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Modern Issues in Ethics and Professionalism

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#MeToo: Shedding Light on Sexual Harassment

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When Does Aggressive Attorney Behavior Cross An Ethical Line? A Discussion of Bullying, #MeToo Issues, and Mental Health

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Part 1: Selected Bankruptcy/Litigation-Related Scenarios[1]

Scenario # 1: Insulting the Trial Judge on Appeal

Attorney represents the plaintiff in an employment lawsuit. The jury awards the client $8,080 in damages. Attorney submits a request for attorney fees of almost $147,000, which the judge, a female, denies as unreasonable. Outraged, the attorney appeals. In the notice of appeal, he refers to the judge as displaying "mindless antipathy towards his client" and intentionally refusing to follow the law. He describes the judge's ruling as disgraceful and "succubistic," stating that it "prompt[s] one to entertain reverse peristalsis unto its four corners," an oblique way of saying the ruling made him want to vomit.

See Bloomberg Law, "California Attorney in Hot Water for Sexist Insult of Judge," March 11, 2019: On appeal, the California Court of Appeal, Fourth District, affirmed the denial of attorney fees and said it would report the attorney, Benjamin Pavone of Pavone & Fonner LLP to the state bar. Much of the opinion is unpublished but the court released one section. Wrote the court: "A succubus is defined as a demon assuming female form which has sexual intercourse with men in their sleep. We publish this portion of the opinion to make the point that gender bias by an attorney appearing before us will not be tolerated, period." The court stated it was bound to report as a violation of the California Business and Professions Code requiring attorneys to maintain the respect due to the courts of justice and judicial officers." The court also noted that the attorney's statements would violate a new section of the California Rules of Professional Conduct which bars attorneys from discriminating against persons on the basis of protected characteristics such as gender. *Martinez v. O'Hara*, Cal. Ct. App., 4th Dist., No. G054840 (Feb. 28, 2019).

Scenario # 2: Decorum & French Fries

[1] Prepared by Cynthia A. Norton originally for the Kansas Bar Association Annual Bankruptcy Seminar April 2017 and revised with the assistance of Brian Gifford, law clerk to John E. Hoffman, Jr.

In the context of a bankruptcy sale hearing, the lawyer says to the Judge:

> I suggest to you, with respect, Your Honor, that you're a few French fries short of a Happy Meal in terms of what's likely to take place.

Is this statement ethical?

1) Not unethical, he said "with respect"
2) Not unethical, truth is a defense
3) Unethical

Discussion

See https://www.law360.com/articles/27556/french-fry-remark-proves-costly-for-mcdermott-head

ABA Model Rule 3.5(d), Impartiality and Decorum of the Tribunal, provides that a lawyer shall not "engage in conduct intended to disrupt a tribunal." Many states phrase it as prohibiting "undignified or discourteous conduct degrading to a tribunal," or similar language. ABA Model Rule 8.2(a), Judicial and Legal Officials, under the heading of "Maintaining the Integrity of the Profession" also provides:

> A lawyer shall not make 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, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

KRPC 3.5(d) and 8.2(a) are identical to the ABA Model Rules.

Scenario No. 3: Taking a Bite Out of Banks

A long-time consumer debtor's lawyer, who only represents debtors, prides himself on what a good job he does on behalf of his debtor clients in Chapter 7s and 13s. His website proudly proclaims: "Screwing Banks Since 1992" (he made that one up himself). Other statements on his website were inspired by some of his competitor's sites, and include: "Keep your property," "Stop wage garnishments," "Stop home foreclosure" and "Stop vehicle repossession." The same statements are in his Yellow Pages Ad.

Are these statements ethical?

(1) No, because saying you will screw someone is conduct unbecoming to an officer of the court
(2) Yes, because the statements are true
(3) Maybe unethical as misleading advertising, but if so, every BK lawyer in the country is in trouble

Discussion

In the Matter of Brent Welke, Indiana Supreme Court Case No. 49S00-DI-293 (Jan. 7, 2016) (lawyer suspended for 30 days after agreeing these statements violated Indiana Rule of Professional Conduct 7.1 prohibiting false or misleading communications about a lawyer's services. Another lawyer had complained about the ads and website. The ACLU defended the lawyer, arguing that it was protected commercial speech. However, there was an earlier decision from the Indiana Supreme Court in 2002, *In re Matter of Anonymous.* The Court in that case had found that an ad reading "Bankruptcy, but keep house & car" was misleading, since it failed to state that a debtor in bankruptcy has only the possibility, not a guarantee, of keeping the house and car. The lawyer later told the ABA Journal in an interview that "screwing banks" uses a term derived from the use of thumbscrews in debtors' prisons to torture people into paying debts, and was not intended literally or in a prurient manner, and that the ad was essentially truthful given that creditors often receive only pennies out of bankruptcy cases. NOTE: His current ad has a picture of a bulldog with the statement: "We love to take a bite out of banks!," according to the ABA article. http://www.abajournal.com/news/article/bankruptcy_lawyer_suspended_for screwing_banks . . . (Jan. 22, 2016).

ABA Model Rule 7.1, Communications Concerning a Lawyer's Services, provides:

> A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

KRPC 7.1 (a) is identical; KRPC 7.1(b) provides: A communication is false or misleading if it . . . (b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law.

Scenario No. 4: Hey, Honey!

The parties are involved in a contentious nondischargeability proceeding. Plaintiff is represented by Carla Smith; the defendant/debtor's counsel is Bert Peters. There have already been several discovery disputes. The Debtor through his counsel Bert produces documents on a disc that is cracked and unreadable; despite Bert's promise to send another disc right away, as of the week before the deposition six weeks later, no new disc has arrived. When Carla emails Bert asking about the missing documents before the deposition, he responds by email: "What do you believe we should be producing that has not already been produced? You already have the documents." The day of the deposition, things get uglier. When a frustrated Carla asks Bert not to interrupt her questions of the Debtor, he says: "Don't raise your voice at me, it's not becoming of a woman."

Later, at the hearing on Plaintiff's motion for discovery sanctions for his interruptions and speaking objections at the deposition, Peter says on the record (with an avuncular smile to Carla): "Now, honey, there you go getting all upset again; your Honor, there is no need for any sanctions; if I offended Carla, it was in the context of her literally yelling at my client and creating a hostile environment during the deposition."

Bert's statements to Carla are:

(1) Within the bounds of zealous advocacy and free speech
(2) Annoying but typical boorish behavior of both male and female lawyers – Carla better thicken her skin if she wants to be a litigator
(3) Unethical, but danged if I know of any Rule that quite fits

Discussion

The facts are inspired by *Claypole v. County of Monterey*, 2016 WL 145557 (N.D. Cal. Jan. 12, 2016), a nonbankruptcy case. In *Claypole*, the Court found that defense counsel had made extremely long speaking objections, coached witnesses, cut off witnesses, and answered for them, and had said to plaintiff's counsel, a female: "Don't raise your voice at me, it's not becoming of a woman." The Court found that the speaking objections, coaching, and other actions violated Fed.R.Civ.P 30(d)(2), which allows a court to impose an appropriate sanction on a person who impedes, delays, or frustrates the fair examination of the deponent. For this behavior, the Court ordered the defendant to reimburse the plaintiff's for their attorneys fees and costs in three depositions.

As for the statement about raising her voice, the Court said defense counsel "had stooped to an indefensible attack on opposing counsel." His statement endorsed the stereotype that women are subject to a different standard of behavior than their fellow attorneys. The Court described his apology as "only a halfhearted politician's apology." The Court noted that a sexist remark is not just a professional discourtesy, but is a signifier of the discrimination that contributes to women's underrepresentation in the legal field. Exercising its power to sanction a lawyer for bad faith, the Court ordered the lawyer to donate $250 to the Women's Lawyers Association of Los Angeles Foundation.

Rule 8.4 of the ABA Model Rules was recently amended to make harassing and discriminatory statements expressly unethical. Rule 8.4 provides:

> It is professional misconduct for a lawyer to …
>
> (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct

> related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16.

KRPC 8.4 has no equivalent. But KRPC 4.4(a) (Transactions with Persons other than Clients) may be applicable when a third party is involved:

> In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such person.

Scenario No. 5: Flying Coffee

Picture another contentious deposition, after plaintiff's counsel has dragged her feet answering, provided ambiguous and coy answers to interrogatories, and refused to answer some interrogatories outright. At the deposition, counsel interrupts opposing counsel numerous times, and allegedly throws her ice coffee at opposing counsel. She says opposing counsel just made her angry and she said she was taking a break, and slammed her coffee cup on the table, causing it to spill on opposing counsel's papers. What should be the remedy for such childish behavior?

1) Monetary sanction of $250
2) Ethics referral
3) Dismissal of the case

Discussion

This scenario derives from a real case, discussed at https://www.law360.com/bankruptcy/articles/900356/loop-looses-ip-suit-over atty's-unprofessional conduct, in which the court dismissed the plaintiff's case as a sanction for misbehavior, in addition to awarding a monetary sanction of $250 for the "flying coffee incident." Plaintiff's counsel's "unprofessional conduct, her refusal to obey the court's deadlines, rules, and orders, and her ability to practice 'with the honesty, care, and decorum required for the fair and efficient administration of justice' underscore the necessity of termination sanctions in this case."

See Rule 26(g)(1) (as incorporated by Rule 7026(g)):

> Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name . . .. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and believe formed after a reasonable inquiry:
>
> (A) with respect to a disclosure, it is complete and correct as of the time it is made; and (B) with respect to a discovery request, response, or objection, it is:

> (i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;
>
> (ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and
>
> (iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

Rule 26(g)(3) provides for a monetary sanction for violation:

> If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

See also Rule 33(b)(2) (as incorporated by Rule 7033): discovery sanctions may include directing matters be taken as established, prohibiting the disobedient party from introducing evidence, striking pleadings, staying further proceedings until the discovery order is obeyed, dismissing the action in whole or in party, rendering a default judgment against the disobedient party, or treating the failure to obey as a contempt of court.

With the emphasis on proportionality in discovery under the Rule 2016 amendments that were effective Dec. 1, 2015, you can expect to see more orders like the one in this scenario. *See, e.g.,*

State of Kansas Department of Labor v. Morrison, Case No. 13-40935, Adv. No. 16-4154 (Bankr. W. D. Mo. Feb. 10, 2017) (Norton, C.J.) (denying summary judgment motion that was voluminous and noncompliant, citing Rule 1001).

In re Milholland, 2017 WL 895752, at *1 (10th Cir.BAP 2017) (Karlin, C.J.) ("For more than thirty years, the Federal Rules of Civil Procedure have stressed the need for courts to actively manage discovery to prevent parties from using it to "wage a war of attrition or as a device to coerce a party, whether financially weak or affluent," and have emphasized the concept of proportionality. Because the court did not abuse its discretion in limiting discovery here in an attempt to achieve the just, speedy, and inexpensive determination of this proceeding, as mandated by Rule 1, we affirm.) (footnotes omitted).

Scenario No. 6: Ethical Lapses of Attorney with Suspected Mental Health/Substance Abuse Issues

Chapter 13 debtor files a motion to extend the automatic stay. She alleges in the motion that her prior case was dismissed for failure to pay the filing fee because, although she had given

her former attorney the funds to pay the fee, the attorney had not done so. Instead, unbeknownst to the debtor, the attorney obtained authority for the debtor to pay the filing fee in installments but then did not make the installment payments. The order scheduling the hearing on the motion to extend requires the former attorney to appear at the hearing and be prepared to address the allegations that the debtor has made against him. The attorney misses the hearing. The bankruptcy judge learns that the attorney has been accused of the same conduct in cases before other judges. Also, the word on the street is that the attorney is struggling with mental health and substance abuse issues.

The judge should:

1) Do nothing other than grant the motion to extend the stay, because that is all that is before the court

2) Report the attorney's conduct to the appropriate disciplinary authorities

3) Make a confidential referral to an attorney assistance program.

Discussion

Canon 3B(6) of the Code of Conduct for United States Judges states:

> A judge should take appropriate action upon receipt of reliable information indicating the likelihood that a judge's conduct contravened this Code, that a judicial employee's conduct contravened the Code of Conduct for Judicial Employees, or that a lawyer violated applicable rules of professional conduct.

The commentary to Canon 3B(6) states:

> Public confidence in the integrity and impartiality of the judiciary is promoted when judges take appropriate action based on reliable information of likely misconduct. Appropriate action depends on the circumstances, but the overarching goal of such action should be to prevent harm to those affected by the misconduct and to prevent recurrence. . . .
>
> Appropriate action may include direct communication with the judge or lawyer, other direct action if available, reporting the conduct to the appropriate authorities, or, when the judge believes that a judge's or lawyer's conduct is caused by drugs, alcohol, or a medical condition, making a confidential referral to an assistance program. Appropriate action may also include responding to a subpoena to testify or otherwise cooperating with or participating in judicial or lawyer disciplinary proceedings; a judge should be candid and honest with disciplinary authorities.

Part II: Mental Health and Substance Abuse: Caselaw[2]

In the Matter of: Tony Sami Botros; No. COA 18-1137 (N.C. App. May 21, 2019)

Holding: lower court had authority to change respondent's bar status to "disability active status" when he attended several court proceedings impaired, refused to take a drug test, and revoked his initial voluntary agreement to enroll in the state's LAP program.

Respondent-attorney appeared impaired in two court proceedings on the same day. *Id*. at *2-3. Both judges noted respondent's dilated eyes, slurred speech, and inability to coherently argue. *Id*. At the second proceeding, respondent was called into chambers where the judge questioned respondent as to his impairment and respondent contended that he was not impaired, however admitted to taking antidepressants and suffering from anxiety and depression. *Id*. at *4. The judge ordered the hearing be continued and told respondent that he appeared impaired. *Id*.

Following the continuance of the second proceeding, respondent returned to the first proceeding to complete his argument, but the judge would not allow respondent to proceed; particularly in light of the other court's continuance. *Id*. Nonetheless, the judge gave respondent the opportunity to be drug tested to determine if he was clean and initially, respondent said "okay." *Id*. Respondent changed his mind however, when the tester arrived. *Id*.

At the continued hearing, respondent appeared late and was again, impaired. *Id*. at *5. As a result, the judge, in chambers, informed respondent of his intent to issue an Order to Show Cause for Contempt but gave an opportunity for the respondent to avoid the order if he voluntarily sought evaluation treatment through the Lawyer Assistance Program. *Id*. Initially, respondent agreed, but later revoked the agreement stating that he was coerced. *Id*. at *5-6. Shortly thereafter, the Show Cause Order was entered. *Id*. at *6.

The Show Cause hearing lasted two days, and while respondent attended the first day, he failed to appear on the second day. *Id*. The judge entered a Disability Order and transferred respondent's bar status to disability inactive status. *Id*. at *6-7. In finding that the trial court had the authority to place respondent on disability inactive status, the reviewing court found ample evidence showing that respondent was impaired and that the court had the duty to ensure justice was done in a fair, safe, and expeditious manner. *Id*. at *20-22.

Edge-Gougen v. State, 182 So. 3d 730 (Fla. Dist. Ct. App. 2015)

Holding: Lower court erred in finding appellant in direct criminal contempt when the judge asked appellant-attorney to take a breathalyzer test and detained appellant following receipt of the results.

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[2] Prepared by Kristi Sutton, Law Clerk to the Hon. Cynthia A. Norton.

Believing she was done with work, appellant went to lunch, but when she learned a client of hers had a plea hearing, appellant attended court. *Id*. Two court employees told the judge appellant smelled of alcohol and when the judge asked appellant about drinking, she responded that she had alcohol at lunch, but that she was not impaired. *Id*. The court requested appellant take a breathalyzer test and announced what was happening in open court. *Id*. The breathalyzer results were .082, .087, and .076 grams/100 milliliter BAL and after receipt of the results, the court did not allow appellant to proceed and ordered her to be held in the county jail until she blew under 0.08 g/100 ml. *Id*.

At the direct criminal contempt hearing, appellant moved to dismiss the charges on the ground that the charge required "an intentional act be committed in the presence of the court, and this requirement was not met under the facts of this case." *Id*. Notwithstanding that two witnesses testified that the appellant neither smelled of alcohol, nor appeared impaired, the court found that the act of drinking was an intentional act enough to hold appellant in direct criminal contempt. *Id*. On appeal, the court reversed and found that the court abused its discretion when it (a) found the appellant guilty of contempt of court; (b) asked appellant to take the breathalyzer test; and (c) detained the appellant. *Id*. at 733.

In a concurring opinion, Judge Makar discussed mental health and substance abuse issues in the legal profession: "[l]awyers and alcohol do mix, so frequently that our profession's rate of substance abuse justified…[establishing lawyers assistance programs]…to provide confidential assistance to members of the Bar for a wide range of personal afflictions." *Id*. at 734. A therapeutic approach, not a "castigatory approach" to alcohol issues is preferable and "[t]his approach places trial judges in a parentalistic role, that of supervising attorneys and protecting their clients—and thereby the judicial system—via intervention when appropriate in a firm but compassionate manner, deploying incrementally the resources and judicial tools necessary to determine the nature of the possible problem and its correction, sometimes simply via informal judicial persuasion." *Id*. at 734-35. Judges are in a unique position to assure confidentiality, which is of great necessity given the "sensitive nature of addictions of all kinds, including their medical dimensions and employment ramifications. . . ." *Id*. at 735.

While no "playbook" exists that instructs judges how to treat attorneys who appear before them smelling of alcohol, but not seeming impaired, contempt is an unlikely solution. *Id*. at 735. While there is no universal solution for attorneys with mental health and substance abuse issues, "it may be worth considering given the therapeutic and remedial approach that the judiciary and Bar support, the lack of clear guidance for trial judges to follow, and the gauntlet of indignities the attorney in this case experienced (detention, monitoring devices, and so on)." *Id*. at 738.

Ridge v. State Bar, 47 Cal. 3d 952, 766 P.2d 569 (1989)

Holding: When an attorney appears in court intoxicated, mishandles his father's estate, and fails to perform services for another client, license suspension is appropriate. *Id*.

The attorney mishandled three separate matters, one of which involved appearing in court intoxicated. *Id*. at 955-56. At the hearing, concerned that petitioner was intoxicated and not

properly representing his client, the judge called the petitioner into chambers. *Id*. at 956. The judge noted petitioner's slurred speech and clumsiness in holding documents. *Id*. Petitioner told the judge he had two beers at lunch, however agreed to a breathalyzer test which resulted in a blood-alcohol level of .17 percent. *Id*.

Upon receipt of the results, "[t]he court expressed the opinion that petitioner's condition constituted contempt of court and concluded that despite the presence of several witnesses, proceedings would have to be continued." *Id*. At the continued hearing, the court held the petitioner in contempt and noted, in addition to slurred speech and document-dropping, the petitioner acted aggressively and smelled of alcohol. *Id*. The court "felt petitioner's conduct had been an affront to the dignity of the court and expressed frank disbelief that petitioner's conduct and his blood-alcohol level could be attributed to two beers." *Id*.

At his State Bar hearing, petitioner admitted lying to the judge about consuming only two beers, however, reported that he entered counseling and was on medication. *Id*. The reviewing court took great offense to the petitioner's lack of candor to the judge and appearing in court intoxicated. *Id*. at 960. And while the reviewing court sympathized with the petitioner's alcoholism, it found that he failed to show "a meaningful and sustained period of successful rehabilitation" because the petitioner withdrew from counseling when he felt cured. *Id*. at 960-61. Resultantly, the court found appropriate the recommendation that the petitioner "be required to abstain from the use of intoxicants and participate in the State Bar's pilot program on alcohol abuse…" *Id*. at 961.

Given that the petitioner mishandled several cases, the reviewing court ordered suspension from practice for three years, "that execution of the suspension be stayed, and that petitioner be placed on probation for three years on condition that he be actually suspended from the practice of law for the first year of said period of probation and that he comply with all other conditions of probation. . . ." *Id*. at 965-66.

Part III: Sexual Harassment (#Me Too): Caselaw

In re Robinson, 2019 VT 8 (Vt. Feb. 22, 2019), order clarified, 2019 VT 24 (Vt. Mar. 27, 2019)

Holding: Disbarment was appropriate when attorney's pattern of professional and sexual misconduct towards clients and employees ran afoul of professional rules of conduct, emotionally harmed the victims, and damaged the reputation of the legal profession.

Respondent, a solo practitioner, provided legal services to two women (C.M. and P.B.). *Id*. at *1. While representing C.M. in her divorce, respondent and C.M. engaged in a sexual relationship without C.M. signing a written waiver. *Id*. at *1-2. Respondent later employed C.M. as she was financially burdened and had children. *Id*. at *2. When the relationship ended, C.M. felt abandoned personally and as a client. *Id*.

P.B., a 29-year-old woman with ADHD and PTSD, retained respondent to represent her in several matters, however respondent did not charge her for the legal services. *Id*. Respondent hired

P.B. as an administrative assistant and over the course of working for respondent, P.B. admitted that he "tossed paperclips…[at her] cleavage, masturbated in her presence [when he requested that she unbutton her shirt], and requested that she sign a contract…indicting their relationship was 'mutually welcome.'" *Id*. at *3. Respondent encouraged P.B. to sign this contract which effectively waived her rights to pursue claims of sexual harassment, notwithstanding that she was unrepresented and that he, respondent, was not acting in her best interest. *Id*. at *12. P.B. admitted, while working for respondent, her mental health issues worsened. *Id*. at *3.

The court concluded respondent's actions violated (1) Rule 1.7 (Conflict of Interest: Current Clients) as respondent failed to have C.M. sign a written waiver of consent and he was aware that engaging in sexual relations with a client in divorce proceedings is a conflict of interest; (2) Rule 4.3 (dealing with Unrepresented Person) as respondent knowingly presented to P.B., an unrepresented person, a contract that effectively waived her rights to bring sexual harassment claims against him; and (3) Rule 8.4(g) (Misconduct – Discrimination) as respondent created a hostile work environment when he threw paperclips at P.B.'s cleavage, masturbated in front of her, and coerced her into signing a contract that was not in her best interest. *Id*. at *10-16. The court found respondent's actions warranted disbarment given the vulnerability of the women respondent targeted, respondent's pattern of misconduct, and the actual harm to P.B., C.M., and to the legal profession. *Id*. at *21.

Iowa Supreme Court Attorney Disciplinary Bd. v. Stansberry, 922 N.W.2d 591 (Iowa 2019)

Holding: License suspension is proper when, attorney, acting as supervisor, violated the privacy of two women when he trespassed into both their offices and one woman's home and took photos of their undergarments.

Attorney Stansberry was an assistant county attorney. *Id*. at 594. The first incident occurred when Stansberry stopped at a co-worker's home (Doe), who was doing yardwork, and asked to use her restroom. *Id*. After Stansberry left, Doe noticed her undergarments on the driveway. *Id*. Doe reported the incident to her boss, an investigation ensued, and Stansberry was placed on administrative leave. *Id*. The investigation led to discovery of deleted photos "showing he had entered Doe's bedroom and photographed her undergarment drawer, he had entered Doe's office and photographed undergarments in her gym bag, and he had entered the office of another colleague – Jane Roe – and photographed her undergarments in her gym bag as well." *Id*. Stansberry resigned shortly thereafter and both women suffered mental and emotional trauma such that Doe resigned from her position and left the county. *Id*.

Both women were under Stansberry's supervision and he used his position to violate victims who trusted him. *Id*. at 597. The court found egregious Stansberry's willingness to take advantage of his position. *Id*. To further exacerbate this case, Stansberry was counsel of record in 145 cases and when he resigned, the county attorney's office was in upheaval. *Id*. at 598. The court found Stansberry's actions warranted license suspension with no possibility of reinstatement for

one year and the court required, prior to being reinstated, that Stansberry provide a healthcare evaluation verifying his fitness to practice law. *Id*. at 601.

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Part IV: Applicable Rules

a. Rules Governing Judicial Conduct

"The Model Code of Judicial Conduct establishes standards for the ethical conduct of judges and judicial candidates."[3] Pursuant to Rule 2.14, "[a] judge having a reasonable belief that the performance of a lawyer or another judge is impaired by drugs or alcohol, or by a mental, emotional, or physical condition, shall take appropriate action, which may include a confidential referral to a lawyer or judicial assistance program.[4] "Appropriate action" is defined as:

> "action intended and reasonably likely to help the judge or lawyer in question address the problem and prevent harm to the justice system. Depending upon the circumstances, appropriate action may include but is not limited to speaking directly to the impaired person, notifying an individual with supervisory responsibility over the impaired person, or making a referral to an assistance program."[5]

While referrals to assistance programs may satisfy a judge's ethical responsibility, [d]epending upon the gravity of the conduct that has come to the judge's attention…the judge may be required to take other action, such as reporting the impaired judge or lawyer to the appropriate authority, agency, or body."[6]

Next, Rule 2.15 instructs judges who "have knowledge" that a judge or lawyer violated the Rules of Judicial or Professional Conduct that "raises a substantial question regarding the judge's [or lawyer's] honesty, trustworthiness, or fitness…shall inform the appropriate authority."[7] When a judge "has knowledge" of the misconduct, that judge must report the offending judge or lawyer to the appropriate disciplinary authority.[8] To do otherwise would "undermine[] a judge's responsibility to participate in efforts to ensure public respect for the justice system."[9]

Rule 2.15 also addresses when a judge has "information indicating a substantial likelihood that another judge [or lawyer] has committed a violation of this Code [or Rules of Professional Conduct] . . ."[10] When no actual knowledge is present, a judge who "receives information indicating a substantial likelihood of such misconduct, is required to take appropriate action…[which] may include…communicating directly with the judge [or lawyer] who may have violated this Code [or Professional Rules of Conduct], communicating with a supervising judge

[3] Model Code of Jud. Conduct, Preamble (ABA 2011).
[4] Model Code of Jud. Conduct Canon 2, R. 2.14 (ABA 2014).
[5] *Id*. R. 2.14, cmt.
[6] *Id*.
[7] *Id*. R. 2.15.
[8] *Id*. R. 2.15, cmt.
[9] *Id*.
[10] *Id*. R. 2.15.

[or an attorney's supervisor], or reporting the suspected violation to the appropriate authority . . . ."[11]

Last, Rule 2.16 instructs judges to cooperate and be honest with judicial and lawyer disciplinary bodies.[12] A judge's cooperation with disciplinary agencies "instills confidence in judges' commitment to the integrity of the judicial system and the protection of the public."[13]

b. Rules Governing Attorney Conduct

Turning to the Model Rules of Professional Conduct, Rule 1.1 requires a lawyer to be competent in his or her client representation and this competence requires an attorney to have the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[14] This Rule requires an attorney to maintain competence and engage in further study and legal education.[15]

Rule 1.16 requires an attorney who is mentally or physically impaired and unable to represent his or her client, to withdraw from representation.[16] An attorney shall not accept representation "unless it can be performed competently, promptly, without improper conflict of interest and to completion."[17]

Next, Rule 8.4 states that it is professional misconduct to violate the Rules of Professional Conduct, to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects," and to "engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law."[18] As it relates to criminal acts, this Rule indicates,

> "[a]lthough a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation."[19]

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[11] *Id*. R. 2.15, cmt.
[12] *Id*. R. 2.16.
[13] *Id*. R. 2.16, cmt.
[14] Model Rules of Prof'l Conduct R. 1.1 (ABA).
[15] *Id*. R. 1.1, cmt.
[16] *Id*. R. 1.16.
[17] *Id*. R. 1.16, cmt.
[18] *Id*. R. 8.4.
[19] *Id*., R. 8.4 cmt.

Further concerning discrimination and harassment, "discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others[] and [h]arassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature."[20]

As of October 17, 2018, thirty-seven jurisdictions approved a revised Judicial Code[21] modeled after the ABA Model Rules and all states have adopted the Rules of Professional Conduct, modeled after same.[22]

c. Advisory Opinion clarifying a Judge's duty under these Rules

According to a recent Advisory Opinion issued by the Ohio Board of Professional Conduct,[23] when a judge has knowledge of a lawyer's misconduct, that judge is obligated to report the attorney to the relevant disciplinary authority.[24] When a judge does not have actual knowledge, but suspects or receives information as to an attorney's misconduct, there is discretion in response.[25] For example, the judge may report the attorney to the appropriate disciplinary authority, speak to the attorney privately, or reach out to a partner or colleague of the suspected attorney.[26] A judge is not necessarily required to recuse himself or herself from future cases involving the attorney and irrespective of whether a judge has actual knowledge, the length of time taken to respond must be "reasonable."[27]

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Part V: Mental Health and Sexual Harassment in the Legal Community

A 2016 study by the American Bar Association and Hazelden Betty Ford Foundation "found that 28 percent of licensed, employed lawyers suffer with depression…, 19 percent have symptoms of anxiety[,] and 21 percent are problem drinkers."[28] Theories as to why legal professionals have mental health issues include (a) personality traits of perfectionism; (b) stresses of graduating law school with debt and uncertain job prospects; (c) inability to escape work because of technology (email, text, instant message); (d) "taking on" and internalizing client problems; (e) bullying and harassment by peers and/or superiors; and (f) the attorney culture of long hours, high stress, and isolation.[29]

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[20] *Id*.
[21] Jurisdictional Adoption of Revised Model Code of Judicial Conduct, http://www.americanbar.org (last visited May 23, 2019).
[22] Lorelei Laird, *California approves major revision to attorney ethics rules, hewing closer to ABA Model Rules* (Oct. 2, 2018), http://www.abajournal.com.
[23] Ohio Bd. of Prof'l Conduct, Informal Op. 2017-02 (discussing a judge's duty to report misconduct pursuant to the Rules of Judicial Conduct).
[24] *Id*. at 2.
[25] *Id*. at 2-3.
[26] *Id*.
[27] *Id*. at 3-4.
[28] Dina Roth Port, Lawyers Weigh in: *Why is there a depression epidemic in the profession*? (May 11, 2018), http://www.abajournal.com.
[29] *See generally id*.

Bullying and sexual harassment have come to the forefront as aggravating factors of mental health issues in attorneys.[30] A recent survey by the International Bar Association revealed "[n]early half of those who work at large law firms said they have been bullied in the workplace. . . ."[31] Forms of bullying include ridicule, extreme micromanaging, unproductive criticism, giving too much or too little work, and misuse of supervisory role and power.[32] Women and young professionals are the most at risk for being victims of bullying.[33]

The same survey revealed 36.6 percent of women and 7.4 percent of men experienced sexual harassment in the workplace, where the highest percentage of harassment occurred in governmental legal jobs.[34] Sexual harassment impacts the mental health of attorneys, may lead to depression and leaves many victims feeling unable to report harassment for fear of losing jobs or being ostracized.[35] Bullying has similar effects on the mental health of attorneys and can lead to victims switching jobs or leaving the legal profession entirely.[36]

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Part VI: Ethical Obligations of Judges

While the Rules of Judicial Conduct guide judges on how to report impaired attorneys, evident from the holdings of *In re: Botros*,[37] *Edge-Gougen v. State*,[38] and *Ridge v. State Bar,*[39] no universal rule exists as to "the best" discipline. Nonetheless, as stated in an article by the Indiana Court Times, judges are in a unique position to observe recurring irregularities and are under a duty to protect the administration of justice.[40] This article explains that not all ethical violations are equal in severity and a range of judicial discipline is required.[41] Citing to Rules 2.14 and 2.15, the article provides a list of factors judges should consider when deciding whether they are ethically obligated to report an attorney to a disciplinary authority:

> 1) the amount and quality of a judge's information (rumor vs. firsthand knowledge);
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> 2) the seriousness of the offense (technical vs. substantial violation);

[30] Aebra Coe, *Law Has A Bullying Problem, But In BigLaw It's Even Worse*, Law360 (May 14, 2019), http://www.law360.com.
[31] *Id*.
[32] *Id*.
[33] *Id*.
[34] Aebra Coe, *The Legal Jobs Where Sexual Harassment Is Most Common*, Law360 (May 14, 2019), http://www.law360.com.
[35] *Id*.
[36] Coe, *supra* note. 28.
[37] *In the Matter of: Tony Sami Botros*; No. COA 18-1137 (N.C. App. May 21, 2019).
[38] *Edge-Gougen v. State*, 182 So. 3d 730 (Fla. Dist. Ct. App. 2015).
[39] *Ridge v. State Bar*, 47 Cal. 3d 952, 766 P.2d 569 (1989).
[40] *Disciplinary Responsibility of Judges and the Duty to Report Ethical Misconduct*, Indiana Court Times, (2010), http://indianacourts.us/times/2010/05/disciplinary-responsibility-of-judges-and-the-duty-to-report-ethical-misconduct/.
[41] *Id*.

> 3) the impact of the offense (substantial harm could or did result vs. no harm);
>
> 4) the possible remedial measures a judge could take; and
>
> 5) whether prior attempts to address the violation have gone unheeded by the offending judge or lawyer.
>
> The first three variables carry more weight than the latter two, as a judge bears a higher burden to report serious misconduct which harms others, even if there are other remedial options that the judge could take.[42]

While Indiana's Code of Conduct does not include specific examples of serious misconduct which would raise a "substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer" and require a judge to report the attorney to a disciplinary body, other jurisdictions, including Massachusetts and Arizona, published a list of ethical violations, which, when breached, carry a duty to report.[43] The following conduct is sufficiently serious to warrant judicial reporting:

- **Criminal or Deceitful Conduct –** Deceitful conduct may include giving false testimony under oath or tampering with or falsifying court papers;

- **Sexual Misconduct/Harassment –** This includes unwanted, overt sexual advances to staff, colleagues, or members of the public that rises to the level of harassment, but more minor misconduct, such as isolated inappropriate comments, may be handled by taking other appropriate measures;

- **Abuse of the Prestige of Office/Abuse of Power –** This includes misusing appointment power to show favoritism, attempting to use judicial status to receive favorable treatment during a traffic encounter, and tampering with or attempting to influence improperly the judicial action of another judge or a pending police investigation;

- **Pattern of Substance Abuse or Serial Neglect –** While taking other actions may be appropriate initially, a judge's duty to

[42] *Id*.
[43] *Id*.

report commences when a lawyer's or judge's substance abuse or neglect becomes routine or threatens to injure others;

- **Repeated Profane or Abusive Behavior in Court/Conduct Bringing Judiciary into Disrepute –** While an occasional language slip-up may not merit the attention of a disciplinary body, repeated abusive behavior by a judge or lawyer affects public perceptions of justice and tarnishes the reputation of the legal system as a whole.[44]

Ultimately, because a judge must decide whether an attorney's misconduct requires reporting to a disciplinary body, the article concludes with a quote to help judges in their ultimate decision: "always let your conscience be your guide."[45]

In conjunction with the Indiana Court Times' suggestions, the Texas Lawyers' Assistance Program provides, if a judge suspects that an attorney is chemically dependent or depressed, a judge may (a) talk to the attorney in chambers, (b) consider contempt charges (which may be purged upon the attorney's willingness to seek treatment), (c) order assessment or treatment, or (d) remove the attorney from any court appointed lists until he/she demonstrates recovery.[46]

Part VII: *How Others in the Legal Community May Help*

The alarming statistics of lawyers who suffer mental health and substance abuse addiction, instigated law firms to adopt policies geared towards employee wellness.[47] Catalyzed by the "ABA Working Group to Advance Well-Being in the Legal Profession," more than a dozen firms pledged to enact new policies to encourage mental health.[48] The pledge includes (a) educating staff on mental health and substance abuse issues, (b) limiting alcohol at firm events and assuring nonalcoholic options are available, (c) providing confidential access to mental health professionals and resources, (d) developing firm policies to treat employees addicted to substances or who suffer from mental health issues, and (e) supporting programs for overall physical, emotional, and mental well-being.[49]

As part of this wellness "push," in a recent article published by Law360, three pitfalls of firm policy are identified as they relate to attorney addiction and include (1) lacking a plan when

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[44] *Id*.
[45] *Id*. (citing Lyric from "Give a Little Whistle" (performed by Jiminy Cricket, voice of Cliff Edwards) in Disney's cartoon classic, Pinocchio (1940)).
[46] *For Judges – Are you Witnessing Chemical Dependency/Clinical Depression and a few suggestions if the answer is "Yes."*, Texas Lawyers' Assistance Program, https://www.texasbar.com (*see also*, Kentucky Lawyer Assistance Program, citing same suggestions at https://www.kylap.org/resources/judges/).
[47] Sam Reisman, *Firms Sign 'Well-Being Pledge' To Address Atty Mental Health*, Law360 (Sept. 10, 2018), http://www.law360.com.
[48] *Id*.
[49] *Id*.

an employee suffers mental health issues, (2) not offering aid early on, and (3) not planning for the attorney's return.[50] A formal, written policy provides reliable and predictable guidance to management and should be implemented to help and support attorneys while also protecting the firm.[51] Further, providing early aid to attorneys exhibiting signs of mental distress may prevent worsening addiction.[52] Last, ensuring that the employee will be permitted to return to the firm and be introduced to the case load gradually will incentivize attorneys to seek early treatment and ensure that he or she will not feel overwhelmed upon return.[53]

In similar vein, firms[54] and bar associations[55] are actively pursuing policies to prevent sexual harassment. In firms, there is a general unwillingness for victims to come forward for fear they will be fired or "cut-off" socially and professionally.[56] As one solution, firms are looking to technology and apps such as StopIt and Kendr, which allow employees to report harassment with anonymity.[57] Bar associations are similarly looking for solutions, not just to prevent sexual harassment, but gender bias as well. In a survey conducted by the Iowa State Bar, a single question was asked: have you experienced or witnessed harassment or discrimination on the basis of gender in the past five years?[58] The results reflected 84 percent of women and 34 percent of men answered yes to this question.[59] Consequently, the Iowa State Bar, partnered with the ABA, is actively educating attorneys about sexual harassment and hopes to draw greater attention to the legal community as a whole, to encourage solutions and inspire conversation.[60]

Part VIII: General Resources on Understanding Mental Health

From an excellent presentation and materials presented on Mental Health Issues presented at the FJC Bankruptcy Program in San Diego on August 9, 2017 by Hon. A. Thomas Small, E.D.N.C. (Retired) and Jay C. Williams, Ph.D., Psychotherapist and Clinical Social Worker, Adjunct Prof. of Psychiatry and Social Work (Retired), University of North Carolina

http://www.mentalhealthfirstaid.org/cs/

Mental Health First Aid is an 8-hour course that gives people the skills to help someone who is developing a mental health problem or experiencing a mental health crisis. The evidence behind the

[50] Aebra Coe, *3 Mistakes Law Firms Make Dealing With Attorney Addiction*, Law360 (March 29, 2019), http://www.law360.com.
[51] *Id*.
[52] *Id*.
[53] *Id*.
[54] Beth Schroeder, *#MeToo At Law Firms And What We Can Do About It*, Law360 (June 19, 2018), http://www.law360.com.
[55] Robert J. Derocher, *As women lawyers across the country say #MeToo, bar associations play an important role*, http://www.americanbar.org (last visited May 28, 2019).
[56] Schroeder, *supra* note 52.
[57] *Id*.
[58] *Id*.
[59] *Id*.
[60] *Id*.

program demonstrates that it does build mental health literacy, helping the public identify, understand, and respond to signs of mental illness.

https://www.nami.org/Learn-More/Mental-Health-Conditions
The National Alliance on Mental Illness has compiled a comprehensive list of materials about every kind of mental health condition. The list includes a description of each condition, its symptoms, how it is diagnosed, how it can be treated, and resources for people struggling with that particular condition.

https://www.mind.org.uk/media/619080/understanding-mental-health-problems-2014.pdf
An easy-to-read pamphlet on understanding mental health problems published by Mind, a mental health charity based in the UK.

https://csgjusticecenter.org/wp-content/uploads/2013/04/Judges-Guide-to-Mental-Illnesses-in-the-Courtroom.pdf
A reference sheet designed to help judges identify potential instances of mental illness in the defendants that come before them in court. Created by the Council of State Governments Justice Center.

https://csgjusticecenter.org/wp-content/uploads/2016/03/JC_MH-Consensus-Statements.pdf
The Council of State Governments Justice Center and the American Psychiatric Association Foundation, in partnership with the National Judicial College, convened a national expert panel of leading researchers, judges, and forensic psychiatrists to consider the current state of the research on the assessment of the risk of violence, failure to appear in court, and recidivism for people with serious mental illnesses. Judicial advisors responded to the presentations from these experts and provided input on key judicial considerations about this issue. A link to several consensus statements agreed upon by this expert panel.

http://www.apa.org/helpcenter/emotional-crisis.aspx
An article published by the American Psychological Association about how to help someone who is having a mental health crisis.

http://www.apa.org/helpcenter/assessment.aspx
An article published by the American Psychological Association about mental health evaluations: what they are for, what they entail, and their potential limitations.

http://psychcentral.com/lib/spending-sprees-in-bipolar-disorder/
A brief overview of bipolar disorder, focusing mainly on the financial aspect of an affected individual's decision making process.

http://psychcentral.com/lib/an-introduction-to-depression/
An introduction to depression including types of depression, causes, symptoms, and evaluation processes.

http://www.nimh.gov

Statistics and other information about mental disorders organized by diagnosis. NIMH will also send excellent, free brochures containing descriptions and information about various mental disorders. Don't Sweat the Small Stuff . . . an it's all small stuff, Richard Carlson, Ph.D., Hyperion, 1997

Emotional First Aid; Healing, Rejection, Guilt, Failure, and other Everyday Hurts, Guy Winch, Ph.D., Plume, 2014.

In addition, Ohio, Indiana, and Kentucky all have attorney assistance programs. See https://www.ohiolap.org/

https://www.in.gov/judiciary/ijlap/index.htm

https://www.kylap.org/