



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1099 (7/12/2016)

Topic: Obligation to Report Judicial Misconduct

Digest: A New York lawyer is not required to report a violation by a judge of the Rules of Judicial Conduct, but is free to do so if it is consistent with the lawyer's duty of confidentiality to the lawyer's client.

Rules: 1.6, 8.3(a), (b) & (c), 8.4(f)

FACTS

The inquirer believes that he has knowledge that a judge who sits in, and is a member of the bar of, New York has engaged in unethical conduct in a judicial capacity. The inquirer seeks advice on whether this knowledge obligates the inquirer to report the judge to the New York State Commission on Judicial Conduct (or "CJC").

QUESTION

1. Must a lawyer report to the Commission on Judicial Conduct knowledge of a judge's violation of the Rules of Judicial Conduct?

OPINION

2. We assume, for purposes of this opinion, that the judge's unethical conduct constitutes a violation of the Rules of the Chief Administrative Judge Regarding Judicial Conduct, 22 N.Y.C.R.R. Part 100 (the "Rules of Judicial Conduct" or "RJC") and does not also violate the New York Rules of Professional Conduct (the "RPC"), which are applicable to all New York lawyers.

3. The question is an issue of first impression for this Committee. Rule 8.3 of the RPC, entitled "Reporting Professional Misconduct," provides in part:

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

(b) A lawyer who possesses knowledge or evidence concerning another lawyer or a judge shall not fail to respond to a lawful demand for information from a tribunal or other authority empowered to investigate or act upon such conduct.

4. Rule 8.3(a) imposes a duty to report; Rule 8.3(b) imposes a duty to cooperate. Rule 8.3's duty to report arises when a lawyer knows of conduct by another lawyer which violates the Rules and raises a substantial question about that other lawyer's honesty, trustworthiness or fitness. Rule 8.3(b)'s duty to cooperate arises when a lawyer has knowledge or evidence that a tribunal or other authority lawfully demands concerning another lawyer or a judge. Had the drafters intended the duty to report to include conduct by a judge that violates the Rules of Judicial Conduct, they easily could have said so. That 8.3(a) does not refer to judges, while Rule 8.3(b) does, suggests an intention not to impose an *obligation* to report alleged judicial misconduct. Rule 8.3(a) contrasts with the analogous provision of the RJC. *See* RJC Part 100.3(D)(1) ("A judge who receives information indicating a substantial likelihood that another judge has committed a substantial violation of this Part shall take appropriate action.")

5. To characterize the omission from the RPC as an oversight is difficult. Rule 8.3 is substantially the same as Disciplinary Rule ("DR") 1-103 of the former Code of Professional Responsibility ("the Code"). When the New York State Bar Association's Committee on Standards of Attorney Conduct, known as COSAC, proposed a revision of the Code to conform to the format, and in many instances the substance, of the American Bar Association's Model Rules of Professional Conduct ("Model Rules"), COSAC recommended that DR 1-103, which was to become Rule 8.3, be amended to extend the duty to report to a lawyer who "knows that a judge has committed a violation of the applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office." *See* L. Emanuel, "Major Differences Between COSAC Proposals & Current N.Y. Lawyer's Code of Professional Responsibility," *New York Legal Ethics Reporter* (April 1, 2006) (quoting the COSAC report). In adopting the RPC, the courts did not accept this recommendation.

6. Of the 51 jurisdictions in the United States that regulate lawyer conduct, 48 explicitly address a lawyer's duty to report alleged judicial misconduct, in most instances with language either tracking Model Rule 8.3(b), *e.g.*, N.J. Rule 8.3(b); Ill. Rule 8.3(b), or tailored to the judicial oversight committee authority of a particular jurisdiction, *e.g.*, Ark. Rule 8.3(b). At least two states – Washington and Georgia – provide that a lawyer "should" do so; Georgia is express in saying that a violation of this suggestion is not a disciplinary violation, *see* Ga. Rule 8.3. In addition to New York, two other states do not address the matter: California has no parallel to Rule 8.3, even in regard to reporting lawyer misconduct. *See* D. Karpman, "New Professional Rules Generate Plenty of Disagreement," *Cal. L.J.* (September 2010) (California rules impose no duty to report misconduct by other lawyers). Alabama requires lawyers to report any violation of its Rule 8.4, which, like New York's, refers only to lawyers, not judges, and yet contains a provision identical to New York's 8.3(b). These comparisons indicate that, when regulators want to impose a whistleblower provision, they know how to phrase it.

7. In this State, at least above the municipal court level, judges are invariably lawyers, which invites the possibility of interpreting Rule 8.3(a)'s reference to the conduct of "another lawyer" to include judges. Certainly the temptation exists to impose a duty to report serious ethical violations by members of the judiciary who are central to the fair administration of justice. Yet for this Committee to do so would require us to ignore (1) Rule 8.3's predecessor (DR 1-103), (2) the evolution of Rule 8.3 from COSAC (which believed an amendment was

desirable if not necessary) to the courts that adopted the Rules (which did not agree), and (3) the rules in most other jurisdictions that adopted variations of Model Rule 8.3 specifically imposing an obligation, on pain of disciplinary sanction, for failing to report judicial misconduct. We believe that ignoring these considerations would be overreaching. In any event, we have assumed for purposes of this opinion that the judge's conduct does not violate the RPC.

8. To say that a lawyer is not subject to discipline for failure to report judicial misconduct is not to say that a lawyer should not make such a report. Subject only to the following caveat, nothing in the Rules may be read to discourage a lawyer from reporting to an appropriate authority (including the CJC) knowledge that a judge has engaged in conduct raising substantial questions about the judge's fitness to occupy a judicial post. The most important restraint on a lawyer's right to report is Rule 1.6, which obligates a lawyer to preserve confidential information acquired in the course of an attorney-client relationship, which includes not only privileged communications but any information the disclosure of which would be embarrassing or detrimental to the client or is inconsistent with the client's wishes. Rule 8.3(c) makes clear that a lawyer's duty to report does not require disclosure of information that Rule 1.6 protects (or is obtained by a lawyer or judge while participating in a bona fide lawyer assistance program). These constraints exist regardless whether the lawyer has a duty to report. Thus, when a lawyer's knowledge of judicial misconduct consists of confidential information within the meaning of Rule 1.6, a lawyer wishing to report the misconduct may require the consent of the client to do so.

9. It bears noting that the Constitution of New York authorizes the CJC to "receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform or performance of official duties of any judge or justice of the unified court system." N.Y. Const., Art. VI, § 22, subd. a. To this end, the Legislature has provided the CJC with broad investigatory and enforcement powers. *See* Judiciary Law §§ 41, 42, 44. Although our State Constitution vests the CJC with this power, a lawyer has the right, subject to any restrictions that Rule 1.6 imposes, to report the alleged judicial misconduct to the CJC or to other authorities, such as a district attorney (for violations of law) or to a grievance committee (for violations of applicable Rules of Professional Conduct).

10. This opinion does not address a lawyer's obligation to report criminal conduct by a judge. Such conduct involves questions of law, such as misprision of a felony, which are beyond our jurisdiction to confront. *See* Rule 8.4(f) (a lawyer may not knowingly assist a judge "in conduct that is a violation of the rules of judicial conduct or other law").

CONCLUSION

11. A New York lawyer has no duty, at risk of disciplinary sanction, to report a violation by a judge of the Rules of Judicial Conduct, but the lawyer is free to do so consistent with the lawyer's duty of confidentiality to the lawyer's client.