

MEMORANDUM

TO: All CJA Members

FROM: Stanley S. Bissey
Executive Director & CEO

DATE: January 2018

SUBJECT: **Formal Ethics Opinion No. 74**

The Judicial Ethics Committee of the California Judges Association has issued the following formal opinions:

Opinion No. 74

*“Judicial Responsibilities When Discovering Attorney Misconduct
(Canon 3D(2))”*

Judges may direct questions on the Code of Judicial Ethics to the current 2017/18 Ethics Committee by writing or calling the CJA office or any Ethics Committee member. The Ethics Committee, as a matter of policy, does not answer inquiries which are moot or raise issues of law. Nor does the Committee respond to questions that involve matters pending before the Commission on Judicial Performance.

All opinions of the committee are advisory only.

Special thanks to Ethics Committee member Judge Leonard Edwards, Santa Clara Superior Court, Retired, for preparing this Opinion.

SSB:jmg

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CALIFORNIA JUDGES ASSOCIATION

Judicial Ethics Committee

Opinion No. 74

Judicial Responsibilities When Discovering Attorney Misconduct (Canon 3D(2))

I. INTRODUCTION

The Code of Judicial Ethics Canon 3D(2) obligates judges to take corrective action whenever the judge has personal knowledge or concludes in a judicial decision that an attorney has committed misconduct or violated the Rules of Professional conduct.

The language in the canon suggests further discussion regarding the following issues: (1) what actions constitute attorney misconduct? (2) If the judge concludes that the attorney committed misconduct or violated the Rules of Professional Conduct, what action should the judge take? (3) What types of corrective action will satisfy the judge's obligation? This opinion will address these issues.

II. APPLICABLE AUTHORITY

Canon 3D. Disciplinary Responsibilities

(2) "Whenever a judge has personal knowledge, or concludes in a judicial decision, that a lawyer has committed misconduct or has violated any provision of the Rules of Professional Conduct, the judge shall take appropriate corrective action, which may include reporting the violation to the appropriate authority."

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Appropriate corrective action could include direct communication with the ... lawyer who has committed the violation, other direct action, such as a confidential referral to a ... lawyer assistance program, or a report of the violation to the presiding judge, appropriate authority, or other agency or body. Judges should note that in addition to the action required by Canon 3D(2), California law imposes additional mandatory reporting requirements to the State Bar on judges regarding lawyer misconduct. See Business and Professions Code sections 6086.7 and 6086.8, subdivision (a), and California Rules of Court, rules 10.609 and 10.1017.

“Appropriate authority” means the authority with responsibility for initiation of the disciplinary process with respect to a violation to be reported.

(4) A judge shall cooperate with judicial and lawyer disciplinary agencies.

(5) A judge shall not retaliate, directly or indirectly, against a person known or suspected to have assisted or cooperated with an investigation of a judge or a lawyer.

Cal. Bus. & Prof. Code § 6086.7

(a) A court shall notify the State Bar of any of the following:

(1) A final order of contempt imposed against an attorney that may involve grounds warranting discipline under this chapter. The court entering the final order shall transmit to the State Bar a copy of the relevant minutes, final order, and transcript, if one exists.

(2) Whenever a modification or reversal of a judgment in a judicial proceeding is based in whole or in part on the misconduct, incompetent representation, or willful misrepresentation of an attorney.

(3) The imposition of any judicial sanctions against an attorney, except sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars (\$1,000).

(4) The imposition of any civil penalty upon an attorney pursuant to Section 8620 of the Family Code.

(5) A violation described in paragraph (1) of subdivision (a) of Section 1424.5 of the Penal Code by a prosecuting attorney, if the court finds that the prosecuting attorney acted in bad faith and the impact of the violation contributed to a guilty verdict, guilty or nolo contendere plea, or, if identified before conclusion of trial, seriously limited the ability of a defendant to present a defense.

(b) In the event of a notification made under subdivision (a) the court shall also notify the attorney involved that the matter has been referred to the State Bar.

Cal. Bus. & Prof. Code § 6086.8

(a) Within 20 days after a judgment by a court of this state that a member of the State Bar of California is liable for any damages resulting in a judgment against the attorney in any civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence com-

mitted in a professional capacity, the court which rendered the judgment shall report that fact in writing to the State Bar of California.

Penal Code § 1424.5

(a) (1) Upon receiving information that a prosecuting attorney may have deliberately and intentionally withheld relevant or material exculpatory evidence or information in violation of law, a court may make a finding, supported by clear and convincing evidence, that a violation occurred. If the court finds such a violation, the court shall inform the State Bar of California of that violation if the prosecuting attorney acted in bad faith and the impact of the withholding contributed to a guilty verdict, guilty or nolo contendere plea, or, if identified before conclusion of trial, seriously limited the ability of a defendant to present a defense.

(2) A court may hold a hearing to consider whether a violation occurred pursuant to paragraph (1).

(b) (1) If a court finds, pursuant to subdivision (a), that a violation occurred in bad faith, the court may disqualify an individual prosecuting attorney from a case.

(2) Upon a determination by a court to disqualify an individual prosecuting attorney pursuant to paragraph (1), the defendant or his or her counsel may file and serve a notice of a motion pursuant to Section 1424 to disqualify the prosecuting attorney's office if there is sufficient evidence that other employees of the prosecuting attorney's office knowingly and in bad faith participated in or sanctioned the intentional withholding of the relevant or material exculpatory evidence or information and that withholding is part of a pattern and practice of violations.

California Rules of Court, Rule 10.609. Notification to State Bar of attorney misconduct

(a) Notification by judge

When notification to the State Bar is required under Business and Professions Code section 6086.7, the judge issuing the order that triggers the notification requirement under section 6086.7 is responsible for notifying the State Bar. The judge may direct court staff to notify the State Bar.

(b) Contents of notice

The notice must include the State Bar member's full name and State

Bar number, if known, and a copy of the order that triggered the notification requirement.

(c) Notification to attorney

If notification to the State Bar is made under this rule, the person who notified the State Bar must also inform the attorney who is the subject of the notification that the matter has been referred to the State Bar.

California Rules of Court, Rule 10.1017. Notification to State Bar of attorney misconduct

(a) Notification by justice

When notification to the State Bar is required under Business and Professions Code section 6086.7, the senior justice issuing the order or the justice authoring the opinion that triggers the notification requirement under section 6086.7 is responsible for notifying the State Bar. The justice may direct the clerk to notify the State Bar.

(b) Contents of notice

The notice must include the State Bar member's full name and State Bar number, if known, and a copy of the order or opinion that triggered the notification requirement.

(c) Notification to attorney

If notification to the State Bar is made under this rule, the person who notified the State Bar must also inform the attorney who is the subject of the notification that the matter has been referred to the State Bar.

Commission on Judicial Performance, Annual Report (1991), Advisory Letter 9, p.12

State Bar of California, Rules of Professional Conduct, Rule 3-110 - Failing to Act Competently and Rule 5-200 – Trial Conduct.

Rothman, David, California Judicial Conduct Handbook, 3rd Edition, Section 5.67-5.68.

III. DISCUSSION

Most judges will encounter attorney misconduct during their judicial careers. Identifying the misconduct and then acting on it raises a number of issues for the judge. The judicial obligations regarding attorney misconduct differ from those involving judicial misconduct (Code of Judicial Ethics, Canon 3D(1)). Pursuant to the Code of Judicial Ethics, Canon 3D(2), the judge must have personal knowledge or conclude in a judicial decision that a lawyer has committed misconduct or has violated any provision of the Rules of Professional Conduct. In both situations the judge shall take appropriate corrective action which may include reporting the violation to the appropriate authority. (emphasis added).

As indicated above, the obligation to take corrective action is only triggered where the judge has personal knowledge that an attorney has committed misconduct or has violated the Rules of Professional Conduct, or concludes in a judicial decision that the attorney has committed misconduct or violated the Rules of Professional Conduct. Having credible information that an attorney has committed misconduct does not trigger the obligation to take corrective action. Therefore, unless the misconduct is the subject of a judicial decision, the first question becomes whether the judge has personal knowledge. That question can be answered by asking whether the judge would be able testify to the misconduct as a percipient witness. If not, the judge cannot be said to have personal knowledge.

Where a judge does have personal knowledge or concludes in a judicial decision that an attorney has committed misconduct or violated the Rules of Professional Conduct, the next question becomes what is an appropriate corrective action. Some violations require the judge to report the misconduct to the State Bar. The mandatory reporting provisions are found in Business and Professions Code sections 6086.7 and 6086.8(a) and Penal Code section 1424.5. Unless one or more of the circumstances listed in those sections applies, a judge normally may, but is not required to, report the matter to the State Bar. However, there have been circumstances in the past where because of the nature of the misconduct, the committee has concluded that reporting the misconduct to the State Bar was the appropriate corrective action. Those situations may arise where the misconduct is particularly egregious, has continued despite prior attempts at corrective action, or where the judge believes other normally appropriate authorities will not take any action.

The following hypotheticals are designed to assist judges in determining under what circumstances a reporting responsibility arises, what may be an appropriate corrective action, and when reporting to the matter to the State Bar is required.

#1 – A judge discovers that an attorney under a 30-day suspension from the State Bar has appeared before the judge during the 30-day period.

Must the judge take any action, and if so what action should the judge take?

The judge must take appropriate corrective action. The misconduct occurred in front of the judge within the courtroom, so the judge has personal knowledge of the misconduct. Although not one of the circumstances listed in Cal. Bus. & Prof. Code §6086.7, practicing law while suspended is a particularly egregious violation and no corrective action short of reporting the matter to the State Bar would be effective. Thus, the judge should notify the State Bar of the attorney's misconduct.

#2 – Based on personal observations of an attorney, including exhibiting signs of intoxication in court, repeatedly missing court dates, and improper performance, a judge believes the attorney has a substance abuse problem.

Must the judge take any action, and if so what action should the judge take?

Where, as here, a judge has personal knowledge that an attorney's competence is being affected by substance abuse, the judge has a duty to take appropriate corrective action. While the judge may refer the matter to the State Bar, the judge is not required to do so. Appropriate corrective action may include referring the attorney to substance abuse program such as the Other Bar¹ and asking the attorney to report back to the judge regarding the course of action taken. If the attorney fails to act, the judge should report the attorney to the State Bar.²

#3 – A Supervising Judge observes copy of an advertisement in the yellow pages wherein an attorney is advertising that he/she is a judge pro tem serving in the judge's court.

Must the judge take any action, and if so what action should the judge take?

Since the supervising judge has personal knowledge of the advertisement, the supervising judge must take appropriate corrective action that may include informing the attorney that this is a violation of the Canons and to cease and desist or referring the matter to the Presiding Judge.

#4 – A judge learns that an attorney resigned from the State Bar prior to the attorney making several appearances before the judge.

Must the judge take any action, and if so what action should the judge take?

Since the judge has personal knowledge of the violation, the judge has a duty to take appropriate corrective action. While none of the per se mandatory reporting provisions apply, the former attorney has essentially committed a

crime in the courtroom. Under these circumstances the judge should report the conduct to the State Bar.

#5 – A judge has personal knowledge that a lawyer has violated a provision of the Rules of Professional Conduct. The judge learned of this violation at an in camera hearing to determine if the lawyer had a conflict of interest.

Must the judge take any action, and if so what action should the judge take?

The judge should take appropriate corrective action which in this case may be conferring with the attorney, reporting the matter to the Presiding Judge, or the judge may make a referral to the State Bar. However, the judge must take care not to disclose any confidential information. Whatever corrective action is taken, the judge must ensure that the attorney's client's rights are protected.

#6 - A judge receives a declaration from an attorney that contains a statement that, based on the judge's personal knowledge, the judge knows to be false.

Must the judge take any action, and if so what action should the judge take?

The judge must take appropriate corrective action, which could include counseling the attorney, discussing the matter with the attorney's supervisor, and possibly reporting the matter to the State Bar.

#7 – After a hearing alleging prosecutorial misconduct, the judge has concluded that a deputy district attorney has committed perjury. Further the judge has reason to believe the attorney's direct supervisor will not report it or take any corrective action.

Must the judge take any action, and if so what action should the judge take?

Since the judge has concluded in a judicial decision that the deputy district attorney has committed misconduct, the judge must take appropriate corrective action. This could include discussing the matter with the elected District Attorney. If no action is taken by the District Attorney, the judge should report the matter to the State Bar.³

#8 – A judge grants a motion to vacate a judgment based on incompetency of counsel.

Must the judge take any action, and if so what action should the judge take?

Whenever a reversal of a judgment is based in whole or in part on incompetent representation, the judge must report the attorney to the State Bar and give notice to the attorney of the judge's actions.⁴

#9 – A judge has reported an attorney’s unethical conduct to the State Bar and the State Bar’s investigator has contacted the judge for further information.

Must the judge take any action, and if so what action should the judge take?

The judge must cooperate with the request for information from the State Bar’s investigator.

#10 – A judge sets aside a final order of contempt regarding an attorney’s conduct.

Must the judge take any action, and if so what action should the judge take?

Under these circumstances, the judge does not need to take any action. Since the contempt order was set aside, the judge is not under a duty report the original finding.⁵

#11 – A judge notices that a deputy public defender is consistently late for court, is unprepared when cases are called, and seems to have poor relationships with his clients.

Must the judge take any action, and if so what action should the judge take?

If the judge concludes that the deputy’s actions before that judge amount to ineffective assistance of counsel, the judge must take appropriate corrective action which could include speaking with attorney directly or discussing the matter with the deputy’s supervisor. In either case, the judge must be careful to avoid engaging in any ex parte communications regarding any matters still pending.

#12 – A judge has been assigned a felony criminal case where the defendant is a practicing attorney.

Must the judge take any action, and if so what action should the judge take?

Since the judge does not have any personal knowledge regarding the alleged felonious conduct, the judge is under no duty to take any action. However, if the attorney is convicted, the clerk in the judge’s court is required by law to report the conviction to the State Bar within 48 hours.⁶

#13 – The judge learns that an attorney is terminally ill and believes that the treatment the attorney is receiving has affected the attorney to the point that the attorney’s clients may suffer due to the attorney’s disability.

Must the judge take any action, and if so what action should the judge take?

The judge must take appropriate corrective action. This may be to consult with the attorney or those with whom the attorney practices. If these interventions are not effective, the judge should report the matter to the State Bar.

#14 – During the course of a contentious trial one of the attorneys was repeatedly disrespectful to the court and ignored the court’s rulings. After warning the attorney to desist, the attorney persisted at which point the judge cited the attorney for contempt of court. After conducting a hearing, the judge issued a written order of contempt.

Must the judge take any action, and if so what action should the judge take?

Once the order of contempt becomes final the judge must send a copy of the relevant minutes, the final order and transcript (if any) to the State Bar.⁷

#15 – A judge becomes aware that a deputy district attorney is being rude and discourteous to administrative and courtroom personnel.

Must the judge take any action, and if so what action should the judge take?

If the judge personally witnessed any of the offensive conduct, the judge must take appropriate corrective action which may include counseling the deputy or discussing the matter with the deputy’s supervisor.⁸

#16 – During the course of a hearing on a motion for new trial, an attorney in the proceeding acknowledged she gained unauthorized access to criminal history information.

Must the judge take any action, and if so what action should the judge take?

Under these facts, the judge has gained personal knowledge that the attorney has committed misconduct, therefore, the judge must take appropriate corrective action, which could include counseling the attorney, reporting the matter to law enforcement, or reporting the attorney to the State Bar.

#17 – A retired judge sitting on assignment presided over a hearing wherein the petitioner requested a civil restraining order against an attorney. The judge granted the request.

Must the judge take any action, and if so what action should the judge take?

Unless the judge issued the order based on actions of the lawyer that would amount to misconduct or a violation of the Rules of Professional Conduct, the judge is neither required to take any corrective action nor report the attorney to the State Bar.

#18 – The judge rendered judgment against an attorney finding the attorney liable for damages resulting from fraud, misrepresentation, and breach of fiduciary duty committed in a professional capacity against a client.

Must the judge take any action, and if so what action should the judge take?

The judge is under an obligation to report that fact in writing to the State Bar within 20 days. The judge must also inform the attorney of the judge's actions.⁹

#19 – The judge imposed sanctions of \$750 against an attorney for the attorney's conduct in court.

Must the judge take any action, and if so what action should the judge take?

Under these facts, the judge is under no obligation to take any further corrective action since the impositions of sanctions was in of itself corrective action for the attorney's conduct and the monetary amount imposed was less than \$1,000.¹⁰

#20 – A judge hearing an adoption case discovered that the petitioner's attorney concealed the fact that the subject child was or might be a Native American child. The judge imposed a civil penalty against the attorney pursuant to Family Code section 8620.

Must the judge take any action, and if so what action should the judge take?

Imposing any civil penalties against an attorney pursuant to Family Code section 8620 triggers the mandatory reporting provisions of Business and Professions Code section §6086.7(a)(4), therefore, the judge must report the matter to the State Bar.

#21 – Following a criminal trial in which the defendant was convicted of the charges, the defendant brings a motion for new trial based on allegations that the prosecutor knowingly withheld exculpatory evidence. Following a hearing on the matter the judge concluded that the prosecuting attorney intentionally withheld the evidence in bad faith and granted the motion.

Must the judge take any action, and if so what action should the judge take?

Implicit in the court's ruling is that the withholding of the evidence contributed to the guilty verdict, therefore the judge must notify the State Bar of the violation.¹¹

#22 – The judge heard an action for legal malpractice brought by a client against her attorney. The jury found for the plaintiff.

Must the judge take any action, and if so what action should the judge take?

Based on these facts the judge may or may not be required to take any action. If the judgement was based on fraud, misrepresentation, or gross negligence in a professional capacity, the judge would have to report the judgment to the State Bar within twenty days.¹² If not, the judge is under no duty to take any action.

#23 – The Court of Appeals has reversed a decision by a judge based on misconduct by one of the attorneys.

Must the justice take any action, and if so what action should the justice take?

The appellate court must report the attorney to the State Bar and inform the attorney that the matter has been referred to the State Bar.¹³

#24 – A judge has received declarations and taken testimony in which it is appears the attorneys for one side or the other have committed perjury or suborned perjury.

Must the judge take any action, and if so what action should the judge take?

On these facts, the judge is not required to take any action. The judge lacks personal knowledge as to whom, if anyone is lying. If after further proceedings, the judge concludes in a judicial decision that one of the attorneys committed perjury, the judge would have to take corrective action. Based on the egregious nature of the misconduct the corrective action should include reporting the attorney to the State Bar.

IV. CONCLUSION

From the law and the hypothetical situations, several conclusions can be drawn.

First, in certain situations involving attorney misconduct, the judge must take appropriate corrective action. Those situations include when the judge has personal knowledge or concludes in a judicial decision that an attorney has committed misconduct.

Second, depending on the circumstances, appropriate corrective action may include one or more of the following: direct communication with the attorney, discussing the matter with the attorney’s supervisor, referring the attorney to a lawyer assistance program, reporting to an appropriate authority or other agency or body such as the State Bar, or referring the matter to law enforcement. “‘Appropriate authority’ means the authority with responsibility for initiation of the disciplinary process with respect to a violation to be reported.”

Third, there are situations when a judge must report an attorney to the State Bar as set forth in B & B Code §§6086.7 and 6086.8 and California Rules of Court, rules 10.609 and 10.1017. In these situations, the judge must also notify the attorney of the action taken pursuant to B & P Code §6086.

Fourth, if the judge becomes aware of criminal conduct by an attorney that takes place in the judge’s courtroom, the judge’s obligation to report the mat-

ter to law enforcement is the same as that of an ordinary citizen. However, if the judge is the only person who knows of illegal conduct by an attorney, the judge has a duty to report the matter to law enforcement.¹⁴

Endnotes:

- 1 The Other Bar is a network of recovering lawyers, law students, and judges throughout the state, dedicated to assisting others within the legal profession who are suffering from alcohol and substance abuse problems. The program is voluntary and open to all California lawyers, judges, and law students.
- 2 See California Judges Association, Judicial Ethics Update (1999) p. 3. Rule 3-110 of the State Bar Rules of Professional Conduct requires that a lawyer not “intentionally, recklessly, or repeatedly fail to perform legal services with competence.” Competence includes the “mental, emotional, and physical ability reasonably necessary for the performance of such service.” Rules of Professional Conduct, rule 3-110(B)(3).
- 3 California Judges Association, Judicial Ethics Update (2001) p.5
- 4 Bus. & Prof. Code § 6086.7(a) (2).
- 5 Bus. & Prof. Code § 6086.7(a) (1).
- 6 Bus. & Prof. Code § 6101(c).
- 7 Bus. & Prof. Code § 6086.7(a) (1).
- 8 If the conduct arose outside the judge’s presence, the judge may still have a duty act under Canon 3B(4) which requires a judge to ensure that lawyers and staff under the judge’s direction and control act in a patient dignified and courteous manner.
- 9 Bus. & Prof. Code § 6086.8.
- 10 Bus. & Prof. Code § 6086.7(a) (3).
- 11 Penal Code §1424.5 and Bus. & Prof. Code §§ 6086.7(2) and 6086.7(5).
- 12 Bus. & Prof. Code §6086.8(a)
- 13 Bus. & Prof. Code § 6086.7(a)(2).
- 14 Canon 3D(2) Advisory Committee Commentary
- 15 The conclusions throughout this document are consistent with the ABA Model Code of Judicial Conduct, Rule 2.15, Responding to Judicial and Lawyer Misconduct.

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