

Opinion 06-107

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Digest: A judge who sanctioned an attorney for an unintentional violation of a disciplinary rule is not required to, but may, report that attorney to the Departmental Disciplinary Committee. **Should the judge choose to report the attorney, he/she must exercise recusal, subject to remittal, when that lawyer appears before him/her while the disciplinary matter is pending before the Departmental Disciplinary Committee.**

Rules: 22 NYCRR 100.3(D)(2); 100.3(E)(1); 100.3(F); 1200.36(a); Opinions 05-37; 01-120 (Vol. XX); 89-74 (Vol. IV); 89-54 (Vol. III).

Opinion:

The inquiring judge presided over a bench trial on attorney fees. During the course of the trial, the inquirer became aware that defense counsel might have violated DR 7-105 (22 NYCRR 1200.36[a]) of the Code of Professional Conduct. The inquirer provided the parties a chance to brief the Court in their post-trial memoranda about whether there was a violation of this rule prohibiting use of threats of criminal prosecution to gain advantage in civil litigation. Based on the submissions, the inquirer issued a written decision holding that defense counsel had indeed run afoul of the disciplinary rule, and, although noting that the violation was committed unintentionally and without knowledge of the disciplinary rule, sanctioned defense counsel and the defendant.

The judge now inquires whether, having sanctioned the lawyer and client, he/she is obligated to report defense counsel to the appropriate Departmental Disciplinary Committee.

Section 100.3(D)(2) of the Rules Governing Judicial Conduct states that "[a] judge who receives information indicating a substantial likelihood that a lawyer has committed a substantial violation of the Code of Professional Responsibility shall take appropriate action." 22 NYCRR 100.3(D)(2). A substantial violation is typically one that involves an attorney's honesty, trustworthiness, or fitness as a lawyer. Opinions 89-74 (Vol. IV); 89-54 (Vol. III).

The Committee has opined that, in general, the question of whether there is a substantial likelihood that a substantial violation of the Code has been committed is a determination to be made by the judge. Once a judge has concluded that there has

been a substantial violation, he/she is obligated to take appropriate action.

The Committee concludes, based on the specific facts presented, that it would not be a violation of the Rules Governing Judicial Conduct for the inquirer to decline to report the attorney to the Departmental Disciplinary Committee. The inquirer's holding that the attorney involved did not knowingly or intentionally violate the rule could provide a sufficient basis to conclude that the lawyer did not commit a substantial violation of the Code, i.e., one which involved the lawyer's honesty, trustworthiness or fitness as a lawyer. In such event, the inquirer's actions, in our view, are sufficient and appropriate to satisfy section 100.3(D)(2).

Nonetheless, the judge may, but is not required to, additionally report the lawyer to the appropriate Departmental Disciplinary Committee. The decision to take this further step lies in the discretion of the judge. We note, however, that should the judge report the attorney, he/she should exercise recusal, subject to remittal, in all further matters in which the attorney appears before him/her while the disciplinary matter is pending. 22 NYCRR 100.3(E)(1), (F); Opinions 05-37; 01-120 (Vol. XX).