

CALIFORNIA COMMISSION ON THE FAIR
ADMINISTRATION OF JUSTICE July 11, 2007

Question:

Should B&P 6068.7 be modified to require a court to notify the State Bar *whenever* a finding is made that an attorney in a criminal case engaged in misconduct, incompetent representation or willfull misrepresentation?

Answer:

No.

Cal. Code of Judicial Ethics, canon 3D(2) requires that a judge who has “personal knowledge” of an attorney’s violation of the Rules of Professional Conduct *must* take “appropriate corrective action.”

“Appropriate action” in the case of an impaired attorney due to alcohol, drugs, or a mental or medical condition, means ether discussing the matter with the attorney or reporting the matter to the State Bar.

Judge Rothman in the California Judicial Conduct Handbook tells us that “a note of caution is appropriate regarding reporting attorneys, or for that matter, a colleague. It is improper for a judge to

lodge an unfounded or insubstantial report in order to retaliate.”

The proposed change contemplates a report to the State Bar whenever a “finding” of misconduct, incompetent representation, or willful misrepresentation is made.

B&P 6068 provides that it is the duty of an attorney to:

- a) Support the Constitution
- b) Maintain respect for the courts and judicial officers.
- c) To bring only legal or just actions, proceedings or defenses.
- d) To employ means only consistent with truth.
- e) To never mislead the court by artifice or false statement.
- f) To maintain confidences.
- g) To advance no prejudicial fact.
- f) And others.

Many of these areas are vague, open to interpretation and argument.

The question of what is misconduct, or incompetence is often hotly contested and dependent upon degrees of advocacy and actual intent.

To require a Bench Officer to report *any* finding of incompetence or misconduct places a potential chilling effect on the Court, adds a potential irrelevant consequence to the fact finding process and leaves no discretion with regard to the *degree* of the finding. In other words does the misconduct have to be really serious or the incompetence something as innocuous as failing to ask a question a Judge might have asked if he or she were trying the case?

Would every Wheeler violation have to be reported?

Would the failure to call *every* potential witness in a case amount to reportable misconduct?

Would this change generate unnessessary motions, or witness in cases because an attorney is worried about what the Judge might think?

What would a Judge with no trial experience as an attorney, trying his or her first case consider to be incompetent?

The change may also put a public defender in a different position from a private lawyer because of the obligation to allow a defendant the P.D. knows is guilty, to testify in the narrative, and later avoid arguing the defendant's fabrications where a private lawyer could simply withdraw from the case.

What about an honest mistake in the interpretation of the law? (Cunningham). Would an arrogant judge who felt the lawyer was stupid, also find him or her to be incompetent and then reportable?

Where incompetence or misconduct results in a finding and sanctions of under \$1000 dollars, would the court have to report the lawyer?

I see lawyers file P.C.1203.4 motions to dismiss a case based on their clients "successful completion of probation," where the client is still on probation or went to prison. Should each of these cases be reported?

In Riverside County, there are cases where the defendant has remained in custody for up to 15 years with the District Attorney not moving the case to trial, and the defense attorney continuing to allow the defendant to waive the right to a speedy trial. Is this incompetence? Is it misconduct?

In many situations, the Prosecutor is held to a higher standard of care than a defense attorney. For there to be consequential prosecutorial misconduct under the law, the conduct must so infect the trial with unfairness as to make the resulting conviction a denial of due process. It must involve the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.

Should all findings of prosecutorial conduct be reported?

This proposed change creates a potential open season on Bench Officers, by any lawyer who disagrees with a courts finding and mandated reporting.

A consequence of this change will be a lot more non-stipulations to commissioners; a lot more CCP 170.6 motions, a lot more defensive posturing generated by fear of what a Judge might think, and a lot of retaliatory complaints against Bench Officers to the Commission on Judicial Performance.

Current law is adequate to protect the public from the really incompetent or unethical attorney. The proposed change removes all discretion from the

court and changes the burden of proof needed to make findings of misconduct or incompetence.

The change is not needed.

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