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## Responding to Judicial and Lawyer Misconduct: Analyzing a Survey of State Trial Court Judges

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# ARTICLE

*Dr. Peter Koelling*

## Responding to Judicial and Lawyer Misconduct: Analyzing a Survey of State Trial Court Judges

**Abstract.** While reported cases or incidents may give us insight into the interpretation of Rule 2.15 of the Model Code of Judicial Conduct, they do not give us a sense of how often judges undertake the obligation to act under the rule. The Judicial Division of the American Bar Association developed a survey to explore the interpretation and the implementation of Rule 2.15 of the Model Code of Judicial Conduct, and to determine how and in what manner state trial court judges responded to ethical violations by lawyers and other judges. The survey looked back over a ten-year period and was sent to the members of the American Bar Association's Judicial Division National Conference of State Trial Judges. This article discusses each paragraph of Rule 2.15, and analyzes the responses to the survey.

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## I. INTRODUCTION

Ethics are at the heart of establishing public trust and confidence in the justice system.<sup>1</sup> The integrity of the system and the ethics of those who participate in it are vital building blocks for that trust and confidence.<sup>2</sup> Through a judge's decision-making and handling of cases, the judge is also a critical element of the justice system.<sup>3</sup> In addition to their duty to fairly administer justice, judges are obligated to protect the integrity of proceedings and to take action when ethical standards are violated.<sup>4</sup>by judges and by lawyers.<sup>5</sup> Indeed, failure to take action is a violation in and of itself.<sup>6</sup> This obligation is clearly set out in the Model Code of Judicial Conduct Rule 2.15.<sup>7</sup>

This Article explores both the interpretation and the implementation of Rule 2.15. While reported cases or incidents may give us insight into the interpretation of the rule, they do not give us a sense of how often judges

1. See MODEL CODE OF JUDICIAL CONDUCT pmb. para. 1 (AM. BAR ASS'N 2011) (providing that inherent in each of the rules in the Model Judicial Code of Conduct "are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system").

2. See *id.* (expressing that judges "must respect and honor the judicial office" because they are endowed with the public trust and confidence in the legal system). "[Judges] should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence." *Id.* para. 2. Judges should strive to preserve the dignity required of their judicial office by avoiding impropriety, or even the appearance of impropriety, both professionally and in their personal lives. *Id.*

3. See *How Courts Work: The Role of Judges*, A.B.A., [http://www.americanbar.org/groups/public\\_education/resources/law\\_related\\_education\\_network/how\\_courts\\_work/judge\\_role.html](http://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/judge_role.html) (last visited Dec. 19, 2016) ("Judges are like umpires in baseball or referees in football or basketball. Their role is to see that the rules of court procedures are followed by both sides."); see also FED. R. EVID. 104(a) (declaring a judge's duty includes deciding preliminary questions regarding privileges, witness competence, and admissibility of evidence); *id.* R. 611 (indicating the element of control a judge has in determining the admissibility of evidence). The judge has the responsibility of "arrang[ing] an orderly sequence for receiving the evidence[.]" and in arranging such a sequence, "the judge must necessarily give thought to the issues involved in the case before him and provide direction for their resolution." Geoffrey C. Hazard & Angelo Dondi, *Responsibilities of Judges and Advocates in Civil and Common Law: Some Lingering Misconceptions Concerning Civil Lawsuits*, 39 CORNELL INT'L L.J. 59, 66 (2006). See generally Judith Resnik, *Trial As Error, Jurisdiction As Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 926 (2000) (portraying ways in which a judge's decision-making is integral to a case).

4. See MODEL CODE OF JUDICIAL CONDUCT r. 2.15 cmt. 1 (AM. BAR ASS'N 2011) ("Ignoring or denying known misconduct among one's judicial colleagues or members of the legal profession undermines a judge's responsibility to participate in efforts to ensure public respect for the justice system.").

5. See *id.* r. 2.15 (requiring judges to respond to misconduct of both judges and lawyers).

6. See *id.* (stressing a judge *shall* take appropriate action or *shall* inform the appropriate authority).

7. See *id.* (requiring a judge to report both known and received information of lawyer or fellow judge misconduct).

undertake the obligation to act under the Model Code of Judicial Conduct (the Code). The American Bar Association's Judicial Division created a survey and sent it to the members of the American Bar Association's Judicial Division National Conference of State Trial Judges to determine how often they had taken action pursuant to Rule 2.15. The survey looks back over a ten-year period and inquired about each of the four separate sections of the rule.<sup>8</sup> The second general inquiry was once a judge determined to take action, what action was taken.<sup>9</sup> The survey also asked the judges to determine whether actions taken were effective in halting ethical violations.<sup>10</sup> A total of 117 judges responded to the survey.<sup>11</sup> In general, 14% of the respondents had taken action with regard to ethical violations by another, while more than half (56%) said they had taken action due to ethical violations by lawyers over the past ten years.<sup>12</sup> While not generalizable, the survey does give helpful insights into the actions and approaches taken by judges in response to this rule.

## II. RULE 2.15 RESPONDING TO JUDICIAL AND LAWYER MISCONDUCT

Invariably, an analysis on a survey regarding Rule 2.15 necessitates an initial examination of the rule itself. Rule 2.15, entitled *Responding to Judicial and Lawyer Misconduct*, reads as follows:

- (A) A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question regarding the judge's honesty, trustworthiness, or fitness as a judge in other respects shall inform the appropriate authority.
- (B) A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as lawyer in other respects shall inform the appropriate authority.
- (C) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code shall take appropriate action.
- (D) A judge who receives information indicating a substantial likelihood that

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8. Judicial Div., Am. Bar Ass'n, Initial Report: Model Code of Judicial Conduct Rule 2.15 (Sept. 2, 2016) (unpublished report) (on file with author).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

a lawyer has committed a violation of the Rules of Professional Conduct shall take appropriate action.<sup>13</sup>

This rule has four paragraphs: two regarding the conduct of lawyers and two regarding the conduct of judges. The duty to take action is based on the judge's level of knowledge of an ethical violation by another.<sup>14</sup> Paragraphs (A) and (B) refer to a judge having *actual knowledge* that another judge has violated the Code or that a lawyer has violated the Rules of Professional Responsibility.<sup>15</sup> Paragraphs (C) and (D) refer to a judge who has *information that indicates a likelihood of* a violation by a judge or a lawyer has occurred.<sup>16</sup>

In addition to being familiar with the rule, it is imperative to examine the commentary when dissecting a particular ethics rule in order to ensure compliance. The commentary to Rule 2.15 of the Model Code of Judicial Conduct reads as follows:

[1] Taking action to address known misconduct is a judge's obligation. Paragraphs (A) and (B) impose an obligation on the judge to report to the appropriate disciplinary authority the known misconduct of another judge or a lawyer that raises a substantial question regarding the honesty, trustworthiness, or fitness of that judge or lawyer. Ignoring or denying known misconduct among one's judicial colleagues or members of the legal profession undermines a judge's responsibility to participate in efforts to ensure public respect for the justice system. This Rule limits the reporting obligation to those offenses that an independent judiciary must vigorously endeavor to prevent.

[2] A judge who does not have actual knowledge that another judge or a lawyer may have committed misconduct, but receives information indicating a substantial likelihood of such misconduct, is required to take appropriate action under paragraphs (C) and (D). Appropriate action may include, but is not limited to, communicating directly with the judge who may have violated this Code, communicating with a supervising judge, or reporting the suspected violation to the appropriate authority or other agency or body. Similarly, actions to be taken in response to information indicating that a lawyer has committed a violation of the Rules of Professional Conduct may include but are not limited to communicating directly with the lawyer who may have committed the violation, or reporting the suspected violation to the

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13. MODEL CODE OF JUDICIAL CONDUCT r. 2.15 (AM. BAR ASS'N 2011).

14. *Id.*

15. *Id.* r. 2.15(A)–(B).

16. *Id.* r. 2.15(C)–(D).

appropriate authority or other agency or body.<sup>17</sup>

Although the commentary to the rule provides a measure of direction, nevertheless, the commentary provides only some guidance regarding when a judge is required to act in light of knowledge or information received of another judge's or a lawyer's misconduct. Therefore, more analysis is required.

### III. ANALYSIS OF RULE 2.15

To determine when a judge is required to act in the face of misconduct, we begin at the top. Rule 2.15(A) contains the requirement that a judge report another judge to the disciplinary authority for violations of the Code of Judicial Conduct.<sup>18</sup> However, there are two threshold requirements that create this duty.<sup>19</sup> In a 1995 opinion, the Illinois Judicial Ethics Committee noted that allegations of misconduct set forth in a motion neither constituted actual knowledge nor created a circumstance where knowledge can be inferred.<sup>20</sup> However, in a 2007 opinion, the Massachusetts Commission on Judicial Ethics advised that a sentence in a motion quoting another judge's judgment finding that a lawyer filed a false affidavit obligates the presiding judge to report the lawyer.<sup>21</sup> It does not create an obligation to report the other judge, who was quoted, as there is no way of knowing if the judge also filed a claim against the lawyer.<sup>22</sup> Consequently, the other judge had no actual knowledge of a violation.<sup>23</sup>

Accordingly, the first threshold requirement is that the reporting judge

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17. *Id.* r. 2.15 cmt. 1–2.

18. *Id.* r. 2.15(A). The rule specifies the violation must “raise[] a substantial question regarding the judge’s honesty, trustworthiness, or fitness as a judge.” *Id.* Therefore, it can be inferred violations that do not raise a substantial question pertaining to a “judge’s honesty, trustworthiness, or fitness” do not require reporting to an appropriate authority. *See id.* (requiring a judge to inform the appropriate authority only upon having knowledge of specific types of Code violations).

19. The first threshold requires reporting judge to have knowledge of the other judge’s ethical violation. *Id.* Next, the violation must raise a question regarding another judge’s “honesty, trustworthiness, or fitness as a judge.” *Id.*

20. Ill. Judicial Ethics Comm., Op. 95-1, 2 (1995).

21. Mass. Comm. On Judicial Ethics, Op. 2007-8, 3 (2007).

22. *See id.* (indicating the existence of such an uncertainty means the actual knowledge standard has not been met, and even if it has, the significant question standard is not necessarily met simply because a judge fails to report a violation).

23. *See id.* (stating a judge’s existing uncertainty of whether an attorney’s conduct was reported means the judge does not have actual knowledge).

must have knowledge of the other judge's ethical violation.<sup>24</sup> *Knowledge* is defined within the Code as "actual knowledge of the fact in question."<sup>25</sup> In the trial court, the judge can meet the actual knowledge standard by directly observing the lawyers in the courtroom.<sup>26</sup> This standard may be hard to achieve with other judges, as judges do not work alongside each other but rather in separate courtrooms handling their own unique sets of matters.<sup>27</sup> Beyond the occasional meeting, judges may go weeks on end without seeing their judicial colleagues.<sup>28</sup> Reports from attorneys, clerks, or other courtroom personnel about another judge's activities do not rise to the level of actual knowledge.<sup>29</sup> Yet, there are times when a judge can have actual knowledge, such as when one judge visits or calls another to interfere in a case that the reporting judge is handling.<sup>30</sup> The judge may also have actual knowledge of another judge's extrajudicial activities that happened outside the courthouse.<sup>31</sup> Overall, it seems there is little opportunity to actually witness a violation in order to have the requisite actual knowledge.<sup>32</sup>

The second threshold issue required to create a duty to act is whether the violation "raises a substantial question regarding the judge's honesty, trustworthiness, or fitness as a judge."<sup>33</sup> Not all violations of ethical rules necessarily involve lack of honesty or trustworthiness, nor do they make a

24. MODEL CODE OF JUDICIAL CONDUCT r. 2.15 (AM. BAR ASS'N 2011).

25. *Id.* terminology. Additionally, the Code specifies, "[a] person's knowledge may be inferred from circumstances." *Id.*

26. See Eli Wald, *Should Judges Regulate Lawyers?*, 42 MCGEORGE L. REV. 149, 149–50 (2010) ("[J]udges are ideally positioned to observe lawyer misconduct . . ."). The Code clarifies the definition of *knowledge* to show it "may be inferred from circumstances." MODEL CODE OF JUDICIAL CONDUCT terminology (AM. BAR ASS'N 2011).

27. Cf. William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 318 (1996) (providing that there is limited communication between judges due to the isolated nature of the occupation).

28. Cf. *id.* (expressing the lack of communication existing between judges due to isolated practices).

29. A judge is only required to take "appropriate action" after receiving information that indicates a substantial likelihood that another judge or lawyer's conduct violated the Code. MODEL CODE OF JUDICIAL CONDUCT r. 2.15(C)–(D) (AM. BAR ASS'N 2011).

30. See *Edwards v. State Comm'n on Judicial Conduct*, (In re Edwards), 492 N.E.2d 124, 124 (N.Y. 1986) (per curiam) (holding petitioner judge's actions in requesting consideration from another judge presiding over traffic proceedings violated the Code).

31. See Leslie W. Abramson, *Canon 2 of the Code of Judicial Conduct*, 79 MARQ. L. REV. 949, 959 (1996) (interpreting Canon 2's phrases "at all times" and "constant public scrutiny" to cover "conduct in the judge's official or personal capacity").

32. See, e.g., *Cunningham v. State Comm'n on Judicial Conduct* (In re Cunningham), 442 N.E.2d 434, 436 (N.Y. 1982) (per curiam) (showing circumstances where the alleged misconduct limited to the view of only one person was difficult to prove as a violation of the Code).

33. MODEL CODE OF JUDICIAL CONDUCT r. 2.15(A) (AM. BAR ASS'N 2011).



person unfit to be a judge.<sup>34</sup> It is clear that there is a high bar for the type of conduct that must be reported.<sup>35</sup> For example, if a judge has actual knowledge of another judge's participation in a charitable activity where it may appear that the judge's office is being used by the charitable entity to encourage others to purchase tickets for an event, in violation of Rule 3.7,<sup>36</sup> does such participation raise "a substantial question regarding the judge's honesty, trustworthiness, or fitness as a judge"?<sup>37</sup> Rule 1.2 provides that a judge should "avoid impropriety and the appearance of impropriety."<sup>38</sup> Creating the appearance of impropriety where there is no actual impropriety could also result in a situation where there is a violation of the Code but not one that involves a substantial question as to the judge's honesty, trustworthiness, or fitness as a judge.<sup>39</sup> These two conditions impose a fairly high standard to trigger this rule. It would not be surprising, therefore, if it is rarely invoked.<sup>40</sup>

Likewise, Rule 2.15(B) has the same requirements of both actual

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34. See *In re Bennett*, 267 N.W.2d 914, 919–20 (Mich. 1978) (finding a judge's public use of vulgar and obscene language to be a violation of judicial canons, but only warranting a one-year suspension, not disbarment); see also *In re Benoit*, 523 A.2d 1381, 1383 (Me. 1987) (per curiam) (declaring a judge violated the Code by publishing his opinion letters concerning a pending case); *In re Hill*, 568 A.2d 361, 374 (Vt. 1989) (per curiam) (determining a judge violated the Code by failing to disqualify himself from a case in which he had seemingly lost the ability to act objectively and impartially).

35. Compare Ill. Judicial Ethics Comm., Op. 95-1, 2 (1995) (finding Judge *A* did not have actual knowledge of and thus, was not obligated to report conduct of Judge *B* when Judge *A* knew Judge *B* had previously threatened a petitioner now before Judge *B*'s court), with Ill. Judicial Ethics Comm., Op. 95-10, 3–4 (1995) (recognizing a judge was required to report misconduct of a lawyer when the judge witnessed the lawyer testifying in the judge's court to cocaine use).

36. See MODEL CODE OF JUDICIAL CONDUCT r. 3.7 (AM. BAR ASS'N 2011) (describing the circumstances when a judge "may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit"). Additionally, a judge's participation is also subject to the requirements prescribed in Rule 3.1, which provides the prohibitions for a judge engaging in extrajudicial activities. See *id.* r. 3.1 (listing the actions in which judges are prohibited from partaking).

37. A violation only needs to be reported by a judge if the violation calls into question the honesty, trustworthiness, or fitness of the violating judge. *Id.* r. 2.15(A).

38. *Id.* r. 1.2.

39. Compare *id.* (explaining impropriety can be seen in situations where a negative perception of a judge is inferred by reasonable minds), with *Id.* r. 2.15 (declaring a judge is obligated to inform an appropriate authority only when a substantial question is raised about another judge or lawyer's honesty, trustworthiness, or fitness).

40. See Arthur D. Hellman, *Judges Judging Judges: The Federal Judicial Misconduct Statutes and the Breyer Committee Report*, 28 JUST. SYS. J. 426, 428 (2007) (reporting the number of complaints against judges range from 600 to 800 a year).

knowledge and questions of honesty, trustworthiness, and fitness.<sup>41</sup> However, Rule 2.15(B) applies to lawyers as opposed to judges.<sup>42</sup> Judges obviously have much more opportunity to observe the conduct of lawyers, especially when they appear in cases before the judge. Since lawyers are trying to convince the judge to rule in their favor, they will be on their best behavior when they appear before a judge.<sup>43</sup> Other lawyers may have more opportunity to gain actual knowledge of a lawyer's ethical transgressions than a judge might, as they have opportunities to observe an attorney's behavior outside the presence of the judge. However, as is clear from this research, there are lawyers who still give judges actual knowledge of their professional ethics violations.<sup>44</sup> For instance, a testimony of a lawyer who admitted to using cocaine, created an obligation on the part of the judge who heard the testimony to report it.<sup>45</sup> In Rule 2.15(B), the second hurdle also applies—the ethical violation in question must raise a substantial question as to “the lawyer’s honesty, trustworthiness, or fitness as a lawyer.”<sup>46</sup> As with most cases of judicial discipline, there are very few published cases offering guidance on these issues, and equally rare that there would be multiple rulings on these issues within a single jurisdiction.

The 1987 case, *In re Voorhees*,<sup>47</sup> indicates a judge must “clearly believe” that misconduct actually occurred before the duty to report arises.<sup>48</sup> This case did not involve the question of whether the judge who should have reported had actual knowledge, but rather, whether the judge clearly believed that the known conduct constituted a violation of the Code.<sup>49</sup> It

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41. MODEL CODE OF JUDICIAL CONDUCT r. 2.15(B) (AM. BAR ASS'N 2011).

42. *Id.*

43. This may be described as the “Eddie Haskell effect.” See James W. Swanson, *Leadership—Accentuating the Positive & Eliminating the Negative*, REPORTER (KEYSTONE EDITION), 2005, at 43, 46, <http://www.afjag.af.mil/Portals/77/documents/AFD-090116-023.pdf> (explaining Eddie Haskell was “the patron saint of sycophants” who are people that “substitute a personal relationship with the boss for quality work”).

44. See Ill. Judicial Ethics Comm., Op. 95-10, 3 (1995) (categorizing a lawyer testifying in court to cocaine use as equal to giving the judge actual knowledge of such violation); cf. Mass. Comm. on Judicial Ethics, Op. 2007-8, 2-3 (2007) (determining a judge’s lack of awareness of a lawyer’s misconduct being reported in accordance with “actual knowledge that false affidavits were filed in court” was sufficient to create an obligation of the judge to report lawyer’s conduct).

45. See Ill. Judicial Ethics Comm., Op. 95-10, 1(1995) (declaring it is the duty of the judge to report “a lawyer who testifies in court that he or she used cocaine”).

46. MODEL CODE OF JUDICIAL CONDUCT r. 2.15(B) (AM. BAR ASS'N 2011).

47. *In re Voorhees*, 739 S.W.2d 178 (Mo. 1987) (en banc).

48. See *id.* at 187-88 (finding a judge, who did not clearly believe another judge’s actions constituted misconduct, did not have a duty to report such conduct).

49. See *id.* at 187 (indicating there is no basis to discipline a judge with actual knowledge of an alleged misconduct when the record did not reflect the judge had a clear belief that the misconduct

must be assumed that the committee addressing changes to the Code in 2007 was aware of this case and made no attempt to distinguish it or modify the rule to address it in any way.<sup>50</sup> Of course, such cases do not hold any precedential value except in the state where they were decided;<sup>51</sup> however, *Voorhees* is likely instructive as to the mental state required of a judge to create a violation of either Rule 2.15(A) or (B).<sup>52</sup>

Furthermore, the terms *honesty*, *trustworthiness*, or *fitness* are not defined within the Code.<sup>53</sup> There are very few court rulings that help to define them. In the case *In re J.B.K.*,<sup>54</sup> a Texas court of appeals held that a lawyer's alleged attempt to engage court staff in expert comments to determine whether he should settle prior to an opinion being issued suggested conduct that could potentially bring the lawyer's honesty and trustworthiness into question.<sup>55</sup> In *Johnson v. Johnson*,<sup>56</sup> counsel filed a frivolous appeal wherein he disparaged the trial court judge and claimed actions were taken that never actually occurred.<sup>57</sup> The court found that the lawyer's actions raised substantial questions about his honesty, trustworthiness, or fitness to

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constituted a punishable violation).

50. See Eileen C. Gallagher, *The ABA Revisits the Model Code of Judicial Conduct: A Report on Progress*, 44 JUDGES J., Winter 2005 at 7. 9 (describing the changes the ABA Standing Committee made from the 2003 edition to the 2007 edition of the Model Code of Judicial Conduct, and noting Rules 2.17 and 2.18 of the 2003 edition were combined and listed as Rule 2.15 in the 2007 edition, however no substantive changes were made).

51. *Cf.* State v. Burnett, 867 N.W.2d 534, 537 (Minn. Ct. App. 2015) (stating, in addressing an issue of first impression, “[a]lthough we are not bound to follow precedent from other states or federal courts, these authorities can be persuasive” (citing State v. McClenton, 781 N.W.2d 181, 191 (Minn. Ct. App. 2010))).

52. See *In re Voorhees*, 739 S.W.2d at 186–87 (concluding “Judge Voorhees clearly believed that the acts of [the judges] . . . were acts of judicial misconduct” that triggered the requirement to act); MODEL CODE OF JUDICIAL CONDUCT r. 2.15(A)–(B) (AM. BAR ASS’N 2011) (asserting one of the two elements necessary to require a judge to act upon misconduct is that the judge must have *knowledge* of the misconduct).

53. The Code defines *integrity* as “probity, fairness, honesty, uprightness, and soundness of character.” MODEL CODE OF JUDICIAL CONDUCT terminology (AM. BAR ASS’N 2011). Nevertheless, the Code is explicit to the characteristics—honesty, trustworthiness, or fitness—that must be called into question before a judge is required to report another judge’s violation to the appropriate authority. *Id.* r. 2.15(A).

54. *In re J.B.K.*, 931 S.W.2d 581 (Tex. App.—El Paso 1996, no writ).

55. See *id.* at 582–83 (“Such alleged violations raise a substantial question as to [the lawyer’s] honesty, trustworthiness, and fitness as a lawyer.”).

56. *Johnson v. Johnson*, 948 S.W.2d 835 (Tex. App.—San Antonio 1997, writ denied).

57. *Id.* at 840–41.

practice law.<sup>58</sup> In *AIG Hawaii Insurance Co. v. Bateman*,<sup>59</sup> the Supreme Court of Hawaii held that failure to disclose a material fact to the court, in this case a settlement that rendered the case moot, was a violation of the Rules of Professional Conduct and raised a substantial question regarding the attorney's honesty, trustworthiness, or fitness.<sup>60</sup> Moreover, it is not clear what the term "substantial" means.<sup>61</sup> It is not defined within the code. None of these terms are discussed or explained within the commentary.<sup>62</sup> It seems that judges are given broad discretion in determining what is a substantial question and to determine what are questions of honesty, trustworthiness, and fitness, although these terms are better developed within the body of case law pertaining to lawyer discipline.<sup>63</sup>

#### IV. SUBSTANTIAL UNDER-REPORTING?

In his article, *Judicial Reporting of Lawyer Misconduct*, Arthur Greenbaum claims that there is "substantial under-reporting" of ethical violations of lawyers by judges<sup>64</sup> because that judges have actual knowledge of substantial violations and do not report them.<sup>65</sup> He argues, "[t]he facts

58. *See id.* at 841 ("In light of counsel's disparaging remarks about the trial court, his firm adherence to those remarks during oral argument, and his claims of error about matters that never occurred or were never presented to the trial court, a substantial question has been raised about counsel's honesty, trustworthiness, or fitness as a lawyer.").

59. *AIG Haw. Ins. Co. v. Bateman*, 923 P.2d 395 (Haw. 1996), *amended on reconsideration in part by* *AIG Haw. Ins. Co. v. Bateman*, 925 F.2d 373 (1996).

60. *Id.* (quoting REVISED CODE OF JUDICIAL CONDUCT Canon 3D(2) (JUDICIARY STATE OF HAW. 1992)).

61. *See* MODEL CODE OF JUDICIAL CONDUCT r. 2.15(A) (AM. BAR ASS'N 2011) ("A judge having knowledge that another judge has committed a violation of this Code that raises a *substantial* question regarding the judge's honesty, trustworthiness, or fitness as a judge in other respects shall inform the appropriate authority."). "Substantial" is not one of the twenty-four terms or phrases defined in the terminology section of the Code. *See generally id.* terminology (defining certain terms used in the Code).

62. The commentary under Rule 2.15 does not elaborate beyond the rule itself or the Code's terminology as to what "substantial" is intended to mean. *Id.* r. 2.15 cmt. 1–2.

63. *See In re J.B.K.*, 931 S.W.2d 581, 582–83 (Tex. App.—El Paso 1996) (analyzing alleged misconduct of an attorney that "raise[d] a substantial question as to his honesty, trustworthiness, and fitness as a lawyer"); *see also AIG Hawaii Ins. Co.*, 923 P.2d at 402 (discussing disciplinary action against a lawyer); *Johnson*, 948 S.W.2d at 840–41 (declaring "a substantial question has been raised about counsel's honesty, trustworthiness, or fitness as a lawyer" considering the lawyer spoke disparagingly about the trial court, strongly adhered to those positions during oral argument, and made claims of error for matters that neither happened nor were presented at trial).

64. Arthur F. Greenbaum, *Judicial Reporting of Lawyer Misconduct*, 77 UMKC L. REV. 537, 558 (2009) ("The facts strongly suggest that substantial under-reporting occurs . . .").

65. *See id.* at 540–41 (discussing two studies—one regarding lawyers filing frivolous claims and the other on prosecutorial misconduct—that revealed judges generally do not report lawyers' ethical violations (first citing Peter A. Joy, *The Relationship Between Civil Rule 11 and Lawyer Discipline: An Empirical Analysis Suggesting Institutional Choices in the Regulation of Lawyers*, 37 LOY. L.A. L. REV. 765, 769, 803

strongly suggest that substantial under-reporting occurs” by judges.<sup>66</sup> The source of this knowledge of under-reporting, or even such an inference, is not clear.<sup>67</sup> Data regarding the percentage of ethical violations reported by judges compared to all reports of violations standing alone does not provide a basis for such inference.<sup>68</sup> While it may be one factor, other variables include the percentage of lawyers that regularly appear in court and the percentage of lawyers from that state that are found in violation of ethical standards. This information may get closer to the answer, but it does not arrive at a conclusion. Despite the assumption that under-reporting occurs, the incidence, or frequency, of failing to report are both unknown and likely unknowable.<sup>69</sup> To know that this is actually happening would require data that indicates when there have been instances of substantial misconduct and how that information compares to the incidence of actual reporting. While Greenbaum acknowledges this would be necessary to determine that there is under-reporting by judges, he still adopts his argument as the conventional wisdom.<sup>70</sup>

This Article does not attempt to answer the question of under-reporting. Failure to report would not likely be reported by survey respondents. As the survey results will demonstrate, fewer than 3% of the judges who responded acknowledged that they failed to report.<sup>71</sup> This is not generalizable, however. If under-reporting were substantial, I would expect this number to be significantly higher despite the bias against answering the survey to acknowledge it.

Paragraphs (C) and (D) of Rule 2.15 address instances where the judge

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(2004); and then citing Ellen Yaroshesky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 UDC/DCSL L. REV. 275, 292 (2004)).

66. Greenbaum, *supra* note 64, at 558.

67. *See id.* at 551 (“Perhaps concerns about under-reporting are exaggerated. After all, we have no real data on the number of reportable instances that go unreported.”).

68. Greenbaum cites only to studies that indicate judges represent a small percentage of parties that report lawyer misconduct to support the proposition that judges largely ignore their duty to report misconduct. *See id.* at 539–40 n.9 (“But the conventional wisdom suggests that this is still a duty largely ignored, and several recent studies seem to confirm that observation.”).

69. *See id.* at 551–52 (“After all, we have no real data on the number of reportable instances that go unreported . . . . That suggests either that less under-reporting goes on than the conventional wisdom suggests, or, more likely, disciplinary counsels, with limited resources, do not believe litigation misconduct, the bulk of expected judicial reporting, is an area they need to police more vigorously.”).

70. *See, e.g., id.* at 539–40 (contending common knowledge suggests judges routinely ignore their duty to report lawyer misconduct).

71. Judicial Div., Am. Bar Ass’n, *supra* note 8.

has only “information indicating a substantial likelihood” that a violation has occurred and an ethical violation for which the judge had actual knowledge but did not believe that it impugned the person’s honesty, trustworthiness, or fitness.<sup>72</sup> In an advisory opinion, the Washington Ethics Advisory Committee explained that if an attorney were accused of a crime—in this case a DUI—without a conviction, such accusation does not automatically establish a substantial likelihood.<sup>73</sup> It should be stressed that where there is at least a substantial likelihood of a violation of judicial or professional ethics—any violation—the judge is mandated to take *some* action.<sup>74</sup> While that can include reporting the violation if the violation does not fall within the ambit of paragraphs (A) or (B), it is not mandatory; however, appropriate action is clearly required. In *Holzman v. Commission on Judicial Conduct*,<sup>75</sup> the New York Commission on Judicial Conduct censured a judge who had knowledge of a lawyer’s ethical violations regarding unearned advance legal fees and did not take action.<sup>76</sup> If the conduct of a lawyer would constitute a crime, the judge should refer the matter to the disciplinary authority.<sup>77</sup> While action by the court is mandatory, the rule gives little guidance and places discretion in the hands of the judge.<sup>78</sup> This

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72. Paragraphs (C) and (D) of the Rule 2.15 requires judges to “take appropriate action” when they “receive[] information indicating a substantial likelihood” a judge or lawyer, respectively, violated the Code of Judicial Conduct or the Code of Professional Responsibility. *Id.* r. 2.15(C)–(D).

73. *See* Wash. Ethics Advisory Comm., Op. 02-15, 1 (2002) (analyzing the requirements for judicial reporting regarding lawyers accused of committing crimes under the the Code, and providing “[t]he judicial officer needs to look at several factors before deciding what action, if any, is appropriate if a judicial officer knows that a lawyer is charged with DUP”).

74. MODEL CODE OF JUDICIAL CONDUCT r. 2.15(C)–(D) (AM. BAR ASS’N 2011).

75. *Holzman v. Comm’n on Judicial Conduct (In re Holzman)*, No. 108251/11, 2011 WL 4443503 (N.Y. Sup. Ct. Sept. 8, 2011).

76. *See id.* at \*2–3, \*6 (denying Judge Holzman’s petition to dismiss the formal written censure without prejudice). The New York Commission on Judicial Conduct filed a complaint against Judge Holzman because, among other things, “despite knowing that [attorney Michael] Lippman had taken unearned advance legal fees without court approval and/or excessive fees, [Judge Holzman] failed to report Lippman to law enforcement authorities or the Appellate Division . . .” *Id.* at \*2–3.

77. *See* Wash. Ethics Advisory Comm., Op. 02-15, 1 (2002) (“First, the judicial officer must have actual knowledge that the lawyer is guilty . . . or there has been a probable cause determination before he or she is required to take any action.”); *see also* MODEL CODE OF JUDICIAL CONDUCT r. 2.15(B) (AM. BAR ASS’N 2011) (“A judge having knowledge that a lawyer has committed a violation of the Rules . . . shall inform the appropriate authority.”).

78. The comments to Rule 2.15 provide some examples of appropriate action, including “communicating directly with the judge [or lawyer] who may have violated [the] Code [or Rules], communicating with a supervising judge, or reporting the suspected violation to the appropriate authority or other agency or body.” MODEL CODE OF JUDICIAL CONDUCT r. 2.15 cmt. 1 (AM. BAR ASS’N 2011).

is the intent of this rule.<sup>79</sup> Judges are important actors in the legal and ethical systems and are empowered to act when necessary.<sup>80</sup> The judge must not only consider the actions of the lawyers but the impact on the case itself.<sup>81</sup> How will the actions of the judge impact the right outcome in the case? As the Illinois Judicial Ethics Committee stated: “Care should be taken to punish the lawyer, however, not the client.”<sup>82</sup> The rule delegates much discretion to the judges, but the rule, opinions, and case law offer little guidance as to what constitutes the appropriate action.

#### V. THE SURVEY

The survey was issued to state trial court judges of general jurisdiction to gain an understanding of the relative rate incidence of each paragraph of Rule 2.15 and, more importantly, get an indication of what constitutes appropriate action within the judiciary.<sup>83</sup> The commentary to the rule only offers two examples of appropriate action for lawyer misconduct, one of which is referral to the appropriate disciplinary authority and the other being referral to the supervising judge in the case of judicial misconduct.<sup>84</sup> These examples, along with other options, were included in the survey.

After the survey was drafted, the Ethics Committee of the ABA Judicial Division reviewed the survey. Comments from the committee members were incorporated into the survey. The survey was sent to 953 judges across the nation, and 117 judges responded.<sup>85</sup> This is a 12% response rate.<sup>86</sup> While the percentage is low for the purposes of being able to generalize the results, 12% is within the range for the typical response rate for electronic

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79. *See id.* r. 2.15 cmt. 2 (“This Rule limits the reporting obligation to those offenses that an independent judiciary must vigorously endeavor to prevent.”).

80. *See id.* r. 2.15 cmt. 1 (providing a judge is empowered, and indeed, obligated to “tak[e] action to address a known misconduct”).

81. *See* Wash. Ethics Advisory Comm., Op. 02-15 (2002) (“The judicial officer should make an independent assessment as to what corrective action is appropriate based on the facts in each case.”); MODEL CODE OF JUDICIAL CONDUCT r. 2.15(B) (AM. BAR ASS’N 2011) (“A judge having knowledge that a lawyer has committed a violation of the Rules . . . shall inform the appropriate authority.”).

82. *See* Ill. Judicial Ethics Comm., Op. 99-6 (1999) (analyzing the duty of a judge to report lawyer misconduct).

83. Judicial Div., Am. Bar Ass’n, *supra* note 8.

84. *See* MODEL CODE OF JUDICIAL CONDUCT r. 2.15 cmt. 2 (AM. BAR ASS’N 2011) (“Appropriate action may include, but is not limited to, communicating . . . with a supervising judge, or reporting the suspected violation to the appropriate authority or other agency or body.”).

85. Judicial Div., Am. Bar Ass’n, *supra* note 8.

86. *Id.*

surveys.<sup>87</sup> It is not possible to determine the statistical significance of the answers from this sample,<sup>88</sup> however, the responses should provide valid insight into how matters are being handled by the judiciary. While it is proper to be concerned that sample bias may exist, there is very little reason to believe that the sample is biased.<sup>89</sup> For example, it may be that a response to a survey on the Code indicates a greater interest in judicial ethics and a willingness to more closely adhere to the Code than a typical judge. In addition, since the instructions informed the judges of the survey's subject matter, those that did not have any incidents to report may have been disinclined to answer the survey, thereby overrepresenting the number of judges who have taken action.<sup>90</sup> These are only suppositions and there is no way to test these possible biases. Even though not generalizable, the answers by 117 general jurisdiction trial judges are instructive at least to the level that Rule 2.15 is being considered and implemented.

All of the questions centered on each of the four paragraphs in Rule 2.15.<sup>91</sup> So that the number of cases would be sufficient, the survey used a ten-year-look-back period.<sup>92</sup> The Ethics Committee suggested this, as it believed the original five-year look-back period would not provide a

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87. See Andrea Fryrear, *Survey Response Rates*, SURVEYGIZMO (July 27, 2015), <https://www.surveygizmo.com/survey-blog/survey-response-rates/> (providing the average response rate for an external survey is 10–15%). Though the survey falls within the statistical average for response rates, it is typically expected there will be a lower response rate if you “have a difficult to reach sample group or your survey topic [is] more sensitive than others.” *Response Rate Statistics for Online Surveys—What Numbers Should You Be Aiming For?*, FLUID SURVS. (Oct. 8, 2014), <http://fluidsurveys.com/university/response-rate-statistics-online-surveys-aiming/>.

88. See *Significance in Statistics & Surveys*, SURV. SYS., <http://www.surveysystem.com/signif.htm> (last visited Dec. 19, 2016) (“Significance levels show you how likely a pattern in your data is due to chance.”). In the field of statistics, the term “significant” means probably true, or in other words, not due to chance. *Id.*

89. Sample validity is one concern. *The Fallacy of Online Surveys: No Data Are Better than Bad Data*, NEWS FROM RESPONSIVE MGMT. (Responsive Mgmt., Harrisonburg, Va.), May 2010, at 2, [http://www.responsivemanagement.com/download/RM\\_ENews/Online\\_Surveys.pdf](http://www.responsivemanagement.com/download/RM_ENews/Online_Surveys.pdf). A sample is valid when “every member of the population under study [has] an equal chance of participating[.]” which can result in a more accurate and reliable sample size. *Id.* A second concern is non-response bias which occurs when a survey is sent only to people who are interested in the topic. *Id.* The recipients are more likely to respond, thus biasing the results. *Id.* A third concern is stakeholder bias, which occurs when “people who have a vested interest in survey results . . . complete an online survey multiple times and urge others to complete the survey in order to influence the results.” *Id.*

90. Judicial Div., Am. Bar Ass'n, *supra* note 8; see also *Responsive Management*, *supra* note 89 (acknowledging the risk of non-response bias, which occurs when people who are interested in a survey's subject matter are more likely to complete the survey). The communication sent with the survey encouraged judges to respond even when they did not have any incidents to report.

91. Judicial Div., Am. Bar Ass'n, *supra* note 8.

92. For example, one question asked: “How many times in the past ten years have you had to inform appropriate authorities with regard to violations by another judge?” *Id.*



sufficient amount of incidents to review. Due to the limited number of cases involving judges, this was likely good advice.<sup>93</sup>

#### VI. THE SURVEY RESULTS: JUDICIAL MISCONDUCT

The survey inquired whether the judge had ever referred another judge to the disciplinary authorities over the past ten years.<sup>94</sup> This would be a situation where the respondent had actual knowledge that there was a violation by another judge.<sup>95</sup> Only sixteen judges, or 14% of the respondents, said they informed the appropriate authorities in such a situation.<sup>96</sup> Three judges, or 2.6% of the respondents, said they had actual knowledge but did not report the violating judge.<sup>97</sup> Later in the survey, one of the judges who responded they had not reported the ethics violation by another judge indicated they had convinced the same to self-report and felt that this fulfilled the obligation.<sup>98</sup> While it may not be the letter of the rule, I am inclined to agree that the point of the rule is to make certain that violations are reported, and to cause it to be reported fulfills the obligation.<sup>99</sup> Obviously, judges who report themselves, as opposed to another judge reporting them, may put themselves in a slightly better position in the view of the enforcement authority.<sup>100</sup> If that incident were counted in the “reporting” column, we would see that 81.6% of the judges

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93. Out of the 953 judges the survey was sent to, 117 responded. *Id.* The response rate likely would have been lower had we not doubled our look-back period from five to ten years. *Id.*

94. *Id.*

95. “A judge having knowledge that another judge has committed a violation of [the Model] Code [of Judicial Conduct] that raises a substantial question regarding the judge’s honesty, trustworthiness, or fitness as a judge in other respects shall inform the appropriate authority.” MODEL CODE OF JUDICIAL CONDUCT r. 2.15(A) (AM. BAR ASS’N 2011).

96. *Id.*

97. *Id.*

98. Question 22 of the survey asks the respondents to “provide any additional information with regard to violations by other judges or lawyers to the code of conduct or professional responsibility” the respondents thought appropriate. *Id.* One judge in particular responded to the question saying the judge was “aware of conduct by a judge that caused me concern but I asked the judge to self-report and he did so which relieved me of any duty to report.” *Id.*

99. *See* Mary K. Foster, *Do Lawyers Have a Duty to Self-Report Ethical Violations?*, LAW. PROF’L. LIABILITY UPDATE (ProAssurance, Okemos, Mich.), Spring 2011, at 1, 2, <http://lawycare.com/sites/default/files/newsletter/Spring2011LCUpdate.pdf>, (explaining self-reporting of ethical violations may serve to reduce risks and the likelihood of more serious consequences to the lawyer).

100. *See id.* (suggesting lawyers should self-report ethical violations because it may reduce the likelihood of more serious sanctions).

have never had to report a violation, while 16% had actual knowledge and took action.<sup>101</sup> About 14% of the respondents had knowledge and reported, while less than 3% of respondents had knowledge but did not report.<sup>102</sup> This can be expressed another way: 10.5% of judges that had actual knowledge of another judge's ethical violation did not report. The follow-up question to this asked those who reported how many times they had to do so over the same ten-year period.<sup>103</sup> The average was 1.5 times, or eighteen total violations.<sup>104</sup> Those who reported they did not take action when they had actual knowledge indicated that it happened only once.<sup>105</sup> From this, we can conclude that only 7% of violations went unreported among judges who responded to the survey.<sup>106</sup> The rate of incidents among the judges responding to the survey was about 2.8 per year, on average.<sup>107</sup> While there may have been other consequences, referral to the disciplinary authority did not often result in public disciplinary action. Only three judges indicated that it had resulted in such.<sup>108</sup> The efficacy of referral was not universal.<sup>109</sup> The result could be described as an inverted bell curve, with half the respondents indicating that it either always worked to stop the behavior or that it worked most of the time, and the other half saying that it never worked or only worked sometimes.<sup>110</sup> The modal response, or the most common answer, was that it never worked, indicated by almost 40% of the respondents.<sup>111</sup>

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101. We found that 14.04% of respondents had actual knowledge of an ethical violation and took action, 2.63% had actual knowledge but took no action, and 81.58% had no knowledge of ethical violations by another judge. Judicial Div., Am. Bar Ass'n, *supra* note 8. Accordingly, if we include the self-reporting judges—because they had actual knowledge, and thus, had a duty to report—in the category of judges who had actual knowledge and reported, we arrive at 16.67%. *Id.*

102. *Id.* (revealing 14.04% of responding judges had actual knowledge of an ethical violation and acted, and 2.63% had actual knowledge but took no action).

103. *See id.* ("How many times in the past ten years have you had to inform appropriate authorities with regard to violations by another judge?").

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. Not all reported violations resulted in the violating judge receiving disciplinary action from the appropriate authorities. *Id.* When asked how many of their referrals resulted in disciplinary action, two judges said all of their referrals led to public disciplinary action, one judge said a few, and eight judges said none. *Id.*

110. Nine out of eighteen judges stated the ethical violations continued even after the violating judge was reported. *Id.*

111. *Id.*

**Q5 - Did ethical violations stop after referral?**

Answer	%	Count
Always	27.78%	5
Most of the time	22.22%	4
About half the time	0.00%	0
Sometimes	11.11%	2
Never	38.89%	7
Total	100%	18

Figure 1

The survey then inquired about ethical violations where the judge had less than actual knowledge.<sup>112</sup> There were actually fewer incidents reported where the judge thought there was a substantial likelihood than compared with incidents of actual knowledge.<sup>113</sup> There were two more incidents of judges who thought there was a violation but took no action.<sup>114</sup> Since the judge was required to take appropriate action, the survey further inquired as to what action was taken.<sup>115</sup> The comments to the rule included that appropriate action could be referring to a disciplinary authority or referring the matter to the supervising judge, so accordingly those options were included as choices.<sup>116</sup> Other prepopulated options included were that they spoke to the judge directly, asked someone else to speak to the judge, made the matter public, asked for an opinion from the disciplinary authority, and “other,” which also provided an opportunity for the respondent to explain

112. Question 8 inquired about instances where the judge has “had to take appropriate action with regard to likely ethical violations by another judge.” *Id.*

113. One hundred twelve incidents were reported when the judge believed there was a substantial likelihood of an ethical violation, as compared to one hundred fourteen when the reporting judge had actual knowledge. *Id.*

114. *Id.*

115. *Id.*

116. The comments to Rule 2.15 provide some examples of appropriate action, including “communicating directly with the judge [or lawyer] who may have violated this Code [or Rules], communicating with a supervising judge, or reporting the suspected violation to the appropriate authority or other agency or body.” MODEL CODE OF JUDICIAL CONDUCT r. 2.15 cmt. 2 (AM. BAR ASS’N 2011).

the other action taken.<sup>117</sup>

When the responding judges took appropriate action, more than one action was taken, on average. For the twelve instances, twenty-nine actions were taken—or, an average of 2.4 actions.<sup>118</sup> The most common action was that the judge taking appropriate action spoke directly to the violating judge.<sup>119</sup> Referral to the supervising judge, referral to the discipline authority, and asking someone else to speak to the judge tied for the second most common action as they accounted for the actions by half of the judges.<sup>120</sup> No judge said that they made the matter public,<sup>121</sup> but this is not surprising as such disclosures would tend to undermine public trust and confidence.<sup>122</sup> Two judges asked for an opinion from the disciplinary authority.<sup>123</sup> With regard to the judges who responded “other,” one asked that training be developed on the subject matter, and one said they cried.<sup>124</sup> I understand this sentiment. We want our system, and those who are a part of it, to be of the highest integrity.<sup>125</sup> We are disappointed when judges fall short of the mark, and we know that it affects the public trust and confidence in the system.<sup>126</sup>

The judges were also asked what they believed to be the most effective action in preventing reoccurring behavior.<sup>127</sup> Judges felt the most effective action was referral to disciplinary authorities, while the second most effective was speaking directly to the judge.<sup>128</sup> Referring the matter to the

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117. Judicial Div., Am. Bar Ass'n, *supra* note 8.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. See Dru Stevenson, *Against Confidentiality*, 48 U.C. DAVIS L. REV. 337, 369–70 (2014) (arguing the current rules undermine the trust the public should have in the legal system and interferes with transparency and societal cooperation).

123. Judicial Div., Am. Bar Ass'n, *supra* note 9.

124. *Id.*

125. See MODEL CODE OF JUDICIAL CONDUCT pmbl. para 1 (AM. BAR ASS'N 2011) (declaring the U.S. legal system must be “composed of men and women of integrity” in order to maintain and enhance public trust and confidence); see also MODEL RULES OF PROF'L CONDUCT pmbl. para 1 (AM. BAR ASS'N 2016) (“A lawyer, as a member of the legal profession, is a representative of clients, and officer of the legal system and a public citizen having special responsibility for the quality of justice.”).

126. See MODEL RULES OF PROF'L CONDUCT pmbl. para 12 (AM. BAR ASS'N 2016) (“Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.”).

127. Judicial Div., Am. Bar Ass'n, *supra* note 8.

128. Seventeen judges, or 19.89%, believed referral to disciplinary authorities was the most effective action, whereas sixteen judges, or 18.72%, believed speaking to the lawyer directly was most effective at preventing reoccurrence. *Id.* In other words, these two actions accounted for nearly 40% of the responses. *Id.*

surveying judge and asking for an advisory opinion from the disciplinary authority were considered somewhat effective.<sup>129</sup> Asking another person to speak to the judge and, even though no one used it, making matters public did not rate as effective.<sup>130</sup>

#### VII. THE SURVEY RESULTS: LAWYER MISCONDUCT

As anticipated, many more judges had an opportunity to deal with lawyer misconduct than judicial misconduct.<sup>131</sup> Almost 56% of the judges said they had actual knowledge of professional ethics violations by lawyers.<sup>132</sup> On the other hand, more than 40% of the judges asserted they had neither actual knowledge nor information regarding ethical violations of judges or lawyers over the last ten years.<sup>133</sup> There is no way to examine whether these statistics are indicative of the small rate of ethical violations that are known or likely to be known, or if they suggest that judges are not reporting incidents when they should be.

The average number of incidents per judge was also higher.<sup>134</sup> Judges who said they had actual knowledge of violations by lawyers did so 1.81 times more on average than judges who responded they did not have actual knowledge of professional conduct violations.<sup>135</sup> There were 112 incidents over the past ten years<sup>136</sup> and less than seventeen resulted in public disciplinary action.<sup>137</sup> Additionally, referral for disciplinary action was much more effective for lawyers than it was for judges.<sup>138</sup> In approximately 71% of all cases concerning ethical violations by lawyers, the violation stopped, as compared to only 50% of all cases involving judges.<sup>139</sup> However, referral for disciplinary action was ineffective in almost 10% of

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129. Fourteen judges, or 16.38%, believed referral to the supervisory judge was effective in preventing reoccurrence, whereas ten judges, or 11.7%, believed that obtaining an advisory opinion from the appropriate disciplinary authority was effective. *Id.*

130. *See id.* (showing a standard deviation of less than one, which indicates ineffectiveness).

131. *Id.*

132. Contrast this to 14% of judges who reported having “actual knowledge of ethical violations by a lawyer.” *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

cases.<sup>140</sup> As with judicial violations, there were far fewer incidents where judges had less than actual knowledge of ethical violations—only about 28% of judges said they had some information about a violation where they took some action.<sup>141</sup> Nearly 5% said they had knowledge of a violation but took no action.<sup>142</sup> That represents 14% of likely violations that were not reported or on which no action was taken.<sup>143</sup> While this is evidence of under-reporting, it is not evidence of “substantial under-reporting.”<sup>144</sup> Clearly, there would be bias for failing to report your own inaction and the number could be much higher; however, these results do not indicate that it is so. Judges who took action, did so in 1.83 cases on average, indicating that there were approximately fifty-five separate incidents of potential violations.<sup>145</sup> Judges took about 1.5 actions per case.<sup>146</sup> However, when judges were dealing with other judges, judges who acted took 2.4 actions per incident on average.<sup>147</sup> These numbers suggest there was a greater sense of urgency in halting the transgressions of other judges, when compared to lawyers. It may also be that judges have more access points when dealing with other judges. They know the supervising judge and may be more likely to know the judge’s closer colleagues.

Similar to the survey results of dealing with judicial misconduct, speaking directly with the violator and referral to the disciplinary authority and were the preferred actions top two preferred actions respectively.<sup>148</sup> This happened in about a quarter of all cases.<sup>149</sup> The judge referred the matter

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140. *Id.*

141. This is in contrast to the nearly 56% of judges who referred lawyers to the appropriate authorities because they had actual knowledge of an ethical violation. *Id.*

142. This figure is higher than in the cases of judges who had actual knowledge yet did not take action, which occurred in 1.80% of the time. *Id.*

143. Note that this figure represents instances where a judge reported either another judge or a lawyer because of actual knowledge of, or a substantial likelihood of, an ethical violation. *Id.*

144. Compare *id.* (finding less than 14% of likely violations were not reported), with Steven Bennett Weisburd & Brian Levin, “On the Basis of Sex”: Recognizing Gender-Based Bias Crimes, STAN. L. & POL’Y REV., Spring 1994, at 21, 26 (indicating bias crimes are characterized by severe under-reporting, with some crimes reaching an under-reporting rate as high as 90%), and Emil P. Wang, *Regulatory and Legal Implications of Reprocessing and Reuse of Single-Use Medical Devices*, 56 FOOD & DRUG L.J. 77, 98 n.46 (2001) (noting failure to report 99% of problems concerning device-related accidents and injuries to the FDA constituted severe under-reporting (citing U.S. GEN. ACCOUNTING OFFICE, GAO/PEMD-87-1, MEDICAL DEVICES: EARLY WARNING OF PROBLEMS IS HAMPERED BY SEVERE UNDERREPORTING (1986))).

145. Judicial Div., Am. Bar Ass’n, *supra* note 8.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

to the lawyer's supervisor 12% of the time, imposed a sanction in a little less than 10% of cases, and asked someone else to speak to the lawyer about 14% of the time.<sup>150</sup> Judges were slow to use their contempt power and did so less than 10% of the time.<sup>151</sup> They dismissed the lawyer from the case 7% of the time.<sup>152</sup> Making the matter public, asking for an advisory opinion from the disciplinary authority, and requiring the lawyer to take an ethics course were also used, but rarely as each was only used in about 3% of cases.<sup>153</sup> In only one matter the judge referred the attorney to a lawyer assistance program for drug and alcohol treatment.<sup>154</sup>

Judges rated referral to the disciplinary authority as the most effective in halting the ethical violations, as the survey indicates that referral stopped the ethical violation about 75–80% of the time.<sup>155</sup> Speaking directly to the lawyer was the second most effective action, followed by imposing sanctions in the case.<sup>156</sup> Referring the matter to the lawyer's supervisor and asking for a disciplinary opinion were rated as equally effective and rated fairly low.<sup>157</sup> Although holding the lawyer in contempt, dismissing the lawyer from the case, and asking another person to speak to the lawyer were not considered very effective, making a matter public and requiring a lawyer to take an ethics course were the least effective.<sup>158</sup>

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150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *See id.* (providing in question 23, as can be seen in *Figure 2*, making matters public had a total score of nine, dismissing the lawyer from the case had a total score of eight, and requiring the lawyer to take an ethics course had a total score of seven).

**Q23 - Please score the following actions based on their effectiveness in halting ethical violations, 0 being the least effective and 5 being the most effective.**

Field	Minimum	Maximum	Mean	Std Deviation	Variance	Count
Informed disciplinary authorities	2.00	5.00	4.29	0.89	0.80	17
Referred matter to the lawyer's supervisor	1.00	5.00	3.21	1.32	1.74	14
Spoke directly to the lawyer	2.00	5.00	3.50	0.87	0.75	16
Asked another judge or person to speak the lawyer	1.00	4.00	2.73	1.21	1.47	11
Made matter public	1.00	5.00	2.33	1.56	2.44	9
Imposed sanctions in the case lawyer was handling	1.00	5.00	3.42	1.19	1.41	12
Held lawyer in contempt	1.00	5.00	2.70	1.49	2.21	10
Dismissed lawyer from the case	1.00	5.00	2.75	1.56	2.44	8
Asked for an opinion from Disciplinary Authority	1.00	5.00	3.20	1.66	2.76	10
Required lawyer to take ethics course	1.00	4.00	2.14	1.12	1.27	7
Other	5.00	5.00	5.00	0.00	0.00	2
Other	1.00	1.00	1.00	0.00	0.00	1

Figure 2

Overall, it seems judges are willing to take action when they have actual knowledge of a lawyer's ethical violation.<sup>159</sup> Judges have taken action twice as often in matters where they have actual knowledge, as compared to cases where there is only a substantial likelihood that a violation occurred.<sup>160</sup> Referral to the disciplinary authority is the most common action taken under Rule 2.15.<sup>161</sup> It is likely done so because the action is seen as the most effective to prevent ethical violations in the future.<sup>162</sup> However, it is rated

159. When asked if they have "ever had to inform the appropriate authorities where [they] have had actual knowledge of ethical violations by a lawyer[.]" 56% of judges responded that they have. *Id.*

160. In cases where judges had actual knowledge of a violation, 56% responded they have had to inform the disciplinary authority. However, in cases where judges did not have actual knowledge, but there was a substantial likelihood of a violation, 28% responded they have taken appropriate action. *Id.*

161. *Id.*

162. When asked what action they believed was the most effective, judges rated informing the appropriate disciplinary authority 4.29 times out of five on average. *Id.* See *In re Pigg*, No. 14-50266-can7, 2015 WL 7424886, at \*29 (Bankr. W.D. Mo. Nov. 20, 2015) (asserting an attorney's unethical



as more effective with lawyers than it is with judges.<sup>163</sup> Because the sample size of judges in the survey is small, it is hard to know if referral to the disciplinary authority would consistently show lower effectiveness in the total population of judges. The effectiveness of judicial discipline systems would be an interesting area of further inquiry.

### VIII. CONCLUSION

It is clear that judges take their role in protecting the integrity of the justice system and the profession very seriously.<sup>164</sup> They are willing to refer both lawyers and their own colleagues to disciplinary authorities to protect the system.<sup>165</sup> While others argue that judges are substantially under-reporting incidents of ethical violations,<sup>166</sup> there does not seem to be a reluctance to under-report—especially when the judge has actual knowledge of the violation.<sup>167</sup> The lawyer often needs the judge to rule in thier favor on motions or objection or even the entire case. It is not surprising, therefore, that the incidence of ethical violations is very low.<sup>168</sup> One hundred and seventeen judges likely handled more than 2 million cases over a ten-year

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conduct would be best deterred by referral to state disciplinary authorities rather than by sanctions by the court); *see also* Arthur F. Greenbaum, *The Automatic Reporting of Lawyer Misconduct to Disciplinary Authorities: Filling the Reporting Gap*, 73 OHIO ST. L.J. 437, 454–55 (2012) (stating the disciplinary system is in place “to protect the public from future harm” caused by attorney misconduct).

163. The survey indicates that the violating lawyer’s conduct stopped twenty-two out of fifty-two times, or 42% of the time, whereas the violating judges conduct stopped four out of twelve times, or 33% of the time. Judicial Div., Am. Bar Ass’n, *supra* note 9.

164. *See id.* (revealing less than 3% of judges took no action when they had actual knowledge of an ethical violation by either a colleague or an attorney); *see also In re J.B.K.*, 931 S.W.2d 581, 584–85 (Tex. App.—El Paso 1996, no writ) (declaring judges take their “duty to the legal system as a whole and to the administration of justice” seriously); *Johnson v. Johnson*, 948 S.W.2d 835, 841 (Tex. App.—San Antonio 1997, writ denied) (asserting judges take their “duty to maintain confidence in our legal system” seriously).

165. Judicial Div., Am. Bar Ass’n, *supra* note 8; *see also* Judith A. McMorrow et al., *Judicial Attitudes Toward Confronting Attorney Misconduct: A View from the Reported Decisions*, 32 HOFSTRA L. REV. 1425, 1436–37 (2004) (explaining various courts have reported attorney misconduct to the bar or other disciplinary authority for a numerous reasons).

166. *See* Jack A. Guttenberg, *The Ohio Attorney Disciplinary Process—1982 to 1991: An Empirical Study, Critique, and Recommendation for Change*, 62 U. CIN. L. REV. 947, 964 (1994) (observing both attorneys and judges fail to report instances of professional misconduct by fellow attorneys); *see also* Greenbaum, *supra* note 64, at 558 (noting “facts strongly suggest that substantial under-reporting” by judges occurs).

167. Judicial Div., Am. Bar Ass’n, *supra* note 8.

168. *Id.*

period.<sup>169</sup> In those, a total of only 167 incidents of ethical violations were reported, a minuscule portion of all matters.<sup>170</sup> Is this evidence of substantial under-reporting or of lawyers trying to be on their best behavior? It is unknown.

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169. See, e.g., John P. Morrissey & Lauren Kitzmiller, *The Sweeney Legacy: A Tribute to the District Court of Maryland's First Chief Judge*, 46 U. BALT. L.F. 83, 86 (2016) (asserting Maryland alone, with 116 judges, handles over 2 million cases that are filed annually).

170. Judicial Div., Am. Bar Ass'n, *supra* note 8.

