



California Supreme Court Committee on Judicial Ethics Opinions

350 McAllister Street, San Francisco, California 94102

www.JudicialEthicsOpinions.ca.gov

INVITATION TO COMMENT [CJEO Draft Formal Opinion 2023-025]

Title

CJEO Draft Formal Opinion 2023-025:
Responding to Attorney Misconduct

Action Requested

Review and submit comments by
January 19, 2024

Prepared by

The California Supreme Court
Committee on Judicial Ethics Opinions

Proposed Date of Adoption or Other Action

To be determined

For information about the committee and its
members, visit the [CJEO website](#)

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CJEO Invites Public Comment

The California Supreme Court Committee on Judicial Ethics Opinions (CJEO) has adopted a draft formal opinion and approved it for posting and public comment pursuant to California Rules of Court, rule 9.80(j), and CJEO Internal Operating Rules and Procedures, rule 7(d). ([Rule 9.80](#); [CJEO Rules](#).) The public is invited to comment on the draft opinion before the committee considers adoption of an opinion in final form, or other action.

This CJEO Draft Formal Opinion has not been adopted by the committee in final form and is circulated for comment purposes only.

CJEO Draft Formal Opinion 2023-025 provides guidance on factors judges should consider when responding to misconduct, assessing the nature and seriousness of the misconduct, deciding what corrective action is warranted, and determining whether mandatory reporting obligations exist.

After receiving and reviewing comments, the committee will decide whether the draft opinion should be published in its original form, modified, or formally withdrawn. (Rule 9.80(j)(2); CJEO rule 7(d)). Comments are due by **January 19, 2024**, and may be submitted as described below.

How to Submit Comments

Comments may be submitted: (1) [online](#); (2) by email to Judicial.Ethics@jud.ca.gov; or (3) by regular mail to:

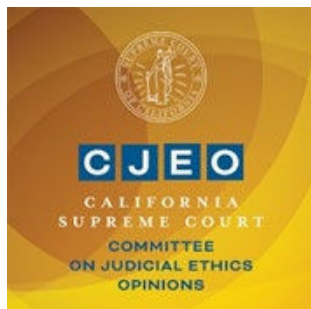
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Comments Due by January 19, 2024

At the close of the comment period, or after **January 19, 2024**, the committee will post on its [website](#) all comments that are not clearly identified as confidential.

Attachment: CJEO Draft Formal Opinion 2023-025

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**CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS**

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CJEO Draft Formal Opinion 2023-025

RESPONDING TO ATTORNEY MISCONDUCT

I. QUESTION

The California Supreme Court Committee on Judicial Ethics Opinions (CJEO) has been asked: What are a judge’s statutory and ethical obligations to take corrective action when an attorney engages in misconduct?

Using a hypothetical scenario for context, this opinion provides guidance on factors judges should consider when responding to misconduct, assessing the nature and seriousness of the misconduct, deciding what corrective action is warranted, and determining whether mandatory reporting obligations exist.

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II. FACTUAL SCENARIO¹

Before trial, a judge in a civil matter heard a discovery motion brought by plaintiff, granted the motion, and issued an order. After trial began, plaintiff's attorney became concerned about defendant's compliance with the court's discovery order.

Outside the presence of the jury, the judge conducted a hearing. Plaintiff's attorney argued plaintiff suffered prejudice as a result of defendant's failure to produce documents ordered by the court, and would accordingly need more time to evaluate the evidence before proceeding with trial.

The judge found defendant was not in compliance with the court's discovery order, and this noncompliance was solely the result of the attorney's misconduct and not of the client. The judge also found defendant's attorney relied on misguided advice from his supervising attorney in failing to produce the documents, and concluded the violation of the court order was neither willful nor in bad faith. Nevertheless, the judge found the failure to produce documents in violation of the court order caused undue prejudice to plaintiff, and on this basis, the judge declared a mistrial resulting in a continuance. The judge did not report the attorney to the State Bar.

III. ADVICE PROVIDED

Generally, judges have two responsibilities with respect to attorney misconduct: (1) comply with their statutory obligations regarding conduct that must be reported to the State Bar, and (2) take appropriate corrective action consistent with the Code of Judicial Ethics.

The committee advises that under the hypothetical facts provided here, the judge would not be required to report the attorney's misconduct to the State Bar. Only one of the statutory grounds for mandatory reporting is potentially applicable to these facts –

¹ The factual scenario is based on a hypothetical set of circumstances.

and that is when a judge imposes sanctions against an attorney under Business and Professions Code section 6086.7 subdivision (a)(3). However, reporting is not required when the sanctions are for failure to make discovery, as was the case in the hypothetical.

While more stringent action would also be appropriate, the mistrial addressed the prejudice the misconduct caused; the judge had reason to believe the offending attorney did not act in bad faith; there was no evidence the offending attorney had a history of ignoring court orders; and the judge's ruling was likely to have a deterrent impact on the offending attorney. Accordingly, the committee advises, given the judge's factual findings and the wide discretion permitted in these circumstances, the judge's decision to declare a mistrial would constitute appropriate corrective action under the canons.

IV. AUTHORITIES

A. Applicable Canons

Terminology, "Knowledge:" "'Knowledge' . . . mean[s] actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."

Canon 1: "An independent, impartial, and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary is preserved."

Canon 2: "A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

Canon 2A: "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

Advisory Committee commentary following canon 2A: "*The test for the appearance of impropriety is whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity, impartiality, and competence.*"

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Canon 2B(1): “A judge shall not allow family, social, political, or other relationships to influence the judge’s judicial conduct or judgment, nor shall a judge convey or permit others to convey the impression that any individual is in a special position to influence the judge.”

Canon 3B(4): “A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers and of all staff and court personnel under the judge’s direction and control.”

Canon 3B(5): “A judge shall perform judicial duties without bias or prejudice.”

Canon 3B(7): “A judge shall not initiate, permit, or consider ex parte communications, that is, any communications to or from the judge outside the presence of the parties concerning a pending or impending proceeding, and shall make reasonable efforts to avoid such communications” except in certain circumstances.

Canon 3B(9): “A judge shall not make any public comment about a pending or impending proceeding in any court, and shall not make any nonpublic comment that might substantially interfere with a fair trial or hearing.”

Advisory Committee commentary following canon 3B(9): “*Although a judge is permitted to make nonpublic comments about pending or impending cases that will not substantially interfere with a fair trial or hearing, the judge should be cautious when making any such comments. There is always a risk that a comment can be misheard, misinterpreted, or repeated.*”

Canon 3D(2): “Whenever a judge has personal knowledge, or concludes in a judicial decision, that a lawyer has committed misconduct or has violated any provision of the Rules of Professional Conduct, the judge shall take appropriate corrective action, which may include reporting the violation to the appropriate authority.”

Advisory Committee commentary following canon 3D(1) and 3D(2):

“*Appropriate corrective action could include direct communication with the judge or lawyer who has committed the violation, writing about the misconduct in a judicial decision, or other direct action, such as a confidential referral to a judicial or lawyer assistance program, or a report of the violation to the presiding judge, appropriate authority, or other agency or body. . . . [¶] “Appropriate authority” means the authority with responsibility for initiation of the disciplinary process with respect to a violation to be reported.*”

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B. Constitutional Provisions, Statutes, and Other Authorities

Business & Professions Code, section 6068

Business & Professions Code, section 6086.7

Business & Professions Code, section 6086.8

Business & Professions Code, section 6101

Business & Professions Code, section 6103

Business & Professions Code, section 6175.3 & 6175.5

Code of Civil Procedure, section 170.1

Family Code, section 8620

Penal Code, section 1424.5

California Rules of Court, Rule 10.609

California Rules of Court, Rule 10.1017

California Rules of Professional Conduct, Rule 3.3

California Rules of Professional Conduct, Rule 3.4

California Rules of Professional Conduct, Rule 3.6

California Rules of Professional Conduct, Rule 3.8

California Rules of Professional Conduct, Rule 8.4

Amjadi v. Brown (2021) 68 Cal.App.5th 383

In re Kelley (1990) 52 Cal.3d 487

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California Commission on the Fair Administration of Justice, *Report and Recommendations on Professional Responsibility and Accountability of Prosecutors and Defense Lawyers* (Oct. 18, 2017)

Commission on Judicial Performance, *Decision and Order Imposing Public Admonishment on Judge Lisa A. Novak* (2018)

Commission on Judicial Performance, Annual Reports for 1990 and 2015

CJEO Oral Advice Summary 2018-024 (2018), *Reporting Misconduct by a Superior Court Research Attorney in a Pending Matter*, California Supreme Court Committee on Judicial Ethics Opinions

California Judges Association, Judicial Ethics Committee Formal Ethics Opinion No. 74, *Judicial Responsibilities When Discovering Attorney Misconduct (Canon 3D(2))* (2018)

California Judges Association, Judicial Ethics Updates for 1999 and 2001
Rothman, et al., California Judicial Ethics Handbook (4th ed. 2017) sections 2:1, 3:15, 3:16, 3:17, 4:1, 4:11, 5:1, and 5:67

Center for Judicial Education and Research, California Judges Benchbook: Civil Proceedings Before Trial (2022), sections 17.30–17.40

V. DISCUSSION

When attorney misconduct occurs, judges have two obligations: (1) follow the law, and (2) take appropriate corrective action consistent with the Code of Judicial Ethics. (Cal. Bus. & Prof. Code § 6086.7; Cal. Code of Judicial Ethics, canon 3D(2); Advisory Com. commentary foll. canons 3D(1) and 3D(2).)² However, before taking action, a judge must determine whether the attorney conduct in question constitutes

² All further references to canons and to Advisory Committee commentary are to the California Code of Judicial Ethics, and all references to statutes are the California Business & Professions Code, unless otherwise indicated. Relevant canons and statutes are set forth in the attached Appendix.

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misconduct. Generally, misconduct involves a dishonest or deceptive act, or egregious or outrageous behavior. Typically, an attorney's inadvertent mistake or incompetence does not qualify as misconduct. (*Examples of Misconduct*, Cal. Judges Benchbook Civ. Proc. Trial § 10.14; *People v. Hamilton* (2009) 45 Cal.4th 863, 955 [no misconduct for asking a witness the same question in three different ways, even when objections were sustained to each question, because the questions were not egregious, deceptive, or reprehensible.]) But intent is not always a prerequisite for a finding of attorney misconduct. For example, although "commingling and conversion are often the result of bad bookkeeping rather than intent to take the money," such action qualifies as attorney misconduct. (Sonya Powell, *Intent as an Element of Attorney Misconduct* (1993) 18 J. Legal Prof. 407, 410; Cal. Rules of Prof. Cond. Rule 1.15; *Palomo v. State Bar* (1984) 36 Cal.3d 785, 796 [fiduciary violations resulting from serious and inexcusable lapses in office procedure may be deemed willful for disciplinary purposes].) A violation of Rule 8.4 of the Rules of Professional Conduct constitutes misconduct,³ as does contravention of any of an attorney's duties under section 6068.⁴

³ Cal. Rules of Prof. Conduct, Rule 8.4 states that it is professional misconduct for attorneys to knowingly violate the Rules of Professional Conduct or the State Bar Act; commit a crime; engage in fraud or reckless or intentional misrepresentation; engage in conduct prejudicial to the administration of justice; give the impression they are able to improperly influence a government agency or official; or knowingly assist or induce a judge to violate their duties. *Bates v. State Bar* (1990) 51 Cal.3d 1056, 1059-60 addressed the question of whether a violation of the Rules of Professional Conduct are "laws of this state" within the meaning of section 6068, subd. (a); determined that it did not need to definitively answer the question as it was moot. If there is a violation of the Rules of Professional Conduct, there is no need for duplicative allegations under section 6068.

⁴ Cal. Bus. & Prof. Code 6068 sets forth an extensive list of an attorney's professional responsibilities, including supporting the laws and the constitution of United States and this state, respecting the courts and judicial officers, bringing or defending only actions that are legal and just, being truthful to the court, and maintaining client confidentiality.

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Even when there is misconduct, corrective action may not always be necessary or appropriate. (*People v. Prieto* (2003) 30 Cal.4th 226, 260 [attorney’s brief reference to an excluded witness in response to an unexpected question did not constitute an egregious pattern of misconduct, did not infect the trial with unfairness, and it was not reasonably likely that jurors would apply the remark in an objectionable fashion]; *Palmquist v. State Bar* (1954) 43 Cal.2d 428, 435-436 [discipline not warranted where attorney’s technical violation of the rule against client solicitation was done without any intention of advertising or soliciting business].)

Once a judge concludes an attorney has committed misconduct, the judge must then determine whether the misconduct must be reported to the State Bar. If reporting is not mandatory, the canons instruct the judge to take appropriate corrective action.⁵

A. Statutory Duty to Report Attorney Misconduct

Judges are required to notify the State Bar of any misconduct that constitutes grounds for disciplinary action by the State Bar. This is dictated by statute – primarily the Business & Professions Code and the Rules of Professional Conduct. Those grounds include violation of any of the specified duties of an attorney, including the duty to (1) support the constitutions and laws of California and the United States, (2) maintain respect and candor to the courts and judicial officers, (3) maintain client confidences, (4) refrain from engaging in conduct involving dishonesty, fraud, deceit, or reckless or

⁵ This opinion focuses on the overarching factors judges must consider when responding to attorney misconduct and applies that decision-making process to the specific facts provided by the hypothetical. The California Judges Association (CJA) Formal Opinion No. 74 provides numerous examples of attorney misconduct and appropriate judicial response to the same. (CJA Judicial Ethics Committee Formal Ethics Opinion No. 74, *Judicial Responsibilities When Discovering Attorney Misconduct (Canon 3D(2))* (2018)). See also Appendix A, attached, which includes a non-exhaustive summary of responses to attorney misconduct under the Code of Judicial Ethics, Business & Professions Code, and the Rules of Professional Conduct.

intentional misrepresentation, (5) avoid committing a criminal act that reflects adversely on a lawyer’s trustworthiness or fitness as a lawyer, and (6) avoid conduct that is prejudicial to the administration of justice. (Bus. & Prof. Code § 6068; Rules of Prof. Conduct Rules 8.3 and 8.4; *In re Kelley* (1990) 52 Cal.3d 487, 497 [repeated failure of attorneys to conform their conduct to the requirements of the criminal law and court orders specially imposed on them may call into question their integrity of officers of the court and their fitness to represent clients].)

1. Mandatory Reporting

Business and Professions Code section 6086.7 is the primary statute relating to mandatory judicial reporting of attorney misconduct to the State Bar. This statute identifies five areas where reporting of attorney misconduct is mandatory. Three are most relevant here.⁶

First, a judge must notify the State Bar of attorney misconduct when the judge has issued a final order of contempt against an attorney that may involve grounds warranting discipline by the State Bar. (Bus. & Prof. Code §§ 6086.7, subd. (a)(1).) “Grounds warranting discipline” include violation of various statutes dictating attorney conduct including Business and Professions Code section 6068, Rule 8.4 of the Rules of Professional Conduct, and the California Rules of Court.

⁶ Judges must also notify the State Bar of “(4) The imposition of any civil penalty upon an attorney pursuant to 8620 of the Family Code” (pertaining to ICWA), and “(5) A violation described in paragraph (1) of subdivision (a) of Section 1424.5 of the Penal Code by a prosecuting attorney, if the court finds that the prosecuting attorney acted in bad faith and the impact of the violation contributed to a guilty verdict, guilty or nolo contendere plea, or, if identified before conclusion of trial, seriously limited the ability of a defendant to present a defense.” (Bus. & Prof. Code § 6086.7 subd. (a)(4)-(5).) These grounds for mandatory reporting are inapplicable here.

Additionally, there are specific procedural requirements for reporting misconduct under this section. (Cal. Rules of Court, Rules 10.609 & 10.1017; Bus. & Prof. Code § 6086.7 subd. (b).) Namely, a judge who issued the final order of contempt must send (or direct the clerk or court staff to send) a copy of the relevant minutes, the final order, and the transcript (if one exists) to the State Bar, and must also notify the attorney involved. (*Id.*; **Appendix A.**)

Second, a judge must report attorney misconduct to the State Bar when the judge modifies or reverses a judgment in a judicial proceeding based in whole or in part on an attorney's misconduct, incompetent representation, or willful misrepresentation. (Bus. & Prof. Code § 6086.7, subd. (a)(2); *Amjadi v. Brown* (2021) 68 Cal.App.5th 383, 385-387, 389, 390 [judgment reversed for attorney misconduct in accepting a settlement over client's objections].) A judge (or judge's staff) must notify the State Bar in writing, and must also notify the attorney who committed the misconduct. (Cal. Rules of Court, Rules 10.609, 10.1017; Bus. & Prof. Code § 6086.7, subd. (b).)

Third, a judge must report when the judge imposes judicial sanctions against an attorney. Sanctions for failure to make discovery and monetary sanctions of less than \$1,000 are excepted from this rule. (Bus. & Prof. Code § 6086.7, subd. (a)(3).)⁷ Note that the sanctions must be "against the attorney," as opposed to sanctions against the party alone. (*Id.*)

Although Business and Professions Code section 6086.7 is the primary authority for mandatory reporting of attorney misconduct, judges are also required to report when (1) an attorney is found liable for damages in a civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence in a professional capacity (Bus. & Prof.

⁷ It bears noting that there is a corresponding requirement that an attorney self-report to the State Bar upon the imposition of judicial sanctions, other than those related to discovery or in an amount less than \$1,000.00. (Bus. & Prof. Code § 6068, subd. (o)(3).)

Code § 6086.8, subd. (a)); (2) an attorney is convicted of a crime (Bus. & Prof. Code § 6101, subd. (c)); or (3) an attorney is found to have violated obligations regarding provision of financial services by lawyers (Bus. & Prof. Code §§ 6175.3, 6175.6).

Even where there is no statutory obligation to report to the State Bar, judges maintain the discretion to do so.

2. Discretionary Reporting

The Business and Professions Code and the Rules of Professional Conduct identify several categories of misconduct where notification to the State Bar is not required, but may nevertheless be appropriate. These actions include (1) where an attorney willfully violates a court order, an oath, or their duties as an attorney,⁸ (2) where an attorney violates the duty of candor to the court;⁹ (3) where an attorney violates the duty of fairness to the opposing party or counsel, including by suppressing evidence;¹⁰ (4) when an attorney makes an improper public statement regarding a case;¹¹ (5) where a prosecutor or defense counsel violates their special responsibilities;¹² and (6) when an

⁸ Bus. & Prof. Code § 6103.

⁹ Cal. Rules of Prof. Conduct, Rule 3.3, which includes making a false statement to the court, failing to correct a previous false statement, failing to disclose contrary controlling legal authority, or knowingly offering false evidence.

¹⁰ Cal. Rules of Prof. Conduct Rule 3.4, which includes obstructing, suppressing, or falsifying evidence and witness tampering.

¹¹ Cal. Rules of Prof. Conduct, Rule 3.6.

¹² Cal. Rules of Prof. Conduct, Rule 3.8, which includes lying to the court, appearing in court under the influence of illegal drugs or alcohol, engaging in unlawful discrimination in a judicial proceeding, willful *Brady* violations, knowingly suborning material perjured testimony, intentionally and unlawfully disclosing victim or witness information, and failing to properly identify themselves in interviewing a victim or witness; California Commission on the Fair Administration of Justice, *Report and Recommendations on Professional Responsibility and Accountability of Prosecutors and Defense Lawyers* (Oct. 18, 2017).

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attorney has violated any of the duties under section 6068, and in particular, any violation for which the attorney is required to self-report to the State Bar.¹³

B. Ethical Duty to Take Appropriate Corrective Action

When a judge has personal knowledge of attorney misconduct that does *not* rise to the level of mandatory reporting, canon 3D(2) obligates the judge to take appropriate corrective action in response to the misconduct. This determination will necessarily be fact-based and depend on the type and context of the misconduct. However, it bears noting that just because reporting to the State Bar is not *required* in any given situation, reporting is not *prohibited*. (Rothman, *supra*, § 5.67, p. 330.) Categories of corrective action and factors to consider are detailed below.

1. Deciding Which Course of Corrective Action is Appropriate

Judges have wide discretion when deciding which course of corrective action is appropriate. Corrective action in response to attorney misconduct may include (1) public or private admonition of the attorney; (2) instruction to the attorney and/or the jury; (3) reporting misconduct to the attorney’s superior or employer; (4) addressing the misconduct in a judicial decision; (5) referring the attorney to the Lawyer Assistance Program (LAP); (6) referring the attorney to the State Bar’s Alternative Discipline Program (ADP); (7) declaring a mistrial;¹⁴ or (8) a non-mandatory report to the State Bar

¹³ Cal. Bus & Prof. Code §§ 6068, 6068(o); *compare*, Rule 8.3 of the California Rules of Professional Conduct, which went into effect on August 1, 2023, and requires attorneys to report to the State Bar when they have credible evidence that another lawyer has committed a crime, engaged in fraudulent conduct, engaged in reckless or intentional misrepresentation, or misappropriated funds or property, that raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness as a lawyer. Note that the “credible evidence” standard is a lower bar than the “personal knowledge” required for judicial reporting pursuant to Business and Professions Code 6086.7.

¹⁴ Code Civ. Proc. § 657, subd. (1).

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(which may be appropriate if the misconduct is particularly egregious, has persisted despite prior corrective action, or if the judge concludes that other authorities, such as the attorney's employer, will not take any action).¹⁵ Overall, the corrective action should be commensurate with the nature, context, and severity of the misconduct that is at issue.

2. Factors to Consider

Judges should consider the following eight factors when determining appropriate corrective action in response to attorney misconduct:

First, a judge should consider whether the attorney's misconduct was willful. As noted above, intent is generally, though not always, a prerequisite for finding attorney misconduct. However, the nature of the intent may serve to mitigate or aggravate the level of misconduct. The more deliberate the misconduct, the more severe the corrective action should be.

Second, a judge should weigh the egregiousness of the misconduct, and the harm it causes. The worse the misconduct and the attendant injury, the more severe the response should be. However, serious misconduct without measurable harm could dictate a more forgiving response.

Third, a judge should determine whether the attorney misconduct caused prejudice to the opposing party. If so, more serious corrective action is warranted.

Fourth, a judge should attempt to ascertain whether the attorney misconduct was an isolated incident or part of an ongoing problem. Where attorney misconduct is a standalone occurrence, as opposed to part of a pattern or practice of bad behavior, a judge may entertain lesser corrective action.

¹⁵ Rothman, *supra*, supp. to § 5.67, citing Cal. Judges Assn., *Formal Ethics Opn. No. 74* (2018), p. 5.

Fifth, a judge should evaluate the likelihood that any other body or authority (e.g., the attorney's employer) will step in to address the attorney misconduct. If other intervention is unlikely, a judge should contemplate more direct corrective action.

Sixth, a judge may consider the availability of less drastic means of corrective action.

Seventh, a judge may examine whether there has been prior corrective action in response to the attorney's misconduct. Where a judge has already taken lesser steps in attempts to address attorney misconduct, and the misconduct persists, the judge should then consider more serious corrective action, including a report to the State Bar.

And eighth, in determining appropriate corrective action, a judge may consider whether the contemplated corrective action will deter future misconduct by the attorney, as well as whether the corrective action will deter such misconduct by other attorneys moving forward. The end goal of corrective action is to deter further attorney misconduct in the future.

3. Additional Considerations After Determining Appropriate Corrective Action

Once a judge has determined the course of corrective action appropriate to the facts and circumstances, the judge should consider five additional factors. First, a judge should ensure that any response is issued in a dignified manner, whether orally or in writing. Second, the corrective action should be carried out in open court and not ex parte. Third, when litigants are present, care should be taken to avoid interfering with the attorney client relationship. Fourth, to avoid embroilment, corrective action should not be personal or retaliatory in nature. Fifth, corrective action should not be undertaken to gain favor with opposing counsel, colleagues, or the public at large.

For future reference, the committee has provided a non-exhaustive table of types of attorney misconduct and whether such misconduct requires notification of the State Bar. (Appendix A.) The appendix includes procedural requirements depending on the

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nature of the misconduct at issue. Judges are cautioned to consider the gravity of a State Bar report, both in terms of the damaging effect on an attorney's professional reputation, as well as the prejudicial effect such a report may have in any ongoing case or trial. In cases where a judge determines reporting to the State Bar is appropriate, they are encouraged to use the [Discipline Referral Form](#) provided by the Office of Chief Trial Counsel for the State Bar of California.

C. Application to the Hypothetical Facts

The attorney here engaged in misconduct by failing to comply with the judge's discovery order. The judge found the attorney's misconduct caused prejudice to the opposing party, and issued sanctions in the form of a mistrial.

1. Was the Judge Required to Report the Attorney Misconduct to the State Bar?

Because the requesting judge did not issue a final order of contempt against the attorney, mandatory reporting to the State Bar would not be required under section 6086.7, subdivision (a)(1) of the Business and Professions Code.

Although the judge declared a mistrial, the judge did not modify or reverse a judgment based in whole or in part on the attorney's "misconduct, incompetent representation, or willful misrepresentation..." Accordingly, mandatory reporting would not be triggered under section 6086.7, subdivision (a)(2) of the Business and Professions Code.

Sanctions (here a mistrial) could trigger mandatory reporting to the State Bar under section 6086.7, subdivision (a)(3) of the Business and Professions Code. As an initial consideration, for this section to apply, the sanctions must be "against the attorney." Here, the judge made a finding that noncompliance with the court's discovery order was solely the result of the attorney's misconduct, and not the client's. Thus, the sanctions would qualify as sanctions against the attorney, as contemplated by the statute.

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(*Levitz v. The Warlocks* (2007) 148 Cal.App.4th 531, 535-536, citing former Cal. Rules of Court, Rule 227(b), now Rule 2.30, subd. (b) [Sanctions for violating pretrial rules must be imposed only on the attorney if the violation is the attorney's responsibility. Such sanctions may not adversely affect the party's case.]) The sanctions here apparently did not adversely affect the party's case, given that the mistrial resulted only in a continuance.

Nevertheless, sanctions for "failure to make discovery" and monetary sanctions of less than \$1,000 are excepted from the mandatory reporting requirements under section 6086.7. Here, the judge issued sanctions – namely, a mistrial – based on the attorney's actions which violated the court's order. But the relevant court order arose out of a discovery motion.

The committee has not located any authority from the Courts of Appeal or the California Supreme Court addressing this issue. Pending direction, it is the committee's view that ordering a mistrial as sanctions for violation of an underlying discovery order falls within the purview of "sanctions for failure to make discovery." Accordingly, the committee concludes the inquiring judge did *not* have a mandatory duty to report the attorney's misconduct to the State Bar under section 6086.7, subdivision (a)(3) of the Business and Professions Code.

This opinion does not address other statutory grounds for mandatory judicial reporting of attorney misconduct to the State Bar. Refer to the attached Appendix for additional information.

Most of the enumerated discretionary grounds for reporting attorney misconduct to the State Bar discussed above are similarly inapplicable to the facts at issue here. Following an evidentiary hearing, the court concluded the attorney did not willfully or in bad faith mislead the court or opposing party, perpetrate fraud upon the court, appear intoxicated in court, engage in unlawful discrimination, suborn perjured testimony, or the like. (Cal. Rules of Prof. Conduct Rules 3.3, 3.6, 3.8, 8.4; Bus. & Prof. Code § 6068.)

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Although Rule 3.4, subdivision (b) of the Rules of Professional Conduct prohibits a lawyer from suppressing any evidence that the lawyer or client has a legal obligation to produce, the court found that the attorney did not withhold the documents willfully or in bad faith. Thus, the case for reporting the misconduct to the State Bar is less compelling.

In the hypothetical, the attorney violated a court order, which could constitute grounds for discretionary reporting to the State Bar under section 6103 regarding the willful disobedience or violation of a court order. “An attorney’s misconduct does not need to be in bad faith to be willful; rather, all that is required is ‘a general purpose or willingness to commit the act or permit the omission.’” (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 37, citing *Durban v. State Bar* (1979) 23 Cal.3d 461, 567.) As noted above, the judge found that the attorney’s conduct in violating the court order was neither willful nor in bad faith. Accordingly, the committee is of the view that the attorney’s misconduct falls outside the reach of Business and Professions Code section 6103.

As such, the committee believes mandatory reporting was not required.

2. Did the Judge Take Appropriate Corrective Action?

Given the hypothetical judge’s factual findings and the wide discretion permitted in these circumstances, the decision to declare a mistrial would constitute appropriate corrective action. Although other, more severe action would also have been appropriate, the mistrial addressed the prejudice the misconduct caused; the judge had reason to believe the offending attorney did not act in bad faith; there was no evidence the offending attorney had a history of ignoring court orders; and the judge’s ruling was likely to have a deterrent impact on the offending attorney and others.

VI. CONCLUSION

Judges have two obligations with respect to attorney misconduct: (1) follow the law, and (2) take appropriate corrective action. This opinion has provided general guidance as to factors a judge should consider when complying with these obligations.

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Applying these factors to the hypothetical fact pattern here, the committee believes (1) the judge would not be required to report the attorney's misconduct to the State Bar, and (2) given the judge's factual findings and permissive discretion, the judge's decision to declare a mistrial would constitute appropriate corrective action under the canons.



This opinion is advisory only (Cal. Rules of Court, rule 9.80(a), (e); Cal. Com. Jud. Ethics Opns., Internal Operating Rules & Proc. (CJEO) rule 1(a), (b)). It is based on facts and issues, or topics of interest, presented to the California Supreme Court Committee on Judicial Ethics Opinions in a request for an opinion (Cal. Rules of Court, rule 9.80(i)(3); CJEO rule 2(f), 6(c)), or on subjects deemed appropriate by the committee (Cal. Rules of Court, rule 9.80(i)(1); CJEO rule 6(a)). The conclusions expressed in this opinion are those of the committee and do not necessarily reflect the views of the California Supreme Court or any other entity. (Cal. Rules of Court, rule 9.80(b); CJEO rule 1(a).)

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Appendix A to Draft CJEO Formal Opinion 2023-025

Please note: This Appendix is current as of the publication date, and will not be revised if/when there is new authority.

Authority	Attorney Misconduct	Mandatory Report?	Reporting Requirements
Canon 3D(2)	When judge has personal knowledge that a lawyer has committed misconduct , or has violated any provision of the Rules of Professional Conduct .	No.	The judge must take “appropriate corrective action.”
Bus. & Prof. Code § 6086.7, generally.		Yes.	The senior justice issuing the order or the justice or judge issuing the order or authoring the opinion triggering the reporting requirement under Bus. & Prof. Code § 6086.7(a) is responsible for notifying the State Bar. The justice or judge may direct the Clerk or court staff to notify the State Bar. The notice must include the attorney’s full name and State Bar number, if known, and a copy of the order that triggered the notification requirement. The person who makes the notification must also inform the attorney who is the subject of the notification that the matter has been referred to the State Bar. (Cal. Rules of Court, Rules 10.609, 10.1017; Bus. & Prof. Code § 6086.7(b).) Use the State Bar’s Discipline Referral Form .
Bus. & Prof. Code § 6086.7(a)(1)	A final order of contempt against an attorney on grounds that may warrant discipline under Bus. & Prof. Code, Div. 3, Chapter 4. Attorneys.	Yes.	Court must send a copy of relevant minutes, final order, and transcript (if one exists) to the State Bar. (Cal. Rules of Court Rule 10.609, and Advisory Comm. Comment on same.) No statutory time limit, but should be done “on a timely basis.”
Bus. & Prof. Code § 6086.7, subd. (a)(2)	Modification or reversal of a judgment based in whole or in part on attorney misconduct, incompetent representation, or willful misrepresentation.	Yes.	Court must notify the State Bar in writing in accordance with Cal. Rules of Court, Rules 10.609, 10.1017. Court must also notify the attorney involved per Bus. & Prof. Code § 6086.7(b). No statutory time limit, but should be done “on a timely basis.”

Bus. & Prof. Code § 6086.7, subd. (a)(3)	Judicial sanctions against an attorney (except sanctions for failure to make discovery or in an amount less than \$1,000).	Yes.	Court must notify the State Bar in writing in accordance with Cal. Rules of Court, Rules 10.609, 10.1017. Court must also notify the attorney involved per Bus. & Prof. Code § 6086.7(b). No statutory time limit, but should be done “on a timely basis.”
Bus. & Prof. Code § 6086.7, subd. (a)(4)	Civil penalty upon an attorney under Fam. Code § 8620 regarding adoption of children with Indian tribal affiliations .	Yes.	Court must notify the State Bar in writing in accordance with Cal. Rules of Court, Rules 10.609, 10.1017. Court must also notify the attorney involved per Bus. & Prof. Code § 6086.7(b). No statutory time limit, but should be done “on a timely basis.”
Bus. & Prof. Code § 6086.7, subd. (a)(5)	Finding of bad faith by a prosecuting attorney for withholding exculpatory evidence .	Yes.	Court must notify the State Bar in writing in accordance with Cal. Rules of Court, Rules 10.609, 10.1017. Court must also notify the attorney involved per Bus. & Prof. Code § 6086.7(b). No statutory time limit, but should be done “on a timely basis.”
Bus. & Prof. Code, § 6086.8, subd. (a)	Judgment for damages against an attorney in a civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence in a professional capacity.	Yes	Court must notify State Bar in writing within 20 days of judgment.
Bus. & Prof. Code § 6068	Violation of any of the duties of an attorney as set forth in section 6068 of the Bus. & Prof. Code,	No.	Judges may use their discretion as to whether to report to the State Bar.
Bus. & Prof. Code § 6101	Conviction of a felony or misdemeanor involving moral turpitude . (A guilty plea, guilty verdict, acceptance of nolo contendere plea, or conviction after a plea of nolo contendere is deemed to be a conviction.)	Yes	The clerk must transmit within 48 hours after conviction a certified copy of the record of conviction to the Office of Chief Trial Counsel.
Bus. & Prof. Code § 6103	Willful disobedience or violation of a court order .	No.	Judges may use their discretion as to whether to report to the State Bar.

Bus. & Prof. Code § 6106	Committing any act involving moral turpitude, dishonesty, or corruption , whether or not the act was committed in their professional capacity as an attorney.	No.	Judges may use their discretion as to whether to report to the State Bar.
Bus. & Prof. Code §§ 6175.3, 6175.5, 6175.6	Violation of disclosure requirements by attorney acting as fiduciary selling financial products to elder or dependent adult.	Yes	The court must report the name, address, and State Bar number of any attorney found to be in violation of Bus. & Prof. Code Chapter 4, Article 10.5 – Provision of Financial Services by Lawyers – to the State Bar and any other appropriate professional licensing agencies for review and possible disciplinary action.
Cal. Rules of Prof. Conduct, Rule 3.3	Violation of duty of candor to the court, including misleading a judge by a false statement of fact or law, or offering evidence that the lawyer knows to be false .	No.	Judges may use their discretion as to whether to report to the State Bar.
Cal. Rules of Prof. Conduct, Rule 3.4	Violation of duty of fairness to opposing party and counsel, including by suppressing evidence that the attorney or client has a legal obligation to produce, or counseling or assisting a witness to testify falsely .	No.	Judges may use their discretion as to whether to report to the State Bar.
Cal. Rules of Prof. Conduct, Rule 3.6	Making improper out of court statements about pending proceedings.	No.	Judges may use their discretion as to whether to report to the State Bar.

Cal. Rules of Prof. Conduct, Rule 3.8	Violation of any of the special responsibilities of a prosecutor , including willful misrepresentation to a court, appearing under the influence in court, engaging in unlawful discrimination , willfully bringing charges without probable cause, Brady violations , and knowingly presenting perjured testimony .	No.	Judges may use their discretion as to whether to report to the State Bar.
Cal. Rules of Prof. Conduct, Rule 8.4	Committing professional misconduct by (a) violating the Rules of Court or the State Bar Act (Bus. & Prof. Code §§ 6000, et seq.); (b) committing a crime that reflects poorly on the attorney’s honesty, trustworthiness, or fitness as a lawyer in other respects; (c) engaging in dishonest, fraudulent, or deceitful conduct, or reckless or intentional misrepresentation ; (d) engaging in conduct prejudicial to the administration of justice; (e) giving the impression that the attorney has the ability to improperly influence a government agency or official; or (f) knowingly assisting, soliciting, or inducing a judge to violate the applicable rules of judicial ethics and conduct.	No.	<p>Judges may use their discretion as to whether to report to the State Bar.</p> <p>Notes:</p> <p>A violation of Rule 8.4, subd. (a) can occur even when a lawyer is acting in pro per, or not practicing law or acting in a professional capacity. Cal. Rules of Prof. Cond., Rule 8.4, Editor’s Comment [1].</p> <p>An attorney may be disciplined for criminal acts as set forth in Bus. & Prof. Code §§ 6101 et seq., or if the criminal act constitutes “other misconduct warranting discipline” which has been defined as misconduct that is not expressly prohibited by statute or rule and/or that does not amount to moral turpitude, but nevertheless warrants disciplinary action. Cal. Rules of Prof. Cond., Rule 8.4, Editor’s Comment [3] citing <i>In re Kelley</i> (1990) 52 Cal.3d 487.</p> <p>An attorney may be disciplined under Bus. & Prof. Code § 6106 for acts involving moral turpitude, dishonesty, or corruption, whether intentional, reckless, or grossly negligent. Cal. Rules of Prof. Cond., Rule 8.4, Editor’s Comment [4].</p>