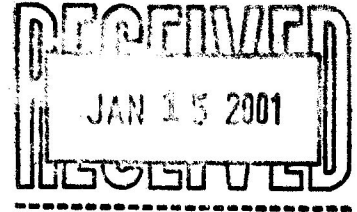


JUDICIAL ETHICS COMMITTEE  
Advisory Opinion No. 01-1  
Issued: January 11, 2001



Issue: Does the Maine Code of Judicial Conduct require a trial judge to report evidence of criminal conduct, revealed during the course of a trial, to an appropriate investigating or prosecuting authority?

Discussion: We conclude that beyond the specific reporting requirements set out in the Maine Code of Judicial Conduct, the Code does not require a trial judge to report criminal activity disclosed during the course of a trial over which that judge presides.

The Code contains several provisions that address a judge's disciplinary responsibilities when the judge becomes aware of specific types of improper conduct. Canon 3D(1) encourages a judge to take "appropriate action" upon learning of a "substantial likelihood" that another judge has violated the Code. The same provision obligates the judge to inform the Committee on Judicial Disability and Responsibility if the offending judge's infraction raises a substantial question of that judge's "fitness for office."<sup>1</sup> Similarly, under Canon 3D(2), a judge should take "appropriate action" if the judge learns that an attorney has violated the Maine Bar Rules; and that provision requires a judge to notify the Board of Overseers of the Bar if the violation "raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer." If the trial process reveals the commission of criminal activity that falls within the scope of either of those provisions, then, of course, the judge would be required to respond as the appropriate canon directs.

These two provisions stand alone in describing circumstances where a judge has an ethical obligation to report or otherwise respond to untoward conduct. Thus,

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<sup>1</sup>More precisely, Canon 3D(1) provides that a judge "should" act in the former circumstances and that the judge "shall" take the action when confronted with the latter. The Preamble to the Code explains that the word "'shall' . . . impose[s] binding obligations, the violation of which can result in disciplinary action." In distinction, the word "'should' . . . is intended as a hortatory statement of what is appropriate or inappropriate conduct but not as a binding rule under which discipline may be imposed."

the Code stops short of requiring that a judge take action in response to other information, such as the evidentiary disclosure of criminal conduct on the part of someone other than an attorney or judge. Because the provisions of the Code specifically identify those circumstances where a judge has some form of responsibility toward disciplinary and enforcement bodies, and because those requirements do not extend to law enforcement agencies, the Committee concludes that as a general matter, a judge is not required to report criminal activity disclosed during the course of a trial over which that judge presides unless that criminal conduct also falls within the scope of Canon 3(D)(1) or (2).

In construing provisions identical to the ones at issue here, the New York Advisory Committee on Judicial Ethics reached the same conclusion. See N.Y. Jud. Adv. Op. 88-85, 88-103 (Dec. 8, 1988). In two separate proceedings, a witness acknowledged failing to report taxable income, and a physician admitted altering medical records. The New York committee observed that there did not exist a statutory or regulatory reporting requirement and declined to infer the existence of one. Additionally, the committee noted:

It would be undesirable to impose a mandatory reporting requirement on judges concerning any crimes revealed in testimony that would dissuade witnesses on trial from telling the whole truth or encourage the threat of possible criminal proceedings as a means of pressure, for settlement purposes or otherwise, by one litigant against another.

We agree with this analysis. If a presiding judge were required to assume a law enforcement role in a trial, there could result an impairment of the effectiveness of the trial process to lead to a truthful exposition of the facts. Therefore, we conclude that the Code of Judicial Conduct does not impose on judges a reporting requirement beyond that specifically set out in Canons 3(D)(1) and (2).

The question addressed in this opinion has been presented in the abstract, and so our consideration of the question is not predicated on specific facts. Thus, it is useful to note that the Code does not prohibit a judge from making such a report. Thus, there may exist circumstances where it is appropriate for a judge to do so,

even though the specific provisions of the Code would not require such a response. The judge's decision of whether to make such a report could take into account a number of factors, such as the nature and magnitude of the crime, whether others are aware of it and the degree to which the public interest might be served if the judge were to make a report. That decision should also be influenced by considerations generated by the Code, such as whether such a report would affect the appearance of the judge's impartiality and whether a report (or the decision not to report) would affect public confidence in the judiciary. See Maine Code of Judicial Conduct Canon 2A, 3B.