

*Arizona Supreme Court
Judicial Ethics Advisory Committee*

ADVISORY OPINION 03-03
(Reissued November 7, 2003)

Guidelines for Reporting Judicial Misconduct

Issue

When should a judge or court employee report alleged judicial misconduct?

Answer: The appropriate action depends on all the circumstances. Generally, one should report any known, substantial violation of the standards contained in the Arizona Constitution and the Code of Judicial Conduct, including conduct that bears on the judge's honesty, trustworthiness, or fitness, or that affects fundamental public perceptions of the fairness or impartiality of a judicial proceeding.

Facts

Judges and court staff periodically seek advice as to when judicial misconduct can be resolved at the local level and when they have a duty to report misconduct to the Commission on Judicial Conduct. This opinion was prompted by the following "hypotheticals":

1. Several employees report to court administration that a judge is creating a hostile work environment for staff as a result of overt sexual advances that are verified and documented. Staff also report that the judge seems to treat female defendants in a friendlier manner than male defendants and asks female defendants about their marital status and, if divorced, for how long.

2. Court employees report that a judge frequently uses profanity in open court.

3. A judge allows a relative to wear a judicial robe, sit on the bench with the judge, and call case names in open court. The incident was captured on the court's recording system.

4. Court staff reports that in open court a judge referred to the courtroom where he was hearing arraignments as the "bad ass court," apparently in an attempt to impress defendants brought in on warrants of the seriousness of their offenses.

5. A presiding judge questions whether or when to report to the commission that another judge, with the understanding and cooperation of all colleagues, has taken an authorized leave of absence for three to six months, or longer, for health-related reasons such as alcohol rehabilitation, cancer treatment, or other such program.

Discussion

The question of when and how judges or other court employees should report judicial misconduct is recurrent and challenging. In general, judges have an unequivocal duty to report judicial misconduct. Canon 3D(1) of the Code of Judicial Conduct states:

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A judge who has knowledge or who receives reliable information that another judge has committed a violation of this code shall take or initiate appropriate action. A judge who has knowledge or who receives reliable information that another judge has committed a violation of this code that raises a substantial question as to the judge's honesty, trustworthiness or fitness as a judge in other respects shall inform the appropriate authority.

As explained in the code's preamble, use of the term "shall" imposes "binding obligations the violation of which can result in disciplinary action." The preamble also notes, however, that "[t]he canons and sections are rules of reason" which "should be applied . . . in the context of all relevant circumstances."

Under Canon 3D(1), judges must "take or initiate appropriate action" when they become aware of violations of the code. The commentary to this section explains that "[a]ppropriate action may include direct communication with the judge . . . who has committed the violation, other direct action if available, and reporting the violation to the appropriate authority or other agency or body." Judges are not required to report all violations to the Commission on Judicial Conduct. Rather, in their discretion, they can resolve minor matters directly with the judge in question, report the matter to the court's presiding or chief judge, or report significant incidents to the commission. But judges cannot simply ignore misconduct, and they must report any violation of the code that involves the offending judge's fundamental integrity or fitness for office.

Similarly, "[j]udicial employees shall report to a supervisor, administrator, or judge within the judicial department any violation of the law or [the judicial employee] code by another judicial employee." Ariz. Code of Conduct for Judicial Employees, Canon 3H. The commentary to that section states that judicial employees "should cooperate with the Commission on Judicial Conduct and may communicate with the Commission at any time, without fear of reprisal, for the purpose of discussing potential or actual judicial misconduct." In addition, the preamble to the judicial employees code states that code "is intended to complement the Code of Judicial Conduct that governs the conduct of judges and should be interpreted in a manner consistent with that code."

Reasonable minds might disagree on what constitutes "appropriate action" in a particular situation. For example, while some judges might feel comfortable drawing a colleague's attention to a minor problem, e.g., frequent tardiness or acting too friendly with attorneys in the courtroom, others may choose to report such incidents to their presiding judge or to the commission. Depending on the circumstances, including the nature and frequency of the misconduct, either approach might constitute "appropriate action." The danger, however, is that judges might want to resolve serious violations internally without reporting to an appropriate body.

It was that tendency to resolve matters internally, without informing the appropriate regulatory body, that led to a higher reporting standard in the ABA's Model Code of Judicial Conduct in 1990. In response to widespread perceptions that judges were not doing enough

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to assist in maintaining professional standards and frequently were ignoring the duty to report misconduct, the code revision committee decided to revise the rule.

The rule was changed to specifically require judges to report to a disciplinary authority significant misconduct of lawyers and other judges, thus to diminish the number of instances in which judges take it on themselves to impose sanctions for professional misconduct without such report. Another reason for modifying the rule was to encourage judges to take other remedial steps as appropriate, such as referring the judge or lawyer whose conduct is in question to a bar-sponsored substance abuse treatment agency, without precluding judges from imposing sanctions for professional misconduct.

Lisa L. Milord, *The Development of the ABA Judicial Code 25* (1992). The revisors, however, still left it up to judges to determine when a matter was serious enough to report:

Both of the provisions distinguish between circumstances in which disciplinary action is required and those in which it is simply permitted. In the latter, the threshold is a judge's receipt of information indicating a substantial likelihood that a violation of the applicable code of conduct has been committed by a judge or lawyer; in the former, the threshold is a judge's having knowledge that a serious violation has been committed.

Id. at 25-26.

The limited published authorities on this subject suggest that relatively minor administrative infractions do not need to be reported (e.g., a magistrate asks another magistrate to cover his evening hours without getting approval of a circuit judge, as required by local directives). *See* Jeffrey M. Shaman, et al., *Judicial Conduct and Ethics* § 6.15, at 204 n. 166 (3d ed. 2000). On the other hand, violations that involve the integrity of the judiciary must be reported (e.g., a judge was admonished for failure to report an alleged attempt by another judge to engage him in an *ex parte* communication that was clearly intended to influence the judge's decision on bail in a particular case). *Id.* at 204 n. 169. Serious violations include any conduct that might significantly affect the actual or perceived fairness and impartiality of the judicial process itself, while minor violations tend to involve administrative or internal matters that generally do not affect public perceptions. *See id.* at 204-05, nn.166-75.

In general, “[a] judge’s duty depends on at least three variables: the amount and quality of a judge’s information (from rumor to firsthand knowledge), the seriousness of the offense (from technical to substantial), and the possible measures a judge could take.” Cynthia Gray, *Disciplinary Responsibilities*, 15 No. 4 *Judicial Conduct Reporter* 6 (Winter 1994). The reporting requirement “is triggered when the judge has sufficient information to conclude that a substantial issue has been raised that a violation has occurred.” Mass. CJE Op. No. 98-11; *see also* Mass. CJE Op. No. 2002-04. Reporting is not necessarily required unless the judge clearly believes that the other judge’s act constitutes misconduct subject to discipline. *See In re Voorhees*, 739 S.W.2d 178 (Mo. 1987) (presiding judge’s failure to report that an associate judge distributed “Don’t Give a Shit Pills” to protest a circuit reorganization plan was not

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misconduct by the presiding judge; although other judge's conduct was coarse, it did not interfere with the administration of the court); *see also* Pa. Adv. Op. 88-6 (not mandatory for judges to report misconduct to disciplinary body if they believe in good faith that it would be more fitting to use an alternative appropriate measure). But if a judge or court employee concludes that another judge committed a substantial ethical violation, such as attempting to unduly influence the judge or improperly requesting a personal favor from the court, the judge should report it to the disciplinary authority. Ariz. Op. 94-11; N.Y. Adv. Op. Nos. 92-42, 97-84; *see also* Pa. Adv. Op. 88-6.

In the first and second hypotheticals, it seems clear that overt sexual advances and the use of vulgar language in open court should be reported to the commission. Such conduct affects public perceptions of justice and tarnishes the reputation of the judiciary. *See, e.g., In re Seaman*, 627 A.2d 106 (N.J. 1993); *In re Deming*, 736 P.2d 639 (Wash. 1987), *amended*, 744 P.2d 340. Our supreme court's Administrative Order 92-33 unequivocally states that "[s]exual harassment in any form will not be tolerated" in the courts, and "[a]ll employees must be allowed to work in an environment free from unsolicited and unwelcome sexual overtones." The order further indicates that employees have an affirmative duty to report such misconduct "in accordance with procedures applicable to each court" and that "[s]exual harassment by judges shall be grounds for complaint to the Commission on Judicial Conduct." Similarly, with respect to inappropriate language, our supreme court expressed its displeasure with vulgar language in a disciplinary case, reminding judges that they have a duty to regulate themselves in this regard. *See In re Goodfarb*, 179 Ariz. 400, 880 P.2d 620 (1994).

The third and fourth hypotheticals are more problematic. In general, judges should not allow friends or relatives to wear their robes and sit on the bench. While a judge might allow a child to do so after hours when no one else is around, it is improper for a judge to allow another to wear a robe, sit on the bench with the judge, and call case names in open court. *See* Ariz. Op. 03-02.

It also is improper to refer to a court in perjorative terms. A judge who witnesses such conduct or receives reliable information that the misconduct occurred could meet privately with the other judge to discuss the problem. If the offending judge is receptive to the feedback, then the informal consultation might well resolve the problem. But if the offending judge repeats the conduct, the matter should be reported to the commission. By the same token, a judge or other court employee would not be wrong to report the conduct to the commission in the first instance. The point is that such conduct should not be ignored, especially when it threatens to affect the reputation of the entire judiciary.

The last hypothetical is undoubtedly the most difficult *and* sensitive because it typically arises in a situation where a colleague is grappling with a serious illness or is earnestly trying to reform his or her life and is seeking support and understanding. There may also be an unspoken fear that informing on a colleague may set in motion a process that could result in the suspension or removal of an experienced judge and trusting friend. Notwithstanding concerns about the disciplinary process, we believe that an illness, recuperation or rehabilitative period that results in an extended absence from judicial duties must be reported

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to the Commission on Judicial Conduct under the language in Canon 3D(1) that requires judges to report conduct that raises a substantial question as to another judge's "fitness as a judge." It is self-evident that a judge who must be absent from work for an extended time period (such as 90 days or more), albeit for legitimate reasons, cannot perform the duties of judicial office "diligently," give precedence to those duties "over all the judge's other activities," or "dispose of all judicial matters promptly, efficiently and fairly," as the code requires. Canon 3, 3A, 3B(8).

This being said, we believe that individual judges still have discretion, within the spirit of Canon 3D(1), to determine when a problem is so serious that it must be reported. In many instances, a judge confronted by a situation in which a colleague discloses a serious illness can fulfill his or her ethical responsibility by reporting to a presiding or chief judge, who can then determine if the problem is significant enough to report to the commission. While there are no specific guidelines for determining when to report a problem of this nature, the commission has repeatedly advised judges that they have a duty to report a health-related problem that results in a judge's absence from the bench for more than 90 days. Judicial Conduct and Ethics Bulletin, *Reporting Judicial Disabilities*, No. 11 (March 2000). The commission is sensitive to such problems and has indicated its willingness to "keep the information confidential and monitor the judge's progress until he or she returns to active service." *Id.* Moreover, a recent rule change expressly allows judges to participate in diversion or monitoring programs involving professional counseling and treatment. Rule 16(b), Rules of the Commission on Judicial Conduct. Like many professional assistance programs, however, it is better for judges to voluntarily report their conduct to the appropriate authority than to force their colleagues to do it for them.

In truly serious cases, presiding judges are cautioned not to put off reporting to the commission in the hope that a colleague will make a speedy recovery. In the absence of administrative directives or more specific language in the code, presiding judges do not have the necessary authority to resolve long-term problems that relate to a judge's fitness for office. The Arizona constitution gives the supreme court broad authority to deal with disabilities "*on recommendation of the commission.*" Ariz. Const. art. 6.1, § 4 (emphasis added). It thus falls within the jurisdiction of the commission to make recommendations to the court for any conduct or problem that could lead to disability retirement.

In summary, in the absence of specific guidelines as to what is "appropriate action" under Canon 3D(1), judges and judicial employees can use their discretion in deciding what to do about minor misconduct if sufficient alternative methods exist for dealing with a problem. Judges, however, must report a substantial violation of the code. We recognize that the dividing line between minor misconduct and substantial violations is not always clear. The preamble to the code, however, mentions several relevant factors in determining whether disciplinary action is appropriate, including "the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system." Those same factors are useful in determining what constitutes a substantial violation that a judge or court employee should report.

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In addition, the effect of the misconduct on others is a relevant consideration. A momentary lapse of judgment resulting in a minor gaffe or embarrassment can easily be resolved internally. On the other hand, misconduct that persists in the face of repeated warnings or inappropriate behavior that affects public perceptions of the fairness or impartiality of a judicial proceeding should be reported promptly. Conduct that falls somewhere in between those two extremes should be dealt with carefully and sensitively; it cannot be ignored or swept under the rug, but it does not always have to be reported to a disciplinary body.

Finally, it has been noted that, “[w]hile judges have an ethical duty to preserve the integrity of the judicial system, many feel that being an informant is socially inappropriate.” Cynthia Gray, *Disciplinary Responsibilities*, 15 No. 4 Judicial Conduct Reporter 6 (Winter 1994). But former Arizona Supreme Court Justice Robert J. Corcoran once stated:

The generation of lawyers to which I belong was raised on movies in which James Cagney and George Raft portrayed gangsters and prisoners who did not “rat” on each other. That kind of rule may be good for imprisoned felons, gangsters, Mafioso, and those involved in RICO enterprises. They have adopted their own code of conduct. However, just the exact opposite applies to professionals who are subject to an honor code requiring them to report unethical conduct of other professionals.

Id., quoting Robert J. Corcoran, *In re Himmel: Am I My Brother’s Keeper?* Arizona Attorney at 16 (Oct. 1989). When it comes to serious violations of the code, judges and court employees should heed that admonition.

Applicable Code Sections

Arizona Code of Judicial Conduct, Canon 3D(1) (1993).

Arizona Code of Conduct for Judicial Employees, Canon 3H (1997).

Other References

Arizona Constitution, Article 6.1, § 4.

In re Goodfarb, 179 Ariz. 400, 880 P.2d 620 (1994).

Arizona Commission on Judicial Conduct, Rule 16(b).

Arizona Judicial Ethics Advisory Committee, Opinions [94-11](#) (Aug. 5, 1994); [03-02](#) (Aug. 7, 2003).

Arizona Judicial Conduct and Ethics Bulletin, *Reporting Judicial Disabilities*, No. 11 (March 2000).

Arizona Supreme Court Administrative Order 92-33 (Oct. 19, 1992).

Massachusetts Supreme Judicial Court Committee on Judicial Ethics, Opinions 98-11 (Aug. 6, 1998); 2002-04 (Feb. 14, 2002).

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New York Advisory Committee on Judicial Ethics, Opinions 92-42; 97-84.

Pennsylvania Conference of State Trial Judges, Judicial Ethics Committee Opinion.

In re Seaman, 627 A.2d 106 (N.J. 1993).

In re Voorhees, 739 S.W.2d 178 (Mo. 1987).

In re Deming, 736 P.2d 639 (Wash. 1987), *amended*, 744 P.2d 340.

Robert J. Corcoran, *In re Himmel: Am I My Brother's Keeper?* Arizona Attorney 16 (Oct. 1989).

Cynthia Gray, *Disciplinary Responsibilities*, 15 No. 4 Judicial Conduct Reporter 6 (Winter 1994).

Lisa L. Milord, *The Development of the ABA Judicial Code* 25 (1992).

Jeffrey M. Shaman, et al., *Judicial Conduct and Ethics* § 6.15, at 204-05, nn.166-75 (3d ed. 2000).

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