

Maryland Judicial Ethics Committee

Opinion Request Number: 2004-07

Date of Issue: April 2, 2004

Published Opinion Unpublished Opinion Unpublished Letter of Advice

Duty and Ability of Judge to Report Criminal Conduct Revealed in Unrelated Litigation

Issues:

1. Must a judge report criminal conduct revealed during unrelated litigation?
2. May a judge report criminal conduct revealed during unrelated litigation?
3. May a judge use judicial stationery to report criminal activity revealed during unrelated litigation?

Answers:

1. No, but see the discussion below.
2. Yes, but see the discussion below.
3. Yes.

Facts: A party-witness in a civil trial testified to having income exceeding \$200,000, but produced a tax return for the same tax year reporting income of only \$15,000. The judge believes this evidence indicates that the party-witness has committed a crime under the tax laws.

Discussion: Canon 3B(3) of the Maryland Code of Judicial Conduct (“the Code”) provides that “A judge should take or initiate appropriate corrective measures against a judge or lawyer for unprofessional conduct of which the judge may be aware.” Plainly, this provision requires a judge to report criminal activity by judges and lawyers. The Code imposes no similar duty on a judge as to any other class of persons; nor does the Code expressly prohibit a judge from reporting criminal activity to the appropriate authorities.

Insofar as we can determine, every judicial ethics advisory committee that has addressed Issues (1) and (2) has determined that a judge is under no ethical obligation to report criminal activity disclosed in civil litigation. Those committees also have, in the main, concluded that a judge is not prohibited from reporting evidence of such illegal activity, in appropriate circumstances. *See* Florida Advisory Opinion 78-4; Alaska Formal Ethics Opinion 17 (1993); Alabama Advisory Opinion 86-281; Arizona Advisory Opinion 92-15; Georgia Advisory Opinion 166 (1992); Illinois Advisory Opinion 96-13; Louisiana Advisory Opinion 73 (1987); Oregon Advisory Opinion 86-1; Pennsylvania Advisory Opinion 95-1; Washington Advisory Opinion 93-11; Washington Advisory Opinion 02- 09; Michigan Advisory Opinion C1-1177 (1988); U. S. Compendium of Selected Opinions Sec. 1.1(a)(b) (1995); Utah Informal Opinion 00-03; Vermont Request for Advice 2827-1 (November 10, 1997); *See also* Virginia Judicial Ethics Advisory Committee Opinion 01-1.

This Committee believes that our Code requires a similar result. We further believe that the decision to report, or not to report, criminal activity coming to the attention of a judge is a matter best left to the judge’s sound discretion.

Imposing a blanket duty on a judge to report every illegal activity disclosed in judicial proceedings would be unduly burdensome on the judge, with no assurance of a corresponding public benefit from the report. For example, few would contend that any significant public benefit likely

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is to be derived from requiring a judge to report every act of adultery divulged in divorce cases, nor every violation of the traffic laws revealed in motor vehicle tort actions. At the other end of the spectrum, few would dispute the propriety of a judge reporting a serious felony which comes to light in some unrelated matter. Countless examples of criminal activity exist between those two extremes, with each, if reported, having an arguably different impact on the public good. Apart from the difficulty in delineating what criminal activity is sufficiently serious to require a report, there is the equally difficult question of what quantum of proof should trigger a judge's duty to report. These considerations, in Committee's view, preclude the development of any standard that could be fairly used to measure compliance with a general rule or mandate that a judge report criminal activity.

We also believe that a rule that uniformly prohibits a judge from reporting evidence of criminal activity, acquired in the performance of judicial duties, would be unwise. Indeed, in certain circumstances such a rule would be inconsistent with the Code.

Most, if not all, law-abiding persons feel a moral obligation to report evidence of serious criminal activity. Absent some compelling reason, a judge should not be denied the opportunity, available to every other individual, to discharge that obligation. In our view, a judge can with an appropriate exercise of discretion reconcile this moral imperative with the judge's ethical obligations under the Code. There is no reason for a rule which deprives a judge of the opportunity to do so.

Canon 2A of the Code exhorts a judge to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. ..." It is not difficult to imagine circumstances in which a judge's failure to report criminal activity would be considered so contrary to the moral obligation of a law-abiding citizen as to greatly undermine public confidence in the integrity of the judiciary. A blanket rule prohibiting disclosure of criminal activity would, in that event, itself cause a violation of the Code.

The circumstances under which a judge should exercise discretion to report criminal activity and the proper time and manner to make that report have been discussed by other judicial ethics advisory committees. The touchstone is, again, the requirement that a judge act in a manner that promotes public confidence in the integrity and impartiality of the judiciary. For example, in deciding whether to report, a judge should consider the severity of the criminal activity and how recently it occurred. Arizona Advisory Opinion 92-15. A report of criminal activity should be made "at a time and in a manner wh[ich] will not affect any ongoing litigation before the judge". Alaska Formal Ethics Opinion 17 (1993). Except in unusual circumstances, the report should be made at the conclusion of the proceeding before the judge. Alabama Advisory Opinion 86-281. "Moreover, the report should be made in a neutral fashion, relating the facts without judgment, perhaps simply by supplying a copy of pertinent portions of the transcript of the proceedings." AJS, *A Judge's Obligation to Report Criminal Activity* (Fall 1996) (citing U.S. Compendium of Selected Opinions § 1.1(d) (1995)); Pennsylvania Advisory Opinion 95-1. The Committee finds these to be useful guidelines. We commend them to the attention of a judge considering whether, and how, to report criminal activity revealed in the course of unrelated proceedings.

A judge who reports criminal activity disclosed in the course of a judicial proceeding is, in

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the Committee's view, exercising a judicial function. It is appropriate to use judicial stationery for that purpose.