

# Nebraska Ethics Advisory Opinion 03-4

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## ***Question Presented –***

*What are a judge's responsibilities under the Nebraska Code of Judicial Conduct when a member of the judge's staff presents complaints about an attorney and requests that the judge file a disciplinary complaint with the Counsel for Discipline?*

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## **Conclusion**

It is the opinion of the Committee that the judge's responsibilities are governed by Canon 3D(2). Canon 3D(2) is divided into two situations or circumstances. The first (as set forth in the first sentence of the Canon) involves the responsibilities of a judge who "receives information" indicating a substantial likelihood that a lawyer has committed a violation of the Nebraska Code of Professional Responsibility. In such case, where the judge has merely "received information," the Code provides that the judge "should" take "appropriate action." Appropriate action is not defined, but presumably might include such things as a reprimand or referring a third party who has personal knowledge to the Counsel for Discipline. The second situation or circumstance (as set forth in the second sentence of Canon 3D(2)) is where a judge has "knowledge" that a lawyer has committed a violation of the Nebraska Code of Professional Responsibility that raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. Where a judge has "knowledge," that judge shall inform the "appropriate authority." The term "appropriate authority" is defined by the Code to include the Counsel for Discipline. The term "knowledge" as defined by the Code denotes "actual knowledge" of the fact in question.

Accordingly, a judge's responsibilities will depend upon the source of the information and the reliability of the information as received by the judge.

## **Statement of Facts**

At his court reporter's request, a judge had a meeting with his court reporter at which she presented several pages of complaints against an attorney regarding incidents beginning in 1998 and continuing through September 2003. The judge informed his court reporter that she was free to file a disciplinary complaint with the Counsel for Discipline. The court reporter requested that the judge file a complaint and asserted that it was the judge's duty to do so under the Nebraska Judicial Code of Conduct. The judge then submitted to the Committee the court reporter's itemized complaints as well as his list of responsive comments.

The court reporter generally described the complaints as "workplace harassment." In 1998, the court reporter stated that she and the judge's bailiff gave the attorney the Administrative Office of the Courts and Probation's "Workplace Harassment" brochure. The court reporter stated the attorney gave her the brochure back with the following language handwritten on the second page: "I don't know why the fuck you're giving this to me you b\_ \_ \_ \_". The court reporter made a complaint to the attorney's employer, the county public defender. The court reporter received a personal apology (although unstated, we assume from the offending attorney). Upon inquiry with his bailiff, the bailiff told the judge that she was not involved in giving the

workplace harassment brochure to the attorney as represented by the court reporter.

During 2001 through 2003, the court reporter made a complaint to the county public defender regarding the same attorney's escalating sexual language in the workplace. Thereafter, she stated the language subsided.

In 2002, the court reporter made a complaint to the judge about the attorney's escalating sexual language in the workplace. Thereafter, she stated the language subsided.

In 2003, the court reporter again complained to the judge about the attorney's escalating sexual language in the workplace. Thereafter, she stated the language subsided.

As to these three instances regarding escalating sexual language, the judge stated he was not present and specific instances were not given to him by the court reporter. However, the judge told the attorney to watch his language around the judge's staff.

The court reporter, attorney, and the deputy county attorney were at an out-of-town deposition in 2003. The court reporter stated that the attorney engaged in explicit sexual language regarding sexual performance, which language was too embarrassing for her to mention. The court reporter made no complaint at the time. Upon inquiry, the deputy county attorney informed the judge that his court reporter agreed that what was said would be confidential and that the court reporter was a willing participant in the discussion.

On September 10, 2003, in court, the attorney called the previously mentioned deputy county attorney "a lying bitch." The court reporter stated that the judge was present and verbally reprimanded the attorney. The attorney apologized to the deputy county attorney. As to this instance, the judge stated he had the attorney come in to his chambers. There, the judge warned the attorney that if that type of outburst ever happened again, the attorney would be held in contempt and disciplinary action would be requested.

On September 11, 2003, the court reporter stated that during a trial, at which the judge was present, the attorney approached the bench and said to the court reporter: "Would you please mark these, dear? And I suppose you want me to start being nice to you too now?" The court reporter told the attorney she wanted him to stop speaking to her like that. Regarding this instance, the judge stated that he was not present when the exchange took place as verified by the previously mentioned deputy county attorney.

At the end of the same day, while in court but not in the judge's presence, the court reporter stated that the attorney said to another attorney: "I don't give a fuck what you think." The court reporter made no complaint at the time. The judge stated that he was not present.

On September 15, 2003, while in court but prior to trial, the court reporter stated that the attorney addressed her as "dear." Again, the court reporter told the attorney not to so address her. Later that day, the attorney said he would not call her "dear." The judge stated that he was not present during this exchange.

Finally, the court reporter stated that the attorney telephoned the judge's bailiff and the previously mentioned deputy county attorney and asked "Are you wearing any panties?" No date was given by the court reporter regarding when this incident occurred. The court reporter also stated that the attorney makes regular and constant comments of a sexual nature to the county attorney's support staff. Upon inquiry, the bailiff told the judge that in 1997 the attorney did call her on the telephone to ask if she was wearing panties. The judge stated that he has no knowledge of regular and constant comments of a sexual nature made to the county attorney's support staff.

## Applicable Code Sections

The following Canons of the Nebraska Code of Judicial Conduct apply to the above-described situation:

Canon 3B, “Adjudicative Responsibilities”, provides in part:

- (3) A judge shall require order and decorum in proceedings before the judge.
- (4) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge’s discretion and control.

. . . .

- (6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice against parties, witnesses, counsel or others based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status. . . .

Canon 3D, “Disciplinary Responsibilities”, provides in part:

- (2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Nebraska Code of Professional Responsibility should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Nebraska Code of Professional Responsibility that raises a substantial question as to the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority.

## References in Addition to Nebraska Code of Judicial Conduct

*In Re Laurie*, No. 84 CC5 (Ill. Cts. Comm’n 1985).

Jeffrey M. Shaman et. al., *Judicial Conduct and Ethics* § 6.15 at 204-06 (3d ed. 2000).

Preamble from the Nebraska Code of Judicial Conduct:

“When the text uses ‘shall’ or ‘shall not,’ it is intended to impose binding obligations, the violation of which can result in disciplinary action. When ‘should’ or ‘should not’ is used, the text is intended as hortatory and as a statement of what is or is not appropriate conduct, but not as a binding rule under which a judge may be disciplined.”

Terminology from the Nebraska Code of Judicial Conduct:

“Appropriate authority” denotes the Nebraska Commission on Judicial Qualifications and the Counsel for Discipline.

“Knowingly,” “knowledge,” “known,” or “knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.

“Require.” The rules prescribing that a judge “require” certain conduct of others are, like all of

the rules in this Code, rules of reason. The use of the term “require” in that context means a judge is to exercise reasonable discretion and control over the conduct of those persons subject to the judge’s direction and control.

Black’s Law Dictionary 876 and 877 (7th ed.1999):

“[A]ctual knowledge **1.** Direct and clear knowledge, as distinguished from constructive knowledge . . . **2.** Knowledge of such information as would lead a reasonable person to inquire further . . . .”

“[P]ersonal knowledge. Knowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said.”

## Discussion

Canon 3B(3) mandates a binding obligation on a judge to maintain order and decorum in court proceedings. Canon B(4) mandates a binding obligation on the judge to require attorneys (among others), to be patient, dignified, and courteous to lawyers and others with whom the judge deals in an official capacity. Canon B(6) provides that the judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice against parties, witnesses, counsel, or others. Accordingly, the judge has a duty to require appropriate conduct by the attorney in question.

The first sentence of Canon 3D(2) deals with the majority of the instances in the present situation. The judge received information from his court reporter alleging that a lawyer violated the Nebraska Code of Professional Responsibility. In such cases, the judge “should” take appropriate action. However, the text is “hortatory” and not a binding rule under which the judge may be disciplined. (See Nebraska Code of Judicial Conduct Preamble and Terminology.)

The judge must determine whether the information is sufficiently reliable to support “a substantial likelihood” that the lawyer violated the Nebraska Code of Professional Responsibility. Apparently, the judge did not think such was the case in several instances listed by his court reporter as set forth in the Statement of Facts. His comments contradict the court reporter’s account. The judge has no responsibility to inform the Counsel for Discipline if he thinks that the information received is unreliable. If the information received is reliable, then the judge has actual knowledge and a responsibility to inform the Counsel for Discipline.

We note that on three occasions, after being informed by his court reporter of the attorney’s escalating sexual language in the workplace, while not in his presence and without specifics given, the judge admonished the attorney to watch his language around the judge’s staff. Canons are rules of reason (see Nebraska Code of Judicial Conduct Preamble), and under the circumstances, it would appear that the judge exercised reasonable discretion and control over the attorney’s conduct. As to the instance of the attorney’s inappropriate question about the bailiff’s undergarments in 1997, the issue may be too remote in time for the judge to act now. However, if the judge does not question the bailiff’s statement, this incident adds to what may be a pattern of inappropriate behavior on the part of the attorney. Only the judge can decide whether to inform the Counsel for Discipline.

Canon 3D(2) provides that a judge shall inform the appropriate authority if he or she has knowledge that a lawyer has committed a violation of the Nebraska Code of Professional Responsibility that raises a substantial question as to the lawyer’s honesty, trustworthiness, or fitness as a lawyer in

other respects. The term “knowledge” is defined by the Code to mean “denoting actual knowledge of the fact in question.” There is, therefore, a difference between actual knowledge and personal knowledge. See definitions as set forth in the “References” section. Once a judge has “actual” knowledge, then a judge “shall” inform the appropriate authority. “Shall” used in this context imposes a binding obligation on the judge. (See Nebraska Code of Judicial Conduct Terminology.) In Canon 3B(3) and (4), the judge is required to maintain order and decorum in proceedings and to require attorneys to be patient, dignified, and courteous to others. The word “require” means a judge is to exercise reasonable discretion and control over the conduct of persons subject to the judge’s direction and control (See Nebraska Code of Judicial Conduct Terminology.) The judge fulfilled his responsibility by admonishing the attorney in chambers when the attorney called the deputy county attorney “a lying bitch” in court. The judge informed the attorney that if that type of outburst ever happened again, he would be held in contempt and further action would be taken.

Shaman’s treatise provides in relevant part:

Among the administrative responsibilities imposed on a judge in Canon 3, therefore, is that of taking or initiating appropriate disciplinary responsibilities against a judge or lawyer for unprofessional conduct of which the judge may become aware. Thus, a judge exposes himself or herself to disciplinary action for failure to report the misconduct of other judges or attorneys to attorney disciplinary bodies and judicial conduct commissions.

Jeffrey M. Shaman et al., *Judicial Conduct and Ethics* § 6.15 at 205 (3d ed. 2000).

There are no previous Nebraska advisory opinions on the question presented and little authority elsewhere. However, in *In Re Laurie*, a judge was suspended for one month without pay for failing to report unprofessional conduct of two attorneys who offered gifts to the judge. One left an envelope which the judge did not take, but acknowledged the attorney was probably attempting to do something unethical or illegal. In the second instance, an attorney told the judge in anticipation of a favorable ruling that he would like to give the judge “something in appreciation for” – but the judge stopped the attorney and rebuffed the offer. The judge did not report the attorneys to the disciplinary authority. Although the case involved at least one other canon violation (ex parte communication), the seriousness of the failure to report the attorneys for disciplinary action given the gravity of the conduct violation is noted by the Illinois commission: “Suspension without pay is the most severe sanction, short of removal from office, that the Commission can impose . . . .” See *In Re Laurie*, No. 84 CC5 (Ill. Cts. Comm’n 1985).

In the present situation, the behavior of the lawyer includes vulgarity, disrespect for other court personnel, and sexual language (unspecified). While troubling, these instances are not of the gravity as in the *In Re Laurie* case, which involved attempted bribery of the judge.

We note that the judge recently admonished the attorney for the incident where he referred to opposing counsel as “a lying bitch.” In the opinion of the Committee, this statement standing by itself would not raise a substantial question of the fitness of the lawyer which would require the judge to inform the appropriate authority (Counsel for Discipline) of the conduct. It appears to the Committee that the judge carried out his responsibilities under Canon 3D(2). However, as to the instances which occurred after the judge admonished the attorney and the instances conveyed to the judge at the time of the meeting with his court reporter, the judge must determine the reliability of the information. If the

judge reasonably concludes that the court reporter's information is reliable, the judge has a responsibility to inform the Counsel for Discipline of the further conduct of the attorney. If the judge concludes otherwise, he has no responsibility to inform. The determination of reliability cannot be judged by this Committee.

**Disclaimer**

*This opinion is advisory only and is based on the specific facts and questions submitted by the person or organization requesting the opinion, pursuant to Appendix A of the Nebraska Code of Judicial Conduct. Questions concerning ethical matters for judges should be directed to the Ethics Advisory Committee.*

APPROVED AND ADOPTED  
BY THE COMMITTEE DECEMBER 10, 2003

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Judge Douglas F. Johnson  
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