

Committee on Judicial Ethics
Regular Meeting
Thursday, December 15, 2022

Committee members present via *Microsoft Teams*: Judge Vernon D. Oliver (Chair), Judge Robert B. Shapiro, Professor Carolyn W. Kaas, Judge Karen A. Goodrow, and Judge Wendy Grispin (Alternate). Staff present: Attorney Viviana L. Livesay (Assistant Secretary) and Carolina E. Marin.

MINUTES

- I. Judge Oliver called the meeting to order at 9:33 a.m. Although publicly noticed, no members of the public were present.
- II. The Committee approved the minutes of the November 17, 2022 Regular Meeting. (Judge Grispin abstained from this vote.)
- III. The Committee approved the 2023 Regular Meeting Schedule, with a change to the March meeting date.
- IV. The Committee considered **Informal JE 2022-09** concerning 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 facts presented are as follows: A Judicial Official, assigned to hear criminal matters, is currently presiding over a case in which the defendant is being represented by a public defender. A co-defendant, whose case is being tried in a different court, is being represented by a private attorney. The defendant and co-defendant's cases are both scheduled for pre-trial in January.

During recent in-chamber discussions, the Judicial Official received information from the public defender indicating that the co-defendant and the co-defendant's attorney visited the defendant's home without the public defender's knowledge and obtained a statement from the defendant outside the presence and without the consent of the defendant's counsel (the public defender). The co-defendant's attorney was not present during this in-chamber discussion. Does the Judicial Official have an obligation to report the attorney's alleged misconduct to appropriate disciplinary authorities?

Relevant Code Provisions:

Canon 1

A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

Rule 1.2 Promoting Confidence in the Judiciary

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and 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 Responding to Judicial and Lawyer Misconduct

(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 Responding to Judicial and Lawyer Misconduct

(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 to Rule 2.15

- (1) Taking appropriate action under the circumstances to address known misconduct is a judge's obligation. Except as otherwise provided in subsection (e), subsections (a) and (b) impose an obligation on the judge to report to the appropriate disciplinary authority the known misconduct of another judge or a lawyer that raises a substantial question regarding the honesty, trustworthiness, or fitness of that judge or lawyer. Ignoring or denying known misconduct among one's judicial colleagues or 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.
- (2) 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)... Appropriate action may include, but is not limited to, communicating directly with the judge who may have violated this Code, communicating with a supervising judge, or reporting the suspected violation to the appropriate authority or other agency or body.
- (3) Similarly, 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 states that: “‘Knowingly,’ ‘knowledge,’ ‘known,’ and ‘knows’ mean actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.”

Applicable Rule of Professional Conduct:

Rule 4.2 Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so....

The **Commentary to Rule 4.2** states that “[t]his Rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.”

Discussion: On several prior occasions, this Committee has addressed the issue of whether a judge has an ethical duty to report lawyer misconduct. In [JE 2009-03](#), in response to an inquiry whether a judge had a duty to refer an attorney to a disciplinary authority for alleged misconduct during a proceeding, the Committee stated that while Canon 3(b)(3) and its Commentary note that a judge should take or initiate appropriate disciplinary measures for unprofessional conduct that the judge becomes aware of, the judge has discretion to report the matter depending upon the seriousness of the conduct and the circumstances involved and that the inquiring Judicial Official should be guided by those provisions in exercising his or her own discretion as to whether to report the attorney’s conduct. In [JE 2010-06](#), the Committee advised the inquiring Judicial Official that they should report an out-of-state attorney who had testified that he had commingled funds in the attorney’s law office account which was held in a state (like Connecticut) in which the commingling of funds was an ethical violation. In [JE 2015-03](#), the Committee unanimously determined that the inquiring judge had personal knowledge of the attorney’s repeated failure to appear before the judge and failure to file requests for continuances with the caseflow coordinator in violation of the Rules of Professional Conduct. As a result, the judge had an obligation to report the attorney to the appropriate disciplinary authority because the violation “raise[d] a substantial question regarding the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects.”

Finally, in [JE 2015-01](#), this Committee discussed the nature of a Judicial Official’s obligation when a judge receives information that an attorney may have committed a violation of the Rules of Professional Conduct. Under the facts of this case, the Judicial Official learned that an attorney had instructed their client to “get rid of” any evidence of drug activity in the client’s home and in the automobile used by client’s spouse. This Committee determined that it did not have sufficient information from the facts provided to determine with certainty whether the Judicial Official had actual knowledge of the lawyer’s conduct and whether the conduct amounted to a violation of the Rules of Professional Conduct. Thus, the Committee was unable to determine whether subsection (b) of Rule 2.15 applied. Instead, the Committee concluded that the matter should be reported to the appropriate authority for further investigation pursuant to subsection (d) of Rule 2.15. Subsection (d) applies when a judge “receives information indicating a substantial question regarding the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects.” Because there is substantial question that the lawyer committed a violation of the Rules of Professional

Conduct 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, the judge need not necessarily report the conduct, but may take less severe appropriate measures.

This Committee also noted in [JE 2015-01](#) that once the Judicial Official reports the attorney, the Judicial Official must disqualify 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 their right to confidentiality both during the disciplinary proceeding and after it is resolved in the attorney's favor or unless the grievance committee issues a public disciplinary decision.

In assessing what constitutes appropriate action, the New York Advisory Committee on Judicial Ethics has explained:

What constitutes appropriate action necessarily depends on the context and nature of the substantial violation. The Committee has previously advised that a judge need not report an attorney to a disciplinary authority if the misconduct is not so egregious as to implicate the lawyer's honesty, trustworthiness, or fitness to practice law. Rather, the judge has the discretion to take other appropriate measures instead of, or in addition to, reporting the attorney, including, but not limited to, counseling and/or warning a lawyer, reporting a lawyer to his/her employer, and/or sanctioning a lawyer. Appropriate action in such situations depends on all the surrounding circumstances known to the judge, including an 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. (See [New York Joint Opinion 15-138/15-144/15-166](#)).

Recommendation: Based on the facts presented, including that the information of the improper conduct was obtained from the public defender and not from personal, first-hand knowledge, the Committee determined that subsection (d) of Rule 2.15 applies. Subsection (d) applies when a judge "receives information indicating a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects."

If the Judicial Official concludes that the lawyer committed a substantial violation that calls into question the lawyer's honesty, trustworthiness, or fitness as a lawyer, the Committee found that the only "appropriate action" under subsection (d) is to report the matter to the Statewide Grievance Committee. If the Judicial Official believes the improper conduct does not call into question the lawyer's honesty, trustworthiness, or fitness as a lawyer, the judge need not necessarily report the conduct, but may take less severe appropriate measures. According to Comment (3) of Rule 2.15, appropriate 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.” The Committee also adopted the approach taken by the New York Advisory Committee, which states that appropriate action “depends on all the surrounding circumstances known to the judge, including an 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.”

If the Judicial Official reports the attorney, the Judicial Official must disqualify 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 their right to confidentiality both during the disciplinary proceeding and after it is resolved in the attorney’s favor or unless the grievance committee issues a public disciplinary decision.

- V. New Business: Assistant Secretary Viviana Livesay reported that she will be working on the annual report to the Chief Justice and will circulate it to the Committee once it is finalized.
- VI. The meeting adjourned at 9:52 a.m.