

CALIFORNIA JUDGES ASSOCIATION

Judicial Ethics Committee

Opinion No. 64

PRESIDING JUDGE'S DUTY TO DISCIPLINE JUDGES UNDER PRESIDING JUDGE'S SUPERVISION

I. Introduction

Under Canon 3D(1), all judges have an ethical obligation to take corrective action when they have reliable information that another judge has violated any of the provisions of the Code. Frequently, the corrective action taken when a judge learns of possible misconduct by a colleague is to report the matter to a supervising judge. In the case of the presiding judge learning of another judge's misconduct, there is no one else to pass the matter on to other than the Commission on Judicial Performance (CJP). Therefore, the presiding judge must either handle the matter or report the matter to the CJP. Under some circumstances, the Rules mandate that the presiding judge report the matter to the CJP.

The Ethics Committee receives frequent inquiries from presiding judges and assistant presiding judges concerning their obligations to discipline their bench colleagues. Although conscientious presiding judges recognize their disciplinary responsibilities, in the often complex situations that arise in trial courts, it is not always clear to the presiding or assistant presiding judge exactly what the appropriate response to a particular judicial misstep may be. This opinion will review the ethical responsibilities of presiding judges to supervise and discipline their colleagues and provide an analytical framework for determining when those duties require referring matters to the CJP, using examples of situations that have arisen and the advice given by the Ethics Committee.

II. Applicable Authority

Canons

3D(1): "Whenever a judge has reliable information that another judge has violated any provision of the Code of Judicial Ethics, the judge shall take or initiate appropriate corrective action, which may include reporting the violation to the appropriate authority."

3C(3): “A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to ensure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.”

California Rules of Court Relating to Authority and Duties of Presiding Judge

CRC 10.603(a)(2): “Ensuring that the duties of all judges specified under rule 10.608 are timely and orderly performed.”

CRC 10.603(c)(4)(A): “Notify the CJP of : (i) A judge’s substantial failure to perform judicial duties, including any habitual neglect of duty, persistent refusal to carry out assignments as assigned by the presiding judge, or persistent refusal to carry out the directives of the presiding judge as authorized by the rules of court; or (ii) Any absences caused by disability totaling more than 90 court days in a 12-month period, excluding absences authorized under (c)(2);”

CRC 10.603(c)(4)(C): “Prepare and submit to the judges for consideration and adoption procedures for receiving, inquiring into, and resolving complaints lodged against court commissioners and referees, consistent with rule 10.703.”

CRC 10.703(k)(1): “If after a formal investigation under (j) the complaint results in the written reprimand, suspension, or removal of the subordinate judicial officer for conduct that if alleged against a judge would be within the jurisdiction of the commission under article VI, section 18 of the California Constitution, the presiding judge must promptly forward to the commission a copy of the portions of the court file on the complaint that reasonably reflect the basis of the action taken by the court, including the complaint and the subordinate judicial officer’s response.”

Rothman, David, *California Judicial Conduct Handbook* (3d Ed.) §§_5.65, 6.00-6.26

III. Authority and Responsibilities of Presiding Judges

Rule 10.603(a)(2) gives presiding judges the authority and responsibility to ensure that judges in their courts carry out their duties, specified in Rule 10.608, in a timely and orderly fashion. Among the duties enumerated in Rule 10.608 are: hearing all assigned matters¹ ; immediately notifying the master

¹ Unless disqualified, or with the consent of presiding judge, supervising judge or master calendar judge following written notification. CRC 10.608(1)(A)and (B).

calendar judge or presiding judge on the completion or continuation of a trial or any other matter assigned for hearing; requesting approval of any absence of one-half day or more; following the court's plan for dealing with employees; and, following the authorized directives of the presiding judge.

Canon 3C(3) provides: "A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to ensure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities."

Read together, Rule 10.603(a)(2) and Canon 3C(3) invest presiding judges with the authority and duty to ensure that judges in their courts promptly and properly carry out their judicial duties and responsibilities. Canon 3(D)(1) takes that responsibility a step further. Where the presiding judge has reliable information that a judge in his/her court has violated *any* provision of the Code, the presiding judge must take corrective action (unless, of course, someone else has already taken appropriate corrective action).

Most often, the appropriate corrective action entails counseling the offending judge and putting mechanisms in place to ensure that there is no reoccurrence of the inappropriate conduct. However, Rule 10.603(c)(4)(A) requires the presiding judge to report to the CJP "a judge's substantial failure to perform judicial duties, including any habitual neglect of duty, persistent refusal to carry out assignments as assigned by the presiding judge, or persistent refusal to carry out the directives of the presiding judge as authorized by the rules of court." Rule 10.703(k)(1) requires notification to the CJP of certain disciplinary actions taken against subordinate judicial officers for conduct that would fall within the jurisdiction of the CJP if committed by a judge. Referring a matter to the CJP would also be required where, under the circumstances, doing so would be the "appropriate corrective action."

IV. Factors in Determining Appropriate Corrective Action

In determining whether a report to the CJP is required, a presiding judge must distinguish between the specific obligation to report to the CJP a judge's "substantial failure to perform judicial duties" or "persistent refusal to carry out the directives of the presiding judge" and the more general obligation (applicable to all judges) to "initiate appropriate corrective action" upon acquiring reliable information that another judge has violated the Code of Judicial Ethics. In the first category, the presiding judge has no discretion – if a judge under the presiding judge's supervision commits one of the named offenses, the presiding judge must report to the CJP. Many kinds of misconduct that come to the presiding judge's attention, however, do not involve specific failures to perform judicial duties or refusals to carry out the presiding judge's directives. In this more general category, the presiding judge must exercise discretion. To further complicate the presiding judge's

decision-making, the two categories of offenses quite often overlap. A review of the advice given to presiding and supervising judges by the ethics committee on whether or not a report to the CJP is required reflects this overlap and reveals a number of factors which need to be considered when the offense is such that the presiding judge is not bound to report to the CJP and must exercise discretion. These factors are:

- 1) The seriousness of the violation;
- 2) The pervasiveness of the conduct;
- 3) The judge's amenability to correcting his/her behavior;
- 4) The likelihood of repeat violations and difficulty of discerning the likelihood of new violations (mistreatment of staff, for example);
- 5) A prior history of discipline.

In some situations one of these factors alone may warrant reporting the matter to the CJP; in others a combination of factors may lead to that conclusion. A single incident of egregious misconduct may require referral to the CJP, even where none of the other factors apply. On the other hand, conduct that would not normally warrant reporting to the CJP may need to be reported where the judge is unwilling or unable to correct his/her conduct. And, of course, if the nature of the conduct is such that CRC 10.603(c)(4)(A) requires the presiding judge to report it, the presiding judge has no discretion in the matter.

V. Examples

A. Situations Where CJP Reporting is Mandated

1. Following an investigation, PJ determined that J had sexually harassed a member of J's staff. J denied the allegations. Such conduct does not fall into the CRC 10.603(c)(4)(A) mandatory reporting category. However, because of the seriousness of the misconduct, J's unwillingness to acknowledge the problem and the difficulty in discerning whether future misconduct is likely, PJ must report the matter to the CJP.
2. J routinely left court early and went home during court hours. PJ attempted to counsel J but the conduct persisted. Such conduct constitutes a substantial failure to perform judicial duties and must be reported to the CJP.
3. PJ had warned J to stop ignoring jury summonses. The warning was sufficient corrective action; however, J continued to ignore the court summons, thus demonstrating a persistent failure to obey court orders. PJ was advised to report J to the CJP.

4. J made suggestive and inappropriate remarks to a court officer whose employment was later terminated. An investigation confirmed the misconduct by J and determined the behavior was more widespread. PJ admonished J to stop the misconduct and transferred J to a branch court. Following the transfer the J made demeaning remarks to a member of court staff. In light of the J's prior misconduct, the failure to respond to counseling and the seriousness of the current misconduct, PJ was advised to report J to the CJP.

5. J modified a speeding ticket without proper authority. Doing so was an abuse of judicial power and such a serious violation that, even without prior misconduct, and even though the conduct did not fall under CRC 10.603(c)(4)(A), PJ was required to report the matter to the CJP.

6. Where PJ determined that J, prior to retiring, had an affair with counsel for a public agency assigned to J's court, without disqualifying or disclosing the affair, PJ must report to CJP. Even though reporting was not required under CRC 10.603(c)(4)(A), the misconduct was pervasive in that it affected the validity of all the cases involving counsel that were decided during the course of the affair.

7. After counseling J regarding violation of the 90-day rule, PJ discovered a new violation and determined that several cases under submission for more than ninety days had unsigned orders. PJ again counseled J and later discovered that J had signed and file- stamped the second case so that it appeared that it was signed within the 90 days and that the unsigned orders had been signed and file-stamped with dates going several months back. Since prior corrective action was ineffective and the J's response to the subsequent counseling was to fabricate the dates on the orders, PJ is required to report to the CJP.

B. Reporting Not Mandated

In many instances a judge's recognition of misconduct taken together with voluntary remedial steps, may avoid the need to report to the CJP:

1. Where a J agrees that sexual remarks are improper and agrees to counseling, the PJ need not report to the CJP. Such conduct does not fall under CRC 10.603(c)(4)(A).

2. Where PJ determined J abused alcohol and had other mental and emotional problems, but that those problems had not affected J's performance in court, referring J to counseling and monitoring J's progress constituted appropriate corrective action and did not require reporting to the CJP. Such conduct does not fall under CRC 10.603(c)(4)(A).

3. J handled arraignments in a manner that resulted in delays exceeding the statutory limits. Where PJ took corrective action which effectively prevented

the problem from reoccurring, PJ was not obligated to report the J to the CJP. Because the conduct was not persistent, it did not fall under CRC 10.603(c)(4)(A).

4. J violated the 90-day rule on submissions. The lapse was out of character and in good faith. PJ was not required to report to the CJP so long as appropriate remedial actions were taken to ensure no future recurrence.

5. PJ learned that retiring J, on leave until date of retirement, was soliciting ADR business. PJ admonished J who continued to solicit. PJ wrote a letter requiring corrective action and J then brought J's retirement date forward to an immediate retirement. PJ need not report J, as the corrective action had the desired result and there was no possibility of reoccurrence.

6. When a PJ becomes aware of inappropriate and biased remarks made by a J in a hallway, J should be counseled. Though serious, the conduct was not pervasive and therefore did not warrant reporting to the CJP.

VI. Conclusion

In a given case, the presiding judge may not be able to immediately discern the line between conduct that must be reported to the CJP and conduct that may be adequately addressed by other corrective action. To aid in that discernment, the presiding judge should determine whether a judge's conduct (1) amounts to a "substantial failure to perform judicial duties" or "persistent refusal to carry out the directives of the presiding judge," in which case reporting to the CJP is mandatory, or (2) does not rise to that level. In the second category, the PJ's duty of oversight may be (but is not always) fulfilled by taking lesser corrective action.

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