By Hon. Deborah L. Thorne, Corinne Stratton and Amelia Quardokus[1]

Protecting the Integrity of the Profession

Attorneys' Ethical Imperative to Report Judicial Misconduct

Hon. Deborah L. Thorne
U.S. Bankruptcy Court (N.D. Ill.); Chicago

Corinne Stratton
Loyola University Chicago School of Law Chicago

Amelia Quardokus
U.S. Bankruptcy Court (N.D. Ill.); Chicago

Hon. Deborah Thorne is a U.S. Bankruptcy Judge for the Northern District of Illinois in Chicago. Corinne Stratton is a third-year student at the Loyola University Chicago School of Law and an extern to Judge Thorne. Amelia Quardokus is a law clerk to Judge Thorne.

An article in the last issue of the *ABI Journal* discussed the duties that judges have under the Code of Conduct for U.S. Judges,[2] but what are the obligations for a lawyer under the Rules of Professional Conduct to report if they observe the unethical conduct of a judge? Are they required to assist in maintaining the ethical integrity of the profession? Does the ethical duty to report conflict with other ethical obligations to vigorously promote the best representation of a client?

In an intertwined bankruptcy law community, there is an understandable reluctance by lawyers to call out judicial misconduct. Despite this reluctance, it is imperative that lawyers are familiar with the process of reporting and the ethical duties mandating them to report any knowledge of misconduct.

Duty to Report

Like the duty under Model Rule of Professional Conduct 8.3(a) to report other lawyers who violate the Rules of Professional Conduct, lawyers "shall" inform the appropriate authority when they have 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."[3] Due to the impracticality of enforcing attorneys' obligations to report every rule violation, this obligation extends only to "those offenses that a self-regulating profession must vigorously endeavor to prevent."[4] Lawyers are expected to report such misconduct only when they have actual knowledge of the violation, or clearly believe that there has been a violation — in other words, more than a suspicion of misconduct.[5]

Complaint Submission and Review Process

The procedure for filing a complaint alleging judicial misconduct of a federal judge is laid out in the Judicial Conduct and Disability Act of 1980.[6] A complainant may "file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct."[7] The complainant must sign the complaint under penalty of perjury.[8]

An alternative to filing a formal complaint may be found in the "identification" process to expose misconduct without officially signing a complaint. When an issue is brought to the chief judge's attention informally, the judge can "identify" a complaint under § 351(b). The chief judge may inquire into the accuracy of the information, but they cannot decline to identify a complaint merely because the person making the allegation has not formally filed a complaint under § 351(a).[9] The extent to which the complaining attorney's identity remains confidential might depend on the chief judge's approach to investigating the allegations.

Once filed or identified, the chief judge of the circuit will review the complaint.[10] The complaint will also be transmitted to the judge who is the subject of the complaint.[11] The chief judge's review process might include communicating with the complainant, judge or whomever may have knowledge of the matter; reviewing transcripts or relevant documents; and requesting the judge whose conduct is complained of to file a written response.[12] The chief judge is not to make findings of fact about matters that are reasonably in dispute.[13] The

1 Judge Thorne is also a past ABI Vice President-Communications and Information Technology and a Fellow in the American College of Bankruptcy.

2 Hon. John T. Gregg, "Disqualification Under the Code of Judicial Conduct for U.S. Judges," XLIII *ABI Journal* 5, 24-25, 59-60, May 2024, *available at* abi.org/abi-journal (unless otherwise specified, all links in this article were last visited on April 24, 2024).

3 Model Rules of Prof'l Cond. 8.3. Rule 8.3(c) provides an exception to this obligation: It "does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program." *Id.*

4 *Id.* at cmt. 3.

5 *See Mont. Merch. Inc. v. Dave's Killer Bread Inc.*, No. CV-17-26-GF-BMM, 2017 WL 4246899, at *5 (D. Mont. Sept. 25, 2017). The Rule 8.3 obligation to report misconduct is not imputed to the law firm of the attorney with knowledge of the misconduct. *Bartolini v. Mongelli*, No. 17-CV-6276-PKC-SJB, 2018 WL 2725417, at *7 (E.D.N.Y. June 5, 2018).

6 28 U.S.C. §§ 351-364. For a clear and concise flowchart of the complaint submission and review process, please refer to Process for Filing a Judicial Conduct or Disability Complaint, *see* uscourts.gov/sites/default/files/rules_flow_chart.pdf.

7 28 U.S.C. § 351(a). An optional form for the complaint is provided in the appendix to the Rules. Complaint of Judicial Misconduct or Disability, U.S. District Court Form AO 310 (03/16). Some circuits also have their own procedures and forms. *See, e.g.*, Complaint of Judicial Misconduct or Disability, Jud. Council of the Ninth Circuit, *available at* cdn.ca9.uscourts.gov/datastore/misconduct/complaint_form.pdf.

8 Rules for Judicial Conduct and Judicial Disability Proceedings, 2E Guide to Judiciary Policy ch. 3. r. 6(d). (2019), *available at* uscourts.gov/sites/default/files/judicial_conduct_and_disability_rules_effective_march_12_2019.pdf.

9 *Id.* at Rule 5(a).

10 If the conduct complained of is that of the chief judge of the circuit, the complaint will be reviewed by the circuit judge next senior in date of commission. 28 U.S.C. § 351(c).

11 *Id.*

12 The judge's response is not to be made available to the complainant unless authorized by the judge filing the response. 28 U.S.C. § 352.

13 *Id.*

chief judge may dismiss the complaint for the reasons outlined in § 352(b).

If the complaint goes to the judicial council for review, the council may conduct an additional investigation, dismiss the complaint or take appropriate action, including ordering a temporary pause on assigning cases to the judge whose conduct was complained of, or censuring or reprimanding the judge privately or in a public announcement.[14] Under 28 U.S.C. § 152(e), the judicial council has the authority to remove bankruptcy judges from office.[15]

Motions to Recuse

Another avenue to address any known or suspected impropriety or bias of a judge in a certain case is to file a motion to recuse or disqualify the judge. Rule 5004 of the Federal Rules of Bankruptcy Procedure provides that 28 U.S.C. § 455 governs the disqualifying circumstances for a bankruptcy judge.[16] The relief is typically sought by motion under Bankruptcy Rules 9013 and 9014 requesting the recusal of a judge whose impartiality might reasonably be questioned.

In bankruptcy courts, motions to recuse under § 455 are heard by the judge whose conduct is in question.[17] Courts have justified this interpretation of § 455 based on administrative efficiency reasons, although many question the ethical conflict inherent in this procedure.[18] The judge in question is to evaluate a motion under § 455(b)(1) for personal bias or prejudice under an objective standard of whether "the likelihood of bias on the part of the judge is too high to be constitutionally tolerable."[19] Although this procedure might not ensure the judge's fairness, attorneys should consider this option to expose factual circumstances warranting a challenge to the judge's impartiality in the case.[20]

Data on Complaints Filed

The nature of our adversary judicial system often leaves dissatisfied parties who might be eager to accuse judges of misconduct, rooted in their frustration over an unfavorable outcome. It is no surprise that judges in every district and every type of court receive complaints.[21] Based on the U.S. Federal Courts' data on judicial complaints filed from September 2022 to September 2023, there were 1,363 complaints filed against federal judges.[22] However, only 19 of these were filed by lawyers.

Of all the complaints reviewed, after about 95 percent were dismissed or withdrawn, and nine complaints were referred to a special committee. Three complaints resulted in voluntary corrective action, and one resulted in the suspension of assignment. Ten complaints were resolved because of "intervening events," which might mean that the judge resigned or retired during the pendency of review.

Barriers to Complaining

Attorneys' reluctance to report judicial misconduct might be rooted in the disincentives for attorneys to come forward with such knowledge. Attorneys rely on the credibility and goodwill that they have cultivated with judges throughout their practice.[23] Attorneys might be nervous that reporting judicial misconduct could threaten this goodwill or negatively impact their practice.

Attorneys might also face the ethical dilemma of how reporting judicial misconduct may conflict with other professional conduct rules. If a lawyer believes that a judge may retaliate if accused of misconduct, should the report be made? Would this conflict with the ethical duty to zealously represent the client? How should a lawyer evaluate what might be perceived as conflicting ethical duties? While these authors do not have a solution to this problem, all parties participating in the legal system must be aware that preserving the integrity and transparency of the system is crucial to maintaining the public's confidence.[24]

Discipline for False Reporting

Attorneys might be conflicted as to how much they need to investigate their certainty of the misconduct so as not to run afoul of their Rule 8.2(a) obligation not to falsely attack. Attorney discipline commissions almost never discipline attorneys for violating Rule 8.3 for failing to report known misconduct.[25] However, discipline boards much more commonly discipline attorneys for violating Rule 8.2(a), which prohibits a lawyer from making "a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge."[26]

In assessing penalties and sanctions for an attorney who made numerous false accusations about certain judges in violation of Rule 8.2(a), the Seventh Circuit acknowledged that while the First Amendment protects speech, where the lawyer made the statements with "actual knowledge of falsity, or with reckless disregard for their truth," pro-

14 28 U.S.C. § 354(a)(1).

15 Rules for Judicial Conduct and Judicial Disability Proceedings, *supra* n.8, at Rule 20(b)(1)(D)(iv).

16 Courts interpret the application of 28 U.S.C. § 455 to bankruptcy courts to mean that § 144 does not apply to bankruptcy courts. *See Seidel v. Durkin (In re Goodwin)*, 194 B.R. 214, 221 (B.A.P. 9th Cir. 1996) ("Section 144 applies only to district court judges."); *Dubnoff v. Goldstein*, 385 F.2d 717, 720 (2d Cir. 1967); *Ginger v. Cohn*, 255 F.2d 99, 99-100 (6th Cir. 1958); *Hepperle v. Johnston*, 590 F.2d 609, 613 (5th Cir. 1979). Section 144 provides that when a party in district court files an affidavit demonstrating the presiding judge's personal bias or prejudice, another judge is to hear the proceeding. Parties in bankruptcy cases do not have this opportunity for the motion to be considered by a third-party judge.

17 *Trahant v. Mintz (In re Roman Catholic Church of Archdiocese of New Orleans)*, No. 20-10846, 2023 WL 7781671, at *3 (Bankr. E.D. La. Nov. 13, 2023).

18 *See In re Martinez-Catala*, 129 F.3d 213, 220 (1st Cir. 1997) ("It might seem odd that recusal issues should be decided by the very judge whose recusal is in question. But there are other considerations at work, including a desire for expedition and a concern to discourage judge-shopping."); *Chitimacha Tribe v. Harry L. Laws Co.*, 690 F.2d 1157, 1162 (5th Cir. 1982) ("The challenged judge is most familiar with the alleged bias or conflict of interest. He is in the best position to protect the nonmoving parties from dilatory tactics.").

19 *Williams v. Pennsylvania*, 579 U.S. 1, 4 (2016).

20 If attorneys suggest grounds for a judge's recusal, even without a formal motion to recuse, this may prompt a judge to request the Judicial Committee on Codes of Conduct for a private advisory opinion as to whether the situation requires recusal. *See* Letter from the Comm. on Codes of Conduct of the Judicial Conference, *Chamber of Commerce v. CFPB*, No. 24-10248 (5th Cir. April 16, 2024) (suggesting that judge need not recuse himself from case unless he determines that he has "an interest that could be substantially affected by the outcome of the litigation").

21 The nature of allegations may include, but are not limited to, special treatment for a friend or relative; acceptance of a bribe, gift or favor; improper *ex parte* communication with party or counsel; financial-disclosure violation; unwanted, abusive or offensive sexual conduct, etc. *See* Table S-22, "Judicial Complaints — Complaints Commenced, Terminated, and Pending with Allegations and Actions Taken Under Authority of 28 U.S.C. 351-364 During the 12-Month Period Ending September 30, 2023," *available at* uscourts.gov/sites/default/files/data_tables/jb_s22_0930.2023.pdf.

22 Thirty-six of the complaints filed were against bankruptcy judges. *Id.*

23 *See* David Pimental, "The Reluctant Tattletale: Closing the Gap in Federal Judicial Discipline," 76 *Tenn. L. Rev.* 909, 928 (2009).

24 "A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." Model Rules of Prof'l Cond. Rule 1.3, cmt. 1.

25 *See* Nikki A. Ott & Heather F. Newton, "A Current Look at Model Rule 8.3: How Is It Used and What Are Courts Doing About It?," 16 *Geo. J. Legal Ethics* 747, 766 (2003). Some have suggested that attorneys will feel more comfortable reporting misconduct if Rule 8.3 is more frequently enforced. *See* Pimental, *supra* n.23 at 933.

26 Model Rules of Prof'l Cond. Rule 8.2(a).

continued on page 60

from page 25

tection does not exist.[27] An attorney can be penalized for stating an opinion such as, "I think that Judge X is dishonest," if they lack the evidentiary support for that implied factual assertion.[28] Unsupported accusations "do not enjoy Constitutional protection."[29]

Discipline for Disclosing Client Confidences

Attorneys might also face ethical dilemmas when they learn about judicial misconduct by way of a client confidence protected under client confidentiality. Rule 8.3(c) provides that attorneys are not required to disclose information protected by Rule 1.6 Confidentiality.[30] Attorneys must be careful not to infringe on this rule within the pursuit of reporting misconduct.

For example, the Supreme Court of Washington upheld a disciplinary suspension of an attorney for disclosing — without authorization — his client's confidential information regarding a judge's misconduct.[31] The attorney learned from his client of the judge's misconduct and reported it to the Washington Commission on Judicial Misconduct. After investigation, the judge was removed from judicial office. The attorney was disciplined primarily for his disclosure of the client confidences to sources other than the appropriate misconduct review authority, including the Federal Bureau of Investigation, prosecutor's office, Internal Revenue Service and the press.

The Ethical Imperative to Maintain the Integrity of the Profession

Suspecting or knowing that a judge is engaged in questionable conduct is a heavy burden for attorneys to bear. Attorneys have an ethical obligation to report judicial misconduct, yet the disincentives to do so often dissuade too many attorneys from ultimately coming forward.

Attorneys face reasonable concerns about how filing a complaint, alerting a chief judge or bringing a motion to recuse may affect their position in the legal community, or impact the effectiveness of representation of their clients. Further, attorneys must take extra steps to consider their duty to report misconduct in light of other professional conduct obligations.

To chart a path forward to hold judges accountable for the high standard of ethics imposed on them by the Judicial Code of Conduct and to maintain public confidence in the courts, attorneys need to acknowledge the perceived risks of disclosure. In the end, we all need to avail ourselves of the procedures provided to allow our self-regulated system to work to preserve an independent judiciary. abi

27 *Matter of Palmisano*, 70 F.3d 483, 487 (7th Cir. 1995).
28 *Id.*
29 *Id.*
30 Model Rules of Prof'l Cond. Rule 8.3. "Rule 8.3 creates a permissive, not mandatory, disclosure when confidences and secrets under Rule 1.6 are concerned." *In re Disciplinary Proc. Against Schafer*, 66 P.3d 1036, 1043 (Wash. 2003).
31 *Id.*