer to:

- (1) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (2) Commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;
- (3) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (4) Engage in conduct that is prejudicial to the administration of justice;...

In reaching its decision, the Committee considered New York Judicial Ethics Advisory Opinions 10-36, 10-85, 10-22, 12-180, 13-118 & 14-88 and *United States v. Russell*, 639 F. Supp. 2d 226 (D. Conn 2007).

As discussed above, subsection (b) of Rule 2.15 applies where the judge has actual knowledge of the lawyer’s conduct, the conduct violates the RPC, and the violation raises a substantial question regarding the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects. The Committee concluded that it did not have sufficient information from the facts provided to determine with certainty whether the Judicial Official has actual knowledge of the lawyer’s conduct and whether the lawyer’s conduct amounted to a violation of the RPC. Thus, the Committee was unable to determine whether subsection (b) of Rule 2.15 applies.

However, regardless of whether subsection (b) applies, the Committee concluded that the matter should be reported to the appropriate authority pursuant to subsection (d) of Rule 2.15. Because there is a substantial likelihood that the lawyer committed a violation of the RPC that calls into question the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects, the Committee determined that the only “appropriate action” under subsection (d) is to report the matter to the Statewide Grievance Committee. The Committee noted that in circumstances where the alleged misconduct does not call into question the lawyer’s honesty,

trustworthiness, or fitness as a lawyer in other respects, the judge need not necessarily report the conduct, but may take less severe appropriate measures.

In reaching this conclusion, the Committee considered the approach of New York. Rule 100.3(D)(2) of New York's Rules of Judicial Conduct provides that "[a] judge who receives information indicating a substantial likelihood that a lawyer has committed a substantial violation of the Code of Professional Responsibility shall take appropriate action." New York's Advisory Committee on Judicial Ethics has explained that it is ordinarily left to the judge's discretion to determine the "appropriate action." However, New York's Committee has concluded that where there is a substantial likelihood of misconduct that clearly calls into question the lawyer's honesty, trustworthiness, or fitness as a lawyer, then the only appropriate action is to report the lawyer to the grievance committee. See New York Judicial Ethics Advisory Opinions 14-88 (noting that there had been several instances "where conduct described in an inquiry to this Committee, if true, demonstrated a substantial likelihood of a substantial violation that clearly called into question an attorney's honesty, trustworthiness or fitness as a lawyer and, therefore, at the very least, warranted an investigation by the attorney grievance committee").

The Committee also adopted the position followed in New York that a judge is under no ethical obligation to conduct an investigation to determine how serious or minor any misconduct may be. See New York Judicial Ethics Advisory Opinions 13-118. In addition, the rules governing judicial conduct address a judge's obligations with respect to misconduct by an attorney or judge, and there is no ethical requirement that a judge report criminal activity or other misconduct by litigants or witnesses disclosed in cases before the judge. See New York Judicial Ethics Advisory Opinions 12-180.

The Committee noted that knowingly destroying evidence of a crime, or instructing others to do so, may constitute obstruction of justice, evidence tampering, aiding and abetting, or conspiracy, depending on the intent of counsel or the client, and the potential or actual existence of an investigation or proceeding. See Evan Jenness, Ethics and Advocacy Dilemmas – Possessing Evidence of a Client's Crime, *The Champion* (December 2010).

In evaluating the attorney's possible misconduct, the Committee considered *United States v. Russell*, 639 F. Supp. 2d 226 (D. Conn. 2007). In that case, an attorney (Philip D. Russell) was charged with obstruction (18 U.S.C. § 1512 (c)(1)) and violating the anti-shredding provision of the Sarbanes-Oxley Act (18 U.S.C. § 1519) after he destroyed a laptop containing child pornography that belonged to the choirmaster of his client, a church. In moving to dismiss the indictment, Russell asserted

that he had no reason to believe at the time of his conduct that any official proceeding was either in progress or would ever be instituted. (Unbeknownst to Russell, the FBI had already commenced an investigation into the choirmaster at the time Russell destroyed the computer). The District Court declined to dismiss the indictment, and Russell ultimately pleaded guilty to a charge of misprision of a felony (a federal offense which makes it a crime to fail to report the commission of a felony).¹

Based on the facts presented, and after consideration of the materials outlined above, the Committee determined that there is a substantial likelihood that the attorney committed a violation of the RPC that calls into question the attorney's honesty, trustworthiness, or fitness as a lawyer in other respects. Accordingly, the Committee concluded that the appropriate action was to report the lawyer to the Statewide Grievance Committee for further investigation. Once the Judicial Official reports the attorney, the Judicial Official must disqualify him/herself from all cases in which the attorney appears either as a party or an attorney, both during the pendency of the disciplinary matter, and for a period of two years after the disciplinary matter is fully resolved. Remittal is not available unless the attorney waives his/her right to confidentiality both during the disciplinary proceeding and after it is resolved in his/her favor or unless the grievance committee issues a public disciplinary decision.

- IV. The Committee approved the Regular Meeting Schedule for 2015.
- V. The meeting adjourned at 9:59 a.m.

¹ The Sarbanes-Oxley Act provides that anyone who "knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States" shall be guilty of a crime. 18 U.S.C. § 1519. Following the *United States v. Russell* decision, the Second Circuit concluded that the government need not prove a nexus between a defendant's conduct and an official proceeding in order to support a conviction under § 1519. *United States v. Gray*, 642 F.3d 371, 378 (2d Cir. 2011).

It should be noted that the U.S. Supreme Court is currently considering the scope of the term "tangible object" under § 1519. See *United States v. Yates* (No. 13-7451) (considering whether destruction of undersized fish by a commercial fisherman constitutes destruction of a "tangible object" under § 1519).