



## Connecticut Committee on Judicial Ethics

### Informal Opinion Summaries

**2020-02 (February 20, 2020)**

**Attorneys; Reporting Misconduct; Promoting Public Confidence; Disqualification; Rules 1.2, 2.11 & 2.15; Rules of Professional Conduct 1.1, 1.3 & 8.4; Practice Book 2-40, 2-42 & 2-47**

(This matter was filed as a joint inquiry by two Judicial Officials. For ease in understanding, the summary set out below refers to “Judicial Official”, singular.)

**Issue:** If it comes to the Judicial Official’s attention that an attorney has been formally charged with a crime, is the Judicial Official under any ethical obligation to do any of the following:

- a. Inquire in chambers of counsel whether he/she has informed the client that he/she has been formally charged;
- b. Inquire whether the attorney asked the client whether he/she still wishes to be represented by the attorney in light of his/her arrest on this formal charge;
- c. Inquire of the client on the record whether he/she was informed of these charges by the attorney and whether the client still wishes to be represented by the attorney; and
- d. Inquire whether the attorney has obtained the client’s written informed consent to continued representation in light of the disclosure of these facts.

In addition to the above questions, and because the Judicial Official has determined that the charge against the attorney would qualify as a “serious crime” as defined in Connecticut Practice Book Section 2-40, the Judicial Official also seeks advice as to whether his or her obligation to do any of the above hinges on the type of crime with which the attorney has been charged.

**Facts:** The specific situation the Judicial Official is currently facing involves an attorney formally charged with witness tampering. The attorney’s case is currently pending in a

different Judicial District than the one in which the Judicial Official is assigned. The attorney appears as counsel of record for numerous clients in the Judicial Official's Judicial District, as well as in many others throughout the state.

The Judicial Official appears to lack any first-hand knowledge of the charged criminal activity.

**Applicable Rules of Judicial Conduct:** 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, and shall avoid impropriety and the appearance of impropriety. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge’s honesty, impartiality, temperament, or fitness to serve as a judge.”

Rule 2.11 (a) provides that “[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned....”

Subsection (d) of Rule 2.15 provides:

(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.

In relevant part, Comment (2) to Rule 2.15 explains that “[a] judge who does not have actual knowledge that ... a lawyer may have committed misconduct, but receives information indicating a substantial likelihood of such misconduct, is required to take appropriate action under [subsection (d)] ....”

Comment (3) to Rule 2.15 provides that “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.”

So, in sum, where the Judicial Official received information about the lawyer's conduct, but does not have actual knowledge of the conduct, the Judicial Official must consider whether there is a "substantial likelihood" that the lawyer committed a violation of the Rules of Professional Conduct. If there is a substantial likelihood of a violation, the judge must take "appropriate action."

**Applicable Rules of Professional Conduct:** Rule 1.1 of the Rules of Professional Conduct provides that a "lawyer shall provide competent representation to the client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Rule 1.3 of the Rules of Professional Conduct provide that provides that a "lawyer shall act with reasonable diligence and promptness in representing a client."

Rule 8.4 of the Rules of Professional Conduct states, in relevant part, that it is professional misconduct for a lawyer to:

- (1) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (2) Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (3) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (4) Engage in conduct that is prejudicial to the administration of justice;...

**Applicable Practice Book Sections:** Connecticut Practice Book Section 2-40 provides that:

- (a) The term "serious crime," as used herein, shall mean any felony, any larceny, any crime where the attorney was or will be sentenced to a term of incarceration, or any other crime that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or any crime, a necessary element of which, as determined by the statutory or commonlaw definition of the crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, wilful

failure to file tax returns, violations involving criminal drug offenses, or any attempt, conspiracy or solicitation of another to commit a ``serious crime."

...

(e) Upon receipt of proof of the finding of guilt, the disciplinary counsel shall determine whether the crime for which the attorney was found guilty is a serious crime, as defined herein. If so, disciplinary counsel shall, pursuant to Section 2-47, file a presentment against the attorney predicated upon the finding of guilt. A certified copy of the finding of guilt shall be conclusive evidence of the commission of that crime in any disciplinary proceeding based upon the finding of guilt. No entry fee shall be required for proceedings hereunder.

...

(g) Immediately upon receipt of proof of the finding of guilt of an attorney of a serious crime, as defined herein, the disciplinary counsel may also apply to the court for an order of interim suspension. If the attorney was or will be sentenced to a term of incarceration, disciplinary counsel shall seek a suspension during the term of incarceration. The court may, in its discretion, enter an order immediately placing the attorney on interim suspension pending final disposition of a presentment filed pursuant to this section. Thereafter, for good cause shown, the court may, in the interests of justice, set aside or modify the interim suspension.

Practice Book Section 2-42 provides:

(a) If there is a disciplinary proceeding pending against a lawyer, ... and the grievance panel, the reviewing committee, the Statewide Grievance Committee or the disciplinary counsel believes that the lawyer poses a substantial threat of irreparable harm to his or her clients or to prospective clients, ... the panel or committee shall so advise the disciplinary counsel. The disciplinary counsel shall, upon being so advised or upon his or her own belief, apply to the court for an order of interim suspension. The disciplinary counsel shall provide the lawyer with notice that an application for interim suspension has been filed and that a hearing will be held on such application.

(b) The court, after hearing, pending final disposition of the disciplinary proceeding, may, if it finds that the lawyer poses a substantial threat of irreparable harm to his

or her clients or to prospective clients, enter an order of interim suspension, or may order such other interim action as deemed appropriate. Thereafter, upon good cause shown, the court may, in the interest of justice, set aside or modify the interim suspension or other order entered pursuant hereto. Whenever the court enters an interim suspension order pursuant hereto, the court may appoint a trustee, pursuant to Section 2-64, to protect the clients' and the suspended attorney's interests.

**Discussion:** In [JE 2015-01](#), this Committee discussed the nature of a Judicial Official's obligation when he or she receives information that an attorney may have committed a violation of the Rules of Professional Conduct. In reaching its decision that the matter under consideration should be reported to the appropriate authority pursuant to subsection (d) of Rule 2.15, the Committee considered New York Judicial Ethics Advisory Opinions 10-36, 10-85, [10-122](#), 12-180, 13-118 and 14-88 and *United States v. Russell*, 639 F. Supp. 2d 226 (D. Conn 2007).

In [JE 2015-01](#), "the Committee considered the approach of New York Rule 100.3 (D) (2) of New York's Rules of Judicial Conduct [which] provides that '[a] judge who receives information indicating a substantial likelihood that a lawyer has committed a substantial violation of the Code of Professional Responsibility shall take appropriate action.' New York's Advisory Committee on Judicial Ethics has explained that it is ordinarily left to the judge's discretion to determine the 'appropriate action.' However, New York's Committee has concluded that where there is a substantial likelihood of misconduct that clearly calls into question the lawyer's honesty, trustworthiness, or fitness as a lawyer, then the only appropriate action is to report the lawyer to the grievance committee. See New York Judicial Ethics Advisory Opinions [14-88](#) (noting that there had been several instances 'where conduct described in an inquiry to this Committee, if true, demonstrated a substantial likelihood of a substantial violation that clearly called into question an attorney's honesty, trustworthiness or fitness as a lawyer and, therefore, at the very least, warranted an investigation by the attorney grievance committee')" (judge learns an attorney appearing before him or her *pro se* testified under oath that the attorney used a fictitious bank account to shield the attorney's law firm income from court-ordered child support payments).

In [JE 2015-01](#), the Committee also adopted the position followed in New York that a judge is under no ethical obligation to conduct an investigation to determine how serious or minor any misconduct may be.

In New York Judicial Ethics Advisory Opinions [10-122](#), a judge was informed by the testimony of a witness in his or her court that the defendant's prior attorney had been involved in activities amounting to witness tampering. The prosecutor advised the judge that the prosecutor's office had already reported the attorney in question to the attorney grievance committee. The judge asked whether he or she must take any action regarding the attorney.

In addition to the decisions noted above, the New York Advisory Committee on Judicial Ethics, concluded that "a judge, who is satisfied that an attorney's alleged misconduct has actually been previously reported, is not required to take any further action." If the judge is uncertain whether a report has been made, the judge should "simply report the attorney." New York Judicial Ethics Advisory Opinions [13-77](#) and [15-180](#). See also New York Judicial Ethics Advisory Opinions [09-49](#) and [10-122](#).

Once the Judicial Official reports the attorney, the Judicial Official must disqualify himself or herself from all cases in which the attorney appears either as a party or an attorney, both during the pendency of the disciplinary matter, and for a period of two years after the disciplinary matter is fully resolved. Remittal is not available unless the attorney waives his or her right to confidentiality both during the disciplinary proceeding and after it is resolved in his or her favor or unless the grievance committee issues a public disciplinary decision. See [JE 2015-01](#).

In New York Judicial Ethics Advisory Opinions [14-39](#) a judge learned from an attorney who was appearing before the judge that the attorney was under indictment. The judge asked whether he or she must disclose that fact to the other attorneys on the case, and similarly whether the attorney has a duty to disclose that fact to his or her client. In that matter, the Committee stated that "individuals under criminal investigation or indictment 'are presumed innocent of such charges until proven guilty in a court of law.'" (Internal citations omitted.) The Committee decided that:

(1) A judge, having learned that an attorney on a case is under indictment, but having no personal knowledge of the underlying circumstances, is not required to report the attorney to the attorney disciplinary authority.

(2) As the judge has concluded he/she can decide the case before him/her without reference to this information, the judge need not make any disclosure to other attorneys on the case.

In that matter, the Committee refused to comment on the attorney's legal or ethical obligations, if any, to advise his or her client that he or she is under indictment.

In New York Judicial Ethics Advisory Opinions [10-86](#), a judge in the course of his or her duties, reviewed a criminal complaint that charged a lawyer with grand larceny in the third degree. That judge had no personal knowledge of the alleged conduct, the lawyer had not been indicted, and the judge was unaware of any corroborating evidence. The Committee in that matter held that “[a] judge who believes that the charges in a criminal complaint against a lawyer would, if proved, constitute a substantial violation of the Rules of Professional Conduct is not required to take any action unless he/she concludes there is a substantial likelihood that the charges are true.”

**Recommendation:** Based on the facts presented, and after consideration of the authorities outlined above, only if the Judicial Official has actual knowledge that the attorney has committed misconduct that raises a substantial question regarding his or her honesty, trustworthiness, or fitness as an attorney in other respects, or if the Judicial Official receives information indicating a substantial likelihood that the attorney committed misconduct, must the Judicial Official take any action that he or she deems appropriate. Merely accessing unproven, uncorroborated information through media sources or other sources does not, without more, require the Judicial Official to act.

Additionally, regardless of whether action is taken in response to the attorney's conduct, there is no obligation on the part of the Judicial Official to delve into the attorney-client relationship as would be the case were the Judicial Official to interpose himself or herself into the situation by inquiring of the attorney and/or client as suggested. Once alleged misconduct has been reported, the structure of the grievance system must be relied upon

to reach a proper resolution, including protection of the interests of affected individuals. Regardless of the possible misconduct, the attorney is obligated to provide competent representation to the client, and must act with reasonable diligence and promptness in representing a client. As such, answers to the specific questions posed by the Judicial Official are not required.

This opinion is not intended to in any way diminish the Judicial Official's exercise of the inherent power of the court to regulate the conduct of lawyers. If, an emergency situation presents itself, such as when a lawyer is incarcerated or otherwise unable to protect the interests of his or her clients, a Judicial Official may be justified in exercising the inherent power of the court to regulate a lawyer's conduct in order to protect the interests of affected clients.

[Connecticut Committee on Judicial Ethics](#)