The Judge's Ethical Duty to Report Misconduct by Other Judges and Lawyers and its Effect on Judicial Independence

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THE JUDGE'S ETHICAL DUTY TO REPORT MISCONDUCT BY OTHER JUDGES AND LAWYERS AND ITS EFFECT ON JUDICIAL INDEPENDENCE

Leslie W. Abramson*

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I. INTRODUCTION

The essence of judicial independence is that any litigant or lawyer appearing before a judge can be certain that the judge will rule according to the applicable rules and precedents without any external influence. Conventional threats to judicial independence are external to the judicial decisionmaking process. For example, judicial elections pose risks to judicial autonomy. Popular election of judges requires campaign money. Judicial retention elections not only cost money, but they are also frequently dominated by special interest groups that may criticize a judge's past decisions. The political process may suggest comparable dangers for judges and judge-designates in the form of judicial confirmation hearings or political criticism of particular judges for their rulings.

Judicial credibility is dependent on the ability to reasonably exercise authority over the courtroom. Judges have inherent supervisory authority over courtroom activities. The exercise of that authority is subject to appellate review for abuse as well as scrutiny by judicial conduct organizations, which render decisions that may pose an internal threat to judicial independence. One of the ethical norms which serves as a potential threat to judicial independence requires judges to report other judges and lawyers whose conduct is unprofessional or draws into

1. The Preamble to the Wisconsin Code of Judicial Ethics provides in part:
   The provisions of the Code of Judicial Ethics are rules of reason. They should be applied consistent with constitutional requirements, statutes, other court rules and decisional law and in the context of all relevant circumstances. The Code is to be construed so as not to impinge on the essential independence of judges in making judicial decisions.

   . . . .

   The provisions of the Code are intended to govern conduct of judges and to be binding upon them. It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as 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.

   Because it is not possible to address every conceivable conduct of a judge that might erode public confidence in the integrity, independence and impartiality of the judiciary, some of the binding rules of the Code are cast in general terms setting forth the principles their specific provisions are intended to foster. Those rules provide a touchstone against which judicial conduct, actual or contemplated, is to be measured. Care must be taken that the Code's necessarily general rules do not constitute a trap for the unwary judge or a weapon to be wielded unscrupulously against a judge.

WISCONSIN CODE OF JUDICIAL ETHICS Preamble (West 1997) (citations omitted).
question their fitness to continue on the bench or to practice law. Recently, a panel of the Texas Court of Appeals articulated the policy for this standard:

We recognize our obligation not only to ensure the proper administration of justice in this Court but also our duty to the system of justice as a whole. We hasten to add that we are not merely the gatekeepers who monitor and patrol the conduct of members of the Bar. While we owe a duty to the legal system as a whole and to the administration of justice, we are ever mindful that the judiciary also has a duty to the lawyers who appear before them, to the public at large which elects them, and even to other members of the judiciary to ensure that our democracy is preserved and protected and that professionalism reigns supreme. We take this duty seriously.\(^2\)

The ethical responsibility of a judge to effectively begin the disciplinary process against fellow lawyers and judicial associates is a heavy burden.\(^3\)

In our society the person who blows the whistle occupies a very ambiguous position. In common parlance and even in law review articles pejorative terms such as “squeal,” “rat,” “stool pigeon,” and “gestapo” are used freely. People often say and believe that such action

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The 1986 American Bar Association Commission on Professionalism recommended the following: “Lawyers and judges should report to the appropriate disciplinary committee or prosecuting attorney any serious misconduct on the part of other lawyers and judges which they believe would support a complaint for discipline or criminal charges.” *AMERICAN BAR ASS’N COMM’N ON PROFESSIONALISM, “. . . IN THE SPIRIT OF PUBLIC SERVICE”: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM, reprinted in 112 F.R.D. 243, 286 (1986).* The Commission’s report further argued that increased reporting of professional misconduct is imperative to protect the public from abuses which would not otherwise be detected. *See id.* A better attitude by lawyers and judges about reporting would result if proceedings were brought in appropriate cases against lawyers who fail to report. *See id.* at 287.

3. Judges are also burdened by standards of judicial ethics which require a judge to serve as a model in both their professional and personal life. Canon 2A of both the 1972 and 1990 Code of Judicial Conduct requires that a judge respect and comply with the law “at all times,” and the accompanying commentary notes that a judge is the subject of “constant public scrutiny,” clearly indicating that Canon 2A affects conduct in the judge’s official or personal capacity. *See Leslie W. Abramson, Canon 2 of the Code of Judicial Conduct, 79 MARQ. L. REV. 949, 959 n.34 (1996)* (citing cases that have held that a judge’s ethical duties extend to his or her private life). Indeed, it has been suggested that judges are held to a higher standard of personal and official conduct than that of lawyers and other professionals in society. *See id.* at 960 & n.35.
somehow does violence to "basic ethical notions." As a parent one can remember using the devastating "put down" of, "Don't be a tattle-tale." On the other hand, we give and have been given messages such as, "Why didn't you tell me that Johnny was . . .?" Or think of press treatment of incidents where large numbers of people do nothing while some horrendous crime is unfolding before them. At best, our culture gives us very ambiguous guidance.4

On the other hand, the American Bar Association ("ABA") Committee on Lawyers' Sanctions has criticized judges for taking the position that there is no such need [to initiate the disciplinary process] and that errant behavior of lawyers can be remedied solely by use of contempt proceedings and other alternative means. It must be emphasized that the goals of lawyer discipline are not properly and fully served if the judge who observes unethical conduct simply deals with it on an ad hoc basis.5


5. AMERICAN BAR ASS'N CTR. FOR PROF'L RESPONSIBILITY, STANDARDS FOR IMPOSING LAWYER SANCTIONS 2 (1986). The report further stated that [i]t may be proper and wise for a judge to use contempt powers in order to assure that the court maintains control of the proceeding and punishes a lawyer for abusive or obstreperous conduct in the court's presence. However, the lawyer discipline system is
This Article examines the judicial duty to disclose, compares it to a lawyer's ethical duty to disclose, surveys several issues of interpretation and application of the judicial ethical requirement, and proposes modification of the existing ethical standard.

II. A JUDGE'S ETHICAL DUTY TO REPORT LAWYERS AND OTHER JUDGES

Both modern versions of the ABA's Model Code of Judicial Conduct impose a duty on judges to take appropriate disciplinary action with regard to unprofessional conduct by lawyers and other judges. This reporting requirement applies to full-time and part-time judges.\(^6\) Canon 3B(3) of the 1972 Code provides that part of a judge's administrative responsibility\(^7\) is to "take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge

in addition to and serves purposes different from contempt powers and other mechanisms available to the judge. Only if all lawyer misconduct is in fact reported to the appropriate disciplinary agency can the legal profession have confidence that consistent sanctions are imposed for similar misconduct.

\(\text{Id.}\)

6. States using the 1972 Code seem to impose a duty on part-time judges to report. See, e.g., Alabama Judicial Inquiry Comm'n, Ops. 78-50, 78-51 (1978) (noting that even a part-time judge who practices law has the ethical obligation to report unprofessional conduct by another judge); New York Advisory Comm. on Judicial Ethics, Op. 89-74 (1989) (stating that a part-time justice who is not an attorney must, nonetheless, report an attorney's conduct deemed by the part-time justice to be a substantial breach of the ethics code). However, the part-time judge has no obligation to report another judge if the former's knowledge is privileged as a result of the attorney-client relationship. See Alabama Judicial Inquiry Comm'n, Op. 78-52 (1978). Moreover, Canon 3B(3) places a burden on the part-time judge/attorney to obtain the client's/judge's permission to report the latter's conduct. See \(\text{id.}\).

7. The ABA's Special Committee on Evaluation of Disciplinary Enforcement, in its 1970 report, specifically recommended "sanctions, in appropriate circumstances, against attorneys and judges who fail to report attorney misconduct of which they are aware." AMERICAN BAR ASS'N SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 167 (1970) [hereinafter PROBLEMS AND RECOMMENDATIONS]. While Canon 1 of the 1972 Code vaguely regulated the reporting of a judge's misconduct when it required that a judge participate "in establishing, maintaining, and enforcing . . . high standards of conduct so that the integrity and independence of the judiciary may be preserved," MODEL CODE OF JUDICIAL CONDUCT Canon 1 (1972), the words "judge or" were added to Canon 3B(3) on the floor of the ABA House of Delegates prior to adoption of the 1972 Code "to remove any possible doubt about a judge's duty to report to the proper authorities unprofessional conduct of another judge." E. WAYNE THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 60 (1973).
may become aware. Since 1972, some states have decided to make the standard mandatory rather than hortatory, expand the measures which a judge should take to include “corrective” or “investigative” measures, or clarify the appropriate actions that a judge must follow.

By the late 1980s, the ABA and others recognized the deficiencies of the 1972 language:

8. **MODEL CODE OF JUDICIAL CONDUCT Canon 3B(3).**


Arkansas, Colorado, Georgia, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, and Washington have retained the 1972 language while adopting other parts of the 1990 Code language. See **ARKANSAS CODE OF JUDICIAL CONDUCT Canon 3D(1) (Michie 1996); COLORADO CODE OF JUDICIAL CONDUCT Canon 3B(3) (West 1990); GEORGIA CODE OF JUDICIAL CONDUCT Canon 3D(1)-(2) (1996); HAWAII CODE OF JUDICIAL CONDUCT Canon 3D(1)-(2) (Michie 1996); ILLINOIS CODE OF JUDICIAL CONDUCT Canon 3B(3) (West 1993 & Supp. 1996); MARYLAND CODE OF JUDICIAL CONDUCT Canon 3B(3) (1996); MASSACHUSETTS CODE OF JUDICIAL CONDUCT Canon 3B(3) (West 1993); MICHIGAN CODE OF JUDICIAL CONDUCT Canon 3B(3) (West 1995); MINNESOTA CODE OF JUDICIAL CONDUCT Canon 3C(1)(-2) (West Supp. 1997); WASHINGTON CODE OF JUDICIAL CONDUCT Canon 3C(1)-(2) (West 1997).

Has a judge who fails to report his or her own misconduct committed a separate ethical violation? Because the 1972 Code uses the term “judge” rather than “another judge,” as the 1990 Code does, it is unclear from the 1972 Code whether a judge has a duty of self-reporting. See Leonard E. Gross, *Legal Ethics for the Future: Time to Clean Up Our Act?*, 77 ILL. B.J. 196, 197 (1988) (stating that Canon 3B(3) “was not intended to encompass self-reporting”).

9. See, e.g., **ILLINOIS CODE OF JUDICIAL CONDUCT Canon 3B(3); LOUISIANA CODE OF JUDICIAL CONDUCT Canon 3B(3) (West 1996); MINNESOTA CODE OF JUDICIAL CONDUCT Canon 3C(1); NEW HAMPSHIRE CODE OF JUDICIAL CONDUCT Canon 3B(3)(a)-(b) (1995).**

10. See, e.g., **MARYLAND CODE OF JUDICIAL CONDUCT Canon 3B(3) & commentary (noting that the judge is to take “appropriate corrective measures,” which the commentary defines as a “private admonition or reporting misconduct to . . . a bar association counseling program”); MASSACHUSETTS CODE OF JUDICIAL CONDUCT Canon 3B(3)(b) (providing that the judge who becomes aware of unprofessional conduct by a lawyer is to take “appropriate investigative or disciplinary measures” against that lawyer).**

Ohio achieves the same result by omitting the word “disciplinary,” which permits the judge to take any appropriate measure against an offending lawyer or judge. See **OHIO CODE OF JUDICIAL CONDUCT Canon 3B(3) (1997).**

Wisconsin, which until 1997 had never adopted any version of the Code of Judicial Conduct, formerly addressed the issue of judicial reporting with language substantially identical to the original ABA Canons of Judicial Ethics, adopted in 1924: “A judge should utilize opportunities to criticize and correct unprofessional conduct of attorneys and counselors, brought to his or her attention; and, if adverse comment is not a sufficient corrective, should send the matter at once to the proper investigating disciplinary authorities.” **WISCONSIN CODE OF JUDICIAL ETHICS Rule 60.01(7) (West 1996).**

11. Instead of vaguely instructing a judge to take or initiate measures, some states clarify the judge’s ethical obligation by requiring the judge to report the offending judge or lawyer to the appropriate disciplinary body or agency. See, e.g., **GEORGIA CODE OF JUDICIAL CONDUCT Canon 3D(1)-(2); MISSOURI CODE OF JUDICIAL CONDUCT Canon 3B(3) (West 1997).**
In the wake of extensive investigations by federal law enforcement authorities revealing widespread corruption in the Cook County, Illinois court system ("Operation Greylord") and elsewhere, indicating not only that significant professional misconduct involving judges was occurring but also that the requirement to report misconduct was frequently ignored, particularly in the cases of judges with regard to the conduct of other judges, the [ABA] Committee decided to articulate the reporting standards more clearly and more comprehensively.12

In 1990, the ABA voted to amend, expand, and reposition Canon 3B(3) as part of the process of replacing the 1972 Code. Currently, Canon 3D of the 1990 Code of Judicial Conduct addresses: (1) a judge's ethical duty to report other judges' Code violations; (2) a judge's parallel duty to report attorneys' violations of the Rules of Professional Conduct (or comparable ethical maxims); and (3) a judge's absolute immunity from suit based on the discharge of his or her duties under the first two sections of Canon 3D.13

Canon 3D(1) lists two ethical obligations imposed upon a judge who learns of ethical violations by other judicial officers. The first sentence contains a general admonition to judges concerning their disciplinary responsibilities with regard to ethical infractions by fellow judges: "A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code should take


The rule was changed to specifically require judges to report significant misconduct of lawyers and other judges to a disciplinary authority, thereby diminishing the number of instances in which judges take it on themselves to impose sanctions for professional misconduct without such reporting. 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.

Id. The revised rule was designed to reflect the standards for reporting professional misconduct that appear in Rule 8.3 of the ABA Model Rules of Professional Conduct. The new rule includes a provision for judicial immunity in the exercise of reporting professional misconduct, a concept recognized by law. See Forrester v. White, 484 U.S. 219, 227, 230 (1988) (granting absolute immunity for judicial acts, such as disbar a lawyer for contempt, but not for administrative acts, such as firing a court employee); MODEL CODE OF JUDICIAL CONDUCT 16-17 (Discussion Draft 1989). The Draft was prepared by the Judicial Code Subcommittee of the ABA's Standing Committee on Ethics and Professional Responsibility.

appropriate action.”\textsuperscript{14} The second sentence requires specific action by a judge who knows that a Code violation has occurred when it relates to a fellow judge’s continued suitability for office: “A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question as to the other judge’s fitness for office shall inform the appropriate authority.”\textsuperscript{15}

It is questionable whether the term “fitness for office” is too ambiguous to serve as the guidepost for applying the ethical responsibility mandated by the second sentence of Canon 3D(1). Arizona and Oregon appear uncomfortable with the use of that lone expression, evidenced by the requirement in their Codes to report a violation when it raises a substantial question regarding a judge’s “honesty, trustworthiness,

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14. \textit{Id.} Canon 3D(1). For a discussion of what constitutes “appropriate action,” see \textit{infra} Part III.C.

The following states have adopted the first sentence of Canon 3D(1) verbatim or in substantially identical language: Kansas, Nevada, New Jersey, North Dakota, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming. \textit{See} KANSAS CODE OF JUDICIAL CONDUCT Canon 3D(1) (West 1996); NEVADA CODE OF JUDICIAL CONDUCT Canon 3D(1) (Michie 1997); NEW JERSEY CODE OF JUDICIAL CONDUCT Canon 3B(3)(a) (West 1996); NORTH DAKOTA CODE OF JUDICIAL CONDUCT Canon 3D(1) (1996-1997); RHODE ISLAND CODE OF JUDICIAL CONDUCT Canon 3D(1)(a) (1996); SOUTH DAKOTA CODE OF JUDICIAL CONDUCT Canon 3D(1) (Michie 1997); VERMONT CODE OF JUDICIAL CONDUCT Canon 3D(1) (Supp. 1996); WEST VIRGINIA CODE OF JUDICIAL CONDUCT Canon 3D(1) (1997); WYOMING CODE OF JUDICIAL CONDUCT Canon 3D(1) (Michie 1991).

California’s Code of Judicial Ethics and Florida’s Code of Judicial Conduct both include a variation of this sentence only, and omit the second sentence of Canon 3D(1). \textit{See} CALIFORNIA CODE OF JUDICIAL ETHICS Canon 3D(1) (West Supp. 1996); FLORIDA CODE OF JUDICIAL CONDUCT Canon 3D(1) (West 1996). Indiana is the only state which enlarges the scope of the judicial duty to include not only fellow judges but also “candidates for judicial office.” \textit{INDIANA CODE OF JUDICIAL CONDUCT} Canon 3D(1) (West Supp. 1995).

15. \textit{MODEL CODE OF JUDICIAL CONDUCT} Canon 3D(1) (footnote omitted). The Terminology section of the 1990 Code defines “appropriate authority” as the “authority with responsibility for initiation of disciplinary process with respect to the violation to be reported.” \textit{Id.} Terminology.

The following states have adopted the second sentence of Canon 3D(1) verbatim or in substantially identical language: Kansas, Nevada, New Jersey, North Dakota, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming. \textit{See} KANSAS CODE OF JUDICIAL CONDUCT Canon 3D(1); NEVADA CODE OF JUDICIAL CONDUCT Canon 3D(1); NEW JERSEY CODE OF JUDICIAL CONDUCT Canon 3B(3)(a); NORTH DAKOTA CODE OF JUDICIAL CONDUCT Canon 3D(1); RHODE ISLAND CODE OF JUDICIAL CONDUCT Canon 3D(1)(a); SOUTH DAKOTA CODE OF JUDICIAL CONDUCT Canon 3D(1); VERMONT CODE OF JUDICIAL CONDUCT Canon 3D(1); WEST VIRGINIA CODE OF JUDICIAL CONDUCT Canon 3D(1); WYOMING CODE OF JUDICIAL CONDUCT Canon 3D(1).

West Virginia’s Code broadens the scope of Canon 3D’s duty to report another judge about whom a substantial question about fitness for office is raised to include reporting a judge who is incapacitated or impaired. \textit{See} WEST VIRGINIA CODE OF JUDICIAL CONDUCT Canon 3D(3). The ethical duty requires the judge to report this knowledge to the Committee on Assistance and Intervention of the judiciary. \textit{See} \textit{id}.
ness or fitness as a judge.” Moreover, in defining a judge’s ethical obligation under this second sentence, several state codes either name the specific authority which should receive the judge’s information or offer a specific example of the “appropriate authority” to contact.

Paralleling Canon 3D(1) of the 1990 Code, Canon 3D(2) lists two ethical obligations for a judge who learns of ethical violations by an attorney rather than another judge:

A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct . . . should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct . . . that raises a substantial question as to the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority.

In other words, if a judge “receives information” indicating that a lawyer has violated the pertinent rules of professional conduct in that state, the judge should take “appropriate action.” If the attorney’s violation raises a substantial question about the lawyer’s fitness, the judge must inform the “appropriate authority.”

In the guise of an ethical standard complementing Canons 3D(1) and (2), Canon 3D(3) makes three points, only one of which may be an ethical concern. The Canon provides that the “[a]cts of a judge, in the

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16. OREGON CODE OF JUDICIAL CONDUCT 2-104(A) (1997). The Oregon Code of Judicial Conduct speaks of the judge’s “honesty, trustworthiness or fitness as a judge” as though fitness is a separate attribute from honesty and trustworthiness. See id.; see also ARIZONA CODE OF JUDICIAL CONDUCT Canon 3D(1) (West Supp. 1996) (discussing the judge’s “honesty, trustworthiness or fitness as a judge in other respects”).

17. See, e.g., MAINE CODE OF JUDICIAL CONDUCT Canon 3D(1) (West 1996) (requiring the judge to “inform the Committee on Judicial Responsibility and Disability or other appropriate authority”); TEXAS CODE OF JUDICIAL CONDUCT Canon 3D(1) (West 1996) (requiring the judge to “inform the State Commission on Judicial Conduct or take other appropriate action”).

18. MODEL CODE OF JUDICIAL CONDUCT Canon 3D(2) (footnote omitted).

The following states have adopted Canon 3D(2) verbatim or in substantially identical language: Arizona, Kansas, Nevada, New Jersey, New Mexico, North Dakota, Rhode Island, South Dakota, West Virginia, and Wyoming. See ARIZONA CODE OF JUDICIAL CONDUCT Canon 3D(2); KANSAS CODE OF JUDICIAL CONDUCT Canon 3D(2); NEVADA CODE OF JUDICIAL CONDUCT Canon 3D(2); NEW JERSEY CODE OF JUDICIAL CONDUCT Canon 3B(3)(b); NEW MEXICO CODE OF JUDICIAL CONDUCT Rule 21-300 D(2) (Michie Supp. 1995); NORTH DAKOTA CODE OF JUDICIAL CONDUCT Canon 3D(2); RHODE ISLAND CODE OF JUDICIAL CONDUCT Canon 3D(2)(a)-(b); SOUTH DAKOTA CODE OF JUDICIAL CONDUCT Canon 3D(2); WEST VIRGINIA CODE OF JUDICIAL CONDUCT Canon 3D(2); WYOMING CODE OF JUDICIAL CONDUCT Canon 3D(2).

The states’ linguistic permutations with regard to Canon 3D(1) apply to their renditions of Canon 3D(2) as well.
discharge of disciplinary responsibilities, required or permitted by Sections 3D(1) and 3D(2) are part of a judge’s judicial duties and shall be absolutely privileged, and no civil action predicated thereon may be instituted against the judge.”

An initial inspection of Canon 3D(3) reveals that judicial acts of reporting misconduct are part of a judge’s “judicial duties.” That much should be obvious from its inclusion in the Code of Judicial Conduct. However, that is not its primary purpose. In addition, as part of a judge’s duties, the act of reporting is “absolutely privileged.” This suggests that the act of reporting, as well as the source of information disclosing judicial misconduct, is confidential. Moreover, Canon 3D(3) grants immunity from civil claims for any judge who either reports another judge or lawyer or takes other “appropriate action” pursuant to the ethical obligations mandated by the other sections of Canon 3D.


The primary difference between the 1972 and 1990 Code provisions is that, unlike the 1972 Code, a portion of the 1990 Code clearly expresses a mandatory duty. A judge who “receives information” about a likely Code violation “should” take “appropriate action” under the 1990 Code, and a judge who knows of a violation “shall” report it to the “appropriate authority.” The 1990 Code, in effect, requires judges to report serious misbehavior of other judges and lawyers to disciplinary organizations, thereby presumably decreasing the situations in which a judge may take other action without reporting the misconduct. Judges may also continue to use their own authority, however, in assessing sanctions for professional improprieties:

19. MODEL CODE OF JUDICIAL CONDUCT Canon 3D(3).

The following states have adopted Canon 3D(3) verbatim or in a substantially identical form: Arizona, Florida, Indiana, Kansas, Nevada, New Jersey, North Dakota, Rhode Island, South Dakota, West Virginia, and Wyoming. See ARIZONA CODE OF JUDICIAL CONDUCT Canon 3D(3); FLORIDA CODE OF JUDICIAL CONDUCT Canon 3D(3); INDIANA CODE OF JUDICIAL CONDUCT Canon 3D(3); KANSAS CODE OF JUDICIAL CONDUCT Canon 3D(3); NEVADA CODE OF JUDICIAL CONDUCT Canon 3D(3); NEW JERSEY CODE OF JUDICIAL CONDUCT Canon 3B(3)(c); NORTH DAKOTA CODE OF JUDICIAL CONDUCT Canon 3D(3); RHODE ISLAND CODE OF JUDICIAL CONDUCT Canon 3D(3); SOUTH DAKOTA CODE OF JUDICIAL CONDUCT Canon 3D(3); WEST VIRGINIA CODE OF JUDICIAL CONDUCT Canon 3D(4); WYOMING CODE OF JUDICIAL CONDUCT Canon 3D(3).

New York ends its version of Canon 3D(3) after the word “duties.” See N.Y. COMP. CODES R. & REGS. tit. 22, § 100.3(D)(3) (1995). Accordingly, a judge ostensibly acting pursuant to Canon 3D(1) or 3D(2) may be sued for discharging his ethical duty.

20. See MODEL CODE OF JUDICIAL CONDUCT Canon 3D(1)-(2).
While the language of Canon 3D(2) is mandatory, it is not exclusive in that it does not prohibit an independent judiciary from exercising its inherent power to protect the jurisdiction of the courts, insure that necessary court security provisions are complied with or to exercise its authority to punish by contempt or otherwise.21

Another difference between the Codes is that the reference point for an ethical obligation to act under the 1972 Code is vague, initiated by the judge’s “awareness” of unprofessional conduct.22 Judges who do not approve of the conduct of a colleague or attorney are often quick to classify that behavior as unprofessional. However, if a judge is excessively cautious in assessing a lawyer’s or colleague’s demeanor, it may lead to an evaluation that differs from one reached by the governing judicial or attorney conduct organization. This exposes the cautious judge to possible ethical sanctions. In contrast, the 1990 standard imposes an ethical duty on the judge to act only when there is concern about a violation of the Code of Judicial Conduct (in the case of another judge), or a violation of the applicable ethical standards (in the case of a lawyer).23 While the scope of those two sets of standards is broad, the cautious but ethical judge has the benefit, at the very least, of controlling principles which are written and easily accessible.

A third difference is found in the commentary to the 1990 Code, which explains the use of the terms “appropriate action” and “appropriate authority.” The 1972 commentary contains no such explanation and leads to inconsistent responses by judges, primarily in the application of “appropriate action.”24 Some decisions hold that reporting is the only disciplinary action a judge may take under Canon 3B(3), while others...
permit and even encourage varied disciplinary measures such as disqualification, sanctions, and contempt.\textsuperscript{25}

Although little case law has applied the 1990 Code’s Canon 3D, its commentary precludes an interpretation that permits only reporting. In addition, “appropriate action” may include direct communication with the offending judge or lawyer or other direct action.\textsuperscript{26} The commentary to Canon 3D also specifies that the “appropriate authority” is the authority responsible for disciplinary proceedings, which is consistent with Canon 3B(3) case law.\textsuperscript{27}

Finally, the 1990 Code defines important terms which are used throughout the Code. Its Terminology section defines two of the expressions most essential to an understanding of Canon 3D: “appropriate authority” and “knowledge.”\textsuperscript{28} Ironically, the ambiguous term “appropriate action” is left undefined.

\textsuperscript{25} Compare United States v. Swanson, 943 F.2d 1070, 1076 (9th Cir. 1991) (“Violation of these standards should be reported by the court and opposing counsel.”); In re Voorhees, 739 S.W.2d 178, 180 (Mo. 1987) (en banc) (stating that a reprimand of a judge should be imposed only for substantial reasons), and Spivey v. Bender, 601 N.E.2d 56, 58-59 (Ohio Ct. App. 1991) (allowing for the disqualification of an attorney only if the attorney's violation poses a significant threat of tainting the trial), with Mentor Lagoons, Inc. v. Rubin, 510 N.E.2d 379, 382 (Ohio 1987) (finding that there exists “inherent authority of dismissal or disqualification from a case if an attorney cannot, or will not, comply with the Code of Professional Responsibility when representing a client”), and In re Larsen, 616 A.2d 529, 609 (Pa. 1992) (allowing for disqualification and sanctions).

\textsuperscript{26} See discussion infra Part III.C for what constitutes “appropriate action.”

\textsuperscript{27} See, e.g., In re Marriage of Dall, 569 N.E.2d 1131, 1136 (Ill. App. Ct. 1991) (“The power to discipline an attorney for such a violation rests solely in the [state] supreme court.”).

\textsuperscript{28} “‘Appropriate authority’ denotes the authority with responsibility for initiation of disciplinary process with respect to the violation to be reported. . . . ‘Knowingly,’ ‘knowledge,’ ‘known’ or ‘knows’ denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.” MODEL CODE OF JUDICIAL CONDUCT Terminology.
B. Comparing a Judge’s Duty to Report with a Lawyer’s Duty to Report

Bound by the ethical obligations of either the Model Code of Professional Responsibility or the Model Rules of Professional Conduct, a lawyer has a duty to report misconduct. The Code of Professional Responsibility is similar to the 1972 Code of Judicial Conduct, and requires lawyers to report unprivileged knowledge about other lawyers’ disciplinary rule violations to the appropriate governing body. Similarly, the Model Rules dictate a lawyer’s ethical duty to report misconduct and is comparable to the judicial duty described in Canons 3D(1) and 3D(2) of the Code of Judicial Conduct.

Under the Model Rules, a lawyer who has knowledge that another lawyer or a judge has committed an ethical violation which raises a substantial question about the latter’s fitness must inform the “appropriate authority.” From the perspective of both the Model Rules and the

29. Lawyers may be reluctant to operate as informers, as required by the Model Code of Professional Responsibility and the Model Rules of Professional Conduct. 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.

29. Lawyers may be reluctant to operate as informers, as required by the Model Code of Professional Responsibility and the Model Rules of Professional Conduct.


30. “A lawyer possessing unprivileged knowledge of a violation of DR 1-102 [dealing with types of lawyer misconduct] shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.” MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103(A) (1980).

31. Rule 8.3 provides the following:

(a) A lawyer having knowledge 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 in other respects, shall inform the appropriate professional authority.

(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge’s fitness for office shall inform the appropriate authority.

(c) This rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while serving as a member of an
Code of Judicial Conduct, it appears that a lawyer's obligation to report is independent of whether a judge exercises the duty to report that same misconduct—the same independent duty is applied to judges. Thus, neither a judge nor a lawyer can avoid the duty to report on the grounds that the other will disclose possible misconduct to the "appropriate authority."

Similar to the language found in the Code of Judicial Conduct, the Model Rules limit a lawyer's obligation to report possible ethical violations to conduct that "raises a substantial question" as to another approved lawyers assistance program to the extent that such information would be confidential if it were communicated subject to the attorney-client privilege.


Alaska, California, Kentucky, Massachusetts, and Washington have adopted the Model Rules, but omit the reporting requirement. Other states have altered the scope of the reporting duty. For example, in Alabama, the duty applies only to violations by lawyers of Rule 8.4; in Louisiana, the duty is expanded to include all violations by lawyers, and narrowed so that lawyers do not have to report judicial violations of the Code of Judicial Conduct; in Michigan, the duty is applied only to "significant" violations; and in Washington, the duty is narrowed to "should promptly inform" rather than "shall inform."

The major case that considers the duty to report another lawyer's wrongdoing is In re Himmel, 533 N.E.2d 790 (III. 1988). In Himmel, the Illinois Supreme Court suspended a lawyer from the practice of law for one year for failing to comply with the ethical obligation to report another lawyer's misconduct. See id. at 796. The court held that the attorney-client privilege did not excuse a lawyer from the duty to report misappropriation of funds by the client's former lawyer. See id. at 794. See generally Ronald D. Rotunda, The Lawyer's Duty to Report Another Lawyer's Unethical Violations in the Wake of Himmel, 1988 U. ILL. L. REV. 977, 982-91 (discussing the Himmel case and the lawyer misconduct therein).

32. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(a)-(b). Under the Model Rules, "[the term 'substantial'] refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware." Id. cmt. 3; cf In re Grievance Comm., 847 F.2d 57, 63 (2d Cir. 1988) (holding that an attorney must have "actual knowledge" before a failure to report is actionable under DR 7-102(B)(2), which requires relaying information "clearly establishing" that a person has committed a fraud on a tribunal).

Our experience indicates that if any standard less than actual knowledge was adopted in this context, serious consequences might follow. If attorneys were bound as part of their ethical duties to report to the court each time they strongly suspected that a witness lied, courts would be inundated with such reports. Court dockets would quickly become overburdened with conducting these collateral proceedings which would necessarily hold up the ultimate disposition of the underlying action. We do not believe that the Code's drafters intended to throw the court system into such a morass. Instead, it seems that the only reasonable conclusion is that the drafters intended disclosure of only that information which the attorney reasonably knows to be a fact and which, when combined with other facts in his knowledge, would clearly establish the existence of a fraud on the tribunal.

To interpret the rule to mean otherwise would be to require attorneys to disclose mere suspicions of fraud which are based upon incomplete or unreliable information which may fall short of clearly establishing the existence of a fraud. We do not suggest, however, that by requiring that the attorney have actual knowledge of a fraud before he
DUTY TO REPORT MISCONDUCT

"lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Moreover, a lawyer's duty to report a judge's violation is similarly limited to judicial conduct that "raises a substantial question" as to the judge's "fitness for office."

The comment for Model Rule 8.3 suggests that a lawyer must report violations promptly. Because there is no requirement that a lawyer should be convinced about the certainty of a violation prior to reporting, postponing the report to obtain more evidence, or to complete the litigation out of which a violation arose, does not appear to be justified. In any event, delay may sometimes lead to a later use of mere threats to report as leverage in any underlying litigation.

In addition, a lawyer's duty to report is subject to an obligation of holding inviolate all client evidentiary confidences and client secrets.

is bound to disclose it, he must wait until he has proof beyond a moral certainty that fraud has been committed. Rather, we simply conclude that he must clearly know, rather than suspect, that a fraud on the court has been committed before he brings this knowledge to the court's attention.

Applying the above to the instant appeal, it becomes clear that Doe did not violate his ethical duties when he did not report to the court the information he possessed concerning witness's potential perjury. Neither the information Doe received from conversations one and two, nor his independent information concerning the facts of the case, provided him with knowledge that a fraud on the court had taken place. Although Doe's subjective beliefs may have caused him to suspect strongly that witness lied, they did not amount to actual knowledge that witness committed a fraud on the court.

Id. 33. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(a).
34. Id. Rule 8.3(b).
35. See id. Rule 8.3 cmt.
36. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-383 (1994) (voicing a concern about the threat to file a disciplinary charge to obtain an advantage in a civil case). The Opinion concludes that "there will frequently be circumstances in which such a threat will violate Model Rule 8.3 or one of the more general restraints on advocacy imposed by the Model Rules," but urges that the reporting itself be deferred until the conclusion of the case. Id.; see also ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-384 (1994) (noting that a lawyer, in connection with a pending case, generally does not have to withdraw from representation of the client when his alleged violation is reported by the opposing lawyer); Michael J. Burwick, Note, You Dirty Rat!! Model Rule 8.3 and Mandatory Reporting of Attorney Misconduct, 8 GEO. J. LEGAL ETHICS 137 (1994) (concluding that there should be a bifurcation of the reporting requirement: (1) mandatory reporting for certain serious offenses, and (2) permissive reporting for certain less-serious offenses).
37. Rule 8.3(c) of the ABA Model Rules specifically refers to Rule 1.6, which refers to client information. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6; see also id. Rule 8.3(c). Comment 2 to Rule 8.3 emphasizes that the lawyer may not report misconduct of another attorney if the reporting would involve a violation of Rule 1.6; "[h]owever, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests." Id. Rule 8.3 cmt. 2. The ABA has issued a formal opinion that is consistent with Model Rule 8.3(c), see ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 341 (1975), but the
Thus, lawyers representing a judge or another lawyer, as a client charged in a disciplinary proceeding, have no responsibility to report any knowledge of possible violations which were divulged by their client.38

Attorneys who learn about another’s misconduct can also ask another lawyer for advice concerning their duty to report. If the advising-lawyer issues a written opinion stating that there is no duty to report, the advising-lawyer is shielded from having to report the client-lawyer. This outcome is particularly ironic when the client-lawyer, after relying on that opinion, faces ethical charges for a failure to report. However, the client-lawyer can at least claim to have sought legal advice regarding whether or not there was a reporting responsibility.

III. A JUDGE’S DUTY TO REPORT

A. When Does the Duty to Report Arise?

A judge’s duty to report judicial or lawyer misconduct not only depends on the extent of the judge’s knowledge concerning the wrongdoing, but also on the amount of time the judge can wait before reporting. Canon 3B(3) of the 1972 Code imposes a judicial duty to report unprofessional conduct by lawyers and other judges of which the judge may become aware. Several states have sought to remedy the clumsy last phrase in an effort to determine when a judge “may become aware” of unprofessional conduct. The use of the verb “may” appears unnecessary because a judge is either aware or unaware of a lawyer’s or another judge’s improper conduct.

The vague language of Canon 3B(3) inevitably gives rise to

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38. The comment for Model Rule 8.3 provides that “[t]he duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.” MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 cmt. 4. In such circumstances, the evidentiary privilege applies, rather than the narrower ethical privilege; the duty of loyalty to one’s client applies as well.

39. See MODEL CODE OF JUDICIAL CONDUCT Canon 3B(3) (1972); see also supra note 8 and accompanying text.

40. MODEL CODE OF JUDICIAL CONDUCT Canon 3B(3). For example, Massachusetts modestly deals with the permissive nature of the judge’s knowledge by changing “may become aware” to “shall become aware.” MASSACHUSETTS CODE OF JUDICIAL CONDUCT Canon 3B(3) (West 1996).
numerous other questions. Does the use of the word "become" suggest that the judge should remain passive in the acquisition of information? In other words, should the judge avoid actively investigating suspicions or rumors about offensive conduct by others and take appropriate measures only after witnessing the offensive conduct or learning about it from another person? How much information should the judge possess prior to taking "appropriate" measures? How certain should the judge be about the unprofessional conduct prior to acting upon it?

To remedy the permissive and passive language, several states have modified Canon 3B(3) and now impose an ethical duty only after a judge has knowledge, has personal knowledge, or clearly believes that professional misconduct has occurred. 41 Ironically, despite the awkwardness of the 1972 standard, many states that have adopted substantial portions of the 1990 Code have retained the ABA's troublesome 1972 language. 42

The first sentences of Canons 3D(1) and 3D(2) in the 1990 Code refer to a judge who "receives information" about the substantial likelihood of an ethical violation by another judge or lawyer. An ethical judge will likely act if the information received leads to more than a reasonable suspicion that another judge or lawyer has committed an ethical violation. 43 Moreover, a few of the states that have imposed a requirement of judicial action if a judge "receives information," also require that the judge act only in situations where the information is reliable, credible, or clearly establishes a violation. 44

41. See, e.g., ALABAMA CANONS OF JUDICIAL ETHICS Canon 3B(3) (1996) ("judge has personal knowledge"); ILLINOIS CODE OF JUDICIAL CONDUCT Canon 3B(3) (West 1993) ("judge having knowledge"); MISSOURI CODE OF JUDICIAL CONDUCT Canon 3B(3) (West 1997) ("judge believes clearly").

42. The states which have taken this approach include Colorado, Delaware, Hawaii, Iowa, Maryland, Michigan, Minnesota, Utah, and Virginia. See COLORADO CODE OF JUDICIAL CONDUCT Canon 3B(3) (West 1990); DELAWARE JUDGES' CODE OF JUDICIAL CONDUCT Canon 3B(3) (1997); HAWAII CODE OF JUDICIAL CONDUCT Canon 3B(3) (Michie 1996); IOWA CODE OF JUDICIAL CONDUCT Canon 3C(3) (West 1997); MARYLAND CODE OF JUDICIAL CONDUCT Canon 3B(3) (1996); MICHIGAN CODE OF JUDICIAL CONDUCT Canon 3B(3) (West 1995); MINNESOTA CODE OF JUDICIAL CONDUCT Canon 3B(3) (West 1993); UTAH CODE OF JUDICIAL CONDUCT Canon 3B(3) (1997); VIRGINIA CODE OF JUDICIAL CONDUCT Canon 3B(3) (Michie Supp. 1996).

43. See, e.g., RHODE ISLAND CODE OF JUDICIAL CONDUCT Canon 3D commentary (1996) ("However, inaction in a situation where the judge has information which would support more than a reasonable suspicion of wrong doing is unacceptable conduct on the part of that judge.").

The second sentences of Canons 3D(1) and 3D(2) require specific action on the part of judges who “know” about an ethical violation. While several states have modified the first sentences to mandate action by the judge, the most frequent change relates to the type of information compelling judicial action. In those states, a judge does not have an ethical obligation merely because of information received which indicates that an ethical violation may have occurred; the judge’s duty does not arise until the judge has knowledge of a violation. This change is consistent with the second sentences of Canons 3D(1) and 3D(2), which refer to a judge’s knowledge, and implies that neither rumors nor other reports concerning ethical breaches will suffice as knowledge or facts.

After a judge has the requisite knowledge for the duty to apply, a question arises as to whether there is an obligation to report immediately. The potential consequences to a judge or lawyer who is reported may suggest postponement to corroborate or investigate the facts, thereby leading to a better understanding of the circumstances. However, similar to a lawyer’s duty to report under Model Rule 8.3, delaying the report until the conclusion of the proceedings from which the misconduct arose does not appear to be justified.

Regardless of the standard of knowledge giving rise to the duty to report, an extension of time in which to gather additional evidence is not required; in other words, the necessary information need not be the best or most certain for the duty to apply. The commencement of “appropriate action” against the judge or lawyer should occur within a reasonable period of time. However, state ethics opinions suggest that when the judge observes unprofessional conduct during trial, the duty to report the conduct to the appropriate disciplinary authority does not necessarily arise until the conclusion of the case, even if one of the parties appeals.

45. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 22, § 100.3(D)(1) (1995) (“shall take appropriate action”); see also ARIZONA CODE OF JUDICIAL CONDUCT Canon 3D(1) (“shall take or initiate appropriate action”); CALIFORNIA CODE OF JUDICIAL ETHICS Canon 3D(1) (same); FLORIDA CODE OF JUDICIAL CONDUCT Canon 3D(1) (West 1996) (“shall take appropriate action”).

46. See, e.g., ARIZONA CODE OF JUDICIAL CONDUCT Canon 3D(1) (“has knowledge” found in both sentences); WASHINGTON CODE OF JUDICIAL CONDUCT Canon 3C(1) (West 1997) (“having actual knowledge” found in both sentences); cf. FLORIDA CODE OF JUDICIAL CONDUCT Canon 3D(1) (“receives information or has actual knowledge”).


48. See, e.g., Alabama Judicial Inquiry Comm’n, Op. 89-390 (1990) (concluding that the court may submit a letter to the state bar grievance committee evaluating the nature and quality of adversary counsel’s representation of the client while the case was on appeal); Michigan State Bar Standing Comm. on Prof’l and Judicial Ethics, Informal Op. CI-1177 (1988) (concluding that a judge
The leading case in this area is *In re Voorhees*,49 which held that a judge must "clearly believe" that another judge’s act constituted misconduct in order for the duty to report to arise.50 The presiding judge ordered removal of the associate judges from their courtrooms and relieved them of their judicial responsibilities as an administrative act to foster cooperation with the circuit court’s reorganization.51 Because the presiding judge did not classify the associate judges’ failure to cooperate as misconduct, and because the judge was not trying to discipline them, he did not view the incident as a disciplinary matter and therefore did not report them to an “appropriate authority.”52 The Missouri Supreme Court found that the presiding judge had no duty to report his colleagues because he did not clearly believe that their acts constituted misconduct.53

B. What Misconduct Should or Must Be Reported?

The Codes suggest that a judge should deal with *any* ethical violation by another judge or lawyer, even if the violation does not relate to the latter’s dishonesty, fraud, deceit, or misrepresentation. Hence, the Codes do not distinguish between major or minor ethical violations. However, at least two states have narrowed the type of misconduct that should be reported. Recent amendments to New York’s Rules governing judicial conduct limit the reporting requirement to *substantial* violations by judges or lawyers.54 Florida’s commentary to Canon 3D indicates that “appropriate action” for a judge depends on whether the offending conduct is considered minor.55 If it is, the judge can address the

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49. 739 S.W.2d 178 (Mo. 1987) (en banc).
50. See id. at 187.
51. See id. at 183.
52. Id. at 187.
53. See id.
54. See N.Y. Comp. Codes R. & Regs. tit. 22, § 100.3(D)(1)-(2) (1995); see also New York Advisory Comm. on Judicial Ethics, Op. 92-42 (1992) (concluding that reporting was required only when a judge concluded that another judge had committed a substantial ethical violation, but notification to the “appropriate authority” was merely discretionary when the violation was technical or insubstantial); New York Advisory Comm. on Judicial Ethics, Op. 91-114 (1991) (requiring reporting of a lawyer’s misconduct only when the judge reasonably believed that the impropriety was substantial).
55. The commentary provides that

[If the conduct is minor, the Canon allows a judge to address the problem solely by direct communication with the offender. A judge having knowledge, however, that}
problem on a one-on-one basis with the offender. Apparently, a
distinction exists between insubstantial and substantial ethical violations,
as well as minor and major ethical transgressions.

Lesser violations may be addressed by direct communication with
the offending person and may remain secret from the "appropriate
authority" designated by law to handle such misconduct. On the other
hand, significant ethical breaches raise serious questions about a lawyer's
or judge's fitness to continue in their particular capacity. Therefore, such
breaches must be reported to the "appropriate authority." Thus, in New
York and Florida, a judge must distinguish between minor and serious
violations in an effort to determine an appropriate response. Unfortu-
nately, the commentary fails to reveal how a judge should evaluate such
unethical conduct.

Although both the 1972 and 1990 Codes explicitly refer to reporting
ethical breaches of lawyers and judges, should the scope of the duty
include reporting any and all wrongdoing to the proper authorities? For
example, in Sheridan v. Sheridan, the parties testified that they had
acquired marital property with funds obtained illegally and which had not
been reported as taxable income. The court held that the duty to report
arises whenever a judge is aware of a litigant's illegal conduct. However,
the ethics opinions indicate that judges have no ethical duty to
report criminal violations by attorneys. On other hand, most of the
case law is broader, confirming that ethics violations of all types should
or must be reported.

another judge has committed a violation of this Code that raises a substantial question
as to to that other judge's fitness for office or has knowledge that a lawyer has committed
a violation of the Rules of Professional Conduct that raises a substantial question as to
the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, is required
under this Canon to inform the appropriate authority. While worded differently, this Code
provision has the identical purpose as the related Model Code provisions.

FLORIDA CODE OF JUDICIAL CONDUCT Canon 3D(3) commentary (West 1996).

57. See id. at 1069-70.
58. See id. at 1072.
of the Internal Revenue Code to the IRS); Louisiana Supreme Court Comm. on Judicial Ethics, Op.
73 (1987) (no ethical duty to report civil and criminal tax fraud or matters relating to tax fraud).
60. Examples of lawyer violations are numerous and varied. See, e.g., Landry v. State, 666
So. 2d 121, 130 (Fla. 1995) (Wells, J., concurring) (supporting ethics opinions that require lawyers'
and judges' competence regarding the law and disclosure of adverse legal authority to the trial
lawyer or judge having knowledge of another lawyer's violation of professional conduct rules to
inform the "appropriate authority"); In re J.B.K., 931 S.W.2d 581, 584 (Tex. Ct. App. 1996)
Some ethics advisory opinions indicate that the obligation to report does not arise unless a judge believes that a breach of professional ethics was substantial, i.e., insubstantial violations need not be reported. With regard to ethical problems that arise during the pendency of a matter, the nature and clarity of the ethical violation may dictate whether a judge should immediately address the problem within the context of the proceeding or alternatively report the facts to the "appropriate authority." For example, if the situation is clearly within the accepted legal definition of a conflict of interest, a judge should refuse to allow such a practice in proceedings over which the judge presides. A judge's continued control over a case where an impermissible conflict of interest exists might suggest judicial approval of the conflict. On the other hand, when the conduct is not clearly within the prevailing legal definitions of a conflict of interest, but arguably may be considered such a conflict, a judge discharges the ethical responsibility by reporting the facts to the "appropriate authority." 

C. What Is an Appropriate Action or Disciplinary Measure for the Judge to Pursue?

The first sentences of Canons 3D(1) and 3D(2) in the 1990 Code provide that a judge with information regarding an ethical violation by (prohibiting lawyers' ex parte contact with court personnel regarding their clients' chances of success in pending cases); Campos v. Investment Management Properties, Inc., 917 S.W.2d 351, 357 n.5 (Tex. Ct. App. 1996) (Green, J., concurring) (requiring judges with knowledge of a lawyer's violation of a disciplinary rule to take "appropriate action"); Cap Rock Elec. Coop., Inc. v. Texas Utils. Elec. Co., 874 S.W.2d 92, 98 (Tex. Ct. App. 1994) (prohibiting the deliberate misleading of court and opposing counsel regarding the existence of contracts); cf. Texas Judicial Ethics Advisory Op. 45 (1979) (requiring a judge to initiate appropriate disciplinary measures against a lawyer who knowingly presents false information).

Examples of judicial violations follow the same pattern. See, e.g., In re Lorona, 875 P.2d 795, 796 (Ariz. 1994) (holding that an offending judge who contacted reporting judge about two of the latter's pending cases warrants suspension); Dodds v. Commission on Judicial Performance, 906 P.2d 1260, 1267-68 (Cal. 1995) (holding that a judge's failure to report another judge who was removing air from a tire of a van parked in the latter judge's courthouse parking space was improper); State ex rel. Schwartz v. Lantz, 440 So. 2d 446, 449 (Fla. Dist. Ct. App. 1983) (holding that a judge willfully violated an appellate court order staying proceedings in case); cf. Pennsylvania Judicial Ethics Comm. of the State Trial Judges, Formal Op. 88-6 (1988) (administrative judge sought advice about request by another judge that a case be assigned to the requesting judge); New York State Comm'n on Judicial Conduct, 1987 Annual Report 19-20 (summarizing In re Gassman, in which a judge was admonished for releasing three people from custody at the ex parte request of another judge and for failing to report the other judge's request).

another judge or lawyer should take “appropriate action.” The commentary to Canon 3D focuses on examples of “appropriate action” under these sentences: “Appropriate action may include direct communication with the judge or lawyer who has committed the violation, other direct action if available, and reporting the violation to the ‘appropriate authority’ or other agency or body.” Although this furnishes only limited guidance, Rhode Island’s commentary supplements it with the obvious: “It is understood that the ‘appropriate action’ will vary with the circumstances of each case.” This totality-of-the-circumstances technique provides grounds to argue that prior cases are distinguishable from the present situation and that there is no “black-letter” precedent for applying Canon 3D to judicial inaction.

On the other hand, Canon 3B of the 1972 Code requires a judge to “take or initiate appropriate disciplinary measures” for a lawyer’s or another judge’s unprofessional conduct. The one-sentence commentary to Canon 3B provides that “[d]isciplinary measures may include reporting

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63. See Model Code of Judicial Conduct Canon 3D(1)-(2) (1990); see also supra notes 14-15, 18 and accompanying text.
Florida has adopted the 1990 commentary, except that the list of appropriate actions is expressed in the alternative; that is, “or reporting” instead of “and reporting.” See Florida Code of Judicial Conduct Canon 3D(3) commentary (West 1996). In addition to mandating a report by the judge about a lawyer’s or another judge’s ethical violation, Oregon’s Code provides that a judge should reveal that knowledge to the proper investigating and disciplinary authorities. See Oregon Code of Judicial Conduct Canon 3B(3).
66. Only California’s Code requires that the actions taken by the judge be “corrective” as well as “appropriate.” California Code of Judicial Ethics Canon 3D(1) & commentary (West Supp. 1996). While the term “corrective” suggests nonpunitive action by the judge, such as the judge speaking directly to the offending jurist, California’s Code and commentary are really no different than the ABA standards, which refer to other direct action or even a report of the violation to the appropriate authority, agency, or body. See id.
a lawyer's misconduct to an appropriate disciplinary body." Thus, it is not mandatory that a judge report others' ethical violations if the judge deems alternative measures to be more appropriate. While the 1972 commentary offers a choice to judges with regard to what they could do with the information they acquire, it does not offer the more extensive inventory of options found in the 1990 commentary or the codes of other states with an amended 1972 Code standard. For example, Connecticut's commentary provides that a judge with information about offensive conduct retains discretion to relate it to the "appropriate authority, depending on the seriousness of the conduct and the circumstances involved." This sentence informs the judge that reporting is an optional "measure" to pursue, albeit the commentary fails to provide guidance about what considerations should direct that exercise of discretion.

Determining what is an "appropriate disciplinary measure" or "appropriate action" depends on the circumstances of each case. Under the 1972 Code, the majority of cases applying Canon 3B(3) concern the judicial obligation to report attorneys who have violated the pertinent ethics rules or local rules of practice. Some cases have held that the 1972 Code permits, or even requires, a judge to make a report to the


“appropriate authority,” but that a judge may not take other disciplinary action.\textsuperscript{69}

Regardless of whether an appellate or reviewing court finds that an attorney’s conduct is a basis for reversible error or a new trial, a court can discharge its ethical responsibility by instructing the clerk to forward a copy of its opinion to the bar association.\textsuperscript{70} Alternatively, the court may use the misconduct as the basis for remanding cases to the trial judge with instructions to consider possible disciplinary action or sanctions against counsel.\textsuperscript{71}

\textsuperscript{69} See, e.g., \textit{In re Marriage of Dall}, 569 N.E.2d 1131, 1136 (Ill. App. Ct. 1991) (“The power to discipline an attorney for such a violation rests solely in the [state] supreme court.”).

\textsuperscript{70} See, e.g., United States v. Swanson, 943 F.2d 1070, 1076 (9th Cir. 1991) (finding a reversible error for ineffective assistance of counsel and directing the clerk of the court to serve a copy of the opinion on state bar, for the attorney’s violation of disciplinary rules which indicated that the attorney failed to zealously advocate client’s interests); Igo v. Coachmen Indus., 938 F.2d 650, 653, 659 (6th Cir. 1991) (finding that the counsel’s outrageous misconduct independently justified a reversal of the verdict and a new trial and directing the clerk of the court to forward a copy of the court’s opinion to the appropriate disciplinary body); Lowenschuss v. C.G. Bluhdorn, 613 F.2d 18, 21 (2d Cir. 1980) (affirming orders of the district court and requesting the state bar to review the attorney’s conduct in case and to take “appropriate action,” without questioning whether trial court should have made the referral); United States \textit{ex rel. Crist} v. Lane, 577 F. Supp. 504, 512 n.16 (N.D. Ill. 1983) (finding that the prosecutor’s misconduct entitled petitioner to habeas corpus relief and directing a copy of the opinion be sent to the state disciplinary commission), rev’d, 745 F.2d 476 (7th Cir. 1984) (holding that improper comments by an attorney may be reported to the appropriate state disciplinary board, but reversing order granting defendant’s habeas corpus relief because such comments did not violate the defendant’s right to a fair trial); Asphalt Eng’rs, Inc. v. Galusha, 770 P.2d 1180, 1184 (Ariz. Ct. App. 1989) (affirming legal malpractice verdict against the defendant-attorney and forwarding a copy of its opinion to the state bar based on the attorney’s intentional disregard of his client’s rights); AIG Haw. Ins. Co. v. Bateman, 923 P.2d 395, 402-03 (Haw. 1996) (holding that counsel’s nondisclosure of a prior settlement was material and ordering the clerk to transmit a certified copy of the opinion to the state bar’s Office of Disciplinary Counsel for its review and appropriate disciplinary action); Bettencourt v. Bettencourt, 909 P.2d 553, 558 (Haw. 1995) (noting that a “lack of professionalism and civility” in the appellant’s opening brief compelled the state supreme court to refer its record); Cap Rock Elec. Coop., Inc. v. Texas Utils. Elec. Co., 874 S.W.2d 92 (Tex. Ct. App. 1994) (stating that deliberately misleading the trial court justifies forwarding the appellate court’s opinion to the state bar for disciplinary action).

Even after a judge has discharged the duty to report improper attorney behavior, the state bar disciplinary committee may decline to address the case because it believes that the situation is outside the scope of its responsibility. For example, the Florida Committee on Standards of Conduct Governing Judges refused to decide whether a judge would violate Florida’s Code of Judicial Conduct should he or she enter a judgment “knowing it would award money to a law firm as reimbursement for expenditures the law firm should not have undertaken.” Florida Comm. on Standards of Conduct Governing Judges, Op. 89-7 (1989). One committee member apparently maintained that entering the judgment would be synonymous with endorsing the law firm’s ethical failing. See \textit{id}. In contrast, another member believed that the judge should withhold the entry of judgment until the completion of any disciplinary action. See \textit{id}.

\textsuperscript{71} See Ryder v. City of Topeka, 814 F.2d 1412, 1427 (10th Cir. 1987) (holding that the trial court should be the first to consider whether counsel’s behavior merits disciplinary action); see also

http://scholarlycommons.law.hofstra.edu/hlr/vol25/iss3/4
Other courts have found that either the 1972 or 1990 Code justifies imposing measures like disqualification, contempt, or other sanctions. Three factors recur in a judicial determination of what action is appropriate or which disciplinary measure to take: (1) the judge’s level of certainty that a violation has occurred; (2) the risk of unfairness in the trial if a judge does not take immediate action; and (3) whether the judge is sitting in a state or federal court.

First, a judge’s level of certainty that a violation has occurred may determine what is an “appropriate action” or disciplinary measure. If the facts surrounding a violation are unclear, the Codes do not require a judge to interrupt the proceedings to make findings. Instead, the judge should “forward matters for investigation when there is an apparent violation even if they are not absolutely certain and do not have the time or the resources to make a crucial finding of fact.” An “appropriate authority” may then make the requisite findings and take further disciplinary action if necessary.

Second, the need for immediate action to prevent trial taint is important in determining the appropriate disciplinary action. Judges should not interrupt the trial to address a disciplinary matter unless it will affect the fairness of the trial. Instead, the judge should wait until the

Gonzalez v. State, 768 S.W.2d 471, 473 (Tex. Ct. App. 1989) (noting that it is the trial judge’s responsibility to initiate disciplinary action for prosecutorial misconduct).

72. See, e.g., People v. District Court, 767 P.2d 239, 241 (Colo. 1989) (en banc) (noting that the court’s contempt power or notification to the lawyer’s superior were possible remedies for the lawyer’s misconduct); In re Order as to Sanctions, 495 So. 2d 187 (Fla. Dist. Ct. App. 1986) (enumerating sanctions which may be considered by an appellate court: dismissal of appeal, contempt, striking of brief, reprimand, assessment of costs, fines, and notice to lawyer’s clients of misconduct; and further stating that repetition of misconduct will result in increased sanctions); State ex rel. Schwartz v. Lantz, 440 So. 2d 446, 450 (Fla. Dist. Ct. App. 1983) (noting that the Code of Judicial Conduct gives the court power and justification for holding a judge in contempt); In re Hart, 577 A.2d 351, 354 (Me. 1990) (noting that the Code of Judicial Conduct provides a judge with explicit authority to require a lawyer to personally appear to discuss the lawyer’s conduct); People v. Gelbman, 568 N.Y.S.2d 867, 868 (Justice Ct. 1991) (holding that the Code of Judicial Conduct supports the disqualification of a law firm); In re Hurnoval, 247 S.E.2d 230, 233 (N.C. 1977) (noting that the court has the duty to discipline lawyers for unprofessional conduct); Spivey v. Bender, 601 N.E.2d 56, 58 (Ohio Ct. App. 1991) (noting that the Code of Judicial Conduct supports a lawyer’s disqualification from a case for unprofessional conduct).

In Sailing v. Moon, 874 P.2d 1098 (Haw. 1994), the “other” sanction by the court was the refusal of the state supreme court’s chief justice to administer the oath of judicial office to an attorney who had been appointed to be a judge but was subsequently facing disciplinary charges and possible suspension from the practice of law.

73. See infra text accompanying notes 77-87.


75. See supra note 15 and accompanying text.
conclusion of the proceeding to report the matter to a disciplinary committee. If an unfair trial can be avoided only by independently correcting an ethical violation, a judge has supervisory authority over the courtroom which allows action in order to prevent a tainted trial.°6

Third, a determination of appropriate discipline depends upon whether the judge is sitting in a state or federal court. Because the Codes do not require a judge to interrupt proceedings to make findings regarding a disciplinary violation, federal judges ordinarily do not take independent action, but merely refer such matters to state disciplinary authorities.77 States are the primary licensing authority for attorneys, and “state law is generally the primary source of the law of professional responsibility.”78 For example, United States v. Vague79 concerned a federal district court judge who had postponed sentencing in a criminal case to hold a hearing on the excessiveness of the defense attorney’s fee.80 The Seventh Circuit held that the district judge should not have taken independent action because it did not require immediate attention to preserve the fairness of the trial proceedings.81 Instead, the judge should have simply reported the violation to the ethics committee of the state bar association or the local federal court executive committee.82

76. "The business of the court is ... not to act as a general overseer of the ethics of those who practice here unless the questioned behavior taints the trial of the cause before it." W. T. Grant Co. v. Haines, 531 F.2d 671, 677 (2d Cir. 1976) (citing Lefrak v. Arabian Am. Oil Co., 527 F.2d 1136, 1141 (2d Cir. 1975)); see also Bank One Lima v. Altenburger, 616 N.E.2d 954, 958 (Ohio Ct. App. 1992) (stating that the trial court has the authority to dismiss or disqualify an attorney from a case when he or she becomes a witness on behalf of the client); Bob Abbott, Judicial Conduct, J. KAN. B. ASS’N, Summer 1982, at 76, 79 (noting that although the “Supreme Court has exclusive jurisdiction to discipline attorneys and judges for violations ... other judges have jurisdiction and authority to determine if a violation would result in an unfair trial”). In W. T. Grant Co., while the court recognized its power of disqualification, it declined to disqualify the plaintiff’s attorney for interrogating a defendant who was not yet represented by counsel because disqualification would result in expense, delay, and prejudice to the plaintiff. See 531 F.2d at 677; cf. Levy, supra note 4, at 113 (perceiving the Second Circuit’s refusal to comment on the misconduct aspect of this case as a manifestation of the “strong presumption in the minds of most judges against being active in ethical matters”).

77. See Kaufman, supra note 74, at 862.
78. Id.
79. 697 F.2d 805 (7th Cir. 1983).
80. See id. at 805.
81. See id. at 807.
82. See id. By acting on its own, the trial court created two problems. First, the court’s power to order restitution of any excess fees depended upon whether the restitution proceeding began before or after sentencing. If the judge had not discovered or had done nothing about the violation until after sentencing, it would have been too late to take any action. Second, the judge mixed judicial and prosecutorial functions by assuming the role that the defendant would have played had he sued for restitution. See also In re Chou-Chen Chem., Inc., 31 B.R. 842, 851 & n.34 (Bankr. W.D. Ky.
Similarly, even though the commentary to Canon 3B(3) provides that disciplinary measures may include reporting (implying that other measures may be more suitable), some state courts have characterized reporting as the only appropriate disciplinary measure. Disciplinary measures beyond reporting are proper when attorney misconduct poses a risk of trial taint that requires immediate resolution in order to ensure a fair trial. In other words, the wrongdoing and the case are so inseparable that a judge would be unable to decide the case fairly without first resolving the ethical violation. To proceed without considering sanctions may suggest to an attorney that the court does not deem the misconduct to be serious. Disciplinary measures in these situations may include disqualification, contempt, or sanctions.

Disqualification arising from an attorney's conflict of interest, for example, is an appropriate disciplinary action to erase or mitigate the risk of trial taint. In *Spivey v. Bender*, the trial court disqualified an attorney for suing a former client on a claim substantially related to matters in the previous claim. The Ohio Appellate Court upheld the disqualification, stating that the trial court had "'inherent authority of dismissal or disqualification from a case if an attorney cannot, or will not, comply with the Code of Professional Responsibility when representing a client.'" However, disqualification "should ordinarily

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1983) (noting that the trial court should raise ethical problems but not correct them).

83. Compare *In re Marriage of Dall*, 569 N.E.2d 1131, 1136 (Ill. App. Ct. 1991) (noting that the state supreme court, rather than the trial court, has the power to discipline an attorney for professional misconduct relating to an action for dissolution of marriage), with *Igo v. Coachmen Indus.*, 938 F.2d 650, 654 (6th Cir. 1991) (noting that the trial court should have controlled an attorney's misconduct at trial by censuring him rather than allowing him to "inflame[] the passions of the jury with improper conduct").

The disparities in the case law may be the result of judicial interpretations of what constitutes a disciplinary measure. For example, in *Pantori, Inc. v. Stephenson*, 384 So. 2d 1357 (Fla. Dist. Ct. App. 1980), the court held that the state supreme court, rather than the trial court, has exclusive jurisdiction to discipline an attorney; however, "a trial court may control an attorney for contemptuous conduct." *Id.* at 1359. Perhaps the appellate court believed that suspension and disbarment are disciplinary measures reserved for the Florida Supreme Court.


85. *See id.* at 57.

86. *Id.* at 58 (quoting *Mentor Lagoons, Inc. v. Rubin*, 510 N.E.2d 379, 382 (Ohio 1987)). Similarly, the "trial court retains the 'authority and duty to see to the ethical conduct of attorneys in proceedings before it . . . [and] [u]pon proper grounds it can disqualify an attorney.'" *Royal Indem. Co. v. J.C. Penney Co.*, 501 N.E.2d 617, 620 (Ohio 1986) (quoting *Hahn v. Boeing Co.*, 621 P.2d 1263, 1266 (Wash. 1980) (en banc)).
be granted only when a violation of the Canons of the Code of Professional Responsibility poses a significant risk of trial taint.  

IV. EXCEPTIONS TO THE DUTY TO REPORT

Three states using the 1972 standard have explicit exceptions to the application of Canon 3B(3). Utah exempts judges from taking or initiating measures when the information available to the judge is "generated and communicated under the policies of the Judicial Performance Evaluation Program." Michigan excuses judges from Canon 3B(3)’s ethical obligation when the judge’s information is “gained while serving with the substance abuse counseling program” of the state bar if the information otherwise would be protected by the ethical duty of confidentiality because it was an attorney-client communication. Connecticut exempts disclosure by a judge who is “serving as a member of a committee that renders assistance to ill or impaired judges or lawyers or while serving as a member of a bar association professional ethics committee.”

Likewise, under the 1990 Code, several states have amended Code or commentary language to create exceptions. For example, New Mexico’s Code and the commentary to Indiana’s Code provide that the

87. Glueck v. Jonathan Logan, Inc., 653 F.2d 746, 748 (2d Cir. 1981); see also People v. Gelbman, 568 N.Y.S.2d 867, 868 (Justice Ct. 1991) (citing Canon 3B(3) as authority to disqualify a law firm representing a former police dispatcher because a member of the firm was also a police officer employed by the town police department); Mentor Lagoons, 510 N.E.2d at 382 (holding that ethical rules may prevent an attorney from testifying on behalf of his or her client, and stating that the Ohio Supreme Court approves and encourages “courts throughout the state in their efforts to halt unprofessional conduct and meet their responsibilities in reporting violations of the Code”).

88. UTAH CODE OF JUDICIAL CONDUCT Canon 3D (1997).

89. MICHIGAN CODE OF JUDICIAL CONDUCT Canon 3B(3) (West 1995). This language is comparable to the language provided by Rule 8.3(c) of the ABA Model Rules of Professional Conduct, which exempts a lawyer from disclosing another lawyer’s or judge’s misconduct when the information was obtained while the lawyer was “serving as a member of an approved lawyers assistance program to the extent that such information would be confidential if it were communicated subject to the attorney-client privilege.” MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(c) (1992).

ethical standards are inapplicable to certain types of communications by a judge or lawyer about alcohol or substance abuse. Nebraska's Code establishes an exception to the scope of Canon 3D(1), exempting members of the Nebraska Judicial Ethics Committee concerning information obtained from judges seeking an advisory opinion.

V. MODIFYING THE CODE STANDARD

Does the legal profession even need a reporting requirement comparable or identical to the 1972 and 1990 Code provisions? Assume that judges would not use the standard selfishly or maliciously, or as a strategic ploy during judicial election campaigns. Is the ethical standard "good" for the profession?

The requirement sets worthy and notable aims against one another: the integrity of self versus the integrity of the legal system. A judge's protection of colleagues and friends is an honorable and valued character trait which extends beyond personal benefit and subordinates the judge's well-being for others. Undoubtedly, a judge's decision to remain silent...
may be preferable to the alternative course of action: reporting others and then enduring their likely response to the judge’s report. Moreover, when a judge reports another judge or a lawyer, even one widely regarded as acting unethically, others may “blame” the notifying judge, whose status may diminish more than that of the reported offender.94 Understandably, what judge would want the reputation of a snitch? Who would want to be a judge?

Indeed, the silent judge may have integrity, but consider the price of the judge’s silence: the unreported offensive conduct will continue to infest the legal system. Judges should demonstrate the responsibility to take action and thereby protect the court system they serve. The duty to provide unsolicited information seems fitting when rectifying unethical behavior is central to the continued credibility of an increasingly disparaged legal system. Moreover, the responsibility to communicate unprofessional behavior becomes all the more compelling when one considers that judges comprise the one group that is most likely to observe or receive information regarding others’ misconduct.

Assuming it is wise to retain the concept of reporting, Canons 3D(1) and 3D(2) of the 1990 Code should be modified in the following manner:

(1) A judge who receives credible information that another judge either is no longer fit to continue in office or has committed a violation of the Code shall inform the appropriate authority.

(2) A judge who receives credible information that a lawyer either is no longer fit to practice law or has committed a violation of the applicable rules of professional conduct shall inform the appropriate authority. The judge’s obligation to inform does not preclude the judge from handling a lawyer’s misconduct by taking additional disciplinary measures against the lawyer.

This modification corrects several flaws inherent in the ABA’s attempt to duplicate Model Rule 8.3 in the current version of Canons 3D(1) and 3D(2) in the 1990 Code, as well as addresses the vague standard first enunciated by the 1972 Code. First, the 1990 Canons diffuse the ethical standard into two sentences, dividing the already debatable norm of the 1972 Code into two muddled, confusing components. Each of the elements has divergent factual assumptions leading to the possibility of different actions—a judge who “receives information” indicating a substantial likelihood of an ethical violation possibly could report, whereas a judge with knowledge about a violation relating to

94. See id. at 532.
fitness shall report. The suggested modification eliminates the need for a judge to make a subjective judgment about the nature of the violation. Instead, the proposal states an affirmative duty to report when either alternative situation exists.\textsuperscript{95}

Second, assuming that a state’s judicial reporting requirement is essential to the maintenance of the judicial system’s integrity, it is preferable to have specific criteria commanding judges to forward all information about ethical violations to the “appropriate authority.” The proposed modification provides one standard of knowledge, “credible information,” which clarifies a judge’s ethical duties. This eliminates a judicial determination of whether a particular ethical violation relates to the offender’s fitness to continue as a judge or as a lawyer (compelling a report), or whether it indicates a substantial likelihood of an ethical violation unrelated to continued fitness (merely advising a report). Working judges lack the time and resources to make these crucial findings of fact. Moreover, bar associations and judicial conduct organizations have professionally trained staff whose primary charge is to investigate any reports that concern alleged ethical violations by lawyers or judges with care and justice.\textsuperscript{96} To discharge the ethical responsibility under the proposal, the judge merely forwards credible information about an ethical violation to the proper authority.

Third, the proposal simplifies and blends the current Canons of the 1990 Code into one ethical norm, creating a streamlined ethical standard. This enables a judge both to execute the ethical duty to report and to retain the supervisory authority to deal with misconduct, without concern for a mistaken characterization of the particular violation. For example, suppose that under Canon 3D(2) a judge initially concludes that a lawyer’s misconduct violates the state’s Code of Ethics, but nevertheless does not raise a substantial question about the lawyer’s fitness to practice. Accordingly, the judge holds the lawyer in contempt or perhaps imposes a different sanction.\textsuperscript{97} If the judge later decides, however, without the benefit of more details, that the offending lawyer’s conduct did raise a question about the lawyer’s suitability to practice, the judge may have violated the Code by delaying the report of the violation.\textsuperscript{98}

\textsuperscript{95} See id.
\textsuperscript{97} See supra Part III.C.
\textsuperscript{98} See supra Part III.A.
If so, there is a substantial risk that the judge will refrain from reporting
(or even discussing the issue with other judges or lawyers, who
themselves might thereafter have a duty to take some action), with the
result of no disciplinary action being taken against the unethical lawyer.

As a corollary to the third point, some may believe that instead of
mandating notification of all violations based on credible information to
an “appropriate authority,” perhaps merely mandating the imposition of
a disciplinary measure would be a more effective use of a judge’s
supervisory authority. This norm would eliminate the need to notify the
“appropriate authority” about every suspected or alleged ethical violation.
Instead, the focus would be on direct communication with and discipline
of the offending lawyer.99

Application of discipline on an ad hoc basis by individual judges,
however, would lack the appearance of uniformity enjoyed by a central
disciplinary organization. The public as well as other members of the
legal profession may be skeptical not only about the propriety of
decisions made by individual judges who are familiar with the offender,
but may also suspect that any questionable decision is merely another
example of lawyers and judges protecting “one of their own.” Moreover,
an offending lawyer who is disciplined by an offended judge may not
always have faith in the decisionmaker’s resolution of the issue and
instead may prefer evaluation by a centralized authority, such as a state
bar ethics committee or a judicial conduct organization.

Finally, mandatory notification to the “appropriate authority” under
the above amended standard is not confined to ethical violations. A judge
also must report any credible information regarding another judge’s
fitness to continue in office or a lawyer’s fitness to practice law. Another
judge or lawyer may have either a physical or mental ailment or an
alcohol or drug addiction which may impede his or her ability to perform
effectively.

VI. CONCLUSION

The 1972 and 1990 versions of the ABA Code of Judicial Conduct
describe the ethical duty of a judge to report misconduct by other judges
and lawyers. This Article notes specific ways in which state supreme
courts have adopted variations on those standards, and how reviewing

99. Judges would still have to report other judges, however. This standard merely addresses
ethical lapses by lawyers. Furthermore, the supervisory authority of a judge does not extend to
conduct by another judge, thereby precluding one judge from sanctioning another.
courts and ethics committees have applied and interpreted the language of the Codes. Because the standards are unclear in their language and judges are frequently unsure or unwilling to apply them, special efforts must be made to clarify those standards in order to preserve both the integrity of the legal system and the reporting judge’s independence in meting out appropriate sanctions. Standards such as Canon 3B(3) of the 1972 Code and Canons 3D(1) and 3D(2) of the 1990 Code invite derision and scorn by a public increasingly impatient with the manner in which the legal profession and the legal system regulates itself.