

JUDICIAL INQUIRY COMMISSION

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ADVISORY OPINION 11-907

CANON 3B(3): DUTY TO REPORT
LAWYER'S SERIOUS ETHICAL
VIOLATION

DISQUALIFICATION: JUDGE FILES
ETHICS COMPLAINT AGAINST
LITIGANT'S LAWYER

ISSUES

1. If a judge has personal knowledge of circumstances that lead him to believe an attorney has committed a serious ethical violation, e.g., lying to the judge, is that judge required by the Alabama Canons of Judicial Ethics to report the attorney's conduct to the Alabama State Bar, or may the judge meet directly with the lawyer, together with another judge as witness, to address the possible ethics violation? **Answer:** The specific action to take is within the judge's discretion if it is legitimately directed toward protecting the integrity of the judicial system and otherwise upholding his obligations under the Canons.

2. If the judge files an ethics complaint with the Alabama State Bar against the attorney, is the judge disqualified from presiding in cases involving that attorney, and, if so, does that disqualification extend beyond the resolution of the ethics complaint? **Answer:** No, unless the specific circumstances present a ground of disqualification pursuant to the provisions of Canon 3C(1) or 3C(1)(a).

FACTS

A judge suspects an attorney, who represents a party in Lawsuit A lied to the judge by stating, on the record, that the plaintiff in related Lawsuit B filed the complaint pro se, without the attorney's assistance. The attorney's

representation of the plaintiff in Lawsuit B would likely have generated a conflict of interest. The judge has reason to believe the attorney actually assisted the plaintiff in Lawsuit B prepare its case.

DISCUSSION

1. When a judge believes a lawyer has violated an applicable rule or standard of professional conduct or has otherwise acted unethically, that judge's responsibilities fall under Canon 3B(3) of the Alabama Canons of Judicial Ethics: "A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge has personal knowledge." The official comment clarifies that "[d]isciplinary measures *may* include reporting a lawyer's misconduct to an appropriate disciplinary body." (Emphasis added.) This comment suggests that reporting misconduct to a disciplinary authority is not mandatory so long as the judge otherwise "take[s] or initiate[s] appropriate disciplinary measures."

Without recommending the specific action(s) a judge should take to fulfill the responsibilities imposed by Canon 3B(3), the Commission has suggested only that a judge must take action in response to suspected attorney misconduct, implicitly leaving the determination of what constitutes "appropriate disciplinary measures" to the judge's discretion. *See* Advisory Opinions 86-264 and 89-372. More recent versions of the ABA Model Code of Judicial Conduct have imposed the heightened standard that a judge "shall inform the appropriate authority" of known misconduct that "raises a substantial question regarding the lawyer's

honesty, trustworthiness, or fitness as a lawyer in other respects,” while retaining the requirement that a judge “take appropriate action” when that judge “receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct.” See Rule 2.15(B) and (D), 2007 ABA Model Code of Judicial Conduct; Canon 3D(2), 1990 ABA Model Code of Judicial Conduct. However, Alabama’s Canons of Judicial Ethics are based on the 1972 version of the Model Code, which does not recognize the above distinction based on the lawyer’s degree of misconduct. The mandatory reporting provision “for a substantial question regarding the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects” was added “to specifically require judges to report to a disciplinary authority significant misconduct of lawyers and other judges, so as to diminish the number of instances in which judges take it upon themselves to impose sanctions for professional misconduct without such reporting.” Commentary to Canon 3D, Annotated Model Code of Judicial Conduct of 1990.

Thus, although the suspected misconduct in this case, a false representation to a tribunal, might very well “raise a substantial question regarding the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects,” the judge is not explicitly required, under Alabama’s Canon 3B(3), to report the attorney to the State Bar. While the judge may certainly report the suspected violation to the State Bar, he may also reasonably determine he could “take or initiate appropriate disciplinary measures” by first discussing the problem with the attorney before deciding whether to turn the matter over to the State Bar. See Advisory Opinion

96-598 (a judge, who suspects another judge of acting unethically, may fulfill his duty under Canon 3B(3) by first inquiring about the judge’s conduct, then filing a complaint with the Commission only upon receiving an “unsatisfactory response”). See also *Matter of Hart*, 577 A.2d 351 (Me. 1990) (holding, under identical language in that state’s version of Canon 3B(3), that a judge had explicit authority to require an attorney to appear before the judge to discuss the lawyer’s unethical conduct); *In re Order as to Sanctions*, 495 So. 2d 187 (Fla. Dist. Ct. App. 1986) (listing a variety of possible disciplinary measures under Canon 3B(3), including an order of contempt, a fine, and a reprimand, as well as reference of the matter to an “appropriate grievance committee”).

In determining whether to report the attorney suspected misconduct to the State Bar, the seriousness of the ethical violation is an important factor, as the more recent versions of the Model Code suggest. While this Commission has no authority to interpret the Alabama Rules of Professional Conduct, see Advisory Opinion 86-264, the judge should consult those Rules to assess the seriousness of the alleged misconduct. Because the attorney’s alleged misconduct, lying to a judge, is clearly a serious matter, the judge should, while exercising independent judgment under Canon 3B(3), strongly consider reporting the matter to the State Bar. Furthermore, the judge should consider his level of certainty that the attorney has actually engaged in unethical or dishonest conduct, as well as whether the judge, the State Bar, or another authority would be best suited to investigate the alleged misconduct.

Judges should also be continuously mindful of their obligations under the other Canons of

Judicial Ethics, including Canon 1 (“A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct.”) and Canon 2A (“A judge . . . should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”). As with most ethics rules, the goal of Canon 3B(3) and similar provisions is to “insure that the integrity of the judicial system is preserved and maintained.” James J. Alfani et al., *Judicial Conduct and Ethics* § 6.08, at 6-35 (4th ed. 2007). Ultimately, a judge’s method of handling a situation like the one presented here is within that judge’s discretion, so long as his actions are legitimately directed toward protecting the integrity of the judicial system and otherwise upholding his obligations under the Canons of Judicial Ethics.

2. In the event a judge files an ethics complaint against an attorney with the Alabama State Bar, that judge may have an obligation to disqualify himself under Canon 3C(1), which states: “A judge should disqualify himself in a proceeding in which his disqualification is required by law or his impartiality might reasonably be questioned.” A list of applicable scenarios follows that general provision, including where the judge “has a personal bias or prejudice concerning a party.” Canon 3C(1)(a). In Advisory Opinion 85-243, the Commission advised, in a similar fact pattern, that the judge “should determine whether there exist proper grounds for recusal,” before deciding whether to withdraw from a case. Furthermore, a “judge’s filing of a complaint against the attorney-litigant with the State Bar is . . . not generally disqualifying. Contempt proceedings are an analogous situation, and recusal is not required there.” Advisory Opinion 97-656.

Alabama courts have held that, under Canon 3C(1), recusal is “required where facts are shown which make it reasonable for members of the public, or party, or counsel opposed to question the impartiality of the judge.” *Miller v. Miller*, 385 So. 2d 54, 55 (Ala. Civ. App. 1980); see also *Wallace v. Wallace*, 352 So. 2d 1376, 1379 (Ala. Civ. App. 1977) (applying a “totality of the facts” test to the same standard). In *Ex parte Rollins*, 495 So. 2d 636, 637-38 (Ala. 1986), the Alabama Supreme Court required recusal where the judge clearly harbored ongoing negative feelings toward an attorney against whom the judge had previously filed a disciplinary complaint. However, other jurisdictions advise a judge disqualified if he has filed a complaint against an attorney in the case. See, e.g., New York Joint Advisory Opinion 08-183 and 08-202 and 09-112.

In the present case, the judge should consider the facts presented as well as all other circumstances in answering the question: “Would a person of ordinary prudence in the judge’s position knowing all of the facts known to the judge find that there is a reasonable basis for questioning the judge’s impartiality?” *Matter of Sheffield*, 465 So. 2d 350, 356 (Ala. 1984). The judge should also assess the severity of the allegations in the complaint filed against the attorney, as well as any other factors that may be relevant.

REFERENCES

Canons 1, 2A, 3B(3), 3C(1), and 3C(1)(a).

Commentary to Canon 3B(3).

Advisory Opinions 97-656, 96-598, 89-372, 86-264, and 85-243.

Ex parte Rollins, 495 So. 2d 636, 637-38 (Ala. 1986).

Matter of Sheffield, 465 So. 2d 350, 356 (Ala. 1984).

Miller v. Miller, 385 So. 2d 54, 55 (Ala. Civ. App. 1980).

Wallace v. Wallace, 352 So. 2d 1376, 1379 (Ala. Civ. App. 1977).

Matter of Hart, 577 A.2d 351 (Me. 1990).

In re Order as to Sanctions, 495 So. 2d 187 (Fla. Dist. Ct. App. 1986).

Rule 2.15(B) and (D), 2007 ABA Model Code of Judicial Conduct.

Canon 3D(2), 1990 ABA Model Code of Judicial Conduct.

Commentary to Canon 3D, Annotated Model Code of Judicial Conduct of 1990.

New York Joint Advisory Opinion 08-183 and 08-202 and 09-112.

James J. Alfini et al., *Judicial Conduct and Ethics* § 6.08, at 6-35 (4th ed. 2007).

This opinion is advisory only and is based on the specific facts and questions submitted by the judge who requested the opinion pursuant to Rule 18 of the Rules of Procedure of the Judicial Inquiry Commission. For further information, you may contact the Judicial Inquiry Commission, P. O. Box 303400, Montgomery, Alabama 36130-3400; tel.: (334) 242-4089; fax: (334) 353-4043.