



## Supreme Court of California Committee on Judicial Ethics Opinions

350 McAllister Street, Room 1144A, San Francisco, California 94102-3688

*JudicialEthicsOpinions.ca.gov*

### **NOTICE:**

The deadline for submitting public comments on CJEO Draft Formal Opinion 2019-014 has been extended to May 15<sup>th</sup>, 2019.

Public comments submitted using an online CJEO form between April 4, 2019, and April 10, 2019, may not have been received by CJEO due to a malfunction on the CJEO website.

If you submitted comments on CJEO Draft Formal Opinion 2019-014 using the CJEO online public comment form, please call CJEO to confirm receipt of your online comment, even if you received an automated message that your comment had been successfully submitted.

**1-855-854-5366**

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## INVITATION TO COMMENT

**[CJEO Draft Formal Opinion 2019-014]**

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Title	Action Requested
Committee on Judicial Ethics Opinions Draft Formal Opinion 2019-014; Independent Investigation of Court Case Management Systems	Review and submit comments by May 15, 2019
	Proposed Adoption Date
	To be determined
Prepared by	Contact
Supreme Court of California Committee on Judicial Ethics Opinions Hon. Ronald B. Robie, Chair	Nancy A. Black Committee Counsel 415-865-7028 Judicial.Ethics@jud.ca.gov

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*CJEO Draft Formal Opinion 2019-014 has been authorized by the committee for posting and public comment but has not been adopted by the committee in final form. The attached draft opinion is circulated for comment purposes only.*

## Summary

The California Supreme Court Committee on Judicial Ethics Opinions (CJEO) has adopted and posted for public comment a draft formal opinion. ([Cal. Rules of Court, rule 9.80\(j\)\(2\)](#); [Cal. Com. Jud. Ethics Opns., rule 7\(d\)](#).) The public is invited to comment on the draft opinion before the committee considers adopting the opinion in final form.

CJEO Draft Formal Opinion 2019-014 advises that a judge should not use a court-provided case management system to independently investigate a party, attorney, or facts relevant to a matter assigned to the judge except in limited circumstances where the search results may be properly judicially noticed or where the search is authorized by law.

After receiving and reviewing comments, the committee will decide whether the draft opinion should be published in its original form, modified, or withdrawn. ([Cal. Rules of Court, rule 9.80\(j\)\(2\)](#); [Cal. Com. Jud. Ethics Opns., rule 7\(d\)](#).) Comments are due by **May 15, 2019**, and may be submitted as described below.

Comments submitted in response to this Invitation to Comment are confidential communications to the committee and precluded from disclosure under the CJEO rules. ([Cal. Rules of Court, rule 9.80\(h\)](#); [Cal. Com. Jud. Ethics Opns., rule 5\(b\)](#).) Confidentiality may be waived under those rules. ([Cal. Rules of Court, rule 9.80\(h\)\(3\)](#); [Cal. Com. Jud. Ethics Opns., rule 5\(b\)\(1\), \(e\)](#).) Following the public comment period, the committee will post any comments submitted with a statement waiving confidentiality or with consent to disclose on the CJEO website. The online comment form provided on the committee's website includes a waiver option.

## CJEO Background

The Committee on Judicial Ethics Opinions was established by the California Supreme Court to provide judicial ethics advisory opinions on topics of interest to the judiciary, judicial officers, candidates for judicial office, and members of the public. ([Cal. Rules of Court, rule 9.80\(a\)](#); [Cal. Com. Jud. Ethics Opns., rule 1\(a\)](#).) The committee is authorized to issue formal written opinions, informal written opinions, and oral advice on proper judicial conduct under the California Code of Judicial Ethics, the California Constitution, statutes, rules, the decisions of the Supreme Court and the Commission on Judicial Performance, and other relevant sources. ([Cal. Rules of Court, rule 9.80\(e\)\(1\)](#); [Cal. Com. Jud. Ethics Opns., rule 1\(b\)\(1\)](#).) The committee acts independently of the Supreme Court, the Commission on Judicial Performance, the Judicial Council, and all other entities. ([Cal. Rules of Court, rule 9.80\(b\)](#); [Cal. Com. Jud.](#)

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Ethics Opns., rule 1(a).) The committee's advice does not necessarily reflect the views of the California Supreme Court.

## **The Draft Opinion**

The committee received a request for an opinion asking whether, in a non-criminal matter, a judge may search a court-provided case management system for information regarding a party, attorney, or facts relevant to the matter before the judge.

In the attached draft opinion, the committee provides an overview of case management systems (CMSs), which provide electronic access to case documents, court records, and calendar information, as well as other information created by judicial officers and court staff. The draft opinion advises that CMSs provide easy access to information that can assist the judge in effectively managing a caseload, but may also tempt a judge to search for other information regarding a party, attorney, or facts that may be relevant to the matter before the judge.

The draft opinion advises that canon 3B(7) of the California Code of Judicial Ethics, which prohibits independent investigation of facts in a proceeding absent limited exceptions, extends to a judge's use of court-provided CMSs. Therefore, a judge may only search a CMS in limited instances when the search results may be properly judicially noticed, when an independent investigation is authorized by law, or when the judge limits the search to documents or other information that are part of the case assigned to the judge.

The draft opinion primarily focuses on the judicial notice exception, advising that although court records are the proper subject of judicial notice, not every court record can be judicially noticed. The draft opinion cautions that a CMS search may yield results, including court records or other information that cannot be properly judicially noticed.

Even where search results are the proper subject of judicial notice, a CMS search also may create a risk of judicial bias, an appearance of judicial bias, or reflect embroilment, particularly if the search results provide a benefit to one party. Based on these concerns, the draft opinion advises that a judge should exercise caution or avoid searching a CMS for information regarding a party, attorney, or other information that may be relevant to the matter before the judge.

The draft opinion advises that a judge who searches a CMS and reviews information that is relevant to the matter before the judge should evaluate whether they are biased or if there is an appearance of bias that would require disqualification. If the judge does not disqualify himself or herself, the judge should disclose the fact that the judge searched the CMS, disclose any records or other information that the judge has viewed, and provide the parties with an opportunity to respond.

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## Invitation to Comment

The committee invites comment on the attached draft opinion by **May 15, 2019**. Comments may be submitted:

- by email to [Judicial.Ethics@jud.ca.gov](mailto:Judicial.Ethics@jud.ca.gov); or
- by mail to:

Ms. Nancy A. Black, Committee Counsel  
The Supreme Court of California  
Committee on Judicial Ethics Opinions  
350 McAllister Street  
San Francisco, California 94102

Following the comment period, the committee will post any comments submitted with a statement waiving confidentiality or with consent to disclose on the CJEO website.

**Attachment:** CJEO Draft Formal Opinion 2019-014



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

350 McAllister Street, Room 1144A  
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**CJEO Draft Formal Opinion 2019-014**

**INDEPENDENT INVESTIGATION OF COURT CASE MANAGEMENT  
SYSTEMS**

**I. Question Presented**

In a non-criminal matter, may a judge<sup>1</sup> search the court's case management system for information regarding a party, attorney, or facts relevant to the matter before the judge?

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<sup>1</sup> As used in this opinion, judge refers to all judicial officers, including trial court judges, appellate justices, and other judicial officers who are subject to the California Code of Judicial Ethics. (Cal. Code Jud. Ethics, canon 6A [anyone who is an officer of the state judicial system and who performs judicial functions is a judge within the meaning of the code and shall comply with the code except as provided in canon 6].)

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## II. Summary of Conclusions

Case management systems (CMSs) are an integral part of California court operations, providing an efficient mechanism for judges and court staff to review court documents and effectively manage caseloads. These systems allow for a judge to search for information related to a party or attorney, or search case documents and other information, and provide instantaneous access to these records.

There is a tension between the ease with which a judge may search the CMS and canon 3B(7) of the California Code of Judicial Ethics, which requires that a judge consider only the evidence presented and prohibits independent investigation of facts relevant to a proceeding using any medium, absent an exception. The committee concludes that the prohibition on independent investigations extends to CMS searches. Therefore, a judge may use the CMS to search for and to view documents submitted by a party or attorney in a matter assigned to the judge. A judge may not search for or view other documents and information contained in a court's CMS that could be relevant to the matter before the judge unless the search is authorized by law or the search results may be properly judicially noticed. This opinion focuses on the judicial notice exception to the prohibition on independent investigations.

Even if a CMS search is permitted, the committee cautions against searching the CMS based on the likelihood that a judge may uncover other information that is not properly subject to judicial notice. If so, the committee advises that the judge should disclose the fact of the search and the results of the search, and provide the parties with an opportunity to respond. Finally, regardless of whether the search complies with the canon 3B(7) of the California Code of Judicial Ethics, the committee cautions that the fact that a judge engaged in an independent investigation could cause a person to reasonably doubt the judge's impartiality in the matter, particularly where the results of the search provide a benefit to one party.

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### III. Authorities

#### A. Applicable Canons<sup>2</sup>

Canon 2A: “A judge . . . shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”

Canon 3B(7): “A judge shall accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the full right to be heard according to law. Unless otherwise authorized by law, a judge shall not independently investigate facts in a proceeding and shall consider only the evidence presented or facts that may be properly judicially noticed. This prohibition extends to information available in all media, including electronic.”

Canon 3B(7)(a): “Except as stated below, a judge may consult with other judges. . . [¶] . . . [¶] In any discussion with judges or court personnel, a judge shall make reasonable efforts to avoid receiving factual information that is not part of the record or an evaluation of that factual information. In such consultations, the judge shall not abrogate the responsibility personally to decide the matter.” [¶] For purposes of Canon 3B(7)(a), “court personnel” includes bailiffs, court reporters, court externs, research attorneys, courtroom clerks, and other employees of the court . . . .”

Canon 3B(7)(d): “If a judge receives an unauthorized ex parte communication, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.”

*Advisory Committee commentary following canon 3B(7): “A judge is statutorily authorized to investigate and consult witnesses informally in small claims cases. Code of Civil Procedure section 116.520, subdivision (c).”*

Canon 3E(1): “A judge shall disqualify himself or herself in any proceeding in which disqualification is required by law.”

Canon 3E(2): “In all trial court proceedings, a judge shall disclose on the record as follows: [¶] (a) Information relevant to disqualification [¶] A judge shall disclose information that is reasonably relevant to the question of disqualification under Code of Civil Procedure section 170.1, even if the judge believes there is no actual basis for disqualification.”

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<sup>2</sup> All further references to the code, canons, or Advisory Committee commentary are to the California Code of Judicial Ethics.

Canon 3E(4): “An appellate justice shall disqualify himself or herself in any proceeding if for any reason: [¶] (a) the justice believes his or her recusal would further the interests of justice; or [¶] (b) the justice substantially doubts his or her capacity to be impartial; or [¶] (c) the circumstances are such that a reasonable person aware of the facts would doubt the justice’s ability to be impartial.”

**B. Other Authorities<sup>3</sup>**

Civil Code, section 1954.13, subdivision (c)

Code of Civil Procedure, sections 116.520, subdivision (c); 116.770, subdivision (c); 170.1, subdivision (a)(6)(a)(i)-(iii); 527.6, subdivision (i); 527.8, subdivision (j); 527.85, (subdivision (j))

Evidence Code, sections 352, 450-460

Welfare and Institutions Code, section 827

*Catchpole v. Brannon* (1995) 42 Cal.Rptr.2d 440

*Flatley v. Mauro* (2006) 39 Cal.4th 299

*Fremont Indemnity Co. v. Workers’ Compensation Appeals Board* (1984) 153 Cal.App.3d 965

*Kilroy v. State of California* (2004) 119 Cal.App.4th 140

*Johnson & Johnson v. Superior Court* (2011) 192 Cal.App.4th 757

*Mathew Zaheri Corp. v. New Motor Vehicle Board* (1997) 55 Cal.App.4th 1305

*People v. Hancock* (1983) 145 Cal.App.3d Supp. 25

*Planning & Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210

*Public Admonishment of Commissioner Friedenthal* (2012)

*Public Admonishment of Judge Connolly* (2016)

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<sup>3</sup> Admonishments issued by the Commission on Judicial Performance.

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*Public Admonishment of Judge Novak* (2018)

*Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518

*Western Mutual Insurance Company v. Yamamoto* (1994) 29 Cal.App.4th 1474

Jefferson, *Jefferson's California Evidence Benchbook* (4th Ed. 2009) sections 49.6, 49.10

Rothman et al., *California Judicial Conduct Handbook* (4th ed. 2017) section 5:16, appendix G

Simons, *California Evidence Manual* (2018 Ed.) section 7:1

American Bar Association, Committee on Professional Ethics, Opinion Number 478 (Dec. 8, 2017)

California Judges Association, Ethics Committee Advisory Opinion Number 68 (2013)

#### **IV. Discussion**

##### **A. Case Management Systems**

CMSs are software systems that electronically store court records and other information to effectively and efficiently manage a caseload. A CMS provides access to documents that are electronically filed with a court, created electronically by a court, or electronic copies or versions of documents that were originally paper records and have been digitized. A CMS may also contain other information, including comments, notes, and to-do lists that are associated with a specific case or are created for general use by the judge and court staff. CMSs allow a judge or court staff to search records and other information using a party's name, attorney's name, or other key terms, simultaneous review of case documents and other information by judges and court staff, and automated calendaring and file tracking.

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Depending on the status of electronic filing in the judge's court or division, the CMS's settings, and the judge's access rights, a judge typically has electronic access to the judge's case documents, as well as the ability to search calendar information, notes, documents, and other court records within the judge's division or entire court. Based on the ease of access and availability of information in a CMS, a judge may be inclined to look up a party, an attorney, a pending or past proceeding, specific court records, or other information to fill in gaps in the proceeding, inform himself or herself about other cases or orders involving the parties, or to satisfy his or her curiosity regarding a party, attorney, or facts or issues related to the matter.

The ease of access and the availability of records and other information available through a CMS search must be balanced against the ethical limitations regarding independent investigations.

#### **B. Independent Investigations**

Due process requires that any person who has a legal interest in a proceeding has the full right to be heard according to law. (*Fremont Indemnity Co. v. Workers' Comp. Appeals Bd.* (1984) 153 Cal.App.3d 965, 971 [due process requires that all parties are fully apprised of the evidence considered and are provided with an opportunity to respond to the evidence and offer other evidence in explanation or rebuttal].) To further this right, canon 3B(7) prohibits a judge from considering evidence outside of the record and from engaging in an independent investigation of facts in a proceeding unless the search is authorized by law or the facts may be properly judicially noticed. (*Id.* at p. 974 [independent investigation in a case tends to violate the requirements of due process and erode public confidence in the integrity and impartiality of the judiciary]; *Mathew Zaheri Corp. v. New Motor Vehicle Bd.* (1997) 55 Cal.App.4th 1305, 1319 [the prohibition on ex parte communications aids in preserving an unbiased tribunal and avoiding an appearance

of bias on the part of decisionmakers].) The prohibition on independent investigations extends to information available in all media, including electronic. (Canon 3B(7).)

There is no exception in canon 3B(7) that allows a judge to independently investigate facts in a proceeding using a CMS, even though it is a court-provided resource.<sup>4</sup> (Cal. Judges Assn., Opn. No. 68 (2013) p. 9 [the ease in which a judge can investigate facts does not change the prohibitions against ex parte communications and requires that a judge understand what constitutes improper ex parte communications and avoid the temptation to engage in them].) “Unless otherwise authorized by law,<sup>[5]</sup> a judge shall not independently investigate facts in a proceeding and shall consider only the evidence presented or facts that may be properly judicially noticed.” (Canon 3B(7);

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<sup>4</sup> It is the committee’s view that canon 3B(7) does not prohibit a judge from using the CMS to search for and to view documents submitted by a party or attorney in a matter assigned to the judge.

<sup>5</sup> A judge may conduct an independent investigation of a CMS where expressly authorized by law, requiring that there is a statute, a court rule, or case law permitting the judge to conduct the search. (Canon 3B(7).) In non-criminal matters, there is very limited authority that authorizes a judge to conduct an independent investigation and would permit a judge to search the CMS regarding the matter currently before him or her. For example, in small claims cases a judge may investigate the controversy with or without providing notice to the parties. (Code Civ. Proc., §§ 116.520, subd. (c); 116.770, subd. (c) [a judge may conduct an independent investigation in small claims court matters that are on appeal in superior court]; Advisory Com. com. foll. canon 3B(7) [a judge may investigate in small claims cases].) A judge may also make a more limited independent inquiry when determining whether to issue a temporary restraining order in certain civil matters. (See Code Civ. Proc., §§ 527.6, subd. (i) [civil harassment], 527.8, subd. (j) [workplace harassment], 527.85, subd. (j) [harassment at postsecondary educational school campus or facility]; Civ. Code § 1954.13, subd. (c) [transitional house participant abuse or program misconduct].) Absent specific authorization to conduct a search pursuant to these statutes or other authority, or the application of another exception, the committee advises that a judge should not search the court’s CMS.

Rothman, et al. Cal. Jud. Conduct Handbook (4th ed. 2017) § 5:16, p. 286 (Rothman) [“Considering evidence that is gathered outside the record and not allowed by the rules of evidence and other lawful exceptions violates Code of Judicial Ethics, canon 3B(7).”].) This opinion focuses on the judicial notice exception.

### **C. Judicial Notice of Court Records**

Judicial notice is governed by Evidence Code sections 450-460. It allows for certain matters of law or fact that are not reasonably subject to dispute to be considered by the judge or jury without requiring formal proof of the matter. (*Kilroy v. State of California* (2004) 119 Cal.App.4th 140, 146 (*Kilroy*) [judicial notice substitutes for formal proof because the matters judicially noticed are not reasonably subject to dispute].)

Court records are the proper subject of judicial notice. (Evid. Code, §§ 452, subd. (d) [California court records and the records of any court of record of another state or the United States may be judicially noticed]; 459 subd. (a) [the reviewing court shall take judicial notice of each matter properly noticed by the trial court and may take judicial notice of court records].) However, not every court record may be judicially noticed. The record must be relevant to the matter before the judge, comply with the hearsay rule,<sup>6</sup>

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<sup>6</sup> A judge is unable to take judicial notice of the truth of statements of fact or of findings contained within court records, including hearsay statements in decisions and court files or allegations in affidavits because they are still reasonably subject to dispute. (*Kilroy, supra*, 119 Cal.App.4th at pp. 145-149 [factual findings in prior judicial opinions are not subject to judicial notice].) A judge may, however, take judicial notice of the existence of records involving the parties, the occurrence and timing of legal proceedings, such as the date a hearing took place or the date a pleading was filed, and the legal effect of a recorded document. (Jefferson, *Jefferson’s Cal. Evidence Benchbook* (4th Ed. 2009) § 49.10 [a court may take judicial notice of the existence of judicial opinions, court documents, and verdicts reached but cannot take judicial notice of the truth of hearsay statements in other decisions or court files, or the truth of factual findings made in another action because these are facts in the judicial record that are subject to dispute];

and its prejudicial effect cannot outweigh its probative value to be properly judicially noticed. (Simons, Cal. Evidence Manual (2018 Ed.) (Simons), § 7:1, p. 581 [a fact that is properly subject to judicial notice can be challenged on relevancy grounds and under Evidence Code § 352, and the hearsay rule may provide a significant limitation on admissibility]; *Johnson & Johnson v. Superior Court* (2011) 192 Cal.App.4th 757, 768 [court cannot take judicial notice of the truth of hearsay statements in other decisions or court files].)

A judge who searches the CMS for a particular court record or records that the judge is certain can be properly judicially noticed complies with canon 3B(7). For example, a judge who must decide whether res judicata or collateral estoppel applies may perform a limited CMS search for the court's prior ruling, which could be judicially noticed. (*Planning & Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 225 [trial court properly took judicial notice of court records in a separate action when considering a demurrer based on res judicata]; *Western Mutual Ins. Co. v. Yamamoto* (1994) 29 Cal.App.4th 1474, 1485 [trial court properly took judicial notice of an entire juvenile court file and entered summary judgment on collateral estoppel grounds].)

More general searches relying on a party's name or other information relevant to the proceeding are more problematic. The information contained in a CMS is not limited to court records. There is other information in a CMS to which a judge may have access, such as another judge's or a court employee's case notes. These items could contain thoughts and impressions, or facts or other prejudicial information, related to a party or to

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ABA Com. on Prof. Ethics, Opn. No. 478 (Dec. 8, 2017) p. 10.) For example, a judge may take judicial notice of an order to prove that the order was issued but cannot take judicial notice of the factual findings contained in the order because those facts may be reasonably subject to dispute. (*Kilroy, supra*, 119 Cal.App.4th at p. 145.)

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the matter before the judge. In limited circumstances, review of another judge's or a court employee's notes may be permitted. (Canon 3B(7)(a) [a judge may consult with other judges or court personnel, but the judge must make reasonable efforts to avoid receiving factual information that is not part of the record or an evaluation of that factual information]; *Public Admonishment of Judge Novak* (2018) p. 8 [judges may consult with each other and assist each other in their adjudicative responsibilities, but a judge cannot inform another judge of how he or she has evaluated evidence in a pending case when it could potentially impair the other judge's independence and impartiality in other matters or on appeal].) However, it is more likely that a CMS search could produce notes or other search results that contain factual information that is not part of the record in the matter before the judge and that does not fall within the judicial notice exception to the prohibition on independent investigations.

Also, not every court record that deals with a party before the judge will be relevant to that particular matter. (Jefferson, *Jefferson's Cal. Evidence Benchbook* (4th Ed. 2009) § 49.6 [matters subject to judicial notice must be relevant and the danger of undue prejudice must not outweigh the probative value of the evidence].) For example, a judge may properly search the CMS for a complaint when considering whether to relate two or more cases. (Cal. Rules of Court, rule 3.300(h).) If the judge performs a term search of the CMS using a party's name to determine whether there are other matters that also should be related, the judge could uncover other information regarding the party or other actions that are not relevant to the cases the judge is reviewing and that is not the proper subject of judicial notice. This is particularly true when a term search turns up a party's criminal history, which is very unlikely to be the proper subject of judicial notice.

CMS searches can also yield results that include sealed records, which may be unavailable to one or both of the parties but still relevant to the matter before the judge. For example, if a judge reviews a sealed juvenile file that cannot be released to all of the

parties or attorneys in the matter before the judge, the information in the file cannot be judicially noticed. (See Welf. & Inst. Code, § 827 [juvenile court records may be inspected only by certain persons and in limited circumstances]; ABA Formal Opn. 478, p. 10 [independent investigation of sealed documents containing information about a party that both sides do not have access to or know exists is impermissible].) In each of these examples, if the judge reviewed these records, the judge would violate canon 3B(7) unless the search was authorized by other law.

In sum, a judge cannot predict the results of a CMS search. A judge who performs an unspecified search using a party's name risks uncovering court records and other information that cannot be judicially noticed. In these instances, the judge will not know whether a CMS search violates canon 3B(7) until it is too late. The committee cautions the uncertainty of the search results should deter a judge from performing a CMS search unless the judge is certain that the entirety of the results may be judicially noticed in the matter before the judge.

**D. Independent Investigations that Yield Results that are not Subject to Judicial Notice**

Where a judge has searched the CMS and reviewed court records or other information that is not properly the subject of judicial notice, the judge must consider whether the judge has the capacity to remain impartial in the matter. (Canon 2A [a judge must act at all times in a manner that promotes public confidence in the impartiality of the judiciary].) If the judge determines that he or she lacks impartiality, the judge must disqualify himself or herself. (Canon 3E(1) [a judge shall disqualify himself or herself in any proceeding in which disqualification is required by law]; Code Civ. Proc., § 170.1, subd. (a)(6)(A)(i) [a judge shall disqualify if for any reason the judge believes there is a substantial doubt as to his or her capacity to be impartial]; canon 3E(4)(b) [an appellate justice shall disqualify himself or herself where the justice substantially doubts his or her capacity to be impartial].)

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If the judge believes that he or she can act impartially despite reviewing information outside of the case, the judge must also consider whether a person aware of the judge's search and review of the information could have reasonable doubts concerning the judge's impartiality. If so, the judge must also disqualify himself or herself. (Canon 3E(1) [a judge shall disqualify himself or herself in any proceeding in which disqualification is required by law]; Code Civ. Proc., § 170.1, subd. (a)(6)(A)(iii) [a judge shall disqualify if a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial]; canon 3E(4)(c) [an appellate justice shall disqualify himself or herself if the circumstances are such that a reasonable person aware of the facts would doubt the justice's ability to be impartial].)

Assuming that the judge determines that the CMS search and the information reviewed does not create judicial bias or an appearance of bias, it is the committee's view that the judge should follow the same steps as when any other improper ex parte communication occurs. The judge should notify the parties that the judge performed a CMS search, provide the parties with details regarding any information that was reviewed by the judge, and provide the parties with an opportunity to respond. (Canon 3B(7)(d) [a judge shall promptly notify the parties of the substance of an unauthorized ex parte communication and provide the parties with an opportunity to respond]; Rothman, *supra*, appen. G, p. 923 [a judge who learns information about a case from the court's computer system is required to disclose this information to the parties].)

#### **E. Other Considerations**

Even where a judge is certain that he or she may take judicial notice of the results of a CMS search and therefore comply with canon 3B(7), the judge should still consider whether the fact that the judge engaged in the search could create an appearance of judicial bias or reflect embroilment in the matter. (Canon 2A [a judge shall act at all times in a manner that promotes public confidence in the impartiality of the judiciary];

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canon 3 [a judge shall perform the duties of judicial office impartially].) For example, if a judge conducted an ex parte investigation of a mother but not a father by searching the mother's name on the CMS, a reasonable person aware of this fact could argue that the judge was seeking prejudicial information against the mother and conclude that the judge was biased against one side but not the other.

The judge's intent may be harmless and be an attempt to obtain relevant records with efficiency or to fill in gaps in the matter. (See *Flatley v. Mauro* (2006) 39 Cal.4th 299, 306, fn. 2 [judicial notice of court materials may be appropriate to give context to a proceeding].) However, when a judge acts in an investigatory role, there may be an appearance that the judge is no longer an impartial arbiter of the facts in the proceeding. (*Catchpole v. Brannon* (1995) 42 Cal.Rptr.2d 440, 452, fn. 9 [an independent factual inquiry is uncharacteristic of an impartial judge]; *People v. Handcock* (1983) 145 Cal.App.3d Supp. 25, 32 [unilateral investigation by a trial court judge is contrary to the primary responsibilities of a neutral judicial officer]; *Ryan v. Com. Jud. Perform.* (1988) 45 Cal.3d 518, 536-537, 546-547 [municipal court judge removed for, among other things, conducting an independent investigation in *People v. Handcock*, demonstrating a loss of objectivity and embroilment]; *Public Admonishment of Commissioner Friedenthal* (2012) pp. 10-11 [commissioner publicly admonished for independent investigation of online records and court files involving the parties, which violated canon 3B(7), reflected embroilment, and created the appearance of a lack of impartiality, contrary to canon 2A]; *Public Admonishment of Judge Connolly* (2016) pp. 2-4 [judge publicly admonished for conducting an independent investigation by collecting information and transcripts from an unrelated proceeding pertaining to an attorney in a matter before the judge].) This is especially true if the search results are beneficial or detrimental to a party.

The committee cautions that even a proper CMS search creates risks of judicial bias or an appearance of bias. Based on the likelihood that the judge will uncover court

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records or other information that may not be judicially noticed and the risk of judicial bias or an appearance of bias, regardless of whether the search complies with canon 3B(7), it is the committee's view that a judge should exercise great caution in or avoid searching a CMS for information regarding a party, attorney, or other information relevant to the matter before the judge.

## V. Conclusion

The committee cautions against performing a CMS search regarding a party, attorney, or other information that may be relevant to the matter before the judge. A judge may conduct an independent investigation of a court's CMS only if the search is authorized by law or if the judge is certain that all of the search results may be properly judicially noticed. By searching the CMS, a judge risks reviewing information that cannot be judicially noticed, including case records or notes or other information contained in the CMS. In these instances, the judge should disclose the CMS search and the information the judge reviewed to the parties, as well as allow the parties an opportunity to respond. Even if the judge is certain that the search satisfies an exception, a judge should consider whether engaging in a CMS search may demonstrate judicial bias, an appearance of bias, or that the judge is embroiled in the matter.



*This opinion is advisory only. (Cal. Rules of Court, rule 9.80(a), (e); Cal. Com. Jud. Ethics Opns. (CJEO), Internal Operating Rules & Proc. 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 rules 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*

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*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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