

**2015-03 (February 19, 2015)**

**Attorneys; Reporting Misconduct; Code of Judicial Conduct Rules 1.2 & 2.15;  
Rules of Professional Conduct 3.4, 3.5 & 8.4**

**Issue:** Does a Judicial Official have a duty to report attorney misconduct if the attorney repeatedly failed to appear at scheduled events in multiple cases over a period of time, the attorney sent an ex parte communication addressed to the Judicial Official, including medical information in support of a motion to re-open a case, and most recently, when the inquiring Judicial Official was trying to get the lawyer in court, for a scheduled hearing on a motion filed by that attorney, caseflow office reached the lawyer on the telephone and the lawyer said that he/she would be 15 minutes late but instead was several hours late because the lawyer went to another courthouse for a different matter first?

**Additional Facts:**

In one case, in which the attorney was the legal representative of a party, the attorney did not appear for a status conference approximately one year ago. No continuance had been requested and opposing counsel was present. The caseflow coordinator reached the lawyer by telephone and the lawyer reported that he/she had “mixed up” the dates, so the status conference was rescheduled. On the second date for the conference, once again no continuance was requested, opposing counsel appeared and the subject lawyer was not present at the scheduled start of the conference. The lawyer called later and stated that he/she was not coming due to a health issue. The matter was rescheduled to a third date. On that date, no continuance was requested, opposing counsel was present on time, and the subject attorney appeared several hours later, after opposing counsel had been released. The subject attorney filed a caseflow request that same date indicating that he/she had a previously scheduled status conference in another judicial district. The status conference was rescheduled to a fourth date, and again counsel did not appear at the start of the conference. The caseflow coordinator contacted the attorney and the attorney appeared approximately one and one half hours late. Opposing counsel had appeared on time. The subject attorney was warned that in light of the foregoing history, the case would be dismissed if the attorney failed to appear in the future. The case was dismissed several months later when the attorney failed to appear for a status conference, no continuance or caseflow request was filed, opposing counsel was present as directed, and caseflow was unable to contact the attorney. The subject attorney filed a motion to reopen the dismissal, which was scheduled for a hearing. The subject attorney was not present at the scheduled time for the hearing and when contacted by the caseflow office, the attorney stated he/she would be there in 15 minutes but instead was several hours late because the attorney went to another courthouse for a different matter prior to reporting for the hearing on the motion to reopen.

The inquiring Judicial Official also dismissed the subject attorney’s personal case, in which the attorney was a party to the action for failing to appear on the date scheduled for jury selection. In several other cases, in which the attorney was the legal representative of a party, the subject attorney failed to appear for scheduled events or

improperly filed a caseflow request (instead of a request for a continuance), on the day of a scheduled event. The inquiring Judicial Official told the attorney in the past not to use caseflow requests and not to file last minute caseflow requests unnecessarily, including entering one or more written orders stating that counsel is to refrain from filing unnecessarily late requests. The attorney also was cautioned not to file continuance requests under the guise of a caseflow request as it may not get to the court in a timely manner. In the instance where the attorney's personal case was dismissed, which was over a year ago, the Judicial Official set forth in an articulation that the attorney had improperly used a caseflow form, however, but thereafter the attorney continued to use caseflow forms in the same improper manner.

**Applicable Code of Judicial Conduct Rules and Rules of Professional Responsibility:**

Rule 1.2 of the Code of Judicial Conduct states that a judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary.

Rule 2.15 of Code of Judicial Conduct states, in relevant part, as follows:

- (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.

...

- (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.

The Comments to the foregoing Rule states, in relevant part, as follows:

- (1) Taking appropriate action under the circumstances to address known misconduct is a judge's obligation. Except as otherwise provided in subsection (e) [not relevant to this inquiry], 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.

...

- (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.

Rule 3.4 of the Rules of Professional Conduct, Fairness to Opposing Party and Counsel, prohibits a lawyer from, inter alia, knowingly disobeying an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.

Rule 3.5 of the Rules of Professional Conduct, Impartiality and Decorum, provides, inter alia, that a lawyer shall not communicate ex parte with a judge, juror, prospective juror or other official during a proceeding unless authorized to do so by law or court order and also prohibits a lawyer from engaging in conduct that is intended to disrupt a tribunal or ancillary proceedings.

Rule 8.4 of the Rules of Professional Conduct notes that it is professional misconduct for a lawyer to, inter alia, engage in conduct that is prejudicial to the administration of justice.

## **Discussion**

On several prior occasions this Committee has been asked about the duty of a Judicial Official to report unprofessional conduct. 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 he or she 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. The Committee noted that a commonly used method to report misconduct that occurs on the record is to forward a copy of the transcript to the appropriate disciplinary authority with a cover letter stating that the matter is being referred for such consideration as the disciplinary authority deems appropriate, however, the Judicial Official may report the misconduct in any manner that he or she determined was appropriate under the circumstances. Finally, in [JE 2010-10](#), the Committee addressed the question of the duty of a judge or a second judge with supervisory responsibilities to whom the first judge had reported information, to report possible misconduct of a third judge. Based upon the facts, the Committee determined that while there was no specific requirement under Canon 3(b)(3) to report the judge's conduct to a disciplinary authority, both judges had a duty to take or initiate appropriate disciplinary measures if, based upon the quality of the information they received, they

believed that the judicial official acted unprofessionally and in violation of the Code of Judicial Conduct. The Committee further found that the first judge had taken appropriate measures by reporting the information to the second judge. With respect to the second judge, the Committee determined that the judge had discretion to decide whether to take or initiate disciplinary measures. If after evaluating the quality of the information received, the second judge was satisfied that there was a sufficient, credible factual basis to conclude that the judge's conduct constituted a substantial violation of the Code, then that judge had a duty to take or initiate disciplinary measures. The Committee further noted that if the information provided to the second judge was sufficient to warrant further reasonable investigation with respect to obvious and readily available sources, the judge should undertake such reasonable investigation in order to clarify the factual situation.

In this case, the inquiring Judicial Official has personal knowledge of the attorney's repeated failures to appear before that Judicial Official and that sanctions have been imposed in at least two cases as a result of the attorney's repeated failures to appear in court when scheduled to be present. The Judicial Official also has knowledge that the attorney told the court he/she would be present in 15 minutes but instead went to a different courthouse first and appeared hours later. In each of the instances of failure to appear or appearing tardy, opposing counsel was present and the attorney's conduct resulted in delays in court proceedings. In addition, the attorney often would file a caseflow request in lieu of a request for a continuance, and would do so on the date when the attorney was scheduled to appear such that there was no time to rule on the matter or for opposing counsel to obtain advance notice of the request, even after the attorney had been advised by the court that was not the proper means for requesting a continuance.

Based upon the facts presented, the Committee unanimously determined that the judge has knowledge that the attorney has engaged in a pattern of conduct in violation of Rules 3.4, 3.5 and 8.4 of the Rules of Professional Conduct. The Committee further determined, in accordance with Rules 1.2 and 2.15 of the Code of Judicial Conduct, that the inquiring Judicial Official has an obligation to report the attorney to the appropriate disciplinary authority because the violation "raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." See also Comment (1) to Rule 2.15. As noted in this Committee's prior opinions, if transcripts or other documents exist that set forth the subject attorney's failures to appear and other alleged misconduct, one option available to the inquiring Judicial Official in discharging his or her obligation to report the attorney to the appropriate disciplinary authority is to send a copy of those documents to the Statewide Grievance Committee for such action as it deems appropriate.