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CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS
350 McAllister Street, Room 1144A
San Francisco, CA 94102
(855) 854-5366
www.JudicialEthicsOpinions.ca.gov

CJEO Formal Opinion No. 2013-001

[Adopted March 25, 2013]

REQUESTING ASSISTANCE FROM ATTORNEYS

I. Question Presented

The Committee on Judicial Ethics Opinions (CJEO) has been asked to provide an opinion on whether the following activities are permissible:

> May a judge meet with attorneys who practice in the court to discuss the impact of fiscal reductions on the court"s budget and request assistance to help communicate to the public and to the Legislature the impacts of proposed budget cuts on the court"s operations?[1]

[1] The question as originally posed focused on a narrow set of facts: "A presiding judge asks partners of law firms . . . to attend a meeting at which the presiding judge makes a presentation about potential budget cuts and asks the attorneys „to help the court in whatever way they believe is appropriate."" The committee concludes that restating

II. Summary of Conclusions

A judge‟s activities relating to court budgets and appropriations fall within the scope of "measures concerning improvement of the law, the legal system, or the administration of justice." (Cal. Code Judicial Ethics, canon 5D.) As a judicial officer, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice (Advisory Com. commentary, Cal. Code Jud. Ethics, foll. canon 4). Therefore, it is ethical for judges to invite attorneys to attend a meeting at which the judge makes a presentation concerning potential budget cuts to the court(s) and asks the attorneys to assist the court in dealing with the impacts of those cuts. In deciding with whom to meet and what to say, the judge should consider all of the ethical factors generally applicable to meetings with attorneys. The primary factors are whether the manner of the invitation or requests might convey an impression of favor or influence, appear to be coercive, or reasonably lead to disqualification or implicate disclosure requirements.

III. Introduction

In times of fiscal instability and austerity, proposed and actual reductions to the judicial branch budget affect the courts‟ ability to provide services to attorneys and litigants. Convening a meeting with attorneys to discuss the potential impacts of these budget cuts on court operations is a constructive way for judges to inform and involve those most affected. Speaking with groups of attorneys outside of a court proceeding raises ethical issues that judges must consider and evaluate under the standards of conduct set forth in the California Code of Judicial Ethics. (Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007) §§ 8.31, 10.15-16, pp. 400, 530-531.) This opinion addresses the ethical principles to be considered when convening such meetings.[2]

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the question provides the opportunity for a broader discussion. (Cal. Rules of Court, rule 9.80(i)(1); Cal. Com. Jud. Ethics Opns., Internal Operating Rules & Proc., rule 6(a).)

[2] The committee has not been asked to opine on the subject of a judge‟s own activities vis-à-vis the public or members of the executive and legislative branches on issues of potential budget cuts to the court system.

IV. Authorities

A. Applicable Canons[3]

Terminology: "Law, the legal system, or the administration of justice. When a judge engages in an activity that relates to the law, the legal system, or the administration of justice, the judge should also consider factors such as whether the activity upholds the integrity, impartiality, and independence of the judiciary (Canons 1 and 2A), whether it impairs public confidence in the judiciary (Canon 2), whether the judge is allowing the activity to take precedence over judicial duties (Canon 3A), and whether engaging in the activity would cause the judge to be disqualified (Canon 4A(4))."

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. A judge shall not make statements, whether public or nonpublic, that commit the judge with respect to cases, controversies, or issues that are likely to come before the courts or that are inconsistent with the impartial performance of the adjudicative duties of judicial office."

Advisory Committee Commentary following canon 2A: "A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by other members of the community and should do so freely and willingly. . . . 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."

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 4A(4): "A judge shall conduct all of the judge's extrajudicial activities so that they do not . . . lead to frequent disqualification of the judge."

Canon 4B: "A judge may speak, write, lecture, teach, and participate in activities concerning legal and nonlegal subject matters, subject to the requirements of this code."

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[3] All further references to canons and to Advisory Committee commentary are to the California Code of Judicial Ethics unless otherwise indicated.

Advisory Committee Commentary following canon 4B: "As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice. . . . To the extent that time permits, a judge may do so, either independently or through a bar or judicial association or other group dedicated to the improvement of the law."

Canon 4C(1): "A judge shall not appear at a public hearing or officially consult with an executive or legislative body or public official except on matters concerning the law, the legal system, or the administration of justice or in matters involving the judge's private economic or personal interests."

Canon 4C(3)(d)(i): "Subject to the . . . other requirements of this code, . . . a judge . . . shall not personally participate in the solicitation of funds or other fundraising activities . . . ."

Canon 5D: "A judge or candidate for judicial office may engage in activity in relation to measures concerning improvement of the law, the legal system, or the administration of justice, only if the conduct is consistent with this code."

B. Other Authorities

Government Code, sections 68106.2, 77000 et seq.

California Rules of Court, rules 10.101(a)-(d), 10.601(b)(4), (5), 10.603(c)(6), and 10.1004(c)(6).

California Judges Association, Ethics Committee Advisory Opinions 33, 41, and 42.

Rothman, California Judicial Conduct Handbook (3d ed. 2007) sections 8.31, 10.15-16.

V. Discussion

A. Judges and the Court Budgeting Process

The effective administration of justice depends on a fully functional court system. A court‟s efficacy and the adequacy of access it affords to the public are measured by many factors, but primarily depend upon a level of funding that will support the operation of a sufficient number of courtrooms and court programs, including adequate staff resources and facilities, without charging exorbitant fees to court users. Because budget

cuts can dramatically affect access to justice, a judge"s activities relating to court budgets and appropriations concern the law, the legal system and the administration of justice.

Budgeting within the judicial branch is complex and involves all three branches of government. Various laws, policies, and procedures govern this process. (See, e.g., Gov. Code, §§ 68502.5, 68502.7, 77000 et seq.; Cal. Rules of Court, rules 10.101(a)-(d), 10.601(b)(4), (5), 10.603(c)(6), 10.1004(c)(6).) Because of the complexity of the budget process, there are many avenues that might be pursued to prevent, reduce, or mitigate the impact of potential cuts. These actions might take place in the court or community on a local level; they may involve advocacy at the administrative level; they may involve communications with the executive and legislative branches. In sum, there are a number of activities attorneys might pursue in order to assist a court facing budget cuts.

The California Code of Judicial Ethics recognizes that judges are in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice (Advisory Com. commentary, foll. canon 4B). Several canons explicitly permit judges to speak, appear in public, and engage in activities related to the improvement of the law, the legal system, or the administration of justice, so long as these activities are consistent with the other requirements of the code (canons 4B, 4C(1), 5D).

Court budget shortfalls directly affect the ability of courts to provide access to justice. In the committee"s opinion, it is permissible and appropriate for a judge to invite lawyers to a meeting to provide information about budget cuts and their potential impact on the administration of justice and to request help in reducing the cuts or ameliorating the impacts. (Canon 5D; Cal. Rules of Court, rule 10.603(c)(8); Cal. Stds. Jud. Admin., std. 10.5.)

B. Ethical Factors

While judges are free to speak to and associate with attorneys, they must comply with the ethical standards set forth in the California Code of Judicial Ethics. The code requires judges to uphold the integrity and independence of the judiciary (canon 1) and to avoid impropriety and the appearance of impropriety in all of the judge"s activities

(canon 2). As the Supreme Court Advisory Committee on the California Code of Judicial Ethics provides, in the commentary to canon 2A, "[a] judge must expect to be the subject of constant public scrutiny . . . [and] must therefore accept restrictions on the judge‟s conduct that might be viewed as burdensome by other members of the community and should do so freely and willingly . . . . 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." (Advisory Com. commentary, foll. canon 2A.) When meeting with attorneys to discuss budget implications, the judge must consider whether the invitations and requests might (1) convey impropriety or the appearance of impropriety, (2) convey an impression of favor or influence, or (3) reasonably lead to disqualification.

1. Impropriety or the Appearance of Impropriety

It is the committee‟s opinion that the California Code of Judicial Ethics does not prohibit judges from asking attorneys to „help the court.‟ (See, *ante*, fn. 1.) Because many attorneys appear in court, however, any solicitation for help directed to attorneys must avoid any suggestion that the attorneys will (1) be disadvantaged if they do not provide assistance or (2) will gain special favor or influence by providing assistance or (3) both. Even the appearance of coercion or favor must be avoided.

A judge who acts in a manner that creates the appearance of favoring or coercing attorneys undermines public confidence in the integrity and impartiality of the judiciary. In presenting information and requesting assistance, a judge may not hint of retribution or bias against an attorney or firm for not acquiescing in the request or otherwise place pressure on an attorney to assist. The distinction between an "ask" and a "lean" may be subtle and highly fact dependent. Under no circumstances should a judge engage in actual pressure, intimidation, retribution, or abuse of power.

Assuming the request is not coercive, it would be permissible, for example, to ask attorneys to write an op-ed piece or engage in outreach and community education on the impact of the budget cuts on their clients and on the community.

It is also the committee's opinion that asking attorneys to write or meet with legislators on the court's behalf is not prohibited by the California Code of Judicial Ethics, so long as the request is not coercive, does not appear to place a lawyer in a special position of influence, and does not create the appearance of either situation if a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity, impartiality, and competence. (See canons 2A, 2B(1); Discussion, *ante*, at pt.V.B.)

2. Conveying the Impression of Special Influence

Canon 2B(1) provides that "[a] judge shall not ... convey or permit others to convey the impression that any individual is in a special position to influence the judge." Accordingly, we state the obvious: there must not be, as a result of the judge's request for assistance, any appearance of an attorney's—or a group of attorneys—special influence that could result in favorable rulings, trial assignments, or procedural advantages. One way a judge might avoid the appearance of favoritism is by prefacing any request with the caveat that help is sought from anyone willing to volunteer, but without any expectations or benefits attached. A person hearing this caveat would be less likely to infer that special benefits in the courtroom were being offered.

Given a judge's limited time and resources, he or she can only meet with so many people. When deciding whom to invite to meetings in which assistance is requested, a judge must carefully consider whether a person aware of the facts might reasonably entertain doubt as to the judge's impartiality (Advisory Com. commentary, foll. canon 2A). In any given county, such considerations will differ based on many factors, including the size of the county, the number of firms in the county, and the number of judges. A judge should evaluate the circumstances to determine whether the invitation might be perceived as conveying favor.

3. Avoiding Disqualification and Disclosure

A judge must avoid extrajudicial activities that might reasonably result in the judge being disqualified. (Canon 4A(4); Advisory Com. commentary, foll. canon 4A.) Consideration must therefore be given to whether any of the invited lawyers have cases

currently pending or impending before the judge, and whether that fact would require disqualification or disclosure in those matters.

4. Other Considerations

The committee considered whether a judge"s request to write to or meet with legislators is akin to fundraising because it is asking lawyers to donate their time or services to the court instead of their money. The committee concludes that such activities are distinguishable and not prohibited. Fundraising traditionally involves the solicitation of funds, such as donations or contributions, to civic or charitable activities (canon 4C(3)(d)(i)). A suggestion that attorneys write to or meet with an elected representative, however, is not a request for a donation of money or gifts. Rather, it encourages an individual"s participation in the political process. The budgeting process for the judicial branch is inherently political and there are few, if any, nonpolitical means to influence that process. (See Discussion, *ante*, at pt. V.A.) Attorneys" advocacy may potentially benefit the court or judicial branch financially, but the Legislature remains the source of the funds rather than any individual donor. Moreover, such political activity is not only in the court"s interest but also in the attorneys" interest in maintaining effective access to justice.

The committee also considered whether a judge"s time spent requesting attorneys to write or speak to legislators could be regarded as the use of judicial resources on grassroots lobbying. (*Miller v. Miller* (1978) 87 Cal.App.3d 762, 768-770 [absent legislative authority, expenditure of public funds to influence the public to lobby legislative bodies is prohibited].) Canon 3A requires that a judge"s prescribed duties must take precedence over all other activities. So long as judges faithfully perform their assigned duties, meeting with attorneys about budget impacts is an extrajudicial activity. As such, any requests for attorney assistance with legislative advocacy would not amount to a prohibited use of judicial resources.

VI. Conclusions

Significant reductions to a court‟s budget, or to the budget of the judicial branch as a whole, can have a severe impact on the ability to provide effective administration of justice and access to the courts. A judge‟s activities relating to those budgets and appropriations fall within the scope of "measures concerning improvement of the law, the legal system, or the administration of justice." (Canon 5D.) It is the committee‟s opinion that inviting groups of attorneys in the community to meet and discuss how they might assist the court in dealing with the impact of budget reductions is permissible judicial conduct. In so doing, judges must consider whether the invitation or the request would violate any other requirements of the Code of Judicial Ethics. When determining whom to invite and what to ask, a judge should be mindful of (1) the appearance of impropriety, (2) the impression of special influence, and (3) the potential for disqualification and disclosure. With these standards in mind, judges will be able to conduct the analysis necessary to make ethical decisions.

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

CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS
350 McAllister Street, Room 1144A
San Francisco, CA 94102
(855) 854-5366
www.JudicialEthicsOpinions.ca.gov

CJEO Formal Opinion No. 2013-002

[Issued December 11, 2013]

DISCLOSURE ON THE RECORD WHEN THERE IS NO COURT REPORTER OR ELECTRONIC RECORDING OF THE PROCEEDINGS

I. Question Presented

The Committee on Judicial Ethics Opinions has been asked to provide an opinion on the following question:

> What constitutes an "on the record" disclosure by a trial judge pursuant to canon 3E(2)(a) of the Code of Judicial Ethics when there is no court reporter or electronic recording of the proceedings?

II. Summary of Conclusions

The Code of Judicial Ethics requires that all disclosures be made "on the record." (Cal. Code of Jud. Ethics, canon 3E(2)(a).) Oral and implied disclosures that are not made part of the record do not satisfy the canon. The simplest way for a judge to ensure that a disclosure is part of the record is to state the disclosure in open court when a court

reporter is transcribing the proceedings or an electronic recording is being made of the proceedings. However, not all proceedings are reported or electronically recorded. In those circumstances, a judge must take steps to ensure that a document describing the nature of any information being disclosed is made part of the case file and must also make the disclosure orally in open court or otherwise notify the lawyers and parties of the written disclosure.

III. Introduction

Canon 3E(2)(a) of the California Code of Judicial Ethics requires judges in all trial court proceedings to disclose "on the record" any 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. Making disclosures in open court when an official court reporter is transcribing the proceedings, or when the proceedings are being electronically recorded and may be transcribed, is a simple and efficient way to ensure that they are part of the record. However, due to recent court budget cuts, more and more matters are being heard without benefit of a reporter or electronic recording. Because a judicial officer must nonetheless satisfy canon 3E(2)(a) and make "on the record" disclosures of information reasonably relevant to the question of disqualification, the committee has been asked how judges can satisfy this ethical obligation when there is no court reporter and no electronic recording. To provide guidance, this opinion addresses what constitutes a record and how to make a disclosure on the record.[1]

[1] Campaign contribution disclosures under canon 3E(2)(b) and Code of Civ. Pro. § 170.1(a)(9)(C) are not encompassed in the question posed to the committee and are beyond the scope of this opinion. The committee may address "on the record" disclosures in these special circumstances in a separate opinion.

IV. Authorities

A. Applicable Canons[2]

Canon 3E(2)(a): "E. Disqualification and Disclosure. . . . (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 disqualifications."

B. Other Authorities

California Code of Civil Procedure, sections 170.1, 170.1(a)(9)(B)-(C), 170.5(f), 269(a)-(b), and 1904.

Government Code, sections 68086, 68151(a)(1), (2), and (3), 68152(j)(14), 69957.

California Rules of Court, rules 2.952. 2.956(c) and (e)(1), 8.120(a), 8.122(b), 8.128(a), 8.320(a)-(b), 8.336(c), 8.388(b), 8.407(a), 8.480(b), 8.610(a), 8.832(a), 8.835, 8.860(a), 8.863, 8.867, 8.868, 8.910(a), 8.914, 8.920, 8.957 and 10.500(c)(1).

California Welfare & Institutions Code, sections 347, 677.

Adams v. Commission on Judicial Performance (1995) 10 Cal.4th 866, 903-906.

Copley Press, Inc. v. Superior Court (1992) 6 Cal.App.4th 106, 113.

Fletcher v. Commission on Judicial Performance (1998) 19 Cal.4th 865, 893-894.

Michael v. Aetna Life & Casualty Ins. Co. (2001) 88 Cal.App.4th 925, 932.

People v. Dubon (2001) 90 Cal.App.4th 944, 954.

California Judges Association, Ethics Committee Advisory Opinions 45, and 48.

Rothman, California Judicial Conduct Handbook (3d ed. 2007) section 7.73.

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[2] All further references to canons and to Advisory Committee commentary are to the California Code of Judicial Ethics unless otherwise indicated.

V. Discussion

Canon 3E(2)(a) of the California Code of Judicial Ethics requires judges in all trial court proceedings to make an "on the record" disclosure of 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.[3] While the Code of Judicial Ethics does not define "on the record," California Supreme Court decisions and other authorities interpreting canon 3E(2)(a) make clear that oral and implied disclosures that do not become part of the record are insufficient (*Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 903-906 [general knowledge, affirmative references, and incomplete oral disclosures constitute failure to disclose on the record for purposes of waiver]; *Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 893-894 [no evidence of disclosure on the record where the judge claimed to have advised of *ex parte* contacts at an in chambers sentencing with no record of the proceedings]; Cal. Judges Assoc., Formal Ethics Opinion No. 45 (1997) p. 6 [the record or the clerk's minutes of the proceedings must reflect a disclosure and merely mentioning to counsel is insufficient]; Cal. Judges Assoc., Formal Ethics Opinion No. 48 (1999) p. 6 [implied disclosure does not satisfy the requirement of disclosure on the record]).

These authorities raise the question of what constitutes a record in trial court proceedings and, more specifically, how to accomplish making a disclosure part of the record where there is no record of oral proceedings.

A. What constitutes a record?

Because the canons do not define "on the record" for purposes of judicial disclosures, we look to other sources for guidance. Several statutes define records of court proceedings in broad terms. The Code of Civil Procedure defines a judicial record as the "record or official entry of the proceedings in a Court of justice, or of the official

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[3] The committee has not been asked to provide an opinion on the sufficiency of any particular disclosures under the Code of Judicial Ethics and other statutes.

act of a judicial officer, in an action or special proceeding" (Code Civ. Proc., § 1904). For purposes of trial court record management, the Government Code provides that a court record consists of ". . . [a]ll filed papers and documents in the case . . . ," [a]dministrative records filed in an action or proceeding . . . [including] . . . transcripts, and tapes of electronically recorded proceedings filed, lodged, or maintained in connection with the case . . . ," and other records, including minutes (§§ 68151(a)(1), (2), (3), 68152(j)(14)). For purposes of judicial administration record requests, an adjudicative record is defined as ". . . any writing prepared for or filed or used in a court proceeding . . . ." (Cal. Rules of Court, rule 10.500(c)(1).)

The rules of court governing appellate matters are instructive because they narrow the broad scope of trial court records for purposes of review on appeal. Those rules specify that a record of trial court proceedings contains two parts: (1) the record of oral proceedings, and (2) the record of written documents. (*See*, Cal. Rules of Court, rules 8.120(a)-(b) [civil appeals], 8.320(a)-(c) [criminal appeals].)

1. Record of Oral Proceedings

A record of proceedings is required to be made by an official shorthand court reporter in juvenile proceedings (Welf. & Inst. Code, §§ 347, 677) and in felony proceedings when requested by the defendant or prosecution (Code Civ. Proc., § 269, subd. (a)(2)). Except in those matters where a reporter is required, local courts have the discretion to decide, as a matter of court administration, whether an official reporter is made available. (Welf. & Inst. Code, §§ 347, 677; Code Civ. Proc., § 269, subd. (a)(2); Cal. Rules of Court, rule 2.956(e)(1).) In general civil matters where an official court reporter is not made available by the court, the parties may arrange for the presence of a certified shorthand reporter at their expense. (Gov. Code, § 68086; Cal. Rules of Court, rule 2.956(c).) In all proceedings where a shorthand reporter makes a verbatim record, an official transcript of the proceedings may be requested. (Code Civ. Proc., § 269, subd. (b).) Thus, in those proceedings where a court reporter is present, oral disclosures made in open court will be "on the record" as required by canon 3E(2)(a).

In some proceedings where neither the court nor a party provides an official shorthand reporter, the local court may elect to make electronic recording equipment available. (Gov. Code, § 59957 [electronic recording is permitted by statute in limited civil, misdemeanor, and infraction proceedings only].) Written transcripts of official electronic recordings may be prepared at the request of the court or a party. (Cal. Rules of Court, rule 2.952(g).) In some circumstances, the electronic recording may be used as the record of oral proceedings in lieu of a reporter's transcript prepared from the recording. (Cal. Rules of Court, rule 2.952(i), (j).) Oral disclosures made in open court at proceedings that are electronically recorded will also be "on the record" as required by canon 3E(2)(a).

Although court reporters are statutorily required in juvenile and felony matters and courts are authorized to provide electronic recording equipment in certain proceedings as noted above, as a matter of practical reality and current economic constraints, neither reporters, nor recording equipment, will be available in large numbers of proceedings that come before the courts every day. Where there is no oral record, the record of written documents becomes significant to the question of how a trial judge complies with the obligation to make disclosures "on the record."

2. Record of Written Documents

While there is no definition of a record for purposes of judicial disqualification, appellate rules identify what documents are recognized as the record of proceedings for purposes of review. On appeal, the record of written documents is set forth in the clerk‟s transcript, which generally includes notices, judgments, orders, minute orders, court minutes, the register of actions, and other documents filed or lodged in the case (Cal. Rules of Court, rules 8.120(a)(A), 8.122(b), 8.320(b), 8.336(c), 8.388(b), 8.407(a), 8.480(b), 8.610(a)(1), 8.832(a), 8.860(a)(1)(A), 8.910(a)(1)(A), 8.920(1)). In some appellate matters, however, the record of written documents may alternatively consist of the court‟s file, where allowed by local rule (Cal. Rules of Court, rules 8.120(a)(C), 8.128(a), 8.860(a)(1)(B), 8.863, 8.910(a)(1)(B), 8.914, 8.920(1)). In small claims

appeals, the record on appeal will always consist of the court file and all related papers (rule 8.957).

For purposes other than judicial disqualification, several courts have evaluated specific court documents and found that minute orders and the court"s official minutes suffice as "a record" when entered in the case file (*People v. Dubon* (2001) 90 Cal.App.4th 944, 954 [a minute order qualified as „a record"]; *Copley Press, Inc. v. Superior Court* (1992) 6 Cal.App.4th 106, 113 [official court minutes accurately and officially reflect the work of the court]; *Michael v. Aetna Life & Casualty Ins. Co.* (2001) 88 Cal.App.4th 925, 932 [a court order is a document that is either entered in the court's permanent minutes or signed by the judge and stamped „filed"]).

From these cases and the rules of court, we conclude that all documents filed, entered, or lodged in the case file constitute a trial court"s written record of proceedings. Such documents include minute orders, the official clerk"s minutes, and formal orders entered in the case file. Thus, when there is no court reporter or electronic recording, and therefore no record of oral proceedings, disclosures must be made part of the written record of proceedings in order to be "on the record" pursuant to canon 3E(2)(a).

B. How To Accomplish Making A Disclosure Part of the Record

Where there is not a reporter"s transcript or electronic recording, an oral disclosure may be made part of the written record of proceedings by preparing and entering a disclosure document in the court file. The written disclosure may take many forms. It may be a brief handwritten document that outlines the information disclosed. It may also take the form of a formal, complete statement, detailing the content of the disclosure.

The written disclosure may also be entered in the case file in the form of a minute order or official court minutes. However, merely having the clerk enter in the minutes that a disclosure has been made would be insufficient. (*Adams v. Commission on Judicial Performance, supra,* 10 Cal.4th 866, 903-906.) When this procedure is used, the minutes should reflect both the fact that the disclosure was made and the nature of the information disclosed. Although the task of documenting the disclosure may be

delegated to a clerk, ultimately it is the judge's responsibility to confirm that the nature of the disclosure has been accurately documented and made a part of the case file. (See *Adams v. Commission on Judicial Performance*, *supra*, 10 Cal.4th 866, 906 [failure to disclose on the record in general terms the nature of the disqualifying relationship was improper for purposes of waiver].)

Moreover, because disclosures are intended to provide the parties and lawyers appearing before a judge with the information being disclosed, simply filing a written disclosure document in the court file is not sufficient. (See Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007) § 7.73, p. 381 [purpose of canon 3E(2) is to provide the parties and their counsel with information relevant to recusal determinations].) To comply with the canons, a judge making disclosures where there is no court reporter or electronic recording must document the disclosure as noted above and make the disclosure orally in open court or otherwise notify the lawyers and parties of the written disclosure.

VI. Conclusions

In order to comply with the canon 3E(2)(a) requirement that disclosures be made "on the record," trial court judges hearing matters that are not reported or electronically recorded must ensure that any disclosures become a part of the written record of proceedings. To accomplish this, disclosures must be documented in a writing that is entered in the case file as a minute order, official clerk"s minutes, or a formal order. The lawyers and parties must also be notified orally or otherwise by service of the written disclosure document.

As guidance, the committee provides the following steps that may be taken in all cases where disclosure is required:

1. If the proceeding is being reported or electronically recorded, make an oral disclosure in open court, stating in general terms the nature of any information being disclosed.
2. If the proceeding is not being reported or electronically recorded:

a) Prepare or have prepared a disclosure document that states in general terms the nature of any information disclosed;
b) Enter the disclosure document in the case file as a minute order, official court minutes, or a formal order;
c) Make an oral disclosure in open court or otherwise notify the lawyers and parties of the written disclosures; and
d) Check to confirm that the disclosure document accurately states the information disclosed and that it is entered in the case file.

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

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San Francisco, CA 94102
(855) 854-5366
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CJEO Formal Opinion No. 2013-003

[Issued December 11, 2013]

DISQUALIFICATION BASED ON JUDICIAL CAMPAIGN CONTRIBUTIONS FROM A "LAWYER IN THE PROCEEDING"

I. Questions Presented

The statute governing disqualification of California trial court judges provides for mandatory disqualification if a judge has received a campaign contribution exceeding $1,500 from a party or lawyer in a proceeding (Code Civ. Proc., § 170.1, subd. (a)(9)(A)).[1] The Committee on Judicial Ethics Opinions (CJEO) has been asked to provide an opinion on two questions:

1. If several lawyers in the same private law firm or public law office individually contribute amounts of $1,500 or less, and if, when aggregated, the contributions exceed $1,500, is the judge disqualified from proceedings involving any lawyer from the firm or office?

[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

2. If a law firm contributes an amount greater than $1,500, is the judge disqualified from proceedings involving any lawyer from the firm?

II. Summary

It is the committee's opinion that disqualification is not mandated by section 170.1, subdivision (a)(9)(A) if a "lawyer in the proceeding" practices law with other lawyers who, collectively, have made campaign contributions exceeding $1,500 or when a "lawyer in the proceeding" practices in a private law firm which has made a campaign contribution that exceeds $1,500. In either circumstance, however, the judge must consider whether those aggregated or law firm contributions might nevertheless cause a reasonable person to doubt the judge's impartiality for purposes of discretionary disqualification, pursuant to section 170.1, subdivision (a)(6)(A) and (9)(B).

III. Authorities

A. Applicable Canon Provisions[2]

Canon 2B(1)

Canon 3E(1)

Canon 3E(2)(b)(i)

Canon 3E(4)

Canon 3E(5)

B. Other Authorities

Code of Civil Procedure, sections 170.1 and 170.5, subdivisions (b), (e) and (f).

Government Code, section 84211, subdivision (f).

Caperton v. A. T. Massey Coal Co., Inc. (2009) 556 U.S. 868.

Apple Inc. v. Superior Court (2013) 56 Cal.4th 128.

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[2] All further references to canons and to advisory committee commentary are to the California Code of Judicial Ethics unless otherwise indicated. The full text of the canons cited in this opinion appear in the attached appendix A.

People v. Freeman (2010) 47 Cal.4th 993.

Holmes v. Jones (2000) 83 Cal.App.4th 882.

Rothman, California Judicial Conduct Handbook (3d ed. 2007) sections 7.16-7.17, pages 307-312 and appendix F, pages 1-2.

IV. Discussion

A. Introduction

Section 170.1 sets forth the grounds for judicial disqualification in the trial courts. In 2010, the legislature added subdivision (a)(9) to the statute. This new provision provides for mandatory disqualification if a judge has received a campaign contribution in excess of $1,500 from a party or "lawyer in the proceeding." (§ 170.1, subd. (a)(9)(A).) Disqualification is mandated for six years following the election for which the disqualifying contribution was received. (*Ibid.*)

Since the enactment of this amendment, questions have arisen regarding the subdivision"s application to aggregated campaign contributions from associated lawyers, and to contributions made by law firms. These questions arise because, while the subdivision on its face refers only to the contributions of a single "lawyer in the proceeding," that term is defined in other provisions of the disqualification statute to include lawyers associated in the private practice of law. The committee has been asked to address these questions and provide guidance.

Before responding to the question, however, we briefly review the historical context of—and impetus behind—the legislative amendment, which sheds light on the purpose of the statute.

B. Background

The legislative history of section 170., subdivision (a)(9) reflects two sources for paragraph (9). They are: (1) the United States Supreme Court decision in *Caperton v. A. T. Massey Coal Co., Inc.* (2009) 556 U.S. 868 [129 S. Ct. 2252] (*Caperton*), and (2) the final report of the California Judicial Council"s Commission for Impartial Courts.

1. The Caperton *Case*

In *Caperton*, a recently elected state supreme court justice refused to disqualify himself after receiving $3 million in campaign contributions from a party whose appeal from an adverse judgment would be heard by the supreme court. (*Caperton, supra,* 556 U.S. at pp. 873-874.) The timing of the contributions were such that, if elected, the justice would consider the party's appeal. Once elected, the justice denied repeated recusal motions on the grounds that he lacked actual bias. (*Id.,* at pp. 881-883.) The United States Supreme Court found the justice's "probing search" into his subjective motives to be insufficient and held that an objective standard was required under the federal due process clause. (*Id.,* at p. 865.) Applying this standard, the court concluded that the amount and timing of the contributions required recusal:

> "[T]here is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." (*Caperton, supra,* 556 U.S. at p. 884.)

Recognizing that "judicial integrity is a state interest of the highest order," the United States Supreme Court acknowledged that states may adopt more stringent standards for disqualification than the objective standard imposed by the due process clause. (*Caperton, supra,* 556 U.S. at p. 889.) The legislative history of section 170.1, subdivision (a)(9) is replete with references to the *Caperton* case as a compelling reason for the adoption of more stringent standards requiring disqualification based on campaign contributions.[3]

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[3] (See Assem. Com. on Judiciary, analysis of Assem. Bill No. 2487 (2009-2010 Reg. Sess.) Apr. 27, 2010, pp. 4-5, 7, 12 [the stunning facts in *Caperton* are an egregious example of corruption in judicial elections]; Assem. Com. on Judiciary, 3d reading analysis of Assem. Bill No. 2487 (2009-2010 Reg. Sess.) May 4, 2010, p. 4 [*Caperton* exposed growing concerns about potentially corrupting effects of campaign contributions in judicial elections]; Sen. Judiciary Com., analysis of Assem. Bill No. 2487 (2009-2010 Reg. Sess.) May 4, 2010, pp. 2, 5-6 [*Caperton* is an example of increasingly expensive and partisan judicial elections]; Sen. Rules Com., Floor Analysis of Assem. Bill No. 2487

2. The CIC Final Report and Recommendations

The Commission for Impartial Courts (CIC) was formed by the Judicial Council in 2007 to study ways to ensure judicial impartiality and accountability, particularly in the context of judicial elections. In 2009, the commission issued a final report containing, among other things, specific recommendations for legislation. The recommendations were based on an in-depth discussion of judicial campaign financing, including consideration of *Caperton* (Judicial Council of Cal., Com. for Impartial Courts: Final Report, Recommendations for Safeguarding Judicial Quality, Impartiality, and Accountability in Calif. (Dec. 2009) pp. 28-59 [CIC Final Report]).

The CIC‟s recommendation proposed standards for disqualification based on both the amount and timing of campaign contributions in judicial elections. Specifically, the CIC recommended setting the threshold amount for mandatory disqualification of trial court judges at $1,500 and recommended setting the time period for disqualifications at two years. (CIC Final Report, *supra,* Recommendation 30, at pp. 34-35, endorsed by the Judicial Council, Feb. 26, 2010.) The recommended $1,500 threshold was based on the Legislature‟s adoption of this amount as defining a judge‟s financial interest in a party for purposes of disqualification in sections 170.1, subdivision (a)(3) and 170.5, subdivision (b). This sum was also based on a campaign disclosure database prepared by the Task Force on Judicial Campaign Finance, which showed that a relatively small number of individual contributions exceed $1,500. (CIC Final Report, *supra,* at p. 40, fn. 35.) The CIC therefore concluded that $1,500 struck the best balance between the competing values of maintaining public trust and confidence in impartial judicial decision making

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(2009-2010 Reg. Sess.) Aug. 2, 2010, p. 4 [*Caperton* exemplifies the considerable time often spent raising money in contested judicial elections]; Governor‟s Off. of Planning and Research, Legis. Unit, enrolled bill rep. on Assem. Bill No. 2487, Aug. 16, 2012, p. 4) [*Caperton* is a recent development exposing potential corruption in judicial elections].)

and allowing judicial candidates to engage in necessary fundraising.[4] (CIC Final Report, *supra*, at p. 43.)

Throughout the legislative process, the bill analyses consistently represented section 170.1, subdivision (a)(9)(A) as being based on, implementing, and encompassing the recommendation of the CIC.[5]

B. Statutory Language

The question before us is whether disqualification is mandated by section 170.1, subdivision (a)(9) if a judge receives campaign contributions from associated lawyers who individually contribute $1,500 or less but whose combined contributions exceed $1,500. To answer that question "'"our fundamental task is to ,,ascertain the intent of the

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[4] The CIC Final Report also discussed whether multiple contributions made by individuals affiliated with the same entity should be subject to mandatory disqualification. It concluded that "a judicial officer [should] disqualify himself or herself if he or she knows or reasonably should know that multiple individual contributions that would, in the aggregate, amount to the recommended threshold are all affiliated with the same entity." (CIC Final Report, *supra,* at p. 41.) Notably, however, that comment is not based on the historical contributions data analyzed by the Task Force, nor was this expression of intent included in the CIC"s recommendation for legislation setting explicit disqualification standards. Rather, the CIC recommended that: "Each trial court judge should be subject to mandatory disqualification from hearing any matter involving a party, counsel, party affiliate, or other interested party who has made a monetary contribution [in excess] of [$1,500] to the judge"s campaign, directly or indirectly . . . ." (CIC Final Report, *supra,* at p. 34.) It is this recommendation that the Legislature relied upon. (Assem. Com. on Judiciary, 3rd reading analysis of Assem. Bill No. 2487, (2009-2010 Reg. Sess.) May 4, 2010, p. 5.)

[5] (See Assem. Com. on Judiciary, analysis of Assem. Bill No. 2487 (2009-2010 Reg. Sess.) Apr. 27, 2010, p. 10 [bill seeks to implement CIC"s recommendation of mandatory disqualification]; Assem. Com. on Judiciary, 3d reading analysis of Assem. Bill No. 2487 (2009-2010 Reg. Sess.) May 4, 2010, p. 5 [bill generally tracks CIC"s recommendation of mandatory disqualification]; Sen. Judiciary Com., analysis of Assem. Bill No. 2487 (2009-2010 Reg. Sess.) June 29, 2010, p.6 [bill based on CIC Final Report]; Governor"s Off. of Planning and Research, Legis. Unit, enrolled bill rep. on Assem. Bill No. 2487, Aug. 16, 2012, p. 3 [bill substantially encompasses CIC"s recommendation to require mandatory disqualification for the specified level of contribution].)

lawmakers so as to effectuate the purpose of the statute.‘”’” (*Apple Inc. v. Superior Court* (2013) 56 Cal.4th 128, 135.) We must first examine the statutory text, giving the language its usual and ordinary meaning while construing the words “‘in light of the statute as a whole and the statute‘s purpose.‘” (*Ibid*.) Statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. (*Holmes v. Jones* (2000) 83 Cal.App.4th 882, 888.)

As has been described, section 170.1 was recently amended by the Legislature to add subdivision (a)(9). This new provision has four component parts related to campaign contributions: (A) mandatory disqualification; (B) discretionary disqualification; (C) disclosure; and (D) waiver. (§170.1, subd. (a)(9)(A)-(D).) Disqualification based on campaign contribution amounts is addressed in subparagraphs (A) and (B).

Subparagraph (A) mandates disqualification if “the judge has received a contribution in excess of . . . $1,500 from a party or lawyer in the proceeding and either of the following applies: [¶] (i) The contribution was received in support of the judge‘s last election, if the last election was within the last six years [or] [¶] (ii) The contribution was received in anticipation of an upcoming election.” (§ 170.1, subd. (a)(9)(A).)

Subparagraph (B) provides: “[n]otwithstanding subparagraph (A), the judge shall be disqualified based on a contribution of a lesser amount if subparagraph (A) of paragraph (6) applies.” (§ 170.1, subd. (a)(9)(B).)[6] In other words, subparagraph (B) requires a judge to make his or her own decision about disqualification based on contributions of $1,500 or less if, for any reason, the judge believes the lesser contributions raise questions about impartiality.

Significantly, neither subparagraph (A) nor (B) addresses aggregation: neither contains language providing that disqualification is required based on a combined sum of

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[6] Section 170.1, subdivision (a), subparagraph (6)(A) provides that a judge is disqualified if, “[f]or any reason: [¶] (i) [t]he judge believes his or her recusal would further the interests of justice[;] [¶] (ii) [t]he judge believes there is a substantial doubt as to his or her capacity to be impartial[; or] [¶] (iii) [a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.” (§ 170.1, subd. (a)(6)(A)(i)-(iii).)

contributions from lawyers practicing in the same firm or office. On its face subparagraph (A) applies only to a contribution exceeding $1,500 from "a…lawyer in the proceeding." (§ 170.1, subd. (a)(9)(A).) The usual and ordinary meaning of that term refers to an individual lawyer appearing in the matter being heard. The subparagraph does not provide a definition of the term "lawyer in the proceeding" nor does it otherwise suggest the term was intended to include either lawyers with whom the appearing lawyer practices or the law firm in which the appearing lawyer practices. We must examine, however, whether the plain meaning of the subdivision"s words should be construed differently in light of the statute as a whole. We therefore examine the term in its entire statutory context.

The term "lawyer in the proceeding" appears in seven subparagraphs of section 170.1, subdivision (a). We quote them here, in context (italics added):

(a) A judge shall be disqualified if any one or more of the following are true:

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(2) (A) The judge served as a *lawyer in the proceeding*, or in any other proceeding involving the same issues he or she served as a lawyer for a party in the present proceeding or gave advice to a party in the present proceeding upon a matter involved in the action or proceeding.

(B) A judge shall be deemed to have served as a *lawyer in the proceeding* if within the past two years:

(i) A party to the proceeding, or an officer, director, or trustee of a party, was a client of the judge when the judge was in the private practice of law or a client of a lawyer with whom the judge was associated in the private practice of law.

(ii) A *lawyer in the proceeding* was associated in the private practice of law with the judge.

(C) A judge who served as a lawyer for, or officer of, a public agency that is a party to the proceeding shall be deemed to have served as a *lawyer in the proceeding* if he or she personally advised or in any way represented the public agency concerning the factual or legal issues in the proceeding.

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[A judge shall be disqualified if]

> (5) A lawyer or a spouse of a *lawyer in the proceeding* is the spouse, former spouse, child, sibling, or parent of the judge or the judge"s spouse or if such a person is associated in the private practice of law with a *lawyer in the proceeding*.
> ***

[A judge shall be disqualified if]

> (6) (A) For any reason [the judge"s impartiality is reasonably subject to doubt]
>
> ….
>
> (B) Bias or prejudice toward a *lawyer in the proceeding* may be grounds for disqualification.
> ***

[A judge shall be disqualified if]

> (9) (A) The judge has received a contribution in excess of one thousand five hundred dollars ($1500) from a party or *lawyer in the proceeding*, and either of the following applies:
>
> (i) The contribution was received in support of the judge's last election, if the last election was within the last six years.
>
> (ii) The contribution was received in anticipation of an upcoming election. (§ 170.1, subd. (a).)

Read together, these provisions show a cohesive pattern and harmonize the terms of the statute as a whole: The Legislature explicitly provided an expansive use of the term "lawyer in the proceeding" in two provisions, where it intended to refer to more than one lawyer, *i.e.*, multiple lawyers associated in the private practice of law (§ 170.1, subd. (a)(2)(B)(i) , (ii)), and multiple family members or lawyers associated in the private practice of law with family members (§ 170.1, subd. (a)(5)). In another provision the statute provides that a judge is deemed to have served as a "lawyer in the proceeding" if he or she "personally advised or in any way represented the public agency concerning the factual or legal issues in the proceeding." (§ 170.1, subd. (a)(2)(C).) The judge is thus also disqualified based upon the *subject matter* of his or her representation or advice provided to a public agency which is a party to the proceeding. In this provision the term "lawyer in the proceeding" is also in the singular form, and refers only to one individual

(the judge). In the two other subparagraphs of the statute using that term, the Legislature did not add any explanatory text or other language "deeming" the term "lawyer in the proceeding" to have a different or more expansive meaning. (§ 170.1, subd. (a)(6)(B), (9)(A).) From this we conclude the Legislature intended the plain meaning of the term "lawyer in the proceeding" -- i.e., a single lawyer-- to apply *unless* additional text expands or deems its meaning to be something broader than its plain meaning.

This interpretation is echoed in the California Code of Judicial Ethics canons governing appellate disqualification (canon 3E). As has been noted, section 170.1 applies only to superior court judges. There are no statutory disqualification provisions for appellate justices. Canon 3(E)(4) and canon 3E(5)(a)-(f), however, restate the disqualification provisions of section 170.1 as ethical rules applicable to appellate justices. These canon provisions use the terms "lawyer in the proceeding," "lawyer in the pending proceeding," and "lawyer in a matter before the court" to refer to a single individual (Cal. Code Jud. Ethics, canon 3 (E)(5)(a), (e), (j)). When the canon provisions refer to multiple individuals, additional text is added, such as in the phrase "a lawyer in the proceeding [who] was associated with the justice in the private practice of law" (id., canon 3E(5)(b); see also canon 3E(5)(e)). Thus, the canon provisions applicable to appellate justices interpret the language of section 170.1 in a manner consistent with our understanding of the legislature"s intent.

Additionally, an interpretation that the provisions of section 170.1, subdivision (a)(2)(B) also apply to subdivision (a)(9)—that a "lawyer in the proceeding" includes lawyers associated in the private practice of law—could lead to absurd results in some cases. For example, because lawyers employed by the government and legal aid lawyers are excluded from the definition of "private practice of law" (Code Civ. Proc., § 170.5, subd. (e)), the aggregation requirement would not apply to any lawyer working for a district attorney"s office. Consequently, aggregated contributions totaling $20,000 from 50 deputy district attorneys in a 90-lawyer office would not *mandate* disqualification from any of the district attorneys" cases but three checks totaling $1,501 from a 75-lawyer private firm would require disqualification from any case in which any of the

firm‟s 75 lawyers is involved. This is not a rational distinction with respect to the public‟s perception of a judge‟s bias, or lack thereof.

In sum, it is the committee‟s opinion that the plain meaning of "lawyer in the proceeding" applies to section 170.1, subdivision (a)(9), and the Legislature did not intend the $1,500 threshold for disqualification to apply to aggregated contributions from multiple individuals from the same law firm, nor to all individuals practicing law in a contributing law firm. A judge receiving such contributions however, is also *required* to make a determination as to whether disqualification is called for under section 170.1, subdivision (a)(6)(iii) and (9)(B). (See Rothman, Cal. Judicial Conduct Handbook (3d ed. 1997) §§ 7.16-17, pp. 307-312, and append. F, pp. 1-2 .) Indeed, the objective standard in section 170.1, subdivision (a)(6)(iii) is an explicit ground for disqualification and is intended to ensure public confidence in the judiciary by requiring disqualification if a person aware of the facts would reasonably entertain doubts concerning a judge‟s impartiality (*People v. Freeman* (2010) 47 Cal.4th 993, 1000-1005, citing *Caperton, supra*, 556 U.S. at pp. 879-889.) The facts a person would need to be aware of under the objective standard are known both to the judge and the public. (Gov. Code § 84211(f); Code Civ. Proc., § 170.1, subd. (a)(9)(C).) The committee therefore concludes that mandatory disqualification for individual attorney contributions over the $1,500 threshold, together with discretionary disqualification for aggregated and law firm contributions, sufficiently ensures the public trust in an impartial and honorable judiciary.

V. Conclusions

Section 170.1, subdivision (a)(9)(A) does not mandate disqualification for aggregated contributions or law firm contributions in excess of $1,500. The disqualification statute as a whole uses the term "lawyer in the proceeding" in a consistent pattern that includes explicit text when deeming or using the term to include multiple individuals. When no such text is used in the statute, as is the case in subdivision (a)(9), the plain meaning of the term applies to the individual lawyer appearing in the matter.

Section 170.1 also provides that judges must evaluate all circumstances, including aggregated and law firm contributions, to determine whether the appearance of impartiality has been compromised, pursuant to subdivision (a))(6)(iii) and (9)(B). The statutory purpose of ensuring that campaign contributions do not influence judicial decision making or create the appearance of influencing judicial decision making is fully served by the combined requirements for mandatory and discretionary disqualification.

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

APPENDIX A

California Code of Judicial Ethics Canons Cited in

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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 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:

. . . .

(b) Campaign contributions in trial court elections.

(i) Information required to be disclosed: In any matter before a judge who is or was a candidate for judicial office in a trial court election, the judge shall disclose any contribution or loan of $100 or more from a party, individual lawyer, or law office or firm in that matter as required by this canon, even if the amount of the contribution or loan would not require disqualification. Such disclosure shall consist of the name of the contributor or lender, the amount of each contribution or loan, the cumulative amount of the contributor's contributions or lender's loans, and the date(s) of each contribution or loan. The judge shall make reasonable efforts to obtain current information regarding contributions or loans received by his or her campaign and shall disclose the required information on the record.

Canon 3E: (4) An appellate justice shall disqualify himself or herself in any proceeding if for any reason:

. . . .

(c) the circumstances are such that a reasonable person aware of the facts would doubt the justice's ability to be impartial.

Canon 3E(5): "Disqualification of an appellate justice is also required in the following instances:

(a) The appellate justice has appeared or otherwise served as a lawyer in the pending proceeding, or has appeared or served as a lawyer in any other proceeding involving any of the same parties if that other proceeding related to the same contested issues of fact and law as the present proceeding, or has given advice to any party in the present proceeding upon any issue involved in the proceeding.

(b) Within the last two years, (i) a party to the proceeding, or an officer, director or trustee thereof, either was a client of the justice when the justice was engaged in the private practice of law or was a client of a lawyer with whom the justice was associated in the private practice of law; or (ii) a lawyer in the proceeding was associated with the justice in the private practice of law.

(c) The appellate justice represented a public officer or entity and personally advised or in any way represented such officer or entity concerning the factual or legal issues in the present proceeding in which the public officer or entity now appears.

. . .

(e) The justice or his or her spouse or registered domestic partner, or a person within the third degree of relationship to either of them, or the spouse or registered domestic partner thereof, is a party or an officer, director, or trustee of a party to the proceeding, or a lawyer or spouse or registered domestic partner of a lawyer in the proceeding is the spouse, registered domestic partner, former spouse, former registered domestic partner, child, sibling, or parent of the justice or of the justice's spouse or registered domestic partner, or such a person is associated in the private practice of law with a lawyer in the proceeding.

(f) The justice . . . (iii) has a personal bias or prejudice concerning a party or a party's lawyer.

. . .

(j) The justice has received a campaign contribution of $5,000 or more from a party or lawyer in a matter that is before the court, and either of the following applies:

(i) The contribution was received in support of the justice's last election, if the last election was within the last six years; or

(ii) The contribution was received in anticipation of an upcoming election.

Notwithstanding Canon 3E(5)(j), a justice shall be disqualified based on a contribution of a lesser amount if required by Canon 3E(4). The disqualification required under Canon 3E(5)(j) may be waived if all parties that did not make the contribution agree to waive the disqualification."

CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS
350 McAllister Street, Room 1144A
San Francisco, CA 94102
(855) 854-5366
www.JudicialEthicsOpinions.ca.gov

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JUDICIAL SCREENING OF EX PARTE APPLICATIONS FOR NON-DOMESTIC-VIOLENCE EMERGENCY FAMILY LAW ORDERS

I. Issue Presented

The Committee on Judicial Ethics Opinions (CJEO) has been asked to provide an opinion on the following question:

> A local rule authorizes judicial officers to review all requests for non-domestic-violence emergency orders in family law matters, in order to determine the necessity for an emergency hearing, even where the request is made without prior notice to the other party or without a request for waiver of notice and a signed explanation of why notice should not be given. Does this local rule facilitate the violation of the Code of Judicial Ethics?

II. Summary of Conclusions

A local rule setting up a procedure by which a judicial officer screens all requests for emergency non-domestic-violence family law orders without regard to whether notice

has been given to the other party or whether a request has been made for waiver of notice and a signed explanation has been provided showing why such notice should not be required is not authorized by the rules of court governing family law emergency orders and therefore contravenes the prohibition against considering ex parte communications in canon 3B(7) of the Code of Judicial Ethics. Therefore, a local rule that purports to authorize such screening facilitates the violation of canon 3B(7) of the Code of Judicial Ethics.

III. Relevant Facts

A local rule[1] provides that when a party in a family law proceeding seeks to have a request for an order (i.e., a motion or request for order) considered for emergency hearing, the clerk is to forward the request to a judicial officer for review. During that review, the judicial officer screens the papers to determine whether they set forth facts showing the necessity for an emergency hearing.[2] If the judicial officer determines that good cause for an emergency hearing exists, a date and time for the emergency hearing is set, and the party seeking relief is required to give notice of the emergency hearing to the other party.[3] Under the local rule, no notice to the other party of the application for an

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[1] For purposes of this opinion, the local rule is described by its operative and relevant features. Providing the text of the local rule would identify a party whose inquiry or conduct the committee is required to maintain as confidential. (Cal. Rules of Court, rule 9.80(h).)

[2] Specifically, the judicial officer is to determine whether an emergency hearing is necessary (1) to avoid immediate danger or irreparable harm to a party or to the children involved in the matter, (2) to help prevent the immediate loss or damage to property subject to disposition in the case, or (3) to make orders concerning any of the matters set forth in rule 5.170 of the California Rules of Court (see *post*, footnote 8 and accompanying text).

[3] The local rule does not specify the procedure that follows a determination that good cause for an emergency hearing does *not* exist, except to say that the request for order must be filed in any event.

emergency hearing is required before the judicial officer screens the application to determine if good cause for an emergency hearing exists, nor does the moving party have to request a waiver of notice and show why notice should not be given before that screening. Instead, as a matter of course, the screening of the application to determine if good cause for an emergency hearing exists occurs without prior notice to the other party.

IV. Authorities

A. Applicable Canons[4]

Canon 3B(7): "A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, full right to be heard according to law. . . . 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 as follows:

"[¶] . . . [¶]

"(b) A judge may initiate, permit, or consider ex parte communications, where circumstances require, for scheduling, administrative purposes, or emergencies that do not deal with substantive matters provided:

"(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

"(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

"(c) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so or when authorized to do so by stipulation of the parties.

"(d) If a judge receives an unauthorized ex parte communication bearing upon the substance of a matter, 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."

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[4] All further references to canons are to the California Code of Judicial Ethics unless otherwise indicated.

B. Other Authorities

California Rules of Court, rules 3.1200 et seq., 5.151-5.170, 9.80

Abramson, *The Judicial Ethics Of Ex Parte And Other Communications* (Winter 2000) 37 Hous. L.Rev. 1343, 1354, 1370

V. Discussion

A. Rules of Court Governing Emergency Orders[5]

In family law cases, applications for emergency orders -- also known as ex parte applications -- are governed by rules 5.151 and 5.165 through 5.170 of the California Rules of Court, which are known as the emergency orders rules.[6] (Cal. Rules of Court, rule 5.151(a).) "The purpose of a request for emergency orders is to address matters that cannot be heard on the court's regular hearing calendar." (*Id.*, rule 5.151(b).) More specifically, "[t]he process is used to request that the court:

"(1) Make orders to help prevent an immediate danger or irreparable harm to a party or to the children involved in the matter;

"(2) Make orders to help prevent immediate loss or damage to property subject to disposition in the case; or

"(3) Make orders about procedural matters, including the following:

"(A) Setting a date for a hearing on the matter that is sooner than that of a regular hearing (granting an order shortening time for hearing);

"(B) Shortening or extending the time required for the moving party to serve the other party with the notice of the hearing and supporting papers (grant an order shortening time for service); and

"(C) Continuing a hearing or trial." (*Ibid*.)

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[5] This opinion addresses only those matters that fall under the rules of court governing family law emergency orders.

[6] These rules generally do *not* apply to ex parte applications for domestic-violence restraining orders under the Domestic Violence Prevention Act. (See Cal. Rules of Court, rule 5.151(a).)

The declarations in support of a request for emergency orders "must contain facts within the personal knowledge of the declarant that demonstrate why the matter is appropriately handled as an emergency hearing, as opposed to being on the court's regular hearing calendar." (Cal. Rules of Court, rule 5.151(d)(2).) Additional requirements apply to requests for emergency orders relating to child custody and visitation. (*Id.*, rule 5.151(d)(5).) In either case, however, the evidence submitted in support of a request for emergency orders must demonstrate that the issuance of an emergency order is necessary to achieve the purposes of the rule.

When a request for emergency orders is made, "notice to the other party is shorter than in other proceedings." (Cal. Rules of Court, rule 5.151(b).) Generally, "[a] party seeking emergency orders under this chapter must give notice to all parties or their attorneys so that it is received no later than 10:00 a.m. on the court day before the matter is to be considered by the court." (*Id.*, rule 5.165(b).) "Notice of appearance at a hearing to request emergency orders may be given by telephone, in writing, or by voicemail message." (*Id.*, rule 5.165(a).) When notice of an emergency hearing has been given, the moving party must include with the request for emergency orders a written declaration based on personal knowledge regarding the details of the notice given.[7] (*Id.*, rule 5.151(c)(4); see *id*., rule 5.151(e)(2)(A).) If notice of the emergency hearing was given later than 10:00 a.m. the court day before the hearing, that declaration must also include a request that "the court approve the shortened notice" and must provide facts showing "exceptional circumstances that justify the shorter notice." (*Id.*, rule 5.165(b)(1).)

Notice to the other party of the request for emergency orders can be "waived under exceptional and other circumstances as provided in the [emergency orders] rules." (Cal. Rules of Court, rule 5.151(b).) Like shortened notice, waiver of notice requires court approval. To ask the court to waive notice of the request for emergency orders, "the

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[7] Specifically, the declaration must describe "[t]he notice given, including the date, time, manner, and name of the party informed, the relief sought, any response, and whether opposition is expected and that, within the applicable time under rule 5.165, the applicant informed the opposing party where and when the application would be made[.]" (Cal. Rules of Court, rule 5.151(e)(2)(A).)

party [seeking the waiver] must file a written declaration signed under penalty of perjury that includes facts showing good cause not to give the notice." (*Id.*, rule 5.165(b)(2).) Situations in which the court may find good cause not to give notice of the emergency hearing include the following:

"(A) Giving notice would frustrate the purpose of the order;

"(B) Giving notice would result in immediate and irreparable harm to the applicant or the children who may be affected by the order sought;

"(C) Giving notice would result in immediate and irreparable damage to or loss of property subject to disposition in the case;

"(D) The parties agreed in advance that notice will not be necessary with respect to the matter that is the subject of the request for emergency orders[.]" (*Ibid*.)

If the party seeking the emergency hearing tried to give notice of the hearing but could not, the declaration regarding notice must state that "the applicant in good faith attempted to inform the opposing party but was unable to do so" and must "specify[] the efforts made to inform the opposing party." (Cal. Rules of Court, rule 5.151(e)(2)(B).) In such a case, the court may waive notice for good cause if it finds that "[t]he party made reasonable and good faith efforts to give notice to the other party, and further efforts to give notice would probably be futile or unduly burdensome." (*Id.*, rule 5.165(b)(2)(E).)

The emergency orders rules also specify certain situations in which a party may always request an order without notice to the other party.[8] (See Cal. Rules of Court, rule 5.170.)

From the foregoing, it is apparent that California law permits a party in a family law proceeding to seek emergency orders from the court without notice to the opposing

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[8] Those situations are as follows: "[a]pplications to restore a former name after judgment"; "[s]tipulations by the parties"; "[a]n order or judgment after a default court hearing"; "[a]n earnings assignment order based on an existing support order"; "[a]n order for service of summons by publication or posting"; "[a]n order or judgment that the other party or opposing counsel approved or agreed not to oppose"; and an "[a]pplication for an order waiving filing fees." (Cal. Rules of Court, rule 5.170.)

party only under very limited circumstances. Additionally, before a court may consider a request for emergency orders without notice, the applicant must ask for waiver of notice and "make an affirmative factual showing of irreparable harm, immediate danger, or [an]other statutory basis for granting relief without notice." (Cal. Rules of Court, rule 5.151(d)(2); see *id.*, rule 5.165(b)(2).) Absent the requisite showing, notice is required.

With that in mind, we turn to the ethical rules regarding ex parte communications between the parties and the court.

B. Ethical Rules

Canon 3B(7) codifies the judge's ethical obligation to protect the right of every party to due process of law. The first sentence of canon 3B(7) states: "A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, full right to be heard according to law." Ex parte communications, defined as "any communications to or from the judge outside the presence of the parties concerning a pending or impending proceeding," inherently infringe on that right. (*ibid.*) It is understood, of course, that ex parte communications are sometimes necessary to prevent immediate danger or irreparable harm. Those circumstances are narrowly defined, however, to ensure the critical right of every party to be heard.

Because of the important role judges play in protecting the right of every party to be heard, with certain exceptions (discussed below), canon 3B(7) prohibits judges from initiating, permitting, or considering ex parte communications and also requires judges to make reasonable efforts to avoid ex parte communications. In effect, the canon generally precludes a judge from engaging in a communication about a "pending or impending proceeding" with a party to that proceeding when the other party is not present and has not received notice of the communication. (*Ibid.*, see Abramson, *The Judicial Ethics Of Ex Parte And Other Communications* (Winter 2000) 37 Hous. L.Rev. 1343, 1354 (*Abramson)* ["An otherwise proper communication becomes a prohibited ex parte communication when matters relevant to a proceeding circulate among or are discussed

with fewer than all the parties who are legally entitled to be present or notified of the communication ….”].)

Exceptions to the prohibitions against ex parte communications are recognized in the following situations:

(1) “where circumstances require, for scheduling, administrative purposes, or emergencies that do not deal with substantive matters”;[9]

(2) “when expressly authorized by law to do so or when authorized to do so by stipulation of the parties.” (Canon 3B(7)(b) & (c).)[10]

We now apply these emergency order rules of court and ethical rules to the present facts.

C. Application to the Facts and the Local Rule

Specifically, the question before us is this: If a local rule sets up a procedure by which judges review all requests for non-domestic-violence emergency orders in family law matters in order to determine whether the moving papers show the necessity for an emergency hearing, and that review occurs without notice to the other party or without a request for waiver of notice with a signed explanation of why notice should not be given, does the rule facilitate or permit ex parte communications in violation of the Code of Judicial Ethics? In the committee’s opinion, the answer to that question is yes.

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[9] The application of this exception is subject to the following conditions: “(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication; and [¶] (ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.” (Canon 3B(7)(b).)

[10] The exception for ex parte communications “expressly authorized by law” permits judges to hear the many ex parte applications that come before them seeking emergency relief, such as ex parte applications brought pursuant to California Rules of Court 3.1200 et seq., which apply in civil cases generally, and those brought pursuant to California Rules of Court, rule 5.151, et seq., which apply in family law cases.

The first step in the analysis is to determine whether a judge's review of the application papers under the procedure specified in the local rules involves an ex parte communication. It clearly does, because the rule allows a party in a family law matter to present a request for emergency orders to the court for review without first notifying the other side that the request will be presented to the court. It does not matter, for purposes of determining whether an ex parte communication has occurred, that the request is to be reviewed at this stage only to determine whether good cause exists to set an emergency hearing. What matters is that one party is communicating to the judge concerning a pending proceeding without notice to the other party. Such a communication is, by definition, an ex parte communication.

Given that an ex parte communication is involved, the next step in the analysis is to determine whether that communication implicates the prohibitions in the canons.[11] It does. It is true that a judge in this situation does not violate the prohibition against *initiating* ex parte communications, because the communication -- i.e., the request for emergency orders -- is initiated by the moving party, not the judge. Nonetheless, the canons also prohibit *permitting* and *considering* ex parte communications, and both of these prohibitions are implicated by the procedure established by the local rule. A rule authorizing a judge to review a request for emergency orders for the purpose of determining whether it demonstrates good cause for an emergency hearing is one that *permits* a judge to *consider* an ex parte communication.

The final step in the analysis is to determine whether the procedure authorized by the local rule falls within any of the exceptions found in the canons. It does not. Under the first exception, a judge may permit or consider an ex parte communication "where circumstances require, for scheduling, administrative purposes, or emergencies that do not deal with substantive matters," provided certain conditions (set out above) are met. (Canon 3B(7)(b).) This exception is a narrow one. The phrase, "where circumstances require," "strongly suggests that this exception must be considered on a case-by-case

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[11] At this point, we do not consider whether the communication falls within one of the exceptions provided for in the canons. That analysis follows below.

basis, without establishing a comprehensive exception to the general rule." (Abramson, *supra*, 37 Hous. L. Rev., at p. 1370.) Here, however, the local rule establishes a procedure to be followed in *every* family law case in which a party seeks non-domestic-violence emergency orders. In each and every such case, the judge reviews the request without prior notice to the other side, and without regard to whether there is any showing that good cause existed not to give such notice. Circumstances do not "require" this sort of blanket screening in every family law case. Further, non-domestic-violence emergency orders are an "emergency" by definition, so the application papers required for requesting such orders deal with substantive matters. Accordingly, this exception does not apply.

Under the second exception, a judge may permit or consider an ex parte communication "when expressly authorized by law to do so or when authorized to do so by stipulation of the parties." (Canon 3B(7)(c).) Just like the first one, this exception does not apply. As for "stipulation of the parties," nothing in the local rule predicates the judge's review of a request for emergency orders on whether the parties have stipulated to such review; the review occurs without notice and without any prior stipulation to the lack of notice. As for what is "expressly authorized by law," nothing in the local rule predicates the judge's review on whether notice has been given or a request for waiver of notice has been made.

Under the family law rules permitting ex parte applications, "[a] party seeking emergency orders . . . must give notice to all parties or their attorneys so that it is received no later than 10:00 a.m. on the court day before the matter is to be considered by the court." (Cal. Rules of Court, rule 5.165(b).) Nothing in the rules excludes from this concept of consideration a judge's determination of whether an emergency hearing should be held on the request for emergency orders. In making that determination, the judge must review the moving papers to see if they "demonstrate why the matter is appropriately handled as an emergency hearing, as opposed to being heard on the court's regular hearing calendar." (*Id.,* rule 5.151(d)(2).) Thus, in conducting the review provided for by the local rule, the judge "considers" the matter presented by the request

for emergency orders, even if the court does not ultimately resolve the request on its merits at that time.

The emergency orders rules do, however, allow a judge to consider requests to waive notice of the ex parte application. (Cal. Rules of Court, rule 5.165(b)(2).) To make such a request, "the party must file a declaration signed under penalty of perjury that includes facts showing good cause not to give the notice." (*Ibid.*) The rule provides that a judge may waive notice for "good cause," which may include that notice would result in harm to the applicant, children, or property at subject in the case. (*Ibid.*)

Thus, a judge is authorized by this rule to consider application papers that have not been served on the other side and necessarily contain ex parte communications when two requirements have been met: (1) a party requests that notice not be given, and (2) a declaration or other signed explanation is provided to support this request. In practical terms, determining which ex parte applications meet these two requirements is an administrative task that must precede judicial consideration of whether the application papers include facts showing good cause not to give notice. Once an ex parte application for an emergency order has been filed that asks for waiver of notice and provides a signed explanation of why notice should not be given, the application papers may be taken to the judge to determine the sufficiency of the explanation and whether notice may be waived.[12]

The local rule here includes none of these requirements for judicial review of ex parte applications. Instead, *all* applications are taken to the judge for review without regard to notice or requests for waiver of notice. This screening process allows the judge to consider application papers containing ex parte communications that are not authorized by law, and, by doing so, violates canon 3B(7)(c).

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[12] The committee is aware of forms used by some courts that allow self-represented and represented parties to request waiver of notice by checking a box, filling in an explanation, and signing on a signature line that includes a penalty of perjury affirmation. Such forms allow easy identification of the applications that may be taken to the judge for a determination of whether the applicant's papers, including those that accompany the form, meet the requirements of the rule and show good cause for waiver on notice.

VI. Conclusion

Under the emergency orders rules, "[c]ourts may require all parties to appear at a hearing before ruling on a request for emergency orders. Courts may also make emergency orders based on the documents submitted without requiring the parties to appear at a hearing." (California Rules of Court, rule 5.169.) A local rule setting up a procedure by which a judicial officer reviews all requests for non-domestic-violence emergency orders for the purpose of determining whether an emergency hearing should be held without the moving party first providing notice to the other side or requesting waiver of notice and showing good cause for such waiver is not expressly authorized by law. Such a local rule, in the committee's opinion, would facilitate a violation of the prohibitions in the Code of Judicial Ethics against permitting and considering ex parte communications.

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

CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS
350 McAllister Street, Room 1144A
San Francisco, CA 94102
(855) 854-5366
www.JudicialEthicsOpinions.ca.gov

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[Issued August 26, 2014]

ACCEPTING GIFTS OF LITTLE OR NOMINAL VALUE UNDER THE ORDINARY SOCIAL HOSPITALITY EXCEPTION

I. Question Presented

The Committee on Judicial Ethics Opinions has been asked to provide an opinion on the following question:

> May judges accept items of little or nominal value under the ordinary social hospitality exception to the prohibitions against gifts in the California Code of Judicial Ethics?

II. Summary of Conclusions

Items of little or nominal value when offered for no consideration as social expressions of appreciation, esteem, or geniality are gifts within the meaning of the Code of Judicial Ethics and subject to the canons governing gifts. Such gifts may not be accepted if (1) they are offered by a party who has appeared or is likely to appear before the judge, (2) they create a perception of influence or favor, or (3) a person aware of the

gift would reasonably believe that advantage was intended or would be obtained. When determining if gifts are otherwise acceptable as ordinary social hospitality, judges should consider whether they are ordinary by community standards, consistent with social traditions, and hospitable in nature.

III. Authorities

A. Applicable Canons[1]

Terminology: "'Gift' denotes anything of value to the extent that consideration of equal or greater value is not received and includes a rebate or discount in the price of anything of value unless the rebate or discount is made in the regular course of business to members of the public without regard to official status."

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 will be preserved. The provisions of this code are to be construed and applied to further that objective. . . ."

Canon 2A: "A judge 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: ". . . A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by other members of the community and should do so freely and willingly.. [¶] The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. [¶] 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. . . ."

Canon 2B: "(1) A judge shall not allow . . . social . . . 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. . [¶] (2) A judge shall not lend the prestige of judicial office or use the judicial title in any

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[1] All further references to canons and to Advisory Committee commentary are to the California Code of Judicial Ethics unless otherwise indicated.

manner, including . . . to advance the pecuniary or personal interests of the judge or others. . . ."

Canon 3C(3): "A judge shall require staff and court personnel under the judge's direction and control to observe appropriate standards of conduct . . . in the performance of their official duties."

Canon 4A: "A judge shall conduct all of the judge's extrajudicial activities so that they do not

(1) cast reasonable doubt on the judge's capacity to act impartially;
(2) demean the judicial office;
(3) interfere with the proper performance of judicial duties; or
(4) lead to frequent disqualification of the judge."

Advisory Committee commentary following canon 4A: "Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the community in which he or she lives. . . . . [¶] Because a judge's judicial duties take precedence over all other activities (see Canon 3A), a judge must avoid extrajudicial activities that might reasonably result in the judge being disqualified."

Canon 4D(5): "Under no circumstance shall a judge accept a gift, bequest, or favor if the donor is a party whose interests have come or are reasonably likely to come before the judge. . . ."

Advisory Committee commentary following canon 4D(5): "In addition to the prohibitions set forth in Canon 4D(5) regarding gifts, other laws may be applicable to judges, including, for example, Code of Civil Procedure section 170.9 and the Political Reform Act of 1974 (Gov. Code, § 81000 et seq.). . . . . [¶] The application of Canon 4D(5) requires recognition that a judge cannot reasonably be expected to anticipate all persons or interests that may come before the court."

Canon 4D(6): "A judge shall not accept . . . a gift, bequest, favor, or loan from anyone except as hereinafter set forth, provided that acceptance would not reasonably be perceived as intended to influence the judge in the performance of judicial duties:

"[¶] . . . [¶]

"(g) ordinary social hospitality; [¶] . . ."

Advisory Committee commentary following canon 4D(6)(g): "Although Canon 4D(6)(g) does not preclude ordinary social hospitality, a judge should carefully weigh acceptance of such hospitality to avoid any appearance of impropriety or bias or any appearance that the judge is misusing the prestige of judicial office. See Canons 2 and 2B.

A judge should also consider whether acceptance would affect the integrity, impartiality, or independence of the judiciary. See Canon 2A."

B. Other Authorities

Code of Civil Procedure, section 170.9.

Government Code, section 81000 et seq.

Adams v. Commission on Judicial Performance (1995) 10 Cal.4th 866, 903-906.

Inquiry Concerning Wasilenko (2005) 49 Cal.4th CJP Supp. 26.

Commission on Judicial Performance, Annual Report (1992) Private Admonishments B and H, pages 12-13, and 1992 Advisory Letters 15 and 17, page 15; Annual Report (1998) Public Admonishment of Judge John Shook, pages 24-26; Annual Report (2002) Private Admonishment 3, page 22.

California Judges Association, Ethics Committee Advisory Opinion No. 43.

Rothman, California Judicial Conduct Handbook (3d ed. 2007) sections 9.30, 9.37, 9.38, 9.44, 9.51, 9.52, 9.57; id. (2013 supp.) appendix 10.

Edwards, The Role of the Juvenile Court Judge: Practice and Ethics (2012) Gifts to the Juvenile Court (Parts 1-3).

Geyh et al., Judicial Conduct and Ethics (5th ed. 2013) section 7.14[5].

IV. Discussion

A. Introduction

In the course of their daily lives, judges are sometimes offered items of little or nominal value as tokens of appreciation, expressions of esteem, acts of generosity, or gestures of geniality. The personal and professional circumstances in which these items are offered are as varied as the items themselves. Examples provided to the committee include: a homemade food item brought to the judge by a juror; a coupon or gift card redeemable for a cup of coffee offered to a judge who has provided volunteer services; a baseball cap or jersey from the hometown team or the judge's alma mater; a bottle of wine offered at a holiday by a neighbor; a ticket to a local sporting or cultural event

offered by an acquaintance; pizza delivered by a law firm to courtroom staff following a long trial. As varied as the examples are, the items are similarly low in extrinsic dollar value but high in intrinsic social value.

These items present ethical questions for judges because the canons prohibit the receipt of gifts except in the narrowest of circumstances. A judge may not accept gifts or favors under any circumstances from a party who has appeared or is likely to appear before the judge (canon 4D(5)). A judge also may not accept a gift from a nonparty if the gift would reasonably be perceived as intended to influence the judge in the performance of judicial duties (canon 4D(6)). Even when not prohibited under either of these provisions, gifts may only be accepted if they fall within specified exceptions, one of which is "ordinary social hospitality" (canon 4D(6)(g)).

The gracious and spontaneous offering of the small-value items the committee has been asked to examine might lead an unwary judge to accept them based on several faulty assumptions. One is that the items are de minimis and therefore do not fall within the gift ban in the canons. Another incorrect assumption is that the ordinary social hospitality exception is a catchall covering any circumstance not otherwise specified in the gift exceptions. And finally, because the items are relatively insignificant in value, a judge might erroneously assume that any ethical violation incurred by acceptance would also be insignificant and easily cured by disclosing the gift or donating it to others.

The committee has been asked for guidance on avoiding these pitfalls. This opinion addresses whether items of little or nominal value are gifts within the meaning of the code, and if so, how to determine whether they may or may not be accepted under the gift canons, and specifically, the ordinary social hospitality exception.

B. Gifts Defined

The California Code of Judicial Ethics defines a gift as "anything of value to the extent that consideration of equal or greater value is not received and includes a rebate or discount in the price of anything of value unless the rebate or discount is made in the regular course of business to members of the public without regard to official status."

(Cal. Code Jud. Ethics, Terminology, "Gift.") This definition was added by amendment to the terminology section of the code in 2013. Prior to the amendment, there was some question as to whether an item of nominal value constituted a gift (see Cal. Judges Assoc., Formal Ethics Opinion No. 43 (1996 rev.) p. 2 [only when property exchanged without consideration is truly "de minimis" can it be said that it does not constitute a gift] (CJA Opinion No. 43)). Under the broad definition provided in the code's Terminology section, gifts are "anything of value." Even gifts of nominal value, therefore, are subject to the canons that govern gifts.

The code's definition of a gift references consideration, price, and the regular course of business, which suggests that a way to determine if an item is "anything of value" is to consider whether it could be exchanged for consideration on the open market. For example, commercially purchased food has market value by virtue of its purchase and would fall within the definition of a gift. Even homemade food items have a value because of the purchased ingredients and individual effort in preparation. In either case, when a judge or the judge's staff[2] is offered such an item, the judge must consider the item a gift governed by the canons.[3]

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[2] Items offered to staff that are related to court business fall within the canons governing gifts (canon 3C(3) [judges must require staff and court personnel under their direction and control to observe appropriate standards of conduct in the performance of their duties]; Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007) § 9.57, pp. 503-504) (Rothman).

[3] Judge Leonard Edwards (Ret.) provides another example in his handbook, The Role of the Juvenile Court Judge: Practice and Ethics (2012) Gifts to the Juvenile Court (Part 2), pages 69-70 . He discusses artwork created by a special-needs dependent child offered to a juvenile court judge. (Edwards, *supra*, p. 70.) Such a personalized homemade item would not be exchanged on the open market and would not fall within the gift definition in the code. Despite its significant therapeutic value to the dependent child, the item would not be considered "anything of value" for purposes of the canon prohibiting gifts from a party, discussed below, and could therefore be accepted by the judge. See also, Judge Edwards's distinction between items offered to a juvenile court *judge* and gifts of value offered to the juvenile *court,* which includes a discussion of the applicable rules for acceptance of such gifts by the court. (Id., pp. 67-73.)

C. Canons Governing Gifts[4]

The canons prohibiting acceptance of gifts are fundamental to the principles of judicial independence and integrity: the purpose of the general gift ban is to ensure impartial decisions. "When a judge receives something of value from a litigant or a lawyer, there exists the potential that, at best, it will be perceived that the donor will receive some advantage from the judge or, at worst, that a bribe has been given." (Rothman, *supra*, § 9.30, p. 471.) To fulfill that purpose, canon 4D(5) prohibits gifts under any circumstance and without exception from "a party whose interests have come or are reasonably likely to come before the judge." Canon 4D(6) extends the prohibition to gifts from a nonparty, except in specified circumstances, and even in those circumstances, "provided that acceptance would not reasonably be perceived as intended to influence the judge in the performance of judicial duties." The specified exceptions to the nonparty gift ban include "ordinary social hospitality" (canon 4D(6)(g)).[5]

Read together, canons 4D(5) and 4D(6) require that when offered a gift of nominal value, a judge must consider three questions in order to determine if the gift might be

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[4] Code of Civil Procedure section 170.9 also governs gifts and sets dollar limitations on gifts a judge is permitted to accept even if they are otherwise permissible under the California Code of Judicial Ethics, which sets no monetary limit. Specifically, Code of Civil Procedure section 170.9 currently sets a $390 limit on gifts a judge is permitted to accept from a nonparty under several exceptions in canon 4D(6), including the ordinary social hospitality exception in canon 4D(6)(g). (Code Civ. Pro., § 170.9(f); see Rothman (2013 supp.) append. 10, pp. 7-12 (Rothman & MacLaren Guide to the No-Gift Rule).) This opinion does not address Code of Civil Procedure section 170.9 because gifts of nominal value fall below the set limit and would not otherwise be prohibited under the statute. This opinion also does not address financial interest disclosure and reporting requirements for gifts under the Political Reform Act of 1974 (see Gov. Code § 8100 et seq.; Cal. Code Regs., tit. 2, § 18110 et seq.; Rothman, *supra*, append. 10, Rothman & MacLaren Guide to the No-Gift Rule, p. 12.)

[5] As Judge Rothman notes, donation of a gift is not a specified exception to the ban on gifts in canons 4D(5) or canon 4D(6). (Rothman, *supra*, § 9.51, pp. 496-497.) Accepting improper gifts and donating or re-gifting them to charity does not avoid or cure a violation of the California Code of Judicial Ethics. (Ibid.)

accepted: (1) Is it offered by a party? (2) Would acceptance create a perception of influence? and (3) Is it otherwise acceptable as ordinary social hospitality?

1. Gifts Offered by a Party Are Banned

Canon 4D(5) prohibits acceptance of gifts from a party whose interests have come or are reasonably likely to come before the judge. On its face, this broadly includes past, present, and future parties. No exceptions or time limits are provided in the text of canon 4D(5) so it would appear that the absolute ban on gifts from parties extends to any party who has appeared or will appear before the judge in the judge's career. (Rothman, *supra*, § 9.37, pp. 478-499; id., appen. 10, Rothman & MacLaren Guide to the No-Gift Rule, p. 4) [canon 4D(5) ban on gifts from parties lasts forever].)

A judge offered a gift of little or nominal value will know if the person offering the gift is a current party and has a duty to know whether the person offering the gift is a former party. Under either circumstance, the judge may not accept the gift even if it is offered in the context of ordinary social hospitality.

If the gift is not offered by a former or current party, the judge must next consider whether the person offering the gift is reasonably likely to appear before the judge in the future. The Advisory Committee commentary to canon 4D(5) acknowledges that "[t]he application of Canon 4D(5) requires recognition that a judge cannot reasonably be expected to anticipate all persons or interests that may come before the court." (Advisory Com. commentary, Cal. Code Jud. Ethics, foll. canon 4D(5).)

Although the list of reasonably likely parties could theoretically include anyone in the world, Judge Rothman observes that, in practical terms, the circumstances in which a judge may accept a gift are limited by the exceptions in canon 4D(6)(a)-(j), and in those circumstances, the judge will be in a position to know or find out whether the donor is reasonably likely to appear (Rothman, *supra*, § 9.37, pp. 479-498; id., Rothman & MacLaren Guide to the No-Gift Rule, p. 4). The committee agrees that judges will know or be able to reasonably determine if a person offering a gift of little or nominal value is likely to appear as a party before the judge.

The committee notes, however, that the size of the community and of the judge's court may factor into the likelihood of someone appearing before the judge. Although the prohibition against accepting gifts from a party applies equally to all judges, the reasonable likelihood of a party appearing before a judge varies with the circumstances of the judge's position and the community in which the judge sits. (*Inquiry Concerning Wasilenko* (2005) 49 Cal.4th CJP Supp. 26, 46 [canons impose uniform statewide standards although ethical duties may arise more frequently in a small town where a judge knows a party than in a major metropolitan area].) If a judge is one of very few bench officers in a small community, the likelihood of hearing any particular community member's matter is relatively high compared to that of a judge who is one of hundreds of judicial officers in a geographically large or densely populated community.

In most circumstances, attorneys do not appear in court as parties, so gifts from attorneys are usually not subject to the absolute ban on gifts from parties imposed by canon 4D(5). (Rothman, *supra*, § 9.38, p. 480; id., appen. 10, Rothman & MacLaren Guide to the No-Gift Rule, p. 4.) However, gifts from attorneys who appear before judges in the course of business may create a perception of influence, which would preclude acceptance under canon 4D(6), as discussed below.[6]

2. Nonparty Gifts That Raise a Perception of Influence Are Banned

Canon 4D(6) prohibits judges from accepting gifts from a *nonparty* that would reasonably be perceived as intended to influence the judge in the performance of judicial duties. Canon 4D(6) underscores that judicial impartiality is so fundamental to the

[6] The committee notes that rule 5-300 of the Rules of Professional Conduct of the State Bar prohibits attorneys from giving "anything of value," either directly or indirectly, to a judge or court employee, except in specified circumstances. However, whether an attorney may give a gift is not dispositive of whether a judge may accept the gift under the canons and statutes governing gifts.

public's trust in the integrity of the judiciary that it is repeated throughout the code.[7] The test for the appearance of impropriety is an objective one: "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." (Advisory Com. commentary, Cal. Code Jud. Ethics, foll. canon 2A.)

Judges offered gifts of nominal value from a non-party must apply this objective test to determine if acceptance would create a perception of influence. Gifts offered by attorneys must be closely scrutinized. In *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866 (*Adams*), the court found that accepting gifts from attorneys who appeared before the judge is "'"inherently wrong"'" and "'"has a subtle, corruptive effect, no matter how much a particular judge may feel that he is above improper influence."'" (*Id.*, at p. 879.)[8] Although in *Adams* the particular attorneys regularly appeared before the judge, the committee agrees with Judge Rothman that "[i]n light of this very strong statement by the California Supreme Court, whenever a judge is offered a gift from a lawyer or law firm, the judge should view the offer as *presumptively* improper." (Rothman, *supra*, § 9.52, p. 497.) Indeed, when judges have been disciplined for improperly accepting gifts, the donor has most often been an attorney.[9] Judges

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[7] (See canons 1 [upholding the integrity and independence of the judiciary], 2 [avoiding impropriety and the appearance of impropriety in all activities], 2A [promoting public confidence], 2B(1) [improper to permit others to convey a position of influence], and 4A(1) [prohibiting conduct that casts reasonable doubt on the judge's capacity to act impartially].)

[8] In the example provided to the committee of a pizza delivered by a law firm to courtroom staff following a long trial, *Adams* makes clear that such gifts are unacceptable. (See *ante*, fn. 2.) Judge Rothman advises that improper perishable gifts should be disposed of or returned, and either way, a letter should be sent documenting that the gift was not accepted and advising the sender that to do so would have violated the canon. (Rothman, *supra*, § 9.51, pp. 496-497, fn. 176.)

[9] (See *Adams, supra*, 10 Cal.4th at pp. 897-901 [improper gifts of dinner, computer, fee writeoffs, condo, and fishing trip from attorneys]; Com. on Jud. Performance, Annual Rep. (1998) Public Admonishment of Judge John Shook, pp. 24-26 [improper gifts of

offered gifts of even nominal value from attorneys should presume they are likely to be improper and carefully consider whether a person aware of the gift might entertain a reasonable perception of influence.

Once a judge has determined that a gift of little or nominal value is not offered by a past, present or future party (canon 4D(5)) and does not create a perception of influence (canon 4D(6)), the judge must consider whether the gift falls within the exception for ordinary social hospitality.

3. The Ordinary Social Hospitality Exception

Canon 4D(6)(g) excepts a gift offered in the context of "ordinary social hospitality," provided the gift is not otherwise prohibited under canons 4D(5) and 4D(6).[10] Although the term "ordinary social hospitality" is not defined in the code, guidance is provided elsewhere.

Seeking to address when invitations to social events hosted by attorneys cease to be ordinary social hospitality and become unacceptable gifts, the California Judges Association (CJA) provides the following definition in an advisory opinion:

> "'[O]rdinary social hospitality' . . . is that type of social event or other gift which is so common among people in the judge's community that no reasonable person would believe that (1) the donor was intending to or would obtain any advantage or (2) the donee would believe that the donor intended to obtain any advantage." (CJA Opinion No. 43, *supra*, p. 4.)

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lunch and transport for the judge and judge's staff by an attorney]; Com. on Jud. Performance, Annual Rep. (1992) Private Admonishments B & H, pp. 12-13, and 1992 Advisory Letters 15 & 17, p. 15 [improper unspecified gifts from attorneys who practiced before the judges]; Com. on Jud. Performance, Annual Rep. (2002) Private Admonishment 3, p. 22 [improper unspecified gifts from attorneys].)

[10] As the Advisory Committee commentary cautions, "[a]lthough Canon 4D(6)(g) does not preclude ordinary social hospitality, a judge should carefully weigh acceptance of such hospitality to avoid any appearance of impropriety or bias or any appearance that the judge is misusing the prestige of judicial office. . . . [Citation.] A judge should also consider whether acceptance would affect the integrity, impartiality, or independence of the judiciary." (Advisory Com. commentary, Cal. Code Jud. Ethics, foll. canon 4D(6)(g).).

This definition has been cited in a wide variety of jurisdictions and sources (*Adams*, *supra*, 10 Cal.4th at p. 880; Rothman, *supra*, § 9.44, p. 489; Geyh, *supra*, § 7.14[5], p. 7-57; Ariz. Jud. Ethics Advisory Com., Opinion 95-13, pp. 1-2; Okla. Jud. Ethics Advisory Panel, Opinion 2005-1, p. 2). The committee agrees with this definition, which incorporates the prohibitions of canons 4D(5) and 4D(6), as discussed above, and focuses on a reasonable perception of an intent to gain advantage. (See *Adams*, *supra*, 10 Cal.4th at p. 880 ["in determining the propriety of activity that arguably might qualify as social hospitality, the focus is upon the reasonable perceptions of an objective observer . . . ."].)

CJA Opinion No. 43 also focuses on the "commonness" of the gift in the judge's community. This focus reflects the concept "that within a judge's community, residents will socialize in the normal course of their lives and that judges should not be barred from joining them." (Geyh et al., Judicial Conduct and Ethics (5th ed. 2013) § 7.14[5], p. 7-57 (Geyh); see Advisory Com. commentary, Cal. Code Jud. Ethics, foll. canon 4A [complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the community in which he or she lives].) The words of the ordinary social hospitality exception reflect that concept, and provide analytical tools for judges to use in determining whether the exception applies to gifts they have determined are not otherwise banned under canons 4D(5) and 4D(6).

a. Ordinary

Ordinary social hospitality gifts are those that are ordinary by community standards (CJA Opinion No. 43, *supra*, p. 4 [factor 1]). In the context of a gift of nominal value, a judge should consider whether the gift appears customary or reasonable, rather than excessive, in the community in which it is offered. A gift that would fall within the exception would be one that is ordinarily exchanged among members of the community. A gift card offered in thanks to volunteers, for example, may be an ordinary and reasonable practice in some communities, but not in others.

b. Social

Social traditions and purposes are also indicators of whether gifts are ordinary social hospitality (CJA Opinion No. 43, *supra*, p. 4 [factors 2, 6]). Judge Rothman makes the distinction between relationships for the purpose of socializing and relationships for the purpose of advancing business interests. (Rothman, *supra*, § 9.44, pp. 489-490.) Gifts that have a business purpose or advance the business interests of the person offering the gift do not fall within the ordinary social hospitality exception. (Ibid.; see canon 2B(2) [prohibiting use of prestige of office for personal or pecuniary advantage of others].) When offered a gift of nominal value, a judge should consider whether it is something that would traditionally be offered in circumstances involving socializing rather than business.

Careful consideration of this distinction should be given in the example of a baseball cap or jersey bearing the logo of the hometown team or the judge's alma mater. Is the cap being offered for the purpose of socializing as opposed to advancing the interests of the team or school, and is it traditionally offered regardless of judicial office?

c. Hospitality

Gifts of ordinary social hospitality must also be hospitable in nature and bear some relationship to hosting or being hosted. A judge's own social conduct is a reasonable measure of hospitality (CJA Opinion No. 43, *supra*, p. 4 [factors 3, 5]). If the judge is hosting a social event, is the gift something the judge would give a host if the judge were a guest? If the judge is a guest, is the gift something the judge would offer his or her guests when hosting a similar event? A history of reciprocal hospitality between the judge and the person offering the gift supports an inference that the gift is ordinary social hospitality. A gift that is commensurate with the occasion is also hospitable in nature, such as a bottle of wine offered at a holiday by a neighbor. A gift of a ticket to a local sporting or cultural event offered by an acquaintance, however, may not qualify as

hospitality. If the acquaintance is not hosting the event, and the judge will not be the acquaintance's guest, the ticket may not be hospitable in nature.[11]

VI. Conclusions

Items of little or nominal value are subject to the canons governing gifts. Under canons 4D(5) and 4D(6), judges may not accept items of little or nominal value if the gift is offered by a party, if acceptance of the gift would create a perception of influence, or if a reasonable person would believe that advantage was intended or would be obtained by acceptance of the gift.

In the committee's opinion, items of little or nominal value that are not otherwise banned may be accepted under the ordinary social hospitality exception in canon 4D(6)(g) if the gift is ordinary by community standards, offered for social traditions or purposes, and hospitable in nature.

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)).

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[11] Judge Rothman provides the similar example of an attorney who offers a judge two tickets to a professional sporting event that the attorney cannot use (Rothman, *supra*, § 9.52, p. 498). He similarly concludes that it would not be appropriate for the judge to accept the tickets, unless the relationship with the attorney is such that the judge would not sit on any case involving the attorney. For support, he cites another exception under canon 4D(6), allowing gifts from a person whose preexisting relationship with the judge would require disqualification (Rothman, § 9.52, p. 498, citing former canon 4D(6)(f), now canon 4D(6)(a)). Although this opinion examines only the ordinary social hospitality exception, Judge Rothman's example illustrates that judges should be familiar with all of the canon 4D(6) exceptions when considering whether gifts that are not otherwise banned may be accepted.

CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS
350 McAllister Street, Room 1144A
San Francisco, CA 94102
(855) 854-5366
www.JudicialEthicsOpinions.ca.gov

CJEO Formal Opinion No. 2014-006

[Issued October 2, 2014]

JUDICIAL COMMENT AT PUBLIC HEARINGS AND CONSULTATION WITH PUBLIC OFFICIALS AND OTHER BRANCHES OF GOVERNMENT

I. Issue Presented

The Committee on Judicial Ethics Opinions (CJEO) has been asked to provide an opinion on the following question:

> What judicial comment and consultation is permitted under the exception in the California Code of Judicial Ethics that authorizes judges to appear at a public hearing or officially consult with the executive or legislative body or public officials on matters concerning the law, the legal system, or the administration of justice?

II. Summary of Conclusions

Canon 4C(1) prohibits judges from appearing at public hearings as a general matter, but excepts from its purview a judge's appearance at public hearings, or official consultations with an executive or legislative body or public official, on "matters

concerning the law, the legal system, or the administration of justice." By its terms, that exception broadly permits comment and consultation concerning the court system or matters of judicial administration. The exception also applies to legal matters when the subject of the appearance or consultation is one with respect to which the judge's experience and perspective *as a judge* gives him or her unique qualifications to assist the other branches of the government in fulfilling their responsibilities to the public. Even if a particular matter falls within the exception, however, a judge must still ensure that the statements made in the appearance or consultation do not violate any other provisions of the code.

III. Introduction

Canon 4C(1) of the California Code of Judicial Ethics[1] provides that "[a] judge shall not appear at a public hearing or officially consult with an executive or legislative body or public official *except* on matters concerning the law, the legal system, or the administration of justice." (Italics added.)[2] The exception unquestionably permits judicial comment before a legislative body, or judicial consultation with other branches of government or with public officials, regarding matters concerning the law, court system and judicial administration. So, for example, comment and consultation authorized by the canon would include testimony regarding the judicial branch's budget, or a bond measure for court construction, or a bill proposing to replace court reporters with electronic recording, as these matters clearly relate to the administration of justice. (See Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007), § 11.03, p. 571

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[1] All further references to canons are to the canons of the California Code of Judicial Ethics unless otherwise indicated.

[2] The exception also permits appearances and consultation on matters "involving the judge's private economic or personal interest." (Cal. Code Jud. Ethics, canon 4C(1).) The committee has not been asked to address the types of comment and consultation that might fall within this language in the exception.

(Rothman).)[3] The committee has been asked to consider whether comment and consultation is also permissible under the exception in several scenarios involving proposed legislation and political measures that are related to the legal system but that also involve policy considerations. Specifically, the committee has been asked whether a judge may appear at a public hearing to advocate for shorter or longer sentences for drug offenders, or whether such an appearance would be permissible if, instead of advocating for specific legislation or sentences for particular offenders, the judge explained to the public body, from a judicial perspective, the effects of any of these proposed laws. The committee has also been asked whether advocacy on a proposed constitutional amendment to replace the death penalty with life without parole, or advocacy on a proposed amendment to collective bargaining laws would be allowed.

These questions can be answered by understanding how the permissive language of the canon 4C(1) exception, and other similar ethical rules, have been interpreted, and how canon 4C(1) is circumscribed by the other canons.

IV. Authorities

A. Applicable Canons

Terminology: "'Law, the legal system, or the administration of justice.' When a judge engages in an activity that relates to the law, the legal system, or the administration of justice, the judge should also consider factors such as whether the activity upholds the integrity, impartiality, and independence of the judiciary (Canons 1 and 2A), whether it impairs public confidence in the judiciary (Canon 2), whether the judge is allowing the activity to take precedence over judicial duties (Canon 3A), and whether engaging in the

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[3] In connection with this exception, Judge Rothman has expressed concern as to where the line is drawn between proper advocacy and encroaching on legislative and executive prerogatives. (Rothman, *supra*, § 11.03, pp. 569-571.) That narrow question is beyond the scope of what the committee has been asked to address in this opinion. Judge Rothman also notes, however, that "[a]lthough the Trial Court Funding Act may have centralized funding of courts, local courts and judges throughout the state have an important role in advocating for adequate funding to assure access to justice." (*Id.*, (2014 supp.) § 11.03, p. 2, citing Cal. Com. Jud. Ethics Opns., CJEO Formal Opinion No. 2013-001, pp. 5-8, for its discussion of meeting with and seeking assistance from attorneys in advocating for adequate legislative funding .)

activity would cause the judge to be disqualified (Canon 4A(4)). See Canons 4B (Commentary), 4C(1), 4C(1) (Commentary), 4C(2), 4C(2) (Commentary), 4C(3)(a), 4C(3)(b) (Commentary), 4C(3)(d)(ii), 4C(3)(d) (Commentary), 4D(6)(d), 4D(6)(e), 5A (Commentary), 5D, and 5D (Commentary)."

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 will be preserved. The provisions of this code are to be construed and applied to further that objective. . . ."

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. A judge shall not make statements, whether public or nonpublic, that commit the judge with respect to cases, controversies, or issues that are likely to come before the courts or that are inconsistent with the impartial performance of the adjudicative duties of judicial office."

Canon 3A: "All of the judicial duties prescribed by law shall take precedence over all other activities of every judge. . . ."

Canon 3B: "(9) A judge shall not make any public comment about a pending or impending proceeding in any court . . . . This canon does not prohibit judges from making statements in the course of their official duties or from explaining the procedures of the court . . . . This educational exemption does not apply to cases over which the judge has presided or to comments or discussions that might interfere with a fair hearing of the case."

Advisory Committee Commentary following canon 3B(9): "[¶] . . . [¶] *Although this canon does not prohibit a judge from commenting on cases that are not pending or impending in any court, a judge must be cognizant of the general prohibition in Canon 2 against conduct involving impropriety or the appearance of impropriety. A judge should also be aware of the mandate in Canon 2A that a judge must act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. In addition, when commenting on a case pursuant to this canon, a judge must maintain high standards of conduct, as set forth in Canon 1."*

Canon 4A: "A judge shall conduct all of the judge's extrajudicial activities so that they do not [¶] (1) cast reasonable doubt on the judge's capacity to act impartially; [¶] . . . [¶] (4) lead to frequent disqualification of the judge."

Canon 4B: "A judge may speak, write, lecture, teach, and participate in activities concerning legal and nonlegal subject matters, subject to the requirements of this code."

Advisory Committee Commentary following canon 4B: "As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. . . ."

Canon 4C: "(1) A judge shall not appear at a public hearing or officially consult with an executive or legislative body or public official except on matters concerning the law, the legal system, or the administration of justice or in matters involving the judge's private economic or personal interests."

Advisory Committee Commentary following canon 4C(1). . ."When deciding whether to appear at a public hearing or whether to consult with an executive or legislative body or public official on matters concerning the law, the legal system, or the administration of justice, a judge should consider whether that conduct would violate any other provisions of this code. For a list of factors to consider, see the explanation of 'law, the legal system, or the administration of justice' in the terminology section. See also Canon 2B regarding the obligation to avoid improper influence."

Canon 5D: "A judge or candidate for judicial office may engage in activity in relation to measures concerning improvement of the law, the legal system, or the administration of justice, only if the conduct is consistent with this code."

B. Other Authorities

Rothman, California Judicial Conduct Handbook (3d ed. 2007 & 2014 supp.), section 11.03

American Bar Association, Model Code of Judicial Conduct

V. Discussion

A. Law, the Legal System, or the Administration of Justice

While canon 4C(1) prohibits judges from appearing at public hearings as a general matter, it contains an exception that permits judges to appear at a public hearing or officially consult with an executive or legislative body or public official on matters concerning the law, the legal system, or the administration of justice. The phrase "the law, the legal system, or the administration of justice" appears in several places in the

canons and in the related Advisory Committee Commentary. For example, in commenting on the provision in canon 4B that "[a] judge may speak, write, lecture, teach, and participate in activities concerning legal and nonlegal subject matters, subject to the requirements of this code," the Advisory Committee Commentary notes that, "[a]s a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice." (Advisory Com. Com., foll. canon 4B.) This suggests that the reason the canons permit a judge to speak publicly or consult officially with other branches of government on matters concerning the law, the legal system, or the administration of justice, is that it benefits the lawmaking process, and thus society, for judges to share their expertise in the law and the justice system with the other branches of government in a manner other than simply performing the duties of their office.

This is consistent with authority from outside of California. For example, the Comment to rule 3.2 of the American Bar Association's Model Code of Judicial Conduct -- a rule that is similar to California's canon 4C(1)[4] -- notes that "[j]udges possess special expertise in matters of law, the legal system, and the administration of justice, and may properly share that expertise with governmental bodies and executive or legislative branch officials."

Although canon 4C(1) does not include the language in rule 3.2 specifying that comment and consultation is permissible if it is made "in connection with matters about which the judge acquired knowledge or expertise in the course of the judge's judicial duties," the committee agrees that it is the judge's experience and perspective *as a judge*

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[4] American Bar Association Model Code of Judicial Conduct rule 3.2 provides that "[a] judge shall not appear voluntarily at a public hearing before, or otherwise consult with, an executive or a legislative body or official, except: [¶] (A) in connection with matters concerning the law, the legal system, or the administration of justice; [¶] (B) in connection with matters about which the judge acquired knowledge or expertise in the course of the judge's judicial duties; or [¶] (C) when the judge is acting pro se in a matter involving the judge's legal or economic interests, or when the judge is acting in a fiduciary capacity."

that justifies allowing the judge to appear before or consult with representatives of the other two branches of government on matters within the judge's area of expertise -- i.e., matters concerning the law, the legal system, and the administration of justice. This is so because judges are uniquely qualified to speak on law-related matters from the perspective they have gained by virtue of their judicial experience. Thus, the committee concludes that legislative appearances by a judge are generally permissible where the subject matter may reasonably be considered to merit the attention and comment of a judge as a judge. The clearest examples of permissible activities are those addressing the legal process; however, comment and consultation about substantive legal issues, where the purpose is to benefit the law and legal system itself rather than any particular cause or group would also be permissible.

Indeed, the purpose of benefiting the legal system rather than particular causes or groups supports the conclusion that substantive law-related comment and consultation is permissible under canon 4C(1) when it is that made from a judicial *perspective*. While all judges have experience and legal knowledge acquired as attorneys prior to taking the bench, that experience is usually the result of representing particular groups or clients. But law practice experience is not unique to judges and attorneys are able to provide the Legislature and the public with advocacy and knowledge of the law from an advocate's perspective. A judge is permitted to be an advocate only on behalf of the legal system—focusing on court users, the courts, or the administration of justice. Where a judge has both judicial and attorney experience (or only attorney experience) in an area of law, the judge's comment and consultation should therefore be presented from a purely judicial perspective.

As guidance, when determining whether anticipated comment and consultation is permissible, judges should ask themselves what they have experienced in their role as a judge that provides information to the decision makers about the legal matter on which they intend to speak. If there is a nexus between the judge's role as a judge and what is being said, the comment and consultation will fall within the canon 4C(1) exception and is permissible. Speaking from a judicial perspective will provide that nexus and still

allow the judge to draw from his or her entire experience with the law when commenting at public hearings or consulting with public officials.

For instance, a judge who was formerly an environmental attorney is not disqualified from expressing her views in support of a new CEQA settlement process merely because she was a former advocate in that arena; however, she must be careful to express herself solely from her viewpoint as a judge who (for example) is seeking to unburden the court's docket by resolving CEQA cases earlier in the judicial process. Or, a judge who was a former prosecutor but with no criminal *judicial* experience could express support for proposed legislation to reduce the number of peremptory challenges permitted in misdemeanor cases; his views might be informed by his experience as a prosecutor but should be expressed in terms of how the law would affect the legal system or the administration of justice (for example) by improving juror satisfaction, enhancing jury diversity, and saving court costs, while still providing the full panoply of due process. Regarding advocacy on a proposed constitutional amendment to replace the death penalty with life without parole, a judge could comment (for example) on the dysfunction of the present system from a judicial perspective, but judicial advocacy for or against the wisdom or morality of the death penalty as a policy matter would fall outside the scope of the exception.

These examples illustrate that like permissible judicial comments concerning the court system and the administration of justice, which inherently include a judicial perspective, judges may broadly comment on legal matters to provide the public, the Legislature, and the executive branch with their unique perspective as judicial officers. Relying on the Advisory Committee Commentary to canon 4B, the committee construes the exception in canon 4C(1) as permitting *official* speech from the "judges'…unique position ['as a judicial officer and person specially learned in the law'] to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice." Thus, the committee views canon 4C(1) as containing an inherent limitation; that limitation is to preclude judges from telling the legislative or executive branches, in a

public hearing or official context, the judiciary's (or judge's) views as to whether a law or proposed law is good or bad social or economic or scientific policy, which is akin to the prohibition on political activity. Limiting judicial comment to the judicial perspective promotes the public's trust in impartiality by avoiding the use of judicial title to insert a judge's views on economics, science, social policy, or morality into the official public discourse on legislation. It also avoids the judiciary's encroachment into the political (policy making) domain of the other branches. Conversely, the committee views the goal of the canon as broadly allowing judges to provide legal expertise, from the judicial perspective, to improve both substantive legislation and the administration of justice.

In sum, in the committee's opinion, canon 4C(1) is most reasonably understood as allowing a judge to appear at a public hearing or to officially consult with an executive or legislative body or public official when the subject of the appearance or consultation is one relating to the law, the legal system, or the administration of justice where the judge's experience and perspective as a judge gives the judge unique qualifications to assist the other branches of the government in fulfilling their responsibilities to the public.

B. Consideration of Other Code Provisions

The committee cautions, however, that even if a matter concerns the law, the legal system, or the administration of justice within the meaning of canon 4C(1), it still may not be proper for a judge to make an appearance at a public hearing or provide an official consultation on that matter because of other provisions of the canons. This point is made clear in several parts of the California Code of Judicial Ethics. For instance, the Terminology section of the code explains as follows:

> "When a judge engages in an activity that relates to the law, the legal system, or the administration of justice, the judge should also consider factors such as whether the activity upholds the integrity, impartiality, and independence of the judiciary (Canons 1 and 2A), whether it impairs public confidence in the judiciary (Canon 2), whether the judge is allowing the activity to take precedence over judicial duties (Canon 3A), and whether engaging in the activity would cause the

judge to be disqualified (Canon 4A(4)).” (Cal. Code Jud. Ethics, Terminology, “Law, the legal system, or the administration of justice.”)

Additionally, the Advisory Committee Commentary to canon 4C(1) advises that “[w]hen deciding whether to appear at a public hearing or whether to consult with an executive or legislative body or public official on matters concerning the law, the legal system, or the administration of justice, a judge should consider whether that conduct would violate any other provisions of this code.” Finally, canon 5(D) specifies more broadly that “[a] judge or candidate for judicial office may engage in activity in relation to measures concerning improvement of the law, the legal system, or the administration of justice, only if the conduct is consistent with this code.”

These limitations, imposed by other parts of the code, may preclude a judge from appearing at a public hearing or providing an official consultation on a matter relating to substantive law even though canon 4C(1) alone would permit such an appearance or consultation. For example, an appearance at a public hearing of a legislative committee to advocate for longer sentences for certain drug offenders would appear to qualify as an appearance on a matter “concerning the law” within the meaning of the canon 4C(1) exception; however, advocacy for longer sentences for only a particular type of offender could undermine public confidence in the impartiality of the judge with respect to such cases and thus run afoul of canons 1, 2A, 3B(9), and 4A(1). Accordingly, such an appearance would not be permissible notwithstanding its apparent consistency with canon 4C(1) unless the judge’s presentation relates to the impact of such sentences on the courts or the adjudicatory process. However, a judge may appear to advocate for improvements in the administration of justice that would seek to reduce recidivism based on the judge's expertise. This could include (for example) information about collaborative court programs the judge had presided over or administered that employ alternative sentencing or probation periods for drug offenders. A judge could advocate for statewide use of alternative programs based on the judge’s experience without commenting on the outcome of cases involving particular offenders, and without implying that the judge will be ruling in a particular way in a class of cases.

Similarly, proposed death penalty and collective bargaining measures are all matters "concerning the law" within the meaning of canon 4C(1); however, judicial advocacy for specific legislation on these matters could contravene the canon 2A prohibition against making statements that commit a judge with respect to cases, controversies, or issues that are likely to come before the courts or that are inconsistent with the impartial performance of duties. Appearing before a public body to explain, from a judicial perspective, the effects of any of these proposed laws on the judicial process or judicial administration, would be permissible under canon 4C(1), as concluded above, and would appear to be consistent with the other provisions of the code.

VI. Conclusion

So that the public at large -- not to mention the members of the executive and legislative branches of government -- may benefit from the unique experience and perspective of judges in matters concerning the law, the legal system, and the administration of justice, a judge may appear at a public hearing or officially consult with an executive or legislative body or public official on matters within the scope of that experience and perspective, provided that the appearance or consultation does not contravene any other provisions of the Code of Judicial Ethics, for example, by commenting on pending or impending proceedings in any court, or by taking a position that could be understood as a commitment with respect to the outcome of cases.

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)).

CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS
350 McAllister Street, Room 1144A
San Francisco, CA 94102
(855) 854-5366
www.JudicialEthicsOpinions.ca.gov

CJEO Formal Opinion No. 2015-007

[Issued January 29, 2015]

DISQUALIFICATION FOR PRIOR APPEARANCE AS A DEPUTY DISTRICT ATTORNEY IN A NONSUBSTANTIVE MATTER

I. Question Presented

The Committee on Judicial Ethics Opinions (CJEO) has been asked to provide an opinion on the following question:

> Is a judge disqualified from presiding over a criminal case if the judge appeared in that case as a deputy district attorney, but only for a brief, nonsubstantive matter such as a scheduling conference?

II. Summary of Conclusions

Trial judges have a statutory duty to hear all matters coming before them unless they are disqualified. (Code Civ. Proc., § 170).[1] A judge is disqualified to hear a matter if the judge previously "served as a lawyer in the proceeding." (§ 170.1, subd. (a)(2)(A).) Taken together, the purpose of these statutes is to promote both the public's faith in the

[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

impartiality of judges and the efficient and effective administration of justice by requiring disqualification in only those circumstances where there is a reasonable doubt as to impartiality.

Where a judge has previously acted as an advocate for one party in a proceeding that later comes before that judge, the law, quite logically, presumes an impairment of impartiality. It is the committee's opinion, however, that a judge who previously appeared in a case as a deputy district attorney only in a perfunctory, nonsubstantive role, such as a brief appearance on a scheduling or uncontested matter, is not disqualified for having "served as a lawyer in the proceeding," unless the judge in some fashion actively participated in the case. To conclude otherwise would impede the administration of justice where there is no reason to doubt impartiality, contrary to the purposes of the disqualification statutes.

III. Authorities

A. Applicable Canons

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

B. Other Authorities

California Code of Civil Procedure, sections 170, 170.1, 170.3, 170.5

Apple Inc. v. Superior Court (2013) 56 Cal.4th 128

Burden v. Snowden (1992) 2 Cal.4th 556

Holmes v. Jones (2000) 83 Cal.App.4th 882

In re Arthur S. (1991) 228 Cal.App.3d 814

In re Dannenberg (2005) 34 Cal.4th 1061

Muller v. Muller (1965) 235 Cal.App.2d 341

People v. Barrera (1990) 70 Cal.App.4th 541

People v. Bryan (1970) 3 Cal.App.3d 327

People v. King (2006) 38 Cal.4th 617

People v. Peralez (1971) 14 Cal.App.3d 368

People v. Thomas (1972) 8 Cal.3d 518

Sincavage v. Superior Court (1996) 42 Cal.App.4th 224

United Farm Workers v. Superior Court (1985) 170 Cal.App.3d 97

Rothman, California Judicial Conduct Handbook (2013 supp.) section 7.37

IV. Discussion

A. Introduction

The disqualification statutes require trial judges to hear all cases assigned to them unless they are disqualified due to, inter alia, having previously "served as a lawyer in the proceeding." (§ 170.1 subd. (a)(2)(A); see § 170.) Judges who are former deputy district attorneys sometimes face the question of whether they are duty bound to hear a case or are disqualified because they previously participated in the matter briefly and superficially (at an uncontested motion or in a scheduling conference), without gaining knowledge of the disputed facts and legal issues, and thus having no occasion to form an opinion or develop a bias about the case that would prevent them from being impartial. This question arises out of the practical realities of criminal law practice, which often involves various perfunctory motions and proceedings.[2] As a result of the high-volume

[2] These circumstances also exist in other public agencies that provide criminal law services, such as public defenders offices, so the question also arises for judges with such pre-bench criminal law experience. (See *People v. Barrera* (1990) 70 Cal.App.4th 541, 579 [nonwaivable disqualification of a commissioner who previously represented the defendant as a deputy public defender].) The committee, however, has been asked about

caseloads in many district attorneys' offices, it is not uncommon for a deputy district attorney to be handed a court file and asked to appear in a nonsubstantive matter without any need (or opportunity) to learn about the disputed facts, the legal issues or the prosecution's strategy in the case. The committee has been asked to provide guidance on whether these nonsubstantive appearances constitute "serv[ice] as a lawyer" that requires disqualification under section 170.1, subdivision (a)(2). The answer to that question requires, first, an examination and construction of the language in the disqualification statutes.

B. Statutory Language

1. Principles of statutory construction

When interpreting statutory language, """our fundamental task is 'to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute.'""" (*Apple Inc. v. Superior Court* (2013) 56 Cal.4th 128, 135.) Because statutory language generally provides the most reliable indicator of that intent, the words of the statute are given their usual and ordinary meanings, as construed in the context of the statute as a whole. (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562.) Additionally, statutes relating to the same subject must be harmonized, both internally and with each other, to the extent possible. (*Holmes v. Jones* (2000) 83 Cal.App.4th 882, 888.)

The plain meaning of the statutory language controls if there is no ambiguity. (*People v. King* (2006) 38 Cal.4th 617, 622.) If, however, the statute is susceptible to more than one reasonable construction, legislative history may be examined. (*In re Dannenberg* (2005) 34 Cal.4th 1061, 1081-1082.) Finally, the impact of an interpretation on public policy may also be considered, for where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation. (*Ibid*.)

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the disqualification requirements of former deputy district attorneys and this opinion discusses only those factual circumstances.

Here, two statutes are relevant to our inquiry. Section 170 provides that "[a] judge has a duty" to serve unless "disqualified." Section 170.1 sets forth the grounds for disqualification. Read together, these sections are understood to mean that "[t]he duty of a judge to sit where not disqualified is equally as strong as the duty not to sit when disqualified." (*United Farm Workers of America v. Superior Court* (1985) 170 Cal.App.3d 97, 100.) It is in this context that the narrower question posed to the committee must be examined.

2. The disqualification requirements

Specific disqualification grounds for prior service as a lawyer are provided in section 170.1, subdivision (a)(2), as follows:

"(a) A judge shall be disqualified if any one or more of the following are true:

. . .

"(2) (A) The judge served as a lawyer in the proceeding, or in any other proceeding involving the same issues he or she served as a lawyer for a party in the present proceeding or gave advice to a party in the present proceeding upon a matter involved in the action or proceeding.

"(B) A judge shall be deemed to have served as a lawyer in the proceeding if within the past two years:

"(i) A party to the proceeding, or an officer, director, or trustee of a party, was a client of the judge when the judge was in the private practice of law or a client of a lawyer with whom the judge was associated in the private practice of law.

"(ii) A lawyer in the proceeding was associated in the private practice of law with the judge.

"(C) A judge who served as a lawyer for, or officer of, a public agency that is a party to the proceeding shall be deemed to have served as a lawyer in the proceeding if he or she personally advised or in any way represented the public agency concerning the factual or legal issues in the proceeding."

The primary disqualifying factor in subdivision (a)(2) is where a judge "*served as a lawyer in the proceeding*." (§ 170.1, subd. (a)(2)(A), italics added.) Subdivision (a)(2)(A) also requires disqualification where, in any *other* proceeding involving the *same issues*, a judge served as a lawyer for, or gave advice to, a party in the present proceeding. (*Ibid*.) Based on the question posed, the second part of subdivision (a)(2)(A) does not apply to this analysis.[3]

Additional disqualifying factors are provided in subdivision (a)(2)(B) and (C), which deem a judge to have *served as a lawyer in the proceeding* in distinct circumstances where the judge did not *actually* "serve[] as a lawyer in the proceeding" but, because of other facts, is disqualified *as if* the judge *served as a lawyer in the proceeding*. (§ 170.1, subd. (a)(2)(B) & (C).) Subdivision (a)(2)(B) deems a judge to have *served as a lawyer in the proceeding* when a party was a client of the judge in private practice or a client of a lawyer who was in private practice with the judge, within the previous two years. Subdivision (a)(2)(C) also deems a judge to have *served as a lawyer in the proceeding* when the judge served as a lawyer for a public agency party and the judge advised or represented the public agency concerning the factual or legal issues

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[3] *Sincavage v. Superior Court* (1996) 42 Cal.App.4th 224 (*Sincavage*) provides an example of facts that might give rise to disqualification based on the judge's service as a lawyer in another proceeding involving the same issues. In *Sincavage*, the trial judge had conducted a preliminary examination as a deputy district attorney in the case involving the defendant's prior convictions, which were alleged as strikes in the proceeding before the judge. The *Sincavage* court, however, did not reach the issue of whether the other proceedings on the defendant's priors involved the same issues under section 170.1, subdivision (a)(2)(A). Instead, the court concluded the judge was disqualified under section 170.1, subdivision (a)(6)(A)(iii), based on two facts: (1) the judge "was active in the prosecution of the priors," and (2) the judge had stated on the record, before her appearance in the preliminary examination was discovered, that she would "automatically recuse herself" if she had actively participated in the defendant's priors, but then failed to do so. The *Sincavage* court found, "A doubt as to impartiality and fairness arises when the judge changes her mind upon learning the very fact which she earlier said would disqualify her." (*Id.* at p. 230.)

in the present proceeding.[4] In both circumstances, a judge who did not appear in the present court proceeding is disqualified *as if* he or she *served as a lawyer in the proceeding*.

Thus, the circumstances specified in subdivisions (a)(2)(B) and (C) also do not apply to the narrow question posed (disqualification for previous nonsubstantive appearance in the same proceeding), but they do provide a statutory context within which to discern the intended meaning of the term "served as a lawyer in the proceedings."

3. The meaning of "served as a lawyer"

The phrase "served as a lawyer in the proceedings" can be—and has been—construed to mean that *any* appearance of any type by a lawyer in a proceeding would subsequently disqualify the judge who had made that appearance "regardless of how significant the judge's role was at the time." (Rothman, Cal. Judicial Conduct Handbook (2013 supp.) § 7.37, p. 12.) Another view, however, is that the Legislature did not intend to have the question of judicial disqualification for prior service as a lawyer in the proceeding turn on "an inconsequential formality." (*In re Arthur S.* (1991) 228 Cal.App.3d 814, 820 (*Arthur S.*).) Although the court in *Arthur S.* decided that successive juvenile proceedings filed under the same case number were separate proceedings and ultimately determined disqualification based on the lack of similar issues, the court's rationale suggests that the statutory term "served as a lawyer in the proceeding*"* is susceptible to more than one reasonable construction.

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[4] The use of the words "represented or advised" distinguishes the service in section 170.1, subdivision (a)(2)(C) from service as a lawyer in the proceedings in subdivision (a)(2)(A). "Proceedings" are statutorily defined as "the action, case, cause, motion, or special proceeding to be tried or heard by the judge." (§ 170.5, subd. (f).) Thus, subdivision (a)(2)(C) applies to lawyers who represent and advise public agencies in forums other than court proceedings, such as administrative and agency hearings, and who provide to the agencies legal advice generally. As an example, a former deputy county counsel who represented the county in annexation hearings before a local agency formation commission (LAFCO) is disqualified under subdivision (a)(2)(C) from presiding as a judge over a court proceeding challenging some aspect of that LAFCO annexation.

Thus, we look to the legislative history to assist in determining whether the legislature intended that a brief, nonsubstantive appearance in the same proceeding would *require* judicial disqualification.

4. Legislative history

The most significant amendments to the disqualification statutes occurred in 1984 and 2005. In 1984, the Legislature sought to clarify the requirements for disqualification, which had been amended more than 20 times since 1927 and had become 'murky.' (Sen. Keene, sponsor of Sen. Bill No. 1633 (1983-1984 Reg. Sess.), letter to Governor, Sept. 6, 1984, requesting approval.) Former section 170 was replaced by former sections 170–170.5. (Stats. 1984, ch. 1555, § 5, p. 5479.) The Legislature made two key changes: (1) it enacted the provision that a judge has a duty to serve where not disqualified, and (2) it replaced the subjective standard of actual bias with an objective standard of reasonable doubt as to impartiality.[5] In addition, disqualification of a judge who had been "attorney or counsel for any party" in "the action or proceeding" under former section 170, subdivision (a)(4) (as amended by Stats. 1982, ch. 1644, § 1, p. 6678) was replaced by section 170.1, subdivision (a)(2), which requires disqualification of a judge who had previously "served as a lawyer in the proceedings." While the legislative history makes no mention of reasons for these specific changes, it does show that the amendments, overall, were intended to restate the standards for judicial recusal and require disqualification "where it is not in the best interest of the administration of justice; where there is a question of the judge's ability to be impartial; or where a third person might reasonably question whether there is an appearance of partiality." (Jud. Council of Cal.,

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[5] Section 170, subdivision (a)(5) was replaced in 1984 by section 170.1, former subdivision (a)(6)(C) (now numbered as § 170.1, subd. (a)(6)(A)(iii)), which requires disqualification where "a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." (See Sen. Com. On Judiciary, Analysis of Sen. Bill No. 1633 (1983-1984 Reg. Sess.), as amended Mar. 19, 1984, p. 3.) The objective reasonable doubt standard is discussed in IV.B.(5), *post*, at pages 10-15.

letter to Assem. Com. On Judiciary re Sen. Bill No. 1633 (1983-1984 Reg. Sess.), Jun. 13, 1984, supporting passage.)

In 2005, the Legislature again amended section 170.1, primarily to clarify the grounds for disqualification of judges considering prospective employment as an alternative dispute resolution (ADR) neutral under section 170.1, subdivision (a)(8). At the same time, technical changes were made to separate the section 170.1, subdivision (a)(2) disqualification factors into subdivision (a)(2)(A)-(C), although no substantive changes were made to these relevant provisions. The legislative history shows that section 170.1. subdivision (a)(8) was amended because the provision had been strictly interpreted to require disqualification if a judge had any discussions with an ADR provider, even when those discussions were unsolicited or entirely superficial. Concern was expressed that recusal could be required when a judge merely appointed an ADR neutral in a proceeding without discussing or intending prospective employment. The 2005 amendment clarified that disqualification was required only where a judge 'has meaningfully participated' in prospective employment discussions and had a specified conflict of interest with an ADR provider. (Sen. Rules Com., reading analysis of Assem. Bill No. 1322 (2005-2006 Reg. Sess.), July 14, 2005, p. 4.) The express intent of the Legislature in enacting this amendment was to "'prevent the wholesale disqualification of civil judges'" (id. at p. 3) which could "'severely hamper a trial court's ability to manage its civil litigation calendar.'" (Sen. Com. On Judiciary, analysis of Assem. Bill No. 1322 (2005-2006 Reg. Sess.) for hearing on July 12, 2005, p. 70). As the author and sponsors of the legislation noted, "judges whose authority rests fundamentally on the well-deserved public esteem for the integrity of the judiciary would be prudent to avoid the potential perception of impropriety . . . ." (Assem. Com. on Judiciary, analysis of Assem. Bill No. 1322 (2005-2006 Reg. Sess.) as amended Mar. 29, 2005, p. 4.)

The legislative histories of the 1984 and 2005 enactments show two clear purposes for the disqualification statutes as a whole: one is to promote trust by precluding judges from presiding in those circumstances where there is a reasonable doubt as to impartiality, and the other is to further the administration of justice by requiring judges to

preside where there is no reasonable doubt as to impartiality. In view of these dual purposes, it appears that the term "served as a lawyer in the proceedings" in section 170.1, subdivision (a)(2) is intended to require disqualification where the judge performed any legal services in the case that could raise a reasonable doubt about the judge's impartiality. What, then, are the types of prior legal services that implicate possible bias or partiality? The courts in California and other jurisdictions provide guidance in answering this question.

5. Reasonable doubt as to impartiality

While no officially reported California case directly decides whether or not a nonsubstantive appearance in the same proceeding is disqualifying, courts that apply the reasonable doubt standard to disqualification decisions in similar circumstances are instructive.[6]

For example, in the circumstances of a prior appearance on a substantive matter in the same proceeding, disqualification is clearly required. (*People v. Crappa* (1925) 73 Cal.App. 260, 261 [judge's revocation of probation and sentencing reversed where the judge previously appeared as a deputy district attorney at the defendant's arraignment and probation hearings in the same matter].) Disqualification is similarly required for substantive involvement in another proceeding related to the matter before the judge. (*Sincavage, supra*, 42 Cal.App.4th at p. 230 [disqualification based on judge's appearance as a deputy district attorney at the defendant's preliminary hearing in a prior conviction which was charged as a prior in the matter pending before the judge].)

Significantly, the court in *Sincavage* found that the judge's prior appearance at a preliminary hearing led to the conclusion that "a person knowing these facts would

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[6] Many of the California cases addressing disqualification for prior service as a lawyer are decided on procedural grounds such as waiver and timeliness, which are not directly relevant to this advisory opinion. (See *People v. Barrera, supra*, 70 Cal.App.4th at p. 579; *Sincavage, supra*, 42 Cal.App.4th at pp. 230-232; *Muller v. Muller* (1965) 235 Cal.App.2d 341, 346-348.) However, insight may be gleaned where reasonable doubt is addressed in passing.

entertain doubt that [the] Judge . . . would be impartial in ruling on matters involving the [defendant's] priors." (*Sincavage, supra*, 42 Cal.App.4th at p. 230.) One of the facts the *Sincavage* court relied on in reaching this conclusion was that the judge had been "active in the prosecution of the priors." (*Ibid.*)

Conversely, the absence of active participation is a deciding factor for several courts that have ruled against disqualification. In *People v. Peralez* (1971) 14 Cal.App.3d 368, the judge had been the district attorney of the county at the time of the defendant's prior conviction. The defendant argued on appeal that the "mere presence of the judge's name on the conviction record" was grounds for reversal based on bias. (*Id.,* at p. 375.) The court rejected the appellant's contention that a judge is disqualified if he was previously "the least bit associated with the prior conviction." (*Ibid.*) Rather, the court found that it was not reasonable to conclude that the judge had an obligation to disqualify "when there is no indication of any actual participation in the previous action." (*Id.,* at p. 376.)

Nor is disqualification required for merely having been an assistant district attorney without any actual participation in the defendant's prosecution. (*People v. Thomas* (1972) 8 Cal.3d 518, 521.) In *Thomas,* the court found that the disqualification statute should be "liberally construed with a view to effect its objects and to promote justice" and that the object of the statute "'is not only to guard jealously the actual impartiality of the judge but also to insure public confidence.'" (*Id*., at p. 520.) The court concluded that it would be unreasonable to assume a trial judge's prior representation of the People in other matters would impair his impartiality or undermine public confidence. (*Ibid.*)

The kinds of active participation that would raise a reasonable doubt as to impartiality are specifically addressed in *People v. Bryan* (1970) 3 Cal.App.3d 327 (*Bryan*). In *Bryan,* a judge pro tem was not required to disqualify because of a prior appearance as a deputy district attorney at the defendant's sentencing on a prior conviction. (*Bryan, supra,* 3 Cal.App.3d at p. 342.) The record disclosed that the judge had not prosecuted the case, and had not participated in post-conviction proceedings or in

an appeal that affirmed the judgment. The judge had merely appeared at a sentencing hearing following the appeal where the originally imposed sentence was reaffirmed. It was noted by the court that the record showed the judge "was simply in the courtroom to take care of the many matters calendared on that date and took no part in the reaffirmance of a sentence originally pronounced." (*Ibid*.) The judge stated that he knew nothing about the case at the time of this appearance. The court found that these circumstances did not merit disqualification under the statute. (*Ibid*.)

The conclusion we draw from these California cases is that disqualifying *service as a lawyer in the proceeding* requires at least a modicum of active participation. It would be unreasonable for the law to presume that a judge's prior appearance at a perfunctory, nonsubstantive hearing—essentially carrying out an administrative task—would compromise the judge's impartiality. Where the appearance was so brief and inconsequential that the judge gained no knowledge of the disputed facts, the legal issues, or the prosecution's strategy, a rational person aware of the circumstances would not have reason to believe that any bias was formed. If, on the other hand, the judge actively participated in any way, for example, by reviewing the facts and arguing the merits of even a minor disputed matter, a doubt as to the judge's impartiality would be reasonable.

A number of other jurisdictions are in accord regarding the requirement of active participation.[7] We note that some jurisdictions, however, follow the view that any appearance requires disqualification.[8] In those jurisdictions that recognize active

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[7] (See *Laird v. Tatum* (1972) 409 U.S. 824, 828 [Supreme Court justice who was formerly a Justice Department official is disqualified if he either signs a pleading or brief or if he "actively participated" in any case even though he did not sign a pleading or brief]; *U.S. v. Ruzzano* (7th Cir. 2001) 247 F.3d 688, 695 [some level of actual participation in the case by the judge while serving as an assistant United States attorney is required to trigger disqualification, on the basis that he or she participated as counsel, adviser, or material witness concerning the proceeding, or expressed an opinion concerning merits of case in controversy].)

[8] (See *Com. v. Young* (1970) 439 Pa. 498, 500 [disqualification is required for judges who, prior to ascending the bench, had association with either the prosecution or the defense in the trial of the case]; *Ex parte Sanders* (1995) 659 So.2d 1036, 1037-1039

participation as a deciding factor, some examples of active participation found to be disqualifying include: (1) prior involvement in the investigation of the case; (2) presentation of the case to the grand jury; (3) prosecution of the defendant's indictment; (4) active involvement in obtaining the underlying conviction; and (5) a review of the case file and expressing a written opinion in the matter.[9] Examples of prior prosecutorial service found not to be active participation and therefore not disqualifying include: (1) a stamped signature on a notice without participation in the grand jury or trial; (2) no examination of the file, participation in the investigation, interview of witnesses, or preparation of legal research; (3) a single appearance to request a continuance in an underlying matter; and (4) assigning the case to another attorney and agreeing with a defense request to expedite the indictment.[10] These examples of the types of active

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[disqualification of a former district attorney is required where, at one point, the judge had been attorney of record for the cases against the defendant].)

[9] (See *United States v. Pepper & Potter, Inc.* (1988) 677 F.Supp. 123, 125-126 [a judge's prior involvement in the investigation of defendant's case, which consisted of reviewing, signing, and submitting an application to the court for the empanelment of a grand jury, was "not merely of a *pro forma* nature" and would prompt an objective observer to question the judge's impartiality]; *State v. Tucker* (1993) 254 N.J.Super. 549, 555 [the impartiality of a judge who, as prosecutor, presented the defendant's case to the grand jury, might reasonably be questioned]; *Jenkins v. State* (1990) 570 So.2d 1191, 1193 [a reasonable person knowing that the judge acted as prosecutor during defendant's indictment would question impartiality]; *Smith v. State* (2011) 357 S.W.3d 322, 342 [a person of ordinary prudence would have a reasonable basis for questioning judge's impartiality where the judge, as prosecutor, was actively involved in prosecuting defendant in related matters and had been in possession of critical evidence used to convict the defendant in the matter before the judge]; *Lee v. State* (1977) 555 S.W.2d 121, 125 [a trial judge who, while district attorney staff, reviewed the case and sent a letter to defense counsel containing opinions about the defendant's record and a recommended sentence, was disqualified from presiding].)

[10] (See *Gamez v. State* (1987) 737 S.W.2d 315, 318-320 [a judge is not disqualified simply because his stamped signature appeared on a notice, but where he did not participate in the grand jury or trial, conduct an investigation, interview witnesses, prepare legal research, or examine the file]; *Mort. Elec. Registr'n Sys. v. Book* (2006) 97 Conn.App. 822, 830-831 [a judge's impartiality could not reasonably be questioned on the basis of his prior role as a prosecutor in another matter in which he appeared only

participation that may or may not be disqualifying are in line with *Bryan, supra*, 3 Cal.App.3d at page 343, and with our view of the intended meaning of *service as a lawyer in the proceedings*.

Thus, it is the committee's opinion that a judge who previously appeared in a case as a deputy district attorney on a nonsubstantive matter, without any active participation in the prosecution, is not disqualified for having served as a lawyer in the proceeding. To conclude otherwise would impede the administration of justice where there is no perception of partiality, contrary to the purpose of the disqualification statutes.

VI. Conclusions

It is the committee's opinion that the term "served as lawyer in the proceeding" in section 170.1, subdivision (a)(2)(A), is intended to include any active participation as an attorney for a party that could create a reasonable doubt as to impartiality. It is also the committee's opinion that active participation does not include a brief appearance on a scheduling or uncontested matter where special knowledge about the case is not gained and hence no opinion or bias about the matter could be formed. These facts would not create a reasonable doubt as to the impartiality of a judge who had made this kind of nonsubstantive appearance. A conclusion that such an appearance would *require* the disqualification of a judge would impede the efficient and effective administration of justice, contrary to the purpose of the disqualification statutes, by removing a judge where there is no reasonable perception of partiality.

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

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once and performed only a limited function, merely requesting a continuance]; *People v. Del Vecchio* (1989) 129 Ill.2d 265, 277-278 [disqualification deemed unnecessary where the judge, as a prosecutor, played only a limited role in the defendant's prosecution by assigning the case to another attorney and by agreeing with a defense request to expedite the indictment].)

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)).

CALIFORNIA SUPREME COURT

COMMITTEE ON JUDICIAL ETHICS OPINIONS

350 McAllister Street, Room 1144A

San Francisco, CA 94102

(855) 854-5366

www.JudicialEthicsOpinions.ca.gov

CJEO Formal Opinion 2016-008

[Issued March 4, 2016]

ATTENDING POLITICAL FUNDRAISING OR ENDORSEMENT EVENTS

I. Question Presented

The Committee on Judicial Ethics Opinions has been asked to provide an opinion on the following questions:

> Under what circumstances does the California Code of Judicial Ethics permit a judicial officer to attend, speak, appear as the guest of honor, or receive an award at a political event where a nonjudicial candidate will be endorsed or funds will be raised? To what extent are these activities permissible in the context of a judicial campaign?
>
> Does the code impose an obligation on judges attending a political event, or engaging in the above-described activities, to inspect promotional material used for such an event to ensure that the judicial title and prestige of office are not used to advance the interests of the candidate or the political organization?

II. Summary of Conclusions

Judges are broadly prohibited from engaging in political activities that may create the appearance of political bias or impropriety. (Canon 5.) They are specifically prohibited from certain activities that are usually an integral part of political events, such as making speeches for a political organization or nonjudicial candidate, and publicly endorsing or personally soliciting funds for a nonjudicial candidate or political organization.[1] (Canon 5A(2) & (3).)

In deciding whether to attend a political fundraising or endorsement event, judges must consider whether their presence may create the appearance that they are endorsing or fundraising for a nonjudicial candidate or political organization. When attending, the types of activities that would be likely to create the appearance of political bias include being introduced as a judge, receiving an award, or being the guest of honor at the event.

Making speeches for a political organization or nonjudicial candidate is prohibited (canon 5A(2)), but speaking about the law, the legal system, or the administration of justice is permitted at a political event so long as the activity does not create the appearance of political bias and is otherwise consistent with the code. (Canon 5D.) If the event is being held for the purpose of endorsement or fundraising for a nonjudicial candidate or political party, judges should consider whether speechmaking on even permissible topics would create the appearance of speaking on behalf of, or lending the prestige of office to, the candidate or political organization.

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[1] "Political organization" is a term defined in the code to include political parties or other groups with the principal purpose of furthering candidates for nonjudicial office. (See p. 4, *post.*) This opinion discusses the canon 5 restrictions on political activities and specifically focuses on activities at political *events* held for the purpose of endorsement or fundraising, which may include events involving *groups* that fall within the definition of political organizations. As is the pattern in canon 5 (see p. 8, *post*), this opinion uses the defined term "political organization" when discussing activities involving such *groups* in the broader context of political fundraising or endorsement *events*. (Canon 5 [restrictions on political activities generally]; canon 5A(2) & (3) [specific restrictions on activities involving political organizations or nonjudicial candidates]; canon 5B [permitting specific activities at political gatherings].)

Judges may endorse candidates for judicial office and may speak at political gatherings on their behalf. (Canon 5A, C.) Candidates for judicial office may attend, be introduced, and speak on their own behalf or on behalf of another candidate for judicial office at a political event so long as the candidate does not commit to a position on an issue that is likely to come before the courts and does not endorse or solicit funds for a candidate for nonjudicial office or a political organization. (Canon 5A(2) & (3), B(1)(a), C.)

While canon 5 does *not* include an express obligation on the part of judges who are not running for election to inspect promotional material used for political fundraising or endorsement events they are attending, judges do have an affirmative obligation to guard against the impermissible use of their names or judicial titles. (Canon 2B(2).) The committee advises judges to assess the likelihood that their attendance will be known to, and possibly used by the promoters of the event, and if so, it would be wise for judges to make reasonable efforts to ensure their title will not be used to promote the event. This may include informing the promoters in advance of the ethical restrictions and reviewing promotional material.

III. Authorities

A. Applicable Canons[2]

Preamble: "The code consists of broad declarations called canons, with subparts, and a terminology section. Following many canons is a commentary section prepared by the Supreme Court Advisory Committee on the Code of Judicial Ethics. The commentary, by explanation and example, provides guidance as to the purpose and meaning of the canons. The commentary does not constitute additional rules and should not be so construed. All members of the judiciary must comply with the code. Compliance is required to preserve the integrity of the bench and to ensure the confidence of the public. [¶] The canons should be read together as a whole, and each provision should be construed in context and consistent with every other provision. . . ."

[2] All further references to canons and to Advisory Committee commentary are to the California Code of Judicial Ethics unless otherwise indicated.

Terminology: "'Candidate for judicial office' is a person seeking election to or retention of a judicial office. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election authority, or authorizes solicitation or acceptance of contributions or support."

"'Law, the legal system, or the administration of justice.' When a judge engages in an activity that relates to the law, the legal system, or the administration of justice, the judge should also consider factors such as whether the activity upholds the integrity, impartiality, and independence of the judiciary (Canons 1 and 2A), whether it impairs public confidence in the judiciary (Canon 2), whether the judge is allowing the activity to take precedence over judicial duties (Canon 3A), and whether engaging in the activity would cause the judge to be disqualified (Canon 4A(4))."

"'Political organization' means a political party, political action committee, or other group, the principal purpose of which is to further the election or appointment of candidates to nonjudicial office."

Canon 2B(2): "A judge shall not lend the prestige of judicial office or use the judicial title in any manner, including any oral or written communication, to advance the pecuniary or personal interests of the judge or others. . . ."

Canon 4A(1): "A judge shall conduct all of the judge's extrajudicial activities so that they do not [¶] (1) cast reasonable doubt on the judge's capacity to act impartially . . . ."

Canon 4C(3): "Subject to the following limitations and the other requirements of this code, [¶] . . . [¶] (d) a judge . . .

"(i) . . . shall not personally participate in the solicitation of funds or other fundraising activities . . . . [¶] . . . [¶]

"(iii) shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or if the membership solicitation is essentially a fundraising mechanism . . . .

"(iv) shall not permit the use of the prestige of his or her judicial office for fundraising or membership solicitation but may be a speaker, guest of honor, or recipient of an award for public or charitable service provided the judge does not personally solicit funds and complies with Canons 4A(1) . . . ."

Advisory Committee commentary following canon 4C(3)(d): "[A] judge must . . . make reasonable efforts to ensure that . . . others subject to the judge's direction and control do not solicit funds on the judge's behalf for any purpose, charitable or otherwise."

Canon 5: "A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary. [¶] Judges and candidates for judicial office are entitled to entertain their personal views on political questions. They are not required to surrender their rights or opinions as citizens. They shall, however, not engage in political activity that may create the appearance of political bias or impropriety. Judicial independence, impartiality, and integrity shall dictate the conduct of judges and candidates for judicial office. [¶] Judges and candidates for judicial office shall comply with all applicable election, election campaign, and election campaign fundraising laws and regulations."

Advisory Committee commentary following canon 5: "The term 'political activity' should not be construed so narrowly as to prevent private comment."

Canon 5A: "Judges and candidates for judicial office shall not [¶] . . . [¶] (2) make speeches for a political organization or candidate for nonjudicial office or publicly endorse or publicly oppose a candidate for nonjudicial office; or [¶] (3) personally solicit funds for a political organization or nonjudicial candidate . . . ."

Advisory Committee commentary following canon 5A: "In judicial elections, judges are neither required to shield themselves from campaign contributions nor are they prohibited from soliciting contributions from anyone, including attorneys. Nevertheless, there are necessary limits on judges facing election if the appearance of impropriety is to be avoided. In soliciting campaign contributions or endorsements, a judge shall not use the prestige of judicial office in a manner that would reasonably be perceived as coercive. See Canons 1, 2, 2A, and 2B . . . .

"*Although attendance at political gatherings is not prohibited, any such attendance should be restricted so that it would not constitute an express public endorsement of a nonjudicial candidate or a measure not affecting the law, the legal system, or the administration of justice otherwise prohibited by this canon.* [¶]

"Under this canon, a judge may publicly endorse a candidate for judicial office. Such endorsements are permitted because judicial officers have a special obligation to uphold the integrity, impartiality, and independence of the judiciary and are in a unique position to know the qualifications necessary to serve as a competent judicial officer."

Canon 5B: "(1) A candidate for judicial office . . . shall not: [¶] (a) make statements to the electorate . . . that commit the candidate . . . with respect to cases, controversies, or issues that are likely to come before the courts . . . ."

Canon 5C: "Candidates for judicial office may speak to political gatherings only on their own behalf or on behalf of another candidate for judicial office."

Canon 5D: "A judge or candidate for judicial office may engage in activity in relation to measures concerning improvement of the law, the legal system, or the administration of justice, only if the conduct is consistent with this code."

B. Other Authorities

Williams–Yulee v. Florida Bar (2015) 575 U.S. ___ [135 S.Ct. 1656, 191 L.Ed.2d 570]

Wolfson v. Concannon (9th Cir. 2016) 811 F.3d 1176 [2016 WL 363202]

Commission on Judicial Performance:
Annual Report (1986) advisory letter, page 5
Annual Report (1987) advisory letter, page 11
Annual Report (1989) advisory letter 24, page 25
Annual Report (1992) advisory letter 12, page 14
Annual Report (1997) advisory letter 23, page 22
Annual Report (2010) advisory letter 9, page 25
Annual Report (2011), private admonishment 4, page 23
Inquiry Concerning Judge Zellerbach, Public Admonishment (2011) pages 4-5

Rothman, California Judicial Conduct Handbook (3d ed. 2007) sections 10.16, 10.17, 10.53, 11.01, 11.07, 11.18

California Judges Association, Judicial Elections Handbook (13th ed. 2014) pages 57-58

California Judges Association, Ethics Committee (2000) Advisory Opinion No. 50

California Judges Association: Judicial Ethics Update (1982) page 5; Judicial Ethics Update (1987) II.A; Judicial Ethics Update (1995) II.A.6; Judicial Ethics Update (1997) III.M; Judicial Ethics Update (2000) III.C; Judicial Ethics Update (2005) III.1; Judicial Ethics Update (2013/2014) III.4

IV. Discussion

A. Restrictions on Political Activity

Canon 5 states that "A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary."[3] This restrictive language "makes clear that the issue of inappropriate political activity is connected to the central principal of judicial ethics: the integrity of the judicial decision." (Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007) § 11.01, p. 567 (Rothman); see *Williams–Yulee v. Florida Bar* (2015) 575 U.S. ___, 135 S.Ct. 1656, 1665 (*Williams–Yulee*) [restrictions narrowly tailored to achieve the compelling state interest in upholding public confidence in the judiciary withstand strict scrutiny]; *Wolfson v. Concannon* (9th Cir. 2016) 811 F.3d 1176 (*Wolfson*) [under *Williams–Yulee*, a state may properly restrict judges and judicial candidates from taking part in political activities that undermine the public's confidence that judges base rulings on law and not on party affiliations].)

The text of canon 5 recognizes that judges do not surrender their rights as citizens but also places general and specific restrictions on the exercise of those rights. As a broad general matter, judges may not "engage in political activity that may create the appearance of political bias or impropriety." (Canon 5.) Thus, the fundamental test a judge must apply when considering whether to participate as a citizen in any political activity is whether the judge's conduct will create the appearance of political bias or impropriety.

The subparts of canon 5 prohibit specified activities, presumably because they have been deemed to reflect impermissible political bias. Canon 5A(2) and (3) prohibit

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[3] The structure of the California Code of Judicial Ethics enactments is explained in the preamble as consisting of "broad declarations called canons, with subparts, and a terminology section," followed by Supreme Court Advisory Committee commentary that provides guidance on the meaning of the canons. (Cal. Code Jud. Ethics, Preamble.)

judges from making speeches for a political organization or candidate for nonjudicial office, publicly endorsing or opposing a candidate for nonjudicial office, or personally soliciting funds for a political organization or nonjudicial candidate. Canon 5A(3) prohibits contributions to nonjudicial candidates or parties over certain amounts.[4] Canon 5B also prohibits a judicial candidate from making statements that commit the candidate with respect to cases, controversies, or issues that are likely to come before the courts. (Canon 5A(2), (3), B(1)(a).)

Other subparts of canon 5 specify activities that are permitted. Canon 5C permits "[c]andidates for judicial office [to] speak to political gatherings only on their own behalf or on behalf of another candidate for judicial office." And significantly, canon 5D permits "[a] judge or candidate for judicial office [to] engage in activity in relation to measures concerning improvement of the law, the legal system, or the administration of justice, only if the conduct is consistent with this code."

Read together, canon 5 and its subparts (1) generally prohibit any political activities that create the appearance of political bias, (2) specifically prohibit certain activities that have been determined to be impermissible, such as public endorsements and personal solicitations, and (3) specifically permit certain activities, such as those concerning law and legal system improvements, so long as other canons are not violated, including the canon 5 prohibition on activities that create the appearance of political bias or impropriety.

Given this combination of prohibitions and permissions, the committee has been asked to discuss what conduct is permissible at a political event where a nonjudicial candidate will be endorsed or funds will be raised, including when a judicial candidate is

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[4] While the contribution limits appear to be somewhat arbitrary, the committee assumes the canon's authors concluded that contributions in excess of these limits would be deemed to show political bias. (See *Wolfson, supra,* 811 F.3d 1176, fn. 10 [judges and judicial candidates may make limited contributions to another candidate or political organization as one of the few exceptions to a valid prohibition on endorsement or campaign participation].)

attending the event as part of his or her campaign for judicial office. This opinion provides guidance to judges on how to decide whether to (1) attend, (2) speak, or (3) appear as the guest of honor or receive an award at a political fundraising or endorsement event. The opinion also discusses how those activities might differ for judicial candidates and what obligations a judge has regarding promotional materials for such a political gathering.

B. Political Fundraising or Endorsement Events

There are different types of political events and the same political activity in different circumstances will have different ethical implications. Political groups may meet for no reason other than to learn about the law or, for example, to visit or discuss an historical site. The committee has been asked, however, to address political events that are held for the purpose of fundraising for, or endorsement of, nonjudicial candidates or political parties.

While it is clear a judge may never engage in certain political activities at such events, i.e., personal fundraising for or public endorsement of a nonjudicial candidate or political organization, there are other activities, such as speaking on the law, and silent presence during solicitation or endorsement by others, that may or may not be permissible under canon 5 depending on whether the context creates the appearance of political bias.

C. Political Activities

1. Attendance

As we have described, a judge or judicial candidate is prohibited from engaging in any political activities that create the appearance of political bias and canon 5A specifically prohibits personally soliciting funds for a political organization or nonjudicial candidate and publicly endorsing or opposing a candidate for nonjudicial office. (Canon 5A(2), (3).) Under these provisions a judge may not attend a political event and

personally request donations or publicly state his or her endorsement of or opposition to a nonjudicial candidate. (Commission on Judicial Performance (CJP), Annual Rep. (2010) advisory letter 9, p. 25 [advisory letter issued for publicly endorsing a candidate for nonjudicial office, although the judge promptly arranged to have the endorsement removed]; CJP, Annual Rep. (1989) advisory letter 24, p. 25 [advisory letter issued for endorsing a candidate for city council]; CJP, Annual Rep. (1987) advisory letter, p. 11 [advisory letter issued for publicly endorsing candidates for nonjudicial office].)

As the Advisory Committee commentary to canon 5A illustrates, however, attendance may be prohibited even if a judge does not make an express statement of endorsement:

> "Although attendance at political gatherings is not prohibited, any such attendance should be restricted so that it would not constitute an express public endorsement of a nonjudicial candidate or a measure not affecting the law, the legal system, or the administration of justice *otherwise prohibited by this canon*." (Advisory Com. com., Cal. Code Jud. Ethics, foll. canon 5A [italics added].)

Thus, it is the committee's opinion that attendance would be prohibited if the judge's presence could reasonably be construed to constitute a public endorsement or otherwise create the appearance of political bias. (Canon 5.) Similarly, attendance might be prohibited where it creates the appearance of a personal solicitation of funds. The California Judicial Conduct Handbook cautions that under canon 5A(3), which prohibits the personal solicitation of funds, "[e]ven the appearance of making such a solicitation would be grounds for discipline." (Rothman, *supra*, § 11.06, p. 573.) Indeed, discipline has been imposed for such an appearance of solicitation. (CJP, Annual Rep. (1992) advisory letter 12, p. 14 [advisory letter issued to a judge who gave the appearance of soliciting contributions from attorneys and their clients for the election campaign of a candidate for nonjudicial office].)

The question is, under what circumstances might attendance at a political fundraising or endorsement event create the appearance of political bias?

To assist in answering that question, the committee looked to the canons that apply to the governmental, civic, and charitable activities of judges.[5] Canon 4C(3)(d)(i) prohibits judges from "personally participat[ing] in the solicitation of funds or *other fundraising activities"* on behalf of civic or charitable organizations.[6] (Italics added.) In that context, the California Judicial Conduct Handbook cautions that, although silent presence during solicitation by others is permitted, judges should not attend a small solicitation event where a potential donor might interpret the judge's presence as intended to influence the donation. (Rothman, *supra*, § 10.53, p. 564.) A judge's literal or symbolic proximity to a personal solicitor can appear coercive or reflect political bias and can undermine the integrity of the judiciary, whether or not the public might perceive the judge as personally soliciting funds by proxy. (Canon 1 ["A judge shall uphold the integrity and independence of the judiciary"]; canon 2B(2) ["A judge shall not lend the prestige of judicial office or use the judicial title in any manner . . . to advance the … interests of the judge or others"]; canon 4C(3)(d)(iii) [a judge "shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or … is essentially a fundraising mechanism"]; canon 4C(3)(d)(iv) [a judge "shall not permit the use of the prestige of his or her judicial office for fundraising or

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[5] Attendance at a political event necessarily involves governmental and civic activity that is governed by canon 4 as well as by canon 5, which specifically addresses political and campaign activity. (See canon 5 [governing judges' rights as citizens]; see also Preamble [the canons should be read together as a whole, and each provision should be construed in context and consistent with every other provision]; Advisory Com. commentary, foll. canon 5D [a judge must consider whether conduct would violate other provisions of the code when deciding whether to engage in permitted activity].)

[6] In the committee's view, the fact that canon 5A(3) proscribes only the *personal solicitation* of funds does not mean "other fundraising activities" that are prohibited under canon 4C(3)(d)(i) would be permitted at political events. Canon 5 broadly prohibits "political activity that may create the appearance of political bias or impropriety." (Canon 5; see pt. IV.A, *ante*, at pp. 7-8.) This necessarily includes activities that give the appearance of soliciting contributions. (CJP, Annual Rep. (1992) advisory letter 12, p. 14; see pt. IV.C.1, *post*, at pp. 10-11.)

membership solicitation . . ."]; canon 5 [a judge shall "not engage in political activity that may create the appearance of political bias or impropriety"].)

The size of the group being solicited is particularly relevant in the context of political events where the donations solicited for a nonjudicial candidate could imply an endorsement in the form of financial support. If a judge is standing next to someone who is asking a small number of individuals for donations, it would be reasonable to interpret the judge's presence as joining the solicitation. Similarly, the judge's silent presence in the small group could create the appearance of an endorsement of the candidate for whom the funds are being solicited. Conversely, a judge's mere presence at a large fundraising event should not give the appearance of personal solicitation or public endorsement, particularly if the judge does not wear a name badge or other insignia bearing his or her title.

The makeup of those in attendance is another factor judges should consider when deciding whether to attend an endorsement or fundraising event. If many of those in attendance are likely to know the judge *as a judge* (for example, a room full of prosecutors or public defenders), then the judge's mere attendance is likely to be noteworthy both to the legal community and in the press. Attendance at even a larger gathering in these circumstances might create the appearance of endorsement or political bias. (Canon 5.)

A judge should also consider whether the judge's presence will connect his or her judicial title to the fundraising or endorsement purpose. Canons 2B(2) and 4C(3)(d)(iv) prohibit the use of judicial title in any manner to advance the interests of others or to raise funds. At political events where the purpose is to raise funds and endorse a specific candidate, a judge's presence at a small gathering could create the appearance of political support for, or lending judicial prestige to, the candidate. In contrast, where the purpose of the event is to allow competing candidates to speak or debate, a judge's attendance is unlikely to be construed as an endorsement or as lending the prestige of the judge's title, even if those candidates or others engage in direct solicitation. (California Judges

Association (CJA) Judicial Ethics Update (2005) III.1 [judge may serve as a neutral moderator at a forum for candidates for city council election].)

At a larger event where the purpose is to fundraise or endorse a nonjudicial candidate, consideration should be given to whether special attention will be drawn to the presence of a judge in a manner that will be likely to lend the judicial title to that purpose. (CJA Judicial Ethics Update (1995) II.A.6 [a judge may not lead pledge of allegiance at fundraiser for a candidate for partisan political office].) Indeed, the California Judicial Conduct Handbook advises that when attending a political event, a judge who is not a judicial candidate should request that he or she not be introduced because it could be construed as an endorsement for the nonjudicial candidate or political organization. (Rothman, *supra*, § 11.18, p. 575; see also CJA Judicial Ethics Update (2000) III.C [judge may attend a campaign kickoff for a nonjudicial candidate but may not be introduced].)

In sum, when deciding whether to attend a political fundraising or endorsement event, judges should consider the size of the event, the audience, and whether attention will be drawn to their presence in a manner that will create the appearance of political bias by connecting them as judges to fundraising by others or that will be construed as an endorsement of a nonjudicial candidate. These considerations are particularly relevant when a judge is considering making a speech, receiving an award, or being a guest of honor at such a fundraising or endorsement event, as discussed below.

2. Making Speeches

Canon 5A(2) specifically prohibits judges from "mak[ing] speeches for a political organization or candidate for nonjudicial office." Canon 5D, however, specifically permits judges and candidates to engage in activity in relation to measures concerning improvement of the law, the legal system, or the administration of justice. Both the definition of the phrase "law, the legal system, or the administration of justice" and the Advisory Committee commentary following canon 5D make clear that any activity undertaken under canon 5D is nevertheless circumscribed by the other provisions of the

code. (Terminology, "Law, the legal system, or the administration of justice"; Advisory Com. commentary, foll. canon 5D.) Read together, canon 5A(2) and canon 5D raise questions about the extent to which speechmaking about the law, the legal system, or the administration of justice is permitted at a political fundraising or endorsement event.[7]

It is the committee's conclusion that any speechmaking that reasonably could create the appearance of fundraising or of an endorsement of a nonjudicial candidate or political organization would violate the provisions of canon 5 and would not be permitted, even if the speech discusses the law, the legal system, or the administration of justice. Judges have been disciplined for speaking at events where their actions contributed to either the fundraising or endorsement purposes of an event. (CJP, Annual Rep. (1987) advisory letter, p. 11 [judge disciplined for being a featured speaker at a nonjudicial candidate's campaign event]; CJP, *Inquiry Concerning Judge Zellerbach* (2011) Public Admonishment, p. 4 [judge disciplined for speaking at a gathering about how the policies adopted by a candidate for district attorney would impact the court, which appeared to be a public opposition to a nonjudicial candidate in violation of canon 5A(2)].) If the speech can be understood as expressly or implicitly soliciting funds for, or endorsing or opposing, a nonjudicial candidate or political organization, the fact that the judge is also speaking on a permissible topic would not remedy its impropriety.

The canons provide a narrow allowance for a judge to speak *to* a political gathering, provided the circumstances "would not give rise to the perception that the judge was speaking *on behalf of, rather than to*, the organization," and the topic is strictly concerning "the law and the administration of justice." (Rothman, *supra*, § 10.17, p. 532.) When choosing to speak within this constraint at a political event, however, judges

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[7] The committee does not intend to suggest that judges may not speak on other politically neutral topics, such as music, art, or gardening. The committee limits its discussion in this opinion to speaking on the law, the legal system, or the administration of justice in the context of a political event because judges are more likely to be asked to speak on such topics and because the canons specifically call out these topics as permissible speechmaking material.

should be careful to "deliver a nonpartisan speech on improvement of the law, the legal system, or the administration of justice." (Rothman, *supra*, § 11.07, p. 574.)

When a judge speaks at a political event, the judge is likely to be introduced as a judicial officer and extended some special recognition. Depending on the context, even a speech devoted exclusively to permissible subjects may be seen as endorsing a political candidate or party. For example, a judge speaking to a political organization on the origins of the Constitution during a meeting devoted to the history of the law would probably raise no ethical issues. But if the same speech were given at an event designed to garner political or financial support for a nonjudicial candidate and could reasonably be perceived as an endorsement of the candidate, or as lending the prestige of the judge's office to the candidate, the committee's opinion is that this activity would be barred by the canons. (Canons 5 & 5A, 2B; Rothman, *supra*, § 11.07, p. 574.)

To summarize, although a speech may relate to the legal system or the administration of justice, the speech's context will be crucial in determining its permissibility. Judges invited to speak at a political fundraising or endorsement event should consider whether any speech at the event, even on permissible topics, could compromise judicial integrity by creating the appearance of political bias or public support of a political party or a nonjudicial candidate, or by lending the prestige of the judicial office to that candidate.

3. Receiving an Award or Being a Guest of Honor

The canons permit a judge to accept an award or to be specially recognized as a guest of honor, even at a fundraising event. Canon 4C(3)(d)(iv) provides that a judge may "be a . . . guest of honor, or recipient of an award for public or charitable service provided the judge does not personally solicit funds . . . ." Thus, judges are free to accept awards from specialty bar organizations or other interest groups, so long as doing so does not give the appearance of favor or constitute improper fundraising. (Rothman, *supra*, § 10.16, p. 530 [judge may speak as a guest at a specialty bar event if the judge is also available to speak at opposing bar association functions]; CJA Opinion No. 50 (2000) p.

2 [judge accepting an award from an agency or group should make clear that the judge is open to receiving awards from agencies or groups with opposing interests].)

In the context of a political endorsement or fundraising event for a party or nonjudicial candidate, however, acceptance of an award or being acknowledged as a guest of honor singles out the recipient as a focal point of that event, and therefore would likely create the appearance that the judge is associated with the purpose of the event, i.e., fundraising or endorsement of a political organization or nonjudicial candidate. (CJA Opinion No. 50, *supra*, p. 3 [judge should decline any award that would entangle the judge in political endorsements or fundraising]; CJA Judicial Ethics Update (1987) II.A [it is inappropriate for a judge to be a guest of honor at a fundraising event for a partisan political organization].) It is therefore the committee's opinion that special recognition at such an event would likely violate canon 5 by creating the appearance of political bias.

D. Judicial Campaign Activities

The prohibitions in canon 5A discussed above are tailored to apply only to political activities involving candidates for *nonjudicial* office. Thus, a judge is not prohibited from publicly endorsing a candidate for *judicial* office. Indeed, "[s]uch endorsements are permitted because judicial officers have a special obligation to uphold the integrity, impartiality, and independence of the judiciary and are in a unique position to know the qualifications necessary to serve as a competent judicial officer." (Advisory Com. com., Cal. Code Jud. Ethics, foll. canon 5A.)

Nor are judges who are themselves candidates in an election for judicial office prohibited under canon 5A from campaigning vigorously and effectively:

> "In judicial elections, judges are neither required to shield themselves from campaign contributions nor are they prohibited from soliciting contributions from anyone, including attorneys. Nevertheless, there are necessary limits on judges facing election if the appearance of impropriety is to be avoided. In soliciting campaign contributions or endorsements, a judge shall not use the prestige of judicial office in a manner that would reasonably be perceived as coercive. See

Canons 1, 2, 2A, and 2B. ” (Advisory Com. com., foll. canon 5A; see also CJA, Judicial Elections Handbook (13th ed. 2014) pp. 20-24).

Thus, there is no conflict between the prohibitions in canon 5A and the permissions in canon 5C. Canon 5A(2) prohibits judges and judicial candidates from making speeches for nonjudicial candidates, while canon 5C permits “[c]andidates for judicial office [to] speak to political gatherings only on their own behalf or on behalf of another candidate for judicial office.” A judge or judicial candidate who speaks at an event on his or her own behalf must take care, however, not to violate canon 5B, which forbids statements by judicial candidates to the electorate “ that commit the candidate . . . with respect to cases, controversies, or issues that are likely to come before the courts.” (Canon 5B(1)(a); see also CJA, Judicial Elections Handbook (13th ed. 2014) pp. 33-34.)

In short, a judge or judicial candidate may only fundraise and solicit support for the judge’s own campaign or for other judicial candidates. (CJP Annual Rep. (1986) advisory letter, p. 5 [advisory letter issued where judge arranged a political mailer that paired the judge with, and endorsed, a candidate for nonjudicial office]; CJP Annual Report (2011) private admonishment 4, p. 23 [private admonishment issued for not promptly removing endorsements of nonjudicial candidates which the judge had made prior to becoming a candidate].)

An effective campaign for judicial office often requires the broadest possible exposure to the electorate. Attending and appearing *as a judicial candidate* at an event devoted primarily to fundraising and promoting nonjudicial candidates or issues may provide such exposure and the opportunity to engage in judicial campaign contribution solicitation that is explicitly permitted under the Advisory Committee commentary to canon 5A. However, because the general and specific restrictions on political activities in canon 5 expressly apply to both judges and candidates for judicial office (see p. 5, *ante*), care must be taken so that a judicial candidate’s activities at such an event do not appear to endorse a political party or candidates for nonjudicial office. (*Wolfson, supra,* 811 F.3d 1176 [the compelling state interest in preserving public confidence in the integrity of the judiciary warrants foreclosing judicial candidates from engaging in

political campaigns other than their own]; CJA, Judicial Elections Handbook, *supra*, p. 58 [judicial candidates may not endorse candidates for nonjudicial office, including candidates for city attorney, district attorneys, and sheriff.)

As the Judicial Elections Handbook advises:

> "[Candidates may] attend fundraisers and other political events for nonjudicial candidates . . . [¶] as long as these activities do not appear to endorse political parties, issues or candidates for nonjudicial office. Subject to these restrictions, judicial candidates may attend, hand out their own promotional material, solicit funds, and meet voters and supporters." (CJA, Judicial Elections Handbook, *supra*, p. 57.)

Subject to the general canon 5 restrictions on judges and candidates, prohibited activities might also include attendance at events of only one political party or nonjudicial candidate to the exclusion of others, which could create the appearance of political bias. (CJA Judicial Ethics Update (2013/2014) III.4 [a judge running for election may make campaign speeches at partisan political meetings so long as the judge is available to both political groups].) Thus, depending on the context, being a guest of honor or a featured speaker might be prohibited, unless the judge is speaking only on behalf of his or her own candidacy or on behalf of another judicial candidate. (Canon 5; CJA, Judicial Elections Handbook, *supra,* p. 58.)

The committee therefore concludes that a candidate for judicial office may attend, be introduced, and speak on his or her own behalf, or on behalf of another candidate for judicial office, at a political event held for the purpose of endorsing or fundraising for a nonjudicial candidate, so long as the candidate does not commit to a position on an issue that is likely to come before the courts, endorse or solicit funds for a candidate for nonjudicial office or a political organization, or otherwise engage in campaign conduct that might create the appearance of political bias. (Canons 5, 5A(2) & (3), 5B(1)(a), 5C.)

E. Obligation to Inspect Promotional Material for Political Events

Canon 5B(2) requires candidates for judicial office to review and approve their campaign materials before dissemination. But canon 5 does not similarly provide that a

noncandidate judge is obligated to inspect promotional material used for political fundraising events a judge plans to attend. Nevertheless, several canons provide that there is a duty to ensure that the prestige of judicial office and judicial title are not used to advance the interests of others, cast doubt on impartiality, or solicit funds. (Canon 2B(2) [a judge shall not lend the prestige of office or use judicial title in any manner, including oral and written communications, to advance the interests of others]; canon 4A(1) [a judge shall conduct all extrajudicial activities so doubt is not cast as to impartiality]; canon 4C(3) [a judge shall not permit the use of the prestige of office for fundraising]; Advisory Com. com., foll. canon 4C(3)(d) [a judge must make reasonable efforts to ensure that others subject to the judge's direction and control do not solicit funds on the judge's behalf for any purpose, charitable or otherwise].) In the context of political events held for the purpose of endorsing or raising funds for a nonjudicial candidate or party, the canons may impose implicit duties when a judge accepts a personal invitation to attend.

In the committee's opinion, a judge must consider the circumstances of the invitation and the event to assess the likelihood that his or her judicial title will be known to the event promoters. If so, the judge would be wise to make reasonable efforts to ensure that judicial title is not used to promote attendance, solicit funds, or otherwise advance political interests. This may include advising the event organizers of the restrictions placed on judges under the California Code of Judicial Ethics, such as an advisement against being identified in promotional materials or publically introduced at the event.[8]

Although the code does not place an affirmative duty on judges to review and approve promotional materials after accepting an invitation to attend a political event, the

[8] It is the committee's view that this issue comes into play only where the judge has been personally invited to attend by the event's sponsors or organizers. A judge's decision to attend an event, whose attendance is not requested and probably not expected, should not give rise to any need to inspect promotional materials or inform the organizers in advance of the judge's ethical restrictions.

duty to take corrective action for impermissible use of judicial title is mandatory. (CJP, Annual Rep. (1997) advisory letter 23, p. 22 [judge listed in an endorsement of a candidate for nonjudicial office disciplined for failing to seek a retraction or otherwise ameliorate the problem, even though the endorsement was unauthorized].)

The California Judicial Conduct Handbook provides the following guidance regarding such corrective action:

> "In the event the judge's name somehow shows up on literature as an endorsement, or on literature soliciting funds or participation in a campaign event, the judge should immediately take action. The judge should notify the candidate or organization that the judge has not authorized use of his or her name, and prohibit future use of the judge's name. If possible, request that the organization clarify to the recipients of the flier that the judge took no part in the endorsement, and request that the campaign withdraw the offending material. The judge's position on this request would be greatly strengthened if the judge told the candidate in writing about this issue." (Rothman, *supra*, § 11.05, p. 572; see also CJA Judicial Ethics Update (1997) II.M [judge erroneously listed as an endorser of a candidate advised to send a written request for a retraction].)

It is the committee's view that prevention is the most effective course of action when a judge concludes his or her attendance might be used to promote a political fundraising or endorsement event. Advising event organizers of ethical restrictions and reviewing promotional materials in advance would eliminate the necessity of taking corrective action after judicial title has been used without consent. In the special circumstance of accepting an invitation to speak about the law, the legal system or the administration of justice at a political event, steps should be taken to prevent, and must be taken to correct, the impermissible use of judicial title to endorse or fundraise in promotional materials.

V. Conclusions

Under any circumstances, judges must refrain from (1) publicly endorsing or opposing, (2) personally soliciting funds for, or (3) making a speech for any nonjudicial candidate or political organization. Beyond these specific proscriptions, canon 5 broadly

prohibits judges and candidates from engaging in political activities that may create the appearance of political bias. When deciding whether to attend political fundraising events where a nonjudicial candidate will be endorsed, judges must consider whether their presence could create the appearance of an endorsement or solicitation due to the size of the event or the makeup of the attendees.

Additional activities that could appear to be an endorsement or solicitation of funds include being introduced, receiving an award, or being a speaker or a guest of honor at a political event where the primary purpose is to raise funds for or endorse a nonjudicial candidate or political organization.

Although making speeches in support of a political organization or nonjudicial candidate is prohibited, speaking at a political gathering about the law, the legal system, or the administration of justice may be permitted. The committee advises judges to consider the context of the gathering, including its primary purpose, in deciding whether or not to be a speaker. If the judge concludes that he or she can accept the speaking invitation, the judge must restrict his or her remarks to the law, the legal system, and the administration of justice and must avoid statements that may appear to be an endorsement or solicitation.

Judges may endorse candidates for judicial office and speak on their behalf. Judicial candidates may speak to political gatherings on their own behalf or on behalf of another judicial candidate and may be introduced as judicial candidates at gatherings for nonjudicial candidates. Candidates for judicial office may not, however, make speeches that make commitments with respect to cases, controversies, or issues that are likely to come before the courts, and may not solicit funds for or endorse nonjudicial candidates.

Because judges have an affirmative obligation to guard against impermissible uses of their judicial titles (canon 2B(2)), the committee advises judges accepting a personal invitation to attend a political fundraising or endorsement event to assess the likelihood that their attendance will be known to the promoters and their name might be used to promote the event. If likely, preventative measures are recommended to inform promoters of the restrictions on the use of judges' names. If a judge's name is used for

promotional purposes, corrective action must be taken. Similarly, when a judge accepts an invitation to speak about the law, the legal system, or the administration of justice at a political fundraising or endorsement event, steps should be taken to prevent, and must be taken to correct the impermissible use of judicial title to endorse or fundraise in promotional materials.

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 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)).

CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS
350 McAllister Street, Room 1144A
San Francisco, CA 94102
(855) 854-5366
www.JudicialEthicsOpinions.ca.gov

CJEO Formal Opinion 2017-009

[Issued July 26, 2017]

JUDGES MEETING WITH VENDORS

I. Question Presented

The Committee on Judicial Ethics Opinions (CJEO) has been asked to provide an opinion on the following questions:

> May a judge meet with a private company providing remote alcohol monitoring services to parties under court order?
>
> More broadly, may judges ethically meet with private vendors to discuss services the vendors provide to courts or to parties?

II. Summary of Conclusions

Presiding judges and justices are responsible for procurement and decisionmaking with respect to products and services used by the court and may delegate their authority to other judges or court administrative staff. (Cal. Rules of Court, rules 10.603(a), (c)-(d), 10.1004(c), 10.1020(a), (c).) This may require judges to meet with vendors in order to diligently discharge administrative duties related to court operations or matters before

them. Similarly, judges may want to meet with vendors to evaluate products to be used by parties pursuant to court orders. The committee concludes that a judge may meet with private vendors, including private vendors providing remote alcohol monitoring services to parties under court order, if such meetings are authorized by law, would aid the judge in discharging administrative responsibilities, and would not violate the California Code of Judicial Ethics by creating a conflict of interest, conveying influence or favoritism, advancing the pecuniary interests of others, or involving the judge in business relationships with potential litigants. (Cal. Code Jud. Ethics, canons 2B(1)-(2), 3C(1)-(2), 4D(1).)

Meetings with vendors for purposes of procuring court services or products are also governed by administrative rules and public contracting laws. The committee recommends that judges involved in such meetings enlist the assistance of court administrative staff to ensure compliance with those laws, guarantee impartiality, and avoid the appearance of improper use of judicial office to advance the pecuniary interests of the vendors. Where reliance on court staff is unavailable or impractical, judges may meet directly with vendors so long as the judges have delegated authority to do so and they take precautions to avoid the appearance of favoritism, conflicts of interest, improper use of judicial office, and business relationships with likely parties.

Meeting with vendors for purposes of investigating services or products to be used by the court or parties pursuant to court orders may also be necessary for the diligent and cooperative discharge of administrative duties. The committee recommends that judges only do so with the approval of their presiding judge or justice and with court administrative staff involvement to avoid conflicts or the appearance of partiality. However, meeting directly with the vendors for the purposes of investigation is ethically permissible so long as the above precautions are taken.

Finally, while judges in specified assignments such as family and juvenile courts are encouraged by the Standards of Judicial Administration to determine and investigate the availability of services for those appearing in their courts, the standards do not authorize interactions with vendors that would otherwise violate the canons, such as

meetings to develop or promote services. The standards encourage those judges to support children and families by active judicial involvement and leadership in community networks, which may independently engage with vendors to develop, maintain, and promote services. (Cal. Stds. Jud. Admin., stds. 5.30(f)(1)-(2), (5), 5.40(e)(1)-(3), (4)-(5).)

III. Authorities

A. Applicable Canons[1]

Preamble: "The canons should be read together as a whole, and each provision should be construed in context and consistent with every other provision."

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 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."

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 2B(2): "A judge shall not lend the prestige of judicial office or use the judicial title in any manner, including any oral or written communication, to advance the pecuniary or personal interests of the judge or others."

Advisory Committee commentary following canon 2B: "A judge should distinguish between proper and improper use of the prestige of office in all of his or her activities. . . . [¶] A judge must avoid lending the prestige of judicial office for the advancement of the private interests of the judge or others."

Canon 3C(1): "A judge shall diligently discharge the judge's administrative responsibilities impartially, on the basis of merit, without bias or prejudice, free of

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[1] All further references to canons and to Advisory Committee commentary are to the California Code of Judicial Ethics unless otherwise indicated.

conflict of interest, and in a manner that promotes public confidence in the integrity of the judiciary."

Advisory Committee commentary following canon 3C(1): "In considering what constitutes a conflict of interest under this canon, a judge should be informed by Code of Civil Procedure section 170.1, subdivision (a)(6)."

Canon 3C(2): "A judge shall maintain professional competence in judicial administration, and shall cooperate with other judges and court officials in the administration of court business."

Canon 4D(1): "A judge shall not engage in financial and business dealings that [¶] (a) may reasonably be perceived to exploit the judge's judicial position, or [¶] (b) involve the judge in frequent transactions or continuing business relationships with . . . persons likely to appear before the court on which the judge serves."

B. Other Authorities

California Code of Civil Procedure, section 170.1 subdivision (a)(6)(A)

California Public Contract Code, sections 100, 19204 subdivision (a)

California Rules of Court, rules 1.5(c), 10.603(a), (c)(6)(A), (D), (d), 10.1004 (c)(5), (6), 10.1020(a), (c)(3)

California Standards of Judicial Administration, standards 5.30(f)(1), (2), (4)-(5), 5.40(e)(1)-(5), (f)(5)

Judicial Council of California, Judicial Branch Contracting Manual, Revised Effective July 1, 2016, section 8.1

Rothman, California Judicial Conduct Handbook (3d ed. 2007), section 6.07, Appendix L, pp. 1-2

California Judges Association, Judicial Ethics Update (1995) III.H, (2008) II.C.2, (2012) V.2

IV. Discussion

A. Introduction

Private companies provide a wide variety of goods and services directly to courts and to effectuate court orders. For example, private companies provide case management systems, legal research products, global positioning systems (GPS) surveillance technology, anger management courses, anti-theft courses, domestic violence prevention courses, parenting courses, and ignition interlock devices to prevent drunk driving. Because judges must remain impartial and may not advance the pecuniary interests of others, ethical concerns may arise when judges interact directly with the vendors of these products and services. [2]

This opinion first discusses the canons, statutes, Rules of Court, and Standards of Judicial Administration that govern judicial interactions with vendors generally. The opinion subsequently discusses meetings judges may consider having with specific vendors who provide services or products for court operations or to parties pursuant to court orders. Guidance is provided on how the ethical rules and standards apply depending on whether the purpose of the meeting is for procurement, investigation, or development and promotion of services.

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[2] The committee has been asked to address whether judges may meet with a vendor from a private company that provides products or services for use by the court or by parties. Thus, the vendors discussed in this opinion are representatives of private, for-profit organizations who seek to meet with judges directly concerning their products or services. The scope of the opinion does not include meetings with public service providers, nor does it address the evaluation processes used by courts to appoint panels of experts or investigators. The opinion also does not address attending educational gatherings, judicial training, or other informational investigations such as facility visits or 'ride-alongs.' Finally, the opinion does not address independent research that does not involve an interaction with a vendor, such as online searches for product information or resource availability.

B. Ethical and Administrative Rules Governing Interactions with Vendors

Presiding judges and justices and their designees are often responsible for decisionmaking with respect to products and services used by the court and the parties. This may necessitate meeting with vendors to diligently discharge administrative duties related to court operations or matters before them.[3] Multiple canons, statutes, Rules of Court, and Standards of Judicial Administration govern or address these interactions with vendors.

1. Canons

While specific canons require judges to diligently and cooperatively perform administrative duties, others prohibit judges from engaging in conduct that creates a conflict of interest, conveys influence or favoritism, advances the pecuniary interests of others, or involves the judge in business relationships with potential litigants. Fulfilling administrative duties must therefore be performed in a manner that does not violate these prohibitions.

Specifically, canon 3C(1) requires that judges discharge their administrative duties "impartially, on the basis of merit, without bias or prejudice, free of conflict of interest, and in a manner that promotes public confidence in the integrity of the judiciary." Canon 3C(2) further requires judges to "maintain professional competence in judicial administration, and . . . cooperate with other judges and court officials in the administration of court business."

The Advisory Committee commentary explains that "[i]n considering what constitutes a conflict of interest under [canon 3C(1)], a judge should be informed by Code of Civil Procedure section 170.1, subdivision (a)(6)," which contains subjective and

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[3] For example, judges working on family law cases may wish to use products provided by vendors to calculate spousal and child support. These judges, who have the most detailed knowledge about their specific cases and needs, may wish to investigate and evaluate such products by directly engaging with the vendors who provide them.

objective grounds for disqualification. (Advisory Com. com. foll. canon 3C(1).) Consequently, judges must consider whether any meeting with a vendor to discharge administrative duties under canon 3C(1) would create a conflict of interest by actually biasing the judge in favor of the vendor's service or by creating a reasonable appearance of favoritism. (See Code Civ. Proc., § 170.1(a)(6)(A)(iii) [objective disqualification ground based on whether a person aware of the facts might reasonably entertain doubt as to impartiality] & (B) [subjective disqualification ground based on whether a judge has actual bias or prejudice].)

In the California Judicial Conduct Handbook, Judge Rothman further explains that the diligent discharge of administrative duties under canon 3C(1) requires "high standards, with ethical grounding," and to avoid conflicts of interest, judges acting in administrative capacities "must not use the position to advance . . . the pecuniary interests of others." (Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007) § 6.07, p. 261 (Rothman).)

Other canons also apply and underscore the importance of impartiality and maintaining the public's confidence in all aspects of judicial decisionmaking, including decisions to meet with and engage vendors. Canon 2B(1) prohibits allowing family or social relationships to influence a judge's judgment, and also prohibits "convey[ing] or permit[ting] others to convey the impression that any individual is in a special position to influence the judge." Canon 2B(2) prohibits "lend[ing] the prestige of judicial office or us[ing] the judicial title in any manner, including any oral or written communication, to advance the pecuniary or personal interests of the judge or others." And canon 4D(1) prohibits a judge from engaging in financial and business dealings that (a) "may reasonably be perceived to exploit the judge's judicial position," or (b) "involve the judge in . . . continuing business relationships with . . . persons likely to appear before the court on which the judge serves."

Read together, these canons preclude any interactions with a vendor that would create a conflict of interest or an appearance of favoritism, even when diligently performing administrative duties. (Cal. Code Jud. Ethics, Preamble ["[t]he canons should

be read together as a whole, and each provision should be construed in context and consistent with every other provision."]) These canons also prohibit meetings that would convey the use of judicial office to advance the pecuniary interests of others or engage a judge in business relationships with likely litigants in the local court.

2. Administrative Statutes and Rules

Because courts require a variety of products and services from the private sector in order to conduct day-to-day operations, administrative statutes and rules provide the means for judicial decisionmaking with regard to court management. Those statutes and rules combine authority and delegation to facilitate procurement of services in a manner that eliminates conflicts of interest and promotes fairness.

Specifically, the Rules of Court charge trial court presiding judges with the management and administration of their court, making them responsible for resource allocation, with the assistance of the court executive officer. (Cal. Rules of Court, rule 10.603(a).) Presiding judges are authorized to "[a]pprove procurements, contracts, expenditures, and the allocation of funds in a manner that promotes the implementation of state and local budget priorities and that ensures equal access to justice and the ability of the court to carry out its functions effectively." (Cal. Rules of Court, rule 10.603(c)(6)(D).) Appellate administrative presiding justices are similarly charged with supervising the court's day-to-day operations and have sole authority over "execution of purchase orders, obligation of funds, and approval of payments." (Cal. Rules of Court, rule 10.1004(c)(5), (6).) Thus, procurement and contracting authority is placed in the hands of presiding judges, who may delegate their authority to other judges or the court executive officer, and in the hands of administrative presiding justices, who may employ the clerk/administrator to "negotiate[] contracts on the court's behalf in accord with established contracting procedures and applicable laws." (Cal. Rules of Court, rules 10.603(d), 10.1020(a), (c)(3).)

Numerous public contracting laws and procedures apply to the trial and appellate courts in exercising their procurement authority. Like the canons applicable to

interactions with vendors, these laws and procedures are designed to eliminate conflicts of interest or favoritism and to promote fairness and public confidence. (Public Contract Code, §§ 100 [intent of public contracting law includes elimination of the favoritism and fairness in the bidding process], 19204, subd. (a) [compliance by judicial branch entities required for the procurement of goods and services]; Judicial Council of Cal., Judicial Branch Contracting Manual, eff. July 2016, p. 3 [judicial branch contracting objectives include ensuring fair opportunities in bidding, elimination of favoritism, and compliance with the Public Contract Code], § 8.1 [contracts should be prepared and negotiated only by persons with appropriate skill and experience who are free from conflicts of interest, and must be executed only by persons with legal authority to do so].) Consequently, the ability of presiding judges and justices to delegate procurement duties involving vendors to court staff who are familiar with public contracting laws ensures compliance with those laws, which themselves are designed to ensure fairness and eliminate favoritism and conflicts of interest.

Judicial officers who are delegated by presiding judges and justices to be involved in administrative decisionmaking by procuring or investigating services from vendors must also follow the complex public contracting laws, and would similarly benefit from doing so with the assistance of court professionals who are well versed in the laws that obligate the courts to perform contracting with fairness and impartially.

3. Standards of Judicial Administration

The Standards of Judicial Administration provide "guidelines or goals recommended by the Judicial Council." (Cal. Rules of Court, rule 1.5(c).) For example, judges assigned to hear specific matters, such as family law and juvenile matters, are encouraged by the standards to provide leadership within the community in obtaining and developing services for the parties they serve. (Cal. Stds. Jud. Admin., stds. 5.30(f)(1), 5.40(e)(1), (4).) They are also encouraged to investigate the availability of services and actively take part in forming community-wide networks to promote and coordinate

private-sector efforts to focus attention on the needs of litigants. (Cal. Stds. Jud. Admin., stds. 5.30(f)(2), (5), 5.40(e)(2), (5).)

Unlike statutes and rules of court, however, the standards are nonbinding and do not independently authorize activities that might include procurement or decisionmaking about services provided by vendors. (Cal. Rules of Court, rule 1.5(c) [the nonbinding nature of the standards is indicated in the language of the goals and guidelines recommended by the Judicial Council].) The goals in the standards must be undertaken at the direction of or in consultation with the presiding judge. (Cal. Rules of Court, rule 10.603(c)(6)(D); Cal. Stds. Jud. Admin., stds. 5.30(f), (5), 5.40(e)). Like any delegated authority, meetings with a vendor by a specialty court judge must be conducted in a manner that is consistent with the canons prohibiting conflicts of interest, favoritism, improper use of title, or business relationships with likely parties. (Rothman, *supra*, appendix L, pp. 1-2 [ethical considerations are the same regardless of assignment and despite community outreach obligations that might be more significant for juvenile or family law assignments].)

C. Meetings with Specific Vendors

It is clear from the governing canons and administrative rules that the question of whether a judge may meet with any specific vendor will depend on the purpose and circumstances of the meeting. While the canons apply to all interactions with vendors, different administrative rules and standards apply when the meeting is for the purpose of (1) procuring services or products for use by the court, (2) investigating services or products for use by the court or parties pursuant to court order, or (3) developing and promoting services for use by parties in specialty courts. The ethical considerations of meeting with specific vendors are discussed below in the context of these three purposes.

1. Meetings for Procurement or Contracting

Judges engage in administrative or management work for their courts as presiding judges, supervising judges, or members of court executive committees or other court committees, and in these roles, "are called upon to enter into contracts with providers of goods and services to the court or in other ways make decisions that could provide financial benefit to others." (Rothman, *supra*, § 6.07, pp. 260-261.) The Code of Judicial Ethics, however, requires judges to avoid conflicts of interest when performing their administrative duties: "it would be a breach of judicial ethics for a judge acting in such a capacity to confer, or approve of, a financial benefit to himself or herself, family members, or others where there is a conflict of interest." (*Id.*, at p. 261.)

The administrative rules provide the means for judges engaging in procurement activities to avoid violating the canons. Under these rules, presiding judges and justices may delegate contract negotiations to court executives or administrative staff and involve these court professionals in direct meetings with vendors to ensure that the public contracting laws will be followed and that the procurement process will be fair and impartial. Relying on the expertise of appropriate administrative personnel to convene and participate in procurement meetings will also help to safeguard against conveying the impression that judges are promoting the vendors' services or advancing their interests.

For example, administrative staff could determine the purposes of the meeting in advance, alert other judicial officers who may also have supervisory or administrative responsibilities related to the product at issue, attempt to schedule panel meetings with competing vendors, gather all necessary information by meeting with the vendors in lieu of judicial officers where possible, or attend any meetings where practical or necessary. Court administrative staff, some of whom have specific duties and responsibilities under the public contracting laws and are experienced with the soliciting and bidding requirements, will also help ensure compliance with these laws and procedures.

Thus, the committee recommends that any judge attending a meeting with a vendor for the purpose of procurement do so only with direct or delegated contracting

authority and with the assistance of court administrative staff to ensure compliance with public contracting law and impartiality.

While such meetings may be undertaken directly by a judicial officer without the assistance or presence of court staff, precautions must be taken by such a judge to avoid bias or the appearance favoritism, conflicts of interest, use of judicial office to advance pecuniary interests, or engagement in business relationships with likely parties.

As guidance, the committee recommends the following precautions be taken by any judge who intends to meet with a vendor for purposes of procurement with delegated authority but without the presence of court staff: (1) meet or be available to meet with vendors providing competing products or services; (2) ensure that the vendor is not a family member, close personal friend, or financial associate; (3) clarify with the vendor the purpose of the meeting so that unintended favoritism or contractual commitments on behalf of the court are not presumed or communicated;[4] and (4) avoid meeting with vendors who are, or whose products are, reasonably likely to be the subject of litigation in the judge's court.

2. Meetings to Investigate Services or Products

The diligent discharge of administrative duties may also require judges to meet with vendors to provide decisionmaking input regarding products for potential use by the courts. For example, judges may be asked or invited to meet with vendors offering legal research tools, books, or case management systems designed to carry out judicial branch functions. Judges and their legal staff may sometimes be better equipped than administrators or other non-legal personnel to evaluate the desirability of particular goods

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[4] Corrective steps may be required in the event that a vendor improperly uses judicial title in the promotion of services or products as the result of such meetings. See for example, California Judges Association (CJA) Judicial Ethics Update (2008) II.C.2. [judge must immediately direct a group providing rehabilitation services to remove from its website and not further reproduce or circulate a letter from the judge properly wrote in support of the group's original grant application, and the judge should send a corrective letter to attorneys and judges known to have received the grant application letter].

or services. Meetings for the purpose of allowing vendors to demonstrate their product or services would be, in the committee's view, permissible and practical for judicial officers and staff to attend, so long as precautions are taken to avoid ethical concerns.[5] Such meetings must be convened in a manner that would not convey or permit others to convey the impression that the vendor is in a special position to influence a judge or judges. (Canon 2B(1) & (2).) Judges must refrain from such meetings with vendors if to do so would result in a conflict of interest, lend the prestige of judicial office to the vendor, or if a person aware of the facts would reasonably doubt the judge's impartiality. (Canons 2B(2) & 3C(1); Advisory Com. com., foll. canon 3C(1); canon 2(A); Advisory Com. com., foll. canon 2A.)

A conflict of interest might arise, for example, if a judicial officer engages in discussions for the benefit of vendors or others rather than for the benefit of the court and the overall administration of law. Specifically, a judge may not "accept an expense paid trip to attend a seminar from a vendor attempting to market a product or service to the court," because "acceptance would have the appearance of impropriety and would create a conflict of interest." (CJA Judicial Ethics Update (Feb. 1995) III.H., p. 3, citing canons 2A, 4H(1), and (2).)

Judges may also be asked or interested in meeting with vendors to ensure that products subject to court orders are reliable and effective. Alcohol monitoring services, private mediation services, interlock systems, GPS tracking, and defensive driving programs are just a few of examples of products and services that provide parties with the means to carry out judicial officers' rulings. Judges may wish to investigate the quality of these products and services in order to diligently discharge administrative

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[5] But see, CJA Judicial Ethics Update (Jan. 2012) § V.2., p. 7 [a judge may not set up a meeting at the courthouse for the representative of a legal publishing company to meet with the judges to promote the publishing company's products]. The committee is of the opinion that such meetings may be permissible if precautions are taken, as recommended *post*, p.15.

responsibilities.[6] (Canon 3C(1).) Since the vendors will be contracting with the parties, such meetings would not involve court procurements or be governed by the public contracting laws and procedures. However, judges considering meeting with vendors in these circumstances have an overarching duty to do so in cooperation with other judges and court officials (canon 3C(2)) and in a manner that does not otherwise violate the Code of Judicial Ethics. Indeed, heightened caution is advisable because meeting with vendors who provide services that are linked to court orders may create the appearance that a judge is endorsing the product or otherwise allowing the prestige of the office to be used to benefit the vendor. (Canon 2B(2).)

For these reasons, whether a judge is investigating the quality of goods or services that might be procured by the court or is evaluating the efficacy of products or services that will be used by parties under court order, the committee recommends enlisting the assistance of court administrative staff. The participation of staff can help eliminate the appearance of partiality or improper use of judicial title by, for example, determining the purposes of the meeting in advance, involving other interested judicial officers, scheduling meetings with competing vendors, or gathering in advance as much information from the vendors as necessary. Meetings with vendors may be undertaken directly by a judicial officer without the assistance or presence of court staff, so long as precautions are taken to avoid favoritism or the appearance of favoritism, conflicts of interest, use of judicial office to advance pecuniary interests, or engagement in business relationships with likely parties.

Judges should also consider whether a possible communication with or about a private organization providing services to parties could reasonably "be perceived as

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[6] Because neither judges themselves nor court personnel rely on these services as they would case management or legal research tools, and because appropriate agencies sometimes provide lists of licensed or approved vendors for the punitive and rehabilitative services used in court orders, interactions between judges and vendors of this kind may not be necessary. For example, the California Department of Motor Vehicles provides a link to a list of licensed ignition interlock device installers on its website.

allowing the organization to convey the impression that [it is] in a special position of influence." (Canon 2B(1).) Because of the highly competitive nature of many industries providing services to parties under court orders, some vendors may seek advantage among parties by mentioning meetings with judges. When meeting with vendors of these types of products and services, judges should take steps to meet with or be available to meet with competing vendors, and should clarify the investigative and evaluative purposes of the meetings to ensure that the vendors will not presume favoritism or commitment on the part of the judge and use the meeting for promotion or advertising.[7]

As guidance, the committee recommends the following precautions for any meetings with vendors to investigate services or products to be provided to the court or parties: (1) cooperate with other judges and court officials by notifying those with responsibilities related to the vendors' products or services of the possible meetings; (2) consider whether the product or service is likely to be the subject of litigation in the court; (3) meet or be available to meet with vendors providing competing products or services; (4) ensure that the vendor is not a family member, close personal friend, or financial associate; and (5) clarify with the vendor the purpose of the meeting so that unintended favoritism or commitments in court orders are not presumed or communicated.

3. Meetings to Develop or Promote Services

Judges in specified assignments such as family and juvenile courts are encouraged by the Standards of Judicial Administration to investigate and determine the availability of services for the benefit of the individuals in their courts, so long as they do so under the direction of the presiding judge and in a way that would not otherwise violate the canons. (Canon 3C(2); Cal. Stds. Jud. Admin., stds. 5.30(f)(2), 5.40(e)(2).) In the committee's view, direct meetings for the purposes of development or promotion of services would clearly violate the canons by favoring and advancing the pecuniary

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[7] See *ante*, p. 12, fnt. 4.

interests of the vendor. (Canons 2A, 2B(2), 3C(1).) While the precautions advised above may ensure ethical meetings with vendors for the purposes of *investigation* and *determining availability*, there are no precautions that would eliminate the appearance of favoritism or the improper use of judicial title to advance interests were a judge to meet directly with a sole vendor for the purpose of *developing* that vendor's services for use by the parties or *promoting* use of the vendor's services through court orders. (Rothman, *supra*, appendix L, pp. 1-2 [despite community outreach obligations that may be more significant for juvenile or family law judges, community activities must nevertheless be analyzed for potential ethical problems such as the appearance of impropriety, public perception of fairness, and judicial impartiality].)

The goal of developing and promoting services may be achieved under the standards, however, by judicial involvement and leadership in *community networks*. (Cal. Stds. Jud. Admin., stds. 5.30(f)(1), (4)-(5), 5.40(e)(1), (4)-(5).) Those networks may independently develop, maintain, and promote private sector services, without judicial participation in meetings with vendors for those purposes.

V. Conclusions

Judges may be asked to meet with vendors in order to diligently discharge their administrative duties. (Canon 3C(1).) In doing so, they have a duty to cooperate with other judges and court officials in the administration of court business. (Canon 3C(2).) Any interaction with a vendor must be conducted in a manner that does not violate the Code of Judicial Ethics by creating a conflict of interest, conveying influence or favoritism, advancing the pecuniary interests of others, or involving the judge in business relationships with potential litigants. (Canons 2B(1), 2B(2), 3C(1) & 4D(1).)

Judges involved in meetings with vendors for the purpose of procuring court services or products must comply with administrative rules and public contracting laws, as well as the canons. Enlisting the assistance of court administrative staff, which may be required to facilitate compliance with contracting laws and procedures, would also ensure

impartiality and eliminate the appearance of improper use of judicial office to advance the pecuniary interests of the vendors.

Such meetings may, however, be undertaken directly by a judicial officer without court staff so long as the judge ensures that the meetings are conducted in a manner that avoids the appearance of favoritism, conflicts of interest, use of judicial office to advance the vendor's interests, or business relationships with likely parties. Best practices for doing so include the following precautions when meeting directly with vendors: (1) meet or be available to meet with vendors providing competing products or services; (2) ensure that the vendor is not a family member, close personal friend, or financial associate; (3) clarify with the vendor the purpose of the meeting so that unintended favoritism or commitments are not presumed or communicated; and (4) avoid meeting with vendors who are, or whose products are, reasonably likely to be the subject of litigation in the court.

The committee also recommends enlisting the assistance of court administrative staff when meeting with vendors for the purpose of investigating products or services to be provided to the court or to parties. Judges may, however, meet directly with such vendors to investigate or evaluate their products so long as the above precautions are taken. Finally, while the Standards of Judicial Administration encourage judges in specified assignments such as family and juvenile courts to determine and investigate the availability of services for the parties in their courts, they do not authorize procurement or interactions with vendors that would violate the canons. The canons do not permit judges to meet directly with vendors to develop or promote services, but specialty court judges are encouraged by the standards to support programs that serve children and families by leading and directing community networks, which may independently develop and promote private sector services without judicial participation.

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)).

CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS
350 McAllister Street, Room 1144A
San Francisco, CA 94102
(855) 854-5366
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CJEO Formal Opinion 2017-010

[Issued April 19, 2017]

EXTRAJUDICIAL INVOLVEMENT IN MARIJUANA ENTERPRISES

I. Question Presented

The Committee on Judicial Ethics Opinions has been asked to provide an opinion on the following question:

> "Is it ethical under the California Code of Judicial Ethics for a judicial officer to have an interest in an enterprise that involves the sale or manufacture of medical or recreational marijuana?"[1]

II. Summary of Conclusions

An interest in an enterprise involving the sale or manufacture of marijuana that is in compliance with state and local law is still in violation of federal law pursuant to the

[1] The relatively recent enactment of state medical and recreational marijuana laws, and the conflict with federal law, presents a myriad of issues related to marijuana. However, for purposes of this opinion, the committee addresses only the question presented.

Controlled Substances Act. (21 U.S.C. §§ 801-904.) A violation of federal law violates a judge's explicit obligation to comply with the law (canon 2A) and is an activity that involves impropriety or the appearance of impropriety (canon 2). Moreover, such extrajudicial conduct may cast doubt on a judge's capacity to act impartially. (Canon 4A(1).) Therefore, the committee advises that a judicial officer should not have an interest in an enterprise that involves the sale or manufacture medical or recreational marijuana.

III. Authorities

A. Applicable Canons[2]

Terminology: "'Impartial,' 'impartiality,' and 'impartially' mean the absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as the maintenance of an open mind in considering issues that may come before a judge. (¶) . . . (¶)

'Impropriety' includes conduct that violates the law, court rules, or provisions of this code, as well as conduct that undermines a judge's independence, integrity, or impartiality. (¶) . . . (¶)

'Law' means constitutional provisions, statutes, court rules, and decisional law."

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: ". . . A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by other members of the community and should do so freely and willingly. (¶) . . . (¶) *The test for . . . impropriety*

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[2] All further references to canons and to Advisory Committee commentary are to the California Code of Judicial Ethics unless otherwise indicated.

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."

Canon 4A(1): "A judge shall conduct all of the judge's extrajudicial activities so that they do not (¶) . . . cast reasonable doubt on the judge's capacity to act impartially . . . ."

Advisory Committee Commentary following canon 4D(1): " Participation by a judge in financial and business dealings is subject to the general prohibitions in Canon 4A against activities that tend to reflect adversely on impartiality, demean the judicial office, or interfere with the proper performance of judicial duties. Such participation is also subject to the general prohibition in Canon 2 against activities involving impropriety or the appearance of impropriety and the prohibition in Canon 2B against the misuse of the prestige of judicial office. (¶) *In addition, a judge must maintain high standards of conduct in all of the judge's activities, as set forth in Canon 1."*

B. Other Authorities

Title 18 United States Code sections 1956, 1957, 3282

Title 21 United States Code sections 801-904

Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. No. 113-235, § 538 (Dec. 16, 2014) 128 Stat. 2129, 2217)

Consolidated Appropriations Act, 2016 (Pub. L. No. 114-113, § 542 (Dec. 18, 2015) 129 Stat. 2242, 2332-2333)

California Constitution, article VI, section 18

California Business and Professions Code, sections 19300-19360

Gonzales v. Raich (2005) 545 U.S. 1

U.S. v. McIntosh (9th Cir. 2016) 833 F.3d 1163

U.S. v. Marin Alliance for Medical Marijuana (N.D.Cal. 2015) 833 F.3d 1163

Ross v. RagingWire Telecommunications, Inc. (2008) 42 Cal.4th 920

Inquiry Concerning Hall (2006) 49 Cal.4th CJP Supp. 146

In re Conduct of Roth (Or. 1982) 645 P.2d 1064

Rothman, California Judicial Conduct Handbook (3d ed. 2007) sections 7.36, 7.57

Colorado Supreme Court Judicial Ethics Advisory Board, Opinion 2014-01

Maryland Judicial Ethics Opinion Request Number 2016-09

Washington Judicial Ethics Advisory Committee Opinion 15-02

Memorandum from James M. Cole, Deputy Attorney General, U.S. Dept. of Justice, Guidance Regarding Marijuana Enforcement (Feb. 14. 2014)

Memorandum from James M. Cole, Deputy Attorney General, U.S. Dept. of Justice, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013)

Voter Information Pamphlet, General Election (Nov. 8, 2016), Proposition, analysis by the Legislative Analyst

III. Discussion

A. Introduction

Since 1996, more than half of the states have decriminalized and created regulatory schemes for medical marijuana. Most states have made these changes in the past 10 years. Even more recently, several states, including California, have gone further, decriminalizing recreational marijuana use. In California, state and local taxes currently collected on medical marijuana reach several tens of millions of dollars each year and recreational marijuana could eventually generate tax revenues of $1 billion annually. (Voter Information Pamp., Gen. Elec. (Nov. 8, 2016), Prop. 64, analysis by the Legislative Analyst, pp. 92, 97.) The profits to be gained from the marijuana industry in California are substantial and investors are flocking to this lucrative industry.

Despite the rapid decriminalization and new regulation of marijuana across the states, it remains a schedule I drug pursuant to the Controlled Substances Act. (21 U.S.C. §§ 801-904.) Under federal law, the use, possession, distribution, or manufacture of marijuana remains illegal, even if such conduct otherwise conforms to state law. Because of the financial incentives to enter to the marijuana market, the rapid changes to

marijuana law, and the continuing disparity between state and federal law, the committee has been asked to provide guidance on whether a judicial officer may have an interest in an enterprise that involves the sale or manufacture of medical or recreational marijuana. For purposes of this opinion, an interest in an enterprise that involves the sale or manufacture of medical or recreational marijuana includes, but is not limited to, a personal financial investment in such an enterprise, private equity fund investments in such an enterprise, maintaining shares in a corporation that invests in marijuana, maintaining a real property interest in a property that is leased for marijuana growth or distribution, or a spouse's or registered domestic partner's financial interest in such an enterprise, shares, or real property.

B. State and Federal Regulation of Marijuana

In 1996, California voters approved Proposition 215 and enacted the Compassionate Use Act, making California the first state to decriminalize limited personal possession or cultivation of marijuana for medical purposes on a physician's recommendation, or possession or cultivation by his or her primary caregiver. (Health & Saf. Code, §11362.5.) In 2004, the Legislature expanded these criminal immunities through the Medical Marijuana Program for the cultivation and possession for sale to specific groups of people. (Health & Saf. Code, § 11362.7 et seq.) In 2015, the Medical Marijuana Regulation and Safety Act[3] was enacted to establish a statewide regulatory system for medical marijuana businesses, governing, among other things, cultivation, processing, transportation, testing and distribution of medical marijuana, and allowing for medical marijuana businesses to operate for profit. (Bus. & Prof. Code, §§ 19300-19360 [enactment of the Medical Marijuana Regulation and Safety Act included additions to other sections of Bus. &Prof. Code, Gov. Code, Health & Saf. Code, Lab. Code, Rev. & Tax. Code, and Wat. Code not applicable to this opinion].) In 2016, California voters

[3] The Medical Marijuana Regulation and Safety Act was enacted through three bills, Assembly Bill No. 266, Assembly Bill No. 243, and Senate Bill No. 643 in the 2015-2016 legislative session. Each bill was conditioned on enactment of the other two.

approved Proposition 64, allowing for recreational use of marijuana for those 21 years old or older. (Health & Saf. Code, §§ 11362.1 et seq.)

California's marijuana laws do not *legalize* medical or recreational marijuana. (*Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920, 926 [stating that "[n]o state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law"]; *U.S. v. McIntosh* (9th Cir. 2016) 833 F.3d 1163, 1179, fn. 5.) Instead, they decriminalize certain marijuana offenses under California law. Under federal law, the knowing or intentional manufacture, possession, and distribution of marijuana remains a federal crime. (21 U.S.C. §§ 812, subd. (c), 841, 844; see also *Gonzales v. Raich* (2005) 545 U.S. 1, 32-33 [commerce clause gives Congress authority to prohibit the local cultivation and use of marijuana, despite state law to the contrary, because local use affects the national marijuana market].) An attempt to violate or a conspiracy to commit a violation of the Controlled Substances Act is subject to the same penalties as the underlying offense. (21 U.S.C. § 846.) Moreover, it is unlawful to knowingly lease, rent, or maintain any place for the purpose of manufacturing, distributing, or using any controlled substance, or to manage or control any place as an owner, lessee, mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance. (*Id*., § 856.) Any capital placed into a marijuana business not only puts an individual at risk of criminal prosecution, but such assets, investments, and profits are subject to forfeiture (*id*., §§ 853, 881) and any investment of marijuana profits further violates federal law (*id*., § 854). Similarly, financial transactions that involve proceeds generated by marijuana can form the basis for federal prosecution under money laundering statutes, the unlicensed money transmitter statute, and the Bank Secrecy Act of 1970. (18 U.S.C. §§ 1956, 1957.)

Based on the rapid decriminalization of medical marijuana by the states, on August 29, 2013, the U.S. Department of Justice issued guidance applicable to all federal enforcement activity, including civil enforcement and criminal investigations and prosecutions concerning medical marijuana. (Memorandum from James M. Cole,

Deputy Atty. Gen., U.S. Dept. of Justice, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013) (Marijuana Enforcement).) This federal policy concentrated and, to a certain extent, limited medical marijuana enforcement efforts in accordance with eight priorities. (*Id*. at pp. 1-2.)[4] On February 14, 2014, these policies were clarified and the same priorities were made applicable to financial crimes that are predicated on medical marijuana-related conduct. (Memorandum from James M. Cole, Deputy Atty. Gen., U.S. Dept. of Justice, Guidance Regarding Marijuana Related Financial Crimes (Feb. 14, 2014) (Financial Crimes).) More recently, federal appropriations bills have prohibited the U.S. Department of Justice and Drug Enforcement Agency from spending funds to prevent states' implementation of medical marijuana laws.[5] (Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, §538 (Dec. 16, 2014) 128 Stat. 2129, 2217; Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542 (Dec. 18, 2015) 129 Stat. 2242, 2332-2333.)

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[4] These priorities include (1) preventing the distribution of marijuana to minors; (2) preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels; (3) preventing the diversion of marijuana from states where it is legal under state law in some form to other states; (4) preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity; (5) preventing violence and the use of firearms in the cultivation and distribution of marijuana; (6) preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use; (7) preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and (8) preventing marijuana possession or use on federal property.

[5] Based on these appropriations bills, the United States District Court for the Northern District of California has prohibited the U.S. Department of Justice from enforcing a permanent injunction enjoining a medical marijuana dispensary from distributing marijuana, to the extent the dispensary complied with California law. (*U.S. v Marin Alliance for Medical Marijuana* (N.D.Cal. 2015) 139 F.Supp.3d 1039, app. dism. Apr. 12, 2016.) The Ninth Circuit has ruled that the U.S. Department of Justice may not use federal funds to continue prosecutions for violations of the Controlled Substances Act where the defendants' conduct was authorized by state law. (*U.S. v. McIntosh*, *supra*, 833 F.3d 1163.)

Although medical marijuana regulation is not currently an enforcement priority for the federal government and the federal government is restricted from spending funds to prosecute certain individuals, these priorities could change. "Congress could restore funding tomorrow, a year from now, or four years from now, and the government could then prosecute individuals who committed offenses while the government lacked funding." (*U.S. v. McIntosh*, *supra*, 833 F.3d 1163, 1179, fn. 5.) A change in executive branch administration could shift federal attitudes and priorities, and these offenses can be prosecuted for up to five years after the offenses occur. (See 18 U.S.C. § 3282.) Moreover, both U.S. Department of Justice memoranda explicitly state that nothing precludes investigation or prosecution, even in the absence of any of the priorities, "in particular circumstances where investigation and prosecution otherwise serves an important federal interest." (Cole, Marijuana Enforcement, *supra*, at p. 4; Cole, Financial Crimes, *supra*, at p. 3.) It is also important to note that these federal policies and appropriations bills *do not* address enforcement priorities for recreational marijuana that is decriminalized and regulated by state law. Therefore, an individual who maintains an interest in a marijuana enterprise that complies with state and local law remains in violation federal law and risks prosecution.

C. Activity Involving Impropriety and the Appearance of Impropriety

As the Code of Judicial Ethics observes, a judge is a highly visible member of government (Preamble) and "must expect to be the subject of constant public scrutiny" and "accept restrictions on the judge's conduct that might be viewed as burdensome by other members of the community and should do so freely and willingly" (Advisory Com. com. foll. Canon 2A). These restrictions extend to a judge's extrajudicial activities, such as maintaining an ownership interest in a business. (Canon 4.)

1. Failure to Comply with the Law

Participation in extrajudicial activities is subject to the general prohibition in canon 2 against activities involving impropriety or the appearance of impropriety.

(Advisory Com. com. foll. canon 4D(1).) Impropriety includes conduct that violates the law. (Terminology, "impropriety.") Moreover, canon 2A explicitly states that a judge must respect and comply with the law, which is defined to include statutes generally. (Canon 2A; terminology, "law"; Advisory Com. com. foll. canons 1, 4A.) Nothing in the code limits compliance to state law only. The California Constitution also obligates a judge to comply with the law. A judge may be disqualified from acting as a judge when subject to a pending indictment or an information charging him or her with a crime punishable as a felony under California or federal law. (Cal. Const., art. VI, § 18, subd. (a).) If the judge is convicted, and if the conviction becomes final, the judge must be removed from office. (*Id*., art. IV, § 18, subd. (c).)

Maintaining an ownership interest in an enterprise that involves the sale or manufacture of marijuana is a crime under the Controlled Substances Act that potentially subjects a judge to federal prosecution. Therefore, having an interest in a marijuana business is an extrajudicial activity that fails to comply with the law and involves impropriety, in violation of the code. Discipline can be imposed for a violation of the canon 2A obligation to comply with the law, whether or not the judge is prosecuted or convicted of a criminal offense. (*Inquiry Concerning Hall* (2006) 49 Cal.4th CJP Supp. 146 [judge disciplined under canon 2A for violating several provisions of the Political Reform Act during her reelection campaign, even though the criminal case was dismissed]; *In re Conduct of Roth* (Or. 1982) 645 P.2d 1064, 1070 [proof of unlawful conduct, not conviction, sufficient to support finding that a judge failed to comply with the law].) Thus, involvement in a marijuana business that would violate federal law is unethical regardless of the likelihood of prosecution. Further, it is the committee's opinion that, like the duty of a judge to be informed as to his or her personal and financial interests in relation to disclosure and disqualification, a judge has a duty to make reasonable efforts to inform himself or herself as to whether any financial or property interest that the judge maintains is being used in an enterprise that involves the sale or manufacture of marijuana. (See canon 3E(5)(d); Code Civ. Proc., § 170.1, subd. (a)(3)(C).) If the judge determines his or her financial or property interest is being so

utilized, the judge has a duty to divest himself or herself of such investment or otherwise take steps to ensure the termination of the enterprise.

The committee's opinion that a judicial officer should not have an interest in an enterprise that involves medical or recreational marijuana is consistent with judicial ethics advisory opinions from states that have similarly decriminalized marijuana. Maryland, which permits medical marijuana use, and Washington and Colorado, which permit both medical and recreational marijuana use, prohibit judicial involvement with marijuana.

In Maryland, the judicial ethics committee concluded that a judicial appointee may not grow, process, or dispense medical cannabis. (Md. Jud. Ethics Com., Opinion Request No. 2016-09 (Mar. 31, 2016).) The Maryland Code of Conduct for Judicial Appointees requires a judicial appointee to comply with the law. (Md. Rules Judges, rule 18-201.1.) As in California's canon 2A, nothing limits application of the Maryland rule to compliance with Maryland law only. Therefore, the committee opined, "as long as federal laws make the possession, use, manufacturing and/or distribution of marijuana (cannabis) illegal, a judicial appointee may not participate in the growing, processing or dispensing of the substance, regardless of the intended purpose." (Md. Jud. Ethics Com., Opinion Request No. 2016-09, *supra*, pp. 1-2.) The committee went further, stating, "Even if the Congress enacted federal legislation analogous to Health General §§ 13-33-6 et seq. [exempting growers, processors and dispensers licensed by the state of Maryland from arrest, prosecution or administrative penalty], a proposal by a judicial appointee to act as a medical cannabis grower, processor and dispenser might raise concerns with other provisions of the Code, for example, Rule 1.2 'Promoting Confidence In The Judiciary.' We need not address these issues at this juncture, however." (*Id*., fn. 2 [some capitalization omitted].)

In Washington, the judicial ethics advisory committee concluded that it was a violation of the state judicial ethics code for a judge to allow a court employee to maintain an extracurricular medical marijuana business, which remains illegal under federal controlled substances laws. (Wn. Jud. Ethics Advisory Com., Opinion 15-02.)

After examining a judge's duty to direct the conduct of court employees, the committee concluded: "[E]ven if owning a medical marijuana business may comply with the state statutory scheme, possessing, growing, and distributing marijuana remains illegal under federal law for both recreational and medical use. See Controlled Substances Act, 21 U.S.C. §§ 801-904. Although the Code does not generally prohibit a court employee from engaging in outside businesses or employment, operating a business in knowing violation of law undermines the public's confidence in the integrity of the judiciary in violation of CJC 1.2, and is contrary to acting with fidelity and in a diligent manner consistent with the judge's obligations under the Code." (*Id*., at p. 2.)

In Colorado, the judicial ethics advisory board concluded that it is a violation of the state judicial ethics code for a judge to engage in the personal recreational or medical use of marijuana in private, and in a manner compliant with the Colorado Constitution and related state and local laws. (Colo. Judicial Ethics Advisory Bd., Opinion 2014-01, p. 1.) The board found that "because activities conducted in Colorado, including medical marijuana use, are subject to both state and federal law . . . , for an activity to be 'lawful' in Colorado, it must be permitted by, and not contrary to, both state and federal law. Conversely, an activity that violates federal law but complies with state law cannot be 'lawful' under the ordinary meaning of that term." (*Id*., at p. 2.)

Consistently with these opinions, and as the California canons state, to maintain an interest in an enterprise that involves the sale or manufacture of medical or recreational marijuana is not lawful under federal law and violates the obligations expressed in canon 2. Therefore, it is the committee's opinion that a judge violates his or her ethical obligations if the judge maintains an interest in an enterprise involving marijuana.

2. Judge's Capacity to Act Impartially

An interest in a marijuana enterprise may also create an appearance of impropriety and cast doubt on a judge's ability to act impartially. (Canon 2 [requiring judges to avoid impropriety and its appearance in all activities]; Advisory Com. com. foll. canon 2A [test for impropriety is whether a person aware of the facts might reasonably entertain a doubt

that the judge would be able to act with independence, integrity, and impartiality]; Terminology, "impropriety" [includes conduct that undermines a judge's impartiality].) Canon 4A(1) also explicitly requires a judge to conduct all extrajudicial activities so that they do not cast reasonable doubt on the judge's capacity to act impartially.

A judge must disqualify himself or herself when a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial. Judges "are expected to honestly examine their lives, thoughts, experiences, relationships and biases and not to sit on a case unless they have determined that none of these things will stand in the way of rendering fair and impartial justice." (Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007) § 7.36, p. 335.) Even if a judge determines that owning an interest in a marijuana enterprise will have no bearing on his or her ability to be impartial, if "a reasonable mind (not the mind of a particular lawyer or party) would conclude that there is an objective doubt that the judge would be able to remain impartial regardless of the judge's professional efforts to put aside his or her bias," then the judge should disqualify himself or herself. (*Id*., § 7.57, p. 366.)

The decriminalization of certain marijuana activities in California has not eliminated state criminal investigation and prosecution for numerous marijuana crimes, such as driving under the influence or possession of large quantities of marijuana, as well as the variety of civil matters that may arise from the marijuana industry, including civil violations of state marijuana regulations, zoning, licensing, seizure or forfeiture of assets, employment disputes, landlord-tenant disputes, and contract disputes. A reasonable person could conclude that a judge who disregards applicable marijuana laws for his or her own benefit is unable to act impartially anytime the judge rules on a marijuana-related matter. For example, it may appear to a reasonable person that a judge who owned an interest in a marijuana business would be unable to act impartially in evaluating a forfeiture of assets that were earned through a marijuana business. This is also true if a judge's spouse holds a separate, noncommunity property investment in a marijuana enterprise. The distinction between separate and community property may be insufficient to eliminate an appearance of impropriety. A reasonable person could

conclude that the judge supports his or her spouse's decision to maintain a separate interest in a marijuana enterprise, and that this spousal interest could impact the judge's ability to act impartially.

There will always be at least an appearance of impropriety and doubts regarding impartiality when a judge decides to disregard a law to benefit his or her personal interest. Therefore, it is the committee's opinion that a judge cannot maintain an interest in a marijuana enterprise and has an ongoing duty to make reasonable efforts to inform himself or herself about any financial interest in a marijuana enterprise. If the judge discovers such a financial interest, he or she should divest himself or herself of such investment or otherwise take steps to ensure the termination of the enterprise. (See canon 3E(5)(d), Code Civ. Proc., § 170.1, subd. (a)(3)(C).). To maintain any such interest would create an appearance of impropriety and cast doubt on a judge's ability to act impartially.

IV. Conclusion

It is the committee's opinion that maintaining any interest in an enterprise that involves the cultivation, production, manufacture, transportation or sale of medical or recreational marijuana is incompatible with a judge's obligations to follow the law under canon 2. Such conduct is an activity involving impropriety that fails to comply with federal law and puts a judge at risk for federal prosecution. Despite the limited decriminalization of medical and recreational marijuana use, there will continue to be numerous marijuana-related matters in the courts. Moreover, a reasonable person could easily conclude that a judge's disregard of federal law creates an appearance of impropriety and casts doubt on the judge's ability to act impartially, particularly in marijuana-related cases. Therefore, the committee concludes that an interest in a marijuana-related business creates an appearance of impropriety, casts doubt on a judge's ability to act impartially, and is incompatible with a judge's obligations under canon 2 and canon 4A(1).

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)).

CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS
350 McAllister Street, Room 1144A
San Francisco, CA 94102
(855) 854-5366
www.JudicialEthicsOpinions.ca.gov

CJEO Formal Opinion 2017-011

[Issued May 2, 2017]

JUDICIAL SERVICE ON A NONPROFIT CHARTER SCHOOL BOARD

I. Question Presented

The Committee on Judicial Ethics Opinions has been asked to provide an opinion on the following question:

> "May a judicial officer serve on the board of a charter school or a nonprofit organization operating one or more charter schools? The charter school receives public funds but is not likely to be involved in litigation within the jurisdiction of the judge's court. It does not have an open enrollment policy and board membership is uncompensated and unelected."

II. Summary of Conclusions

Judges are encouraged to participate in extrajudicial activities, so long as these activities adhere to the restrictions within the California Code of Judicial Ethics.[1] One of these restrictions is that judges are prohibited from receiving appointment to a

[1] All further references to canons and to Advisory Committee commentary are to the California Code of Judicial Ethics unless otherwise indicated.

governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. (Canon 4C(2).) However, canon 4 permits a judge to serve as an officer, director, trustee, or nonlegal advisor of an educational, religious, charitable, service, or civic organization not conducted for profit, so long as such service does not violate any other provisions within the canons. (Canon 4C(3)(b).)

Charter schools are similar to both public and private schools. Like private schools, charter schools are commonly operated by nonprofit organizations. They are relatively autonomous and, for the most part, are given freedom to operate outside of most of the regulations governing traditional public schools. On the other hand, charter schools are statutorily characterized as a part of California's single, statewide public school system and receive public funds. Adding to the uncertainty, California courts have held that charter schools are public entities for some purposes (for example, for receiving public monies) but are private entities for other purposes (such as for purposes of the Government Claims Act), and that charter school officials are equivalent to officers of public schools.

In analyzing whether service on the board of a charter school is ethically permissible, the committee evaluated relevant case law and considered whether such service is a governmental position or public office and therefore prohibited by canon 4C(2) or whether it constitutes service on the board of an educational nonprofit organization that is permitted by canon 4C(3)(b). The committee also examined article VI, section 17 of the California Constitution, which provides that a judge is "ineligible for public employment or public office" and that "[a]cceptance of [a] public office is a resignation from the office of judge."

Because the law is unsettled on the question of whether a charter school board member holds a "governmental position" as that term is used in the canon, or a "public office" as that term is used in the Constitution, *and* because the Constitution absolutely proscribes a judicial officer from holding public office, a judge runs the risk of automatic resignation from judicial office if he or she serves on a charter school board. The

committee therefore advises that a judge not serve on a charter school board.[2] Based on the committee's recommendation, the committee does not address whether service on a charter school board may also cast doubt on the judge's capacity to act impartially, interfere with the proper performance of judicial duties, or lead to frequent disqualification as prohibited by canon 4A, or whether such service may also create an appearance of impropriety prohibited by canon 2.

III. Authorities

A. Canons

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

Canon 4A: "A judge shall conduct all of the judge's extrajudicial activities so that they do not [¶] (1) cast reasonable doubt on the judge's capacity to act impartially,

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[2] This conclusion does not necessarily prohibit retired judges in the assigned judges program (AJP) from serving as members of a charter school board. Canon 6B provides that a retired judge who "has received an acknowledgement of participation in the Assigned Judges Program shall comply with all provisions of this code, except for" canon 4C(2) and canon 4E. Moreover, article VI, section 17 of the California Constitution "applies only to sitting judges and not to persons who have resigned or retired from a judicial office" and, therefore, retired judges are not prohibited from holding other public office or engaging in other public employment. (*Gilbert v. Chiang* (2014) 227 Cal.App.4th 537, 540-41.) The Chief Justice, however, has sole discretion to determine the eligibility of retired judges for service in the AJP. (Cal. Const., art. VI, § 6, subd. (e) [the Chief Justice has authority to assign consenting retired judges to any court]; Judicial Council of Cal., AJP Handbook: Standards and Guidelines for Judicial Assignments (Apr. 2016) p. 1 (AJP Handbook) [adopted by the Chief Justice in the exercise of constitutional authority to make assignments through the AJP].) The current AJP standards and guidelines do not expressly preclude appointment to a nonelected governmental position, but they do prohibit a judge from seeking or accepting elected or political office. (AJP Handbook, at pp. 5-7.) The AJP standards and guidelines also provide that the Chief Justice's discretion regarding assignment-based decisions is not limited by the AJP Standards and Guidelines, nor do the AJP standards and guidelines necessarily encompass all of the factors upon which the Chief Justice may base such decisions. (AJP Handbook, at p. 1.)

[¶] (2) demean the judicial office, [¶] (3) interfere with the proper performance of judicial duties, or [¶] (4) lead to frequent disqualification of the judge."

Canon 4C(2): "A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. . . ."

Advisory Committee commentary following canon 4C(2): *"The appropriateness of accepting extrajudicial assignments must be assessed in light of the demands on judicial resources and the need to protect the courts from involvement in extrajudicial matters that may prove to be controversial. Judges shall not accept governmental appointments that are likely to interfere with the effectiveness and independence of the judiciary, or that constitute a public office within the meaning of article VI, section 17 of the California Constitution.*

"Canon 4C(2) does not govern a judge's service in a nongovernmental position. See Canon 4C(3) permitting service by a judge with organizations devoted to the improvement of the law, the legal system, or the administration of justice and with educational, religious, charitable, service, or civic organizations not conducted for profit. For example, service on the board of a public educational institution, other than a law school, would be prohibited under Canon 4C(2), but service on the board of a public law school or any private educational institution would generally be permitted under Canon 4C(3)."

Canon 4C(3)(a): "[A] judge may serve as an officer, director, trustee, or nonlegal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice provided that such position does not constitute a public office within the meaning of article VI, section 17 of the California Constitution . . . ."

Canon 4C(3)(b): "[A] judge may serve as an officer, director, trustee, or nonlegal advisor of an educational, religious, charitable, service, or civic organization not conducted for profit . . . ."

Advisory Committee commentary following canon 4C(3): "*Canon 4C(3) does not apply to a judge's service in a governmental position unconnected with the improvement of the law, the legal system, or the administration of justice. See Canon 4C(2)*."

Canon 4C(3)(c): "[A] judge shall not serve as an officer, director, trustee, or nonlegal advisor if it is likely that the organization [¶] (i) will be engaged in judicial proceedings that would ordinarily come before the judge, or [¶] (ii) will be engaged frequently in adversary proceedings in the court of which the judge in a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member."

B. Other Authorities

California Constitution, article VI, sections 6 and 17

California Charter Schools Act (Ed. Code, § 47600 et seq.)

Abbott v. McNutt (1933) 218 Cal. 225

California School Bds. Assn. v. State Bd. of Education (2010) 186 Cal.App.4th 1298

Ghafur v. Bernstein (2005) 131 Cal.App.4th 1230

Gilbert v. Chiang (2014) 227 Cal.App.4th 537, 550

Knapp v. Palisades Charter High School (2007) 146 Cal.App.4th 708

Lungren v. Davis (1991) 234 Cal.App.3d 806

Wells v. One2One Learning Foundation (2006) 39 Cal.4th 1164

Wilson v. State Board of Education (1999) 75 Cal.App.4th 1125, 1139

Caviness v. Horizon Cmty. Learning Ctr., Inc. (9th Cir. 2010) 590 F.3d 806

Doe ex rel. Kristen D. v. Willits Unified School Dist. (N.D.Cal., Mar. 8, 2010, No. C 09-03655 JSW) 2010 WL 890158

Sufi v. Leadership High School (N.D.Cal. 2013) 2013 U.S.Dist.Lexis 92432, [2013 WL 3339441]

Judicial Council of Cal., AJP Handbook: Standards and Guidelines for Judicial Assignments (Apr. 2016)

67 Ops.Cal.Atty.Gen. 385 (1984)

Rothman, California Judicial Conduct Handbook (3d ed. 2007) sections 10.01, 10.02, 10.31, 10.36, 10.38

California Judges Association, Formal Opinion Nos. 31, 46, 61

California Judges Association, Judicial Ethics Update (1989)

Arizona Supreme Court Judicial Ethics Advisory Committee, Advisory Opinion 96-05

Colorado Judicial Ethics Advisory Board, Advisory Opinion 2007-02

Connecticut Committee on Judicial Ethics, Informal Opinion 2015-22

Delaware Judicial Ethics Advisory Committee, Advisory Opinion 2001-2

Florida Judicial Ethics Advisory Committee, Judicial Ethics Opinion 2016-01

New York Advisory Committee on Judicial Ethics, Advisory Opinion 11-44

South Carolina Advisory Committee on Standards of Judicial Conduct, Advisory Opinion 16-2002

IV. Discussion

A. Restrictions on Extrajudicial Activities

The California Code of Judicial Ethics governs the ethical conduct of judges both on and off the bench. Off the bench, community activity by a judge is encouraged, subject to limitations that minimize the risk of conflict with a judge's judicial obligations. (Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007) § 10.02, p. 525 (Rothman) ["Although community activity is encouraged and considered a judicial duty, there are limitations that judges must know."].) While all extrajudicial activities must comply with the entirety of the code, canon 4 provides specific guidance to judges regarding extrajudicial conduct. In general, canon 4 requires a judge to conduct all of the judge's extrajudicial activities in a manner that does not cast reasonable doubt on the judge's capacity to act impartially, demean the judicial office, interfere with the proper

performance of judicial duties, or lead to frequent disqualification of the judge. (Canon 4A.)

Canon 4C(2) explicitly prohibits a judge from accepting "appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice." Stating the inverse, canon 4C(3)(a) permits service within an "organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice provided that such position does not constitute a public office within the meaning of article VI, section 17 of the California Constitution." Public educational institutions are governmental bodies. (See *Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1190 (*Wells*) [a public school district cannot be sued under the California False Claims Act as the statute does not include governmental entities]; Advisory Com. com. foll. canon 4C(2); Cal. Judges Assoc., Judicial Ethics Update (1989) pp. 2-3 [a judge may not serve on a school board]; Rothman, *supra*, § 10.31, pp. 541-42 ["Membership on a public school board of education or a committee of same does not relate to the law, legal system, or administration of justice and, therefore, would be improper."].)

Canon 4C(3)(b), however, allows for a judge to "serve as an officer, director, trustee, or nonlegal advisor of an educational, religious, charitable, service, or civic organization not conducted for profit," so long as such service complies with the remainder of the code. Specifically, a judge is further restricted from serving "as an officer, director, or nonlegal advisor if it is likely that the organization [¶] (i) will be engaged in judicial proceedings that would ordinarily come before the judge, or [¶] (ii) will be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member." (Canon 4C(3)(c).) Even if an extrajudicial assignment is permissible, "[t]he appropriateness of accepting extrajudicial assignments must be assessed in light of the demands on judicial resources and the need to protect the courts

from involvement in extrajudicial matters that may prove to be controversial." (Advisory Com. com. foll. canon 4C(2).)

To summarize, canon 4C permits a judge to be a member of the board of a private educational institution and prohibits service on a public school board. Assuming compliance with the remainder of the code, a judge's ability to serve on a charter school board depends on whether such service constitutes a governmental committee or commission or other governmental position, i.e., whether canon 4C(2) or canon 4C(3)(b) applies. In deciding whether service on a charter school board is a governmental position, a judge must look to California's distinct legal framework regarding charter schools, examine the differences between traditional public schools and charter schools, and evaluate the instances in which charter schools are determined to be more akin to private or public institutions.

B. Charter Schools

a. Background

Through enactment of the Charter Schools Act of 1992 (Charter Schools Act) (Ed. Code, § 47600 et seq.), the Legislature intended "to improve learning; create learning opportunities, especially for those who are academically low-achieving; encourage innovative teaching methods; create new opportunities for teachers; provide parents and students expanded choices in the types of educational opportunities available; hold the charter schools accountable for meeting quantifiable outcomes; and provide 'vigorous competition within the public school system to stimulate continual improvements in all public schools.'" (*California School Bds. Assn. v. State Bd. of Education* (2010) 186 Cal.App.4th 1298, 1306, citing Ed. Code, § 47601.) In furtherance of these goals, charter schools are, for the most part, permitted to be autonomous. They operate independently from the existing school district structure and are "given substantial freedom to achieve academic results free of interference by the public educational bureaucracy. The sole relationship between the charter school operators and the chartering districts in this case

is through the charters governing the schools' operation." (*Wells, supra,* 39 Cal.4th at p. 1201.) A charter school may operate as a nonprofit benefit corporation, and such nonprofit's board of directors makes decisions that are specific only to the nonprofit organization and its charter school or schools. (Ed. Code, § 47604, subd. (a).)

Despite their independence, however, charter schools are subject to some of the same restrictions imposed on their traditional public school counterparts as well as oversight by the chartering authority. The school district that grants a charter is entitled to one representative on the board of directors of the charter school. (Ed. Code, § 47604, subd. (b).) They are also subject to, among other traditional public school requirements, a minimum number of school days and instructional minutes (*id*., § 47612, subd. (d)(3)-(4)), teacher credential requirements equivalent to those of other public schools (*id*., § 47605, subd. (l)), free tuition, and a prohibition on discrimination against students who wish to attend the school (*id*., § 47605, subd. (d)(1)). Absent these and a few other requirements, however, charter schools and their operators are "exempt from the laws governing school districts." (*Id*., § 47610; see *Wells*, *supra*, 39 Cal.4th at p. 1201.)

b. Charter Schools Are Public Schools and Charter School Officials Are Officers of Public Schools

Perhaps due to the hybrid structure of charter schools, which "in some respects blur[s] the distinction between public and private schools" (*Ghafur v. Bernstein* (2005) 131 Cal.App.4th 1230, 1239 (*Ghafur*)), it is unresolved whether a charter school is a public or private entity for all purposes. To allow for public funding, the Legislature has declared that charter schools are part of the public school system pursuant to article IX of the California Constitution. (Ed. Code, § 47615.) In *Wilson v. State Board of Education*, (1999) 75 Cal.App.4th 1125, the First District Court of Appeal examined the constitutionality of the Charter Schools Act and found that charter schools are within the mandatory state system of common schools and permissibly funded by public money. (*Id.* at pp. 1137-1141.) To establish that charter schools are constitutionally permissible, the court determined that charter schools are public schools, charter schools are under the

exclusive control of the officers of public schools, and "charter school officials are officers of public schools to the same extent as members of other boards of education of public school districts." (*Id*. at pp. 1139-1141.) Moreover, each charter school is deemed to be its own school district for purposes of statutory and constitutional funding allocations. (*Id*. at p. 1141; Ed. Code, § 47612, subd. (c).)

Applying the same logic used to find that charter school officials are akin to traditional public school officials, the First District Court of Appeal has determined that a former charter school superintendent was a public official for defamation purposes. The court first concluded that a traditional public school superintendent, though unelected, is a public official because the head of a school district has "substantial responsibilities in the operation of the [school] system" and the public has "a substantial interest in the qualifications and performance of the person appointed as its superintendent." (*Ghafur*, *supra*, 131 Cal.App.4th at p. 1238, citation omitted.)

Examining whether the same reasoning applied to a charter school superintendent, the court concluded that to differentiate the public official status of a public school superintendent from that of a charter school superintendent would "overlook 'the intent of the Legislature that charter schools are and should become an integral part of the California educational system' (Ed. Code, § 47605, subd. (b))." (*Ghafur, supra,* 131 Cal.App.4th at p. 1240.) Charter schools are public schools, and the positions of charter school superintendent and charter school board member are of equal public concern and importance as those of their traditional public school counterparts. Charter school superintendents retain "substantial responsibility for or control over the conduct of governmental affairs." (*Ibid*., quoting *Rosenblatt v. Baer* (1966) 383 U.S. 75, 85.) Therefore, at least for defamation purposes, the *Ghafur* court held that charter school board members and superintendents are equivalent to traditional public school board members and superintendents.

c. Charter Schools Are Both Public and Private Entities

Charter schools are not consistently treated as public or private entities for liability or immunity purposes. In some instances, charter schools have been determined to be arms of the state to establish immunity. (*Doe ex rel. Kristen D. v. Willits Unified School Dist.* (N.D.Cal., Mar. 8, 2010, No. C 09-03655 JSW) 2010 WL 890158 [charter schools are arms of the state for 11th Amend. immunity purposes].) In other instances, however, charter schools have been distinguished from public schools in determining liability.

In *Wells*, the Supreme Court held that, although "charter schools are deemed part of the system of public schools for purposes of academics and state funding eligibility, and are subject to some oversight by public school officials [citation], the charter schools here are operated, not by the public school system, but by distinct outside entities." (*Wells, supra,* 39 Cal.4th. at pp. 1200-1201.) Therefore, based on their private operation, the court determined that charter schools were not considered local public entities for purposes of the Government Claims Act. (*Id*. at p. 1214; see also *Knapp v. Palisades Charter High School* (2007) 146 Cal.App.4th 708, 717 [following *Wells* and concluding that the plaintiff was not required to present written claims to the charter school under the Government Claims Act before filing sexual harassment and tort claims].) The court further concluded that although traditional public school districts are not persons subject to suit under the California False Claims Act and the unfair competition law, charter schools and their operators are not public or governmental entities and not exempt from these laws "merely because such schools are deemed part of the public schools system." (*Wells*, *supra*, 39 Cal.4th at p. 1164; see *id*. at pp. 1179, 1202, 1204; see also *Sufi v. Leadership High School* (N.D.Cal., July 1, 2013, No. C-13-01598(EDL)) 2013 WL 3339441, at *8 [2013 U.S.Dist.Lexis 92432] [a charter school is not a state actor for purposes of 42 U.S.C. § 1983] (*Sufi*); *Caviness v. Horizon Community Learning Center, Inc.* (9th Cir. 2010) 590 F.3d 806, 812-814 (*Caviness*) [an Ariz. charter school is acting as a private actor in connection with employment decisions and not a state actor for purposes of 42 U.S.C. § 1983].)

As evidenced by the case law, a charter school can be considered a public or private entity depending upon the issue. (*Caviness*, *supra*, 590 F.3d at pp. 812-813 ["an entity may be a State actor for some purposes but not for others"].) Nothing affirmatively resolves whether service on a nonprofit charter school board is a governmental position for the purpose of judicial ethics. However, the decisions of a charter school board and a traditional public school board have substantially similar impacts, affecting the operation of the local school system and playing significant roles in local communities. (See *Ghafur, supra,* 131 Cal.App.4th at pp. 1238-1239.) The committee advises that based on the case law and the substantially similar impact that decisions of either a charter school board or a traditional school board have on a community, service on a local charter school board would likely be considered a governmental position.

d. Other State Advisory Opinions on Charter School Board Service

Judicial ethics advisory bodies in other jurisdictions are also divided on whether service on a charter school board constitutes a governmental position prohibited by the canons, supporting the committee's recommendation not to accept a charter school board position. Some states with similar canons, constitutional prohibitions on holding dual offices, and charter school laws as in California advise that a judge may not serve on the board of a charter school. The New York Advisory Committee on Judicial Ethics advises that a judge may not serve on the board of a charter school because, like public schools, a charter school may "generate quasi-political and highly controversial issues that could interfere with a judge's judicial duties and compromise his/her appearance of impartiality."[3] (N.Y. Jud. Advisory Com. Jud. Ethics, Op. 11-44.) The New York

[3] In New York, charter schools are also deemed public schools (N.Y. Educ. Law § 2853, subd. (1)(c)-(d)), and judicial officers are prohibited from simultaneously holding any other public office, absent limited exceptions (N.Y. Const., art. VI, § 20). Like the California canon, New York's canon 4 prohibits a judge from accepting appointment to a governmental committee, commission, or other governmental position that is not concerned with the improvement of the law, the legal system, or the administration of justice, but permits service as an officer, director, trustee, or nonlegal advisory of an

committee found "no reason to distinguish between service on a public school board and a public charter school board." (*Ibid*.) Similarly, a Florida Judicial Ethics Advisory Committee opinion advises simply that because in Florida, charter schools are part of the state's program on public education and all charter schools in the state are public schools, such service is prohibited. (Fla. Jud. Ethics Advisory Com., Opn. 2016-01.)

Other states have advised that service on a charter school board is permitted under the state's canons. The Arizona Supreme Court Judicial Ethics Advisory Committee, also with substantially similar canons, constitutional prohibitions on holding dual offices, and charter school laws, has determined that service on a charter school board is not a governmental position and is therefore permitted, subject to the other provisions within the canons. (See Ariz. Const., art. VI, § 28; Ariz. Supreme Ct. Rules, Judicial Ethics, rules 3.4, 3.7(A)(6); *Sufi*, *supra,* 2013U.S.Dist.Lexis 92432 [2013 WL 3339441] [comparing Ariz. and Cal. charter schools and finding that the two states have substantially similar charter school laws].) The Arizona committee has determined that, based on the purpose of the canon and the differences between charter schools and public schools and service on a local school board and a charter school board, "[m]embership on the board of directors of a non-profit corporation that operates a charter school is not a governmental position." (Ariz. Jud. Ethics Advisory com., Op. 96-5, p. 1.) Other states have reached similar conclusions. (See Conn. Com. on Jud. Ethics, Opn. 2015-22 [judicial officer may serve on the board of a nonprofit that consists of four public charter schools so long as the judge meets nine conditions within the canons]; Del. Jud. Ethics Advisory Com., Opn. 2001-2 [judge may serve as a board member for a military academy operated as a charter school after assuming that although publicly funded, the charter school would not be considered a governmental committee or commission]; Colo.

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educational organization not conducted for profit. (N.Y. State Rules of the Unified Court System, Rules of the Chief Admin. Judge, § 100.4(C)(2)(a), 100.4(C)(3).)

Jud. Ethics Advisory Bd., Op. 2007-02 [board of directors of a nonprofit public charter school is not a governmental organization and service on a charter school board in a different county and different judicial district was not prohibited]; S.C. Advisory Com. on Standards Jud. Conduct, Opn. 16-2002 [judge may accept appointment to serve on a charter school board in a county not served by the judge].) Significantly, however, none of these opinions address or resolve the concerns regarding dual offices, such as the prohibition within article VI, section 17 of the California Constitution and the potential for automatic resignation from judicial office if service on a charter school board is deemed a public office.

C. Prohibition on Holding Dual Offices

In addition to the restrictions within the code, service in a governmental position may also be prohibited by the California Constitution. Article VI, section 17, provides that a judge "is ineligible for public employment or public office other than judicial employment or judicial office." (Cal. Const., art. VI, § 17.) Most significantly, the acceptance of a public office "is a resignation from the office of judge." (*Ibid*.) Therefore, "[a]fter taking judicial office, a judge must be cautious in undertaking or accepting appointment to any local, county or state government position, board, agency or commission without first making sure that the position is not a 'public employment or public office other than judicial employment or judicial office.'" (Rothman, *supra,* § 10.01, pp. 524-525.)

Article VI, section 17 is "intended to exclude judicial officers from such activities as may tend to militate against the free, disinterested and impartial exercise of their judicial functions." (*Abbott v. McNutt* (1933) 218 Cal. 225, 229 [judges are prohibited from serving on a qualification board formed to submit a list of qualified candidates to the board of supervisors for a county manager position]; see also 67 Ops.Cal.Atty.Gen. 385 (1984).) Specifically, it is intended "conserve the time of the judges for the performance of their work, and to save them from the entanglements, at times the partisan suspicions, so often the result of other and conflicting duties." (*Abbott*, *supra*, 218 Cal. at

p. 229, quoting *In re Richardson* (1928) 247 N.Y. 401, 420.) The prohibition creates a distinct separation of the judiciary from the rest of the government, protecting the independence and impartiality of the judicial branch. (*Gilbert v. Chiang*, *supra*, 227 Cal.App.4th 537, 550; *Lungren v. Davis* (1991) 234 Cal.App.3d 806, 819.) These goals are closely aligned with the limitations on extrajudicial activities within the code.

Like the code, article VI, section 17 fails to define the term public employment or public office. It is, however, widely accepted that public school board members are public officials. (Cal. Const., art. VI, § 17; *Ghafur*, *supra*, 131 Cal.App.4th at p. 1238; Rothman, *supra*, § 10.01, p. 524.) It is less certain whether service on a charter school board is "public employment or public office" within article VI, section 17 of the California Constitution. (Rothman, *supra*, § 10.31, pp. 541-42 ["Memberships on boards of, or leadership positions in connection with, public educational institutions are governmental activities not related to the law, legal system, and administration of justice, and may amount to public employment or holding public office"].) If so, a judge is constitutionally ineligible for a charter school board position unless he or she resigns from judicial office. To accept a public office would result in automatic resignation from judicial office.

V. Conclusions

Judges are prohibited from serving in a governmental position that is not concerned with the improvement of the law, the legal system, or the administration of justice. (Canon 4C(2).) A judge may serve as an officer, director, trustee, or nonlegal advisor of an educational organization not conducted for profit, so long as such service does not violate any other provisions within the canons. (Canon 4C(3)(b).) The committee believes that charter schools blur the distinction between governmental entities and nonprofit organizations, and service on a charter school board may constitute a violation of canon 4C(2), or implicate the constitutional provision prohibiting a judicial officer from holding public office.

The case law regarding whether service on a charter school board is a governmental position and therefore prohibited by canon 4C(2), or is a public office and therefore prohibited by the Constitution, is unsettled. Given the grave risk of *automatic resignation* from judicial office upon acceptance of a charter school board position, if such a position is ultimately found to be a public office, the committee advises against service on a charter school board.

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)).

CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS
350 McAllister Street, Room 1144A
San Francisco, CA 94102
(855) 854-5366
www.JudicialEthicsOpinions.ca.gov

CJEO Formal Opinion 2018-012

[Issued June 5, 2018]

PROVIDING EDUCATIONAL PRESENTATIONS AT SPECIALTY BAR EVENTS

I. Questions Presented

The Committee on Judicial Ethics Opinions has been asked to provide an opinion on the following questions:

> May a judge make educational presentations to specialty bar associations whose members primarily represent a particular class of litigants on one side in cases before the courts, such as district attorneys, public defenders, or attorneys in private civil practice representing plaintiffs or defendants?
>
> What responsibility should a judge exercise over the program and promotional materials describing the judge's involvement?

II. Summary of Conclusions

Canon 4B of the California Code of Judicial Ethics[1] permits judges to speak about and teach legal subject matters, subject to the requirements of the code. The Advisory Committee commentary explains that this permits a judge to speak and teach through bar associations, so long as the other canons are observed. (Advisory Com. com., Cal. Code Jud. Ethics, foll. canon 4B.)

It is the committee's opinion that a judge may give an educational presentation to a specialty bar association, but must avoid bias or the appearance of bias towards the association's members who may represent a particular class of clients, engage in a particular practice area, or reflect a particular group of people. (Canons 2, 2A, 4A(1).) A judge must also avoid creating an appearance that the specialty bar association is in a special position to influence the judge towards its members or causes. (Canon 2B.)

A judge must be equally available to give educational presentations to audiences with opposing interests or viewpoints. The judge should also evaluate whether the frequency of presentations before a particular specialty bar association or type of association would create an appearance of bias. The content of the presentation must be neutral, presented from a judicial perspective, and avoid coaching or providing a tactical advantage to the audience. Discussing proper procedures, trial and appellate techniques, and black-letter law is acceptable; coaching to the advantage of one side, such as how to select a jury that will favor plaintiffs or defendants, is not. The presentation cannot include statements that may cast doubt on the judge's capacity to act impartially. A presentation is sufficiently neutral if the judge can give the same presentation to specialty bar associations with members that represent opposing or competing interests or parties.

Promotional materials related to an educational presentation, including the title of the presentation, may identify a judge by judicial title and must accurately reflect the neutral and educational nature of the presentation. (Advisory Com. com. foll. canon 4B.)

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[1] All further references to canons and to Advisory Committee commentary are to the California Code of Judicial Ethics unless otherwise indicated.

The promotional materials and title of the presentation cannot create an appearance of bias, lend the prestige of judicial office to advance the interests of the specialty bar association, convey that the specialty bar association or its audience is in a special position to influence the judge, or otherwise violate the canons. (*Id*.; canons 2A and 2B.) The committee advises that a judge should request to review promotional materials in advance to ensure that the materials conform to the canons. If the judge is aware that the materials do not adhere to the canons, the judge has a duty to take corrective action, which may include giving an oral disclaimer at the time of the presentation.

III. Authorities

A. Applicable Canons

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. A judge shall not make statements, whether public or nonpublic, that commit the judge with respect to cases, controversies, or issues that are likely to come before the courts or that are inconsistent with the impartial performance of the adjudicative duties of judicial office."

Advisory Committee commentary following canon 2A: "A judge must avoid all impropriety and appearance of impropriety. . . . [¶] *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. . . .* [¶] *As to judges making statements that commit the judge with respect to cases, controversies, or issues that are likely to come before the courts, see Canon 3B(9) and its commentary concerning comments about a pending proceeding."*

Canon 2B(1): "A judge shall not allow . . . social . . . 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 2B(2): "A judge shall not lend the prestige of judicial office or use the judicial title in any manner, including any oral or written communication, to advance the pecuniary or personal interests of the judge or others. . . ."

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. . . . Other than cases in which the judge has personally participated, this canon does not prohibit judges from discussing, in legal education programs and materials, cases and issues pending in appellate courts. This educational exemption does not apply to cases over which the judge has presided or to comments or discussions that might interfere with a fair hearing of the case."

Canon 4: "A judge shall so conduct the judge's quasi-judicial and extrajudicial activities as to minimize the risk of conflict with judicial obligations."

Canon 4A: "A judge shall conduct all of the judge's extrajudicial activities so that they do not [¶] (1) cast reasonable doubt on the judge's capacity to act impartially, [¶] (2) demean the judicial office, [¶] (3) interfere with the proper performance of judicial duties, or [¶] (4) lead to frequent disqualification of the judge."

Canon 4B: "A judge may speak, write, lecture, teach, and participate in activities concerning legal and nonlegal subject matters, subject to the requirements of this code."

Advisory Committee commentary following canon 4B: "As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that time permits, a judge may do so, either independently or through a bar or judicial association or other group dedicated to the improvement of the law. It may be necessary to promote legal education programs and materials by identifying authors and speakers by judicial title. This is permissible, provided such use of the judicial title does not contravene Canons 2A and 2B."

B. Other Authorities

California Code of Civil Procedure, section 170.1, subdivision (a)(6)(iii).

Wechsler v. Superior Court (2014) 224 Cal.App.4th 384.

Attending Political Fundraising or Endorsement Events, CJEO Formal Opn. No. 2016-008 (2016).

Judicial Comment at Public Hearings, CJEO Formal Opn. No. 2014-006 (2014).

Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) §§ 5:35, 6:38, 9:20, 10:16.

Cal. Judges Assn., Jud. Ethics Com., Opn. No. 47 (1997).

D.C. Advisory Com. on Jud. Conduct, Advisory Opn. No. 4 (1994)

IV. Discussion

A. Educational Presentations at Specialty Bar Events

Recognizing a judge's unique education and experience, canon 4B permits judges to speak about and teach legal subject matters, subject to the requirements of the code. (Canon 4B; Advisory Com. com. foll. canon 4B [judicial officers are specially learned in the law and in a unique position to contribute to its improvement].) The Advisory Committee commentary also recognizes that canon 4B permits a judge to speak and teach through bar associations and other groups dedicated to the improvement of the law. (Advisory Com. com. foll. canon 4B.)

Specialty bar associations commonly comprise attorneys who represent particular types of clients, engage in particular practice areas, or advocate for the interests of a specific group of people. (Cal. Judges Assn., Opn. No. 47, *supra*, p. 2 [specialty bar associations promote the interest of a limited segment of the bar]; D.C. Advisory Com. on Jud. Conduct, Advisory Opn. No. 4, *supra*, p. 1 [a blanket rule on judicial attendance at all specialty bar-related functions would be futile given the sheer number of organizations and the diverse missions and memberships of specialty bar associations].) There are stand-alone specialty bar associations and specialty bar associations that are a section of a larger bar association. Some specialty bar associations promote neutral interests, such as women, minority, or solo and small firm associations, or promote particular practice areas, such as family law, trusts and estates, or intellectual property. (Cal. Judges Assn., Opn. No. 47, *supra*, p. 2.) Other groups promote one-sided interests,

such as district attorney or public defender associations and plaintiff-oriented or defense-oriented associations. (*Ibid*.)

There is a risk that a judge who gives an educational presentation to a specialty bar association might be perceived as advocating for or agreeing with the interests, views, goals, or agenda of the sponsoring organization, creating an appearance of bias or the impression that the group is in a special position to influence the judge. The canons require that a judge avoid bias or an appearance of bias in all activities, both on and off the bench. (Canons 2 [a judge shall avoid impropriety and the appearance of impropriety in all activities], 2A, 4 & 4A(1) [a judge shall act at all times in a manner that promotes impartiality and the appearance of impartiality], 2B(1) [a judge shall not convey or permit others to convey the impression that they are in a special position to influence the judge].) An appearance of bias is evaluated objectively: whether a reasonable member of the public, aware of the facts, would fairly entertain doubts that the judge is impartial.[2] (Advisory Com. com foll. canons 2 and 2A; *Wechsler v. Superior Court* (2014) 224 Cal.App.4th 384, 391.)

1. Audience at the Presentation

The composition of the audience at a specialty bar association event does not prevent a judge from giving an educational presentation, so long as an appearance of bias or influence is not reasonably created by the circumstances. In the committee's opinion, presenting to a specialty bar association, by itself, does not constitute an endorsement of

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[2] The canon 2A test for an appearance of impartiality in a judge's professional and personal conduct is nearly identical to the test used for discretionary disqualification in specific matters before the judge. (Advisory Com. com. foll. canons 2 and 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 . . . impartiality"]; Code Civ. Proc., § 170.1, subd. (a)(6)(iii) [a judge shall be disqualified if for any reason "a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial"].)

the organization or its interests, views, goals, or agenda that may create an appearance of bias.

There may be an appearance of bias if a judge frequently or exclusively speaks before a particular specialty bar association or associations with similar interests. For example, if a judge frequently gives presentations to public defender associations and never presents to prosecutorial associations, or vice versa, a reasonable person could conclude that the judge favors the group to which he or she frequently presents. The committee does not believe that a judge must present equally to specialty bar associations on each side of an issue; however, a judge should evaluate whether the frequency that he or she presents to a particular specialty bar association or to associations with similar interests would cause a reasonable person aware of the facts to think the judge lacks impartiality. To avoid an appearance of bias, a judge must be equally available to groups that represent opposing viewpoints. (Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) §§ 6:38, 10:16, pp. 383, 685 (Rothman); Cal. Judges Assn., Opn. 47, *supra*, p. 2.)

In the committee's opinion, it is the content of the presentation, rather than the audience, that will ensure compliance with the code.

2. Content of the Presentation

Especially when speaking before an audience that promotes a particular interest or group, such as a specialty bar association, a judge must ensure that the content of the presentation does not create an appearance of bias. (Canon 2A; Advisory Com. com. foll. canon 2A [a judge shall act at all times in a manner that promotes the impartiality of the judiciary and shall not make statements that are inconsistent with the impartial performance of the adjudicative duties of judicial office].) To achieve a sufficiently neutral presentation that conforms to the canons, the committee advises that a presentation must be presented from a judicial perspective, avoid coaching or providing a tactical advantage to the audience, and avoid statements that might cast doubt on the judge's capacity to act impartially.

A judge's education and experience make him or her uniquely qualified to contribute to the improvement of the law. (Advisory Com. com. foll. canon 4B [a judge is specially learned in the law and in a unique position to contribute to its improvement].) In Formal Opinion 2014-006, the committee advised that a judge's unique experience and perspective *as a judge* make it valuable for a judge to share his or her expertise in the law and the justice system outside of the duties of their office. (CJEO, Formal Opn. 2014-006, *supra*, pp. 2, 5-6 [advising that a judge may appear at public hearings or consult with the other branches of government or public officials on matters concerning the law, the legal system, or the administration of justice].) However, the committee advised that a judge's comments or consultation with other branches of government should not include his or her experience as an attorney. (*Id*. at p. 7.) It is the committee's opinion that when presenting to a specialty bar association, a judge may utilize his or her unique judicial perspective for the benefit of the audience and may also rely on his or her experience as an attorney. The judge must ensure that when discussing prior attorney experience, the judge maintains neutrality and avoids indicating a bias, particularly if the judge is presenting to former colleagues or attorneys from the judge's previous practice area. (Cal. Judges Assn., Opn. 47, *supra*, p. 2 [recommending a neutral posture and avoidance of any impression that the goals espoused by the organization are shared by the judge].) A neutral presentation includes matters of equal interest to both sides of a legal issue, and does not benefit one side of an issue over the other or include advocacy for one position or another on unsettled areas of the law. (Rothman, *supra*, § 9:20, p. 602.)

A judge's presentation must also avoid coaching or providing strategic or tactical advantages that would benefit members of one specialty bar association to the disadvantage of members of another. (Rothman, *supra,* § 10:16, p. 685 [a judge may be the keynote speaker at a statewide conference of district attorney investigators if the judge does not coach and the content does not cast doubt on the judge's impartiality].) A judge may discuss proper procedures, trial or appellate techniques, and lecture on black letter law. It is also permissible to speak about best practices and provide tips to avoid common errors. (*Id*. at p. 686.) For example, a presenting justice may recommend to an

audience that an attorney should avoid filing a writ at 5:00 p.m. on a Friday, as such advice would be equally beneficial to audiences representing competing interests or parties. A judge may also lecture on general voir dire procedures or give general advice on the best qualities of an expert witness, so long as that advice does not benefit one side over another. It is improper, however, to lecture on how to select a jury that would favor either plaintiffs or defendants. It is also improper to lecture on the ideal demeanor and testimony of a type of witness that favors a particular side, such as the proper use of police testimony in criminal cases, as it would give the appearance of coaching the audience and a reasonable person aware of this component of a presentation would doubt the impartiality of the judge. (*Id.* at p. 685.)

As guidance, if a judge is able to give the identical presentation to specialty bar associations with members that represent opposing or competing interests or parties, the presentation is likely sufficiently neutral, avoids creating an appearance of bias, and complies with the canons.

The committee further advises that a presentation cannot indicate the judge's leanings, biases, or demonstrate a prejudgment of certain matters. Such statements could cast doubt on the judge's capacity to act impartially in pending or future proceedings. (Canons 2A, 4A; Rothman, *supra*, § 10:16, p. 686.)

Finally, a judge may discuss cases and issues pending in appellate courts as long as the judge did not preside over the case, the comments or discussions do not interfere with a fair hearing of the case, and the discussions are limited to legal education programs and materials. (Canon 3B(9); Rothman, *supra*, § 5:35, p. 308 [the combined effect of canon 3B(9) and canon 4B permits a judge to comment on cases and issues pending in a higher court, but only in the legal education context].) As with the remainder of the presentation, when commenting on pending cases, a judge should be careful to avoid any conduct that creates an appearance of bias and any comments on pending matters should promote public confidence in the integrity and impartiality of the judiciary. (Canons 2, 2A.)

B. Promotional Materials

The use of judicial title for the limited purpose of promoting an educational presentation is permitted if the materials accurately reflect the neutral and educational nature of the presentation. (Advisory Com. com. foll. canon 4B.) The use of judicial title in promotional materials for an educational presentation hosted by a specialty bar association, by its nature, advances the specialty bar association's interest. (Rothman, *supra*, § 9:20, p. 601.) Even so, the Advisory Committee Commentary recognizes that it may be necessary for promotional materials to identify a judge by judicial title when promoting legal education programs that are permitted by canon 4B. (Advisory Com. com. foll. canon 4B.) The promotional materials must still comply with the canons, and a judge has a duty to ensure that the prestige of judicial office and judicial title are not used to advance the interests of the specialty bar association, other than to promote the event itself, or create an appearance of bias in favor of the specialty bar association. (Canons 2A [a judge shall act at all times in a manner that promotes the impartiality of the judiciary], 2B [a judge shall not lend the prestige of judicial office or use the judicial title to advance the interests of others and shall not permit others to convey the impression that they are in a special position to influence the judge], 4A [a judge's extrajudicial activities cannot cast reasonable doubt on the judge's capacity to act impartially].)

If the judge is aware that the promotional materials create an appearance of bias, lend the prestige of judicial office to advance the interests of the specialty bar association, convey that the specialty bar association or its audience is in a special position to influence the judge, or otherwise violate the canons, then the judge has a duty to take corrective action. (Canons 2A and 2B; Advisory Com. com. foll. canon 4B.) If the title of the presentation suggests that the judge will provide coaching or a strategic or tactical advantage to the audience that would benefit members of one specialty bar association to the disadvantage of members of another, or the title otherwise creates an appearance of bias, the judge must also take corrective action. Corrective action may include having the association reprint corrected materials to clarify the judge's neutral

role or making a disclaimer at the beginning of the presentation if correction prior to the event is unfeasible. (CJEO Formal Opn. 2016-008, *supra*, p. 20 [corrective action mandatory for impermissible use of judicial title in promotional materials for a political event]; Com.Jud.Performance, Advisory Letter 23, 1997 Annual Report, p. 22 [discipline imposed for failing to seek a retraction or otherwise correct an unauthorized endorsement of a candidate for nonjudicial office].) Given this duty, the committee advises that a judge inform event organizers of ethical restrictions and request to review the promotional materials and title of the presentation in advance to ensure that the use of judicial title in the materials conforms to the canons and the materials to not create an appearance of bias.[3] (CJEO Formal Opn. 2016-008, *supra*, p. 20 [advising event organizers of the judge's ethical obligations and previewing promotional materials eliminates need to take corrective action if the materials violate the canons].)

V. Conclusion

It is the committee's opinion that a judge may give an educational presentation to a specialty bar association so long as the audience and content of the presentation do not create an appearance of bias or influence, or otherwise violate the canons. An appearance of bias is eliminated when a judge is available to give educational presentations to groups with opposing interests or viewpoints and when the judge is able to make the same neutral presentation to various groups. A judge should request to review in advance the title of the presentation and any promotional materials related to the presentation. If the judge is aware the materials do not conform to the canons, the judge should take corrective action.

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[3] If the judge requests to review the materials in advance, but does not receive them prior to the educational presentation and at the presentation discovers that the materials violate the canons, the judge should take corrective action, which may include an oral disclosure to the audience prior to the presentation.

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 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)).

CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS
350 McAllister Street, Room 1144A
San Francisco, CA 94102
(855) 854-5366
www.JudicialEthicsOpinions.ca.gov

CJEO Formal Opinion 2019-013

[Issued March 14, 2019]

DISCLOSURE OF CAMPAIGN CONTRIBUTIONS IN TRIAL COURT ELECTIONS

I. Question Presented

The Committee on Judicial Ethics Opinions (CJEO) was asked for an opinion on a trial court judge's disclosure obligations related to campaign contributions, including what prompts a judge's disclosure obligations, what information the judge must disclose, how to properly make the disclosure, and when and for how long the judge must disclose relevant campaign contribution information.

II. Summary of Conclusions

Judges are required to maintain public confidence in judicial integrity and impartiality in their judicial duties and in all other activities, including judicial campaigns. At the same time, judges may accept campaign contributions from parties, lawyers, and law offices or law firms who may appear before the judge in a matter. To balance this tension, the California Code of Judicial Ethics and the Code of Civil

Procedure set forth mandatory and discretionary campaign-related disqualification and disclosure obligations.

This opinion focuses on a judge's campaign-related disclosure requirements, which are prompted by certain monetary contributions provided by a party, lawyer, or law office or firm that could cause a person to have reasonable doubts regarding the judge's impartiality in the matter. If a judge is required to make a disclosure, specific information regarding the campaign contribution and contributor must be conveyed on the record in a manner that avoids solicitation of additional campaign contributions, promotes transparency, and provides the parties and lawyers with easy access to the information. This disclosure requirement begins one week from the judge's receipt of his or her first campaign contribution and continues for a period of at least two years after the judge takes office. The opinion also advises that other campaign-related assistance provided by a party, lawyer, or law office or firm, such as indirect monetary contributions, aggregate contributions from lawyers in one law office or firm, and roles in the judge's campaign or relationships to the judge, may also create doubts regarding a judge's impartiality in a matter and require disclosure.

III. Authorities

A. Applicable Canons[1]

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."

Canon 3: "A judge shall perform the duties of judicial office impartially, competently, and diligently."

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

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[1] All references to canons and to Advisory Committee commentary are to the California Code of Judicial Ethics unless otherwise indicated.

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. [¶] (b) Campaign contributions in trial court elections [¶] (i) Information required to be disclosed [¶] In any matter before a judge who is or was a candidate for judicial office in a trial court election, the judge shall disclose any contribution or loan of $100 or more from a party, individual lawyer, or law office or firm in that matter as required by this canon, even if the amount of the contribution or loan would not require disqualification. Such disclosure shall consist of the name of the contributor or lender, the amount of each contribution or loan, the cumulative amount of the contributor's contributions or lender's loans, and the date(s) of each contribution or loan. The judge shall make reasonable efforts to obtain current information regarding contributions or loans received by his or her campaign and shall disclose the required information on the record. [¶](ii) Manner of disclosure [¶] The judge shall ensure that the required information is conveyed on the record to the parties and lawyers appearing in the matter before the judge. The judge has discretion to select the manner of disclosure, but the manner used shall avoid the appearance that the judge is soliciting campaign contributions. [¶] (iii) Timing of disclosure [¶] Disclosure shall be made at the earliest reasonable opportunity after receiving each contribution or loan. The duty commences no later than one week after receipt of the first contribution or loan, and continues for a period of two years after the candidate takes the oath of office, or two years from the date of the contribution or loan, whichever event is later."

Advisory Committee commentary following canon 3E(2)(b): "Code of Civil Procedure section 170.1, subdivision (a)(9)(C) requires a judge to 'disclose any contribution from a party or lawyer in a matter that is before the court that is required to be reported under subdivision (f) of Section 84211 of the Government Code, even if the amount would not require disqualification under this paragraph.' This statute further provides that the 'manner of disclosure shall be the same as that provided in Canon 3E of the Code of Judicial Ethics.' Canon 3E(2)(b) sets forth the information the judge must disclose, the manner for making such disclosure, and the timing thereof.

"'*Contribution' includes monetary and in-kind contributions. See Cal. Code Regs., tit. 2, § 18215, subd. (b)(3). See generally Government Code section 84211, subdivision (f).*

"*Disclosure of campaign contributions is intended to provide parties and lawyers appearing before a judge during and after a judicial campaign with easy access to information about campaign contributions that may not require disqualification but could be relevant to the question of disqualification of the judge. The judge is responsible for ensuring that the disclosure is conveyed to the parties and lawyers appearing in the matter. The canon provides that the judge has discretion to select the manner of making*

the disclosure. The appropriate manner of disclosure will depend on whether all of the parties and lawyers are present in court, whether it is more efficient or practicable given the court's calendar to make a written disclosure, and other relevant circumstances that may affect the ability of the parties and lawyers to access the required information. The following alternatives for disclosure are non-exclusive. If all parties are present in court, the judge may conclude that the most effective and efficient manner of providing disclosure is to state orally the required information on the record in open court. In the alternative, again if all parties are present in court, a judge may determine that it is more appropriate to state orally on the record in open court that parties and lawyers may obtain the required information at an easily accessible location in the courthouse, and provide an opportunity for the parties and lawyers to review the available information. Another alternative, particularly if all or some parties are not present in court, is that the judge may disclose the campaign contribution in a written minute order or in the official court minutes and notify the parties and the lawyers of the written disclosure. See California Supreme Court Committee on Judicial Ethics Opinions, CJEO Formal Opinion No. 2013-002, pp. 7-8. If a party appearing in a matter before the judge is represented by a lawyer, it is sufficient to make the disclosure to the lawyer.

"*In addition to the disclosure obligations set forth in Canon 3E(2)(b), a judge must, pursuant to Canon 3E(2)(a), disclose on the record any other information that may be relevant to the question of disqualification. As examples, such an obligation may arise as a result of contributions or loans of which the judge is aware made by a party, lawyer, or law office or firm appearing before the judge to a third party in support of the judge or in opposition to the judge's opponent; a party, lawyer, or law office or firm's relationship to the judge or role in the campaign; or the aggregate contributions or loans from lawyers in one law office or firm.*

"*Canon 3E(2)(b) does not eliminate the obligation of the judge to recuse himself or herself where the nature of the contribution or loan, the extent of the contributor's or lender's involvement in the judicial campaign, the relationship of the contributor or lender, or other circumstance requires recusal under Code of Civil Procedure section 170.1, and particularly section 170.1, subdivision (a)(6)(A).*"

Canon 5: "A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary."

Canon 5B(4): "In judicial elections, judges may solicit campaign contributions or endorsements for their own campaigns or for other judges and attorneys who are candidates for judicial office. Judges are permitted to solicit such contributions and endorsements from anyone, including attorneys and other judges, except that a judge shall not solicit campaign contributions or endorsements from California state court commissioners, referees, court-appointed arbitrators, hearing officers, and retired judges serving in the Assigned Judges Program, or from California state court personnel. In

soliciting campaign contributions or endorsements, a judge shall not use the prestige of judicial office in a manner that would reasonably be perceived as coercive. See Canons 1, 2, 2A, and 2B."

Advisory Committee commentary following canon 5B(4): "Although it is improper for a judge to receive a gift from an attorney subject to exceptions noted in Canon 4D(6), a judge's campaign may receive attorney contributions."

B. Other Authorities[2]

Code of Civil Procedure, sections 170.1, subdivision (a)(6)(A)-(B), (9)(A)-(D), 170.9, subdivision (l)(4)

Government Code, section 84211, subdivision (f)

Caperton v. A.T. Massey Coal Co., Inc. (2009) 556 U.S. 868

Inquiring Concerning Kreep (2017) 3 Cal.5th CJP Supp. 1

Public Admonishment of Judge Flanagan (2017)

Public Admonishment of Judge Walsh (2016)

Public Admonishment of Judge Brehmer (2012)

Inquiry Concerning Hall (2006) 49 Cal.4th CJP Supp. 146

Public Admonishment of Judge Benson (2006)

Rothman et al., California Judicial Conduct Handbook (4th ed. 2017), section 7:56

CJEO Formal Opinion 2013-003 (2013), *Disqualification Based on Judicial Campaign Contributions from a Lawyer in the Proceeding*, California Supreme Court Committee on Judicial Ethics Opinion

CJEO, Formal Opinion 2013-002 (2013), *Disclosure on the Record When There is no Court Reporter or Electronic Recording of the Proceedings*, California Supreme Court Committee on Judicial Ethics Opinions

CJEO Oral Advice Summary 2018-023, *Disqualification Responsibilities of Appellate Court Justices*, California Supreme Court, Committee on Judicial Ethics Opinions Oral Advice Summary

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[2] Admonishments and Inquiries issued by the Commission on Judicial Performance.

California Judges Association, Judicial Ethics Committee, Advisory Opinion No. 48 (1999)

Assembly Committee on Judiciary, Synopsis of Assembly Bill No. 2487 (2009-2010 Reg. Sess.) as amended April 20, 2010

Judicial Council of California, Committee for Impartial Courts, Final Report: Recommendations for Safeguarding Judicial Quality, Impartiality, and Accountability in California (Dec. 2009)

Supreme Court Advisory Committee on the Code of Judicial Ethics, Invitation to Comment No. SP12-01 (2012)

Supreme Court Advisory Committee on the Code of Judicial Ethics, Invitation to Comment No. SP11-08 (2011)

IV. Discussion

A. Introduction

With limited exceptions, a judge[3] may accept campaign contributions from anyone, including parties, lawyers, and law offices or firms that may appear before the judge. (Canon 5B(4) [a judge may solicit campaign contributions from anyone, including attorneys, but not certain subordinate judicial officers or state court personnel]; Advisory Com. com. foll. canon 5B(4) [a judge's campaign may receive attorney contributions]; Code Civ. Proc., § 170.9, subd. (l)(4)[4] [a campaign contribution is not a prohibited gift].) However, if a judge accepts a campaign contribution from a party, lawyer, or law office or firm in a matter, there may be concerns about the judge's impartiality. (Canon 2A [a

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[3] This opinion focuses on the disclosure obligations of trial court judges. "Judge" is used to refer to a trial court judge. Appellate court justices may also accept campaign contributions and are subject to mandatory and discretionary disqualification for certain campaign contributions, but they are not required to make disclosures. (CJEO Oral Advice Summary 2018-023, *Disqualification Responsibilities of Appellate Court Justices*, Cal. Supreme Ct., Com. Jud. Ethics Oral Advice Summary, p. 3 [appellate court justices do not have disclosures obligations under either the canons or Code Civ. Proc. § 170.1]; canon 3E(4), (5)(j).)

[4] All references to section or sections are to the Code of Civil Procedure unless otherwise indicated.

judge shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary]; canon 5 [a judge shall not engage in campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary]; Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 7:56, pp. 475-476 (Rothman) [there are many protections regarding contributions to judicial campaigns, but there is still a potential compromise to judicial integrity created by campaign contributions in judicial elections].)

To mitigate against these concerns, there are discretionary and mandatory grounds for disqualification depending on the campaign contribution. A judge must disqualify himself or herself if, in the last six years or in anticipation of an upcoming election, the judge received a campaign contribution in excess of $1,500 from a party or lawyer in the matter, absent waiver. (§ 170.1, subd. (a)(9)(A), (D); canon 3E(1) [a judge shall disqualify himself or herself in any proceeding in which disqualification is required by law].) A judge is also disqualified if the judge believes there is substantial doubt as to his or her capacity to be impartial or unbiased in the proceeding or if another person aware of a campaign contribution or other campaign-related assistance might reasonably entertain doubts regarding the judge's impartiality. (§ 170.1, subd. (a)(6)(A), (B); Advisory Com. com. foll. canon 3E(2)(b) [canon 3E(2)(b) does not relieve a judge of his or her obligation to disqualify where campaign related circumstances would require disqualification under § 170.1].)

If a judge is not disqualified by a campaign contribution, the judge remains subject to the extensive disclosure requirements expressed in canon 3E(2) and section 170.1, subdivision (a)(9)(C).[5]

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[5] This opinion does not advise on California's election campaign reporting laws, which create other obligations for candidates for judicial office. Failure to comply with these laws is itself a violation of the canons and may result in discipline. (Canons 2A, 3B(2), 5; see, e.g., *Public Admonishment of Judge Benson* (2006) [admonished for violations of the Political Reform Act as found by the Fair Political Practices Commission]; *Public Admonishment of Judge Brehmer* (2012) [admonished for violations of the Political

B. What Prompts Disclosure Obligations

There are two types of campaign-related assistance that a judge is required to disclose. First, a judge who is or was a candidate for judicial office has an ethical and statutory duty to disclose any campaign contribution or loan of $100 or more if the contribution or loan was made by a party, individual lawyer, or law office or firm in the matter. Canon 3E(2)(b)(i) requires disclosure of any campaign contribution of $100 or more. Section 170.1, subdivision (a)(9)(C) requires that a judge disclose any contribution that is required to be reported by Government Code section 84211, subdivision (f), which currently requires that any campaign contribution of $100 or more is reported in a campaign statement. This $100 disclosure threshold applies to both monetary and in-kind contributions, such as discounted goods or services or use of office space or equipment. (Advisory Com. com. foll. canon 3E(2)(b); Cal. Judges Assn., Jud. Ethics Com., Advisory Opn. No. 48 (1999), p. 6 [examples of in-kind contributions include accounting services and materials for use in signage and campaign literature].)

Second, a judge must disclose any other type of campaign-related assistance that may create an appearance of bias. This duty arises from the requirement that a judge disclose any information relevant to the question of disqualification, even if the judge believes there is no actual basis for disqualification. (Canon 3E(2)(a).) When evaluating whether the judge should make the disclosure, the analysis should be based on whether a reasonable person aware of the campaign-related assistance would have doubts regarding the judge's impartiality. (§ 170.1, subd. (a)(6)(A)(iii) [disqualification is required where a person aware of the facts might reasonably entertain a doubt that the judge would be

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Reform Act as found by the Fair Political Practices Commission and other violations of the Political Reform Act found by the Commission on Judicial Performance]; *Public Admonishment of Judge Flanagan* (2017) [admonished for violations of the Political Reform Act as found by the Fair Political Practices Commission]; *Inquiry Concerning Kreep* (2017) 3 Cal.5th CJP Supp. 1, 14-18, [censured for violating provisions of the Political Reform Act]; *Inquiry Concerning Hall* (2006) 49 Cal.4th CJP Supp. 146, 154-165 [removal from office for violating campaign finance and disclosure laws].)

able to be impartial].) The following examples of indirect monetary contributions, aggregate contributions from lawyers in one law office or firm, and roles in the campaign or relationships to the judge illustrate when additional disclosures are necessary.

Indirect monetary contributions are contributions or loans that the judge is aware of or reasonably should be aware of[6] that are made by a party, lawyer, or law office or firm that appears before the judge to a third party in support of the judge or in opposition to the judge's opponent. (Advisory Com. com. foll. canon 3E(2)(b).) For example, if the judge is aware that a party appearing before the judge contributed to a political action committee (PAC) that is exclusively raising funds on behalf of the judge or in opposition to the judge's opponent, the judge should disclose this contribution. Similarly, if a PAC supports several candidates or causes, the judge is aware that a party made a contribution to the PAC that was directed to be used for the benefit of the judge, and the PAC will use the funds as directed by the party, the judge should disclose the party's PAC contribution. A judge should also consider whether to disclose when the judge is aware of a contribution from a nonparty who has an interest in the outcome of the proceeding. (See, e.g., *Caperton v. A.T. Massey Coal Co., Inc.* (2009) 556 U.S. 868, 884-887 (*Caperton*) [party's executive contributed to a candidate for judicial office's campaign committee, a PAC that negatively targeted the candidate's opponent, and made other independent expenditures in support of the candidate's campaign, raising an intolerable appearance of bias that required recusal under the Due Process Clause].)

Smaller contributions that are less than $100 or aggregate contributions or loans from lawyers in one law office or firm may also warrant disclosure. (Advisory Com. com. foll. canon 3E(2)(b).) For example, if the judge is aware of numerous $99 contributions from lawyers employed by a large law firm that appears before the judge and these contributions are a significant portion of the judge's campaign contributions, the judge should disclose the contributions. (See CJEO Formal Opinion. 2013-003

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[6] Within this section, the use of the term "aware" includes "aware" or "reasonably should be aware."

(2013), *Disqualification Based on Judicial Campaign Contributions from a Lawyer in the Proceeding*, Cal. Supreme Ct. Com. Jud. Ethics Opns., p. 11 [the $1500 campaign contribution threshold for disqualification does not apply to aggregated contributions from multiple individuals who practice law together or are from the same law firm].) Conversely, if lawyers employed in a three-person law firm each contribute $99 and this amount is a small portion of the judge's campaign contributions, the contributions alone would not require disclosure. Essentially, if the smaller contributions frustrate the purposes of the disclosure or disqualification requirements — to promote public confidence in the impartiality of the judiciary — a judge should consider whether, at a minimum, these smaller contributions warrant disclosure. (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 3 [a judge shall perform the duties of judicial office impartially].)

A judge should disclose when a party, lawyer, or law office or firm that appears before the judge has or had a role in the campaign or a relationship to judge. (Advisory Com. com. foll. canon 3E(2)(b).) For example, a judge should disclose if the party, lawyer, or members of the law office or firm participated in canvassing, phone banking, or provided other volunteer services. Relatedly, if a party, lawyer, or law office or firm has or had a relationship to the judge or the judge's campaign and the judge determines such relationship does not necessitate disqualification, the judge should still disclose. (*Ibid*. [canon 3E(2)(b)'s disclosure requirements do not eliminate a judge's obligation to disqualify pursuant to § 170.1].)

Finally, any monetary or in-kind contribution or other campaign-related assistance that would necessitate disclosure if made by a party, lawyer, or law office or firm should also be disclosed if made by a witness in a proceeding where the judge will evaluate the witness's credibility, such as a bench trial. A reasonable person aware of the witness's contribution or campaign-related assistance could find that a judge lacked impartiality when evaluating witness's credibility. (Cal. Judges Assn., Jud. Ethics Com., Advisory Opn. No. 48, *supra*, at p. 6.)

C. What Information to Disclose

A judge must disclose certain information regarding a campaign contribution and the contributor as required by canon 3E(2)(b) and section 170.1, subdivision (a)(9)(C).

Canon 3E(2)(b) sets forth all of a judge's ethical obligations regarding campaign contribution disclosures in trial court elections. It is divided into three subparagraphs: subparagraph (i) sets forth the contribution amount that creates a disclosure obligation — $100 or more — and the information that a judge must disclose. (Canon 3E(2)(b)(i).) Subparagraph (ii) sets forth the manner of a judge's disclosure. (Canon 3E(2)(b)(ii).) Subparagraph (iii) sets forth the timing of the disclosure, including when the disclosure obligation begins and for how long a judge must continue to make campaign contribution disclosures. (Canon 3E(2)(b)(iii).)

Relevant here, subparagraph (i) states that where a judge receives a campaign contribution or loan of $100 or more from a party, lawyer, or law office or firm, the judge must disclose: (1) the name of the contributor or lender; (2) the amount of each contribution or loan; (3) the cumulative amount of the contributor's contributions or lender's loans; and (4) the date of each contribution or loan. (Canon 3E(2)(b)(i).)

Section 170.1, subdivision (a)(9)(C) also sets forth obligations regarding campaign contribution disclosures, stating that "[t]he judge shall disclose any contribution from a party or lawyer in a matter that is before the court that is required to be reported under subdivision (f) of Section 84211 of the Government Code, even if the amount would not require disqualification under this paragraph. The manner of disclosure shall be the same as that provided in Canon 3E of the Code of Judicial Ethics."

Government Code section 84211, subdivision (f), cited in section 170.1, subdivision (a)(9)(C), sets forth the information that must be disclosed in a candidate's campaign statement pursuant to the Political Reform Act of 1974. It requires that if the cumulative amount of contributions or loans received from a person is $100 or more and received during the period covered by the campaign statement, the campaign statement must include: (1) the contributor's full name; (2) the contributor's street address; (3) the contributor's occupation; (4) the name of his or her employer, or if self-employed, the name of the business; (5) the date and amount received for each contribution during the

period covered by the campaign statement and whether the contribution was a monetary contribution, in-kind contribution of goods or services, or a loan; and (6) the cumulative amount of contributions. (Gov. Code, § 84211, subd. (f).)

As is apparent, Government Code section 84211, subdivision (f) requires a candidate to disclose more information in a campaign statement than a judge is required to disclose pursuant to canon 3E(2)(b)(i). This difference requires a determination of whether the reference to Government Code section 84211, subdivision (f) in section 170.1, subdivision (a)(9)(C) requires that a judge disclose all of the information that must be reported in a campaign statement or whether the reference is only to express that campaign contributions of $100 or more must be disclosed. Taking into account the statutory language and construction of section 170.1, subdivision (a)(9)(C), the timing of the amendments to this section and canon 3E(2)(b), and the purpose of campaign contribution disclosure, it is the committee's view that a judge is only required to disclose the items listed in canon 3E(2)(b)(i) to comply with section 170.1, subdivision (a)(9)(C).

The first sentence of section 170.1, subdivision (a)(9)(C) requires that a judge "disclose *any contribution* from a party or lawyer in a matter that is before the court that is required to be reported under" Government Code section 84211, subdivision (f). (Italics added.) The second sentence of section 170.1, subdivision (a)(9)(C) requires that "[*t*]*he manner of the disclosure* shall be the same as" canon 3E. (Italics added.) As organized, the reference to Government Code section 84211, subdivision (f) in the first sentence defines the contributions which must be disclosed, those that are $100 or more, and not the details of the contribution itself. (§ 170.1, subd. (a)(9)(C).) The reference to canon 3E in the second sentence establishes that the canon controls the manner of disclosure, which encompasses all the details of the campaign contribution disclosure including the information that a judge must disclose. (*Ibid*.; canon 3E(2)(b)(i)) [titled "Information required to be disclosed"].) The timing of the amendments to section 170.1 that added subdivision (a)(9) and to canon 3E(2), and the intent of campaign contribution disclosure, further support the committee's view that only the information listed in canon 3E(2)(b)(i) must be disclosed.

In 2009, the California Judicial Council's Commission for Impartial Courts recommended mandatory disclosure of any campaign contribution of $100 or more in an effort to enhance public trust and confidence in an impartial judiciary without imposing campaign contribution limits. (Jud. Council of Cal., Com. for Impartial Courts, Final Report: Recommendations for Safeguarding Judicial Quality, Impartiality, and Accountability in California (Dec. 2009) pp. 32-34.) The Legislature responded to this report and other concerns regarding campaign spending and judicial impartiality by adopting section 170.1, subdivision (a)(9), establishing mandatory disqualification and disclosure obligations based on certain campaign contributions, effective January 1, 2011. (Assem. Com. on Judiciary, Synopsis of Assem. Bill No. 2487 (2009-2010 Reg. Sess.) as amended Apr. 20, 2010, pp. 1, 3-7.) Although not made explicit in the statute's legislative history, it appears that the Legislature intended that the details of a campaign contribution disclosure, including what information a judge must disclose, and how, when, and for how long to make a disclosure, would be addressed by subsequent amendments to canon 3E. This is supported by both the reference to canon 3E in section 170.1, subdivision (a)(9)(C) and the fact that shortly after the amendments were adopted, the Supreme Court Advisory Committee on the Code of Judicial Ethics proposed canon 3E(2)(b) "to effectuate Code of Civil Procedure section 170.1(a)(9)(C)." (Sup. Ct. Advisory Com. on the Code of Jud. Ethics, Invitation to Comment No. SP11-08 (2011) pp. 14-15; Sup. Ct. Advisory Com. on the Code of Jud. Ethics, Invitation to Comment No. SP12-01 (2012) pp. 1-2.) Canon 3E(2)(b) was adopted by the California Supreme Court, effective January 1, 2013.

Requiring disclosure of a contributor's address, occupation, and employer in all circumstances, as required by Government Code section 84211, subdivision (f), would also do little to advance public trust and confidence an impartial judiciary. In most instances, it will be sufficient for a party to know that the opposing party, lawyer, or law office or firm contributed to the judge's campaign and the amounts and dates of any contributions. In those instances where a contributor's address, occupation, or employer would be relevant to the question of disqualification, a judge is still obligated to make a

disclosure. (Canon 3E(2)(a) [a judge shall disclose information that is reasonably relevant to the question of disqualification under § 170.1].) For example, if a lawyer appearing before a judge made a campaign contribution of $100 or more and other lawyers in the same law firm also made significant contributions to the judge's campaign, disclosure of the lawyer's employer could be relevant to the question of disqualification because it would assist a party in knowing the total amount of contributions from a particular law firm. (CJEO Formal Opinion 2013-003 (2013), *supra*, at p. 11 [a judge who receives contributions from multiple individuals from the same law firm must determine whether a person aware of the aggregated contributions would reasonably entertain doubts concerning the judge's impartiality].)

Therefore, based on section 170.1, subdivision (a)(9)(C)'s plain language and construction, the timing of the amendments, and the purpose of campaign contribution disclosure, it is the committee's view that compliance with section 170.1, subdivision (a)(9)(C) does not require that a judge always disclose a contributor's address, occupation, or employer as required by Government Code section 84211, subdivision (f). To comply with section 170.1, subdivision (a)(9)(C) and canon 3E(2)(b)(i), the judge must disclose the following information:

- the contributor's or lender's full name;
- the amount of each contribution or loan;
- the date of each contribution or loan; and
- the cumulative amount of the contributor's contributions or lender's loans.

(Canon 3E(2)(b)(i).)

A judge is still required to disclose any other information that may be relevant to the question of disqualification. (Canon 3E(2)(a); § 170.1, subd. (a)(6)(A)(iii) [disqualification is required where a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial].) This may include information outside of this list and, in particular, information related to non-monetary campaign assistance. For example, if a judge receives or received volunteer assistance from a party

or lawyer appearing before the judge, the time commitment and type of work provided would be relevant to the question of disqualification and should be disclosed.

D. How to Disclose

A judge has discretion to select the manner of disclosure so long as the judge follows two requirements. (Canon 3E(2)(b)(ii); § 170.1, subd. (a)(9)(C) [the manner of disclosure shall be the same as canon 3E].) First, a judge must make the campaign contribution disclosure on the record to the parties and lawyers appearing in the matter. (Canon 3E(2)(b)(ii); CJEO Formal Opinion 2013-002 (2013), *Disclosure on the Record When There is no Court Reporter or Electronic Record of the Proceedings*, Cal. Supreme Ct. Com. Jud. Ethics Opns., pp. 8-9 [a judge may make an on the record disclosure orally in open court when there is a court reporter or an electronic recording of the proceeding, but if a court reporter or electronic recording is unavailable, the judge must ensure that any disclosures become a part of the written record of the proceeding].) Second, when making the disclosure, the judge must avoid the appearance that he or she is soliciting campaign contributions. (Canon 3E(2)(b)(ii).)

When selecting the appropriate manner of disclosure, a judge should also consider the purpose of disclosure – to provide transparency and to promote public confidence in the independence and impartiality of the judiciary. (*Public Admonishment of Judge Walsh* (2016) p. 3 [failure to disclose campaign contributions can give rise to public distrust in the independence and impartiality of the judiciary]; *Public Admonishment of Judge Brehmer* (2012) p. 4 [the integrity of the judicial campaign process and the judiciary is harmed when the public is deprived of information regarding sources of campaign contributions and amounts of campaign expenditures].) The disclosure should be effective and efficient, and provide the parties and lawyers with easy access to the information. (Advisory Com. com. foll. canon 3E(2)(b); Rothman, *supra*, at § 7:56, p. 474 [the theme of canon 3E(2)(b) is to require robust and effective disclosure of campaign contributions].)

With these purposes in mind, it is the committee's view that, if all of the parties and lawyers are present, the most transparent, effective, and efficient way to make a

disclosure is for the judge to state the required information orally and on the record. In some instances, however, the circumstances may make an oral disclosure impracticable, such as the number of parties and lawyers in a particular matter, the absence of some of the parties or lawyers from court, or the court's calendar. The Advisory Committee commentary following canon 3E(2)(b) provides useful examples of appropriate manners of disclosure in these circumstances.

Where an oral disclosure is impracticable, it may be appropriate for a judge to provide the parties and lawyers with the required information another way. If all or some of the parties are not present in court, a judge may disclose the campaign contribution in a written minute order or in the official court minutes and notify the parties and the lawyers of the written disclosure. (Advisory Com. com. foll. canon 3E(2)(b).) Or, a judge may state orally on the record in open court that the parties and lawyers may obtain the required contribution information at an easily accessible location in the courthouse, and provide an opportunity for the parties and lawyers to review the available information. (*Ibid.*) The fact that campaign contribution information is available at an accessible location in the courthouse does not negate a judge's obligation to be aware of campaign contributions that are relevant to the particular matter. The committee acknowledges that the sheer number of contributions may make it difficult for a judge to track the identity of the contributors and the amounts contributed. Still, a judge has an ethical obligation to be aware of these contributions and how they may be relevant to a proceeding to ensure that the contributions themselves or the contributions coupled with other factors would not require the judge to disqualify. (Canon 3E(2); § 170.1, subd. (a)(6)(A).)

The committee further advises that during the campaign, a judge should make continuing on-the-record disclosures to the parties and lawyers in the matter, as the judge may receive ongoing campaign contributions from previous and new contributors that are relevant to the matter. By reminding the parties and lawyers on the record that the judge has received additional campaign contributions and providing the parties with an opportunity to review new campaign contributions, the judge continues to promote

transparency regarding his or her contributions, instilling confidence in the independence and impartiality of the judiciary.

E. When and How Long to Disclose

The disclosure obligation begins one week after receipt of the first campaign contribution. (Canon 3E(2)(b)(iii).) During an active campaign, a judge should disclose a campaign contribution at the earliest reasonable opportunity after receiving a contribution or loan. (*Ibid.*) The committee advises that, in most circumstances, if a judge reviews his or her campaign contributions on a weekly basis and makes relevant disclosures, the judge fulfills this requirement. An additional disclosure should occur each time a judge receives an additional contribution from a party or lawyer appearing before the judge.

Once the campaign ends, the disclosure obligation endures for two years after the judge takes the oath of office or from the date of the contribution or loan, whichever is later. (Canon 3E(2)(b)(iii).) The two-year timeframe mandated by canon 3E(2)(b)(iii) is the minimum duration of disclosure required by the canons. If a campaign contribution by a party or lawyer appearing before the judge remains relevant to the question of disqualification and if a person aware of the contribution could reasonably have doubts regarding the judge's impartiality the judge should continue to disclose the contribution. (Canon 3E(2)(a); § 170.1, subd. (a)(6)(A)(iii).)

V. Conclusion

A judge should be familiar with the kinds of campaign contributions the judge receives, the amounts and dates of the contributions, and basic knowledge related to the contributor. A judge should also be aware of other campaign-related assistance that may require disclosure. Ultimately, the information disclosed and the manner of disclosure should avoid an appearance that the judge is soliciting additional campaign contributions, provide transparency regarding campaign contributions or campaign-related assistance, and promote public confidence in both the integrity of the judge's campaign and the

judge's impartiality in the matter before him or her, even where a party, lawyer, law office or firm may have contributed to the judge's campaign.

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 views of the California Supreme Court or any other entity. (Cal. Rules of Court, rule 9.80(b); CJEO rule 1(a).)

CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS
350 McAllister Street, Room 1144
San Francisco, CA 94102
(855) 854-5366
www.JudicialEthicsOpinions.ca.gov

CJEO Formal Opinion 2020-014

[Issued July 20, 2020]

JUDICIAL PARTICIPATION IN PUBLIC DEMONSTRATIONS AND RALLIES

I. Question

May judicial officers ethically participate in public demonstrations and rallies about racial justice and equality, or make public statements about those matters, under the Code of Judicial Ethics?[1]

II. Summary of Conclusions

In view of recent events that have focused attention on concerns regarding racial justice and equality in our communities, judicial officers may feel a moral obligation to support these

[1] All further references to canons, the code, terminology, and advisory committee commentary are to the California Code of Judicial Ethics unless otherwise indicated.

issues, and other social justice issues, by participating in public demonstrations and rallies, or by making public statements. Chief Justice Cantil-Sakauye has recognized the importance of these issues by acknowledging the need to "continue to strive to build a fairer, more equal and accessible justice system for all." (Cantil-Sakauye, Statement on Racism and Bias (June 8, 2020) <https://newsroom.courts.ca.gov/news/california-chief-justice-speaks-on-removing-barriers-to-justice-addressing-bias-and-racism> (as of July 20, 2020).

At the same time, judges have a paramount duty to comply with the judicial canons to promote the public's confidence in judicial impartiality, which is the foundation of our system of justice. Judges must not allow their conduct outside the courthouse to affect their ability to fulfill their judicial obligations on the bench. For these reasons, before attending or otherwise participating in a public demonstration or rally, or making a public statement on matters of public concern, judges must examine whether their conduct is ethically permissible, under the Code of Judicial Ethics.

Judges may not participate in a public demonstration or rally if: (a) participation might undermine the public's confidence in the judiciary; (b) the event relates or is likely to relate to a case pending before a court, relates to an issue that is likely to come before the courts, or is reasonably likely to give rise to litigation and the judge's attendance might lead to disqualification; (c) participation would or is likely to cause a violation of the law, for example by violating a curfew; (d) participation would create the appearance of speaking on behalf of, or lending the prestige of office to, a political candidate or organization; or (e) participation would interfere with the proper performance of judicial duties.

In determining whether participation would be appropriate, judges should examine the official title of the demonstration or rally, its stated mission, its sponsors, and its organizers. Judges should also take reasonable efforts to determine the messages that will be delivered by other participants and the risks that the demonstration or rally might depart from its original mission. Practically speaking, this may be difficult. Judges must remain vigilant and be prepared to leave if remaining at the demonstration or rally might result in a violation of their ethical duties or interfere with judicial obligations. Judges should also assume that their identity

will likely be known and that their participation will be scrutinized, publicized, and depicted in reports of a demonstration or rally, including in press coverage or on social media.

In addition to or in place of attending and personally participating in a public demonstration or rally, judges also may write a public statement about matters relating to racial justice and equality, as the Chief Justice and the Supreme Court have done. (*See ante* & Section IV.E, *post*.) Since judges can maintain control of the substance and tone of a written statement, a writing that addresses issues of racial justice and equality may present fewer ethical risks than participating in a public demonstration or rally on those same issues.

III. Authorities

A. Applicable Canons

Terminology: "Law, the legal system, or the administration of justice." When a judge engages in an activity that relates to the law, the legal system, or the administration of justice, the judge should also consider factors such as whether the activity upholds the integrity, impartiality, and independence of the judiciary (Canons 1 and 2A), whether the activity impairs public confidence in the judiciary (Canon 2), whether the judge is allowing the activity to take precedence over judicial duties (Canon 3A), and whether engaging in the activity would cause the judge to be disqualified. [¶] . . . [¶]

"Pending proceeding" is a proceeding or matter that has commenced. A proceeding continues to be pending through any period during which an appeal may be filed and any appellate process until final disposition. [¶] . . . [¶]

"Impending proceeding" is a proceeding or matter that is imminent or expected to occur in the near future.

Canon 1: "A judge shall uphold the integrity and independence of the judiciary."

Advisory Committee Commentary following canon 1: ". . . Although judges should be independent, they must comply with the law and the provisions of this code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violations of this code diminish public confidence in the judiciary and thereby do injury to the system of government under law."

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. A judge shall not make statements, whether public or nonpublic, that commit the judge with respect to cases, controversies, or issues that are likely to come before the courts or that are inconsistent with the impartial performance of the adjudicative duties of judicial office."

Advisory Committee Commentary following canon 2A: ". . . A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by other members of the community and should do so freely and willingly. [¶] . . . [¶] *The test for . . . 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."*

Canon 3A: "All of the judicial duties prescribed by law shall take precedence over all other activities of every judge. In the performance of these duties, the following standards apply."

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."

Canon 4A(1), (3) & (4): "A judge shall conduct all of the judge's extrajudicial activities so that they do not [¶] . . . cast reasonable doubt on the judge's capacity to act impartially [¶] . . . interfere with the proper performance of judicial duties, or [¶] . . . lead to frequent disqualification of the judge."

Advisory Committee Commentary following canon 4A: "Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the community in which he or she lives. Expressions of bias or prejudice by a judge, even outside the judge's judicial activities, may cast reasonable doubt on the judge's capacity to act impartially as a judge. [¶] . . . [¶] *Because a judge's judicial duties take precedence over all other activities (see Canon 3A), a judge must avoid extrajudicial activities that might reasonably result in the judge being disqualified."*

Canon 5: "A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary. [¶] Judges and candidates for judicial office are entitled to entertain their personal views on political questions. They are not required to surrender their rights or opinions as citizens. They shall, however, not engage in political activity that may create the appearance of political bias or impropriety. Judicial independence, impartiality, and integrity shall dictate the conduct of judges and candidates for judicial office."

Advisory Committee Commentary following canon 5A: "Although attendance at political gatherings is not prohibited, any such attendance should be restricted so that it would not constitute an express public endorsement of a nonjudicial candidate or a measure not affecting the law, the legal system, or the administration of justice otherwise prohibited by this canon."

B. Other Authorities

California Code of Civil Procedure, section 170.1, subdivision (a)(6)(A)(iii).

Rothman et al., California Judicial Conduct Handbook (4th ed. 2017) sections 5:32, 7:57, 8:32, 10:40, 10:47, and 11:3.

Attending Political Fundraising or Endorsement Events, CJEO Formal Opinion No. 2016-008 (2016).

Judicial Appearance in an Educational Documentary, CJEO Informal Opinion Summary No. 2014-004 (2014).

IV. Discussion

Recent events have sparked a national conversation about racial justice and equality, with thousands of people joining in demonstrations and rallies in cities throughout the state, often just outside of courthouse doors. As our Supreme Court has acknowledged, judicial officers have a particular duty to "confront the injustices that have led millions to call for a justice system that works fairly for everyone." (Supreme Court of California, Statement on Equality and Inclusion (June 11, 2020) <https://newsroom.courts.ca.gov/news/supreme-court-of-california-issues-statement-on-equality-and-inclusion> (as of July 20, 2020) (Supreme Court Statement). Having devoted themselves to the cause of justice from the bench, judicial officers may feel compelled to attend, speak at, or otherwise participate in demonstrations or rallies to manifest their support for racial justice and equality. (Advisory Com. commentary, foll. canon 4A [judges are not to be isolated from the larger community].) Although such demonstrations and rallies are not necessarily partisan, they address matters that are the subject of current debate and litigation and can relate to subjects over which passions run high. Given the intense societal focus on public events that address these issues, a judge's participation in them is likely to be the subject of public scrutiny. For these reasons, judges must accept certain restrictions that might be viewed

as burdensome by other members of the community. (Advisory Com. commentary, foll. canon 2A [judges must expect to be the subject of constant public scrutiny and must therefore accept restrictions on their conduct; the test judges must apply to all of their conduct is whether a person aware of the facts might reasonably entertain a doubt as to impartiality].)

A. A Judge's Ethical Duties Take Precedence Over Other Considerations

Judicial participation in public demonstrations and rallies necessarily implicates a number of canons that judges are required to uphold, regardless of the merits of the message or the urgency of the cause.[2] For example, canons 1 and 2 require judges to maintain public confidence in the judiciary, while provision 2A forbids them from making "statements, whether public or nonpublic, that commit the judge with respect to cases, controversies, or issues that are likely to come before the courts or that are inconsistent with the impartial performance of the adjudicative duties of judicial office." Canon 4 requires judges to conduct themselves outside the courtroom so "as to minimize the risk of conflict with judicial obligations." Canon 5 prohibits judges from engaging in political or campaign activity that is inconsistent with their roles in the judiciary.

The proper maintenance and functioning of our system of justice depends on judicial officers following these restrictions, which are based on the principle of public trust in an impartial judiciary. As the Advisory Committee commentary to canon 1 recognizes, "[a]lthough judges should be independent, they must comply with the law and the provisions of this code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violations of this code diminish public confidence in the judiciary and thereby do injury to the system of government under law." (*Id.*) For that reason, when judges consider participating in demonstrations or rallies, among the factors they

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[2] In another restraint on extrajudicial conduct under the code, Judge Rothman has observed that judges are not allowed to solicit on behalf of charitable causes, even if they are causes of extraordinary worth or profound virtue. (Rothman et al., California Judicial Conduct Handbook (4th ed. 2017) § 10:42, p. 718 (Rothman) [there is no "really-worthy-charity" exception to the fundraising ban].)

should take into account are whether the activity impairs public confidence in the judiciary (canon 2), whether they are allowing the activity to take precedence over judicial duties (canon 3A), and whether engaging in the activity would cause them to be disqualified (canon 4A(4)). (Terminology [defining "[l]aw, the legal system, or the administration of justice"].)

B. Deciding Whether to Attend a Demonstration or Rally

When participating in a public demonstration or rally, judges should always assume that their attendance will be known and that their conduct may be subject to comment and reporting in press coverage or on social media. In small gatherings, for example, it is likely that the judge will be recognized by other participants. In larger demonstrations, it is likely that there will be members of the public or press present recording the event, and modern facial recognition technology makes it difficult to remain anonymous in a crowd. As a result, judges should always conduct themselves at a demonstration or rally as if their presence will become known, and they must consider the public perception of their participation before deciding whether to attend.

a. Promoting Public Confidence in the Judiciary

While the canons recognize that judges "are not required to surrender their rights or opinions as citizens," a judge's obligation to promote public confidence in the judiciary is paramount. (Canon 2A; canon 5 [prohibiting judges from engaging in political activities that may create an appearance of political bias].) In fulfilling this duty, a key determination judges should make before deciding whether to attend a demonstration or rally is whether a person aware of their presence at the event might reasonably entertain a doubt that they would be able to act in their official capacity with impartiality. (Advisory Com. commentary, foll. canon 2A.) For that reason, before attending, judges should investigate the agenda for the demonstration or rally, including the objectives of the event's organizers, and evaluate the risk that organizers or supporters will express views that might reasonably be perceived to compromise the judge's independence and impartiality. (California Supreme Court Committee on Judicial Ethics Opinions, CJEO Formal Opinion No. 2016-008, Attending Political Fundraising or Endorsement

Events, at p. 10 (CJEO) [judge's attendance at political event would be prohibited if it could reasonably be construed to constitute a public endorsement of a political candidate or organization or otherwise create the appearance of political bias].) For example, if a demonstration or rally is promoted using derogatory or disrespectful references to individuals, groups of people or communities, the judge should not attend. (Canons 4A, 5D.) Furthermore, if an invitation or other promotional materials use unfamiliar terms, symbols or abbreviations, judges should make reasonable efforts to determine their meaning and should decline to participate if they cannot do so.

b. Avoiding Demonstrations and Rallies that Relate to Matters Pending Before a Court or that Are Likely to Come Before a Court

Judges cannot comment on any pending[3] or impending[4] legal proceedings, and as a result they must avoid demonstrations and rallies concerning current and future cases. (Canons 3B(7), 3B(9) [prohibiting judges from making public comments about proceedings in any court that might substantially interfere with a fair trial and requiring them to make reasonable efforts to avoid communications in matters before them].) The fundamental reason for these prohibitions is the duty to maintain impartiality and avoid conduct that might influence the outcome or impair the fairness of the proceeding. Further, if a judge participates in a demonstration or rally on an issue that may involve litigation, for example, if a demonstration lacks proper permits, the judge's presence at the event could lead to disqualification. (Canons 3E(3)(a), 3E(4)(c) [appellate justice disqualification required when a reasonable person aware of the facts would doubt the justice's ability to remain impartial]; Code Civ. Proc., § 170.1(a)(6)(A)(iii) [trial judge disqualification required if a person aware of the facts might

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[3] A "pending proceeding" is a proceeding or matter that has commenced. A matter remains pending within the meaning of the code if there is sufficient time for a party to petition the United States Supreme Court seeking review of the appellate decision. (Terminology; CJEO Oral Advice Summary No. 2018-024, Reporting Misconduct by a Superior Court Research Attorney in a Pending Matter, pp. 2-3.)

[4] An "impending proceeding" is a proceeding or matter that is imminent or expected to occur in the near future. (Terminology.)

reasonably entertain a doubt that the judge would be able to be impartial].) If a demonstration or rally is sponsored or organized by individuals or entities that regularly appear in state court proceedings, a reasonable person may have cause to question the judge's independence and impartiality when making decisions about those individuals or entities in subsequent cases, which may result in frequent disqualification and violate the judge's duty to avoid extrajudicial activities that may lead to disqualification. (Canon 4A(4); Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007) § 7:57, p. 476 (Rothman) [judges must consider whether potential disqualification requires them to avoid public activities].)

If it seems likely that a demonstration or rally might result in a confrontation between participants and others, including law enforcement, and might lead to unlawful acts by either side, the judge should likewise not participate or be a witness to such events. A judge's appearance at such demonstrations or rallies could create future disclosure and disqualification issues.

c. Minimizing the Risk of Breaking the Law

A judge should not attend a demonstration or rally if it is reasonably foreseeable that by doing so the judge may violate the law. For example, if a rally is scheduled to begin at a time that makes it possible that the event will not conclude before a lawful curfew, judges should not attend unless they can be certain that they will be able to leave early to comply with the law. (Canon 2A [requiring judges to respect and comply with the law].)

d. Avoiding Endorsements at Politicized Events

Although demonstrations and rallies for racial justice and equality are often nonpartisan, in certain circumstances they may be sponsored by or associated with a political party, politician or candidate for political office, or relate to a political measure. Although attendance at political gatherings is not prohibited, any such attendance should be restricted so that it would not constitute an express public endorsement of, or lend the prestige of office to, a nonjudicial candidate or a political measure not affecting the law, the legal system, or the administration of justice otherwise prohibited by the code. (CJEO Formal Opinion No. 2016-008, *supra*,

Attending Political Fundraising or Endorsement Events, at p. 6 [judges attending political event must consider whether their presence may create the appearance of endorsement or bias]; Advisory Com. commentary, foll. canons 2A & 5A.)

e. Ensuring that Judicial Duties Are Unaffected

As noted, a judicial officer should not attend any demonstration or rally that might lead to disqualification because the subject matter, sponsors, organizers, or the event itself is or is likely to be the subject of litigation. (Canon 4A(4); Advisory Com. commentary, foll. canon 4A [judge must avoid extrajudicial activities that might reasonably result in the judge being disqualified].) In addition, any participation should be avoided that might interfere with any of the judge's other official duties. (Canon 4A(3); Advisory Com. commentary, foll. canon 4A ["a judge's judicial duties take precedence over *all other activities*." (emphasis added)].) For example, if a demonstration is scheduled for a time that conflicts with the judge's duties on the bench, the judge may not reschedule his or her official duties in order to attend the demonstration. (Rothman, *supra*, § 8:32 p. 517 [before engaging in any extrajudicial activity, judges must test whether it will interfere with the proper performance of their judicial duties]; *id.* at § 10:40, p. 716 [judicial activities have priority over extrajudicial activities].)

C. Maintaining Vigilance While at a Demonstration or Rally

After a judge has determined that he or she might ethically attend a demonstration or rally, the judge should continue to be mindful of any risks that the demonstration or rally might evolve in ways that could violate the judge's ethical duties. In that regard, judges should be sensitive to how much, if any, control they will have over how an event will proceed, whether the organizers or sponsors have the ability to control the event, and whether confrontations between participants and law enforcement or others are likely. After arriving at a demonstration or rally, if a judge sees other participants with signs or hears crowds chanting slogans that are

inflammatory, derogatory, and inconsistent with the judge's own ethical duties, the judge should leave the event.[5]

D. Engaging in Symbolic Gestures or Speaking at a Demonstration or Rally

Even where judges may ethically attend a demonstration or rally, they should consider whether engaging in a symbolic act, carrying a sign, wearing clothing or buttons that might identify them as siding with a particular viewpoint, or making a public statement on even permissible topics would undermine the public's confidence in the judiciary. (CJEO Formal Opinion No 2016-008, *supra*, Attending Political Fundraising or Endorsement Events, at p. 15 [speech relating to the permissible subjects of the legal system or the administration of justice could compromise judicial integrity by creating the appearance of political bias].) Judges must also consider whether there is a risk that, by making a verbal statement or engaging in a symbolic act at a demonstration or rally, they would be lending the prestige of their office to further the personal interests of the individuals or entities organizing the event. (Canon 2B(2) [a judge shall not lend the prestige of judicial office or use the judicial title to advance the interests of others and shall not permit others to convey the impression that they are in a special position to influence the judge]; CJEO Formal Opinion No. 2018-012, Providing Educational Presentations at Specialty Bar Events, Cal. Supreme Ct., Com. Jud. Ethics Opns., at p. 10 [the prestige of the judicial office and judicial title should not be used to advance the interests of a specialty bar association]; CJEO Formal Opinion No. 2017-007, *supra*, at 2 [judges should consider whether speechmaking would create the appearance of lending the prestige of office to a political candidate or organization].)

Judges should avoid engaging in symbolic gestures or wearing apparel likely to be seen as one-sided statements that may call into question their impartiality. (Canons 2A and 5; Advisory Com. commentary, foll. canon 2A [judges should not create a reasonable doubt in the minds of

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[5] Before joining in a group chant, judges should consider whether the substance of the message and the dynamics of delivering the message as part of a crowd are appropriate. (*See* Section IV.D., *post*, [discussing ethical considerations when a judge participates in symbolic gestures or makes a statement at a public event].)

others as to their impartiality].) Similarly, speaking at a demonstration or rally on a topic likely to come before the courts in a way that commits a judge to taking a position is prohibited. (Canon 2A.) Furthermore, a judge should not make any statement or make any symbolic reference at a demonstration or rally about a pending or impending proceeding. (Canon 3B(9); CJEO Informal Opinion Summary No. 2014-004, Judicial Appearance in an Educational Documentary, Cal. Supreme Ct., Com. Jud. Ethics Opns., p. 9 [judge may not comment on the substance of pending case]; Rothman, *supra*, § 5:32, pp. 302-03 [noting a judge's discipline for making public comments about cases in which the judge was not involved].)

E. Written Expression of Views

Rather than participating in a public demonstration or rally, judges who wish to make their views known might consider writing a letter or providing a written statement or opinion to the press. By doing so judges may make their views on a subject known while avoiding many of the risks inherent in participating in a public demonstration or rally, and can maintain control over the tone and substance of the message they wish to convey. (Rothman, *supra*, § 10:47 p. 723 [providing examples of permissible and impermissible letters]; *id.* at § 11:3 p. 739 [providing examples of appropriate written advocacy].) The Supreme Court's recent Statement on Equality and Inclusion provides an example of the kind of statement that is ethically permissible:

> We state clearly and without equivocation that we condemn racism in all its forms: conscious, unconscious, institutional, structural, historic, and continuing. We say this as persons who believe all members of humanity deserve equal respect and dignity; as citizens committed to building a more perfect Union; and as leaders of an institution whose fundamental mission is to ensure equal justice under the law for every single person. (Supreme Court Statement, *supra*.)

A written statement of this kind advances the cause of racial justice and equality while promoting public confidence in the judiciary, without violating the canons by creating an appearance of partiality, referencing any pending or impending case, or committing the courts to taking a position on an issue likely to come before them.

The need for "equal justice under the law" in our society will always be of manifest concern. (Supreme Court Statement, *supra*.) As judicial officers, committed to the ideals of our constitutional democracy, we must fulfill our role to ensure equal justice under the law to all. This commitment applies to proceedings in our courtrooms and, as this opinion details, in all our extra-judicial activities.

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)).

CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS
350 McAllister Street, Room 1144A
San Francisco, CA 94102
(855) 854-5366
www.JudicialEthicsOpinions.ca.gov

CJEO Formal Opinion 2020-015

[Issued November 5, 2020]

SUPERVISING JUDGE'S DUTIES WHEN A PARTY COMPLAINS ABOUT A JUDGE IN A PENDING MATTER

I. Question Presented

When may a supervising judge[1] ethically disclose to a trial judge an ex parte communication made in connection with a complaint against the trial judge?

[1] Presiding judges and other judges who have been delegated responsibility to supervise judicial officers are referred to in this opinion collectively as "supervising judges." The term "supervising judges" includes judges who have been designated by their presiding judge to supervise a division, district or branch court pursuant to California Rules of Court, rule 10.603(b)(1)(A), as well as judges who have been delegated supervisory responsibilities by their presiding judge pursuant to rule 10.603(d).

II. Summary of Conclusions

Supervising judges may disclose an ex parte communication to a trial judge in the discharge of their duty of oversight, but they should do so only when there is no alternative way to properly investigate and respond to a complaint. It would be preferable not to disclose ex parte communications to the trial judge if the complaint can be properly investigated and resolved without such disclosure, or if the disclosure can be delayed until the case from which the complaint arises is no longer pending, and no further proceedings in the case before the trial judge are anticipated. If the disclosure of the ex parte communication to the trial judge is required, then the supervising judge should only reveal information that is necessary to investigate the allegations of the complaint, remediate any harm relating to the complaint, or improve the trial judge's conduct in the future. If an ex parte communication is disclosed, the supervising judge remains responsible to take reasonable measures to ensure that the trial judge follows proper procedures that may be required by the disclosure of the ex parte communication to the trial judge.

III. Authorities

A. Applicable Canons[2]

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 2A: "A judge shall respect and comply with the law and shall act at all times in a manner that promotes 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

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[2] All further references to code, canons and to Advisory Committee commentary are to the California Code of Judicial Ethics unless otherwise indicated.

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. . . . 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 as follows:

"(a) Except as stated below, a judge may consult with other judges. A judge presiding over a case shall not engage in discussions about that case with a judge who has previously been disqualified from hearing that case; likewise, a judge who knows he or she is or would be disqualified from hearing a case shall not discuss that matter with the judge assigned to the case. A judge also shall not engage in discussions with a judge who may participate in appellate review of the matter, nor shall a judge who may participate in appellate review of a matter engage in discussions with the judge presiding over the case.

"[¶] . . . [¶] 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.

"[¶] . . . [¶] (b) A judge may initiate, permit, or consider ex parte communications, where circumstances require, for scheduling, administrative purposes, or emergencies that do not deal with substantive matters provided: [¶] (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and [¶] (ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

"(c) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so or when authorized to do so by stipulation of the parties.

"(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."

Canon 3C(1): "A judge shall diligently discharge the judge's administrative responsibilities impartially, on the basis of merit, without bias or prejudice, free of conflict of interest, and in a manner that promotes public confidence in the integrity of the judiciary."

Canon 3C(3): "A judge shall require staff and court personnel under the judge's direction and control to observe appropriate standards of conduct and to refrain from (a) manifesting bias, prejudice, or harassment based upon race, sex, gender, gender identity,*

gender expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, or (b) sexual harassment in the performance of their official duties."

Canon 3C(4): "A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to ensure the prompt disposition of matters before them and the proper performance of their other judicial duties."

Canon 3D(1): "Whenever a judge has reliable information that another judge has violated any provision of the Code of Judicial Ethics, that judge must take appropriate corrective action, which may include reporting the violation to the appropriate authority."

ADVISORY COMMITTEE COMMENTARY: Canons 3D(1) . . . . "[¶] Appropriate corrective action could include direct communication with the judge . . . 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 . . . 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."

B. Other Authorities

Code of Civil Procedure, sections 170.3, subdivision (b), 170.4, subdivision (c).

California Rules of Court, rules 10.603(b)(1)(A), (c)(4), (d), 10.703(g).

California Standards of Judicial Administration, standard 10.20(d).

Alameda County Superior Court, Local Rules, rule 2.0.

Contra Costa County Superior Court, Local Rules, rule 2.150.

San Diego County Superior Court, Local Rules, rule 1.2.1.

San Francisco Superior Court, Local Rules, rule 2.6.

Inquiry Concerning Schnider (Aug. 31, 2009) <https://cjp.ca.gov/wp-content/uploads/sites/40/2016/08/Schnider_DO_08-31-09.pdf> (as of Nov. 5, 2020).

Inquiry Concerning Velasquez (2007) 49 Cal.4th CJP Supp. 175.

Inquiry Concerning Ross (2005) 49 Cal.4th CJP Supp. 79.

Inquiry Concerning Platt, (2002) 48 Cal.4th CJP Supp. 227.

Rothman et al., California Judicial Conduct Handbook (4th ed. 2017) sections 5:2, 6:2.

Commission on Judicial Performance, Annual Reports for 2011, 2010, 2009, 2002, 2000, 1998, 1995, 1994, 1993, 1992, 1990 and 1988.

California Judges Association, Judicial Ethics Update (Jan. 2016).

IV. Discussion

Supervising judges are required to exercise proper oversight of the judicial officers they supervise, regardless of the size of their court or the way in which supervisorial duties are delegated within the court. (Canon 3C(4); Cal. Rules of Court, rule 10.603(c)(4), (d).) As part of their oversight obligations, supervising judges frequently must handle complaints against trial judges under their supervision from parties, witnesses, court staff or others. (Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 6:2, pp. 339-340 (Rothman).) Supervising judges must respond to such complaints appropriately and in a timely manner, or face discipline for having failed to do so. (*Inquiry Concerning Schnider* (Aug. 31, 2009) pp. 4-5 (*Schnider*) [supervising family law judge disciplined for failing to respond to complaints about commissioner under his supervision from three different litigants and two attorneys];[3] Com. on Jud. Performance, Ann. Rep. (2011) Private Admonishment 9, p. 24 [presiding judge failed to take appropriate corrective action after receiving reliable information about serious wrongdoing by another judge on the court]; Com. on Jud. Performance, Ann. Rep. (2010)

[3] A supervising judge's primary ethical duties are the same regardless of whether the individuals supervised are commissioners, superior court judges or any other kind of judge. (*Schnider* at p. 2 [canon 3C(3) "requires judges with supervisory authority for the judicial performance of other judges and commissioners to take reasonable measures to ensure the prompt disposition of matters before them"; canon 3D(1) "requires judges to take appropriate corrective action when they have reliable information that another judge has violated provision of the Code of Judicial Ethics"].)

Advisory Letter 22, p. 27 [presiding judge did not properly respond to a complaint about a delay by a commissioner in a family law case]; Com. on Jud. Performance, Ann. Rep. (2009) Advisory Letter 14, p. 19 [judge charged with duty to supervise failed to ensure timely responses to litigants' complaints]; Com. on Jud. Performance, Ann. Rep. (2002) Advisory Letters 1, 15, pp. 23-24 [presiding judge did not respond to a litigant's complaint in a timely manner, or to a letter from the Commission on Judicial Performance inquiring about the status of the matter; another presiding judge failed to process a complaint for nine months]; Com. on Jud. Performance, Ann. Rep. (2000) Advisory Letters 17, 18, p. 22 [presiding judge failed to respond in a timely manner to a complaint; in another case, a presiding judge acted promptly but delayed before notifying complainant about the outcome of investigation]; Com. on Jud. Performance, Ann. Rep. (1998) Advisory Letters 28, 29, p. 28 [supervising judge failed to respond to a complaint against two commissioners and respond timely to a complaint against another commissioner]; Com. on Jud. Performance, Ann. Rep. (1995) Advisory Letters 35, 36, p. 27 [supervising judges delayed response to complaints about commissioners]; Com. on Jud. Performance, Ann. Rep. (1994) Advisory Letters 19, 21, 25, p. 19 [discipline imposed for failures to respond to complaints]; Com. on Jud. Performance, Ann. Rep. (1993) Private Admonishment G, p. 16 [same]; Com. on Jud. Performance, Ann. Rep. (1993) Advisory Letters 14, 19, pp. 18-19 [same]; Com. on Jud. Performance, Ann. Rep. (1992) Advisory Letter 20, p. 15; [same]; Com. on Jud. Performance, Ann. Rep. (1990) Advisory Letter 29, p. 24 [same]; Com. on Jud. Performance, Ann. Rep. (1988) Advisory Letter 44, p. 16 [same].)[4]

When responding to a complaint against a trial judge under their supervision, supervising judges should first determine if the court's local rules require them to follow any specific procedures. (Cal. Stds. Jud. Admin., std. 10.20(d) [a court's informal complaint procedure "should be memorialized in the applicable local rules of court"];

[4] To ensure that there is a clear record if needed, supervising judges should consider documenting in writing all steps taken in response to a complaint against a trial judge.

see, e.g., Super. Ct. Alameda County, Local Rules, rule 2.0 [mandating that violations of the court's policy against bias be reported to the presiding judge, but reserving for a future time implementation of Standard 10.20]; Super. Ct. Contra Costa County, Local Rules, rule 2.150 [describing procedures presiding judge should follow when in receipt of complaint against a bench officer]; Super. Ct. San Diego County, Local Rules, rule 1.2.1 [describing court's policy against bias and access to court services]; Super. Ct. San Francisco, Local Rules, rule 2.6 [outlining procedures after a complaint has been filed].) But whether or not a court has adopted a local rule governing complaint procedures, a supervising judge should always take reasonable measures to review, investigate and respond to a complaint in a way that is designed to take appropriate corrective action when the supervising judge has determined that the information is reliable. (*Schnider*, *supra*, at p. 2 [citing canon 3C(3), which requires judges with supervisory authority to take reasonable measures to ensure the prompt disposition of matters in their courts, and canon 3D(1), which requires judges to take appropriate corrective action when they have reliable information that another judge has violated the code].)

The "reasonable measures" that a supervising judge should take in response to a complaint will depend on the facts and circumstances of each particular complaint. (*Schnider*, *supra*, at pp. 4-5 [noting that a supervising judge's knowledge that a commissioner had a history of delay should have prompted the supervising judge to investigate further]; see also Cal. Rules of Court, rule 703(g) [describing alternative actions that a supervising judge may take after reviewing a complaint, depending on whether the allegations merit further investigation].) That is particularly true with regard to the decision whether to contact the trial judge accused of wrongdoing. For example, if it is clear that a party is protesting a legal ruling that the trial judge has made in a case, rather than an alleged breach of ethics, then it would not be necessary for the supervising judge to communicate with the trial judge about the matter. Similarly, if the supervising judge is able to determine that the complaint on its face is not reliable because it utterly lacks credibility, it may be reasonable not to pursue an investigation. Where the

complaint seems at first blush to be reliable, a supervising judge may be able to test the complaint's reliability and resolve the matter by reviewing transcripts, minute orders and other recordings of trial court proceedings, by speaking with percipient witnesses including court staff, or by employing an observer to attend proceedings and report to the supervising judge about whether the trial judge's behavior on the bench corroborates the allegations of the complaint. If a supervising judge is not able to fully resolve a complaint this way, he or she may be obligated by the duty of oversight to communicate with the trial judge who is the subject of a complaint, either as part of an investigation into the reliability of the complaint's allegations or, if the supervising judge is convinced of the reliability of the complaint, to confer with the trial judge about appropriate corrective action. (Canon 3D(1); Cal. Judges Assn., Judicial Ethics Update (Jan. 2016) § I.D, p. 4 [a presiding judge who receives a complaint by a litigant in a pending case has a duty to investigate the complaint which may include discussing the matter with the judge].)

In cases where the duty of oversight requires communication with the trial judge about a complaint, the supervising judge should give careful consideration to whether it is necessary to refer to specific facts and circumstances that relate to a proceeding pending before the trial judge. Disclosure of such information by the supervising judge to the trial judge would constitute an ex parte communication, which canon 3B(7) defines as "any communications to or from the judge outside the presence of the parties concerning a pending or impending proceeding." Generally speaking, such ex parte communications are prohibited. With certain exceptions discussed below, judges must "not initiate, permit, or consider ex parte communications" and must "make reasonable efforts to avoid such communications." (Canon 3B(7).) For that reason, if discussion of a case currently before the trial judge is required, the supervising judge should consider whether it would be appropriate and practicable to avoid an ex parte communication by delaying the discussion while the case proceeds to conclusion, and then resuming the inquiry with the

trial judge when the case is no longer pending and no further proceedings before the trial judge are reasonably anticipated.[5]

It may not be appropriate or practicable in every instance to delay speaking with the trial judge who is the subject of a complaint. For example, if the allegations of a complaint set forth facts that might affect the outcome of a currently pending case, then the supervising judge may conclude that it would be improper to delay discussing the matter with the trial judge. Or, if the complaint alleges sexual misconduct or racism or other bias, then the supervising judge may feel compelled to proceed in order to mitigate any harm should the allegations be established as true. Further, if a complaint arises in the context of a family law case, probate, juvenile dependency or another kind of matter that may last many years, or in a matter that is likely to be appealed and thereafter remanded to the trial court, then it may not be possible to stay an investigation long enough for the case to finally conclude. In those circumstances, there are exceptions to the general prohibition on ex parte communications that permit disclosures of case-related information to trial judges when necessary to fulfill the supervising judges' oversight obligations, so long as certain conditions are met, as discussed below. (Cal. Judges Assn., Judicial Ethics Update (Jan. 2016) § I.D, p. 4 [where a presiding judge discloses a complaint to the judge it becomes an ex parte communication which the judge would have to disclose].) For example, Canon 3B(7)(b) allows ex parte communications for administrative purposes (such as judicial oversight) "where circumstances require." (*Inquiry Concerning Ross* (2005) 49 Cal.4th CJP Supp. 79, 104, fn. 6 [ex parte communication by supervising judge while investigating complaint against trial judge was part of legitimate administrative duties pursuant to canon 3C(3), and for that reason it was not improper]; Rothman, *supra*, § 5.5, p. 268-269 [it is "essential" that the communication be necessary for it to be ethically permissible].) Canon 3B(7)(a) allows

[5] If a stay of an investigation is appropriate in order to delay a communication with the judge who is the subject of the complaint, then the supervising judge should consider whether to inform the complainant and other parties in the case of the stay as well as the reasons for the stay.

ex parte communications between trial judges and "court personnel and others authorized by law" (including a supervising judge) "as long as the communication relates to that person's duty to aid the judge in carrying out the judge's adjudicative responsibilities." A supervising judge's communication with a trial judge to investigate a complaint or correct the trial judge's violation of judicial ethics falls within this carve-out to the general prohibition on ex parte communications.

Even where ex parte communications are allowed in the circumstances described above, supervising judges should exercise caution to avoid unnecessary disclosure of facts or other specific information about a case pending before the trial judge who is the subject of the complaint. A trial judge does not have a right to know case-specific information that is not necessary to evaluate the allegations raised in a complaint against the trial judge or to take appropriate corrective action. (*Inquiry Concerning Velasquez* (2007) 49 Cal.4th CJP Supp. 175, 209 [trial judge disciplined for demanding copies of letters of complaint that had been submitted to his presiding judge].) "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." (Canon 3B(7)(a); accord canon 3B(7)(b) [allowing ex parte communications for administrative purposes only "where circumstances require"].) For that reason, the supervising judge should narrow the focus of any discussion with the trial judge to issues related to the administration of justice, the remediation of a violation of the trial judge's ethical duties, or the improvement of the trial judge's conduct in future matters. No extraneous information about cases pending before the trial judge, or that are impending, should be disclosed. (*Inquiry Concerning Platt*, (2002) 48 Cal.4th CJP Supp. 227, 245, fn. 4 [general inquiry into administrative matters does not become an ex parte communication unless and until it is linked to some specific case].) In addition, the supervising judge should not disclose information to the trial judge that would provide a procedural or tactical advantage to a party appearing before the trial judge in pending litigation. (Canon 3B(7)(b)(ii).) Furthermore, supervising judges should limit their

interactions with the trial judge as much as possible to written communications, so that there is a clear record of what has been disclosed to the trial judge in case the content or propriety of the communications is ever called into question. In the event that the supervising judge verbally discloses ex parte communications to the trial judge, the supervising judge should soon thereafter commit to writing any conversations regarding the disclosure. The supervising judge remains responsible to take reasonable measures to ensure that the trial judge follows proper procedures that may be required by the disclosure of an ex parte communication to the trial judge. (*See Schnider* at p. 4 [discipline imposed on supervising judge who failed to follow up with commissioner under his supervision after instructing her to take measures to remedy her ethical violations].)

V. Conclusion

The proper handling of a complaint may require a supervising judge to disclose an ex parte communication to the trial judge who is the subject of the complaint. Before making such a disclosure, the supervising judge should determine if there are any appropriate alternative ways to proceed with the investigation and resolution of the complaint that would not require disclosure. If disclosure is required, it should be limited to what is necessary.

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 summary 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)).)

CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS
350 McAllister Street
San Francisco, CA 94102
(855) 854-5366
www.JudicialEthicsOpinions.ca.gov

CJEO Formal Opinion 2021-016

[Issued September 21, 2021]

INDEPENDENT INVESTIGATION OF INFORMATION CONTAINED IN ELECTRONIC COURT CASE MANAGEMENT SYSTEMS

I. Question

The Committee on Judicial Ethics Opinions (CJEO) was asked to provide an opinion on whether, in a non-criminal matter, a judge[1] may search the court's electronic case management system (CMS) for information regarding a party, attorney, or facts relevant to the matter before the judge.

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[1] 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 otherwise provided].)

II. Summary of Conclusions

Canon 3B(7) of the California Code of Judicial Ethics[2] provides that "[u]nless 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*" (emphasis added). How this canon applies to using an electronic case management system (CMS) in all matters, whether civil or criminal, is the subject of this opinion.

It is the committee's view that a judge may use a CMS to search for information that will assist in the proper performance of judicial duties. A judge may also use a CMS to independently investigate facts in a proceeding where the investigation is authorized by law. The committee advises that canon 3B(7) prohibits only those CMS searches that are performed to independently investigate adjudicative facts where the investigation is not authorized by law or where the information is not the proper subject of judicial notice. Adjudicative facts are those that may resolve factual issues or relate to evaluating credibility in the matter before the judge.

III. Authorities

A. Applicable Canons

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 3: "A judge shall perform the duties of judicial office impartially, competently, and diligently"

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

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[2] All further references to the code, canons, or advisory committee commentary are to the California Code of Judicial Ethics.

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."

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."

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

Code of Civil Procedure sections 116.520, 116.770, 170.1, 391, 391.2, 527.6, 527.8, 527.85

Civil Code section 1954.13

Evidence Code sections 450-460

Family Code sections 3031, 6306

Penal Code sections 18155, 18175

Probate Code section 2620

California Rules of Court, rules 3.300, 5.440, 5.445, 8.252

Catchpole v. Brannon (1995) 36 Cal.app.4th 237

Conservatorship of Presha (2018) 26 Cal.App.5th 487

Fremont Indemnity Co. v. Workers' Comp. Appeals Bd. (1984) 153 Cal.App.3d 965

Gimbel v. Laramie (1960) 181 Cal.App.2d 77

Harris v. Rivera (1981) 454 U.S. 339

In re Marriage of Davenport (2011) 194 Cal.App.4th 1507

Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc. (2005) 133 Cal.App. 4th 26

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

Wechsler v. Superior Court (2014) 224 Cal.App.4th 384

CJEO Formal Opinion 2015-007 (2015), *Disqualification for Prior Appearance as a Deputy District Attorney in a Nonsubstantive Matter*, California Supreme Court Committee on Judicial Ethics Opinions

CJEO Oral Advice Summary 2019-029 (2019), *Appellate Disqualification for Prior Assignment as Coordinated Proceedings Judge*, California Supreme Court Committee on Judicial Ethics Opinions

CJEO Oral Advice Summary 2018-023 (2018), *Disqualification Responsibilities of Appellate Court Justices*, California Supreme Court Committee on Judicial Ethics Opinions

Rothman et al., California Judicial Conduct Handbook (4th ed. 2017) appendix G

ABA Committee on Professional Ethics, Opinion Number 478 (Dec. 8, 2017)

Thornburg, *The Lure of the Internet and the Limits on Judicial Fact Research* (Summer/Fall 2012) 38:4 Litigation 41

IV. Discussion

A. Electronic Case Management Systems

At its most basic level, a CMS contains what was traditionally stored in paper files but is now stored electronically in searchable databases and other formats. A CMS receives, stores, organizes and retrieves case data, including documents that are

electronically filed with a court, created electronically by a court, or electronically stored with the court, as well as electronic copies or versions of documents that were originally paper records and have been digitized. Some CMSs may also contain calendar information and additional features that allow for the creation of and access to other information, such as comments, impressions, notes, research results, or to-do lists that are associated with a specific case or are created for general use by a judge or court staff. Judges usually access information contained in a CMS through a 'viewer' application, which provides total or limited access to all the information and data stored in a CMS. CMSs and companion judicial viewer applications provide immediate access to comprehensive data. Some CMSs may also link to or provide access to a court's document management system, which may include templates, prior orders, frequently cited cases, or internal court memoranda, operating as a brief bank.

Unlike paper files, the information stored in a CMS is readily accessible, easily searchable, and may contain more than what is in a paper file. Depending on the features of a court's individualized CMS, the system's settings, other judges' privacy settings, and a judge's access rights, search results may be limited to matters assigned to a specific judge or may be more comprehensive. It is not unexpected that a CMS search will yield relevant results from all the case records and other information within the judge's case type or discipline or from within the judge's entire court.

B. Permissible CMS Searches

Electronic case management systems are an integral part of California court operations, providing an efficient mechanism for judges and court staff to electronically review court documents and effectively manage caseloads. These electronic systems provide easy and immediate access to court records as well as other information that can be searched and viewed instantaneously.

Canon 3B(7) of the code states that "[u]nless 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*" (emphasis added). For judges using their court's CMS as a regular and necessary part of their judicial function, the question becomes: what electronically stored information are they authorized by law to search for or view?

There are many statutes, court rules, and cases that authorize a judge to search for and view information relevant to the matter assigned to the judge. In some instances, an independent investigation of relevant facts is required.[3] In other instances, an independent investigation is permitted, such as to avoid inconsistencies with other orders[4] or to determine whether there are grounds that justify issuing an order.[5] In small claims cases, a judge may investigate the controversy with or without providing notice to the parties.[6] In certain matters, a judge may engage in an independent investigation as part of the court's supervisory duties.[7]

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[3] Fam. Code, § 6306 [a court shall ensure that a search is conducted to determine certain information regarding the subject of the proposed order].

[4] Fam. Code, § 3031 [a court considering the issue of custody or visitation is encouraged to make a reasonable effort to ascertain whether there are other orders in effect that concern the parties or the minor]; Cal. Rules of Court, rules 5.440 & 5.445 [courts should identify cases and information related to a pending family law case to avoid inconsistent orders].

[5] Pen. Code, §§ 18155, 18175 [gun violence restraining orders]; Code Civ. Proc., §§ 391, 391.2 [vexatious litigant findings based on prior unmeritorious litigation practices], §§ 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].

[6] 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].

[7] Prob. Code, §§ 2620, subd. (d) [a court may consider any information necessary to determine the accuracy of a conservatorship accounting]; *Conservatorship of Presha* (2018) 26 Cal.App.5th 487, 49-498 [a judge may consider a court-appointed conservator's billing practices in other cases to determine whether the conservator is properly discharging the conservator's duties].

A judge may also search the court's CMS for case management purposes. This includes searching a CMS to determine whether to coordinate, relate, or consolidate cases.[8] A judge may also search the CMS to determine whether the judge should disqualify himself or herself based on prior involvement in the matter, prior representation of a party, or a financial interest in a party.[9] These examples are not exhaustive. There are many other statutes, regulations, and rules of court, as well as case law, that authorize a judge to independently investigate a matter. An independent investigation using a CMS that is performed pursuant to such authority is permitted by canon 3B(7). (Canon 3B(7) [prohibiting independent investigation of facts in a proceeding unless otherwise authorized by law].)

A judge who searches a CMS for court records that are the proper subject of judicial notice also complies with canon 3B(7). (Canon 3B(7) [a judge may consider facts that may be properly judicially noticed]; Evid. Code, § 450 [judicial notice may not be taken of any matter unless authorized or required by law]; Evid. Code, § 452 [authorizing judicial notice of court records]; Evid. Code, § 455 [requiring a reasonable opportunity to be heard on any permissive judicial notice].)[10] For example, a judge who

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[8] Cal. Rules of Court, rule 3.300(h) [a judge must determine whether certain cases should be ordered related], rule 5.440 [courts should identify cases related to a pending family law case to make effective use of court resources].

[9] Code Civ. Proc., § 170.1 [setting forth the grounds for disqualification of trial court judges]; canon 3E(4)-(5) [setting forth the grounds for disqualification of appellate justices]; CJEO Formal Opinion 2015-007, *Disqualification for Prior Appearance as a Deputy District Attorney in a Nonsubstantive Matter*, Cal. Supreme Ct., Com. Jud. Ethics Formal Opn., p. 14 [a judge who appeared in a case as a deputy district attorney in a nonsubstantive role is not disqualified unless the judge actively participated in the case]; CJEO Oral Advice Summary 2019-029, *Appellate Disqualification for Prior Assignment as Coordinated Proceedings Judge*, Cal. Supreme Ct., Com. Jud. Ethics Oral Adv. Sum., p. 5 [a justice who served as a coordination judge is not required to disqualify where he was not actively involved nor made any decisions as the coordination judge on the matter on appeal or other related matters].

[10] A comprehensive discussion of the law relating to mandatory and permissive judicial notice is beyond the scope of this opinion. With regard to the judicial ethics

must decide whether res judicata or collateral estoppel applies may perform a limited CMS search for the court's prior ruling, which may be judicially noticed. (*Planning & Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 225 [judicial notice of court records in a separate action is permissible when considering a demurrer based on res judicata].)

C. Impermissible CMS Searches

The canon 3B(7) prohibition on the independent investigation of facts in a proceeding addresses two primary concerns — judicial impartiality and protecting due process rights. A judge who engages in fact-finding may demonstrate a lack of impartiality or embroilment and, if the judge relies on information obtained from an independent investigation, deprive a party of the opportunity to confront and respond to certain evidence. (Canon 2A [a judge shall act at all times in a manner that promotes public confidence in the 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]; *Catchpole v. Brannon* (1995) 36 Cal.App.4th 237, 259, fn. 9 [an independent factual inquiry is uncharacteristic of an impartial judge]; *Fremont Indemnity Co. v. Workers' Comp. Appeals Bd.* 153 Cal.App.3d 965, 971, 974 [independent investigation in a case may violate the requirements of due process and erode public confidence in the integrity and impartiality of the judiciary].) These

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issues raised by CMS searches, canon 3B(7) necessarily requires a judge to determine that a specific fact, document, court record, or other item of information is the legally permitted subject of judicial notice before engaging in an electronic search of the court's system for that item. (Evid. Code § 451 [specifying matters subject to mandatory judicial notice; Evid. Code §§ 452-452.5 [specifying matters subject to permissive judicial notice]; Evid. Code §§ 453-460 [specifying procedures and rules regarding the propriety of taking judicial notice]; Cal. Rules of Court, rule 8.252(a) [specifying procedures for judicial notice on appeal]; *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App. 4th, 26, 39-42 [discussing and detailing documents that constitute cognizable legislative history for purposes of judicial notice].)

concerns are particularly applicable to independent investigations of adjudicative facts, which are facts that are specific to a particular case, such as "who did what, where, when, how, and with what motive or intent," and that are usually resolved by a fact finder. (ABA Com. on Prof. Ethics, Opn. No. 478 (Dec. 8, 2017) pp. 4–5, quoting 2 Davis, Administrative Law Treatise (1958) § 15.03, p. 353; Thornburg, *The Lure of the Internet and the Limits on Judicial Fact Research* (Summer/Fall 2012) 38:4. Litigation 41, 44–45 [general information and background information about a party or the subject matter of a pending case constitutes adjudicative facts if it is of factual consequence in the matter].) It is, therefore, the committee's opinion that an independent investigation of facts when the facts are adjudicative in nature is prohibited unless the review of such information is permitted by statute or is a proper subject of judicial notice.[11]

D. Permissible CMS Searches that Produce Adjudicative Facts

The committee recognizes that judges regularly and routinely search case files and information using a CMS in furtherance of the proper performance of the duties of judicial office. Many of these tasks are predominately administrative in nature or conducted in connection with administrative functions. Using a court-provided CMS in furtherance of the duties of judicial office is not generally inconsistent with a judge's ethical obligations. A judge who searches a CMS for non-adjudicative information and

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[11] Limiting the prohibition on independent investigations to adjudicative facts is also consistent with other sections of canon 3B(7) that allow for ex parte communications in limited circumstances. For example, canon 3B(7)(a) permits ex parte communications among judges and court personnel that do not concern factual information. (*Ibid.* [a judge may consult with other judges and court personnel but should make reasonable efforts to avoid receiving factual information outside the record or an evaluation of that factual information].) Canon 3B(7)(b) also permits limited ex parte communications "where circumstances require, for scheduling, administrative purposes, or emergencies that do not deal with substantive matters" if no party will gain an advantage and the judge notifies the parties and provides an opportunity to respond.

reviews only those results that include non-adjudicative information complies with canon 3B(7).

Similar to internet searches, it is not uncommon to conduct a search not knowing what information will be provided. Due to the nature of CMSs, which provide immediate and easy access to large quantities of information, a judge should be aware that a CMS search could produce results that include some adjudicative and non-adjudicative facts. This is particularly the case when reviewing information that is not part of a case record but nonetheless available in a CMS. For example, a judge may have access to other judges' notes in an electronic CMS environment. Those notes may contain a judge's credibility assessments of parties or attorneys. When initiating a CMS search while performing necessary judicial functions, a judge should attempt to avoid reviewing adjudicative facts unless review of such information is authorized by law or if the adjudicative facts may be properly judicially noticed. A judge may not initiate or use a CMS search for the purpose of independently investigating adjudicative facts that pertain to resolving factual issues or to assess credibility in an assigned matter unless the judge has determined that review of those facts is permitted by statute or the facts are the proper subject of judicial notice.

E. Disqualification and Disclosure Considerations Following Inadvertent Review of Adjudicative Facts

A judge who inadvertently reviews adjudicative facts should first consider their capacity to remain impartial in the matter in light of the information that has been reviewed. (Canon 2A [a judge must act at all times in a manner that promotes public confidence in the impartiality of the judiciary]; canon 3 [a judge shall perform the duties of judicial office impartially].) A judge may determine that he or she is able to disregard this information, just as a judge is presumed to disregard irrelevant or inadmissible evidence presented by a party in the decision-making process. (*Harris v. Rivera* (1981) 454 U.S. 339, 346 [trial judges routinely hear inadmissible evidence that they are

presumed to ignore when acting as fact finders]; *In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1526 [the mere fact that a court reviewed evidence is not sufficient to overcome the presumption that a judge will distinguish and recognize only those facts that properly may be considered]; *Gimbel v. Laramie* (1960) 181 Cal.App.2d 77, 84 [the nature of judicial office and the judicial process requires a judge to divorce from the judge's mind inadmissible matters that may be brought to light in a trial].) However, if a judge determines that he or she is unable to disregard what has been inadvertently viewed, the judge must disqualify on the grounds of impartiality. (Code Civ. Proc., § 170.1, subd. (a)(6)(A)(ii) [a judge shall disqualify if the judge believes there is a substantial doubt regarding his or her impartiality]; canon 3E(1) [a judge shall disqualify where disqualification is required by law]; canon 3E(4)(b) [an appellate justice shall disqualify himself or herself where the justice substantially doubts his or her capacity to be impartial].)

A judge must also consider whether a person aware of the search and inadvertent review of adjudicative information would have reasonable doubts concerning impartiality, which would require disqualification. (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]; *Wechsler v. Superior Court* (2014) 224 Cal.App.4th 384, 391 [if a fully informed, reasonable member of the public would fairly entertain doubts that the judge is impartial, the judge is disqualified].)

A judge who inadvertently views adjudicative facts during a CMS search must also determine whether to disclose to the parties the details regarding any information that was inadvertently reviewed, as well as provide the parties with an opportunity to respond to the disclosure. (Canon 3E(2)(a) [a trial court judge must disclose on the record any information that is reasonably relevant to the question of disqualification even if the judge believes there is no actual basis for disqualification]; CJEO Oral Advice

Summary 2018-023, *Disqualification Responsibilities of Appellate Court Justices*, Cal. Supreme Ct., Com. Jud. Ethics Opns, p. 3 [an appellate court justice may, but is not required to, disclose information relevant to the decision to not disqualify himself or herself].)

In deciding whether to disclose, a judge should again evaluate whether a party aware that the judge had reviewed the information would reasonably doubt the judge's impartiality and whether the information provides a benefit to one side in a matter. (Rothman et al., Cal. Jud. Conduct Handbook (4th ed. 2017) appen. G, p. 923, citing Cal. Judges Assn., Jud. Ethics Update (1997) § I.D., p. 2 [a judge who learns information about a case from the court's computer system that may be useful to one side or the other in an ongoing trial is required to disclose this information to the parties].) If the judge is the fact finder in the matter, it is more likely that the judge should disclose the information. A judge should disclose and allow the parties an opportunity to respond if the judge intends to rely on the information in some manner to avoid due process concerns. (*Fremont Indemnity Co. v. Workers' Comp. Appeals Bd.*, *supra*, 153 Cal.App.3d at p. 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].)

Overall, a judge's decision to disqualify or to make a disclosure based on an inadvertent review of adjudicative information is a highly fact-specific evaluation. The nature of the matter before the judge and the adjudicative information that the judge reviewed should guide the judge's discretionary decision regarding disqualification or disclosure.

V. Conclusion

Judges are expected to and do use CMS searches for information that will assist in the proper performance of the duties of judicial office. Canon 3B(7) prohibits the use of a CMS to independently investigate adjudicative facts unless the investigation is authorized by law or the information is the proper subject of judicial notice. A judge

using a CMS should do so with awareness that a CMS search could produce results that include adjudicative information and attempt to avoid reviewing adjudicative information, unless it is legally authorized or judicially noticeable.

Judges who inadvertently review court records or other information that contains adjudicative facts as part of an otherwise permissible CMS search should consider (1) whether they are allowed by law or judicial notice to review the information; (2) whether the information they have viewed raises actual or reasonable doubt about impartiality; and (3) whether they should disclose the CMS search and the information reviewed and provide the parties with an opportunity to respond.

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 views of the California Supreme Court or any other entity. (Cal. Rules of Court, rule 9.80(b); CJEO rule 1(a).)

CALIFORNIA SUPREME COURT

COMMITTEE ON JUDICIAL ETHICS OPINIONS

350 McAllister Street

San Francisco, CA 94102

(855) 854-5366

www.JudicialEthicsOpinions.ca.gov

CJEO Formal Opinion 2021-017

[Issued May 6, 2021]

PROVIDING CLOSE FAMILY MEMBERS WITH ADVICE THAT IMPLICATES LEGAL ISSUES

I. Question

The Committee on Judicial Ethics Opinions (CJEO) has been asked to advise whether and to what extent a judge may ethically provide advice to a member of the judge's family about a matter that implicates legal issues.

II. Summary of Conclusions

Judges are prohibited by the California Constitution and the California Code of

Judicial Ethics[1] from providing legal advice to a family member if by doing so they would be practicing law. Numerous decisions from the state Supreme Court and the Courts of Appeal, collected in the appendix to this opinion, may help judges determine whether advice that they might provide to a family member would be considered legal advice and for that reason would constitute the practice of law. If there is no precedent that would resolve whether advising a family member in a given circumstance would constitute the practice of law, a judge should evaluate whether providing the requested advice would undermine the dual purposes underlying the prohibition on judicial practice of law to ensure the performance of official judicial duties and maintain the integrity of the judiciary. If the judge's advice would not align with these purposes, it is not permissible.

As guidance, the committee concludes that a judge is not permitted to: (1) accept compensation for help with legal matters; (2) neglect official duties in favor of a matter involving a family member; (3) provide advice that would cause a reasonable person to question the judge's independence or integrity; or (4) act, or appear to act, as an advocate.

Even so, a judge may provide limited law-related advice to a family member. Such advice may include statements of law, explanations of court procedures and court rules, and guidance about legal requirements, similar to the kinds of information that a judge would be able to provide a self-represented party appearing at a hearing before the judge. A judge may also provide advice relating to a matter in which the judge is personally involved when the judge is acting in his or her own personal interest or is acting in a representative capacity permitted under the code.

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[1] All further references to the code, canons, preamble, terminology, and advisory committee commentary are to the California Code of Judicial Ethics unless otherwise indicated.

III. Authorities

A. Applicable Canons

Preamble: "The canons . . . are to be applied in conformance with constitutional requirements, statutes, other court rules, and decisional law."

Terminology: " 'Member of the judge's family' means a spouse, registered domestic partner, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship."

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. A judge shall not make statements, whether public or nonpublic, that commit the judge with respect to cases, controversies, or issues that are likely to come before the courts or that are inconsistent with the impartial performance of the adjudicative duties of judicial office."

Canon 3B(8): "A judge shall manage the courtroom in a manner that provides all litigants the opportunity to have their matters fairly adjudicated in accordance with the law."

Advisory Committee commentary following canon 3B(8): *"For example, when a litigant is self-represented, a judge has the discretion to take reasonable steps, appropriate under the circumstances and consistent with the law and the canons, to enable the litigant to be heard."*

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."

Canon 4A: "A judge shall conduct all of the judge's extrajudicial activities so that they do not

"(1) cast reasonable doubt on the judge's capacity to act impartially,

. . .

"(3) interfere with the proper performance of judicial duties, or

"(4) lead to frequent disqualification . . . ."

Canon 4G: "**A judge shall not practice law**." (Boldface added.)

Advisory Committee commentary following canon 4G: *"This prohibition refers to the practice of law in a representative capacity and not in a pro se capacity. A judge may act for himself or herself in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with legislative and other governmental bodies. However, in so doing, a judge must not abuse the prestige of office to advance the interests of the judge or member of the judge's family. See [c]anon 2B."*

Canon 4E(1): "A judge shall not serve as executor, administrator, or other personal representative, trustee, guardian, attorney in fact, or other fiduciary, except for the estate, trust, or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties. A judge may, however, act as a health care representative pursuant to an advance health care directive for a person whose preexisting relationship with the judge would prevent the judge from hearing a case involving that person under [c]anon 3E(1)."

B. Constitutional Provisions, Statutes, and Other Authorities

California Constitution, article VI, sections 9, 17.

Code of Civil Procedure, sections 170.1, subdivision (a)(1), (3) (4) and (5), 170.5 subdivision (b).

Adams v. Commission on Judicial Performance (1995) 10 Cal.4th 866.

Altizer v. Highsmith (2020) 52 Cal.App.5th 331.

Baron v. City of Los Angeles (1970) 2 Cal.3d 535.

Birbrower, Montalbano, Condon & Frank v. Superior Court (1998) 17 Cal.4th 119.

Doan v. Commission on Judicial Performance (1995) 11 Cal.4th 294.

Gilbert v. Chiang (2014) 227 Cal.App.4th 537.

Holloway v. Quetel (2015) 242 Cal.App.4th 1425.

Inquiry Concerning Judge Kreep (2017) 3 Cal.5th CJP Supp. 1.

Inquiry Concerning Saucedo (2015) 62 Cal.4th CJP Supp. 1.

Inquiry Concerning Judge Stanford (2012) 53 Cal.4th CJP Supp. 1.

People v. Merchants' Protective Corp. (1922) 189 Cal. 531.

Public Reproval of Judge Schatz (1989) Com. on Jud. Performance.

State Bar of California v. Superior Court (1929) 207 Cal. 323.

Commission on Judicial Performance, Annual Reports for 2010, 1993 and 1992.

CJEO Oral Advice Summary No. 2013-001, *Disclosure When A Judge's Spouse Serves on a City Commission*, California Supreme Court, Committee on Judicial Ethics Opinions Oral Advice Summary.

Rothman et al., California Judicial Conduct Handbook (4th ed. 2017) § 2:28.

California Judges Association, Judicial Ethics Update (Jan. 2016).

Senate Committee on Judiciary, Hearing on Assembly Constitutional Amendment No. 17 (1987-1988 Reg. Sess.) June 28, 1988.

Ballot Pamphlet, General Election (Nov. 4, 1930) argument in favor of Proposition 19, page 24.

IV. Discussion

A. Introduction

It can be hard to resist the human impulse to assist family members when they ask for advice. Whether out of love, obligation, or a sense of responsibility, many parents, children, siblings, and other close family members would not think twice about providing whatever kind of advice they can to another member of their family who needs guidance, even when the advice relates to a legal matter. For a judge, however, the decision

whether to advise a member of the judge's family[2] on law-related matters can be complicated and often difficult. Family members who are certainly aware of the judge's professional background may expect that, considering the normal instinct to assist loved ones, the judge would draw on his or her legal training and experience to help them. Family members seeking advice may not be aware that a judge, although naturally inclined to help, is prohibited by the Constitution and by the judge's obligations under the code from practicing law on a family member's behalf.[3] The Constitution plainly states that "[a] judge of a court of record may not practice law," and the code similarly provides that "[a] judge shall not practice law." (Cal. Const., art. VI, § 17; canon 4G.) Indeed, despite having been admitted and licensed to practice law, judges cease to be members of the bar during their period in office. (Cal. Const., art. VI, § 9.) These restrictions can put judges in an awkward situation of having to decline a request for legal advice or to limit the kind of information and guidance that they can provide family members who come to them with questions about law-related matters. Determining what is permissible advice and what is the prohibited practice of law can be challenging.

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[2] For purposes of this opinion, CJEO adopts that portion of the code's definition of a "[m]ember of the judge's family" to mean "a spouse, registered domestic partner, child, grandchild, parent, or grandparent." Also for purposes of this opinion, however, CJEO is not adopting the portion of the code definition that broadly includes "other relative or person with whom the judge maintains a close familial relationship." (Terminology, citing canons 2B & 4G.) The focus of this opinion is on the natural impulse to assist a close family member who needs legal help. Discussion of broader close relationships is beyond the scope of the opinion, although the analysis below may provide judges with guidance in determining the assistance permissible in those circumstances on an individual basis.

[3] For this reason, it is recommended that when asked for legal assistance, judges advise any individual, including a family member, that judges are not permitted to practice law for the reasons discussed in this opinion.

B. Prohibited Practice of Law

Case law may assist judges to determine where they should draw the line about what is permissible when advising family members in a matter that implicates legal issues. The Supreme Court has said that the practice of law " ' "includes legal advice and counsel" ' " (*California v. Superior Court* (1929) 207 Cal. 323, 335) and that "[i]n close cases, the courts have determined that the resolution of legal questions for another by advice and action is practicing law 'if difficult or doubtful legal questions are involved which, to safeguard the public, reasonably demand the application of a trained legal mind' " (*Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 543). Following these decisions, a number of courts have identified specific instances where providing legal advice and other law-related assistance would constitute the law practice. (Appen. A, Cases Defining the Practice of Law.) But the Supreme Court has also noted that the practice of law "does not encompass all professional activities," and judges are not prohibited from offering their family members all law-related advice. (*Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119, 129.) Some guidance and information, although law-related, may be given by a judge to a family member as discussed below.

In circumstances not already addressed by case law, however, judges may find it hard to determine whether and to what extent they may provide guidance or other information when a family member asks them for advice on a law-related matter. Numerous situations may fall into a gray area. For example, to what extent may a judge help a member of the judge's family to write a demand letter? When and to what extent may a judge review and comment on a contract involving a family member? May a judge advise a member of the judge's family about litigation in which the family member is a party or comment on decisions made or actions taken by the attorneys representing the family member? When asked for help in these situations, the natural instinct of judges may be to provide assistance, even when they know that they are limited in the kind of assistance they may provide to family members.

In such cases, where precedent may not provide adequate clarity about what is permissible, judges weighing the nature and extent of advice they are able to provide family members are guided by the original rationales for the prohibition on judicial practice of law. Initially, the prohibition was thought to ensure that judges would conserve their time and focus their energy on their judicial duties, rather than becoming distracted by the competing demands of a law practice. Thereafter, the prohibition was increasingly considered necessary to keep the judiciary above reproach or suspicion by eliminating the opportunity for fraud and the potential for undisclosed conflicts of interest that might arise if a judge were representing private clients as a lawyer. (*Gilbert v. Chiang* (2014) 227 Cal.App.4th 537, 549-550.)[4] During the legislative debate prior to the most recent amendment of the constitutional prohibition in 1988, the Senate Judiciary Committee confirmed that the reasons judges are prohibited from practicing law have remained the same: "to avoid conflict of interest and to ensure that other duties do not distract from their performance as judicial officials." (Sen. Com. on Judiciary, Hearing on Assem. Const. Amend. No. 17 (1987-1988 Reg. Sess.) June 28, 1988, p. 3.)

Before helping a family member with a law-related matter, judges should evaluate whether the advice or assistance they would give is consistent with or contrary to either of the two purposes behind the prohibition on judicial practice to ensure performance of judicial duties and to avoid potential conflicts of interest. If the advice or assistance would undermine either purpose, it is not constitutionally permitted.

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[4] The earliest prohibition on judicial practice of law was added to the California Constitution in the 19th century and applied only to a judge's activities in court. In 1930, the Constitution was amended by popular referendum to extend the prohibition on law practice to a judge's conduct both in and out of court. The ballot argument in favor of the expansion of the 1930 amendment noted that "[c]itizens will not feel properly confident of justice if they know their judges are advising or aiding corporations, groups, or individuals in a legal capacity, on the side, in spare time [; n]o matter how innocent the practice, it is liable to vicious abuse." (Ballot Pamp., Gen. Elec. (Nov. 4, 1930) argument in favor of Prop. 19, p. 24.)

C. What Constitutes Impermissible Legal Advice and Permissible Law-related Advice

As noted, judges are not permitted to advise their family members in law-related matters if the advice would undermine the dual purposes behind the prohibition to ensure the performance of official judicial duties and maintain the integrity of the judiciary by avoiding conflicts of interest.[5] (*Gilbert v. Chiang* (2014) 227 Cal.App.4th 537, 550.) As a result, it would be impermissible for judges to advise a family member while acting as an advocate on behalf of either the family member or a particular legal position. (*Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 907 (*Adams*) [judge disciplined for suggesting that a close friend file a particular motion]; Com. on Jud. Performance, 1992 Ann. Rep., p. 13 [judge admonished for advising a relative and negotiating a settlement on their behalf].) Similarly, it would not be permissible for judges to accept compensation for their advice, provide assistance that could lead to disqualification, neglect official duties in favor of matters involving family members, or engage in activities that would cause a reasonable person to question their independence or integrity. (Canons 4A(1), (3) and (4), 4H.)

Keeping these prohibitions in mind, judges are permitted to provide family members with certain limited advice about law-related matters. Specifically, a judge is

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[5] The risk that a judge would undermine the purpose of the prohibition to ensure the performance of judicial duties is reduced when providing law-related advice to a family member because judges are generally disqualified when a close family member is a party, the judge has a financial interest in the matter, or the judge has personal knowledge of disputed evidentiary facts concerning the proceeding. (Code Civ. Proc., §§ 170.1, subd. (a)(1), (3), (4) & (5), 170.5, subd. (b); canons 3E(4), 3E(5)(d), (e), (f)(iii), (i); CJEO Oral Advice Summary No. 2013-001, *Disclosure When A Judge's Spouse Serves on a City Commission*, Cal. Supreme Ct., Com. Jud. Ethics Opns., p. 2.) However, because the constitutional and code prohibitions on practicing law apply to all judicial conduct and are not limited to presiding over case matters, disqualification alone does not make advice that constitutes the practice of law otherwise permissible.

permitted to provide a family member with general legal information, including, for example, statements of law, explanations of court procedures and court rules, and guidance about legal requirements, similar to the kinds of information that judges often provide to self-represented parties appearing before them. (Canon 3B(8) [judges must provide due process to all litigants]; Advisory Com. commentary foll. canon 3B(8) [judges have the discretion to take reasonable steps, appropriate under the circumstances and consistent with the law and the canons, to enable self-represented litigants to be heard]; *Holloway v. Quetel* (2015) 242 Cal.App.4th 1425, 1435 (*Quetel*) [judges must ensure self-represented litigants a fair hearing without assuming or appearing to assume the role of advocate]; Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 2:28, pp. 98-100 (Rothman) [interpreting these authorities from an ethics point of view, judges are permitted to explain court procedures, inform a party of the process for securing witnesses, and even inform a party of missing elements of proof or other legal requirements].)[5]

If a judge is advising a family member in connection with a matter in which the judge is personally involved or the judge's personal interests are implicated, such advice

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[5] The analogy to self-represented litigants is not to the canon 3B(8) general duty to provide all litigants with due process; it is to the discretion recognized in the advisory committee commentary to 3B(8) about the reasonable steps under the law and canons that may be taken to ensure self-represented litigants are heard without the judge appearing to practice law. (Canon 3B(8); Advisory Com. commentary foll. canon 3B(8); *Quetel, supra*, 242 Cal.App.4th at p.1435.) It is also to Judge Rothman's interpretation of those authorities as permitting judges to explain court procedures and provide self-represented litigants with information about legal processes and requirements from an ethics point of view. (Rothman, *supra*, § 2:28, pp. 99-100). The practical value of this analogy, however, is that judges who often hear matters involving self-represented litigants are practiced at exercising that discretion and determining what law-related advice they may provide without advocating or practicing law, which is the same discretion this committee concludes judges are permitted to exercise when advising family members outside of the courtroom setting.

is permissible.[6] (Advisory Com. commentary foll. canon 4G [judges may act for themselves in all legal matters].) Additionally, a judge is more likely permitted to provide law-related advice where the judge does not appear publicly on behalf of the family member or act as an advocate, and the advice given to the family member is limited to the kind and quality of information that a nonlawyer might provide in a similar situation. (*Altizer v. Highsmith* (2020) 52 Cal.App.5th 331, 341 [acting in a clerical capacity or as a scrivener is not the unauthorized practice of law].) In general, assisting a family member in these circumstances would not impair a judge from fulfilling the judge's official duties or create an undisclosed conflict of interest.

D. Determining What Advice is Permissible

While each circumstance must be determined based on the specific facts involved, the examples described above may assist in deciding whether to provide a family member with law-related advice. The most obvious risks arise in the context of a family member asking a judge for advice about active litigation in which the family member is involved, whether as a party or otherwise. In providing a family member with support in a nonlegal manner, the judge must avoid the risk of engaging in the practice of law by offering advice on legal issues in the case, providing or offering to provide research on any legal issues in the case, or in any way acting or appearing to act as an advocate arguing on behalf of the family member. (Canons 2B(1), (2) & 4G; *Doan v. Commission on Judicial Performance* (1995) 11 Cal.4th 294, 320-321, 336-337 [judge's offer to conduct legal research constituted the practice of law].) These restrictions on the practice

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[6] In addition, canon 4E(1) permits judges to serve as an executor, administrator, trustee, guardian, attorney in fact, or other fiduciary or personal representative of a family member, so long as such service (i) will not interfere with the proper performance of judicial duties, (ii) is not likely to come before the judge, or (iii) is not likely to come before the judge's court or appellate district. These permissions and limitations are in line with the guidance provided in this opinion and would not be prohibited as the practice of law.

of law prohibit any substantive involvement by a judge in the prosecution, defense, or settlement of any litigation on behalf of a member of the judge's family.[7] In addition, a judge who actively assists a family member involved in litigation runs the risk of violating the prohibition against improper ex parte communications by commenting on pending or impending cases. (Canons 3B(7) & (9); *Inquiry Concerning Judge Stanford* (2012) 53 Cal.4th CJP Supp. 1, 13-14, 21 [judge's discussion of a speeding ticket with his son-in-law constituted ex parte communication]; *Doan*, *supra,* at pp. 318-319 [judge's discussion of criminal charges filed against her gardener was an improper ex parte contact].) In sum, a judge is only permitted to offer limited assistance to a family member involved in litigation. Beyond providing moral support, the judge risks violating constitutional and code prohibitions against practicing law.

Judges should also exercise caution when asked for law-related advice in other contexts as well. For example, if a family member asks for help drafting a demand letter, a judge could agree to assist with clerical tasks such as proofreading the letter or acting as a scrivener to fill in the blanks of an incomplete draft with information that the family member provides or that is generally known. But if asked to advise on what to include in the letter or how to write it, a judge must consider the likelihood that providing such guidance would put the judge in the role of an advocate, either on behalf of the family member or of a legal position that advances the interests of the family member, and for that reason would be impermissible. (*Adams*, *supra*, 10 Cal.4th at pp. 906-908 [providing an issue analysis constituted the practice of law]; *Quetel*, *supra*, 242 Cal.App.4th at p. 1434.)

As another example, a judge would be permitted to assist a family member asking for help with an employment offer by discussing standard business terms included in the offer, such as the amount of compensation, location of the position, or hours required. It

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[7] As noted at page 12, *ante*, a judge may act on his or her own behalf in connection with litigation that also involves a member of the judge's family. (Advisory Com. commentary foll. canon 4G.)

may also be permissible for a judge to provide generalized, abstract information about provisions usually included in a standard employment offer. But before discussing any of the law-related terms actually included in an offer or advising the family member on terms that may be missing from it, a judge should evaluate whether such advice would cross the line into advocacy or negotiation and therefore constitute the practice of law.

V. Conclusion

Judges are prohibited by the California Constitution and California Code of Judicial Ethics from practicing law. Based on the purposes of the constitutional prohibition, case law interpreting the practice of law, and the provisions of the code, the committee concludes that judges may not: (1) accept compensation for help with legal matters; (2) neglect official duties in favor of a matter involving a family member; (3) provide advice that would cause a reasonable person to question judicial independence or integrity; or (4) act, or appear to act, as an advocate.

Within these constraints, however, judges may provide limited law-related advice to a family member that does not constitute the practice of law. Such advice may include statements of law, explanations of court procedures and court rules, and guidance about legal requirements, similar to the kinds of information that judges are permitted and experienced in providing to a self-represented party appearing before them. Judges may also provide advice relating to a matter in which they are personally involved when acting in their own personal interests or acting in a representative capacity as permitted under the code.

It is often difficult for judges to assess whether and to what extent their advice to family members in law-related matters might constitute the practice of law. The examples and guidance provided may help judges evaluate whether specific advice they have been asked to give a family member is permissible and how they may assist family members generally in matters involving the law.

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 summary 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)).)

Appendix A - Cases Defining the Practice of Law

Acts That Are Clearly Prohibited as the Practice of Law

a. Performing professional services in a court proceeding (*People v. Merchants' Protective Corp.* (1922) 189 Cal. 531, 535) (*Merchants' Protective*);

b. Preparing a legal instrument or contract (*Merchants' Protective*, *supra*, 189 Cal. at p. 535);

c. Assuming the role of an advocate (*Holloway v. Quetel* (2015) 242 Cal.App.4th 1425, 1434);

d. Assisting in the preparation of settlement conference briefs (*Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 906-908 (*Adams*) [including drafting an "issue analysis" that was incorporated almost verbatim into a brief]);

e. Advising the filing of a particular motion (*Adams*, *supra*, 10 Cal.4th at pp. 906-908 [including reviewing and approving of the motion]);

f. Attempting to negotiate a dismissal of son's criminal matters (*Public Reproval of Judge Schatz* (1989) Com. on Jud. Performance, pp. 1-3);

g. Negotiating the settlement of a claim on behalf of a relative (Com. on Jud. Performance, 1992 Ann. Rep., p. 13);

h. Providing advice about potential penalties and defenses to an alcohol-related citation (*Inquiry Concerning Saucedo* (2015) 62 Cal.4th CJP Supp. 1, 11-12, 42-43; see *id.* at p. CJP Supp. 12 [including writing a letter that detailed the potential penalties for the offense, identified several potential defenses to the charge, and said that if a further notice to appear was issued, he would " 'find out and let [Tovar's son] know how Fresno County handles minor in possession of alcohol cases whether filed as infractions or misdemeanors' "]);

i. Offering to conduct legal research (*Doan v. Commission on Judicial Performance* (1995) 11 Cal.4th 294, 320-321, 336-337 [including reviewing trial transcripts and briefs]);

j. Offering unsolicited advice to defendants on what they should tell potential employers about indictments against them (*Inquiry Concerning Judge Kreep* (2017) 3 Cal.5th CJP Supp. 1, 35);

k. Attending the deposition of a fiancée where the parties were aware of the judge's position, which created the appearance that the judge was acting as a legal advocate and was using the prestige of office to benefit the deponent (Com. on Jud. Performance, 2010 Ann. Rep., p. 25).

Some Examples of Acts That Are Permitted

a. Directing a person to community resources for finding a lawyer (Advisory Com. commentary foll. canon 3B(8); Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 2:28 (Rothman));

b. Explaining court procedures (Advisory Com. commentary foll. canon 3B(8); Rothman, *supra*, § 2:28);

c. Informing a party of the process for securing witnesses (Advisory Com. commentary foll. canon 3B(8); Rothman, *supra*, § 2:28);

d. Informing a party of missing elements of proof or other legal requirements (Advisory Com. commentary foll. canon 3B(8); Rothman, *supra*, § 2:28).

CALIFORNIA SUPREME COURT

COMMITTEE ON JUDICIAL ETHICS OPINIONS

350 McAllister Street

San Francisco, CA 94102

(855) 854-5366

www.JudicialEthicsOpinions.ca.gov

CJEO Formal Opinion 2021-018

[*Issued December 15, 2021*]

PROVIDING FEEDBACK ON ATTORNEY COURTROOM PERFORMANCE

I. Question

The Committee on Judicial Ethics Opinions (CJEO) has been asked whether it is ethically permissible for a judicial officer to provide feedback on an attorney's courtroom performance when requested by the attorney or the attorney's supervisor.

II. Summary of Conclusions

While the Code of Judicial Ethics[1] does not specifically prohibit judicial officers from providing feedback on courtroom performance to appearing attorneys or their

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[1] All further references to the code, canons, terminology, and advisory committee commentary are to the California Code of Judicial Ethics unless otherwise indicated.

supervisors, there are several canon restrictions and ethical risks that must be taken into account. When providing feedback on courtroom performance, a judicial officer may not: (1) engage in prohibited ex parte communications (canon 3B(7)); (2) make a public comment on a pending proceeding or nonpublic comment that may interfere with a fair trial or hearing (canon 3B(9)); (3) create an appearance of favor or bias (canons 1, 2, and 2A); (4) suggest that anyone is in a special position to influence the judicial officer (canon 2B(1)); or (5) engage in coaching by advising on tactics or strategies that give one side an advantage in litigation or by providing legal advice (canon 4G).

Judicial officers who elect to provide such feedback must avoid discussing their own assigned matters until final resolution; refrain from discussing matters pending before other judges or courts; ensure that the substantive nature and tone of any feedback is neutral; and be equally available to provide feedback to attorneys representing various interests or viewpoints. Judicial officers must also ensure that their conduct does not suggest a special relationship with any attorney or law office and should avoid acting as evaluators of attorney job performance in the context of employment evaluations for promotion or discipline. Finally, judicial officers must ensure that feedback does not provide any attorney or party with an inside advantage.

III. Authorities

A. Applicable Canons

Terminology: " 'Pending proceeding' is a proceeding or matter that has commenced. A proceeding continues to be pending through any period during which an appeal may be filed and any appellate process until final disposition. The words 'proceeding' and 'matter' are used interchangeably, and are intended to have the same meaning."

Canon 1: "A judge shall uphold the integrity and independence of the judiciary."

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. A judge shall not make statements, whether public or nonpublic, that commit the judge with respect to cases, controversies, or issues that are likely to come before the courts or that are inconsistent with the impartial performance of the adjudicative duties of judicial office."

Advisory Committee commentary following canon 2 and 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.*"

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 2B(2)(d): "A judge may respond to judicial selection inquiries, provide recommendations (including a general character reference relating to the evaluation of persons being considered for a judgeship), and otherwise participate in the process of judicial selection."

Canon 2B(2)(e): "A judge may serve as a reference or provide a letter of recommendation only if based on the judge's personal knowledge of the individual. These written communications may include the judge's title and may be written on stationery that uses the judicial title."

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 as follows . . . ."

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."

Canon 4B: "A judge may speak, write, lecture, teach, and participate in activities concerning legal and nonlegal subject matters, subject to the requirements of this code."

Advisory Committee commentary following canon 4B: "*As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile*

justice. To the extent that time permits, a judge may do so, either independently or through a bar or judicial association or other group dedicated to the improvement of the law. It may be necessary to promote legal education programs and materials by identifying authors and speakers by judicial title. This is permissible, provided such use of the judicial title does not contravene Canons 2A and 2B."

Canon 4G: "A judge shall not practice law."

B. Constitutional Provisions, Statutes, and Other Authorities

Code of Civil Procedure, section 170.1, subdivision (a)(2)(B) and (a)(2)(C)

Adams v. Commission on Judicial Performance (1995) 10 Cal.4th 866

Inquiry Concerning Mills (2018) 6 Cal.5th CJP Supp. 1

Inquiry Concerning Van Voorhis (2003) 48 Cal.4th CJP Supp. 257

Commission on Judicial Performance, *Public Admonishment of Judge Ronald Maciel* (1997)

Commission on Judicial Performance, *Public Admonishment of Judge Stuart Scott* (2016)

CJEO Formal Opinion 2018-012 (2018), *Providing Educational Presentations at Specialty Bar Events,* California Supreme Court Committee on Judicial Ethics Opinions

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

Rothman et al., California Judicial Conduct Handbook (4th ed. 2017) sections 2:24, 5:8, 10:16

California Judges Association, Judicial Ethics Updates (April 2000), (February 2002), (March 2004), (June 2007), and (January 2017)

Geyh et al., Judicial Conduct and Ethics (6th ed. 2020) section 8.02

IV. Discussion

Judicial officers are permitted and, in some cases, encouraged to comment on attorney performance in certain contexts. For example, judges may provide letters of recommendation or references in the context of a judicial application or application for another position or honor. (Canon 2B(2)(d) and (e).) Judicial officers may also provide feedback on attorney performance in educational settings, such as moot court programs, Inns of Court, or bar association events. (Canon 4B [judges may speak, write, lecture, teach, and participate in other activities concerning legal and nonlegal subject matters, subject to other requirements of the code]; Advisory Com. com. foll. canon 2B [as a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice, and may do so to the extent time permits, either independently or through a bar or judicial association or other group dedicated to the improvement of the law].)[2]

By contrast, there are other circumstances where providing feedback implicates canon restrictions that must be considered before a judicial officer provides input. These range from individual attorneys requesting feedback to supervisors asking for input about an attorney or class of attorneys who regularly appear in the judge's courtroom. The purpose of this opinion is to identify the canons and ethical considerations that judicial officers are required to bear in mind before responding to a request to comment on an attorney's courtroom performance.

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[2] There may be specific instances where judges are permitted to ensure that attorneys who appear in court have sufficient training to perform their jobs competently. (Cal. Stds. Jud. Admin., std. 5.40(d)(1) and (4) [presiding judges of juvenile courts should establish relevant prerequisites and ensure sufficient training for court-appointed attorneys and advocates].) Involvement in these training programs, however, is a guideline rather than mandatory and subject to other requirements in the code. (Cal. Rules of Court, rule 1.5(c) [standards are guidelines rather than mandatory].)

A. Ex Parte Communications

Judicial officers may not provide feedback about attorney courtroom performance if doing so would result in an ex parte communication. The code defines ex parte communications as "*any* communications to or from a judge outside the presence of the parties concerning a pending or impending proceeding." (Canon 3B(7), italics added [prohibiting ex parte communications with few exceptions, none of which are directly relevant here].) A "pending proceeding" is a proceeding or matter that has commenced through any period during which an appeal may be filed and any appellate process until final disposition. (Terminology, Pending proceeding; CJEO Oral Advice Summary 2018-024 (2018), *Reporting Misconduct by a Superior Court Research Attorney in a Pending Matter*, Cal. Supreme Ct. Com. Jud. Ethics Opns., pp. 3–4 [a matter remains pending if there is still sufficient time for a party to petition for review].)

However well-intentioned, commenting on an appearing attorney's courtroom performance runs the risk of discussing the facts, merits, or status of a particular case or matter. Even a seemingly innocuous comment may interfere, intentionally or unintentionally, with one party's decisionmaking process or strategy on appeal. For this reason, judicial officers should exercise extreme caution when asked to provide feedback at the close of a trial or hearing and may not comment on attorney performance relating to that trial or hearing prior to final resolution of all possible appeals. (Canon 3B(7); Rothman et al., California Judicial Conduct Handbook (4th ed. 2017) § 2:24, p. 92 (Rothman) [unless a case is absolutely final on appeal, providing attorney feedback creates the potential for an improper ex parte communication]; Cal. Judges Assn., Judicial Ethics Update (CJA Update) (April 2000) p. 2 [when asked by a trial attorney to critique the attorney's performance after trial, a judge may do so only after the matter is finally resolved so as to avoid any appearance of impropriety].) This prohibition extends to providing feedback to an appearing attorney's supervisor.

The California Commission on Judicial Performance (CJP) has disciplined judges for commenting on attorney performance prior to the close of all pending proceedings.

(Com. on Jud. Performance, *Public Admonishment of Judge Stuart Scott* (2016) pp. 2–5 [judge disciplined for pulling aside a deputy district attorney at the end of trial but prior to sentencing, despite her protestations, to comment on her trial performance and that of the public defender, which violated the prohibition against ex parte communications and undermined public confidence in the impartiality of the judiciary in violation of canon 2A]); *Inquiry Concerning Mills* (2018) 6 Cal.5th CJP Supp. 1, 19 [judge disciplined for, at the close of trial and while the jury was deliberating, advising a prosecutor how the judge would have countered the defense's expert based on techniques used in the past; while the judge attempted to defend his conduct by characterizing it as "sharing a war story," CJP found that "[t]here is no 'war story' exception to the prohibition against ex parte communications"]; *Inquiry Concerning Van Voorhis* (2003) 48 Cal.4th CJP Supp. 257, 317 [judge removed for multiple instances of misconduct, which included critiquing attorneys during trial and in the jury's presence].)

B. Public and Nonpublic Comment on Pending Proceedings

In addition to refraining from engaging in ex parte communications, judicial officers may not provide feedback on attorney performance that violates canon 3B(9). Canon 3B(9) prohibits judges from making public comments about a pending or impending proceeding and from making nonpublic comments that may substantially interfere with a fair trial or hearing, including those pending before other judges or courts, with limited exceptions. For instance, a judicial officer may discuss a case pending on appeal "in legal education programs and materials," but not if the judge had any personal involvement in the case at any stage or if the discussion would interfere with the fair hearing of a case. (Canon 3B(9).)

Even when a judicial officer comments on a pending proceeding in a nonpublic setting, such as a private conversation in chambers or by electronic means, there is a risk that any discussion of case specifics may interfere with a fair trial or hearing. (Advisory Com. com. foll canon 3B(9) [explaining the risk of nonpublic comments being misheard,

misinterpreted, or repeated, which can negatively impact a pending case].) Therefore, when providing solicited feedback about courtroom performance directly to attorneys or their supervisors, judicial officers must ensure that their comments do not involve pending proceedings in their own or any other court.

C. Appearance of Favor or Bias

Judicial officers are also prohibited from providing attorney feedback that exhibits favoritism or otherwise undermines the judicial officer's impartiality. (Canons 1, 2, and 2A [judges must preserve the integrity and impartiality of the judiciary in all activities].) To minimize ethical risks, judicial officers choosing to provide feedback must ensure that the substantive nature and tone of the feedback would not suggest to an objective observer that the judicial officer has a particular affinity or dislike for certain attorneys or parties. (Advisory Com. com. foll. canon 2 and 2A [the test for impropriety is whether a person aware of the facts would reasonably doubt a judge's impartiality].) For instance, the content of feedback should be neutral and not disparage any other attorneys or parties. As a precaution, the feedback should be equally applicable to and appropriate to say in the presence of attorneys on opposing sides of the same case. (CJEO Formal Opinion 2018-012 (2012), *Providing Educational Presentations at Specialty Bar Events*, Cal. Supreme Ct. Com. Jud. Ethics Opns., pp. 7–9 (CJEO Formal Opinion 2018-012) [educational content is permissibly neutral if the identical presentation could be given to bar associations representing competing interests].)

Judicial officers must also avoid the suggestion of favoritism or bias in terms of who has access to the judicial officer's feedback. For example, it would be improper for a judicial officer to only provide feedback to a law office with which the judicial officer was previously affiliated or to repeatedly provide feedback to one side of the criminal bar to the exclusion of the other. In most cases, attorneys requesting feedback on courtroom performance are doing so in a private setting, as opposed to an educational setting or public environment. If a judge provides feedback at the request of one party, the opposing party may not be aware that the judge is either providing or available to provide

this feedback. For this reason, the committee recommends that judicial officers choosing to provide feedback make it clear that they are equally available to provide such feedback to all parties upon request.

In order to preserve the impartiality of the judiciary, judicial officers choosing to provide feedback must do so in a manner that does not favor or exclude, or appear to favor or exclude, any particular attorney or group of attorneys, and be equally available to attorneys representing various interests or viewpoints. (CJEO Formal Opinion 2018-012, *supra*, at pp. 2, 7–8 [judges may give educational presentations to specialty bar associations, provided they are equally available to bar associations having opposing interests or viewpoints, and must ensure neutrality when speaking to judges from a prior practice area]; CJA Update (June 2007) p. 3 [a judge may speak with newly hired district attorneys about trial practice provided the judge is available to give similar talks to the public defender's office].)

D. Appearance of Special Position of Influence

When providing individualized feedback to attorneys, judicial officers must also ensure that their conduct does not suggest that the requesting attorneys have a special relationship with the judicial officer in violation of canon 2B(1) (judges must not convey or permit others to convey the impression that any individual is in a special position to influence the judge). As discussed above, only providing feedback to a particular group of attorneys may suggest bias or imply that those attorneys are in a special position to influence the judicial officer. In addition, providing feedback regarding an appearing attorney's performance, particularly when it is requested by the attorney's supervisor, may put the judicial officer in a position of evaluating the attorney from the perspective of a supervisor-supervisee relationship. Providing such feedback may suggest that the judicial officer favors or has a special relationship with a particular law office or has a special interest in the development of its employees.

For this reason, providing feedback in the context of an employment evaluation for purposes of promotion or discipline raises additional concerns. As Judge Rothman suggests in his treatise: "there are far more reasons against engaging in this practice than favoring it." (Rothman, *supra*, § 5:8, p. 274, discussing CJA Update (March 2004) p. 2.) In addition to identifying the ethical concerns discussed above, Judge Rothman notes that there are other ways for supervisors to obtain information about how their employees are performing and for new attorneys to learn, such as attending courtroom proceedings to observe. (Rothman, *supra*, § 5:8, pp. 273–274.)

The committee agrees that judicial officers should avoid acting as evaluators of attorney job performance in the employment evaluation context, as there are significant pitfalls to doing so and more effective ways for supervisors to evaluate employees for promotion or discipline. Once a judicial officer provides feedback to a supervisor, the judicial officer loses control over both the content of the information and the manner in which it may later be relayed to others. The committee also notes that, because judicial officers are prohibited from commenting on an attorney's performance in the judicial officer's assigned matters prior to the close of all proceedings, the time delay in providing any feedback for employment evaluation purposes would likely diminish its value. Finally, providing feedback in the context of an employment evaluation may put the judicial officer in the position of becoming a percipient witness in the event of an employment dispute.

E. Coaching

When providing feedback about attorney performance, judicial officers must also be cautious to avoid coaching. Although judicial officers are permitted to teach attorneys by providing neutral instruction on substance, procedure, or technique, they are prohibited from suggesting strategies or tactics that would provide an advantage before a particular judge or court. Coaching is impermissible because it suggests that a judicial officer may be biased in favor of, or have a special relationship with, the attorneys being

coached in violation of canons 2, 2A and 2B(1). The suggestion of bias may be heightened when a judge appears to coach attorneys that repeatedly appear before that judge. (Rothman, *supra*, § 2:24, p. 92.)

Coaching is not defined in the code. In a previous opinion, this committee has advised that judicial officers may discuss procedures, trial or appellate techniques, black letter law, best practices, tips to avoid common errors, and proper courtroom protocol. (CJEO Formal Opinion 2018-012, *supra*, at pp. 8–9.) For instance, a judge may speak at a statewide conference of district attorneys or teach courses on evidence to a criminal defense association, as long as the judge provides impartial instruction and refrains from advocating for certain positions. (Rothman, *supra,* § 10:16, p. 685, citing CJA Update (February 2002) p. 2; CJA Update (January 2017) p. 10.) However, it would be impermissible for a judicial officer to advise on topics or strategies that favor a particular side in litigation, such as how to select a pro-plaintiff or pro-defense jury or the ideal demeanor for a police witness in a criminal case. (CJEO Formal Opinion 2018-012, *supra*, at p. 9; Rothman, *supra*, § 10:16, p. 685.)

Depending on the factual scenario, coaching may also suggest that a judicial officer is providing legal advice to an attorney in violation of canon 4G, which prohibits judges from practicing law. For example, in *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 906–908, a judge was disciplined for, among other things, assisting attorneys in cases pending before other judges by suggesting particular motions, commenting on rulings in related cases, and reviewing and proposing edits to pleadings. The court found that the judge had provided legal advice to the attorneys and found that the judge's actions "amounted to egregious misconduct, demonstrating a disregard for the integrity of the bench, and constituted prejudicial conduct." (*Id.* at p. 907.) In addition, the court found that the judge's conduct could be construed as sharing information "known or peculiarly available to members of the [judge's] bench" with some attorneys to the exclusion of others, which cast doubt on the integrity and impartiality of the judiciary. (*Id.* at p. 908.) In essence, this improperly gave the assisted

attorneys an inside advantage. (See also Com. on Jud. Performance, *Public Admonishment of Judge Ronald Maciel* (1997) pp. 1–2 [judge admonished for privately advising a prosecutor on the time period for filing a peremptory challenge].)

V. Conclusion

While the code does not specifically prohibit providing feedback on courtroom performance to appearing attorneys or their supervisors, judicial officers must take into consideration the following canon restrictions and ethical risks. It is not permissible for judicial officers to provide feedback in matters assigned to them until all proceedings are finally resolved due to the restriction on ex parte communications. Judicial officers must also refrain from making public comments on proceedings pending before any other judge or court, or nonpublic comments that may interfere with a fair trial or hearing. Judicial officers may only provide feedback in a manner that avoids the suggestion of favoritism, bias, or a special relationship with the requesting attorneys and should avoid acting as evaluators of attorney job performance in an employment context. Finally, judicial officers must ensure that their feedback does not cross the line into coaching by suggesting tactics or strategies that favor a particular side in litigation or by providing legal advice.

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350 McAllister Street, Room 1144A
San Francisco, CA 94102
(855) 854-5366
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CJEO Informal Opinion Summary No. 2012-001

[Posted August 23, 2013]

EMPLOYMENT OF AN APPELLATE COURT JUSTICE'S SPOUSE AS A STAFF ATTORNEY IN THAT JUSTICE'S CHAMBERS

The Committee on Judicial Ethics Opinions (CJEO) was asked by a presiding appellate justice for an opinion on whether it is a violation of the California Code of Judicial Ethics for a justice to have his or her spouse work as the chambers attorney of that justice, and if so, whether the presiding justice has any reporting duties. An opinion was also sought on whether it is a violation of the Code for the presiding justice to approve the timesheets of a chambers attorney of another justice.

The facts provided were that at the time the attorney was selected by the justice and hired by the court there was no relationship. Within two years a personal relationship developed, resulting in marriage. After the marriage, the attorney worked in the chambers of another justice, but later returned to work in the chambers of the justice-spouse, and remained there for more than eleven years. During that time the Presiding Justice signed that attorney's time sheets.

CJEO opined that, where an intimate personal relationship (including but not limited to marriage) develops between an appellate justice and one of the attorneys assigned to his or her chambers, the continued service of the attorney in that chambers would violate the canons of judicial ethics by failing to avoid nepotism and favoritism, and/or by creating an appearance of impropriety that tends to diminish, rather than promote, public confidence in the integrity and impartiality of the judiciary. (Canons 2, 2A, 2B(1), 3(C)(1), and 3(C)(4)[1].)

This opinion was based, primarily, on the nature of the working relationship between a supervising justice and his or her chambers attorney, and secondarily on the fact that—where there is a marriage—the attorney's compensation is not insubstantial and inures directly to the benefit of the judge-spouse's household. In thus concluding, CJEO expressly declined to consider whether any employment laws are implicated, or to consider unique factors that may pertain to a specific employment situation, such as good faith reliance, advice of counsel, or lack of alternative candidates (e.g., in sparsely populated areas).

The committee advised that it was within the discretion of the presiding justice to determine what corrective action would be appropriate, including reporting the matter to the Commission on Judicial Performance. In exercising that discretion, the presiding justice was advised to consider all relevant factors. (See, e.g., Cal. Judges Assoc., Formal Ethics Opinion No. 64 (2009) p. 4).

CJEO concluded there is no ethical dilemma if a presiding justice verifies the time sheet of another justice's chambers attorney for administrative convenience, for example,

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[1] The informal opinion that was issued by the committee in 2012 and this summary are based on canon 3C(4), which was in effect at the time of the of issuance of the informal opinion. The committee notes that effective January 1, 2013, the California Code of Judicial Ethics was amended and former canon 3C(4) was renumbered as canon 3C(5).

where a Division attorney rotates through the justices' chambers. If, however, the presiding justice is not in a position to know whether the attorney was present or absent on the days represented on the time sheet, this would likely constitute a violation of canon 3C(1). If a presiding justice were to sign the timesheet of another justice's attorney to relieve that justice of his or her administrative duties, an ethical concern might arise depending upon the reason for doing so. For example, if a justice has failed or been unable accurately to document the attorney's work days, the presiding justice should not be covering for that justice by signing the attorney's time sheet, but should, instead, be addressing the justice's administrative competence or integrity.

This informal opinion summary is advisory only (Cal. Rules of Court, rules 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)).

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COMMITTEE ON JUDICIAL ETHICS OPINIONS
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San Francisco, CA 94102
(855) 854-5366
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CJEO Informal Opinion Summary No. 2012-002

[Posted August 23, 2013]

ASSIGNMENT AND DISQUALIFICATION OF A JUDGE WHEN COUNSEL FOR A PARTY IS THE LANDLORD OF THE LAW FIRM THAT EMPLOYS THE JUDGE'S SPOUSE

The Committee on Judicial Ethics Opinions (CJEO) was asked by a presiding judge of a superior court for an opinion on whether the court was required to refrain from assigning cases to a judicial officer where counsel for a party is the landlord of the law firm that employs the judicial officer's spouse as an associate attorney, and if not, whether the judicial officer must disqualify him or herself in such cases. The presiding judge also sought an opinion on whether to advise the judicial officer that a blanket disqualification on these facts alone was not required.

The facts provided were that a superior court judge assigned to hear family law matters was married to an attorney who practices family law in the court. The spouse was an associate attorney in a large law firm and the judge regularly disqualified in all cases in which any attorney from the spouse's law firm appeared. The presiding judge received a letter from another family law firm advising that the law firm's senior partner owned

the building in which the spouse's law firm had its offices. The landlord-law firm requested that the court not assign the judge cases in which an attorney from the landlord-law firm appears because of the financial arrangement between the landlord-law firm and the spouse's tenant-law firm.

The committee concluded that a court is not required to refrain from assigning cases to a judicial officer at the request of a law firm, or under any circumstances, until the judicial officer has made a personal determination that he or she is disqualified to hear an assigned matter and notifies the presiding judge. (Cal. Code of Judicial Ethics, canon 3B(1); Cal. Code of Civil Procedure, section 170.3(a)(1); Cal. Rules of Court, rules 10.603(c)(1) and 10.608(1)(A).) The committee also concluded that the judge in question was not required to disqualify because a person aware of the facts would not reasonably doubt the judge's ability to be impartial where there was no direct connection, whether social, financial, or otherwise, between the judge or the spouse and the landlord-law firm. (Cal. Code Civ. Pro., § 170.1.) That being the case, the presiding judge could advise the judge that disqualification was not required based solely on the facts presented.

This informal opinion summary is advisory only (Cal. Rules of Court, rules 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)).

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CJEO Informal Opinion Summary No. 2012-003

[Posted August 23, 2013]

DISQUALIFICATION AND DISCLOSURE: UNIVERSITY REPRESENTATION OF A PARTY IN A MATTER BEFORE A JUSTICE EMPLOYED BY THE UNIVERSITY

The Committee on Judicial Ethics Opinions (CJEO) was asked by an appellate court presiding justice for an opinion as to what an associate justice's disqualification and disclosure duties were, if any, where the associate justice was employed by a university, and the university, its staff, and students under university supervision, represented a party appearing before the associate justice. An opinion was also sought as to the presiding justice's reporting or corrective action duties, if any.

The committee was specifically asked to address circumstances in which an associate justice had decided not to disclose or disqualify in a matter pending before the justice where a clinical program at a university's law school represented a party and the justice was employed for compensation by the same university to teach an undergraduate law-related course.

The committee concluded that disqualification was not required under canon 3E(4)(c) of the California Code of Judicial Ethics. In the absence of facts showing a substantive relationship between the justice's teaching and the law school clinic, the committee concluded that an aware person would not reasonably doubt the justice's impartiality. The committee also concluded that because disclosure is not required for appellate justices, there was no violation of a duty to disclose. Thus, the presiding justice had no duty to report or seek corrective action.

In reaching these conclusions, the committee was guided by *Stanford University v. Superior Court* (1985) 173 Cal.App.3d 403, decisions from other jurisdictions, and other persuasive authorities. (*Stanford, supra*, 173 Cal.App.3d at pp. 407-409; *Fairley v. Andrews* (2006) 423 F.Supp.2d 800, 820 (N.D. Ill.); *Williams v. Viswanathan* (2001) 65 S.W.3d 685, 692 (Tex. App.); *U.S. v. Moskovits* (1994) 866 F.Supp. 178, 181-182 (E.D. Pa.); Rothman, Cal. Judicial Conduct Handbook (3d ed. 1997) § 7.73, pp. 381-382.) The committee noted that the university itself was not a party, nor was the justice's teaching opportunity dependent upon the outcome of the appeal, leaving only employment by the university as a link between the matter and the justice. The committee concluded that the link between the university and the justice was too remote and unrelated to give a reasonable person sufficient doubt as to the justice's impartiality and disqualification was not required.

In addressing disclosure, the committee noted that although there is no requirement for disclosure by appellate justices, each justice must decide for himself or herself whether the facts require disclosure for the purpose of reaffirming the public's trust in the integrity and impartiality of the judicial system. (Rothman, *supra*, § 7.90, at p. 389.) That decision, like a disqualification decision, must be made solely by the justice involved. (*Kaufman v. Court of Appeal* (1982) 31 Cal.3d 933, 937-940.) In the facts provided, the justice had decided not to disclose the university employment and that decision did not violate the Code of Judicial Ethics.

This informal opinion summary is advisory only (Cal. Rules of Court, rules 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)).

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CJEO Informal Opinion Summary No. 2014-004

[Posted September 15, 2014]

JUDICIAL APPEARANCE IN AN EDUCATIONAL DOCUMENTARY

The Committee on Judicial Ethics Opinions (CJEO) was asked by the Tribal Court-State Court Forum (Forum)[1] for an informal opinion about whether state court judicial officers who are members of the Forum may appear in an educational

[1] This informal opinion summary identifies the requesting party as the Tribal Court-State Court Forum, which has submitted a written waiver of confidentiality and consent to disclose its identity. (Cal. Rules of Court, rule 9.80(h)((3); Cal. Com. Jud. Ethics Opns., Internal Operating Rules & Proc., rule 5(e) [requesting parties may waive confidentiality and consent to disclosure by CJEO of identifying information].) The Forum is an advisory body of the Judicial Council that makes recommendations to the council for improving the administration of justice in all proceedings in which there is overlapping authority to exercise jurisdiction by the state judicial branch and the tribal justice systems. Members of the Forum include tribal court judges, state court judges, and chairs of the Judicial Council's advisory committees. For purposes of this informal opinion summary, the Forum and tribal courts are referred to as those terms are used in California Rules of Court, rule 10.60.

documentary being produced for public television that focuses on tribal justice systems in California. The committee was advised that the state court members of the Forum would appear in the documentary in a minor or secondary capacity and would be identified by judicial title but not wear robes, except in any filmed court proceeding.

I. Questions Presented

The Forum provided the committee with the following information and specifically asked the following questions:

> "A respected filmmaker is producing an educational documentary for public television exploring the work of tribal courts in California. Would the appearance in the film of one or more state court judges (in particular, judges who are members of the Tribal Court-State Court Forum (Forum)) violate canon 2(B)(2) or any other provision of the California Code of Judicial Ethics because the documentary might ultimately generate some downstream pecuniary or other personal benefit to the producer or her production company, which owns the copyright?
>
> Specifically, we seek an informal opinion on the following three, closely related questions: Does a judge's appearance in a minor or secondary capacity in a documentary produced for public television focusing on tribal justice systems in California violate the Code of Judicial Ethics, when he or she:
>
> > "(1) Is interviewed about tribal courts, the overlap of jurisdiction with the state judicial branch and/or the work of the Forum [note: the judge would be identified by title but would not be wearing robes; the interview would not take place in a courtroom]?
> >
> > "(2) Is filmed during a meeting of the Forum to illustrate aspects of inter-court cooperation [again, the judge would not be wearing robes; the meetings occur at the Judicial Council offices; the judge might be identified by title]?

"(3) Is filmed presiding over an actual judicial proceeding involving a case that is also being heard in a tribal court or otherwise involves inter-jurisdictional issues?"

II. Summary of Conclusions Provided

The appearance by state court Forum judges in the described documentary film would not justify a reasonable suspicion that the prestige of office was being utilized to promote a commercial product. The state court judges are permitted under the canons to appear in filmed interviews in which they explain their work with the Forum and tribal courts, including discussing court procedures and legal issues that would promote public understanding and confidence in the administration of justice. However, they must be cautious not to answer questions in such a way that discusses the substance of pending cases, creates the appearance of political bias or prejudgment, or otherwise reveals facts from confidential proceedings. The documentary may include filming of trial court proceedings only as permitted under California Rules of Court, rule 1.150, and any applicable local rules. Finally, state court Forum judges may appear in a filmed Forum meeting but must use the cautions advised for appearances and interviews.

III. Appearance in the Documentary

The Forum's threshold question was whether California judges who are members of the Forum may appear in an educational documentary made for public television that could ultimately generate pecuniary or personal benefit to the filmmaker and copyright holder.

The committee concluded that there was no question the documentary film described in the request concerned the law, the legal system and the administration of justice. The Forum state court judges are authorized by canon 4B to participate

in educational activities concerning legal matters, and they may do so in televised media programming or educational film appearances. (Cal. Judges Assn., Formal Ethics Opn. No. 57 (2006) p. 2 (CJA Opinion No. 57); Cal. Judges Assn., Judicial Ethics Update (2003) p. 8.) Indeed, the Standards for Judicial Administration consider community activities that promote public understanding and confidence in the administration of justice to be an official judicial function, and judges are encouraged to develop educational programs to increase public understanding of the court system. (Cal. Stds. for Jud. Admin., std. 10.5(a), (b)(2)).[2] However, both canon 4B and the Standards for Judicial Administration specify that any judicial participation in educational activities must be consistent with the requirements of the California Code of Judicial Ethics.

Several canons set limits on judges when appearing and being interviewed in educational programs that will be broadcast or otherwise released for public viewing. Specifically, canon 2B(2) prohibits lending the prestige of judicial office to advance the pecuniary interests of others. The purpose for this limitation has been expressed in the context of televised appearances as preventing commercial endorsement and protecting the independence and integrity of the judiciary. (Cal. Judges Assn., Formal Ethics Opn. No. 10 (1958) p. 3 (CJA Opinion No. 10) [purpose of canon 2B(2) limitation is to prevent a judge's name or office from being directly or indirectly used as an instrument for attracting public attention to a

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[2] See *Inquiry Concerning Ross* (2005) 49 Cal.4th CJP Supp. 79, 120-121 (*Ross*), where the Commission on Judicial Performance (CJP) found that judicial appearances on a public television program related to community affairs were not inappropriate based on 'the strong public policy encouraging California judges to promote public awareness of the judiciary and the judicial system,' under Standard of Judicial Administration, former section 39, now standard 10.5. However, the CJP also found that some of the comments made by the judge during those appearances were improper. (*Ross*, at p. CJP Supp. 123; see discussion of interviews, *post*.)

television program sponsor, business, or product]; *In re Inquiry of Broadbelt* (1996) 146 N.J. 501, 516 (*Broadbelt*) [a judge should avoid appearing in either commercial or noncommercial television programs when the judge's association with the program lends the prestige of office and compromises the independence and integrity of the judiciary].)

To prevent the use of the judicial office to promote commercial interests, at least one jurisdiction prohibits media appearances unless they are produced for purely nonprofit purposes.[3] California, however, has long recognized that judicial appearances in commercially sponsored and funded programming may be permissible. (CJA Opn. No. 10, *supra*, p. 3 [canon 2B(2) does not proscribe the appearance of a judge on a television program merely because it is commercially sponsored].) The vast majority of jurisdictions are in accord.[4] The line drawn in

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[3] (See N.Y. Advisory Com. on Jud. Ethics, Opn. 01-86 (2001) p. 1 [judge should not participate in an educational video production about the judicial branch of government that is being produced by a for-profit entity]; N.Y. Advisory Com. on Jud. Ethics, Opn. 09-182 (2009) p. 1 [judge may not be interviewed in a documentary that would accompany a criminal justice textbook where the video will be produced by a for-profit organization]; N.Y. Advisory Com. on Jud. Ethics, Opn. 94-116 (1995) p. 1 [judge may not participate in a television production intended to result in a television series based on the judge's judicial experiences and life].)

[4] (See *Broadbelt, supra,* 146 N.J. at p. 516 [not every television appearance by a judge on commercial television will be improper]; Va. Jud. Ethics Advisory Com., Opn. 99-7 (1999) p. 1 [judge is not necessarily prohibited from all appearances on a commercial radio or television program]; ABA Com. on Prof. Ethics, Informal Opn. C-230(g) (1961) [the nature of the program and the appearance is the important thing and whether or not it is commercially sponsored is secondary]; S.C. Advisory Com. on Stds. Jud. Conduct, Opn. 14-1991 (1991) p. 1 [the nature and effect of the judge's appearance is the focus, not merely whether the show is commercial or noncommercial]; Md. Jud. Ethics Com., Opn. No. 1973-05 (1973) p. 1 [mock trial staged and filmed at commercial studios for a commercial program to inform the public about juvenile court proceedings is not

these jurisdictions between permissible and impermissible appearances is based on the educational nature of the programming and, more specifically, the degree to which it is commercially sponsored, endorses a product, or constitutes an advertisement.[5]

In California, the line has been similarly drawn. According to a 1958 advisory opinion by the California Judges Association (CJA), there was an impermissible degree of commercial sponsorship where a judge participated in a weekly television program that simulated traffic court proceedings. (CJA Opn. No. 10, *supra*, p. 1.) The show was originally an unsponsored public service program that became popular and was sold to commercial advertisers. The show opened and closed with a sponsorship announcement by a car dealership association and was interrupted by commercials designed to sell cars. CJA concluded that from this degree of commercial sponsorship, public viewers would have "fair reason to believe there was at least tacit official judicial approval of the reliability of the sponsor and his product . . . ." (*Id*., pp. 3-4.)

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proscribed so long as the tape is not used for fundraising and is not directly sponsored by an advertiser].)

[5] (See Fla. Jud. Ethics Advisory Com., Opn. No. 2006-14 [judge may not appear in a documentary film about a reading instruction program that tacitly endorses the program and is used as a marketing tool]; Neb. Jud. Ethics Com., Opn. 11-3, p. 2 [judge may not appear in an architectural firm's video about a courtroom construction project to be shown to potential courtroom renovation clients]; N.M. Advisory Com. on Code Jud. Conduct, Advisory Opn. No. 97-04 (1997) pp. 1-2 [judge prohibited from appearing on a CBS video as a judge reading and singing a morning television show endorsement]; Ind. Jud. Com. on Jud. Qualifications, Advisory Opn. 2-89, pp. 1-2 [judge may not appear on a television commercial for a cable television company that advances the cable company's private interests and is an advertisement or endorsement]; Md. Jud. Ethics Com., Opn. No. 2013-14 (2013) p. 1 [judge may not appear on for-profit program where the sponsor hopes the judge's presence will attract more viewers].)

In 1983, CJA addressed the question of whether a judge could appear on a public television program that was funded by a commercial sponsor. (CJA Opn. No. 28 (1983) p. 1.) The public service program opened and closed with an announcement that the program was made possible by a grant from a for-profit legal publisher. Observing that the judge did not announce the grant and was not identified personally with the grantor's product, CJA distinguished the commercial sponsorship in Opinion No. 10 and concluded that the judge's public television appearance was permissible because it did not use the power and prestige of judicial office to promote a business or product. (CJA Opn. No. 28, p. 2.) CJA concluded that "the public benefit" to be derived from "sparking interest in the law" and "presenting the law in a dignified and professional setting . . . far outweighs any remote possibility . . . that the judge will be perceived as a salesman for those making the grant." (*Ibid*.)

In 2006, CJA again addressed media appearances and lending the prestige of judicial office to personal or business interests. (CJA Opn. No. 57, *supra*, p. 3.) CJA concluded generally that when commercial factors do not predominate, there is little reason to find that a media appearance violates canon 2B(2) by lending prestige to an enterprise simply because the program is being aired for commercial profit, particularly if the media appearance or interview has solid educational content. (CJA Opn. No. 57, p.3.)

Here, the potential for some downstream pecuniary or other personal benefit to the copyright holder does not constitute a commercial factor that would violate canon 2B(2). The educational content not only predominates, it is the sole purpose of the film. As described, the appearance of the state court Forum judges cannot reasonably be perceived as that of a salesperson for the copyright holder's product. The clear public benefit to be derived from sparking an interest in the cross jurisdictional legal issues that are to be documented far outweighs any remote

possibility of personal or pecuniary gain. Judicial appearance in the documentary film would not lend the prestige of office to a predominately for-profit enterprise and is therefore not prohibited by the canons.[6]

(1). Interview About Tribal Courts and the Forum

The question of whether such appearances may include interviews potentially implicates several canons. In Opinion No. 57, CJA explained that a judge may not participate in media appearances and interviews if participation would cast doubt on the judge's impartiality (canons 1, 2A, 4A(1)), require the judge to comment on pending or impending cases or engage in inappropriate political activity (canons 2A, 3B(9)), demean the judicial office (canon 4A(2)), or interfere with the performance of judicial duties (canon 4A(4). (CJA Opinion No. 57, *supra*, p. 2 [noting that educational programming on legal matters rarely creates a risk of demeaning the judicial office].)

Specifically, canon 2A prohibits public comments about cases or issues that are likely to come before the courts, and canon 3B(9) prohibits public comments about a case pending in *any* court.[7] Although these canons apply to all media

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[6] As a judicial branch entity, the Forum's significant participation in the production of the film further supports this conclusion. (Wash. St. Courts Ethics Advisory Com., Opn. 99-04 (1999) p. 1 [judiciary may purchase or use donated time from a broadcasters association for radio and television presentations to educate the public as to how the judicial branch operates or to present programs on matters relevant to the judiciary]; N.Y. Advisory Com. on Jud. Ethics, Opn. 13-158 (2013) p. 1 [judge may participate in creating and producing a video to provide information about the history and current capabilities of the court and may invite other judges to appear in the video].)

[7] This would include comments by state court judges about cases pending in tribal courts. "When the case is pending before a judge other than the commenting judge, the public may perceive the comment as an attempt to influence the judge

appearances, including those discussed generally above, they are of particular concern in the context of interviews where a judge is answering questions put to him or her by others. (CJA Judicial Ethics Update (Oct. 1989) No. 8 [where participation involves answering questions, a judge must be mindful of the prohibition against discussion of cases pending in the court system].)[8]

Canon 3B(9), however, expressly permits judges to explain court procedures and legal issues to promote public understanding and confidence in the administration of justice. (Rothman, *supra*, §§ 5.32-5.34, pp. 226-230.) Canon 3B(9) contains a narrow 'public procedural exemption' that permits judges to publically provide information about court procedures and give the public a better understanding of legal issues, even in cases pending in the judge's court. (*Ross, supra*, 49 Cal.4th at pp. CJP Supp. 124, 128 [exemption permits explaining venue and jury procedures and providing neutral background information concerning the case and the specific issue before the court].) But the exemption does not allow the judge to comment publicly on the substance of a case, to make statements that could give the appearance of political bias or prejudgment, or to discuss facts from confidential proceedings. (*Ross, supra*, at p. CJP Supp. 123 [improper discussion of confidential juvenile proceedings showed an abandonment of neutrality that

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who is charged with deciding the case." (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1101.) Such commentary could undermine public confidence in the decisions of the court. (Rothman, California Judicial Conduct Handbook (2013 supp.) § 5.32, p. 226 (Rothman).)

[8] Other jurisdictions are in accord regarding the potential pitfalls of interviews. (Va. Jud. Ethics Advisory Com., Opn. 99-7, *supra,* p. 1 [it is difficult to imagine an interview with a judge on a radio or television program that would not lead to discussion of legal issues either pending or impending]; *Broadbelt, supra,* 146 N.J. at p. 510, citing N.J. Advisory Com. on Jud. Conduct, Opn. 1-89 (1989) p. 1 for the caution that the give and take of an interview discussion might expose the judge to the hazard of commenting on the issues in a pending case].)

undermined public trust]; *id*., at pp. CJP Supp. 124, 127 [improper comments about the facts and political overtones of a case on appeal had significance beyond the legal issues].) Thus, great care must be taken in any interview to avoid commenting on a case in a way that could undermine public confidence in the integrity and impartiality of the judiciary. (Rothman, *supra*, § 5.34, p. 227 [comments on cases rarely made due to concern that permitted comments on procedural matters are seen as involving the substance of the case].)

An interview that is a personal profile about the judge and does not mention cases is therefore permitted under canon 3B(9). (Rothman, *supra*, § 5.34, p. 230 [discussing a nationally broadcast interview with Judge Ito that did not mention the high profile case he was hearing].) This would necessarily extend to an interview that profiles the work with the Forum and tribal courts where cases are not mentioned.

In sum, the state court Forum judges are permitted under the canons to appear in filmed interviews in which they explain their work with the Forum and tribal courts, including discussing court procedures and legal issues that would promote public understanding and confidence in the administration of justice. But they must be careful not to make statements that describe the substance of pending cases, create the appearance of political bias or prejudgment, or reveal facts from confidential proceedings.

(2). Filming of a Case

Media coverage that includes recording and broadcasting court proceedings is governed by California Rules of Court, rule 1.150, which specifies that filming is prohibited unless exempted under the rule. (Cal. Rules of Court, rule 1.150(c).) The rule expressly prohibits filming of spectators (rule 1.150(e)(6)(D)), proceedings closed to the public (rule 1.150(e)(6)(B)), and conferences between

attorneys and clients, witnesses or other attorneys, and bench conferences (rule 1.150(e(6)(E)). Otherwise, media coverage is permitted by court order. The judge has discretion to permit or limit recording (rule 1.150(e)). The rule specifies the factors a judge must consider when permitting filming.[9] In addition, some courts have adopted local rules that provide further limitations on filming. So long as the filming is consistent with all applicable rules, the documentary may include filming of trial court proceedings.[10]

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[9] The specified factors include: (A) the importance of maintaining public trust and confidence in the judicial system; (B) the importance of promoting public access to the judicial system; (C) the parties' support of or opposition to the request; (D) the nature of the case; (E) the privacy rights of all participants in the proceeding, including witnesses, jurors, and victims; (F) the effect on any minor who is a party, prospective witness, victim, or other participant in the proceeding; (G) the effect on the parties' ability to select a fair and unbiased jury; (H) the effect on any ongoing law enforcement activity in the case; (I) the effect on any unresolved identification issues; (J) the effect on any subsequent proceedings in the case; (K) the effect of coverage on the willingness of witnesses to cooperate, including the risk that coverage will engender threats to the health or safety of any witness; (L) the effect on excluded witnesses who would have access to the televised testimony of prior witnesses; (M) the scope of the coverage and whether partial coverage might unfairly influence or distract the jury; (N) the difficulty of jury selection if a mistrial is declared; (O) the security and dignity of the court; (P) undue administrative or financial burden to the court or participants; (Q) the interference with neighboring courtrooms; (R) the maintenance of the orderly conduct of the proceeding; and (S) any other factor the judge deems relevant. (Cal. Rules of Court, rule1.150(e)(3)(A)-(S).)

[10] Other jurisdictions are in accord with the educational value of filming court proceedings. (See Nev. Standing Com. on Jud. Ethics & Election Practices, Opn. JE07-0 11 (2007) p. 1 [under rules of court, a judge may allow a television station to videotape an entire trial for posting on the television station's Web site and viewing by the general public].) Although New York is a jurisdiction that prohibits appearances and interviews in for-profit programming generally, as noted above, that prohibition does not apply to the filming of actual court proceedings. (See N.Y. Advisory Com. on Jud. Ethics, Joint Opn. 11-154/11-155 (2012) p. 1 [subject to administrative approvals, a judge may permit a for-profit video

(3). Filming of a Forum Meeting

The canons already discussed in section III.(1). would apply to any decision by the Forum to film its meetings. Thus, state court Forum judges may appear in a filmed Forum meeting but must use caution not to discuss the substance of pending cases, make statements that create the appearance of political bias or prejudgment, or reveal facts from confidential proceedings.

IV. Conclusions

The appearance by state court Forum judges in the described documentary film would not give rise to a reasonable suspicion that the prestige of office was being utilized to promote a commercial product. The demonstrable public benefit to be derived from the educational content of the documentary far outweighs any attenuated possibility of personal or pecuniary gain to the copyright holder. Judicial appearance in the documentary film is therefore not prohibited by the canons. Further, the state court Forum judges are permitted under the canons to appear in filmed interviews in which they explain their work with the Forum and tribal courts, including discussing court procedures and legal issues that would promote public understanding and confidence in the administration of justice. However, they must be cautious not to discuss the substance of pending cases, create the appearance of political bias or prejudgment, or reveal facts from confidential proceedings. The documentary may include filming of trial court

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production company to film regular court proceedings for a documentary, and may permit a local public access television channel to film selected court hearings for broadcast at a later time, as long as the judge will merely perform his or her regular judicial duties while being filmed, will not receive compensation from the filming company or broadcaster, and will not allow the filming process to interfere with the court's proceedings].)

proceedings that are excepted under California Rules of Court, rule 1.150, and that follow any applicable local rules. Finally, state court Forum judges may appear in a filmed Forum meeting but must use the cautions that apply to appearances and interviews.

This informal opinion summary is advisory only (Cal. Rules of Court, rules 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)).

CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS
350 McAllister Street, Room 1144A
San Francisco, CA 94102
(855) 854-5366
www.JudicialEthicsOpinions.ca.gov

CJEO Informal Opinion Summary No. 2018-005

[Posted June 26, 2018]

DISQUALIFICATION FOR SPOUSE'S POLITICAL CAMPAIGN SERVICES

I. Question Presented

The Committee on Judicial Ethics Opinions (CJEO) was asked for an opinion on whether a trial court judge must disqualify himself or herself when the judge's spouse provides political campaign services to reelect the head of a government legal office and attorneys from that office, but not the head of the office, appear as counsel in a proceeding. An opinion was also sought on whether the judge has disclosure obligations if the judge is not disqualified and, if so, the length of time that the judge must disclose the relationship.

II. Summary of Conclusions Provided

Canon 3B(1) of the California Code of Judicial Ethics and Code of Civil Procedure section 170[1] require a judge to hear and decide all matters assigned to the judge, except those in which the judge is disqualified by law. Section 170.1 and canon 3E provide the grounds necessitating disqualification, including where the judge has a financial interest in the proceeding and where the judge is biased or prejudiced in the matter, based on either the judge's subjective belief or an objective belief of a reasonable person aware of the facts. (§ 170.1, subd. (a)(3), (6)(A), (6)(B).)

The committee advised that a judge whose spouse provides campaign services to the head of a government legal office does not have a statutory disqualifying financial interest when attorneys from the government legal office, but not the head of the office, appear as counsel in a proceeding. The spouse's services are provided to the head of the government legal office and not to the government legal office itself, the services are unrelated to the matter before the judge, and the head of the government legal office is not appearing before the judge. Therefore, in most instances, a reasonable person aware of the spouse's campaign services would not doubt the judge's impartiality, and the judge may decline to disqualify himself or herself unless the judge subjectively believes that he or she is unable to act impartially. The committee advised that the judge should evaluate the facts and circumstances surrounding the campaign and the proceeding to determine whether the specific circumstances, such as the source of campaign funds, publicity surrounding the proceeding, and size of the government legal office, could cause a person aware of the facts to reasonably doubt the judge's impartiality. If so, the judge should disqualify himself or herself.

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[1] All further references to canons are to the California Code of Judicial Ethics unless otherwise indicated. All references to section or sections are to the Code of Civil Procedure unless otherwise indicated.

The committee further advised that the spouse's campaign services to the head of the government legal office is information that is reasonably relevant to the question of disqualification. (Canon 3E(2)(a).) The trial court judge should disclose on the record that the spouse is engaged in campaign services. The judge should continue to disclose the spouse's campaign services for a reasonable period of time after the spouse's services end or after the last payment related to the services is received, whichever occurs later.

III. Disqualification

Section 170 and canon 3B(1) obligate a judge to hear and decide all matters unless the judge is disqualified, including those matters that are controversial and may subject the judge to public disapproval and criticism. (Canon 3B(2) ["A judge shall be faithful to the law regardless of partisan interests, public clamor, or fear of criticism"]; *United Farm Workers v. Superior Court* (1985) 170 Cal.App.3d 97, 100, 103 [section 170 reminds judges of their duty to hear cases, which is equally as strong as the duty to disqualify, and protects judges from public criticism by providing a clear statement of their responsibility].) On the other hand, a judge cannot allow relationships to influence the judge's judicial conduct or judgment, and the canons require a judge to uphold the independence and impartiality of the judiciary at all times. (Canons 1, 2A, 2B(1).) The duty to disqualify is intended to safeguard the integrity and fairness of the judicial process, is concerned with the rights of the parties before the court, and is intended to ensure public confidence in the judiciary. (*People v. Freeman* (2010) 47 Cal.4th 993, 1000-1001.)

Section 170.1 sets forth the grounds for judicial disqualification at the trial court level.[2] A judge is disqualified if any of the grounds specified in section 170.1 are

[2] This opinion summary focuses on the disqualification and disclosure obligations of trial court judges. "Judge" and "trial court judge" are used interchangeably to refer to a trial court judge. Canon 3E(4) and 3E(5) set forth the standards for recusal of an appellate justice and are substantially similar to the grounds for disqualification pursuant to section 170.1. Appellate justices are not subject to disclosure obligations pursuant to the canons.

present, including, as relevant here, if the judge has a financial interest in the proceeding, is biased or prejudiced in the matter, or if a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial. (§ 170.1, subd. (a)(3), (6)(A), (6)(B).)

A. Financial Interest in the Proceeding

A judge is disqualified if the judge has a financial interest in the subject matter of a proceeding or in a party to the proceeding. (§ 170.1, subd. (a)(3)(A).) A judge is deemed to have a financial interest if the judge or the judge's spouse possesses "ownership of more than a 1 percent legal or equitable interest in a party, or a legal or equitable interest in a party of a fair market value in excess of one thousand five hundred dollars ($1,500), or a relationship as director, advisor, or other active participant in the affairs of the party," with certain exceptions. (§§ 170.5, subd. (b); 170.1, subd. (a)(3)(B)(i) [a judge is deemed to have a financial interest if the spouse has a financial interest].)

The fact that the judge's spouse receives a financial benefit from the head of the government legal office, and not the government legal office itself, does not constitute a disqualifying financial interest as the term is defined. (§ 170.5, subd. (b); Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 7:30, p. 429 (Rothman) ["[T]he disqualification statute makes no mention of financial interest in entities other than a party, nor does the statute refer to ownership interests that may be affected by a decision regarding a party"].) The head of the government legal office is not the subject of or a party to the proceeding, so the spouse's anticipated compensation from the head of the government legal office is not a disqualifying financial interest for the judge.

Nor is the spouse a director, advisor, or other active participant in the affairs of the government legal office. While the spouse may be an active participant in the campaign of the head of the government legal office, such activity does not extend to the activities or policy decisions of the government legal office itself. (Cal. Judges Assn., Opn. No. 55 (2006), p. 2 [involvement that would trigger consideration of disqualification is where the

spouse's position requires him or her "to advise on, or actively participate in, the major activities or policy decision of the government entity"].) Therefore, the committee advised that the spouse's financial interest in the head of the government legal office does not necessitate disqualification pursuant to section 170.1, subdivision (a)(3).

B. Capacity To Be Impartial

Section 170.1, subdivision (a)(6)(A) requires disqualification where a judge is unable to be impartial based on either the judge's subjective belief or the objective belief of a reasonable person. Section 170.1, subdivision (a)(6)(A)(ii) requires disqualification where "[t]he judge believes there is a substantial doubt as to his or her capacity to be impartial." This is an individual determination that a judge makes in each proceeding, which is balanced against the overarching duty to decide a case. No authority has held that a judge erred by failing to recuse on this subjective ground. (Rothman, *supra*, appen. G, p. 917.)

Section 170.1, subdivision (a)(6)(A)(iii) requires disqualification when "[a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." Subdivision (a)(6)(A)(iii) was enacted due to the difficulty in proving that a judge is biased unless the judge admits such bias and disqualifies himself or herself, as well as to promote public confidence in the integrity and impartiality of the judiciary. (*United Farm Workers of America v. Superior Court*, *supra*, 170 Cal.App.3d at p, 103; Rothman, *supra*, appen. G, p. 918.) It strikes a balance between the parties' right to a decision based upon an objective evaluation of the facts and the law, and the public's right to a fair, yet efficient resolution of disputes. (*United Farm Workers of America v. Superior Court*, *supra*, at p. 100; *People v. Freeman*, *supra*, 47 Cal.4th 993, 1000-1001 [section 170.1 is concerned with both the rights of the parties before the court and ensuring public confidence in the judiciary].) Disqualification based on this statutory ground is evaluated under an objective standard: "if a fully informed, reasonable member of the public would fairly entertain doubts that the judge is impartial, the judge should be disqualified." (*Wechsler v. Superior Court* (2014) 224 Cal.App.4th 384, 391.)

Applying this objective standard, in *United Farm Workers v. Superior Court*, *supra*, 170 Cal.App.3d 97, the Court of Appeal determined that no person aware of the facts would reasonably doubt the judge's impartiality where, six years before the judge presided over the matter, the judge's wife worked for one of the parties for two days. The court regarded this as a close issue and based its decision on the absence of a continuing relationship between the party and the judge's spouse that could give rise to a personal or financial interest. (*Id*. at p. 105.) In most instances, there is an appearance of bias necessitating disqualification if the spouse is employed by a nongovernmental entity that is a party to the proceeding. (Cal. Judges Assn., Judicial Ethics Update (2016), I.B.15, p. 2 [a judge should disqualify himself or herself where adult son who lives at home is employed part-time by a corporation that is a party in a matter before the judge].) Conversely, where a spouse is employed by a governmental entity party, the judge is not disqualified unless the spouse is involved in the case before the court. (Rothman, *supra*, § 7:46, p. 464; Cal. Judges Assn., Opn. No. 55, *supra*, p. 2 [advising that disqualification is typically not required where a judge's family member is directly employed by a government entity party].)

Here, the judge's spouse is employed by a nongovernmental entity that is neither a party to nor the subject matter of the proceeding. The spouse receives compensation from the head of a government legal office, not the government legal office itself, and the head of the government legal office is not the subject of the proceeding or a party to the proceeding and does not appear as counsel in the matter. There is no direct connection between the judge or the judge's spouse and the government legal office. Under these circumstances, the committee advised that a person aware of the facts would not reasonably doubt the judge's capacity to be impartial, and the judge may decline to disqualify himself or herself.

There are other factors a judge should consider, however, that may cause a person aware of the facts to reasonably doubt the judge's impartiality. Where the judge does not have a disqualifying financial interest under section 170.1, subdivision (a)(3), the judge must still consider whether there are financial ties to the party that may create an

appearance of bias. For example, if the judge is aware that the head of the government legal office is self-funding the campaign and the spouse's payment is therefore derived exclusively from the candidate's salary, the judge's impartiality might reasonably be questioned as the judge's community property is indirectly attributable to the government legal office. The judge's impartiality is even more likely to be questioned where a judgment against the government legal office could endanger the position of the head of the government legal office. If the proceeding is high profile or likely to garner publicity that could impact the campaign, the judge's impartiality is more likely to be questioned. Whether the judge's conduct in a proceeding would result in the head of the legal office no longer utilizing the judge's spouse for campaign services is, in most instances, highly speculative; however, the judge should still consider whether the nature of the proceeding and the publicity related to the proceeding warrant disqualification. (Cal. Judges Assn., Opn. 55, *supra*, p. 2 [financial consequences to a family member employed by a government entity that receives an adverse judgment so attenuated that no reasonable person would doubt the judge's impartiality]; Rothman, *supra*, § 7:46, pp. 464-465.)

Another factor the judge should consider is the size of the government legal office. If the government legal office is so large that the head of the office has minimal oversight of the attorneys appearing before the judge, there is less of an appearance of doubt that the judge would be impartial. If, however, the government legal office consists of only a few attorneys and the head of the office is involved in the day-to-day supervision of the attorneys or the proceeding, the judge's impartiality may reasonably be questioned.

In sum, the committee advises that, in most instances, a judge is not disqualified from hearing a matter where the judge's spouse provides campaign services to reelect the head of a government legal office when attorneys from that office, but not the head of the office, appear as counsel in a proceeding. The judge should evaluate other factors, such as whether the campaign is entirely or mostly self-funded, the publicity surrounding the proceeding, and the size of the government legal office. Depending on these facts, a reasonable person may doubt the judge's impartiality, requiring disqualification.

IV. Disclosure Requirements

Once a trial judge determines that he or she is not disqualified under the Code of Civil Procedure or the canons, the judge must then evaluate whether disclosure is necessary. Disclosure ensures the appearance of impartiality and integrity of decisions as required by canons 1 and 2, provides information that could form a basis for a party to seek recusal, and gives the parties an opportunity to bring to the judge's attention any additional information that the judge is unaware of, which may be relevant to disqualification. (Canons 1 [a judge shall uphold the integrity of the judiciary] & 2 [a judge shall avoid impropriety and the appearance of impropriety]; *People v. Freeman*, *supra*, 47 Cal.4th 993, 1000-1001 [the grounds for disqualification are concerned with the rights of the parties and ensure public confidence in the judiciary]; Rothman, *supra*, § 7:73, p. 495.) A judge must examine what information is relevant to the question of disqualification and should be disclosed, if any, and how long disclosure is required.

A. Relevance

The disclosure requirement is broader than the disqualification requirement. A judge must disclose on the record "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." (Canon 3E(2)(a).) Information that is reasonably relevant to the question of disqualification includes any information a judge relies on when deciding whether he or she is disqualified. (Rothman, *supra*, § 7:75, p. 500 ["relevant" as used in canon 3E(2)(a) refers to the definition in Evidence Code section 210 – the information should have a tendency in reason to prove or disprove something].)

The fact that a family member is an employee of a private law firm or a government legal office appearing before the court, even where the family member has no involvement in the case, is relevant to the question of disqualification and should be disclosed. (Rothman, *supra*, § 7:45, pp. 459, 462; Com. on Jud. Performance, Ann. Rep.

(2016), Advisory Letter 10, p. 28 [judge failed to disclose relative's employment with the district attorney's office when attorneys appeared before the judge]; Com. on Jud. Performance, Ann. Rep. (2005), Advisory Letter 15, p. 25 [judge failed to disclose that his teenage child was employed as a "go-fer" by a law firm while the law firm frequently appeared before the judge].) Similarly, if the spouse works for an agency, such as a police department, that is involved in an investigative capacity in a case but the spouse is not personally involved in the case, that fact should be disclosed. (Rothman, *supra*, § 7:46, p. 464.)

The committee advised that the parties or lawyers would consider the spouse's campaign services as similarly relevant to the question of disqualification in a matter. Although the judge's spouse has no direct connection to the government legal office, the spouse receives financial compensation from the head of the government office who has ultimate authority over those attorneys that appear before the judge. Therefore, the committee advised that the judge should disclose on the record the spouse's campaign services while the spouse is engaged in providing such services. (Canon 3E(2)(a); CJEO Formal Opn. 2013-002 (2013) [advising a judge how to make a disclosure on the record when there is no court reporter or electronic record].)

B. Duration of Disclosure

Neither the canons nor section 170.1 set a specific timeframe for disclosure of information that is relevant to disqualification, except as it relates to campaign contributions. Canon 3E(2)(b)(iii) requires a trial court judge to disclose campaign contributions that the judge received no later than one week after the receipt of the first contribution or loan and for two years after the judge takes the oath of office, or two years from the date of the contribution or loan, whichever is later. Section 170.1, subdivision (a)(2)(B) and (8)(A) set timeframes relevant to disqualification, requiring that a judge disqualify himself or herself unless at least two years have elapsed from when the judge served as a lawyer in the proceeding or from when the judge participated in discussions regarding prospective employment as a dispute resolution neutral,

respectively. Based on these provisions, a two-year timeframe has become the benchmark for other disclosure obligations. (Cal. Judges Assn., Opn. No. 60 (2008), p. 3 [suggesting that two years is a reasonable period of time to disclose and may serve as a benchmark].)

The committee advised that the judge should disclose the spouse's campaign services for a reasonable period of time from when the spouse's services end or from when the spouse receives final payment from the head of the government legal office, whichever occurs later. Depending on the facts surrounding the spouse's campaign services and the matter before the judge, including the degree of the head of the government legal office's involvement in the proceeding, the degree of the spouse's involvement in the campaign, the source of the campaign funds, the publicity surrounding the proceeding, and the size of the government legal office, the judge's disclosure obligations may be shorter or longer than the two-year benchmark. Disclosure for a reasonable period of time achieves the objectives of ensuring the appearance of impartiality and integrity of decisions, providing an opportunity to hear from the parties and to determine whether the disclosure raises other issues that the judge might want to consider, and providing information that could form a basis for a party to seek recusal. (Canons 1 & 2; Rothman, *supra*, § 7:73, p. 495.)

V. Conclusion

A judge has a duty to decide all matters assigned to the judge, except where disqualified by law. The committee advised that, in most instances, a judge whose spouse provides campaign services to the head of a government legal office may decline to disqualify himself or herself when attorneys from that office, but not the head of the office, appear before the judge. The judge should disqualify himself or herself if the judge believes that he or she is unable to act impartially. The committee further advised that a trial court judge should disclose the fact that the spouse is providing campaign services to the head of the government legal office. The judge should continue to

disclose the spouse's campaign services for a reasonable period of time from when the spouse's services end or from when the final payment is received, whichever occurs later.

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COMMITTEE ON JUDICIAL ETHICS OPINIONS
350 McAllister Street, Room 1144A
San Francisco, CA 94102
(855) 854-5366
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CJEO Oral Advice Summary No. 2013-001

[Issued September 4, 2013]

DISCLOSURE WHEN A JUDGE'S SPOUSE SERVES ON A CITY COMMISSION

I. Question:

Is disclosure required when a judge's spouse has been appointed as a city utility commissioner and the judge hears cases involving the city?

The question was asked by a judge whose spouse was recently nominated by the mayor to serve as a city utility commissioner. Commissioners are responsible for setting policy only as to the utility itself. As a proprietary department, the utility manages and controls its own assets and funds. Commissioners are volunteers; they are not paid and are not city employees. The commissioners meet as a board once or twice per month. The judge frequently hears cases involving the city, but questioned whether disclosure is necessary when the utility itself is not a party and neither the actions nor policies of the utility are implicated in the dispute.

II. Oral Advice Provided:

Disclosure is required when a judge's spouse has been appointed as an unpaid commissioner of a city utility and the judge hears cases involving the city. As a general rule, information relevant to the question of disqualification must be disclosed. (Cal. Code of Jud. Ethics, canon 3E; Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007), § 7.72, p. 380.) In this instance, disqualification would be required when the city is a party only if the judge's spouse were employed by the city or if the spouse had a relationship with the city as a director, advisor or other active participant in city affairs (Code Civ. Proc., §§ 170.1 subds. (a)(3) & (a)(4), 170.5 subd. (b); Rothman, *supra*, § 7.16, pp. 307-308.) The facts presented do not mandate disqualification every time the city is a party because the judge's spouse is not a city employee nor an active participant in the affairs of the city itself. Reaching that conclusion necessarily requires consideration of the spouse's relationship to the city and whether he or she is an active participant in policy and affairs. Consideration of those distinguishing facts makes them relevant to the question of disqualification, thereby requiring disclosure whenever the city is a party. (Canon 3E.)

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CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS
350 McAllister Street, Room 1144A
San Francisco, CA 94102
(855) 854-5366
www.JudicialEthicsOpinions.ca.gov

CJEO Oral Advice Summary No. 2013-002

[Issued September 10, 2013]

ATTENDING A PRIVATE FOUNDATION MEETING TO SPEAK ABOUT NATIONAL AND STATE CIVICS EDUCATION WORK

I. Question:

May a judicial officer meet with the board of a private foundation to discuss national and state civics education and a project the judicial officer is developing with a national legal association?

A judicial officer requested advice as to whether the canons prohibit attending a board meeting of a private foundation to speak about national and state civics education. The judicial officer had been appointed within the judicial branch to multiple civics education committees and task forces. The question centered on a civics education project the judicial officer was developing with a national legal association. A private foundation was interested in working with the national legal association on the project and asked the judicial officer to speak to its board about state and national civics education. Members of the foundation include former California judicial officers and

prominent attorneys. The judicial officer would not seek financial support from the foundation and would limit discussions with the board to civics education and the proposed project with the national legal association.

II. Oral Advice Provided:

The judicial officer may meet with the board of the private foundation to discuss matters concerning the law, the legal system, or the administration of justice. Judges are authorized to "speak, write lecture, teach, and participate in activities concerning legal and nonlegal subject matters," subject to the requirements of the Code of Judicial Ethics. (Cal. Code Jud. Ethics, canon 4B.) The Advisory Committee commentary to canon 4B states that "[a]s a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice . . . . To the extent that time permits, a judge may do so, either independently or through a bar or judicial association or other group dedicated to the improvements of the law." (Cal. Code Jud. Ethics, Advisory Com. commentary foll. canon 4B.) The terminology section of the Code states the following when defining the law, the legal system, or the administration of justice: "When a judge engages in an activity that relates to the law, the legal system, or the administration of justice, the judge should consider factors such as whether the activity upholds the integrity, impartiality, and independence of the judiciary (canons 1 and 2A), whether it impairs public confidence in the judiciary (canon 2), whether the judge is allowing the activity to take precedence over judicial duties (canon 3A), and whether engaging in the activity would cause the judge to be disqualified (canon 4A(4))." (Cal. Code Jud. Ethics, Terminology, "Law, the legal system, or the administration of justice.")

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COMMITTEE ON JUDICIAL ETHICS OPINIONS
350 McAllister Street, Room 1144A
San Francisco, CA 94102
(855) 854-5366
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CJEO Oral Advice Summary No. 2013-003

[Issued September 2, 2013]

FUNDRAISING AMONG JUDGES FOR A CIVICS EDUCATION PROJECT OF A NONPROFIT NATIONAL LEGAL ASSOCIATION

I. Question:

May a judicial officer engage in direct, individual solicitation of money from other judges to fund a civics education project by a nonprofit national legal association?

An appellate justice requested advice as to whether the canons prohibit fundraising among other judicial officers for a civics education project. The appellate justice chairs a civics education committee of a nonprofit national legal association and would like to solicit funds for the committee's civics education project from other members of the committee who are also judicial officers. Members of the committee include judges and justices from other states, federal judges, retired judges from other states, and California judges and justices. The appellate justice would not solicit funds from committee members who are trial judges in the justice's appellate district and whose work the justice may review.

I. Oral Advice Provided:

The appellate justice may engage in direct, individual solicitation of money from other judges to fund the civics education project of a nonprofit association devoted to the improvement of the law, the legal system, and the administration of justice. Although a judicial officer is prohibited from fundraising for a government, civic, or charitable organization, a judicial officer is permitted to "privately solicit funds for such an organization from other judges (excluding court commissioners, referees, retired judges, court-appointed arbitrators, hearing officers, and temporary judges)." (Cal. Code Jud. Ethics, canon 4C(3)(d)(i); Advisory Com. commentary foll. canon 4C(3)(d).) The rationale for this fundraising exception is that the improper use of the judicial office does not apply to private solicitations among judges. (Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007), § 10.45, pp. 559-560.) The appellate justice's intent not to solicit trial judges within the justice's appellate district eliminates any ethical concerns about the use of superior judicial office. All of the retired judges on the committee are from other states and do not fall within the retired judge exclusion from the exception in canon 4C(3)(d)(i). The code defines judges as officers of the state judicial system (canon 6A) and retired judges as those serving in the Assigned Judges Program (canon 6B). These definitions would apply to the use of the term "retired judges" in canon 4C(3)(d)(i), which would not preclude the appellate justice from soliciting the out-of-state retired judges on the committee.

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350 McAllister Street, Room 1144A
San Francisco, CA 94102
(855) 854-5366
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CJEO Oral Advice Summary No. 2014-004

[Issued January 29, 2014]

USE OF A TESIMONIAL LETTER TO PROMOTE A NATIONAL BAR ASSOCIATION PROGRAM

I. Questions:

Question 1. May a California judicial officer serve as signatory to a testimonial letter for a national bar association program that coordinates judicial internships for law students, which will be mailed directly to sitting federal and state judges using judicial letterhead?

Question 2. Would use of the testimonial letter by the national bar association as part of informational materials given to law firms considering participating in or funding the program raise ethical concerns under the California Code of Judicial Ethics? Specifically:

(a) May the testimonial letter be included in informational materials forwarded by the national bar association to law firms that request information about the program?

(b) May the testimonial letter be included in informational materials forwarded to law firms by the national bar association to solicit funds for the program?

(c) May the testimonial letter be posted on the national bar association's website as part of informational material available to all viewers?

II. Oral Advice Provided:

Question 1. A California judicial officer may serve as a signatory to a testimonial letter that will be mailed directly to sitting federal and state judges using judicial letterhead. The draft testimonial letter provided to the committee with the request for oral advice falls within the permissions granted in the California Code of Judicial Ethics because it is a personal-knowledge-based testimonial letter (canon 2(B)(2)(e)) recommending a national bar association program dedicated to the improvement of the law, the legal system, and the administration of justice (canon 4B.). It is addressed to other state and federal judicial officers and seeks their non-monetary participation in the program (Advisory Com. commentary foll. canon 4B). It does not request funds or otherwise seek to raise money for the program. Thus, the judicial officer's name and title may be used in the letter to promote the program. Because the letter provides judges with information about the program, which includes mentoring and employing interns in the performance of judicial duties, it is being used for a public purpose and the letter may be written on official judicial stationary. (Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007), § 8.52, p. 426; canon 2B(2)(e).)

Question 2. The draft testimonial letter raises ethical concerns under the California Code of Judicial Ethics if it is used essentially as a fundraising mechanism by the national bar association to solicit donations of time or money for the program from law firms. (Canon 4C(3)(d)(iv).) If sent to law firms as part of program materials intended to solicit funds, the letter provides a reasonable implication of the judicial officer's endorsement of funding and could reasonably be perceived as part of that

solicitation. Such use of the letter is prohibited under canon 4C(3)(d)(iv). Specifically, the testimonial letter may not be provided to law firms considering participation in the program as a sponsor or contributor. The letter may not be forwarded to law firms as part of a solicitation effort by the national bar association seeking funding for the program, regardless of whether or not the law firms have requested information about the program. The letter may be posted on the national bar association's website as part of informational material available to all viewers, including judges, law firms, and the public, but may not be posted on an area of the website devoted to solicitation and funding.

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CJEO Oral Advice Summary No. 2014-005

[Posted March 17, 2014]

DISQUALIFICATION FOR MEMBERSHIP IN AN AMICUS CURIAE

I. Question:

Does an appellate justice have disqualification obligations when the justice is a member of a regional, environmental, non-profit organization that has filed an amicus curiae brief in a matter being heard by the justice?

The question was asked by an appellate justice hearing an appeal in which an amicus curiae brief had been filed on behalf of a regional, environmental, non-profit organization. The justice has been a member of the amicus organization for approximately 20 years. The justice's participation in the organization has been limited to payment of annual membership dues of approximately $120.00.

II. Oral Advice Provided:

The justice has discretion to decline to disqualify. Canon 4A requires judges to conduct their extrajudicial activities so that they do not cast doubt on the judge's capacity to act impartially or lead to frequent disqualification. (Cal. Code of Jud. Ethics, canon 4A(1) and (4).) Canon 3E(4) obligates appellate justice to make a discretionary decision to disqualify if the justice substantially doubts his or her capacity to be impartial, or if the circumstances are such that a reasonable person aware of the facts would doubt the justice's ability to be impartial. (Canon 3E(4)(b) and (c).)

Judicial membership in non-profit community organizations that do not practice invidious discrimination is not prohibited by the canons. (Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007), §§ 10.02-10.06, pp. 525-527.) Instead, community activities are expected of judges and encouraged. (Canon 4A, Advisory Committee commentary foll. canon 4A; Standards of Judicial Administration, std. 10.5.)

Two sources provide guidance on disqualification issues posed by judicial involvement in non-profit organizations (Rothman, *supra*, § 7.57, pp. 367-368, append. L [Guide to Involvement in Community Activities and Outreach], and Cal. Judges Assoc., Formal Ethics Opinion No. 53 (2003), pp. 1-4). Both provide factors to be considered by judges when determining their disqualification obligations where the judge has made contributions to an appearing non-profit organization (*id*.). The applicable factors are:

1) The nature of the organization;
2) The levels of involvement;
3) The size of the contribution; and
4) Whether the contribution is a voluntary donation.

Factors 2-4 clearly indicate against disqualification in this case. The justice's level of involvement is limited to annual payment of dues. The size of the justice's $120 membership dues are small in relation to the organization's total dues from over 35,000 members. The justice renews membership annually and does not participate in a fundraising event.

Only the first factor requires analysis, but the resulting conclusions also indicate against disqualification. Judge Rothman explains the disqualification concerns related to the nature of the organization as follows: "Where the non-profit organization represents a side in litigation before the courts (*e.g.*, a contribution to Legal Aid suggests support of access to justice for the poor, whereas a contribution to a tenant's advocacy group suggests sympathy for a side in landlord/tenant cases) … membership in the organization could raise a question of the judge's capacity to maintain impartiality." (Rothman, *supra*, § 7.57, pp. 367-368.) Here, the non-profit organization is like Legal Aid in that it supports conservation of regional rivers. The non-profit organization is not in the nature of an advocacy group and it is not regularly involved in litigation, such as may be the case with the Sierra Club. (See, *e.g.*, In re U.S., 666 F.2d 690, 695 (1st Cir. 1981) [pre-judicial appointment participation in the Sierra Club, which regularly engages in adversarial court proceedings, does not require disqualification]; Flamm, *Judicial Disqualification* (2d ed., 2007), §10.5, p. 269 [disqualification in federal proceedings involving the Sierra Club may sometimes be appropriate for post-appointment membership].)

The most significant fact here, however, is that the non-profit organization filed an amicus brief and is not a party in the matter the justice is deciding. A reasonable person aware of this fact would have no reason to doubt the justice's ability to be impartial in deciding *the interests of the parties*. The California Supreme Court's practices support this conclusion.

In Supreme Court matters in which one or more justices hold a financial interest in an organization that has filed an amicus brief, the court may decide to issue what is titled a *Notice Concerning Necessity to Recuse* (copy attached below). In that *Notice*, the court concludes that a justice is not required to recuse when a non-party files an amicus brief and the justice has a financial interest in the amicus curiae. The *Notice* provides notice to the parties that after considering all of the applicable rules, canons, statutes, and principles, the justices who hold financial interests in amicus curiaes have declined to recuse themselves and will continue to participate in the proceedings.

Here, as the court concludes in its *Notice Concerning Necessity to Recuse*, the justice has the discretion to decline to disqualify. The justice also has the discretion to decide whether or not to disclose the membership and the decision not to disqualify (Rothman, *supra*, § 7.72, p. 382, § 7.90, p. 389).

III. Attachment

NOTICE CONCERNING NECESSITY TO RECUSE

A justice is required to recuse him or herself when he or she has specified financial or other interests in a party appearing before the court. The court has been asked whether the same recusal requirement applies when a justice has a similar interest in an amicus curiae, but not a party.

No statute, Canon of Ethics, or rule requires recusal under such facts. Recusal is required if a judicial officer or a specified member of the justice's household has a financial interest in the matter, defined as an "ownership or more than 1 percent legal or equitable interest *in a party*, or a legal or equitable interest *in a party* of a fair market value exceeding one thousand five hundred dollars." (Code of Judicial Ethics, canon 3E(5)(d), italics added.) There may, of course, be some circumstances in which recusal based on a non-party interest would be appropriate pursuant to canon 3E(4)(c) of the

Code of Judicial Ethics, requiring disqualification if "the circumstances are such that a reasonable person aware of the facts would doubt the justice's ability to be impartial." Nevertheless, it is clear that the applicable laws and regulations do not automatically require disqualification based upon a financial interest in a non-party to the action.

Each justice has a duty to hear the matters assigned to him or her in the absence of a ground for disqualification. (Canon 3B(1).) Moreover, it is important to the administration of justice to avoid the potential for "justice- shopping" that might occur if non-parties were to file amicus curiae briefs or letters in order to disqualify an otherwise qualified jurist in an individual case.

After considering all the applicable rules, canons, statutes, and principles, the justices who hold a financial interest in parties that have participated in the filing of amicus curiae briefs have declined to recuse themselves and will continue to participate in the proceedings in the above entitled matter.

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CJEO Oral Advice Summary No. 2014-006

[Posted March 17, 2014]

DISQUALIFICATION FOR MEMBERSHIP IN A SPECIALITY WOMEN'S BAR ASSCOIATION

I. Question:

Are judges or justices who are members of a specialty bar association dedicated to the advancement of women in law and society disqualified from hearing matters involving female litigants, such as family law matters?

The question was asked by a presiding judge who received a request from an attorney that all female judicial members of a specialty women's bar association be banned from hearing family law matters and appeals because of bias in favor of female litigants. The stated mission of the specialty women's bar association is to advance the status of women in the law and society and membership is open to male and female members of the bar and bench.

II. Oral Advice Provided:

Judges and justices who are members of a specialty bar association dedicated to the advancement of women in law and society are not disqualified from hearing matters involving female litigants, such as family law matters. The Code of Judicial Ethics does not prohibit membership in a specialty women's bar association that has male and female members and does not invidiously discriminate based on gender. (Cal. Code of Judicial Ethics, canon 2C; Advisory Committee commentary foll. canon 2C; Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007) §10.23, pp. 538-539.) A person aware of the women's bar association's mission and membership would reasonably conclude that its male and female judicial members share an interest in the goal of advancing women's participation in law and society as attorneys and judges. Such an aware person would not reasonably doubt a judicial member's ability to be impartial towards female litigants. (Cal. Code of Judicial Ethics, canon 3E(1), (4)(c); Advisory Committee commentary foll. canon 2A; Code of Civ. Proc., § 170.1(a)(6)(A)(iii).)

Regarding the request made by an attorney in a letter to the presiding judge asking that all members of a women's bar association be banned from family law matters and appeals, the committee concludes that the attorney's request is beyond the authority of the presiding judge, under any circumstances, until a judicial officer has made a personal determination that he or she is disqualified to hear an assigned matter and notifies the presiding judge. (Cal. Code of Judicial Ethics, canon 3B(1); Code of Civ. Proc., §§ 170-170.9; Cal. Rules of Court, rules 10.603(c)(1) and 10.608(1)(A); Rothman, *supra*, § 7.17, p. 310, Appendix F; Cal. Judges Assoc., Formal Ethics Opinion No. 62 (2009) pp. 2-3 [except in the case of a motion by a party under section 170.3(c), no judge, including a presiding judge, may declare another judge to be disqualified to hear a case].)

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CJEO Oral Advice Summary No. 2014-007

[Posted May 2, 2014]

JUDICIAL REVIEW OF EX PARTE APPLICATIONS FOR FAMILY LAW CONTEMPT ORDERS

I. Question:

CJEO was asked to clarify or extend CJEO Formal Opinion 2014-004, or to provide an independent opinion addressing judicial review of ex parte applications for contempt orders. The request posed the following question:

> Does a judicial officer breach the ethical obligations (as stated in CJEO Formal Opinion 2014-004) to avoid having ex-parte communication with a party in viewing family law contempt applications, i.e. reading them and/or signing them or rejecting them, without prior notice having been given to the opposing party and or counsel?

CJEO made the discretionary decision to provide oral advice in response to this request (Cal. Rules of Court, rule 9.80 (j)(1); CJEO Rules, rule 7(b)).

II. Oral Advice Provided:

CJEO Formal Opinion 2014-004 clearly states the ethical rule that ex parte communications are prohibited unless expressly authorized by law under canon 3B(7)(c) of the California Code of Judicial Ethics. The opinion also clearly states that it addresses only the extent to which ex parte communications are authorized by the family law rules of court governing ex parte applications for non-domestic-violence emergency orders (Cal. Rules of Court, rules 5.151 et seq.). The opinion's analysis is clearly limited to the question of whether the screening procedures used under a specific local rule allow ex parte communications that are not authorized by those family law rules of court. Given these express limitations, there is no basis for a clarification or extension of CJEO Formal Opinion 2014-004 to discuss ex parte applications for family law contempt orders, which are governed by other laws pertaining to general civil and family law contempt proceedings (Code of Civil Procedure §§ 1211(b), 1211.5; Family Law Code § 292). The Judicial Council Forms mandated for use under those statutes provide procedures for authorized judicial review of ex parte communications (Family Law Code § 292(c); JCC FL-410, 411, and 412). An independent CJEO advisory opinion is not necessary to explain those forms or otherwise provide a legal opinion interpreting the contempt statutes.

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CJEO Oral Advice Summary No. 2014-008

[Posted July 1, 2014]

APPLICATION OF THE RULE OF NECESSITY

I. Question:

Does the rule of necessity permit a sitting appellate justice to author an opinion deciding an issue on appeal that would disqualify all sitting and retired appellate justices?

The question was asked by an appellate justice assigned to author an opinion involving the issue of whether article Vl, section 17, of the California Constitution prohibits judges and justices from accepting any form of public employment during the remainder of their term of office.[1]

[1] Limited identifying information is included in this oral advice summary because confidentiality has been waived by the appellate justice's reliance on, and reference to, this advice in a published appellate opinion (Cal. Rules of Court, rule 9.80(h)(3); CJEO rules, rule 5(e); Gilbert v. Chiang (2014) 227 Cal.App.4th 537).

II. Oral Advice Provided:

Under the 'rule of necessity,' a judge is not precluded from adjudicating a cause because of a disqualifying financial interest if there is no judge or court available to hear and resolve the cause. (*Olson v. Cory* (1980) 27 Cal.3d 532, 537; *People v. Superior Court (Mudge)* (1997) 54 Cal.App.4th 407, 410.) The California Code of Judicial Ethics recognizes the rule of necessity in the Advisory Committee commentary to canon 3E (Cal. Code Jud. Ethics, Advisory Com. commentary foll. canon 3E). In view of the fact that all sitting and retired California appellate justices have an interest in *Gilbert v. Controller of the State of California*, which involves the issue of whether article Vl, section 17, of the California Constitution prohibits judges and justices from accepting any form of public employment during the remainder of their term of office, the rule of necessity applies and the requesting justice is qualified to determine the issues before the justice's appellate panel and author an opinion in the matter.

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CJEO Oral Advice Summary No. 2014-009

[Posted November 24, 2014]

PROHIBITION ON FUNDRASING WHILE A SUBORDINATE JUDICIAL OFFICER

I. Question:

Does the California Code of Judicial Ethics prohibit a subordinate judicial officer in the state judicial branch from engaging in fundraising activities as the Chief Justice of her sovereign nation's tribal court and judicial system? [1]

II. Oral Advice Provided:

The California Code of Judicial Ethics prohibits a state judicial officer from personally engaging in the solicitation of funds or other fundraising activities on behalf of a governmental, civic, or charitable organization (Cal. Code Jud. Ethics, canon 4C(3)(d)(i).) The purpose of the canon is to prevent "… *the danger that the person*

[1] Limited identifying information is included in this oral advice summary because confidentiality has been waived by the requesting party (Cal. Rules of Court, rule 9.80(h)(3); CJEO rules, rule 5(e)).

solicited will feel obligated to respond favorably if the solicitor is in a position of influence or control." (Advisory Com. Com., foll. canon 4C(3)(d)(i).) The canon is not limited in application or purpose to fundraising on behalf of charitable organizations or to activities that advance a private interest. The canon does not contain an exception for worthwhile causes or extraordinary needs. (Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007) § 10.42, p. 556.)

The requesting state court commissioner analogizes her fundraising activities on behalf of her tribal court to the California Chief Justice and Judicial Council's budget management activities before the executive and legislative branches, which are authorized by state law and are not solicitation of funds that are prohibited by the Code of Judicial Ethics. (Cal. Rules of Court, rule 10.101(b)(3), (c)(1)(B).) The requesting state court commissioner's direct solicitation of donations from groups and individuals is dissimilar from these state law authorized administrative duties and is fundraising that is prohibited by canon 4C(3)(d)(i).

The Code of Judicial Ethics does not prohibit the Chief Justice of a sovereign tribal nation from performing judicial responsibilities authorized by tribal law, including personal solicitation of funds necessary for her tribal court. The Code does, however, prohibit a state court commissioner from fundraising while holding state judicial office. The requesting commissioner is in a position of influence, *as a state court judicial officer,* over those she solicits for funds on behalf of her tribal court, even if she does so without the use of state court judicial title. (Rothman, *supra*, § 10.44, p. 559) The requesting commissioner is prohibited from fundraising for her tribal court and tribal justice system while she is employed as a state court subordinate judicial officer.

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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)).

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CJEO Oral Advice Summary No. 2015-010

[Posted June 17, 2015]

SERVICE BY AN APPELLATE JUSTICE AS A COMPLIANCE OFFICER IN PENDING FEDERAL PROCEEDINGS

I. Question:

Does the California Code of Judicial Ethics prohibit a recently nominated Associate Justice of the California Court of Appeal from continuing to serve as a Prison Compliance Officer in pending federal proceedings concerning overcrowding conditions in the California prison system?[1]

II. Oral Advice Provided:

The question of whether an appellate justice may serve as a Prison Compliance Officer appointed by a federal court panel in pending federal proceedings involving overcrowding in the California prison system raises both legal issues under the California Constitution and ethical issues under the California Code of Judicial Ethics. The Supreme Court Committee on Judicial

[1] Limited identifying information is included in this oral advice summary because confidentiality has been waived by the requesting party (Cal. Rules of Court, rule 9.80(h)(3); CJEO rules, rule 5(e)).

Ethics Opinions (CJEO) has no authority to provide legal advice and declines to do so. It is the responsibility of the appellate justice requesting ethical advice from CJEO to obtain a legal opinion about whether simultaneous service is permissible under article 7, sections 7 & 17, of the California Constitution.

Assuming for the purposes of this opinion that there are no constitutional impediments, the question is whether the California Code of Judicial Ethics prohibits a state court appellate justice from serving as a prison compliance officer under court order in federal litigation involving overcrowding in the California prison system.

Simultaneous service would not be strictly prohibited under canons 1 or 2 because a person aware of the federal court position would not have reason to doubt the justice's impartiality or independence in state appellate matters generally. (Cal. Code Jud. Ethics, canons 1 & 2; Advisory Com. commentary, foll. canon 2A [test for appearance of impropriety is whether a person aware of the facts might reasonably entertain doubt that the judge would be able to act with integrity, impartiality, and competence].) More specific canons addressing extrajudicial involvement in governmental activities and the disqualification requirements of appellate justices also do not prohibit simultaneous service, however, those canons raise issues for consideration by the appellate justice during the course of that service.

Federal court appointment as a Prison Compliance Officer is an extrajudicial activity involving the law, the legal system, and the administration of justice, which is excepted from the prohibitions against appearing before public officials or accepting governmental positions in canons 4C(1) & (2). The appropriateness of continuing such an excepted extrajudicial assignment must be assessed by the appellate justice in light of the demands on his time and the potential for interference with his effectiveness and independence. (Advisory Com. commentary, foll. canon 4C(2); Canon 3A ["judicial duties … shall take precedence over all other activities …."].)

Similarly, the disqualification canons do not strictly prohibit simultaneous service, however, the potential for disqualification under canon 3E(5)(f)(ii) and the frequency of disqualification under canon 4A(4) must be considered by the appellate justice when assessing the appropriateness of continuing to serve in the federal court Prison Compliance Officer

position. The extent to which the justice might be disqualified based on personal knowledge of disputed evidentiary facts about individuals and circumstances in the California prison system gained while serving as the Prison Compliance Officer is only speculative. Continued service is not precluded until the justice makes such a disqualification decision in a specific matter before him as an appellate justice. (*Kaufman v. Court of Appeal* (1982) 31 Cal.3d 933, 937-940 [each appellate justice decides whether the facts require recusal, subject only to higher court review for bias or unfairness in the appellate proceedings].)

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CJEO Oral Advice Summary No. 2015-011

[Posted July 20, 2015]

USE OF JUDICIAL TITLE ON A SCHOLARSHIP FUND

I. Question:

May a legal educational institution name a scholarship after a sitting judicial officer and raise donations to fund the scholarship in the judge's name?

II. Oral Advice Provided:

A judicial officer's name and title may not be used by an alumni association of the judge's law school alma mater on a scholarship named in honor of the judge if the scholarship will be funded by donations solicited using the judge's name.

Canon 2B(2) broadly prohibits lending the prestige of judicial office or using the judicial title *in any manner* to advance the interests of others. (Cal. Code Jud. Ethics, canon 2b(2).)[1] Canon 4C(d)(i) prohibits solicitation of funds *or other fundraising activities*.

[1] All further references to canons are to the California Code of Judicial Ethics.

Read together, these canons preclude a judge from allowing his or her name to be used in any manner that involves a fundraising activity for the direct benefit of another, including the use of judicial title in scholarship fundraising activities. (California Judges Association (CJA) Judicial Ethics Update (1983) I.A. [a judge is prohibited from allowing his or her name to appear in the letterhead of a scholarship fund committee when the letterhead is to be used in soliciting members of the bar and corporations to donate money to the scholarship fund]; CJA Judicial Ethics Update (1982) I.C. [prohibiting the same use of judicial title on the letterhead of a scholarship fund committee honoring a deceased judge when the letter is to be used in soliciting members of the bar and corporations to donate money to the fund].)

While the canons contain several exceptions for activities concerning the law, the legal system, and the administration of justice, there is no applicable exception for fundraising activities using the judicial title for the direct benefit of a scholarship fund or recipient. For example, canon 4B authorizes judges to participate in educational activities concerning legal matters, but those activities are still subject to the requirements of the code, including the canons prohibiting fundraising. As the advisory committee commentary to canon 4B explains, this exception applies narrowly to legal educational materials where the use of judicial title is necessary to identify a judge as an author or speaker. (Advisory Com. commentary, Cal. Code Jud. Ethics, foll. canon 4B.)

Similarly, canon 4C(d)(iv) prohibits the use of judicial prestige for fundraising, but permits a judge to be a speaker, guest of honor, or recipient of an award by a public or charitable service so long as the judge does not personally solicit funds. While naming a scholarship after a judge is indeed an honor, the solicitation of donations to fund the scholarship will necessarily use the judge's name in a manner that amounts to personal solicitation. (CJA Ethics Update (2009) IV.C.1. [a women lawyers association may establish and exclusively fund a scholarship in the judge's name with no other contributions to the scholarship fund to be sought or accepted].)

In the event that the honor is bestowed without the judge's prior authorization, the judge must take reasonable steps to correct the impermissible use of judicial title for fundraising activities. (Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007) § 10.51, p. 562 [a judge must make reasonable efforts to ensure against unauthorized uses of judicial title for fundraising, including appropriate notification and, if necessary, a request that clarification be sent to any recipients of unauthorized solicitations].)

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CJEO Oral Advice Summary No. 2015-012

[Posted August 24, 2015]

INVITING ATTORNEYS TO PROVIDE LEGAL EDUCATION TO APELLATE JUSTICES

I. Question:

May appellate attorneys be invited to speak on law-related topics at a legal education program held for the justices of the appellate district court where the attorneys practice?

II. Oral Advice Provided:

The California Code of Judicial Ethics[1] permits a presiding justice to invite attorneys to speak on law-related topics at a legal education program held for the justices of the appellate district court where the attorneys practice, so long as precautions are

[1] All further references are to the canons and Advisory Committee commentary in the California Code of Judicial Ethics.

taken to avoid the appearance of impropriety or the diminishment of the public's confidence in the impartiality of the court. (Canon 2A(2) [a judge shall act at all times in a manner that promotes confidence in the integrity and impartiality of the judiciary]; Advisory Comm. Commentary foll. Canon 2A(2) [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]; canon 4B [a judge may participate in activities concerning legal subject matters, subject to the requirements of the code]; (Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007) § 6.37, p. 290 (Rothman) [a judge may not participate in an educational program that may cast reasonable doubt on the judge's capacity to act impartially, create the appearance of political bias or impropriety, or involve comment on pending cases that might substantially interfere with a fair trial or hearing]; Cal. Judges Assoc. (CJA) Formal Opinion No. 47 (1997) p. 4 [it is appropriate and desirable for judges to participate educational programs provided by attorneys so long as the judges' participation does not cast reasonable doubt on impartiality or diminish public confidence in the judiciary].)

In the context of an educational luncheon program for appellate justices where a variety of attorneys who practice before the court are invited to speak about current law-related topics, the presiding justice is advised to consider and balance the following precautions to ensure confidence in the impartiality of the court:

- Invite the attorney to discuss legal issues but not specific cases, issues, or controversies pending in the courts. (Rothman, *supra*, § 6.37, p. 290, fnt. 161 [any educational activity must avoid public comment on pending or impending cases]; CJA Op. No. 58 (2006) p. 3 [a judge should never attend an educational program in which specific matters pending before the court are the subject of discussion].)

- Review the curriculum and content of the attorney's remarks before the educational program to ensure that it is not designed to advocate a particular point

of view or the merits of the attorney's cases. (CJA Op. No. 47, *supra*, p. 3 [discussion of legal issues, ideas, and philosophies is appropriate, however, discussion of specific pending cases is not appropriate, whether or not the case is pending before another judge]; CJA Op. No. 58, *supra*, p. 3 [a judge invited to attend an educational program should scrutinize the curriculum and content to ensure that the program is not designed to advocate a particular point of view].)

- Invite attorneys representing opposing positions or parties to speak to the justices or otherwise be available to hear additional viewpoints. (CJA Op. No. 47, *supra*, p. 3 [to offset any perception of partiality, judges participating in educational events with attorneys representing particular viewpoints are advised to be equally available to groups representing opposing viewpoints]; CJA Op. No. 58, *supra*, p. 3 [to dispel any appearance of favoritism, judges should be available to participate in educational programs involving other groups].)

- Prohibit use of the speaking engagement in the attorney's advertising or to otherwise promote the attorney's practice. (Canon 2B(2) [a judge shall not lend the prestige of judicial office or use the judicial title in any manner to advance the interests of others]; CJA Op. No. 47, *supra*, p. 3 [attorney groups providing education to judges may not use the judge in its advertising in such a manner as to make it appear that the judge promotes the goals of the organization].)

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CJEO Oral Advice Summary No. 2015-013

[Posted November 12, 2015]

JUDICIAL MEMBERSHIP IN A BOY SCOUTS OF AMERICA-SPONSORED EAGLE SCOUT ALUMNI GROUP

I. Question:

Will the California Code of Judicial Ethics prohibit judicial membership in a local Boy Scouts of America (BSA) sponsored eagle scout alumni group after the canon 2C amendment becomes effective in January, 2016, and the "youth organization" exemption is eliminated from the ban on membership in organizations that practice invidious discrimination?

II. Oral Advice Provided:

Canon 2C[1] prohibits membership in "any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or

[1] All further references are to the canons and Advisory Committee commentary in the California Code of Judicial Ethics.

sexual orientation." The amendment to canon 2C that becomes effective in January of 2016 eliminates a canon 2C exception for membership in nonprofit youth organizations, such as BSA.

The Advisory Committee commentary to canon 2C advises that determining whether an organization practices invidious discrimination depends on such "relevant factors as whether the organization is dedicated to the preservation of religious . . . or other values of legitimate common interest to its members. . . . Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes members on the basis of . . . sexual orientation. . . ." (Advisory Com. commentary, Cal. Code Jud. Ethics, foll. canon 2C; see also California Judges Association Formal Opinion No. 34, p. 3 (CJA) [citing and applying the Advisory Committee commentary following canon 2C as a "test" to determine whether a men's service club practiced invidious discrimination].)

Historically, BSA has prohibited youth and adult membership based on sexual orientation. In January, 2014, BSA adopted a policy that no youth will be denied membership on the basis of sexual orientation. In July, 2015, BSA adopted a policy that BSA employees and non-unit-serving volunteers will not be denied membership on the basis of sexual orientation. The policy also states that chartering organizations, such as those sponsoring local troops, have the right to select adult scout leaders based on the chartering organization's religious and moral values concerning sexuality.

Given these policies, judicial membership in a BSA-sponsored eagle scout alumni organization is not prohibited under canon 2C, effective January, 2016, because the current BSA policy precludes invidious discrimination on the basis of sexual orientation for non-unit-serving volunteers such as the eagle scout alumni members. The fact that

BSA's policy may result in discriminatory practices by some chartering organizations in the selection of local troop leaders does not prohibit membership in a BSA-sponsored eagle scout alumni organization that does not discriminate. (Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007) § 10.25, pp. 539-540 [a judge to be a member of a local group that does not discriminate against women even if the group is part of a national or international organization that allows invidious discrimination based on gender], citing CJA Opinion No. 34, pp. 3-4 [where an organization has made a formal decision to end discriminatory membership practices, but those previously excluded have not in fact yet been admitted, the judge who wishes to remain a member must hold a conscious belief that the open-membership policy is bona fide and will be implemented in the ordinary course of events].)

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CJEO Oral Advice Summary No. 2015-014

[Posted November 12, 2015]

JUDICIAL MEMBERSHIP IN A CHURCH-SPONSORED BOY SCOUTS OF AMERICA TROOP

I. Question:

Will the California Code of Judicial Ethics prohibit a judge from continuing to be the scoutmaster of a local Boy Scouts of America (BSA) troop that is sponsored by the judge's church after the canon 2C amendment becomes effective in January, 2016, and the "youth organization" exemption is eliminated from the ban on membership in organizations that practice invidious discrimination?

II. Oral Advice Provided:

Canon 2[1] prohibits membership in "any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or

[1] All further references are to the canons and Advisory Committee commentary in the California Code of Judicial Ethics.

sexual orientation." The amendment to canon 2C that becomes effective in January of 2016 eliminates a canon 2C exception for membership in nonprofit youth organizations, such as BSA. Following the amendment, canon 2C continues to state that it "does not apply to membership in a religious organization."

The Advisory Committee commentary to canon 2C advises that determining whether an organization practices invidious discrimination depends on such "relevant factors as whether the organization is dedicated to the preservation of religious . . . or other values of legitimate common interest to its members. . . . Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes members on the basis of . . . sexual orientation . . . ." (Advisory Com. commentary, Cal. Code Jud. Ethics, foll. canon 2C; see also California Judges Association Formal Opinion No. 34, p. 3 (CJA) [citing and applying the Advisory Committee commentary following canon 2C as a "test" to determine whether a men's service club practiced invidious discrimination].)

In the context of gender discrimination, canon 2C has been interpreted to allow a judge to be a member of a local group that does not discriminate against women even if the group is part of a national or international organization that allows invidious discrimination based on gender. (Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007) § 10.25, pp. 539-540 (Rothman); CJA Opinion No. 34, pp. 3-4; see also CJA Judicial Ethics Update (1997) p. 13 [membership in the Masons is improper unless the judge is satisfied that it is a religious organization or does not invidiously discriminate in light of canon 2C].) Thus, the focus of a canon 2C inquiry is on the membership practices of the specific local group in which a judge seeks to participate.

Historically, BSA has prohibited youth and adult membership based on sexual orientation. In January, 2014, BSA adopted a policy that no youth will be denied membership on the basis of sexual orientation. In July, 2015, BSA adopted a policy that BSA employees and non-unit-serving volunteers will not be denied membership on the basis of sexual orientation. The policy also states that chartering organizations, such as those sponsoring local troops, have the right to select adult scout leaders based on the chartering organization's religious and moral values concerning sexuality.

Given these policies, the requesting judge must determine for himself whether or not his church-sponsored BSA troop excludes adult gay members based on his troop's commonly-held religious values concerning sexuality:

> "A judge must determine for himself or herself whether a particular organization . . . practices invidious discrimination. The fact that no members of a particular race, gender, or other group are members of the organization, even where no by-law exists barring members of such groups, can be an indication of discriminatory practices or policies. Under those circumstances, the judge must investigate to be sure that there is no such policy or practice. Membership in a local club that does not discriminate is not prohibited, even if the club is part of a national or international organization that does discriminate." (Rothman, *supra*, § 10.30, pp. 539-560, citing CJA Op. No. 34, pp. 3-4.)

The advice from CJA cited by Judge Rothman is in accord:

> "Where an organization has made a formal decision to end discriminatory membership practices, but those previously excluded have not in fact yet been admitted, the judge who wishes to remain a member must hold a conscious belief

that the open-membership policy is bona fide and will be implemented in the ordinary course of events. If, in the circumstances, as he or she knows them, the judge cannot hold such a belief, Canon 2C requires resignation from the organization." (Id., p. 4.)

Accordingly, the committee cannot provide an opinion as to whether the requesting judge's troop, or any BSA troop, has a bona fide open-membership policy or is dedicated to shared religious values. The judge must investigate his troop's policies, practices, and values of common interest to the troop members. Canon 2C, effective January, 2016, will permit the judge's membership in his church-sponsored BSA troop if he is satisfied that the troop does not exclude members based on sexual orientation, or if he is satisfied that the troop is an organization dedicated to the preservation of religious values of legitimate common interest to the troop members. (Advisory Com. commentary, *supra*, foll. canon 2C.)

The requesting judge's challenges to the constitutionality of the canon 2C amendment are legal questions beyond the scope of CJEO's authority and are nonetheless moot given the conclusions above.

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CJEO Oral Advice Summary No. 2016-015

[Posted March 30, 2016]

FULL BENCH DISQUALIFICATION

I. Questions:

Does a presiding judge, under some circumstances, have the authority to disqualify the entire local bench? For example, in circumstances where a criminal case is filed alleging a local judge's family member as a victim or perpetrator, considerable embarrassment could be avoided if the presiding judge is able to disqualify the entire bench without disclosing the identity of the individuals involved and the details of the alleged crime to the other judges in order to poll them about disqualification.

Is there a statutory reason to conclude that a presiding judge does have the authority to disqualify the entire bench under these circumstances? Cal. Code Civ. Proc. §170.1(a)(6)(A)(i) & (ii) state that disqualification is required if "[t]he judge believes …" certain circumstances exist. In contrast, §170.1(a)(6)(A) (iii) states that disqualification is required if "[f]or any reason: … [a] person aware of the facts might reasonably

entertain a doubt that the judge would be able to be impartial." On the face of (iii), may the determination of disqualification be made by another judge, including a presiding judge, who is often in a better position to make the call? When there is a concern that a person aware of the facts might reasonably entertain a doubt as to a judge's impartiality, can that concern be addressed by the presiding judge?

II. Oral Advice Provided:

In *Kaufman v. Court of Appeal* (1982) 31 Cal.3d 933, the Supreme Court stated the ethical rule that each appellate justice decides for himself or herself whether disqualification is required, and therefore, colleagues of a justice, a judge, or a panel may not assume jurisdiction to decide if another judicial officer should be disqualified. (*Kaufman, supra*, at pp. 937–940.) This ethical rule also applies to trial court judges since the appellate justice disqualification canon contains the same disqualifying language as the superior court judge disqualification statute. (Compare Cal. Code Jud. Ethics, canon 3E(4)(a)-(c) with Cal. Code Civ. Proc. § 170.1(a)(6)(A)(i)-(iii).) California Code of Civil Procedure section 170.1(a)(6)(A) does not provide statutory grounds for circumventing this ethical rule to allow a presiding judge, or any other individuals, to determine whether another judge is disqualified. Although the exact phrase "if the judge believes" is not used in subpart (iii), the reasonable doubt test in that subpart is clearly intended to be decided by the judge to whom the subpart applies, in keeping with the statutory pattern and *Kaufman*.

Given the ethical rule that no judge may decide another judge is disqualified, if a presiding judge believes that all of the local judges could be disqualified, each member of the court must make an individual disqualification determination before the presiding judge may seek assignment of the matter to a judge from another court. (Cal. Code Civ. Pro., § 170.8 [when there is no judge of a court qualified to hear an action or proceeding,

the Chief Justice may assign a judge to hear the matter]; California Judges Association (CJA) Formal Opinion No. 62, p. 3 [the presiding judge must poll the individual judges for their disqualification determinations as a prerequisite to reassignment under § 170.8].)

There are, however, two administrative alternatives that may allow a presiding judge to make an assignment to an outside judge without polling the local judges and without violating the ethical rule. First, a retired judge may be assigned to the court through the Assigned Judges Program (AJP) and the presiding judge may be able to assign such a matter to the AJP judge. (Cal. Const., art. VI, § 6(e) [the Chief Justice has authority to assign a retired judge to any court]; Cal. Rules of Court, rule 10.603(a) [presiding judges have authority to make assignments within their court].) Second, when the presiding judge's court has a reciprocal assignment order issued by the Chief Justice, the presiding judge may be permitted to assign matters to a judge in another court as specified in the order. (Cal. Const., art. VI, § 6(e) [the Chief Justice has authority to assign any judge to another court within the judicial branch]; Cal. Rules of Court, rule 10.630 [a "reciprocal assignment order" issued by the Chief Justice permits judges in courts of different counties to serve in each other's courts]; Gov. Code § 69740(b) [allows presiding judges to agree to hold sessions of court outside of a county while maintaining venue].)

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CJEO Oral Advice Summary No. 2016-016

[Posted April 28, 2016]

DISQUALIFICATION OF A PRO TEM APPELLATE JUSTICE UNDER ACTIVE CONSIDERATION

I. Question:

Does a superior court judge who is sitting as a pro tem appellate justice while under active consideration[1] by the Governor for appointment to the Court of Appeal have disqualification obligations in a habeas corpus matter in which the Governor's decision to affirm, modify, or reverse the parole board is at issue?

[1] "Active consideration" indicates that either the Commission on Judicial Nominees Evaluation of the State Bar of California is evaluating the superior court judge for appointment to an appellate court at the request of the Governor, or that the Governor or the Governor's staff is engaging in direct conversations with the superior court judge regarding appointment to an appellate court.

II. Oral Advice Provided:

The committee recommends that a superior court judge sitting as a pro tem appellate justice while under active consideration by the Governor for appointment to the Court of Appeal disqualify himself or herself when asked to decide a habeas corpus matter in which the Governor's decision to affirm, modify, or reverse the parole board is at issue.

The Governor makes appointments and nominations to the Court of Appeal pursuant to article VI, section 16(d)(1) and (2) of the California Constitution. In addition, article V, section 8 provides that "[n]o decision of the parole authority of this state with respect to the granting, denial, revocation, or suspension of parole of a person sentenced to an indeterminate term upon conviction of murder shall become effective for a period of 30 days, during which the Governor may review the decision subject to procedures provided by statute." (Cal. Const., art. V, § 8.)

In the California Judicial Conduct Handbook, Judge Rothman observes that "[t]he pressures on judicial independence are significant where political considerations play a part in the appointment, election, or elevation of judges," and that "[t]he need to 'please' the electorate or appointing authority can pervert judicial integrity and courage." (Rothman, Cal. Judicial Conduct Handbook (2013 supp.) § 3.46, p. 143.) Moreover, canon 3E(4) requires a pro tem appellate justice under active consideration by the Governor for appointment to the Court of Appeal to disqualify himself or herself from a habeas corpus matter in which the Governor's decision to affirm, modify, or reverse the parole board is at issue if "his or her recusal would further the interests of justice," or if he or she "substantially doubts his or her capacity to be impartial." (Canon 3E(4)(a), (b).) In addition, disqualification is required if the "circumstances are such that a reasonable person aware of the facts would doubt the justice's ability to be impartial." (Canon 3E(4)(c).)

"The 'reasonable person' is not someone who is 'hypersensitive or unduly suspicious,' but rather is a 'well-informed, thoughtful observer.'" (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 389 [internal citations and quotations omitted].) "[L]itigants' necessarily partisan views [should] not provide the applicable frame of reference." (*United Farm Workers of America v. Superior Court* (1985) 170 Cal.App.3d 97, 104.) Instead, "'a judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street.'" (*Ibid*.)

In light of the Governor's constitutional authority to review personally all decisions of the parole board granting, denying, revoking, or suspending parole, and in light of the substantial interest a judicial officer under active consideration for permanent elevation to an appellate court may have in maintaining the Governor's favor during service as a pro tem appellate justice, a reasonable person aware of the facts would likely doubt the justice's ability to be impartial. (See Judicial Conference of U.S., Guide to Judicial Policy, Vol. 2B, Ch. 2, Com. on Codes of Conduct Advisory Opn. No. 97 (June 2009) p. 169 [recognizing that "[a]n incumbent [magistrate judge] seeking reappointment obviously has a substantial interest in receiving a favorable recommendation from [a reappointment] panel," and advising recusal when a member of the reappointment panel appears before that magistrate judge because "during the period of time that the panel is evaluating the incumbent and considering what recommendation to make concerning reappointment, a perception would be created in reasonable minds that the magistrate judge's ability to carry out judicial responsibilities with impartiality is impaired."]).

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CJEO Oral Advice Summary No. 2016-017

[Posted July 7, 2016]

DISQUALIFICATION FOR PRIOR APPEARANCE AS A DEPUTY DISTRICT ATTORNEY IN ANOTHER PROCEEDING

I. Question

In light of the recent United States Supreme Court decision in *Williams v. Pennsylvania* (June 9, 2016) __ U.S. __ [195 L.Ed.2d 132] (*Williams*), is a judge disqualified from hearing a criminal arraignment if the judge served as the prosecutor at the preliminary hearing in a prior conviction alleged as a strike for sentencing enhancement in the current matter? The judge will not preside at the current trial, does not recall facts from the preliminary hearing that occurred over 10 years before the judge's appointment to the bench, and was not involved in the guilty plea that led to the prior conviction.

II. Summary of Oral Advice

A judge who actively participated in the prosecution of a case alleged as a prior for purposes of sentencing is disqualified from hearing any proceeding in the matter in which the prior is alleged. *Williams* clarifies that active participation includes, at a minimum, significant personal involvement "as a prosecutor in critical decisions regarding the prior case." (*Williams, supra,* __ U.S. at p. __ [195 L.Ed.2d at p. 141].) Passage of time, a judge's memory, and the fact that the defendant pled guilty are not relevant factors in determining that there is an appearance of impartiality when a judge served as an advocate in a case that will govern sentencing in the current matter.

III. Analysis

The California disqualification statute prohibits trial judges from hearing a case when the judge previously served as a lawyer in the proceeding, or served as a lawyer for a party in any other proceeding involving the same issues. (Code Civ. Proc., § 170.1, subd. (a)(2)(A).) The Committee on Judicial Ethics Opinions (CJEO) concluded in CJEO Formal Opinion 2015-007 that this statute does not require disqualification of a judge who had previously appeared in the *same case* as a deputy district attorney on a nonsubstantive matter, such as a perfunctory continuance, because a person aware of the fact that the judge did not "actively participate" in the prosecution would not have reason to doubt the judge's impartiality. (CJEO Formal Opinion 2015-007, pp. 3, 14.) Conversely, the committee also concluded that the statute disqualified a judge who "actively participated" as a prosecutor in the *same case*. (*Id.*, at p. 12.) The United States Supreme Court recently applied a similar "significant, personal involvement" standard to conclude that a former prosecutor was disqualified from hearing a habeas matter in the

same case under the federal due process clause. (*Williams, supra*, __ U.S. at p. __ [195 L.Ed.2d at pp. 144-145] [federal due process demarks the outer boundaries of judicial disqualifications, which states may address with more stringent and detailed ethical rules].)

The *Williams* court held that the outer boundaries of due process require disqualification of a former prosecutor who served as an advocate for the state in a case the judge was later asked to adjudicate. (*Williams, supra*, __ U.S. at p. __ [195 L.Ed.2d at p.142].) *Williams* sets the disqualification standard as the former prosecutor having had significant, personal involvement in making critical decisions in the prosecution of the case. The court explained that a prosecutor may bear responsibility for any number of critical decisions, including what charges to bring, whether to extend a plea bargain, and which witnesses to call. Thus, the involvement of multiple actors and the passage of time, which are the consequences of a complex criminal justice system, do not relieve a former prosecutor of the duty to withdraw in order to ensure the neutrality of the judicial process. (*Ibid.*)

The California statute also provides more detailed disqualification rules for prior service in *another proceeding* involving the same issues. (Code Civ. Proc., § 170.1, subd.(a)(2)(A).) Under that statute, a similar "active participation" standard has been applied to disqualify a former prosecutor who served as an advocate for the state at a preliminary hearing in a prior conviction, later alleged as a "strike" to enhance sentencing in another matter that came before her as a judge. (*Sincavage v. Superior Court* (1996) 42 Cal.App.4th 224, 230 (*Sincavage*) [doubt as to impartiality and fairness arises when the judge was active in the prosecution of priors]; Code Civ. Proc., § 170.1, subd. (a)(6)(A)(iii).)

When determining whether the same issues are involved, the critical factor is whether there are overlapping issues of law or fact between the prior matter and the current matter, which occurs when an alleged prior governs the punishment in the current

matter. (*Sincavage, supra*, 12 Cal.App.4th at p. 231 [distinguishing *In re Arthur S.* (1991) 228 Cal.App.3d 814, 817, in which a subsequent juvenile matter did not allege the previous conduct or involve a violation of probation].) The question is not whether the prior conviction is contested or a plea of guilty was entered, it is whether the prior conviction will be an issue at sentencing. (*Sincavage*, at p. 231*; People v. Oaxaca* (1974) 39 Cal.App.3d 153, 158 [the contested nature of a criminal proceeding does not end with a guilty plea; sentencing retains the elements of a contested action even to the extremes of probation and life imprisonment].)

The length of time since prior service in a matter involving similar issues is also not a question relevant to disqualification. The Legislature did not include a time limitation in subdivision (a)(2)(A), as it did in subdivision (a)(2)(B), which applies to service as a lawyer in private practice, so the number of years since the judge's active participation in an alleged prior is not a determining factor. (Compare Code Civ. Proc., § 170.1, subd. (a)(2)(A) & (B); accord, *Williams, supra,* __ U.S. at p. __ [195 L.Ed.2d at p.142] [passage of time does not relieve the duty of disqualification or ensure the neutrality of the judicial process].) Nor is a judge's memory of the prior proceedings relevant to the question of disqualification or whether a person aware of the facts might reasonably doubt impartiality. (Code Civ. Proc., § 170.1, subd. (a)(6)(A)(iii); *Sincavage, supra*, 42 Cal.App.4th at pp. 228-229 [judge disqualified who did not remember acting as a prosecutor at the preliminary hearing and had no recollection of the defendant or the proceeding alleged as a prior]; accord, *Williams, supra,* pp. 143, 151 [disqualification required despite doubt that the judge remembered the contents of the charging memo almost 30 years later].)

Finally, the nature of the hearing to be adjudicated is not a relevant factor in determining whether disqualification for prior service on similar issues is required. The statutory disqualification scheme requires that a judge who is disqualified may not participate in any aspect of the case, except for specified ministerial matters, such as

default matters. (Code Civ. Proc., §§ 170.3, subd. (a)(1) [disqualified judge shall not participate further in the proceedings except as provided in § 170.4], 170.4, subd. (a)(3) [disqualified judge may hear purely default matters], 170.5, subd. (f) [proceeding defined as "the action, case, cause, motion, or special proceeding to be tried or heard by the judge"]; *Muller v. Muller* (1965) 235 Cal.App.2d 341, 345 [disqualification not required where the defendant in a civil action allowed default to be entered and put nothing into controversy].) Thus, a judge who is disqualified for active participation in the prosecution of an alleged prior conviction may not preside at the pretrial arraignment even if the prior will not be disputed at the arraignment. (*People v. Freeman* (2010) 47 Cal.4th 993, 1001 [the disqualification statutes do not permit limited, partial or conditional recusal].)

IV. Conclusions

A judge is disqualified from hearing a criminal arraignment if the judge served as the prosecuting district attorney at the preliminary hearing in a prior conviction alleged as a strike for sentencing enhancement in the current matter. An appearance at a preliminary hearing necessarily involves direct, personal involvement in the prosecution of a prior conviction that will govern punishment in the current matter and a person aware of this active participation would reasonably doubt impartiality. Conversely, if the judge appeared at a nonsubstantive hearing, such as a continuance or other ministerial matter, and did not actively participate in the prosecution of the alleged prior, reasonable doubt as to impartiality would not be likely and disqualification would not be required. (CJEO Formal Opinion 2015-007, pp. 2, 14.)

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CJEO Oral Advice Summary 2016-018

[Issued November 29, 2016]

ADMINISTERING THE OATH OF OFFICE TO A RECENTLY ELECTED DISTRICT ATTORNEY

I. Question

May a judge administer the oath of office to a recently elected district attorney?

II. Oral Advice Provided

Judicial officers are among those authorized by law to administer the oath of office required to be taken by all public office holders under the California Constitution. (Cal. Const., art. XX, § 3 [all public officers and employees, executive, legislative, and judicial, shall take the prescribed loyalty oath]; Gov. Code, § 1225 [authorization for judicial officers to administer oaths].) To do so is necessarily an official function of judicial office.

While judges must take caution to avoid any activities that might convey an appearance of bias towards individuals or groups that appear before the court (Rothman, Cal. Judicial Conduct Handbook (2013 Supp.) § 10.34, pp. 544-545), a person aware of the fact that a judge was performing an official function would not entertain doubt as to the judge's impartiality. (Cal. Code Jud. Ethics, canon 2; Advisory Com. com. foll. canon 2; Rothman, *supra*, § 10.34, p. 546; Cal. Judges Assn., Formal Opinion No. 58 (2006) pp. 2-3 [a judge's administration of the oath of office at a ceremony to swear in new police officers or a new police captain would be an official function that does not create an appearance of bias].)

Thus, a judicial officer may administer the oath of office at a ceremony to swear in a public official, including a newly elected district attorney, without creating an appearance of bias in violation of the California Code of Judicial Ethics.

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San Francisco, CA 94102
(855) 854-5366
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CJEO Oral Advice Summary 2016-019

[Issued; December 9, 2016]

ACCEPTING COMPENSATION FOR PERFORMING A MARRIAGE AFTER JANUARY 1, 2017

I. Question

May judges continue to accept compensation for performing marriages on weekends and holidays?

II. Oral Advice Provided

Beginning in 2017, judicial officers will be prohibited by law from accepting compensation for solemnizing a marriage. The Legislature recently amended Family Code section 400 to expand the category of those who may perform marriages to include former elected officials, and in doing so, prohibited acceptance of compensation by all

those authorized to perform such services. (Fam. Code, § 400, subds. (b)(1) & (2), (c).) This amendment is effective January 1, 2017.

California judges have long been authorized by Family Code section 400 to perform marriages; however, the amendment prohibiting acceptance of compensation is new and conflicts with another statute and the California Code of Judicial Ethics when applied to judicial officers. Canon 4H provides that judges "may receive compensation and reimbursement of expenses as provided by law" for permitted extrajudicial activities. Canon 4H(3) permits judges to accept "fees or other things of value received pursuant to Penal Code section 94.5 for performance of a marriage." Penal Code section 94.5, which was not simultaneously amended by the Legislature, permits acceptance of a fee by judicial officers for performance of a marriage on a Saturday, Sunday, or legal holiday. Thus, the newly enacted Family Code prohibition on accepting fees is inconsistent with canon 4H and Penal Code section 94.5, and with long-standing practices under those laws. (Com. on Jud. Performance, Annual Rep. (1992) advisory letter no. 11, p. 14 [judge disciplined for accepting a gift following performance of a wedding on a weekday in violation of Pen. Code, § 94.5]; Rothman, Cal. Judicial Conduct Handbook (2013 Supp.) appen. 13, p. 1 [judges may accept a fee for performing a marriage Saturday, Sunday, or a legal holiday]; Cal. Judges Assn., Formal Opinion No. 5 (1951) pp. 1-2 [acceptance by a judge of a gratuity for the performance of marriage does not violate any constitutional provision or statute]; Cal. Judges Assn., Judicial Ethics Update (1982) par. III.D., p. 4 [a judge may accept a gratuity for the performance of a marriage ceremony on a Saturday, Sunday, or legal holiday].)

In the face of these inconsistencies, judicial officers must nonetheless comply with all statutory law. (Cal. Code Jud. Ethics, canon 2 [a judge shall respect and comply with the law]; *id*., preamble [canons are to be applied in conformance with constitutional requirements, statutes, other court rules, and decisional law]; *id*., terminology ["law" means constitutional provisions, statutes, court rules, and decisional law].) Although the Family Code amendment

prohibits conduct expressly permitted by the California Code of Judicial Ethics and the Penal Code, judges must comply with the Family Code until such time as it or other laws are conformed.[1] This means that beginning in 2017, judges may no longer accept compensation for solemnizing a marriage while holding office.

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[1] The committee is authorized to provide ethics advice about whether specific judicial conduct would violate the Code of Judicial Ethics or other statutes. (Cal. Rules of Court, rule 9.80 (e).) It is not authorized to provide decisional law reconciling statutory inconsistencies, harmonizing conflicting enactments, or interpreting intended application and enforcement. (See *State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 960 [doctrines regarding judicial interpretation of conflicting statutes hold that later enactments supersede earlier enactments, except that more specific provisions take precedence over more general provisions regardless of when enacted].)

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(855) 854-5366
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CJEO Oral Advice Summary 2017-020

[Issued August 4, 2017]

JUDICIAL SERVICE ON A NONPROFIT CREDIT UNION ADVISORY COUNCIL

I. Question

May a judge accept an invitation to serve on an advisory council of a nonprofit credit union? The invitation specifies that the advisory council was created to strengthen the flow of information between credit union members and its management team, and that the judge's role would be to provide feedback on service levels, evaluate new ideas, and make recommendations for the future of the credit union.

II. Oral Advice Provided

Judicial officers are prohibited by the California Code of Judicial Ethics from serving "as an officer, director, manager, or employee of a business affected with a public

interest, including, without limitation, a financial institution." (Cal. Code Jud. Ethics, canon 4D(3).) In the *California Judicial Conduct Handbook*, Judge Rothman explains that "[t]his is a well-settled ethical principle based on the importance and power of such institutions in … society and the need to keep the judicial office independent of them." (Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007) § 9.05, pp. 453-455.) Thus, he concludes, a judge cannot be a member of the board of directors of a bank or any other financial institution. (*Ibid.*)

The well-settled ethical principle Judge Rothman refers to has its foundation in several additional canons. (Cal. Code Jud. Ethics, canons 1 [judicial independence is indispensable to justice in society], 2A [a judge shall act at all times in a manner that promotes public confidence in the impartiality of the judiciary], 2B(2) [a judge shall not lend the prestige of judicial office or use the judicial title in any manner to advance the pecuniary interests of others], & 4D(1)(b) [a judge shall not engage in financial and business dealings that involve the judge in continuing business relationships with persons likely to appear before the judge's court].) It is clear from the code as a whole that service in an advisory capacity to a nonprofit financial institution such as a credit union is prohibited in California.

Support for this conclusion is found in other states with similar canon restrictions. Significantly, the restriction on service with a financial institution was found to serve a compelling state interest and upheld as constitutional by the Supreme Court of one such state. (*Babineaux v. Judiciary Comm. of Louisiana* (La. 1977) 341 So.2d. 396, 400-404 (*Babineaux*) [canon prohibiting service on a bank board does not violate the due process, equal protection, or freedom of association rights of judges].) Indeed, in a state with less restrictive canon language that *permits* judicial service on the board of a business entity, the Supreme Court held that service as a director or advisor of a financial institution is nonetheless prohibited. (*Walson v. Ethics Comm. of Kentucky Judiciary* (Ky. 2010) 308 S.W.3d 205, 207 (*Walson*) [banks and other financial institutions are frequent litigants

and judicial service as an advisor or director would unquestionably lend the prestige of office to those institutions].) Both high courts upheld the restrictions because they serve "to reduce the possibility that a judge would, or would seem to, use the prestige of … judicial office to attract business for the financial institution, to eliminate the potential conflict between a director's fiduciary duty to the corporation and …judicial office, and to lessen the possibility of conflict of interest for the judge revolving around litigation before the court." (*Babineaux*, *supra*, 341 So.2d. 679-800, quoted in *Walson, supra*, 308 S.W.3d 211.)

In line with *Walson*, the judicial ethics advisory committees in a majority of other states have concluded that judges may not serve in *advisory positions* for banking institutions. (Tex. Comm. on Jud. Ethics, Op. 38, p. 1 [judicial service as an advisory director of a financial institution prohibited for lending prestige of office to advance the private interest of others]; Ariz. Sup. Ct. Jud. Ethics Advisory Comm., Op. 92-5, p. 1 [judges are strictly prohibited from serving as a director or advisor to a local bank, which would give reasonable grounds for suspicion that the prestige of office was being used to persuade others to patronize the business]; Ill. Jud. Ethics Comm., Op. 06-01 pp. 2-3 [judge may not serve on a bank advisory board under a court rule prohibiting financial or business dealings that (1) reflect adversely on impartiality, (2) interfere with performance of duties, (3) exploit judicial position, or (4) involve the judge in frequent transactions with those likely to come before the court].)

Specifically, the judicial ethics advisory committee of South Carolina advised a judge not to accept an invitation to join a local bank advisory body that did not make policy decisions but was created as a sounding board in the local community. (S.C. Advisory Comm. on Stnds. Of Jud. Conduct, Op. 6-1989, pp. 1-2.) The South Carolina Judicial Department Advisory Committee concluded that there was "a significant risk that a judge's service on a bank's advisory committee would be perceived by the bank's

competitors as an indication of a lack of impartiality on the part of the judge." (*Id.* at p. 2.)

Judicial ethics advisory committees in several other states have further concluded that judges may not serve in positions with *nonprofit credit unions*. (Fla. Sup. Ct. Jud. Ethics Adv. Comm., Op. 94-45, p. 1 [judicial service as a director of a credit union prohibited, regardless of the not-for-profit nature of the financial institution]; Okla. Jud. Ethics Advisory Panel, Op. 2004-4, p. 1 [service prohibited on the board of a not-for-profit credit union that is a business entity engaged in competition with other financial institutions].)

Here, too, the credit union's invitation to provide feedback on service levels, evaluate new ideas, and make recommendations for the future of a business entity engaged in competition with other financial institutions would be impermissible under the California Code of Judicial Ethics. Such service could (1) reflect adversely on the judge's impartiality towards the credit union, its competitors, or financial institutions generally, (2) reasonably be perceived as lending judicial title to the advancement of the credit union's interests, or (3) potentially involve the judge in frequent transactions with a party likely to appear before the court on which the judge serves. (Cal. Code Jud. Ethics, canons 2A, 2B(2), 4D(1)(b) & 4D(3).) The committee advises against accepting the invitation.

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CJEO Oral Advice Summary 2017-021

[Issued November 2, 2017]

DISQUALIFICATION FOR ACQUAINTANCE WITH LEADERS OF AN AMICUS CURIAE

I. Question

Does an appellate justice have disqualification obligations when the justice is an acquaintance of leading members of associations that have filed an amicus curiae brief in a matter being heard by the justice?

The question is asked by an appellate justice hearing an appeal in which an amicus curiae brief was filed on behalf of multiple associations. The justice is not a member of any association but was acquainted with leaders of the associations through professional activities approximately four to five years before becoming a judicial officer. The

justice's acquaintance with the leaders was limited to greetings at events and an occasional lunch but nothing more personal and nothing within the last 2 years.

II. Oral Advice Provided

The justice has discretion to decline to disqualify. The Code of Judicial Ethics obligates an appellate justice to make a discretionary decision to disqualify if the circumstances are such that a reasonable person aware of the facts would doubt the justice's ability to be impartial. (Cal. Code Jud. Ethics, canon 3E(4)(c).)

In appellate proceedings, an amicus curiae is not a party to the action, but rather a person or entity that applies for permission to file a brief to assist the court in deciding the matter. (Cal. Rules of Court, rule 8.200(c); *In re Veterans' Industries, Inc.* (1970) 8 Cal. App. 3d 902, 916 [not being a party to the action, an amicus curiae has limited powers and no right to appeal where its views are ignored].) Thus, the committee concluded in CJEO Oral Advice Summary 2014-005 that a reasonable person would not doubt a justice's ability to be impartial in deciding *the interests of the parties* in circumstances where the justice was a member of an organization that had filed an amicus brief. (CJEO Oral Advice Summary 2014-005, *Disqualification for Membership in an Amicus Curiae*, Cal. Supreme Ct., Com. Jud. Ethics Opns., p. 3.)

A similar conclusion applies in the circumstances of a justice's acquaintance with members or leaders of an association that has filed an amicus curiae brief. (Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007) § 7.51, p. 356 [disqualification not required for mere acquaintanceship, but moves closer to being required for social relationships within the inner circle of the judge's intimate friends].) Here, greetings at events and lunches that occurred over two years ago with individuals the justice knew

professionally before taking the bench are not social relationships that would otherwise cause reasonable doubt as to impartiality.

The committee advises that the justice may decline to disqualify. Because appellate justices are not obligated to make disclosures, the justice also has the discretion to decide whether or not to disclose the acquaintance with amicus leaders. (Rothman, *supra*, § 7.73, p. 382, § 7.90, p. 389).

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CJEO Oral Advice Summary 2018-022

[Issued February 22, 2018]

DISCLOSURE REQUIREMENTS FOR A STATE BAR COURT REVIEW DEPARTMENT JUDGE

I. Question

Is a State Bar Court Review Department judge required to disclose information that is reasonably relevant to the question of disqualification pursuant to canon 3E(2)(a) of the California Code of Judicial Ethics[1] if the judge has determined that he or she is not disqualified from hearing the matter?

II. Oral Advice Provided

Canon 3E(2)(a) requires that in all trial court proceedings a judge disclose information relevant to disqualification, even if the judge believes there is no actual basis

[1] All further references to the canons and to Advisory Committee Commentary are to the California Code of Judicial Ethics unless otherwise indicated.

for disqualification. Canon 3E(2)(a) applies only to trial judges and no rule requires appellate justices to make nondisqualifying disclosures. (Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 7.73, p. 496 (Rothman).) The Advisory Committee Commentary following canon 3E states that "[t]he term 'appellate justice' includes justices of both the Courts of Appeal and the Supreme Court." At issue is whether a State Bar Court Review Department proceeding is a "trial court proceeding[ ]" within the meaning of the canons. (Canon 3E(2)(a).) To answer the question, a brief overview of the State Bar Court is useful.

The State Bar Court includes a Hearing Department and a Review Department. (Bus. & Prof. Code, §§ 6079.1, 6086.65.) The Hearing Department is the trial level of the State Bar Court, and hearing judges conduct evidentiary hearings on the merits. (*Obrien v. Jones* (2000) 23 Cal.4th 40, 44-45.) The Review Department may review a decision of the Hearing Department at the request of a disciplined attorney or the State Bar. (*Ibid*.) The Review Department independently reviews the record and may adopt findings, conclusions and a decision or recommendation different from those of the hearing judge. (*Ibid*.; Cal. Rules of Court, rule 9.12.)

The Review Department functions as an appellate body, reviewing the determination of a Hearing Department judge, and, therefore, a Review Department judge is not subject to the disclosure obligations of canon 3E(2)(a). A Review Department judge is not required to, but may, disclose any information that may be relevant to disqualification. (Rothman, *supra*, § 7.91, p. 503 [an appellate justice is not prevented from making disclosures where appropriate].)

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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)).

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CJEO Oral Advice Summary 2018-023

[Issued August 1, 2018]

DISQUALIFICATION RESPONSIBILITIES OF APPELLATE COURT JUSTICES

I. Question:

The Committee on Judicial Ethics Opinions was asked for an opinion on whether the disqualification responsibilities of a trial court judge also apply to an appellate court justice. An opinion was also sought on whether, if disqualified, an appellate court justice may request and accept waiver by the parties and attorneys and whether the appellate court justice may revoke his or her disqualification decision if the factors that necessitated disqualification are no longer present.

II. Oral Advice Provided:

A. Grounds for Disqualification of an Appellate Court Justice

There are no statutory grounds for disqualification that are applicable to appellate court justices. In *Kaufman v. Court of Appeal* (1982) 31 Cal.3d 933 (*Kaufman*), the Supreme Court of California held that the procedures for disqualification set out in Code of Civil Procedure section 170[1] do not apply to appellate court justices and an appellate court justice must decide whether to disqualify himself or herself. Following *Kaufman*, in 1984, the Legislature reorganized section 170 by dividing it into sections 170 through 170.5, and excluded appellate court justices from the statutory scheme, including the grounds for disqualification. (§ 170.5, subd. (a) ["judge" under the disqualification statutes means judges of the superior courts, court commissioners, and referees].)

As such, canon 3E(1), (3), (4), (5), and (6) of the California Code of Judicial Ethics sets forth the only grounds for disqualification applicable to appellate court justices. (See Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 7:90, pp. 501-502 (Rothman) [providing a summary of the changes to the Code of Civil Procedure and the Code of Judicial Ethics following *Kaufman*].) Canon 3E is intended to eliminate the appearance of bias and ensure public confidence in the impartiality of legal proceedings. (See canon 2 [promoting public confidence in the impartiality of the judiciary is required in all matters].) Canon 3E(1) requires trial court judges and appellate court justices to disqualify themselves in any proceeding in which disqualification is required by law. Canon 3E(3) requires disqualification if, while a candidate for judicial office, a trial court judge or an appellate court justice makes a statement that would commit the judge or justice to a particular result or to rule in a particular way in a proceeding, or where the judge or justice owns certain corporate or government bonds. Canon 3E(4) sets forth the general grounds for disqualification of an appellate court justice and is nearly identical to general grounds for disqualification of a trial court judge, set out in section

[1] All further references to section or sections are to the Code of Civil Procedure unless otherwise indicated. All references to canon or canons are to the California Code of Judicial Ethics unless otherwise indicated.

170.1, subdivision (6)(A)(i)-(iii). The specific grounds for disqualification of an appellate court justice are set forth in canon 3E(5) and largely track the statutory specific grounds for disqualification applicable to trial court judges, set forth in sections 170 through 170.5. Finally, canon 3E(6) sets forth instances that are not grounds for disqualification that are substantively the same as section 170.2. (Advisory Com. com. canon 3E(6).)

There are also no disclosure obligations for appellate court justices, either within the code or by statute. Canon 3E(2), which requires trial court judges to disclose information relevant to the question of disqualification, specifically excludes appellate court justices. (Rothman, *supra*, § 7:90, pp. 502-503 [disclosure requirement in the appellate context would be more complex than in trial courts because there is no face-to-face contact with the parties until the hearing date, after the briefs are examined and a tentative decision is discussed by the appellate court justices].) An appellate court justice may, but is not required to disclose information relevant to the decision to not disqualify himself or herself. (*Ibid*.)

B. Waiver of Disqualification of an Appellate Court Justice

The statutory scheme applicable to trial court disqualification includes a general waiver provision, which by its terms does not apply to appellate court justices. (§ 170.5, subd. (a); *Kaufman*, *supra*, 31 Cal.3d 933, 939-940.) Section 170.3, subdivision (b)(1) provides that a trial court judge "who determines himself or herself to be disqualified after disclosing the basis for his or her disqualification on the record may ask the parties and their attorneys whether they wish to waive the disqualification." The statute provides that waiver is not permitted if the trial court judge disqualifies for either personal bias or prior service as an attorney or material witness in the matter. (§ 170.3, subd. (b)(2)(A) & (B).)

The Supreme Court has not adopted a similar general waiver provision applicable to appellate disqualification. Moreover, no appellate decision has addressed whether waiver is generally available to appellate court justices who determine they are disqualified under the Code of Judicial Ethics. One canon provision specifically permits waiver when a justice is disqualified for judicial campaign contributions over a specified amount (canon 3E(5)(j)), but

this provision was added to mirror a recent amendment to section 170.1, subdivision (a)(9), that expressly permits waiver of disqualification for campaign contributions received by trial court judges, although such a waiver is generally permitted under section 170.3. (§§ 170.1, subd. (a)(9)(D), 170.3, subd. (b)(1).) The narrow waiver provision in canon 3E(5)(j) is not similarly supported by a general waiver provision applicable to appellate disqualification on other grounds.

It is the committee's opinion that appellate disqualification may be waived with party consent because it is not prohibited under the Code of Judicial Ethics. (Rothman, *supra*, § 7.90, p. 502 [the most reasonable approach is to apply the waiver procedures in § 170.3, subd. (b) to waive grounds for disqualifying appellate court justices].) However, it is the committee's opinion that a request for waiver of disqualification should be made only in exceptional circumstances, such as when the appellate court would have difficulty creating a panel without the disqualified justice's participation. Moreover, an appellate court justice should evaluate his or her other obligations under the canons to determine whether he or she should request or accept the parties' waiver of disqualification. (Canons 2A [a judge shall act at all times in a manner that promotes public confidence in the impartiality of the judiciary], 3 [a judge shall perform the duties of judicial office impartially].) The circumstances surrounding the disqualification, request for waiver, and acceptance of waiver should be such that a reasonable person would have no doubt of the appellate court justice's impartiality. The committee further advises that if the appellate court justice requests or accepts a waiver of disqualification, the request and acceptance should be in writing and made a part of the appellate record.

C. Revocability of an Appellate Court Justice's Decision To Disqualify

In the event that an appellate court justice determines that the circumstances necessitating disqualification are no longer present, it is the committee's opinion that an appellate court justice may revoke his or her disqualification. Whether disqualification may be revoked differs for appellate court justices and trial court judges. Section 170.3, subdivision (a)(1) provides that a trial court judge who determines himself or herself to be disqualified shall not further

participate in the proceeding unless disqualification is waived pursuant to section 170.3, subdivision (b), or except as provided in section 170.4, which limits the actions a disqualified trial court judge may take. (§ 170.4, subd. (a)(1)-(6).) Section 170.4, subdivision (d) specifically provides that, other than for the specific purposes provided in section 170.4, a disqualified trial court judge "shall have no power to act in any proceeding after his or her disqualification after the filing of a statement of disqualification until the question of his or her disqualification has been determined."

These statutory disqualification requirements are notable because of the Supreme Court's decision in *People v. Freeman* (2007) 47 Cal.4th 993 (*Freeman*). The defendant in *Freeman* forfeited her statutory remedy to challenge the trial court judge's failure to disqualify himself when the case was reassigned to the judge following his initial disqualification on discretionary grounds that later proved to be unfounded. (*Id.*, at p. 1006.) Deciding only the narrow issue of whether the due process clause of the United States Constitution required disqualification, the Supreme Court held that the defendant was required to show a probability of actual bias, rather than an appearance of bias, and the defendant failed to make such a showing. (*Ibid.*) The Supreme Court rejected the defendant's claim that the trial court judge's acceptance of the case after he had once recused himself presented the kind of exceptional facts that demonstrate a due process violation: "At most, [the trial court judge's] decision to accept reassignment of defendant's case may have violated the judicial disqualification statutes that limit the actions that may be taken by a disqualified judge. [Citations.] But, without more, this does not constitute the kind of showing that would justify a finding that defendant's due process rights were violated." (*Ibid.*)

Relying on this language in *Freeman*, *supra*, 47 Cal.4th at page 1006, Rothman concludes that a trial court judge may not have the authority to revoke disqualification, even if the facts underlying the initial decision to disqualify turn out to be erroneous. (Rothman, *supra*, § 7:27, pp. 422-423.) The Ethics Committee of the California Judges Association (CJA) also advised that "a judge who has disqualified him/her self from a case and who now believes that the disqualification was done in error may not set aside the disqualification." (Cal. Judges Assn., Judicial Ethics Update (2016) p. 3, I.B.20, citing canon 2A [requires judges to promote

public confidence], and canon 3E(1) [requires judges to disqualify themselves when required by law].)

While both Rothman and CJA agree that disqualification by a trial court judge may not be revoked, Rothman acknowledges that appellate disqualification differs. In Rothman's discussion of divestment following recusal, there is a citation to the Supreme Court's docket in *Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481 (*Stockton*). (Rothman, *supra*, § 7.27, pp. 423-424, fn. 184.) The Supreme Court's docket shows an order filed in late 2009, which states: "Chief Justice George recused himself from participating in the order granting review in this case, filed on February 13, 2008. Having examined the materials subsequently filed in this court, and having concluded that there is no basis for requiring his further recusal in this matter, Chief Justice George will participate further in all further proceedings in this matter before this court." (*Stockton*, S159690, Supreme Ct. Mins., Nov. 10, 2009.)

The Rothman citation also refers a Daily Journal article, which reports that Chief Justice George recused in *Stockton*, *supra*, 48 Cal.4th 481 because he owned shares in the real party in interest, but he concluded that there was no further basis for recusal after he divested himself of those shares. (Ernde, *Court Allows 'Unrecusals' For Judges*, S.F. Daily J. (Dec. 7, 2009).) The article also reported on a court policy that allows justices to avoid conflicts and disqualification by selling stock. (*Ibid.*) There are other instances in Supreme Court dockets where justices have revoked disqualification and participated in proceedings following recusal on unspecified grounds. (See *Voices of the Wetlands v. State Water Resources Control Board*, S160211, Supreme Ct. Mins., Jan. 12, 2011 [Justice Corrigan's Mar. 19, 2008, recusal revoked following an examination of the materials filed and her conclusion that there was no basis for further disqualification].)

It is reasonable to conclude that the Supreme Court's policy and practice of revoking disqualification would apply in the event that the circumstances that caused an appellate court justice to disqualify were erroneous or no longer exist, for example, due to a divestment or removal of an improper party. Moreover, the inability of a trial court judge to revoke his or her disqualification, as referenced in *Freeman* and Rothman, is explicitly based on the statutory

provisions that limit the powers of disqualified trial court judges, excluded from the canons, and inapplicable to appellate court justices. (§§ 170.3-170.5; canon 3E(5)(a)-(j).) Therefore, it is the committee's opinion that an appellate court justice may revoke his or her disqualification and participate in subsequent proceedings if the factors that necessitated disqualification are no longer present. As with requesting and accepting waiver of disqualification, the appellate court justice should limit revocation of disqualification to exceptional circumstances. Moreover, the justice should consider the circumstances that caused his or her disqualification, if there may be an appearance of bias if the justice revokes disqualification, and whether the justice's participation in the proceeding could violate other canons. If the appellate court justice revokes his or her disqualification, the committee advises that decision to revoke the disqualification should be in writing and made a part of the appellate record.

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CJEO Oral Advice Summary 2018-024

[Issued September 24, 2018]

REPORTING MISCONDUCT BY A SUPERIOR COURT RESEARCH ATTORNEY IN A PENDING MATTER

I. Questions Presented:

The Committee on Judicial Ethics Opinions was asked for an opinion on the following question:

Does an Administrative Presiding Justice or Presiding Justice (APJ) of a Court of Appeal have an ethical obligation to report a superior court research attorney to the State Bar or the research attorney's presiding judge when the APJ determines that the research attorney engaged in misconduct related to a particular appellate matter?

A petition for review in the matter was denied by the California Supreme Court; however, at the time of the request for this opinion, there was sufficient time to petition the United States Supreme Court seeking review.

II. Oral Advice Provided:

A. Communication Between Courts on a Pending Matter

Canon 3B(7) of the Code of Judicial Ethics[1] prohibits a judge from initiating, permitting, or considering ex parte communications, which include any communications from the judge outside the presence of the parties concerning a pending matter, absent certain exceptions. One exception is that, in certain instances, a judge may consult with other judges. (*People v. Hernandez* (1984) 160 Cal.App.3d 725, 739 ["History and logic recognize the value of certain types of discussion between judges and, in our present society, the demands of the judicial function require it."].) The canon explicitly states, however, that a communication between a judge who may participate in appellate review of a matter and judge presiding over the case is an improper ex parte communication. (Canon 3B(7)(a).) Communication between members of the trial and appellate courts is similarly prohibited by Government Code section 68070.5, subdivision (a), which states "[w]hen a case is appealed, there shall be no communication direct or indirect, between the judge or judicial officer who heard the case and *any* judge of the reviewing court concerning the facts or merits of the case" unless it is a written communication and all the parties are sent a copy at the time of the communication. (Italics added.)

The prohibition against ex parte communications endures while the matter is pending. The terminology section of the Code of Judicial Ethics states that a matter "continues to be pending through any period during which an appeal may be filed and any appellate process until final disposition." (Terminology, "Pending proceeding;" *Roberts v. Commission on Judicial Performance* (1983) 33 Cal.3d 739, 746-748 [trial court judge censured for telephoning the presiding justice who participated in a writ proceeding before the rehearing time had expired in violation of canon 3B(7) and Government Code section 68070.5.]; Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 5:60, p. 320 (Rothman) ["When an appellate panel reverses a trial judge's decision and remands the case for a new trial, and the matter is pending in the trial court, the appellate justices on the panel and trial judge may not discuss the reasons for reversal

[1] All further references to canon or canons and to the Advisory Committee commentary are to the California Code of Judicial Ethics unless otherwise indicated.

even though the appellate matter is final."].) Here, the matter was recently denied by the California Supreme Court; however, a party may petition for a writ of certiorari to the United States Supreme Court within 90 days after entry of the order denying discretionary review by the California Supreme Court. (U.S. Supreme Ct. Rules, rule 13.) Therefore, it is still a pending matter even if the matter is final as it relates to the California courts.

The committee advises that until the matter is no longer pending within the meaning of the Code of Judicial Ethics, the APJ may not contact the presiding judge. Such contact would be an impermissible ex parte communication regarding a pending matter. (Canon 3B(7)(a).)

B. Reporting Attorney Misconduct

Canon 3D(2) states that a judge shall take appropriate corrective action whenever a judge has personal knowledge that an attorney has committed misconduct or has violated any provision of the Rules of Professional Conduct.[2] Personal knowledge is defined within the terminology section of the Code of Judicial Ethics to "mean actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." (Terminology, "Knowledge;" Cal. Judges Assn., Jud. Ethics Com., Opn. No. 74 (2018) p. 5 [advising that a judge has personal knowledge of attorney misconduct where the judge would be able to testify to the misconduct as a percipient witness].) The Advisory Committee commentary following canons 3D(1) and (2) explains that appropriate corrective action may include direct communication with the attorney who has committed the violation or other direct action, including reporting the violation to the presiding judge, appropriate authority, or other agency or body. The appropriate authority is "the authority with responsibility for initiation of the disciplinary process with respect to a violation to be reported." (Advisory Com. com. foll. canons 3D(1), 3D(2).)

If the APJ has personal knowledge of facts that he or she concludes constitute misconduct, then the APJ has an affirmative obligation to take appropriate corrective action.

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[2] Business and Professions Code sections 6086.7 and 6086.8, subdivision (a), Penal Code section 1424.5, and California Rules of Court, rules 10.609 and 10.1017 impose additional mandatory reporting requirements to the State Bar for specific types of attorney misconduct.

(Canon 3D(2).) In this instance, the committee advises that the APJ could report the misconduct to the State Bar, which is the authority with responsibility for initiation of an attorney disciplinary proceeding. During the time that a party may file a writ of certiorari with the United States Supreme Court in the matter, direct communication with the superior court research attorney or the presiding judge constitutes impermissible ex parte communication. (Canon 3B(7)(a).)

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CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS
350 McAllister Street, Room 1144
San Francisco, CA 94102
(855) 854-5366
www.JudicialEthicsOpinions.ca.gov

CJEO Oral Advice Summary 2018-025

[Issued October 18, 2018]

DISQUALIFICATION AND DISCLOSURE DUTIES OF A TRIAL JUDGE ASSIGNED AS AN APPELLATE JUSTICE

I. Question

Does a trial court judge assigned to hear a matter in an appellate court have disqualification and disclosure obligations as an appellate justice or as a trial court judge?

A trial court judge who has been invited to sit on assignment as a pro tempore justice of an appellate court asks for advice about whether any of the following circumstances raise ethical concerns with accepting assignment: the appellate matter includes parties from whom the trial court judge received campaign contributions during the judge's recent judicial election; the judge also accepted a campaign contribution from a third party entity, or super political action committee (PAC), that accepted contributions from named parties in the appellate matter; and, finally, the judge is an active member of an

organization devoted to the law, the legal system, and the administration of justice, which includes parties to the appellate matters as other members of the organization.

II. Oral Advice Provided

Disqualification and disclosure rules differ for trial court judges and appellate justices, but those rules apply based on the type of proceeding rather than on a judicial officer's formal title or status. (*Mosk v. Superior Court* (1979) 25 Cal.3d 474, 483 [an assigned judge pro tempore generally has the same power and authority as a regular judge of the court to which he or she is assigned].) Here, the trial court judge would have no mandatory duty to disqualify or disclose the reported campaign contributions from parties in the appellate proceeding, which were all under the $5,000 limit requiring appellate justice disqualification. (Cal. Code Jud. Ethics, canon 3E(5)(j).)[1] Nor would the judge have a duty to disqualify or disclose the third party super PAC contribution. Similarly, the trial court judge would have no mandatory duty to disqualify or disclose the judge's membership in an organization devoted to the law, the legal system, and the administration of justice.

However, as an appellate justice pro tempore, the judge is obligated to make a discretionary decision to disqualify in the assigned matter if the judge believes recusal would further the interests of justice or the circumstances are such that a reasonable person aware of the facts might doubt impartiality. (Canon 3E(4)(a) & (c).) The party contributions below the canon limit for mandatory appellate justice disqualification are circumstances the judge should consider when making a discretionary decision about whether a reasonable person aware of those contributions through the judge's publically available Fair Political Practices Commission (FPPC) filings, or any other circumstances

[1] All further references to canons and to Advisory Committee commentary are to the California Code of Judicial Ethics unless otherwise indicated.

related to the campaign or memberships, would doubt the judge's impartiality in the appellate matter.

III. Analysis

(a). Applicable Rules

The disqualification and disclosure requirements for trial court judges differ from those applicable to appellate court justices. For example, it is mandatory for a trial court judge to disqualify for all campaign contributions over $1,500 from a party or lawyer in the proceedings. (Code Civ. Proc. § 170., subd. (a)(9)(A) & (B); CJEO Formal Opinion 2013-005, *Disqualification Based on Judicial Campaign Contributions from a Lawyer in the Proceedings*, Cal. Supreme Ct., Com. Jud. Ethics Opns., p. 9.) Appellate Justices, on the other hand, are required to disqualify only for such contributions over $5,000. (Canon 3E(5)(j).)

The differences in disclosure requirements are more significant. A trial court judge must disclose information that is "reasonably relevant to the question of disqualification . . . , even if the judge believes there is no actual basis for disqualification." (Canon 3E(2)(a); canon 3E(2)(b)(i) [judge who was a candidate for judicial office in a trial court election must disclose any contribution of $100 or more from a party, even if the amount would not require disqualification]; Advisory Com. com. foll. canon 3E(2)(b) [additional required campaign contribution disclosures might include those made by a party to a third party in support of a trial court judge's campaign, such as a super PAC contribution made by a party]; Code Civ. Proc. § 170.1, subd. (a)(9)(C) [trial court judges must specifically disclose any campaign contribution by a lawyer or party in the proceeding].)

In contrast, appellate justices have no disclosure duties under either the canons or statute. (CJEO Oral Advice Summary 2018-023, *Disqualification Responsibilities of Appellate Court Justices*, Cal. Supreme Ct., Com. Jud. Ethics Oral Adv. Sum., p. 3;

Rothman et al., Cal. Jud. Conduct Handbook (4th ed. 2017) § 7:90, pp. 501-503 [disclosure requirement in the appellate context would be more complex than in trial courts because there is no face-to-face contact with the parties until the hearing date, after the briefs are examined and a tentative decision is discussed by the appellate court justices].) An appellate court justice may, but is not required to, disclose information relevant to the decision to not disqualify himself or herself. (CJEO Oral Advice Summary 2018-063, *supra*, at p. 3.)

It is clear from these canons and statues, and other authorities interpreting them, that the differing disqualification and disclosure rules apply based on the type of proceeding rather than on the judicial officer's formal title or status. (Canon 3E(2) [disclosure requirement for information relevant to disqualification expressly applies in trial court proceedings]; *Mosk v. Superior Court, supra,* at. p. 483 [an assigned judge pro tempore generally has the same power and authority as a regular judge of the court to which he or she is assigned].) Thus, a trial court judge invited to sit on assignment as a pro tempore justice of the Supreme Court would be subject to the disqualification and disclosure obligations applicable to an appellate court justice.

(b). No Mandatory Duty to Disqualify or Disclose

Mandatory grounds for disqualification applicable to appellate court justices are set forth in canon 3E(5), which includes the disqualification requirement for justices who have received a campaign contribution of $5,000 or more from a party in the matter before the court. (Canon 3E(5)(j).)

In the circumstances here, the requesting trial court judge reports receiving campaign contributions from several parties in the appellate matter, but all of those contributions were in amounts lower than the $5,000 limit requiring appellate disqualification. The judge also reports receiving a $7,000 contribution from a super

PAC, which included contributions to the third party super PAC made by parties to the appellate matter. Because this third party contribution was not made by "a party or lawyer" in the appellate matter, the canon 3E(5)(j) limit requiring appellate disqualification does not apply. None of these reported contributions would require the judge to disqualify himself under the mandatory canon applicable to appellate justices.

Because appellate justices have no duty to disclose, the requesting trial court judge would be under no obligation to disclose any of these contributions, which he would have been required to disclose in a trial court proceeding as information reasonably relevant to the question of disqualification. (Canons 3E(2)(a) & 3E(2)(b)(i); Advisory Com. com. foll. canon 3E(2)(b); Code Civ. Proc. § 170.1, subd. (a)(9)(C).)

Similarly, the judge's active membership in an organization devoted to the law, the legal system, and the administration of justice would not require disqualification under any canon or statute, but disclosure would be required in a trial court proceeding because the organization is primarily made up of parties to the appellate matter, which is reasonably relevant to the question of disqualification. In the appellate court proceeding the judge has been invited to hear on assignment, however, the judge would have no duty to disclose the circumstances of the membership. (CJEO Oral Advice Summary 2014-005, *Disqualification for Membership in an Amicus Curiae*, Cal. Supreme Ct., Com. Jud. Ethics Opns., p. 3 [a reasonable person would not doubt a justice's ability to be impartial in deciding *the interests of the parties* in circumstances where the justice was a member of an organization that had filed an amicus brief].)

(c). Discretionary Decisions about Disqualification for the Appearance of Impartiality

Discretionary grounds for disqualification applicable to appellate court justices are set forth in canon 3E(4), which requires appellate justices to disqualify themselves when

they believe recusal would further the interests of justice or when the circumstances are such that a reasonable person aware of the facts might doubt impartiality. (Canon 3E(4)(a) & (c); CJEO Oral Advice Summary 2014-005, *supra*, Cal. Supreme Ct., Com. Jud. Ethics Oral Adv. Sum. at p. 2.) In this case, the judge will not have a duty as an appellate justice pro tempore to disclose the non-disqualifying party campaign contributions, but those contributions would still be publically available in the judge's FPPC filings. The judge's discretionary decision about disqualification must take into consideration whether a reasonable person aware of those public records and the campaign contributions from parties to the action, or any other circumstances related to the judge's campaign or memberships, would doubt impartiality.

CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS
350 McAllister Street, Room 1144A
San Francisco, CA 94102
(855) 854-5366
www.JudicialEthicsOpinions.ca.gov

CJEO Oral Advice Summary 2018-026

[Issued November 2, 2018]

SOLICITING ENDORSEMENTS FROM TRIAL COURT JUDGES FOR OTHER APPELLATE COURT JUSTICES SUBJECT TO RETENTION ELECTIONS

I. Question Presented:

May a presiding justice (PJ) of a Court of Appeal contact superior court presiding judges within the PJ's appellate district to solicit campaign endorsements for other appellate court justices facing retention elections. When soliciting the presiding judges, the PJ also intends to ask each presiding judge to solicit endorsements from every judge on the presiding judge's trial court on behalf of the justices seeking retention.

II. Oral Advice Provided:

Subject to certain restrictions, canon 5B(4) of the California Code of Judicial Ethics[1] permits a judge to solicit campaign contributions or endorsements for his or her own campaign and on behalf of other judges and attorneys who are candidates for judicial office. Judges are uniquely knowledgeable about the necessary and ideal qualifications of a judge based on their own experience on the bench. Judges also have particular knowledge about the qualifications of certain judicial candidates based on their personal experience as colleagues or from participating in review of their work. (Advisory Com. com. foll. canon 5A [judges are in a unique position to know the qualifications necessary to serve as a competent judicial officer].) Based on a judge's unique position to evaluate candidates, the judiciary and public benefit when a judge endorses a qualified candidate. Moreover, if a judge who is already endorsing a candidate based on the candidate's qualifications can solicit and obtain additional endorsements from other judges who similarly believe the candidate is well qualified, there is a greater likelihood that a highly qualified candidate will be retained or elected. Electing or retaining highly qualified judges promotes the integrity of and public confidence in the judiciary. (Canon 1 [an honorable judiciary is indispensable to justice in our society].)

There is a blanket prohibition on certain campaign-related solicitations, as well as two additional limitations a judge must consider. A judge is prohibited from soliciting campaign contributions or endorsements from certain subordinate judicial officers[2] or from California state court personnel in all circumstances. (Canon 5B(4).) When soliciting campaign endorsements from anyone else, including other judges, a judge may not use the prestige of judicial office in a manner that would reasonably be perceived as coercive and the solicitation must conform to the other obligations within the code, including that any such activity promote judicial independence, integrity, and impartiality. (Canons 2A [judges must act at all times in a

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[2] Specifically, canon 5B(4) prohibits solicitation of campaign endorsements from California state court commissioners, referees, court-appointed arbitrators, hearing officers, and retired judges serving in the Assigned Judges Program.

manner that promotes public confidence in the integrity and impartiality of the judiciary], 2B(1) [judges must not convey that any individual is in a special position of influence], 3 [judicial duties must take precedence over all other activities], 5 [judicial independence, impartiality, and integrity must dictate the conduct of judges engaged in political activity].)

There is a risk that anyone a judge solicits for a campaign endorsement will feel obligated to make the endorsement, regardless of whether the request is made by the judicial candidate or on behalf of the judicial candidate. This risk may be greater and there may be a perception of coercion when the soliciting judge is in a position of influence or control over the person being solicited. For this reason, canon 5B(4) prohibits judges from soliciting campaign endorsements from certain subordinate judicial officers and court staff in all circumstances. (Advisory Com., Invitation to Comment SP18-08 (2018) p. 3 [a court employee or subordinate judicial officer would likely feel pressure to endorse a judge's campaign].) The concerns that justify this blanket prohibition on soliciting certain subordinate judicial officers and court staff do not similarly support a blanket prohibition on appellate court justices soliciting trial court judges. The relationship between an appellate court justice and a trial court judge differs from the relationship between a judge and a subordinate judicial officer or other court staff. Appellate court justices do not supervise the work of trial court judges in an employer-employee context. They do not have influence or control over trial court judges in the manner that trial court judges may control subordinate judicial officers and court staff. As such, a blanket prohibition is not justified.

Any judicial officer soliciting an endorsement must also consider the other two limitations on solicitation of campaign endorsements; whether the particular solicitation creates a perception of coercion and whether it could cause doubts regarding judicial independence, integrity, or impartiality. Both these concerns are heightened in the narrower question of whether a PJ may solicit campaign endorsements from trial court presiding judges in the PJ's district, especially where the solicitation also requests the presiding judges to solicit endorsements from other judges on the presiding judge's court.

A PJ has additional supervisory responsibilities related to the court. (See, e.g., canon 3C(4) [a judge with supervisory authority shall take reasonable measures to ensure other judges

properly perform their judicial responsibilities].) At a minimum, these responsibilities demonstrate that the PJ is in a leadership position and creates a perception that any request by the PJ will be seriously considered and most likely followed by other justices and trial court judges, including presiding judges. Therefore, a PJ should be cognizant of his or her heightened leadership position when soliciting endorsements to avoid the perception that the solicited judge was coerced to make an endorsement based on the PJ's position within the court.

The PJ should also consider whether the proposed solicitation could create doubts regarding the independence, integrity, or impartiality of the judiciary. (Canon 1 [a judge shall uphold the integrity and independence of the judiciary].) Appellate courts oversee trial court decisions, and a trial court judge may have a case that is pending review by the appellate court justice soliciting an endorsement. If an appellate court justice solicits an endorsement for his or her own campaign or for another candidate for judicial office while actively reviewing the trial court judge's decision, a reasonable person aware of this fact could doubt the justice's capacity to be impartial in that matter. (Canon 3E(4)(c) [disqualification required in circumstances where a reasonable person aware of the facts would doubt a justice's ability to be impartial].) These concerns of impartiality are again compounded when the solicitation is made by a PJ who has supervisory authority over all of the cases within his or her appellate district or division.

The proposed mass solicitation by the PJ to every trial court presiding judge to endorse the justices seeking retention with the additional request that the presiding judge solicit every trial court judge on the PJ's behalf heightens the concerns of coercion and impartiality to a degree that is impermissible. Looking at the solicitation from the perspective of the solicited trial court judge or a reasonable person aware of the solicitation, the solicitation is from a presiding judge, the solicitation seeks an endorsement of every appellate court justice facing a retention election, and the solicitation originally came from the PJ on behalf of those justices. Also, the solicitation asks for an endorsement of each justice seeking retention without evaluating a justice's individual qualifications. The proposed mass solicitation uses the prestige of the PJ's office in a manner that would reasonably be perceived as coercive and is prohibited by canon 5B(4). It would also result in an overall decrease in the perceptions of judicial independence, integrity, and impartiality.

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CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS
350 McAllister Street, Room 1144
San Francisco, CA 94102
(855) 854-5366
www.JudicialEthicsOpinions.ca.gov

CJEO Oral Advice Summary 2019-027

[Posted January 29, 2019]

SERVICE ON A NONPROFIT ADVISORY BOARD INVOLVED IN CRIMINAL JUSTICE ISSUES

I. Question

May a judicial officer serve on an advisory board of a nonprofit organization involved in criminal justice issues? The advisory board will be active in drafting legislation to reform part of the criminal law system and service may involve providing testimony before the Legislature or meeting with legislative sponsors. Members of the advisory board will include law professors and an attorney.

II. Oral Advice Provided

The California Code of Judicial Ethics[1] makes clear that a judge or justice may engage in extrajudicial activities, including pursuits in nonprofit civic organizations dedicated to the law, the legal system, or the administration of justice. (Canon 4B [judges may participate in activities concerning legal subjects that are consistent with the requirements of the code]; canon 4C(1) [judges may appear before or officially consult with the a legislative body on matters concerning the law, the legal system, or the administration of justice]; canon 4C(3)(a) [judges may serve as nonlegal advisors to an organization devoted to the improvement of the law, the legal system, or the administration of justice]; canon 4C(3)(b) [judges may serve as nonlegal advisors to a nonprofit charitable or civic organization].)

Indeed, judicial participation in activities involving the law, the legal system, and the administration of justice is encouraged. The advisory committee commentary following canon 4B permitting involvement in both legal and nonlegal extrajudicial activities explains that judges are in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice because they are specially knowledgeable in the law. (Advisory Com. com. foll. canon 4B [a judicial officer is specially learned in the law and in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice].) Significantly, this commentary expressly identifies revision of substantive and procedural law and improvement of criminal justice as permitted activities. It also specifies that such participation may be through a group dedicated to the improvement of the law.

The permissions granted under canon 4B, however, must also be consistent with all other requirements of the code, which means that judicial involvement with a nonprofit group dedicated to the improvement of law must be squared with the canon 4C(3)

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limitation on judicial activities with civic and nonprofit organizations to participation as a nonlegal advisor. (Advisory Com. com. foll. canon 4C(3) [a judge is prohibited from practicing law or serving as a legal advisor under the code].) The advisory committee commentary following canon 4B again provides the explanation: the distinction between permissible nonlegal advisory service and impermissible legal service lies in the fact that judges are uniquely qualified to address matters falling within their judicial experience. Thus, the revision of substantive and procedural law encouraged under canon 4B is permitted nonlegal advisory service under canon 4C(3) when done from the judicial perspective.

This committee reached a similar conclusion with regard to judicial comment and consultation before public officials, including providing testimony at legislative hearings or consulting with legislators. (CJEO Formal Opinion 2014-006 (2014), *Judicial Comment at Public Hearings and Consultation with Public Officials and Other Branches of Government*, Cal. Supreme Ct. Com. Jud. Ethics Opns., p. 6.) In CJEO Formal Opinion 2014-006, the committee examined canon 4(C)(1) and concluded that the reason judges are permitted to speak publicly or consult officially with other branches of government on matters concerning the law, the legal system, or the administration of justice, is that it benefits the lawmaking process, and therefore society, for judges to share their expertise in the law and the justice system with the other branches of government in a manner other than simply performing the duties of their office. (*Ibid*.)

As guidance for determining whether anticipated commentary or consultation is permissible, the committee explained that speaking from a judicial perspective allows judges to draw from their entire experience with the law while promoting the public trust in impartiality. (CJEO Formal Opinion 2014-006, *supra*, at pp. 7-9 [distinguishing permissible commentary about the effect of criminal legislation on the court system from impermissible advocacy directed at benefiting a particular group or social policy].)

The committee, however, cautioned that even permissible commentary must be considered in light of other code restrictions. (CJEO Formal Opinion 2014-006, *supra*, at pp. 9-11; Advisory Com. com., foll. canon 4C(1) [when deciding whether to appear at a public hearing or consult with a public official on matters concerning the law, the legal system, or the administration of justice, a judge should consider whether that conduct would violate any other provisions of the code]; Advisory Com. com., foll. canon 4C(3)(c) [it is necessary for judges to regularly examine the activities of organizations they serve due to the changing nature of some organizations and their relationship to the law].) Those considerations generally include whether the permissible activity might nonetheless detract from the dignity of office (canon 1), reflect adversely on the judge's impartiality (canons 1 & 2), commit the judge with respect to the outcome of cases (canon 2A), convey a special position of influence or lend judicial title (canon 2B), interfere with the performance of duties (canon 3A), comment on pending or impending cases (canon 3A), or lead to frequent disqualification (canon 4A(4)). (CJEO Formal Opinion 2014-006, *supra*, at pp. 9-10.)

With these canons, conclusions, and considerations in mind, it is the committee's view that the requesting judicial officer may serve on an advisory board of a nonprofit organization dedicated to improving criminal justice. Such service may include drafting legislation that will benefit the law or judicial system directly, serve the general interests of those using the legal system, or enhance the prestige, efficiency, or function of the legal system. Service may also involve providing testimony before the Legislature or meeting with legislative sponsors to provide a judicial perspective. However, these activities are permissible only so long as the judicial officer determines on a continuing basis that they are otherwise consistent with the obligations of judicial office required under the code.

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CALIFORNIA SUPREME COURT
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350 McAllister Street, Room 1144
San Francisco, CA 94102
(855) 854-5366
www.JudicialEthicsOpinions.ca.gov

CJEO Oral Advice Summary 2019-028

[Posted February 14, 2019]

SERVICE ON A CIVIL LIBERTIES PROGRAM ADVISORY PANEL FOR THE STATE LIBRARY

I. Question:

Does the California Code of Judicial Ethics permit an Associate Justice of the California Court of Appeal to accept appointment by the Governor to serve on an advisory panel for the California State Library (State Library)?[1] The appointment will be to an advisory panel for the California Civil Liberties Public Education Program (Civil Liberties Program), which is a state-

[1] Limited identifying information is included in this oral advice summary because confidentiality has been waived by the requesting party. (Cal. Rules of Court, rule 9.80(h)(3); Cal. Supreme Ct. Com. Jud. Ethics Opns., Internal Operating Rules & Proc., rule 5(e).)

funded grant program to sponsor educational projects about the internment of Japanese Americans during World War II, as well as other civil rights violations and injustices perpetrated on the basis of race, national origin, immigration status, religion, gender, or sexual orientation. The Civil Liberties Program also sponsors the development of public educational activities and materials to ensure that the events surrounding the internment of Japanese Americans during World War II will be remembered, illuminated, and understood.

II. Oral Advice Provided:

As the Supreme Court Committee on Judicial Ethics Opinions (CJEO) has concluded in the past, the question of whether an appellate justice may serve in an advisory capacity to another branch of government raises both legal issues under the California Constitution and ethical issues under the California Code of Judicial Ethics.[2] (CJEO Oral Advice Summary 2015-010 (2015), *Service by an Appellate Justice as a Compliance Officer*, Cal. Supreme Ct. Com. Jud. Ethics Opns., p. 1.) CJEO has no authority to provide legal advice and declines to do so. (*Id.* at pp. 1-2.) It is the responsibility of an appellate justice requesting ethical advice from CJEO to independently determine the legal question of whether simultaneous service is permissible under article 7, sections 7 and 17, of the California Constitution. (CJEO Oral Advice Summary 2015-010, *supra*, at pp. 1-2.)

Assuming for the purposes of this opinion that there are no constitutional impediments, the question is whether the code permits an appellate justice to serve by gubernatorial appointment on an advisory panel for the State Library, where the purpose of the panel is to make recommendations to the State Library regarding grants to develop programs to educate the public about the internment of Japanese American citizens during World War II.

The code makes clear that judicial officers may engage in extrajudicial activities, including pursuits in civic organizations dedicated to the law, the legal system, or the administration of justice. (Canon 4B [judges may participate in activities concerning legal subjects that are

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consistent with the requirements of the code]; canon 4C(1) [judges may appear before or officially consult with the a legislative body on matters concerning the law, the legal system, or the administration of justice]; canon 4C(3)(a) [judges may serve as a nonlegal advisor to an organization devoted to the improvement of the law, the legal system, or the administration of justice]; canon 4C(3)(b) [judges may serve as a nonlegal advisor to a nonprofit charitable or civic organization].)

The code's encouragement of extrajudicial activities related to the law, the legal system, and the administration of justice is also present in exceptions to restrictions on governmental appointments and consultations. (Canon 4C(1) [consulting with an executive or legislative body prohibited except on matters concerning the law, the legal system or the administration of justice]; canon 4C(2) [appointment prohibited to a governmental committee or position concerned with issues of fact or policy on matters other than the law, the legal system, or the administration of justice].)

It is clear that gubernatorial appointment to the Civil Liberties Program advisory panel is an extrajudicial activity involving the law, the legal system, and the administration of justice. The advisory panel was legislatively established to make recommendations regarding grants to educate and inform the public about civil rights violations and civil liberties injustices perpetrated on the basis of race, national origin, immigration status, religion, gender, or sexual orientation as well as the internment of Japanese Americans during World War II. (Ed. Code § 13015(c).) These goals not only involve the law and the administration of justice, they are also in accord with similar goals in the code. (Canon 2C [judicial membership prohibited in organizations that invidiously discriminate on the basis of race, sex, gender, gender identity, gender expression, religion, national origin, ethnicity, or sexual orientation].)

Thus, acceptance of the appointment is permissible under the code, which also requires the appellate justice to continually assess the appropriateness of ongoing service. (Advisory Com. com., foll. canon 4C(3)(c) [it is necessary for judicial officers to regularly examine the activities of organizations they serve due to the changing nature of some organizations and their relationship to the law].) Those considerations generally include whether the permissible activity might nonetheless detract from the dignity of office (canon 1), reflect adversely on the

justice's impartiality (canons 1 & 2), commit the justice with respect to the outcome of cases (canon 2A), interfere with the performance of duties (canon 3A), comment on pending or impending cases (canon 3B(9)), or lead to frequent disqualification (canon 4A(4)). (Cal. Code Jud. Ethics, Terminology, "Law, the legal system, or the administration of justice.")

In the case of this advisory panel, CJEO does not believe service would lead to frequent disqualification because a person aware of the educational activities of the Civil Liberties Program would have no reason to doubt the justice's impartiality or independence in appellate matters generally. As such, continued service would not be precluded unless the justice makes disqualification decisions related to advisory panel activities in specific appellate matters before the justice. (*Kaufman v. Court of Appeal* (1982) 31 Cal.3d 933, 937-940 [each appellate justice decides whether the facts require recusal, subject only to higher court review for bias or unfairness in the appellate proceedings].)

In sum, accepting appointment by the Governor to serve on an advisory panel for the Civil Liberties Program is permissible under the Code of Judicial Ethics so long as the appointed appellate justice determines on a continuing basis that serving is otherwise consistent with the obligations of judicial office.

CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS
350 McAllister Street, Room 1144
San Francisco, CA 94102
(855) 854-5366
www.JudicialEthicsOpinions.ca.gov

CJEO Oral Advice Summary 2019-029

[Issued April 4, 2019]

APPELLATE DISQUALIFICATION FOR PRIOR ASSIGNMENT AS COORDINATED PROCEEDINGS JUDGE

I. Questions

Must a recent appellate justice disqualify himself from hearing an appeal in Judicial Council coordinated proceedings where the justice was assigned for several months as the coordination judge? While assigned to the justice, the matter on appeal was either (i) the subject of a stay ordered by a previous coordination judge or (ii) on appeal, depriving the court of jurisdiction. The docket shows no action taken in the matter by the justice while he was the coordination judge. Now elevated to the Court of Appeal and serving on a panel hearing all appellate matters from the coordinated proceedings, the justice asks if he must disqualify or may

participate in deciding the matter on appeal. The justice asks for additional guidance on his disqualification obligations when assigned to appeals from other coordinated matters in which the justice did not issue the ruling on appeal as the trial judge.

II. Oral Advice Provided

The Code of Judicial Ethics[1] provides that disqualification of an appellate justice is mandatory when the justice "tried or heard" the case on appeal as a trial judge. (Canon 3E(5)(f)(i) [disqualification required when an appellate justice served as the judge before whom the proceeding was tried or heard in the lower court].) This canon is nearly identical to Code of Civil Procedure section 170.1, subdivision (b) (section 170.1(b)), which provides that a trial court judge before whom a proceeding was "tried or heard" shall be disqualified from participating in any appellate review of that proceeding. While no court or other authority has interpreted what "tried or heard" means in the context of canon 3E(5)(f)(i), the term has been interpreted as used in the similar circumstances of section 170.1(b). (*Housing Authority of Monterey County v. Jones* (2005) 130 Cal.App.4th 1029 (*Jones*) [judge who ruled on contested pretrial motions but did not try or hear the subsequent judgment is not subject to mandatory disqualification under § 170.1(b)].) By analogy, *Jones* compels the conclusion here that mandatory disqualification is not required for the inquiring appellate justice who did not take any action in the proceeding now on appeal before the justice's panel. (*Jones, supra,* at pp. 1040-1041.)

The *Jones* court went on to rule, however, that the judge was disqualified from the appellate division panel reviewing the judgment because a reasonable person might doubt the judge's impartiality knowing that the judge had decided contested pretrial motions related to the judgment on appeal. Conversely, *Jones* also suggests that a reasonable person would not doubt the impartiality of the inquiring justice who did not actively participate as a trial judge in any matter related to the merits of the appeal. (*Jones, supra,* 130 Cal.App.4th at pp. 1041-1042.)

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[1] All further references to the code or canons are to the California Code of Judicial Ethics unless otherwise indicated.

Finally, basic guidance on appellate disqualification for prior service as a trial or coordination judge can be garnered from *Jones*. (*Id.* at p. 1042.)

(a). Tried or Heard

In *Jones,* the court analyzed whether a trial court judge was disqualified from participating in a superior court appellate division panel review of a case in which the judge had issued pretrial continuance and discovery orders but had not presided over the subsequent judgment on appeal. Interpreting the statutory term "tried or heard" applicable to trial court judges under section 170.1(b), *Jones* acknowledged that while appellate justices are not bound by the statute, the appellate disqualification canon is similar and also contains the term "tried or heard." (*Jones, supra,* 130 Cal.App.4th at pp. 1040, 1043, fn. 6.)

To interpret the meaning of "tried or heard" in section 170.1(b), *Jones* examined the entire statutory scheme for trial court disqualification and observed that it defined 'proceeding' to mean 'the action, case, cause, motion, or special proceeding to be tried and heard by the judge.' (*Jones, supra,* 130 Cal.App.4th at p. 1040, quoting Code Civ. Proc., § 170.5, subd. (f).) The court concluded from this definition that a judge who decided contested pretrial continuance and discovery motions heard a different "proceeding" from the ultimate judgment on appeal and so was not disqualified from sitting on the superior court appellate division panel under section 170.1(b). (*Jones, supra,* at p. 1090.) The court reasoned that the judgment the appellate panel was reviewing had not previously been heard by the same judge, even though those motions were related to the judgment. The court found it significant that in her order on the motions, the judge stated that she was not ruling on the case-in-chief or the affirmative defenses, and no claim of error was made on appeal with regard to those motions. (*Id.,* at 1041.) Thus, *Jones* held that mandatory disqualification from the superior court appellate division panel was not required because no part of the judge's ruling was actually included within the proceeding on appeal. (*Ibid.*)

Although the appellate disqualification canons do not similarly define a "proceeding," as *Jones* noted, we reach an analogous conclusion under canon 3E(5)(f)(i) because the inquiring

justice made no rulings included within the proceeding on appeal. (*Jones, supra,* 130 Cal.App.4th at p.1043, fn. 6 [unlike the parallel statue governing superior court disqualification, canon 3E does not define proceeding].) Here, the inquiring justice took no action in the coordinated proceedings, which were stayed or on appeal during the assignment, depriving the court of jurisdiction. Defining or distinguishing proceedings is not necessary to conclude that the inquiring justice did not try or hear any part of the matter on appeal and therefore is not disqualified under canon 3E(5)(f)(i).

A disqualification analysis does not end there, however, as *Jones* noted. (*Jones, supra,* 130 Cal.App.4th at p.1041 [a more general disqualification determination about the appearance of impropriety is also required].)

(b). Appearance of Impartiality

Having decided that disqualification was not mandatory under section 170.1(b), the *Jones* court turned its attention to analyzing the provision of the disqualification statute that requires trial court judges to disqualify in all matters if a person aware of the facts might reasonably entertain doubt the judge would be able to be impartial. (*Jones, supra,* 130 Cal.App.4th at p. 1041, citing Code Civ. Proc., § 170.1(a)(6)(C), now subd. (a)(6)(4)(iii).) Canon 3E(4)(c) contains a parallel provision for appellate justices who must disqualify in all matters if a reasonable person aware of the facts would doubt the justice's ability to be impartial. (*Kaufman v. Court of Appeal* (1982) 31 Cal.3d 933, 937-940 [each appellate justice decides whether the facts require recusal, subject only to higher court review for bias or unfairness in the appellate proceedings].)

Jones looked at the contested pretrial motions and concluded that, although technically not the same proceedings as the judgment on appeal, the legal and factual issues were related. (*Jones, supra,* 130 Cal.App.4th at p. 1031, 1041.) For example, the motions limited the scope of discovery and the proceedings, although the motions themselves were not appealable, and the appellant did not argue those rulings were in error on appeal. (*Ibid.*) Nonetheless, the court concluded that a person aware of the degree to which the contested pretrial motions were

implicated by and referenced in the arguments on appeal would reasonably question the judge's impartiality, which in turn compelled the judge's disqualification. (*Id.,* at p. 1042.)

The pretrial rulings in *Jones* are easily distinguished here and the circumstances described by the inquiring justice do not compel disqualification. The justice lacked jurisdiction or the matter was stayed the entire time the justice was assigned as the coordination judge, so he took no action that could possibly suggest the appearance of partiality. As this committee concluded in a similar situation, disqualification is not required when a judge previously appeared in the same case as a deputy district attorney on a nonsubstantive matter, such as a perfunctory continuance, because a person aware of the fact that the judge did not "actively participate" in the prosecution would have no reason to doubt the judge's impartiality. (CJEO Formal Opinion 2015-007 (2015), *Disqualification for Prior Appearance as a Deputy District Attorney in a Nonsubstantive Matter*, Cal. Supreme Ct. Com. Jud. Ethics Opns., pp. 3, 14; see also CJEO Oral Advice Summary 2016-017 (2016), *Disqualification for Prior Appearance as a Deputy District Attorney in Another Proceeding*, Cal. Supreme Ct. Com. Jud. Ethics Opns., p. 4 [active participation in another proceeding includes, at a minimum, significant personal involvement as a prosecutor in critical decisions regarding the other case].)

Here, the inquiring justice was precluded from taking any action in the coordinated proceedings. A reasonable person aware of these facts could not conclude that he was actively involved or made any decisions as the coordination judge regarding the matter on appeal or other related matter. Therefore the committee advises against discretionary disqualification under canon 3E(4)(c).

(c). Appellate Disqualification Considerations in Other Coordinated Proceedings

The inquiring justice asks for additional guidelines about making disqualification decisions in other matters generally where he served as the coordination judge. With regard to mandatory disqualification under canon 3E(5)(f)(i), it is the committee's advice that a matter is tried or heard below, and disqualification is mandated, when a prior coordination judge was actively involved in a judicial decision being appealed. (Rothman et al., *Cal. Jud. Conduct*

Handbook (4th ed. 2017) § 7:63, pp. 487-486 [citing *Jones* but concluding that the decision against mandatory disqualification would be different in circumstances where the motion is itself on appeal].) Concomitantly, *Jones* instructs that disqualifying actions by a judge in the lower court include issuing rulings or orders actually included in the proceeding on appeal. (*Jones, supra,* 130 Cal.App.4th at pp. 1040-1041.) That is, disqualification is not mandatory under canon 3E(5)(f)(i) unless the issues on appeal were previously decided by the justice.

Jones also provides valuable guidance for making a discretionary decision about disqualification based on whether a person aware of the facts might reasonably doubt impartiality. *Jones* identifies the following facts as likely to raise reasonable doubt as to impartiality: (1) the judge decided issues of law or fact related to the merits of the appeal; (2) the appeal references or is implicated by the lower court ruling; (3) the judge made a ruling in the case in chief or affirmative defenses; (4) the judge made a procedural determination that had a substantial effect on the ultimate outcome; or (5) a claim of error about the judge's lower court rulings is raised in the arguments on appeal. The committee agrees and advises that these are also facts to be considered by an appellate justice under canon 3E(4)(c).

(d). Conclusions

The committee concludes that mandatory disqualification is not required under canon 3E(5)(f)(i) because the inquiring justice did not previously try or hear the appellate matter, which was stayed or on appeal during the time the justice was assigned as the coordinated proceeding judge. The justice took no action and made no decisions in the matter. The committee also advises against discretionary disqualification under canon 3E(4)(c) because a reasonable person aware of the circumstances, including the fact that the justice did not decide a motion or contested issue of law or fact related to the merits of the appeal, would have no reason to doubt the justice's impartiality. Finally, the committee recommends that when determining whether to disqualify in other appeals from coordinated proceedings in which the justice served, the justice consider whether he actively participated in the matter on appeal. It is the committee's view that the following actions as a trial judge below would likely lead a

reasonable person to doubt impartiality: (1) rulings on contested issues of law or fact related to the appeal; (2) a ruling that is referenced or implicated in the appeal; (3) a ruling on the case in chief or affirmative defenses; (4) a procedural determination that had a substantial effect on the ultimate outcome; or (5) any rulings about which a claim of error is raised in the arguments on appeal. A reasonable person would doubt impartiality in these circumstances. (Canon 3E(4)(c).)

This oral advice summary is advisory only. (Cal. Rules of Court, rule 9.80(a), (e); Cal. Supreme Ct. 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 summary 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)).)

CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS
350 McAllister Street, Room 1144
San Francisco, CA 94102
(855) 854-5366
www.JudicialEthicsOpinions.ca.gov

CJEO Oral Advice Summary 2019-030

[Posted July 2, 2019]

ACCEPTANCE OF A PRIVATE TESTIMONIAL DINNER AND HONORS

I. Questions

A judicial officer who is retiring after serving nearly 20 years on an Inn of Court executive committee, but who is not retiring from judicial office, requests ethical advice concerning a retirement dinner planned by the other executive committee members to honor the judge, and about an annual student achievement award the executive committee plans to establish in the judge's name.

The requesting judge's Inn of Court is a local chapter of the national America Inns of Court. The national organization and the judge's local chapter provide a forum for attorneys and judges to improve the law, the legal system, and the administration of

justice through education, mentoring, and socializing. Inns of Court promote strong professional relationships while providing educational services that fulfill minimum continuing legal education (MCLE) requirements for attorneys. Through monthly dinner meetings, members advance training and education in a collegial environment. Law students are also invited to be active members of Inns of Court, which offers them an opportunity to learn and to develop professional relationships with members of the bar and bench. The monthly MCLE programs provided at the judge's Inn of Court are presented by teams from the general membership, which include law students who learn and teach side-by-side with experienced judges and attorneys in the community. The judge has served on the Inn of Court executive committee for many years as the at-large MCLE program coordinator, and the executive committee wishes to honor the judge for this service with a retirement dinner and award.

The dinner will be attended by the other executive committee members and their guests. The long-standing executive committee consists of judges and prominent local attorneys, with whom the judge has established close personal relationships during decades of Inn of Court service together. It has been the judge's practice to recuse in matters involving the individual executive committee attorney members, who the judge considers to be close personal friends. The dinner will be held at an executive committee member's private home. Three executive committee attorney members, who are the judge's close personal friends, will share the cost of the dinner, which will not exceed $125 per person, although the estimated total cost of the dinner will not exceed $3,500.

The award to be established in the judge's name will recognize the educational achievements of a law student member of the Inn of Court each year, which the executive committee plans to commemorate on a plaque installed at the law school where the Inn of Court meetings are traditionally held. The executive committee also plans to give the judge a framed replica of the plaque at the retirement dinner to commemorate the judge's educational contributions through the Inn of Court.

The judge specifically asks if the dinner is a private testimonial or an otherwise acceptable gift, and if so, whether the dinner should be valued at the cost of the judge and his or her guest's dinners, a quarter of the total cost of the dinner, or the total cost of the dinner. The judge also asks if reimbursing the three hosting executive committee attorney members for the value of the dinner resolves the statutory prohibition against accepting more than $450 a year from a single source. Finally, the judge asks if the award and acceptance of the framed commemoration are permissible.

II. Oral Advice Provided

The Code of Judicial Ethics[1] recognizes the importance of judicial officers engaging in their communities in the ways for which this judge is being honored. (Advisory Com. com. foll. canon 4A ["complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the community in which he or she lives"]; canon 4B [a judge may teach and participate in activities concerning legal matters]; Advisory Com. com. foll. canon 4B [a judicial officer is in a unique position to contribute to the improvement of the law, the legal system and the administration of justice, and may do so through a group dedicated to the improvement of the law]; canon 4C(3)(a) & (b) [a judge may serve as a director of a civic or nonprofit educational organization devoted to the improvement of the law, the legal system, or the administration of justice].) It does so by explicitly permitting this judge's educational service and by providing exceptions to the general prohibition on accepting gifts associated with such extrajudicial community activities. The code and these exceptions allow the judge to ethically accept the retirement dinner and award planned by the Inn of Court executive members.

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[1] All further references to canons, the code, and to advisory committee commentary are to the California Code of Judicial Ethics unless otherwise indicated.

A. Retirement Dinner

The code defines a gift as anything of value to the extent that consideration of equal or greater value is not received. (Code, Terminology, "Gift.") This definition is fundamentally the same as that in Code of Civil Procedure section 170.9, which also governs the acceptance and valuation of gifts by judicial officers. (Code Civ. Proc., § 170.9, subd. (*l*) ["gift" means a payment to the extent that consideration of equal or greater value is not received]; Rothman et al., *Cal. Jud. Conduct Handbook* (4th ed. 2017) § 9:31, p. 616 (Rothman) [the code and the statute use essentially the same definition].) Both the code and the statute exclude certain items as gifts and contain exceptions to the general prohibition on judicial officers accepting items that are gifts.

One of the items that both the code and the statute exclude as gifts subject to the general prohibition and exceptions are public testimonials. (Rothman, *supra*, § 9:39, p. 623 [recognition of a judge at a public testimonial event is not a tangible item that falls within the gift definitions in either the code or the statute, and the event itself, such as a dinner publicly honoring a judge, is not subject to the no-gift rules].) Although the code does not define a public testimonial, it has been interpreted as an event that publicly, not privately, pays tribute to, celebrates, or honors a judge and is open to the community. (*Ibid.* [a public testimonial event by a bar association that is open to the legal community and civic leaders, or a tribute dinner by a community institution that is open to its members and supporters, are not items subject to the gift rules].)

Given this interpretation, the retirement dinner planned by the Inn of Court executive committee cannot be described as a *public* testimonial that is excluded or excepted from the rules prohibiting and permitting gifts. The dinner is limited to the executive committee, which includes judges and attorneys, but is not open to other members of the greater Inn of Court membership or legal community. As a *private* testimonial, however, the retirement dinner is a gift that falls within at least one exception that allows acceptance.

Canon 4D(6)(a) provides that a judge may accept a gift from a person whose preexisting relationship with the judge would prevent the judge from hearing that person's matter under the disqualification rules. Judicial officers are required to disqualify themselves when they believe they cannot be impartial or that someone aware of their relationship with a person would reasonably doubt their ability to be impartial if that person appeared before them. (Canon 3E(4)(b) [applicable to appellate justices]; Code Civ. Proc., § 170.1, subd. (a)(6)(A)(iii) [applicable to trial court judges].) These rules have long been applied to preclude judges from hearing matters involving a close friend. (Rothman, *supra*, § 9:45, p. 636 [relationships requiring recusal normally include close personal friends of the judge].) Thus, a judge may accept a gift under the preexisting relationship exception in canon 4D(6)(a) when the gift is from a close friend whose matters the judge is disqualified from hearing. (*Ibid.* [judges may accept gifts from friends where a reasonable person would doubt impartiality and the judge is disqualified from hearing the friend's matter].)

Code of Civil Procedure section 170.9, subdivision (b)(3) similarly provides that gifts are not prohibited from a person whose preexisting relationship with the judge would prevent the judge from hearing a case involving that person under the code.

Here, the retirement dinner is planned by, will be attended by, and will be hosted by persons for whom the judge disqualifies when they appear. Specifically, the judge considers the three attorney board members who are hosting the dinner to be close personal friends, so the costs of the dinner are acceptable gifts that fall within the preexisting relationship exception.

Significantly, the statute also provides that acceptable gifts from friends for whom the judge disqualifies are not limited by value and may be accepted without regard to the $450 single source limit. (Code Civ. Proc., § 170.9, subd. (a), (b); Rothman, *supra*, § 9:45, p. 636 [excepted gifts from close friends are eliminated from the statutory dollar

limitation and a judge is free to take a gift in any amount from a person whose preexisting relationship with the judge requires disqualification].)

The value of the acceptable gift is nonetheless subject to reporting requirements under the Political Reform Act of 1974 (Gov. Code, §§ 8100 et seq.), which does not add further limitations on the receipt or value of gifts to judicial officers, but which requires public reporting of any gift or compensation. (See Rothman, *supra*, § 9:31, pp. 615-616.) It is generally accepted that the value of gifts falling within various code exceptions is the reasonable amount of the judge's participation and the participation of the judge's spouse, domestic partner, or guest. (See Rothman, *supra*, § 9:48, p. 639; id., § 9:55, p. 649 [acceptable invitations to ticketed educational events are calculated at the reasonable value of refreshments dinner, and entertainment, rather than the face value of the ticket].)

Thus, in the circumstances described here, the reportable value of the retirement dinner would be the cost of the dinner for the judge and his or her guest, or approximately $125 each, for a total value of $250. Although the purpose of the dinner is to celebrate the judge's retirement from the executive committee as the at-large coordinator of educational programs, nothing in the code or the statutes requires the judge to pay for the costs of those attending to celebrate and honor the judge.

Under the circumstances, the committee concludes that the retirement dinner is an acceptable gift and it would not be necessary for the judge to pay or otherwise reimburse the hosting attorneys for the cost of the judge and his or her guest's meals, a quarter of the total cost of the dinner, or the total cost of the dinner.

B. Award

The annual student achievement award the executive committee plans to establish in the judge's name is similarly a permissible honor, although it is not a gift to the judge.

The award will recognize the educational achievements of a law student Inn of Court member each year without bestowing anything of monetary value on the judge.

Nor will it advance the pecuniary interests of the judge, the student, or the Inn of Court. (Canon 2B(2).) Unlike a scholarship, which would require prohibited fundraising, the use of the judge's title in the award will contribute to legal education in a manner that advances the law, the legal system, and the administration of justice. (Cf. CJEO Oral Advice Summary 2015-011 (2015), *Use of Judicial Title on a Scholarship Fund*, Cal. Supreme Ct. Com. Jud. Ethics Opns., p. 1 [judicial officer's name and title may not be used by an alumni association of the judge's law school alma mater on a scholarship named in honor of the judge if the scholarship will be funded by donations solicited using the judge's name].) As such, it is a permissible use of title and the prestige of office in honor of both the judge and the students who will receive the award each year. (Rothman, *supra*, § 10.18, p. 689 [there is no prohibition on use of judicial title to promote a permissible legal educational program because the importance of judges contributing to the law, legal system, and the administration of justice far outweighs any arguable use of the prestige of office to advance the pecuniary interests of others].)

Finally, the plaque and the framed commemoration of the award that the executive committee intends to present to the judge are also honors the judge may accept. The statute specifically excludes plaques from the definition of a gift, so long as they are limited in value to under $250. (Cal. Code Civ. Proc., § 170.9, subd. (*l*)(6) [the term 'gift' does not include personalized plaques and trophies with an individual value of less than $250.00].) While the code does not contain a similar exclusion, the committee believes that the similarity in the two gift definitions supports the conclusion that the plaque and framed commemoration are not gifts because the personalization eliminates any value that could potentially be used as consideration. (CJEO Oral Formal Opinion 2014-005, *Accepting Gifts of Little or Nominal Value Under the Ordinary Social Hospitality Exception*, Cal. Supreme Ct. Com. Jud. Ethics Opns., p. 6 & fn. 6 [advising

that items of any value are gifts within the meaning of the code when they could be exchanged for consideration on the open market, but distinguishing homemade personalized items that would have no market value].)

Nonetheless, to the extent that the cost of procuring the personalized plaque and framing it were to be viewed as a gift incidental to the private retirement dinner, it would fall within the same code exception for permissible gifts based on the judge's preexisting relationships and disqualification practices, as discussed above. (See Rothman, *supra*, § 10:16, p. 685 [a judge may accept a free dinner and a plaque from a local bar association even though the event is underwritten by attorneys who will appear in front of the judge and who will be recognized for their donations at the event].)

III. Conclusions

The retirement dinner is a private testimonial the judge may accept as a gift, without limit and without reimbursement of costs for any part of the dinner, including the costs of the judge and his or her guest's meals. For reporting purposes, the value of the gift is the total cost of the judge and his or her guest's meals. The student achievement award in the judge's name is also a permissible honor and use of judicial title. Finally, the framed commemoration of the award is an acceptable honor incidental to the retirement dinner.

This oral advice summary is advisory only. (Cal. Rules of Court, rule 9.80(a), (e); Cal. Supreme Ct. 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 summary 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)).)

CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS
350 McAllister Street, Room 1144
San Francisco, CA 94102
(855) 854-5366
www.JudicialEthicsOpinions.ca.gov

CJEO Oral Advice Summary 2019-031

[Posted August 15, 2019]

EXTRAJUDICIAL SERVICE AS A ROTARY DISTRICT YOUTH PROTECTION OFFICER

I. Question

A retired judicial officer who regularly sits on assignment through the Temporary Assigned Judges Program inquires about whether volunteering as a Rotary International district youth protection officer would violate canon 4A of the California Code of Judicial Ethics,[1] which prohibits extrajudicial activities that might cast reasonable doubt on impartiality or lead to frequent disqualification.

[1] All further references to canons, the code, and to advisory committee commentary are to the California Code of Judicial Ethics unless otherwise indicated.

II. Facts

The Temporary Assigned Judges Program (AJP) is an exercise of the Chief Justice's constitutional authority to assign retired judicial officers to fill vacancies on a temporary basis in courts requesting assistance. (Cal. Const., art. VI, § 6, subd. (e) ["The Chief Justice shall seek to expedite judicial business and to equalize the work of judges"].) The inquiring judge is an active AJP member who primarily hears cases in the counties served by a Rotary International (Rotary) district in which the judge is also a member.

Rotary is a volunteer community service organization consisting of local clubs organized into districts. The judge has been asked to serve as a youth protection officer for a Rotary district governing 78 local clubs.

Rotary is significantly involved in youth activities, and the volunteer position oversees programs to protect youths participating in those activities within the district. The duties of a Rotary district youth protection officer include: (1) acting as a point of contact for all youths involved in Rotary activities; (2) handling complaints of abuse by youths within the district; (3) informing and acting as a link to appropriate authorities such as law enforcement; (4) monitoring changes in the laws related to youth abuse and protection; (5) providing screening, selection, and training measures for adults involved in district youth programs; (6) maintaining records of abuse allegations; (7) monitoring and controlling background checks for adults participating in district youth programs; and (8) overseeing the proper handling of abuse allegations to protect the interests of all involved. (Rotary, *Rotary Youth Protection Guide*, p. 5.) District youth protection officers are selected by Rotary if they have professional experience related to these duties, such as a background in the law, law enforcement, counseling, or child development. (*Ibid.*)

III. Oral Advice Provided

While the code permits and encourages extrajudicial activities, it does so with limitations. (Advisory Com. com. foll. canon 4A [complete separation of judges from extrajudicial activities is neither possible nor wise]; canon 4C(3)(b) [a judge may serve as an officer or nonlegal advisor of a civic service organization, subject to the limitations and other requirements of the code].) Retired judges in the AJP are subject to these permissions and limitations. (Canon 6B [retired AJP judges are required to comply with all provision of the code, with exceptions inapplicable to civic organization positions]; Judicial Council of California, *Temporary Assigned Judges Program Handbook* (June 2019), Standards and Guidelines for Temporary Judicial Assignments, p. 14 [retired judges sitting on assignment shall comply with applicable provisions of the code].)

Two overarching limitations are the canon 4A(1) and (4) requirements that extrajudicial activities be conducted so that they do not lead to frequent disqualification or cast doubt on impartiality. More specific limitations are included in canon 4C(3)(b), which permits service as an officer of a nonprofit civic organization, but only as a *nonlegal* advisor. (Rothman et al., *Cal. Jud. Conduct Handbook* (4th ed. 2017) § 8:80, p. 570 (Rothman) [although a judge is permitted to serve on a civic organization board, the judge is prohibited from acting as a legal advisor].) Canon 4C(3)(c)(i) and (ii) further limit such service if the organization will be engaged in judicial proceedings before the judge or will frequently be engaged in proceeding in the judge's court or appellate district. (See Advisory Com. com. foll. canon 4C(3)(c) [judges should avoid leadership positions in organizations that regularly engage in litigation as it could compromise the appearance of impartiality].) Finally, judges are generally prohibited from practicing law by canon 4G and from using judicial title to advance the interest of others by canon 2C(2). (See Advisory Com. com. foll. canon 6C [retired judges serving in the AJP are bound by canon 4G barring the practice of law]; *Temporary Assigned Judges Program*

Handbook, *supra*, p. 14 [a retired judge serving on assignment shall not lend the prestige of the judicial assignment to advance the interests of the judge or others].)

With these permissions and limitations in mind, it is clear from the Rotary district youth protection officer duties and qualifications that service by a judicial officer would be prohibited under the code. While it seems unlikely that the retired AJP judge would *frequently* be assigned cases involving Rotary youth program issues, requiring disqualification and prohibiting service under canon 4A(4), or that the Rotary would *ordinarily* come before the judge in violation of canon 4C(3)(c)(i), it is likely, given the reasons for the protection officer position, that the Rotary will be involved in proceedings in the courts where the judge is primarily assigned, prohibiting service under canon 4C(3)(c)(ii). The question of whether the Rotary will *frequently* be engaged in those proceedings suggests the probability that whoever fills the Rotary district youth protection officer will be called as a witness or participant in *any* such proceeding in the courts where the AJP judge is primarily assigned. For a judicial officer, this would compromise the appearance of impartiality and improperly lend the prestige of office. (Canons 4A(1), 2B(2); Advisory Com. com. foll. canon 4C(3)(c); Rothman, *supra,* § 8:49, p. 551 [whenever a judge appears in court as a competent witness, the judge's testimony may be viewed as lending the prestige of office to advance the interests of one litigant over another].)

But more prohibitively, canons 4C(3)(b) and 4G, and the commentary following canon 6C, preclude practicing law or acting as a legal advisor to a nonprofit organization. (Rothman, *supra*, § 8:80, p. 570 [the practice of law includes providing legal advice].) Here, experience with the law is precisely what qualifies the judge for the Rotary district youth protection officer position. (*Rotary Youth Protection Guide, supra*, p. 5.) The stated duties of that position would necessarily entail giving legal advice when performed by the judge. For example, the responsibilities of the position include monitoring changes in the law related to youth abuse, providing training for adults about what

constitutes abuse, screening background checks, overseeing the proper handling of abuse allegations, and other activities that inherently involve advising the district and its members about the law. (*Ibid.*; Rothman, *supra*, § 10:36, p. 707, citing Cal. Judges Assn., Formal Opn. No. 61 (Aug. 2008), p. 5 [a judge may not serve on a church advisory committee that recommends actions to be taken regarding accusations of clergy sexual misconduct, which would implicate litigation and the practice of law].)

Finally, any participation by the judge in that role would appear to benefit the Rotary because of the judge's unique legal experience and judicial title. (Rothman, *supra*, appen. L, *Guide to Involvement in Community Activities and Outreach*, p. 961 [whether an organization is looking for legal advice or highlighting that one of its members is a judge is a consideration when applying ethical rules to determine if service is appropriate].) For all these reasons, the committee advises that service as a volunteer Rotary district youth protection officer is not permitted under the code.

IV. Conclusions

Extrajudicial service as a Rotary district youth protection officer is not permitted under the code where the qualifications for the position include legal experience and the duties of the position include providing advice about the law. Extrajudicial service as an officer of a civic organization is permitted so long as that service is as a nonlegal advisor. Practicing law, which includes providing legal advice, is prohibited for judicial officers, including retired judges active in the AJP. Judges are further prohibited from serving in civic organizations that will frequently be involved in adversary proceedings in the judge's court. The responsibilities of a Rotary district youth protection officer suggest the probability that such an officer will be called as a witness or participant in any proceedings involving the Rotary district's youth programs or practices, which would compromise the appearance of impartiality and lend the prestige of judicial office if performed by a retired AJP judge primarily assigned to cases within the district. Finally,

any participation by the judge in the role of district youth protection officer could impermissibly advance the interests of Rotary because of the judge's title.

This oral advice summary is advisory only. (Cal. Rules of Court, rule 9.80(a), (e); Cal. Supreme Ct. 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 summary 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)).)

CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS
350 McAllister Street, Room 1144
San Francisco, CA 94102
(855) 854-5366
www.JudicialEthicsOpinions.ca.gov

CJEO Oral Advice Summary 2020-032

[Issued May 26, 2020]

JUDICIAL OBLIGATIONS REGARDING WITNESS FACE MASKS DURING THE COVID-19 PANDEMIC

I. Question

In anticipation of courts reopening and participants in civil and criminal trials being asked or required to wear masks because of continued concerns arising from the COVID-19 pandemic, a judge asks whether judges may ethically require a witness or party who has expressed a fear of uncovering his or her face to remove a partially obscuring mask while testifying.

II. Oral Advice Provided

While judges have an obligation under the Code of Judicial Ethics[1] to maintain their courtrooms in a manner that provides litigants the opportunity to have their matters fairly adjudicated in accordance with the law (canon 3B(8)), what the law accords in any particular matter is a legal question rather than a judicial ethics question. The California Supreme Court Committee on Judicial Ethics Opinions (CJEO) is without authority to offer advice about legal questions concerning balancing individual due process and other rights with individual health and safety measures.

III. Discussion

The judicial branch has undertaken a series of significant actions in response to the emergence of the novel coronavirus and the potentially catastrophic public health threats posed by the COVID-19 pandemic. In order to protect the health and safety of the public, courts have been partially or completely physically closed, most documents are now required to be filed and served in electronic form, and most judicial proceedings and court operations are currently conducted by employing video, audio, and telephonic means for remote appearances and by using remote interpreting, reporting and recording to make the official record of actions and proceedings. (Cal. Rules of Court, appen. I, *Emergency Rules Related to COVID-19*, rule 3.) These emergency procedures can be expected to relax somewhat as conditions permit courts to eventually reopen. Inevitably, though, the way that courts conduct their business will be changed for the foreseeable future to reduce the risk of continued spread of the novel coronavirus.

Among the expected changes to court procedures are new policies that permit or require individuals to wear masks when participating in court proceedings, including in civil and

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[1] All further references to canons and the code are to the California Code of Judicial Ethics unless otherwise indicated.

criminal trials. Having witnesses provide testimony while a portion of their face is covered by a mask would represent a significant departure from the face-to-face engagements that were the norm in prepandemic times. It may also implicate constitutional considerations under the Sixth Amendment's confrontation clause, the Fourteenth Amendment's due process clause, and the parallel protections of the right to confront and to due process guaranteed by article I, sections 7 and 15 of the California Constitution. On the other hand, protecting litigants' constitutional rights by requiring witnesses to remove their masks when testifying might risk the health not only of the witness but also of everyone else in the courtroom. CJEO has been asked to provide advice as to whether a judge may ethically require a witness who has expressed a fear of uncovering his or her face to remove a protective mask when testifying.

The Supreme Court established CJEO to provide ethics advice to judicial officers and candidates for judicial office. (Cal. Rules of Court, rule 9.80(e).) To help CJEO fulfill its mandate, judges and candidates are encouraged to seek ethics advice from CJEO, and CJEO endeavors to provide them with guidance for complying with the canons. CJEO is not limited to issuing advice solely under the code, but may also advise on proper judicial conduct under the California Constitution, statutes, and "any other authority deemed appropriate" by CJEO. (Cal. Rules of Court, rule 9.80(e)(1).) This necessarily limits the committee's advice to matters of judicial ethics. As an advisory body, CJEO has no authority to resolve legal disputes or provide an opinion on legal issues. (CJEO Oral Advice Summary 2019-028 (2019), *Service on a Civil Liberties Program Advisory Panel for the State Library*, Cal. Supreme Ct. Com. Jud. Ethics Opns., pp. 1-2 [CJEO has no authority to provide legal advice and declines to do so; citing CJEO Oral Advice Summary 2015-010 (2015), *Service by an Appellate Justice as a Compliance Officer*, Cal. Supreme Ct. Com. Jud. Ethics Opns., pp. 1-2].)

Although the question presented does implicate a judge's ethical obligations to provide fairness in judicial proceedings under canon 3B(8),[2] the primary issues it presents are legal in nature and not ethical. The question of whether a witness may be compelled to remove a mask

[2] Canon 3B(8) states in full: "A judge shall dispose of all judicial matters fairly, promptly, and efficiently. A judge shall manage the courtroom in a manner that provides all litigants the opportunity to have their matters fairly adjudicated in accordance with the law."

is likely to be resolved by a balancing of the legal rights of the witness against the litigants' rights of confrontation and due process under the Sixth Amendment, Fourteenth Amendment and article I of the California Constitution. (*People v. Murphy* (2003) 107 Cal.App.4th 1150, 1155 [a defendant's right to confront accusatory witnesses may be satisfied absent a full face-to-face confrontation at trial where (1) denial of such confrontation " 'is necessary' "; (2) it " 'further[s] an important public policy' "; and (3) " 'the reliability of the testimony is otherwise assured' "], quoting *Maryland v. Craig* (1990) 497 U.S. 836, 850, 110 S.Ct. 3157, 111 L.Ed.2d 666; *People v. Williams* (2002) 102 Cal.App.4th 995, 1009 [due process requires that any limitation on face-to-face testimony comport with fundamental fairness].) Such legal issues fall outside the purview of CJEO, which has no authority to provide advice on questions of law. (Cal. Rules of Court, rule 9.80(e)).

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CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS
350 McAllister Street, Room 1144
San Francisco, CA 94102
(855) 854-5366
www.JudicialEthicsOpinions.ca.gov

CJEO Oral Advice Summary 2020-033

[Issued June 4, 2020]

PARTY REIMBURSEMENT OF JUDICIAL EXPENSES

I. Questions

A judge assigned to hear a Judicial Council Coordinated Proceeding ("JCCP" or "Coordinated Proceeding") involving parties who are also parties to a Multidistrict Federal Court Litigation ("MDL" or "Consolidated Litigation") being conducted in parallel on the east coast asks whether it would be permissible for the California judge to accept reimbursement from the parties or their counsel for travel, food and lodging in connection with the judge's attendance at an out-of-county or out-of-state hearing in the Consolidated Litigation on issues relevant to the Coordinated Proceeding.

II. Conclusions

A judge presiding over a Coordinated Proceeding may not be reimbursed by the parties or their attorneys for travel, lodging, meals and like expenses incurred in connection with the matter because such a payment would be a prohibited gift from persons appearing before the judge. Instead, a judge seeking reimbursement for travel-related expenses incurred in connection with their official duties must request payment from the courts following the policies and procedures and using the reimbursement rates approved by the Judicial Council.

III. Discussion

Mass torts and other like matters that give rise to complaints throughout the state and across the nation can result in state and federal lawsuits with similar, sometimes overlapping claims. In those kinds of cases, an overarching purpose behind both California's JCCP and federal MDL procedures is to make case management of such complex litigation more efficient, economical and convenient for both the courts and the litigants. (Code Civ. Proc., § 404.1; 28 U.S.C. § 1407.) For that reason, Coordinated Proceedings and Consolidated Litigations involving the same factual or legal issues are often coordinated, with identical discovery and sometimes joint hearings on common motions or common status conferences. Many times a majority of the parties and their counsel can be located out of county or out of state. The parties might request that a California judge presiding over a Coordinated Proceeding attend or participate in a hearing in a parallel Consolidated Litigation held out of county or out of state.

In circumstances where it may be more efficient and economical for the judge to travel to perform his or her official functions in connection with litigation, the inquiring judge asks whether it would be permissible to accept reimbursement for his or her travel-related expenses from the parties or from their counsel. Those expenses could include but are not limited to travel, lodging and meals which the judge initially pays for out of his or her own pocket. This question is particularly relevant to the context of Coordinated Proceedings and Consolidated Litigations, because a purpose behind both the JCCP and MDL statutes is to reduce the burdens

on litigants, and judges are required to manage their cases with the convenience of the parties, witnesses and counsel in mind.[1]

IV. Oral Advice Provided

A. Reimbursements by Parties or Their Counsel Are Impermissible Gifts

The ability of a judge to be reimbursed for travel or related expenses incurred in connection with the judge's official capacity is subject to the gift restrictions set forth in canon 4D(5)-(6) of the California Code of Judicial Ethics.[2] Those provisions of the canon limit or prohibit judges from accepting certain gifts, bequests, favors and loans. As used in the canons, the word "gift" is a defined term meaning in pertinent part "anything of value to the extent that consideration of equal or greater value is not received." (Terminology; CJEO Formal Opinion 2014-005 (2014), *Accepting Gifts of Little or Nominal Value Under the Ordinary Social Hospitality Exception, California Supreme Court Committee on Judicial Ethics Opinions*, Cal. Supreme Ct. Com. Jud. Ethics Opns., p. 6 [items of little or nominal value when offered for no consideration are gifts].) Here on the facts, the reimbursement of the judge's travel and related expenses falls within this definition. (Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 9:71, p. 653 (Rothman) [payment by persons or organizations to a judge for travel is a gift or favor to the judge that is subject to the prohibitions and limitations on gifts].)

Under the code, all gifts are inherently prohibited. While some gifts are permitted under exceptions and exclusions, gifts from a party are prohibited under all circumstances. (Canon 4D(5) [under no circumstances shall a judge accept a gift if the donor is a party whose interests have come or are reasonably likely to come before the judge].) The prohibition on party gifts is

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[1] There are other circumstances in which parties might want a judge to travel in their official capacity in connection with their work on a specific case and for that reason might offer to pay the judge's expenses for doing so. For example, the parties may wish the judge to view a particular location in person and agree amongst themselves to bear the costs of transportation incurred by the judge. In that circumstance, the same principles analyzed in this advice summary would apply to the reimbursement of the judge's expenses.

[2] All further references to canons, the code, and to advisory committee commentary are to the California Code of Judicial Ethics unless otherwise indicated.

without exception and extends even to gifts of nominal value. (Canon 4D(6)(i).) As a result, any reimbursement of travel or travel-related expenses made by a party or parties to the judge would be prohibited. This is true whether the parties reimburse the judge directly or pay the judge's expenses indirectly through their attorneys. (Rules Prof. Conduct, rule 1.8.5 [attorneys may pay for a client's litigation-related expenses only "from funds collected or to be collected for the client as a result of the representation, with the consent of the client"]).

B. Judges Must Seek Reimbursement of Travel-Related Expenses from the Court

While the requesting judge's travel expenses may not be reimbursed by the parties or their attorneys, reimbursement may be possible through the judge's court following policies and procedures applicable to the judicial branch as a whole. Reimbursement of a judge's travel-related expenses is *not* prohibited if the travel is provided by "a government, a governmental agency or authority" under section 170.9, subdivision (e)(2) of the Code of Civil Procedure.

The Legislature specifically tasked the Judicial Council with developing and adopting "fiscally responsible travel reimbursement policies, procedures, and rates for the judicial branch that provide for appropriate accountability." (Gov. Code, § 68506.5.) As part of its mandate, the Judicial Council approves the recommendations of the Administrative Director of the Courts for policies and schedules for reimbursement of travel expenses and procedures for processing reimbursement requests. (Gov. Code, § 69505.) Once those policies, reimbursement rates and procedures are approved by the Judicial Council, trial courts are required to follow them. (*Ibid.* [approved policies and procedures "*shall* be followed by the trial courts" (italics added)]; Gov. Code, § 14 [" 'Shall' is mandatory and 'may' is permissive."].)

Requiring judges to submit claims for reimbursement of travel-related expenses by means of court-managed and supervised policies and procedures helps to ensure that there is "appropriate accountability" for such payments. (Gov. Code, § 68506.5.) It also helps judges avoid numerous potential ethical minefields. For example, if a judge receives financial reimbursements in one case from litigants directly or through their attorneys, parties adverse to those same litigants or attorneys in future matters before that same judge may feel that there is some influence or bias based on the past reimbursements, particularly where it is unclear

whether the reimbursements were reasonable and necessary or seemed extravagant under the circumstances. (Fla. Jud. Ethics Advisory Com., Jud. Ethics Opn. No. 2006-22 (Aug. 29, 2006); Rothman, *supra*, § 9:71, p. 653 ["It is well known that travel by public officials, beyond that for government business that is paid for by the government, can provide the person or entity paying for the travel with an opportunity to secure special access to and influence with the officials receiving such benefit."].) The judge also may need to disclose travel expense payments in future matters in which the paying party, attorney or law firm appears before the judge. (Canon 3E(2)(a) [a trial court judge shall disclose on the record information that is reasonably relevant to the question of disqualification, even if the judge believes there is no actual basis for disqualification]; Rothman, *supra*, § 9:59, p. 651 [any gift received from an attorney must be disclosed on the record for an appropriate period of time].) This is true regardless of whether the reimbursement is also reported on the judge's statement of economic interest.

For all of these reasons, judges are advised to consider the policies and procedures approved by the Judicial Council pursuant to the Government Code as mandatory, and the sole means of seeking reimbursement of travel-related expenses incurred in connection with their official duties. *People v. Standish* (2006) 38 Cal. 4th 858, 870 (interpreting use of the word "shall" to denote a requirement where such meaning is consistent with purpose of the statute); accord Massachusetts Committee on Judicial Ethics, Opinion No. 2002-05 (under Massachusetts statute, payment by state is "exclusive mechanism" for reimbursing judicial travel expenses).

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CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS
350 McAllister Street, Room 1144
San Francisco, CA 94102
(855) 854-5366
www.JudicialEthicsOpinions.ca.gov

CJEO Oral Advice Summary 2020-034

[Issued June 12, 2020]

JUDGES WORKING REMOTELY AFTER COURT REOPENINGS DURING THE COVID-19 PANDEMIC

I. Question

During the COVID-19 pandemic, many courts have provided remote technology that allows judges to perform selective judicial functions outside of public courtrooms while courts are closed. The California Supreme Court Committee on Judicial Ethics Opinions (CJEO) has been asked if there are ethical considerations prohibiting trial court judges from continuing to work remotely after courts reopen, out of concerns about their age or preexisting medical

conditions that could place them at greater risk if they were to be physically present in a courtroom and potentially exposed to the coronavirus there.

II. Oral Advice Provided

Judges are not ethically prohibited from working remotely when assigned by their presiding or supervising judge to matters authorized by law or emergency rules enacted in response to the COVID-19 pandemic to be performed remotely from outside of a courtroom.

While judges have an obligation under the Code of Judicial Ethics[1] to hear all matters assigned to them unless they are disqualified, an individual judge's personal health status, safety concerns, and possible disabilities are court management matters determined by presiding judges. Presiding judges rather than individual judges are ultimately responsible for making assignments. The nature of those specific assignments determines whether remote judicial functions are authorized by law or, in the circumstances of the pandemic, authorized under the Judicial Council Emergency Rules Related to COVID-19. (Cal. Rules of Court, appen. 1.) CJEO is without authority to offer advice about legal and court management questions concerning the balance of specific assignments with reasonable accommodations for the health and safety of individual judicial officers.

III. Discussion

In response to the public health threats posed by the COVID-19 pandemic, the judicial branch has enacted emergency rules that have partially or completely closed courts to protect the health and safety of the public, court staff, and judicial officers. (Cal. Rules of Court, appen. I, *Emergency Rules Related to COVID-19* (Emergency Rules);[2] CJEO Oral Advice Summary 2020-032 (2020), *Judicial Obligations Regarding Witness Face Masks During the COVID-19*

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[1] All further references to canons and the code are to the California Code of Judicial Ethics unless otherwise indicated.

[2] All further citations to Emergency Rules are to appendix 1 of the California Rules of Court.

Pandemic, Cal. Supreme Ct. Com. Jud. Ethics Opns., pp. 2-3 (CJEO Oral Advice Summary 2020-032) [whether a witness may be compelled to remove a mask is resolved as a legal rather than ethical matter in individual cases by balancing witness protections and a litigant's constitutional rights].) Under the Emergency Rules, many judicial proceedings and court operations have been conducted by employing video, audio, and telephonic means for remote appearances and by using remote interpreting, reporting, and recording to make the official record of actions and proceedings. (Emergency Rule 3(a)(1) [courts may require that judicial proceedings and court operations be conducted remotely for the protection of health and safety].)

As emergency conditions have changed, courts have begun to reopen. In anticipation of being asked to return to court, judges who have been performing judicial functions remotely are considering the risks of returning based on their individual circumstances. These reopenings raise the question for judges who may be especially vulnerable if they contract COVID-19 by reason of age, preexisting health conditions, or other factors, about whether they have ethical obligations to conduct judicial functions in person in a public courtroom.

The code requires judges to hear all matters assigned to them unless they are disqualified. (Canon 3B(1) [duty to serve and trial court disqualification grounds based on the statutory obligations in Code Civ. Proc., §§ 170, 170.1].) While the code requires that judges manage their courtrooms in a manner that provides all litigants the opportunity to have their matters fairly adjudicated in accordance with the law (canon 3B(8)), it does not obligate judges to hear all matters in a public courtroom.

As a general legal matter, judicial functions are to be performed in court unless authorized by statute to be performed outside of open court or in chambers. (*Richmond v. Shipman* (1976) 63 Cal.App.3d 340-343.) In chambers functions are not confined to courthouse spaces and may extend to any place in which a judge is authorized to hear court matters. (*Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 64, fn. 10 [whenever a judge is present at a place designated for the transaction of judicial business, the judge's acts may be considered as the acts of the court], citing *Von Schmidt v. Widber* (1893) 99 Cal. 511, 514; see *id.* at p. 513 [the term "chambers" may include any out-of-court places where judges may hear applications or make

orders while the court is not in session]; *People v. Valenzuela* (1968) 259 Cal.App.2d 826, 831 [judicial functions performed while court is not in session are done in chambers if performed at the judges residence or elsewhere].)

Several statutes authorize remote judicial functions. For example, Code of Civil Procedure sections 164 and 166 specify judicial actions that may be performed in chambers by appellate justices and trial court judges.[3] The Emergency Rules enacted in the wake of the COVID-19 pandemic expand the list of authorized remote judicial actions by broadly authorizing courts to "require that judicial proceedings and court operations be conducted remotely." (Emergency Rule 3(a)(1) [authority to require remote appearances granted to courts, with exceptions for specified proceedings], (b) [rule effective until COVID-19 state of emergency lifted or until amended or repealed].) Assuming the validity of this broad authority and its extension to court reopenings, these rules do not raise ethical issues for individual judges about their ethical duty to hear assigned matters in which they are not disqualified.

Under the code, a judge's ethical duty to serve or disqualify in any specific matter is necessarily determined by a judge on a case-by-case basis after the matter has been assigned. But the prerequisite question of assignment is exclusively in the hands of presiding judges who are responsible for ensuring the effective management and administration of the courts, consistent with any rules adopted by the Judicial Council or the courts. (Cal. Rules of Court, rule 10.603(a).) Indeed, presiding judges have the ultimate authority to make judicial assignments while balancing the needs of the public, their court, a particular judge's interests, the desirability of placing a judge in a particular type of assignment, and other appropriate factors. (*Id.,* rule 10.603(c)(1)(A)(i), (iv), (vi), (viii).) This authority extends to judicial schedules, oversight of judges, and personnel matters. (*Id.,* rule 10.603(c)(2), (4), (5).) As court managers, presiding judges are also responsible for their court's duty to provide reasonable accommodations under state and federal disability laws to those attending court proceedings (*id.,*

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[3] Code of Civil Procedure section 166, subdivision (b) further provides that "[a] judge may, out of court, anywhere in the state, exercise all the powers and perform all the functions and duties conferred upon a judge as contradistinguished from the court, or that a judge may exercise or perform in chambers."

rule 1.100(a)(1)(3)), and have a duty to report absences caused by disability for specified periods of time and failure to perform judicial duties or carry out assignments (*id.,* rule 10.603(c)(4)(A)(i) & (ii)).

It is clear from these rules that an individual judge's personal health status, safety concerns, and possible disabilities, are court management matters determined by presiding judges, who are ultimately responsible for making assignments. Those specific assignments determine whether remote judicial functions are authorized by law or, in the circumstances of the pandemic, authorized under the Emergency Rules. CJEO is without authority to offer advice about legal and court management questions concerning the appropriate balance of specific assignments against reasonable accommodations for the health and safety of individual judicial officers. (CJEO Oral Advice Summary 2020-032, *supra*, p. 2 [what the law accords concerning witness face masks in any particular matter is a legal question rather than a judicial ethics question and CJEO has no authority to offer advice about balancing legal or court management concerns].)

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COMMITTEE ON JUDICIAL ETHICS OPINIONS
350 McAllister Street, Room 1144
San Francisco, CA 94102
(855) 854-5366
www.JudicialEthicsOpinions.ca.gov

CJEO Oral Advice Summary 2020-035

[Issued June 2, 2020]

APPELLATE DISQUALIFICATION FOR PRIOR PEREMPTORY CHALLENGE AS A TRIAL JUDGE IN THE MATTER

I. Question:

An appellate justice requests advice about disqualification obligations in a matter in which the justice had been the subject of a peremptory challenge as a trial court judge. Is a peremptory challenge below a ground to disqualify an appellate justice from hearing the matter on appeal?

II. Oral Advice Provided:

Yes, a peremptory challenge that removed a judge below is a ground for disqualification, when that judge becomes an appellate justice and the matter is assigned to the appellate justice for review.

Applying canon 3E(4)(c) of the California Code of Judicial Ethics,[1] the committee advises that a justice who was disqualified as a trial judge by peremptory challenge should reach the determination that a reasonable person would doubt impartiality and disqualify from the panel hearing the matter. A peremptory challenge is meant to end a judge's involvement in a case. Public confidence in the judiciary's impartiality comes, in part, by giving great weight to a litigant's stated belief of bias made under oath. While the peremptory challenge did not, and does not, disqualify an appellate justice, a justice's obligation to consider the objective appearance of impartiality should.

III. Discussion:

Disqualification for trial court judges is set by statutes. (Code Civ. Proc., §§ 170 et. seq., 170.1, 170.6.) A peremptory challenge does not disqualify an appellate justice. (§ 170.6, subd. (a); Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 7:10, p. 404 (Rothman) [statutory language specifying application to superior court judges precludes application to appellate justices].)

Disqualification for appellate justices is a decision made by each justice alone, under grounds set by canon. (Canon 3E(1), (3), (4) & (5); *Kaufman v. Court of Appeal* (1982) 31 Cal.3d 933, 935, 938-940 [statutory grounds for trial court disqualification are not applicable to appellate justices].) Canon 3E(4)(c) requires disqualification when circumstances are "such that a reasonable person aware of the facts would doubt the justice's ability to be impartial."

The application of the reasonable doubt standard uses an objective test; the perspective is of the "'average person on the street.'" (*United Farm Workers v. Superior Court* (1985) 170 Cal.App.3d 97, 105 [the reasonable person standard does not require

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[1] All further references to canons are to the Code of Judicial Ethics. All further references to statutes are to the Code of Civil Procedure unless otherwise indicated.

proof of actual bias, the objective test ensures that proceedings appear to the public to be impartial, and hence worthy of public confidence].) "'The "reasonable person" is not someone who is "hypersensitive or unduly suspicious," but rather is a "well-informed, thoughtful observer."'" (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 389.)

Although section 170.6 does not apply to appellate justices, several characteristics of peremptory challenges should inform the justice's decision about whether the lower court disqualification would suggest to a reasonable person that the justice might not be impartial.

Section 170.6 "'guaranteed to litigants an extraordinary right to disqualify a judge.'" (*Solberg v. Superior Court of San Francisco* (1977) 19 Cal.3d 182, 193.) A party's sworn affidavit of a belief of bias filed under section 170.6 does not create a presumption of prejudice; rather, it provides disqualification on a separate ground, because "actual prejudice is not a prerequisite to invoking the statute." (*Ibid*.) The statute was specifically enacted to ensure "confidence in the judiciary and avoid the suspicion" of unfairness that occurs when a party believes a judge to be biased. (*Johnson v. Superior Court* (1958) 50 Cal.2d 693, 697.) As the Supreme Court observed in *Maas v. Superior Court* (2016) 1 Cal.5th 962, 973, section 170.6 should be liberally construed in favor of peremptory challenges. Like all disqualification grounds applicable to a trial court, a peremptory challenge is irrevocable, and its effect may outlast the challenging party's own interest in the case. (*Louisiana-Pacific Corp v. Philo Lumber Co.* (1985) 163 Cal.App.3d 1212, 1219, 1217.)

In addition to these strong policy considerations, canon 3B(7)(a) prohibits a judge from discussing a matter with any judge "who has previously been disqualified from hearing that case," and prohibits a judge who knows "he or she is or would be disqualified" from discussing the matter with another judge assigned to the case. The ban on discussions between a judge on a case and a disqualified judge is also aimed at promoting the "public confidence in the integrity and impartiality of the judiciary."

(Rothman, *supra*, § 7:5, at p. 399 [that judge's discussion with disqualified judge was inadvertent was irrelevant because violation of canon 3B(7)(a) undermines public confidence in the judiciary].)

Considering all applicable circumstances objectively, it is unlikely that an average person would think it fair that a judge who had irrevocably lost power in a matter could reclaim that same power by accepting a new judicial position. Likewise, a judge removed by a party's subjective belief of bias, who is the same individual later assigned to sit in review on the same case and who fails to disqualify, may cause an average person to doubt that judicial officer's ability to be impartial.

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CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS
350 McAllister Street, Room 1144
San Francisco, CA 94102
(855) 854-5366
www.JudicialEthicsOpinions.ca.gov

CJEO Oral Advice Summary 2020-036

[Issued August 7, 2020]

APPELLATE DISQUALIFICATION FOR JUDICIAL COUNCIL SERVICE IN MATTERS CHALLENGING COVID-19 EMERGENCY RULES AND ORDERS

I. Questions

An appellate justice inquires whether disqualification is required in cases challenging emergency rules and orders related to COVID-19 where the justice served as a nonvoting member of the Judicial Council, and in that role, participated in discussions that led to the Judicial Council's adoption of COVID-19 emergency rules and approval of related emergency orders issued by Chief Justice Cantil-Sakauye.[1] The Judicial Council is named as a party in

[1] Limited identifying information is included in this oral advice summary because the requesting party has waived confidentiality. (Cal. Rules of Court, rule 9.80(h)(3); Cal. Supreme Ct. Com. Jud. Ethics Opns., Internal Operating Rules & Proc., rule 5(e).)

some of the cases coming before the inquiring justice's appellate division and is not named as a party in others. The justice also asks whether disqualification is required in matters involving emergency rules that were approved for recommendation to the Judicial Council by its Rules Committee after the justice, who serves as a voting member of that committee, voted on whether to submit some proposed emergency rules for public comment.

II. Oral Advice Provided

First, an appellate justice's prior service as a nonvoting Judicial Council member and as voting member of the council's Rules Committee, standing alone, would not require the justice to be disqualified. The justice's service on the council and the committee does not raise a reasonable belief that the justice's discussion of emergency COVID-19 rules and orders with the council were statements committing the justice to a particular outcome in matters challenging those rules or orders. Second, in matters naming the Judicial Council as a party in direct challenges to the emergency rules and orders, the justice is disqualified. A person aware of the justice's membership in a named party would have reason to doubt the justice's impartiality when that party's actions are challenged. Finally, in matters where the Judicial Council is not a named party, the justice is not disqualified because law drafting is expressly not a ground for disqualification and because a person aware of the justice's administrative role and duties would not reasonably doubt the justice's ability to reconsider the validity of a rule or order as part of his or her judicial function.

III. Discussion

The Judicial Council, as the policymaking body of the California courts, is responsible for ensuring the consistent, independent, impartial, and accessible administration of justice. (Cal. Const, art. VI, § 6; Cal. Rules of Court,[2] rule 10.1(a)-(b).) The council consists of voting

[2] All further references to rules are to the California Rules of Court unless otherwise indicated.

members of the judiciary and others, and nonvoting advisory council members determined by the voting members of the council and appointed by the Chief Justice, as specified in the constitution and the rules of court. (Cal. Const., art. VI; rule 10.2(a)(1).) Nonvoting advisory council members may participate in the council's discussions, but they do not vote, speak, or act for the council unless authorized to do so for specific purposes. (Rules 10.30(a), (b)(4), 10.31(d).)

The council is also assisted in its duties by internal committees, which are comprised of voting council members and nonvoting advisory council members appointed by the Chief Justice. (Rules 10.2(b)(2), 10.10(a)-(c).) One such internal committee is the Rules Committee, which, among other duties, assists the council in making informed decisions about rules of court by reviewing and proposing rules, advising the council about circulating proposals for public comment, recommending council action, and ensuring that proposed rules do not conflict with statutes or other rules. (Rule 10.13.) Nonvoting council members who serve on an internal committee such as the Rules Committee may vote on internal committee matters. (Rules 10.3(b),10.10(e).)

Since the outbreak of the novel coronavirus, the Judicial Council has adopted a number of emergency rules related to COVID-19 and has approved emergency orders issued by the Chief Justice in response to the pandemic. The justice requesting advice from the Committee on Judicial Ethics Opinions (CJEO) is a nonvoting advisory council member and sits on the Rules Committee. The justice made recommendations to the council and participated in discussions that led to the council's adoption of these emergency rules, and approval of related orders, but did not vote to adopt or approve them. In at least one instance, however, the inquiring justice was authorized to vote as a Rules Committee member on whether to submit a proposed emergency rule for public comment.

A. Disqualification for Judicial Council Service

Appellate court justices must each decide for themselves whether their disqualification is required in any case assigned to them. *Kaufman v. Court of Appeal* (1982) 31 Cal.3d 933, 940 (*Kaufman*). Canon provisions 3E(1), (3), (4), (5), and (6) of the California Code of Judicial

Ethics[3] set forth the grounds for disqualification applicable to appellate court justices. (CJEO Oral Advice Summary 2018-023 (2018), *Disqualification Responsibilities of Appellate Court Justices*, Cal. Supreme Ct. Com. Jud. Ethics Opns., p. 2; Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 7:90, pp. 501-502 (Rothman) [providing a summary of statutory and code changes following *Kaufman*].) These provisions of canon 3 include mandatory and discretionary grounds for disqualification that must be considered in all assigned proceedings.[4]

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[3] All further references to canons, the code, and to advisory committee commentary are to the California Code of Judicial Ethics unless otherwise indicated.

[4] All grounds for disqualification, once met, require an appellate justice or trial court judge to disqualify under the code and statute. (Canon 3E(4)-(5) [appellate disqualification is required if any specified grounds are met]; Code Civ. Proc., § 170.1-9 [trial court disqualification is required if any specified grounds are met]; Advisory Com. com. foll. canon 3E, (4)-(6) [canon grounds for appellate disqualification are consistent with and substantively similar to the statutory grounds for trial court disqualification]; CJEO Formal Opinion 2013-003 (2013), *Disqualification Based on Judicial Campaign Contributions From a Lawyer in the Proceedings*, p. 10 [canon grounds for appellate disqualification restate the statutory grounds for trial court judges].) The terms *mandatory* and *discretionary* are used to distinguish between (a) grounds that require disqualification when a judicial officer identifies mandatory criteria set by the statute or code that has been met in any proceeding (*mandatory grounds*), and (b) grounds that require disqualification when a judicial officer exercises discretion after evaluating whether objective or subjective disqualifying circumstances have been met in any proceeding (*discretionary grounds*).

Most grounds are mandatory and include, for example, prior service as an attorney in the matter, prior representation of a party, ownership of a financial interest in a party, appearance of a family member as a party or witness, personal knowledge of disputed facts, or receipt of campaign contributions from an appearing lawyer above certain amounts. (CJEO Formal Opinion 2013-003, *supra*, pp. 2, 7, 11 [disqualification required for any judicial campaign contribution of more than the mandatory amount of $1,500 from an individual lawyer appearing in a trial court proceeding]; canon 3E(5)(j) [disqualification required for any judicial campaign contribution of more than the mandatory amount of $5,000 from a party or lawyer in an appellate matter].)

Discretionary grounds are more limited in number and include circumstances where a judicial officer determines he or she has personal bias, substantially doubts the ability to be impartial, believes justice would be served by disqualification, or concludes that a reasonable person aware of the facts might doubt impartiality. (Canon 3E(4)(a)-(c), (f)(iii); Code. Civ. Proc., § 170.1(a)(6)(A)(i)-(iii); CJEO Formal Opinion 2013-003, *supra*, pp. 2, 7, 11-12 [disqualification required if a judge evaluates all circumstances, including aggregated and law firm contributions, and makes the discretionary determination that a reasonable person would

Here, the facts require a disqualification analysis of two separate circumstances: first, where the Judicial Council is named as a party, and second, where the Judicial Council is not named.

B. Judicial Council as a Party

Two mandatory grounds for disqualification touch on issues related to this justice's inquiries. Canon 3E(5)(e)(i) mandates disqualification when a justice "is a party or an officer, director, or trustee of a party to the proceeding." On its face, however, this mandatory ground does not apply to a justice who was a nonvoting advisory council member of party but was not an officer, director, or trustee of that party.

Another ground for disqualification that is both mandatory and discretionary is canon 3E(3)(a), which requires judicial officers to disqualify when they have made statements, other than in a court proceeding, judicial decision, or opinion, that a person aware of the facts might reasonably believe commits them to reach a particular result or rule in a particular way in a proceeding. (Rothman, *supra*, §§ 7:1, 7:3, 7:56, pp. 388, 391, 474 [appellate justices are also bound by canon 3E(3)].) Although canon 3E(3)(a) describes a statement as a mandatory ground for disqualification, it also requires a discretionary determination about whether an aware person would reasonably believe that the statement commits the justice to a particular legal result or ruling. This discretionary determination is similar to the broader discretionary ground in canon 3E(4)(a)(c), which requires the justice to determine whether a reasonable person aware of the facts would doubt impartiality. Thus, disqualification here will turn on a discretionary determination of what a reasonable person would conclude under the circumstances of a direct challenge to the constitutionality and validity of rules and orders adopted and approved by the Judicial Council as a named party.

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doubt the judge's impartiality]; quoted in *Eith v. Ketelhut* (2018) 31 Cal.App.5th 1, 15-16 [mandatory disqualification for individual attorney contributions over the statutory $1,500 threshold, together with discretionary disqualification for aggregated and law firm contributions that the judge determines would raise reasonable doubt about the judge's impartiality, sufficiently ensures the public trust in the judiciary].)

In those circumstances, a person aware of the facts would know that while the justice did not vote to adopt or approve the rules and orders, the justice's duties as a Rules Committee member included advising whether proposed rules are consistent with statutory law and the constitution, and making recommendations to the council about the adoption of those rules. (Rules 10.1(a)(2) [council seeks advice and recommendations from committees], 10.13(a)(5) [rules committee ensures that proposed rules do not conflict with statutes or other rules]; *In re Richard S.* (1991) 54 Cal.3d 857, 863 [rules established by the Judicial Council are authoritative only to the extent that they are not inconsistent with legislative enactments and constitutional provisions].) While the justice may never have made an explicit commitment to uphold the validity of rules and order, particularly as the justice did not vote to adopt or approve them, a person aware that the judge served as a nonvoting advisory member when the council adopted them might reasonably doubt the justice's impartiality if assigned to determine the validity of the Judicial Council's adoption and approval of them in a lawsuit where the Judicial Council is a named party.

Although disqualification is a matter solely for an appellate justice to determine under *Kaufman, supra*, 31 Cal.3d at p. 940, it is the opinion of this committee that a reasonable person would not believe that a nonvoting Judicial Council member's discussion of emergency rules and orders committed the justice to uphold COVID-19 rules and orders in direct challenges naming the Judicial Council as a party under canon 3E(3)(a). However, the committee also concludes that under canon 3E(4)(a)(c), that same reasonable person might doubt the impartiality of a justice who served as a member of a named party, in ether a voting or nonvoting capacity, when the *actions* of that party are directly challenged in a matter before the justice. A person aware of these facts would understand that the justice's relationship as a member of a named party whose actions are challenged would make it difficult for the justice to be impartial when judging those actions. The committee concludes that when the Judicial Council is named as a party, discretionary disqualification would compel the justice to recuse in direct challenges to the council's actions in adopting or approving any rules or orders the justice discussed as a nonvoting advisory council member or as a member of the Rules Committee.

C. Judicial Council Not Named as a Party

In circumstances where the Judicial Council's actions in adopting or approving emergency COVID-19 related rules and orders are challenged indirectly as applied in a particular matter or to a particular individual without naming the council as a party, the committee reaches the same conclusion that mandatory disqualification is not required for statements as to outcome, but reaches the opposite conclusion regarding the discretionary ground of reasonable doubt as to impartiality where the Judicial Council is not named as a party. In those circumstances, recusal is not required based on past practices, the distinction between administrative and adjudicatory judicial functions, and canon 3E(6)(c), which expressly eliminates law drafting as a ground for disqualification.

There have been several instances in which justices of the California Supreme Court participated in cases challenging rules of court adopted by the Judicial Council when they were members of the council, where the Judicial Council was not named as a party. (*People v. Hall* (1994) 8 Cal.4th 950, 964 [opinion by Chief Justice George determining the invalidity of rule 428, adopted by the Judicial Council while the Chief Justice was the council chair]; *In re W.B.* (2012) 55 Cal.4th 30 [Chief Justice Cantil-Sakauye and Justice Baxter concurred to the determination that rule 5.480 was overbroad, where the rule was adopted by the Judicial Council while the Chief Justice was chair and Justice Baxter was a member].) This precedent follows the reasoning of the court in *Curran v. Mount Diablo Council of the Boy Scouts* (1998) 17 Cal.4th 670, 684 fn.10 (*Curran*).

In *Curran*, the court concluded that the justices' adoption of nondiscrimination provisions in the Code of Judicial Ethics did not raise a conflict of interest, or the appearance of such a conflict, preventing them from deciding whether similar non-discrimination provisions in the Unruh Civil Rights Act (Civ. Code, § 51) applied to the Boy Scouts. (*Curran*, *supra*, 17 Cal.4th 670.) Approximately two years before it decided *Curran*, the court adopted a provision in the Code of Judicial Ethics barring a judge from holding membership in any organization that practices invidious discrimination on the basis of "race, sex, religion, national origin, or sexual orientation." (Canon 2C.) The court, responding to a letter it had received from a nonparty that

questioned whether it could hear the case in such circumstances, concluded that its adoption of the code did not create a conflict of interest or an appearance of such a conflict. The court reasoned, among other findings, that even if its adoption of the code reflected a legal conclusion on an issue relevant to the issues in *Curran*, that did not create a conflict of interest for the court because "[c]ourts routinely are called upon to apply, modify, or reconsider prior legal determinations in subsequent litigation, and a judge's participation in a prior decision involving a related legal issue has not been viewed as … a basis for recusal in later proceedings." (*Curran, supra*, at p. 684, fn.10.)

In concluding there was no conflict, the *Curran* court distinguished the court's function of administrating the conduct of judges from an individual justice's adjudicatory duties. This distinction follows more direct authority from other jurisdictions, as noted by a leading commentator on judicial disqualification, Professor Richard Flamm. When a judge has both adjudicative and administrative duties, "courts have held that the dual responsibilities of diligent administration and impartial adjudication do not create a substantial conflict; and . . ., judges have routinely declined to recuse merely because a litigant challenges a court's administrative directive." (Flamm, Judicial Disqualification: Recusal and Disqualification of Judges (2007) § 10.6, p. 270, citing *N.Y. State Assn. of Crim. Defense Lawyers v. Kaye* (2000) 95 N.Y.2d 556, 559-560 [reasoning that just as a court may reconsider its own rulings, so too may it rule on the validity of its own administrative orders and the judges who comprised the court when it issues the challenged order are not disqualified].)

The leading California commentator, Judge David Rothman, notes that in this state, participation in efforts to draft, pass or defeat laws are expressly not a valid ground for disqualification in circumstances where the meaning, effect, or application of the law is at issue in a matter before the judge, "unless the judge believes that his or her prior involvement was so well known as to raise a reasonable doubt in the public mind as to his or her capacity to be impartial." (Code Civ. Proc, § 170.2, subd. (c); Rothman, *supra*, § 7:16, pp. 410-412.) For appellate justices, this *nonground* for disqualification is provided in canon 3E(6)(c) [it shall not be a ground for disqualification that a justice has, as a public officer, participated in the drafting of laws when the meaning, effect, or application of those laws is before the justice, unless the

justice believes that his or her prior involvement was so well known that it raises reasonable doubt in the public mind as to impartiality].)

Applied here, this canon supports *Curran*'s distinction between administrative rulemaking and adjudicatory duties and exempts this inquiring justice's involvement in the adoption of emergency rules as a ground for disqualification. The distinction also suggests that a reasonable person would not doubt the justice's impartiality when the Judicial Council is not a named party, unless the inquiring justice's involvement in a particular rule at issue was more specifically well known.[5] Even if the inquiring justice voted as a Rules Committee member to ensure the consistency of a challenged emergency rule, or made other recommendations, this administrative role would also be known to an aware person as prescribed rulemaking duties under rule 10.13(a) and would not raise a reasonable doubt as to the justice's ability to reconsider the rule as part of his or her judicial function.

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[5] Nothing suggests the inquiring justice's involvement entailed more than performing the duties known to be required of the justice's memberships with the Judicial Council, such as advising the council as a nonvoting member, voting on rules when called to do so as an internal Rules Committee member, or making recommendations about the public comment process. The committee recommends, however, that the justice consider whether in the course of performing these duties, the justice took a leading public role or gained special notoriety as part of the rule drafting, or if the justice obtained personal knowledge of disputed evidentiary facts that went beyond the legislative history of the rule, which would independently require disqualification under canon 3E(5)(f)(ii).

CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS
350 McAllister Street, Room 1144
San Francisco, CA 94102
(855) 854-5366
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CJEO Oral Advice Summary 2020-037

[Issued October 23, 2020]

JUDICIAL OBLIGATIONS RELATING TO SOCIAL MEDIA COMMENTS BY APPELLATE COURT STAFF

I. Questions

The committee has been asked for advice on what, if any, ethical obligations appellate justices have once they become aware that a member of their staff has made inappropriate comments online that would violate the canons.[1]

[1] All further references to canons, the code, advisory committee commentary and to "Terminology" are to the California Code of Judicial Ethics unless otherwise indicated.

II. Advice Provided

The canons mandate that appellate justices exercise reasonable direction and control over the conduct of their staff to prevent them from making public comments that would violate the canons. When a justice becomes aware that a staff member has used social media to post a comment that violates the canons, the justice should immediately take steps to remedy the ethical violation, including at a minimum requiring the staff member to take all reasonable steps to have the post taken down and removed from the public domain.

III. Discussion

Social media has become a common way to communicate with colleagues, friends and the world at large, a trend that has accelerated during the current pandemic as other avenues for communicating have become more limited. In many ways, social media has taken the place of both the proverbial office water cooler and the town square. As with any other members of the general public who participate in social media to express themselves, appellate court staff can be expected to post their thoughts, comments and opinions online. Perhaps not surprisingly, such postings can, and frequently do, reference their employment at the court.

Appellate court staff are not prohibited from posting comments on social media about their employment or about the courts in general.[2] But, the canons constrain the content of any such comments and obligate justices to require staff compliance with the canons. (Canons 3B(9) and 3C(3).)[3] Accordingly, appellate court staff must refrain from posting comments on social media that violate the canons.

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[2] As a term of their employment, court staff are required to keep confidential the decision making process of a court with respect to any pending matter.

[3] Canon 3B(9) states in pertinent part that "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. The judge shall require similar abstention on the part of staff and court personnel subject to the judge's direction and control." Canon 3C(3) states in full that "A judge shall require staff and court personnel under the judge's direction and control to observe appropriate standards of conduct and to refrain from

Certain canons, including canons 3B(9) and 3C(3), require justices to exercise reasonable direction and control over the conduct of the staff that they employ. The canons define the term "required" to mean that justices are "to exercise reasonable direction and control over the conduct of those persons subject to [their] direction and control." Appellate justices face discipline if they fail to exercise such "reasonable control and direction" over their staff to prevent them from making inappropriate comments on social media. (*Public Admonishment of Commissioner Mark Kliszewski* (2017) [commissioner's failure to take sufficient corrective action to stop court staff from making inappropriate comments violated canons 3B(4) and 3C(3)]; see also Geyh et al., Judicial Conduct and Ethics (5th ed. 2013) § 6.03 [compiling cases outside of California in which judicial officers have been disciplined under similar canon provisions as a result of the unethical conduct of their staff].)

Once a justice becomes aware that a staff member has posted a comment on social media that violates the canons, the justice must take reasonable steps to remedy the ethical violation. At a minimum, the justice should instruct the staff member to take all reasonable steps to delete or to have removed from public view any improper comment that violates the canons, and then follow up with the staff member to ensure that they have done so. If the justice becomes aware that an improper comment has already been viewed by the public, republished or otherwise disseminated, then depending on the circumstances, the justice may need to instruct the staff member to correct or repudiate the comment on social media, particularly if the comment is demeaning or offensive, or otherwise undermines the dignity of the court. Appropriate training will assist appellate court staff in understanding the vital role that they play in maintaining public confidence in the integrity of the judicial system, as well as the importance of maintaining confidentiality and impartiality and of upholding the dignity of the court in their postings to social media.

(a) manifesting bias, prejudice, or harassment based upon race, sex, gender, gender identity, gender expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, or (b) sexual harassment in the performance of their official duties."

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COMMITTEE ON JUDICIAL ETHICS OPINIONS
350 McAllister Street, Room 1144
San Francisco, CA 94102
(855) 854-5366
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CJEO Expedited Opinion[1] 2021-038

[Posted February 9, 2021]

ACCEPTANCE OF ATTORNEY SERVICES FROM A LAW FIRM

I. Question

May an appellate justice ethically accept the services of an attorney, who is an employee and incoming associate of a law firm, to work in the justice's chambers for a period of six to twelve months?

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[1] The California Supreme Court Committee on Judicial Ethics Opinions (CJEO) issues **Expedited Opinions**, formerly known as **Oral Advice Summaries**, pursuant to California Rules of Court, rule 9.80(i)(1) [eff. Jan. 1, 2021]. Expedited Opinions are issued to requesting judicial officers following a discretionary decision by CJEO to address the ethical issues raised in an expedited process that does not include posting draft opinions for public comment, as required for CJEO Formal Opinions. CJEO Expedited Opinions are published in full, without identifying information regarding the requesting judicial officer, to provide information and analysis to the bench and public regarding judicial ethics.

II. Advice Provided

An appellate justice may not ethically accept the services of an attorney from a law firm because the attorney's services constitute a gift under the Code of Judicial Ethics[2] and the Code of Civil Procedure, which does not fall into any permissible exception to the general prohibition on gifts. In addition, accepting the attorney's services would impermissibly lend the prestige of judicial office to advance the interests of the law firm.

III. Discussion

A. The Attorney's Services Are an Impermissible Gift

The attorney's services constitute a gift from the law firm. The code defines a gift as "anything of value to the extent that consideration of equal or greater value is not received" and bans gifts, favors, and loans, unless an exception applies. (Terminology, Gift; canon 4D(5) [prohibiting gifts or favors from parties]; canon 4D(6) [prohibiting gifts, favors, or loans from anyone, unless excepted as specified]; Code Civ. Proc. § 170.9(1) [defining gift similarly to the code].) This committee has interpreted the code definition to mean that a gift is anything with market value. (CJEO Formal Opinion 2014-005 (2014), *Accepting Gifts of Little or Nominal Value Under the Ordinary Social Hospitality Exception*, Cal. Supreme Ct. Com. Jud. Ethics Opns., p. 6 [an item has value if it could be exchanged for consideration on the open market].) The services of a licensed attorney clearly have a value on the open market as evidenced by the competitive salaries paid to incoming associates by many law firms.

There is no exception to the general prohibition on gifts that could be invoked here. Canon 4D(6), which enumerates the exceptions to the general prohibition on gifts, specifies that judicial officers cannot rely on an exception if the gift would either influence or "reasonably be perceived as intended to influence" the justice in his or her duties. Although there may be no actual influence, in this case an objective observer might reasonably believe that the presence of

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[2] All further references to the code, terminology, and canons are to the California Code of Judicial Ethics unless otherwise indicated.

the law firm's attorney in the justice's chambers could place the law firm in a position to exert influence on the justice. Due to this potential appearance of influence, the gift may not be accepted even if the justice were to disqualify when the law firm appeared. (Canons 4D(6) & (6)(a).)

As the California Supreme Court states in *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th. 866, 879, gifts from lawyers to judges are " ' "inherently wrong" ' " and have a " ' "subtle, corruptive effect, no matter how much a particular judge may feel that he is above improper influence." ' " For this reason, an offer of any gift from a lawyer or law firm is "*presumptively improper*." (Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 9:52, p. 641 (Rothman) [emphasis in original].) Embedding someone within the court who is closely associated with a law firm creates the overall impression that judicial independence may be eroded. Indeed, the attorney's services are a gift not only to the justice, but also to the court since the services are displacing the costs of salaried postgraduate clerkships or annual staff positions, which would normally be borne out of the court's budget. Because the attorney is affiliated with a law firm having business before the court generally, the attorney's presence casts a shadow of influence, which must be avoided. (Rothman, *supra*, § 9:56, p. 649 [although a court is not itself bound by the code, its judicial officers are, and as an institution of government, courts should not accept gifts that would undermine the court's integrity or impartiality].)

B. The Gift Impermissibly Lends Judicial Prestige to the Law Firm

Even if the gift was permissible under an exception, accepting the attorney's services would impermissibly lend the judiciary's prestige to benefit a private law firm. A fundamental principle of judicial ethics is that judicial officers must preserve the integrity of the court by avoiding impropriety and the appearance of impropriety in all activities. (Canons 1 & 2.) To this end, canon 2B(2) prohibits a judicial officer from "lend[ing] the prestige of judicial office . . . in any manner . . . to advance the pecuniary or personal interests of the judge or others."

Allowing a law firm to place an incoming associate on a justice's staff, even temporarily, is likely to advance the interests of the law firm by enhancing its reputation. In addition, the law firm would have a favored position not enjoyed by its competitors and might be viewed as having the court's endorsement. (Canon 2B(2); CJEO Formal Opinion 2013-001 (2013), *Requesting Assistance From Attorneys*, Cal. Supreme Ct. Com. Jud. Ethics Opns., p. 6 [judges must ensure that requests for assistance from lawyers do not convey the impression that law firms providing assistance are afforded special favor, or that law firms that do not provide assistance are at a disadvantage]; Rothman, *supra*, § 9:7, p. 591, citing Cal. Judges Assn., Judicial Ethics Update (Nov. 2012) p. 4 [a judge may not endorse an attorney's law practice].)[3] Because the arrangement could lend judicial prestige to advance the interests of the law firm, the attorney's services may not be accepted regardless of the gift canons.

IV. Conclusion

An appellate justice may not ethically accept the services of an attorney from a law firm. Such an arrangement constitutes a gift that conveys a reasonable perception of influence, which precludes reliance on an exception to the ban on gifts. The attorney's services would also impermissibly lend the prestige of the judiciary to advance the interests of the law firm and therefore could not be accepted.

This expedited advice opinion is advisory only. (Cal. Rules of Court, rule 9.80(a), (e); Cal. Supreme Ct. Com. Jud. Ethics Opns. (CJEO), Internal Operating Rules & Proc. rule 1(a),

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[3] The attorney services offered by the law firm here are distinguishable from unpaid judicial externship programs where law students work for a judge or justice in exchange for course credit. Even if such programs arguably lend prestige to participating law schools, the educational purpose of the programs is an overriding factor. (Rothman, *supra*, § 10:18, p. 689 [there is no prohibition on use of judicial title to promote a permissible legal educational program because the importance of judges contributing to the law, legal system, and the administration of justice far outweighs any arguable use of prestige of office to advance pecuniary interests of others].)

(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 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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COMMITTEE ON JUDICIAL ETHICS OPINIONS
350 McAllister Street, Room 1144
San Francisco, CA 94102
(855) 854-5366
www.JudicialEthicsOpinions.ca.gov

CJEO Expedited Opinion[1] 2021-039

[Posted February 17, 2021]

GIFT EXCHANGES BETWEEN JUDGES AND THEIR STAFF

[1] The California Supreme Court Committee on Judicial Ethics Opinions (CJEO) issues **Expedited Opinions**, formerly known as **Oral Advice Summaries**, pursuant to California Rules of Court, rule 9.80(i)(1) [eff. Jan. 1, 2021]. Expedited Opinions are issued to requesting judicial officers following a discretionary decision by CJEO to address the ethical issues raised in an expedited process that does not include posting draft opinions for public comment, as required for CJEO Formal Opinions. The CJEO Expedited Opinions are published in full, without identifying information regarding the requesting judicial officer, to provide information and analysis to the bench and public regarding judicial ethics.

I. Question

A judge has asked the committee to advise on whether judges may exchange gifts with courtroom staff to celebrate birthdays and holidays.

II. Advice Provided

Judges may exchange modest gifts with their courtroom staff but, when giving or accepting gifts, judges should treat all staff equally and maintain proper decorum. Judges should not give any gifts that might (1) pressure staff to reciprocate, (2) be offensive, demeaning, or otherwise inappropriate, or (3) be perceived as harassment.

III. Discussion

A. Judges are generally permitted to exchange gifts with their courtroom staff, but should try to treat their courtroom staff equally

Judges are encouraged to maintain good relations with their courtroom staff and to foster a healthy work environment. (Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 6:27, p. 367 (Rothman) [observing that judges depend on the goodwill of their staff to ensure proper courtroom operations].) Acknowledging birthdays, holidays and other special occasions can be an appropriate way to build morale among a judge and his or her staff. On such occasions, there is no ethical impediment for a judge to exchange modest gifts with staff as part of the celebrations. (*Ibid.* [noting that a judge may accept a gift from staff under Cal. Code Jud. Ethics, canon 4D(6)(a)[2] because the judge would be disqualified from hearing a case involving staff]; Cal. Judges Assn., Jud. Ethics Com., Opn. No. 70 (2015) at pp. 1-2 (California Judges Association Opinion No. 70).)

When giving gifts to their courtroom staff, judges must take care that they show no bias or favoritism. (*Inquiry Concerning Saucedo* (2015) 62 Cal.4th CJP Supp. 1, 79 (*Saucedo*).) To

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[2] All further references to canons and the code are to the California Code of Judicial Ethics.

the extent reasonably possible, judges should endeavor to treat their staff equally. For example, judges should not give holiday gifts to different staff members that are significantly disproportionate. Similarly, judges should not celebrate the birthdays of certain of their staff while ignoring the birthdays of others. Judges also should be sensitive to and respect the fact that staff may come from different faiths and traditions. To the extent reasonably possible, judges should tailor any gifts that they give to align with the heritage and belief systems of their staff.

B. Judges cannot pressure staff to exchange gifts

Judges cannot pressure their courtroom staff to give a gift, even if such pressure is implicit. For example, some staff might feel that an expensive or extravagant gift should be reciprocated, particularly when such a gift is received from a workplace supervisor such as a judge. For that reason, judges should take into account both the power and financial imbalances between themselves and their staff, and keep any gifts modest. (See CJEO Formal Opinion No. 2014-005, Accepting Gifts of Little or Nominal Value Under the Ordinary Social Hospitality Exception, Cal. Supreme Ct., Com. Jud. Ethics Opns, pp. 7, 11-14 [discussing what constitutes "ordinary social hospitality" under canon 4D(6)(g))].) Judges should not solicit staff for a group gift. In addition, judges can reduce the risk that staff feel coerced into giving a gift by telling them that there is no obligation or expectation that they reciprocate any gifts they receive. (Cal. Judges Assn. Opn. No. 70, *supra*, at p. 2.)

C. Judges cannot give gifts that are offensive, demeaning, or otherwise inappropriate, or that would be perceived as harassment

Judges must demonstrate professionalism at all times and maintain appropriate decorum with their courtroom staff. (Rothman, § 6:27, pp. 370-371.) Judges cannot give gifts that are offensive or demeaning, for example by being obscene, profane or degrading in any way to the recipient or to others. (*Inquiry Concerning Block* (Dec. 9, 2002) CJP No. 167, p. 4 [judge disciplined for playing practical joke on court interpreter].) In addition, judges cannot give gifts that would be perceived as harassing, for example if given in the expectation of fostering a

romantic or sexual relationship with a staff person. (*Saucedo*, *supra*, 62 Cal.4th at pp. CJP Supp. 2, 18, 57-58.)

IV. Conclusion

Judges are allowed to give to and receive modest gifts from their courtroom staff to celebrate birthdays and holidays, and are encouraged to do so when the gift exchange boosts employee morale and fosters a healthy courtroom work environment. To the extent reasonably possible, judges must treat their courtroom staff equally, and cannot give gifts that are inappropriate or harassing, or of a nature or value that results in an expectation of, or the perceived expectation of, a need for reciprocity.

This expedited opinion is advisory only. (Cal. Rules of Court, rule 9.80(a), (e); Cal. Supreme Ct. 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)(2); 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 expedited 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)).)

CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS
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San Francisco, CA 94102
(855) 854-5366
www.JudicialEthicsOpinions.ca.gov

CJEO Expedited Opinion[1] 2021-040

[Posted February 23, 2021]

ACCEPTANCE OF CAMPAIGN CONTRIBUTIONS DONATED BY A COURT EMPLOYEE POLITICAL ACTION COMMITTEE TO A JUDICIAL POLITICAL ACTION COMMITTEE

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[1] The California Supreme Court Committee on Judicial Ethics Opinions (CJEO) issues **Expedited Opinions**, formerly known as **Oral Advice Summaries**, pursuant to California Rules of Court, rule 9.80(i)(1) [eff. Jan. 1, 2021]. Expedited Opinions are issued to requesting judicial officers following a discretionary decision by CJEO to address the ethical issues raised in an expedited process that does not include posting draft opinions for public comment, as required for CJEO Formal Opinions. The CJEO Expedited Opinions are published in full, without identifying information regarding the requesting judicial officer, to provide information and analysis to the bench and public regarding judicial ethics.

I. Question

Court reporters, clerks and other employees of a superior court have formed a political action committee (Employee PAC) that collects voluntary contributions from court employees. The Employee PAC has offered to donate funds to a political action committee that supports the campaigns of active superior court judges facing an election challenge (Judicial PAC). The individual judges are not made aware of the identity of employees who contributed to the Employee PAC or the amount of the individual's donation. A judge has asked whether the judge may accept a donation from the Judicial PAC, which includes funds originating from the Employee PAC.

II. Advice Provided

A judge may accept a donation of funds from a Judicial PAC that accepted Employee PAC donations, provided that (1) the initial contributions from court employees to the Employee PAC as well as the subsequent contribution from the Employee PAC to the Judicial PAC were each unsolicited; and (2) there was no judicial coercion of court employees.

III. Discussion

a. Soliciting contributions

Although the canons[2] generally allow judges to solicit and accept campaign contributions under specified circumstances, the one categorical exception to this general rule is the prohibition on soliciting judicial campaign contributions from California state court personnel. (Canon 5B(4); Rothman et al., Cal. Judicial Conduct Handbook (2020 supp.) § 11.60, p. 116.) This prohibition includes both direct solicitations by a judge to court employees as well as indirect solicitations of court employees made by or to third parties. (CJEO Oral Advice Summary No. 2018-026, *Soliciting Endorsements from Trial Court Judges for Other Appellate Court Justices Subject to Retention Elections*, Cal. Supreme Ct. Com. Jud. Ethics Opns., p. 4 (CJEO Oral Advice Summary No. 2018-026) [applying solicitation rules to requests for

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[2] All further references to canons, the code, and to advisory committee commentary are to the California Code of Judicial Ethics unless otherwise indicated.

endorsement made indirectly].) For that reason, judges as well as entities affiliated with judges such as a Judicial PAC are prohibited from soliciting both court employees and entities affiliated with court employees such as an Employee PAC. As a result, judges cannot accept contributions from a Judicial PAC if the Judicial PAC or any judge solicited either the court employees who contributed to the Employee PAC or the Employee PAC itself. Conversely, a judge may accept a contribution from a Judicial PAC if there was no solicitation of court employees either directly or through the Employee PAC, provided that there was also no coercion of court employees, as explained in the next section.

b. Coercing contributions

Judges are not permitted under any circumstance to use the prestige of judicial office in a manner that is, or that would reasonably be perceived to be, coercive. (Canons 1, 2, 2A, 2B & 5B(4).) A judge's position of influence or control over court employees might give rise to a risk that an employee-initiated donation is, or is perceived to be, the result of coercion. The potential for coercion depends on factors including the nature and length of the relationships judges have with court employees, the size of the court, both numerically and geographically, the frequency and proximity in which particular judges and court employees work together, and whether contributions are designated for specific judicial campaigns or instead are intended to benefit all judges equally. For example, in a small court with only one location and relatively few court employees, where long term work assignments with single judges are commonplace, there may be some risk that a judge could ascertain which individuals contributed funds to the Employee PAC for the judge's benefit, even when their identities have not been disclosed by the Employee PAC. In that case, judges may need to exercise particular caution that court employees do not feel pressured to contribute. Conversely, there may be less such risk in larger courts where court employees are not assigned to a single judge, judges and court employees are spread out in multiple courthouses, and employee contributions are not directed to any specific campaigns. In either circumstance, to the extent possible, ensuring that the identities of court employees who

donate to an Employee PAC remain unknown to the judges of the court greatly reduces the risk of coercion.[3]

A judge cannot accept a campaign contribution from a Judicial PAC which received funds from an Employee PAC if the judge knows, or reasonably should know, that a judge coerced either the initial donation from court employees to the Employee PAC or the subsequent donation of funds from the Employee PAC to the Judicial PAC. However, a judge may accept such a campaign contribution where there is no judicial solicitation or coercion involved in either (1) the initial contribution by employees to the Employee PAC or (2) the subsequent donation by the Employee PAC to the Judicial PAC. (Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 11.54, pp. 774–775; CJEO Oral Advice Summary No. 2018-026, *supra*, at p. 4–5; Cal. Judges Assn., Judicial Ethics Update (Jan. 2017) § III.2, p. 6 [judge may accept an unsolicited campaign donation from a commissioner on judge's court].)[4]

IV. Conclusion

The inquiring judge may accept the campaign contribution from a Judicial PAC that accepted Employee PAC donations where there was no judicial solicitation of either the court employees who initially donated the funds to the Employee PAC or of the Employee PAC that

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[3] The risk of coercion increases if the identities of the employees who donate to an Employee PAC are disclosed or otherwise made known to the judges of the court, or if their identity can be ascertained somehow. In that case, coercion can be perceived if a judge fosters warm relationships with court employees known to have contributed to an Employee PAC while keeping those who have not at a distance, or treating non-contributors with any disrespect or disdain. Similarly, if a presiding judge discharges his or her administrative duties of court supervision or management in a manner that is consistently more favorable to known contributors to an Employee PAC, employees may feel pressured to contribute.

[4] There may be circumstances in which judges are required to disclose campaign contributions originating from a court employee that pass through an Employee PAC to a Judicial PAC before being paid to the judge's campaign at the direction of the Employee PAC. CJEO Oral Advice Summary No. 2018-025, *Disqualification and Disclosure Duties of a Trial Judge Assigned as an Appellate Justice*, Cal. Supreme Ct. Com. Jud. Ethics Opns., p. 3 [noting that disclosures might be required when a party contributes to a super PAC that donates to a judge's campaign].)

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COMMITTEE ON JUDICIAL ETHICS OPINIONS
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San Francisco, CA 94102
(855) 854-5366
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CJEO Expedited Opinion[1] 2021-041

[Posted March 3, 2021]

SERVICE ON A GOVERNMENTAL TASK FORCE

I. Question

May a judge serve as a member of a governmental task force created to address hate crimes with a broad-based agenda, including legal, educational, social, and policy reforms?

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II. Advice Provided

When the scope of the stated purposes of a governmental task force is so broad and varied that a judge cannot reasonably limit his or her participation to topics directly related to the law, the legal system, or the administration of justice, a judge may not ethically serve as a member of the task force. However, a judge may assist the task force in other ways, for example, by appearing before, providing information to, or advising the task force on issues within the judicial branch's purview and relating to the judge's experiences and unique perspective as a judge.

III. Facts

A county board of supervisors has created a multi-disciplinary task force to address hate crimes that includes a variety of community stakeholders, such as representatives from the county, a major city, the school board, the district attorney's office, the public defender's office, local law enforcement agencies, and certain nonprofit groups. In its resolution creating the task force, the board also designated the presiding judge of the superior court, or his or her designee,[2] as a voting member of the task force. The resolution specifies that the task force will be subject to the Ralph M. Brown Act open meetings law and will be supported by county clerk staff.

The stated purposes of the task force are to: (1) develop recommendations to address hate crimes and violence incited by hate speech; (2) develop recommendations to employ existing law, and assess new policies and legislation, to protect against gender-based hate crimes; (3) examine the pathology of hate crimes to develop the best methods and policies to address them; (4) examine and develop recommendations regarding the relationship of firearm accessibility to hate crimes; and (5) recommend educational programs to promote social and cultural change.

As a preliminary matter, the committee notes that based on these facts, the task force is governmental or at least quasi-governmental in nature. Apart from ethical concerns, judges are prohibited from holding "public office" by article VI, section 17, of the California constitution.

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[2] Were the presiding judge to elect to designate another judicial officer, this opinion would apply to that designated judge.

The committee declines to provide a legal opinion regarding whether membership on the task force constitutes public office for constitutional purposes. Assuming for purposes of this opinion that service is not constitutionally barred, the committee provides the following advice about whether a judge may ethically be a member the task force.

IV. Discussion

The Code of Judicial Ethics[3] broadly permits extra-judicial conduct relating to the "law, the legal system, or the administration of justice." (Canons 4B, 4C, and 5D.) Canon 4C(1) prohibits judges from appearing before or officially consulting with an executive or legislative body except on matters relating to the law, the legal system, or the administration of justice, or on matters concerning the judge's personal economic interests. (Canon 4C(1).) Similarly, canon 4C(2) prohibits judges from accepting appointments to a governmental committee or commission or other governmental position that is "concerned with issues of fact or policy on matters" other than improvement of the law, the legal system, or the administration of justice. Canon 4C(3) permits judges to act as officers and directors of, and non-legal advisors to, organizations and government agencies devoted to the improvement of the law, the legal system, or the administration of justice, provided that such positions do not constitute a public office within the meaning of article VI, section 17, of the California constitution. Finally, canon 5D permits judges to engage in political activity relating to the law, the legal system, and the administration of justice, provided conduct is consistent with the code overall.

The determining factor here is whether the task force's activities fall within the scope of the law, the legal system, or the administration of justice. The resolution lies in determining the meaning of this phrase, which is not defined with specificity in the code.[4] Because judges are

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[3] All further references to the code, terminology, canons, and advisory committee commentary are to the California Code of Judicial Ethics unless otherwise indicated.

[4] Although the phrase, "the law, the legal system, or the administration of justice" is listed in the Terminology section of the code, it is not defined. Instead, the Terminology section states that when a judge engages in an activity that relates to the law, the legal system, or the administration of justice, the judge should also consider his or her ethical obligations under multiple enumerated and described canons. Cal. Judges Assn., Jud. Ethics Com., Opn. No. 75

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COMMITTEE ON JUDICIAL ETHICS OPINIONS
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San Francisco, CA 94102
(855) 854-5366
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CJEO Expedited Opinion[1] 2021-042

[Posted April 28, 2021]

SOCIAL MEDIA POSTS ABOUT THE LAW, THE LEGAL SYSTEM, OR THE ADMINISTRATION OF JUSTICE

I. Question

A judicial officer who would like to make statements on Facebook concerning legislation related to the law, the legal system, and the administration of justice asks the

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Committee on Judicial Ethics Opinions (CJEO) to review those posts and advise whether they are permissible under the California Code of Judicial Ethics. While the committee declines to comment on specific social media posts, it provides the following guidance for permissible use of social media to make law-related statements.

II. Advice Provided

Judges may use social media to make statements relating to the law, the legal system, or the administration of justice, but should consider the following when posting or engaging with others online: (1) the same standards for judicial communications that apply in face-to-face settings apply with equal force to online statements and social media posts; (2) due to lack of control over the dissemination and permanence of online statements, judges must exercise caution and restraint and should assume the widest possible audience; (3) while statements concerning the law, the legal system, or the administration of justice are generally permissible, judges may not engage in prohibited social or political commentary on social media; and (4) judges must carefully evaluate what they intend to post and continually monitor their social media communications and posts to ensure public confidence in the integrity, independence, and impartiality of the judiciary.

III. Discussion

Social media has become a pervasive form of communication and socialization in daily life. Social media is commonly used to share information, network, connect with friends, and express opinions. Judges are no exception to the popularity of social media. (Epps & Warren, *Resisting Shiny Trinkets in This New Digital Age: Judicial Interaction with Media Platforms* (Aug. 2019) 58 Judges' J. 28, 30 [as of 2016, surveys showed that approximately 40 percent of judges use social media]; Cal. Judges Assn., Jud. Ethics Com., Advisory Opn. No. 78 (2020), p. 3 (CJA Opn. No. 78) [observing that more and more judges are expected to engage in social media over time].)

With social media permeating nearly every aspect of personal and professional life, it is understandable that judges have questions regarding how to use social media without violating

the California Code of Judicial Ethics.[2] In general, social media is governed by the same rules that govern statements made in any other context. However, there are certain ethical pitfalls associated with social media, such as the loss of control over and permanence of statements, that distinguish it from other forms of communication. For guidance, the committee provides the following standards and cautions concerning the use of social media to express opinions related to the law, the legal system, or the administration of justice.

A. The Code Applies Equally to Traditional and Online Conduct

In 2018, the California Supreme Court amended the code to recognize that judicial use of social media is governed by the same ethical rules that govern judicial conduct in any other setting. "The same canons that govern a judge's ability to socialize and communicate in person, on paper, or over the telephone apply to electronic communications, including use of the Internet and social networking sites." (Advisory Com. com. foll. canon 2 and 2A; CJA Opn. No. 78, *supra*, p. 3 [the same rules apply to a judge's online conduct that apply in any other context]; *State v. Thomas* (N.M. 2016) 376 P.3d 184, 198 [limitations on judicial conduct apply with equal force to virtual actions and online conduct].)

While the same rules apply in traditional and online environments, there are important differences for judges to consider. For example, on social media, a person making a statement does not always have control over who can view the statement, responses or reactions to the statement, how widely or in what manner the statement is shared or repeated by third parties, how long the statement is retained on a particular format, or whether the statement can be modified or deleted. For this reason, the code instructs judges to use caution in online communications. (Advisory Com. com. foll. canons 2 and 2A [judges should exercise caution due to the accessibility, widespread transmission, and permanence of material posted on the internet]; Cal. Judges Assn., Jud. Ethics Com., Advisory Opn. No. 66 (2010), pp. 3–4 (CJA Opn. No. 66) [the use of social media technology poses unique issues, such as loss of control over the dissemination of content and the permanence of statements made in cyberspace]; CJA

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[2] All further references to the code, terminology, canons, and advisory committee commentary are to the California Code of Judicial Ethics unless otherwise indicated.

Opn. No. 78, *supra*, p. 8 [social media users cannot control the use or lifespan of their communications; even platforms intended to display messages for a brief period of time do not guarantee that posts will be removed].)

While the committee advises vigilance and caution, it is not always practical or preferable to avoid social media altogether. Social media is a powerful tool for making and maintaining connections, both personal and professional, and for community participation. Judicial involvement in the community makes for engaged and socially aware judges, which is to be encouraged. (Advisory Com. com. foll. canon 4A [complete separation from extrajudicial activities is neither possible nor wise, and judges should not become isolated from the community in which they live].) Just as judges should not be isolated from their physical communities, judges are not prohibited from engaging in online communities. In addition, while they are subject to restrictions and limitations on extrajudicial activities, judges are not required to give up their personal lives or individual opinions. (Advisory Com. com. foll. canon 2 and 2A [judges must expect to be the subject of constant public scrutiny and therefore must accept restrictions on their conduct that might be viewed as burdensome]; canon 5 [judges are entitled to personal views on political issues and not required to surrender their rights or opinions as citizens]; CJA Opn. No. 66, *supra*, p. 4 [a judge's participation in social media does not per se violate the canons].)

That said, judges must be mindful of how the public may perceive social media activity and refrain from any online statements or communications that call into question the impartiality of the judiciary. (Canon 2 [judges shall not make public statements that are inconsistent with the impartial performance of judicial office]; Advisory Com. com. foll. canon 2 and 2A [judges must avoid impropriety in all activities; the test for impropriety is whether a person aware of the facts would reasonably entertain a doubt about judicial integrity, impartiality, or competence].) For instance, judges should carefully consider whether online friendships or participation in certain online groups or forums suggest that they have allowed "family, social, political, or other relationships" to influence their judgment or convey the impression that anyone is in a special position to influence them. (Canon 2B(1); CJA Opn. No. 66, *supra*, pp. 7–11 [judges must exercise caution when engaging in online "friendships," especially with lawyers, and should not

interact on social media with lawyers in pending cases].) Judges must also ensure that online statements and social media posts do not lend judicial prestige to benefit anyone's personal or pecuniary interest. (Canon 2B(2); CJA Opn. No 78, *supra*, p. 9 [a judge should refrain from reviewing businesses online when the judge's identity can be ascertained and be circumspect when "liking" other's posts about products or businesses].)

When posting comments online, judges must carefully consider the canons and the potential hazards of social media to strike a balance between the restrictions on judicial conduct and the expression of personal opinions.

B. Online Conduct Is Inherently Public Conduct

Judges must assume that all statements made on social media platforms will reach the widest possible audience regardless of whatever viewing restrictions or privacy settings a judge applies. This is because it is sometimes difficult for social media users to discover how the technology works, the technology does not work exactly as advertised, the technology's default settings change over time, or some combination of the foregoing. (CJA Opn. 66, *supra*, p. 3 [describing the varying degrees of Facebook privacy settings and noting that certain information is available even to people who are not "friends" with a judge]; Browning, *Should Judges Have a Duty of Tech Competence?* (2020) 10 St. Mary's J. Legal Malpractice & Ethics 176, 180-185 [describing judicial discipline for engaging in inappropriate posts on Facebook or Twitter due to lack of familiarity with the websites' privacy settings].)

In fact, several judges disciplined for online behavior mistakenly believed that they had taken necessary precautions to protect the privacy of their statements. (Com. on Jud. Performance, Ann. Rep. (2018) Public Censure of Former Commissioner Joseph J. Gianquinto, pp. 33–34 (Public Censure of Gianquinto) [judge's lack of knowledge regarding how to remove content from social media site did not excuse code violations]; *Inquiry Concerning Krause* (Fla. 2015) 166 So.3d 176, 177–178 [judge's intention to keep comments private on social media did not excuse misconduct]; *Judicial Discipline and Disability Commission v. Maggio* 440 (Ark. 2014) S.W.3d 333, 334 [judge disciplined for statements made on social media even though a pseudonym was used].) Even if a judge takes steps to keep his or her social media statements

private or limited to a select group of viewers, social media platforms and the sophistication of online viewers are evolving so rapidly that even the most technologically proficient users may have difficulty keeping pace with the privacy features, sharing capabilities, or hacking vulnerabilities of each site. (*In re Complaint of Judicial Misconduct* (3d Cir. 2009) 575 F.3d 279, 291–294 [federal judge admonished for not adequately securing his personal server to prevent public access to sexually explicit files, which embarrassed and undermined public confidence in the judiciary in violation of federal codes of conduct].)

A judge's online statements and social media posts are particularly likely to draw heightened attention when a judge is engaging in discourse on controversial subjects or current events. (Advisory Com. com. foll. canons 2 and 2A [judges are expected to be the subject of constant public scrutiny and are therefore subject to increased restrictions]; CJEO Formal Opinion 2020-014 (2020), *Judicial Participation in Public Demonstrations and Rallies*, Cal. Supreme Ct. Com. Jud. Ethics Opns., p. 5 (CJEO Formal Opinion 2020-014) [given intense societal focus on racial justice and equity issues, a judge's participation in social protests was likely to draw public scrutiny].) Thus, the committee advises judges to assume that any statements they make on social media are public statements, potentially subject to scrutiny, and to use discretion and heightened caution when online.

C. Online Statements Concerning the Law, the Legal System, or Administration of Justice

The code generally permits judges to engage in activities concerning "the law, the legal system, or the administration of justice" provided those activities do not violate other provisions in the code. (Canons 4B, 4C & 5D.) The reasoning behind this broad permission is that judges are "specially learned in the law" and therefore in a "unique position to contribute to [its] improvement." (Advisory Com. com. foll. canon 4B.) When applied to online activities, it is permissible for judges to use social media to comment on legislation affecting the judiciary or legal system, so long as the commentary would not violate other canons or rules. (Canon 5D.) For example, statements must not: (1) undermine public confidence in the judiciary or suggest bias (canons 1, 2 & 2A); (2) relate to pending matters or potential pending matters (canon 2A);

(3) stray into unlawful activities or demean the judicial office (canons 2A & 4A(2)); (4) constitute prohibited political activities (canon 5); (5) convey a special position of influence or use title to promote the interests of others (canon 2B(1) & (2); or (6) interfere with the performance of judicial duties (canons 3 & 4A(3)). (Com. on Jud. Performance, Ann. Rep. (2017) Public Admonishment of Judge Jeff Ferguson, pp. 2–3 [judge admonished for making statements on a social media page about an attorney's sexual affairs with reckless disregard for the truth, which compromised the integrity of the court and demeaned the judicial office].)

The code does not precisely define the law, the legal system, or the administration of justice, and an overly broad interpretation could sweep nearly any sociopolitical topic within its ambit. (Terminology, Law, the Legal System, or the Administration of Justice; CJEO Expedited Opinion 2021-041 (2021), *Service on a Governmental Task Force*, Cal. Supreme Ct. Com. Jud. Ethics Opns., pp. 3–5 (CJEO Expedited Opinion 2021-041) [acknowledging the challenges in interpretating the phrase]). Judges must therefore exercise caution to ensure that public statements directly relate to the law, the legal system, or the administration of justice rather than their personal social or political views. (Canon 5 [judges shall not engage in political activity inconsistent with the independence, integrity, or impartiality of the judiciary][3]; Public Censure of Gianquinto*, supra*, pp. 33–34 [judge disciplined for statements relating to presidential policies, immigration, racial issues, and political views]; *In re Kwan* (Utah 2019) 443 P. 3d 1228, 1232, 1237–1239 [judge suspended for social media posts extensively criticizing a sitting president, among other violations]; N.Y. Advisory Com. on Jud. Ethics, Advisory Opinion No. 2019-120 [a judge may publicly support legislative and constitutional changes affecting court structure and operations but should use caution when expressing opinions on social media].)

The distinction between permissible statements concerning the law, the legal system, or the administration of justice and prohibited political statements may not be a bright line. However, this committee has previously advised that conduct is more likely to fall within the

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[3] Canon 5A specifically prohibits judges from engaging in partisan politics, such as holding office in a political organization, publicly endorsing nonjudicial candidates, or fundraising for nonjudicial campaigns. (Canon 5A (1)–(3).) Any social media post that publicly endorses a nonjudicial candidate or political organization is expressly prohibited.

scope of the law, the legal system, or the administration of justice when it pertains to "purely administrative issues, such as court budgets, facilities, and docketing impacts" rather than "the more substantive end of the policy spectrum." (CJEO Expedited Opinion 2021-041*, supra*, p. 4.) Thus, statements regarding court impacts are more likely to fall within the safe harbor of the law, the legal system, or the administration of justice than general policy-related statements not directly linked to the courts. The committee advises that this same guidance applies whether engaging in public activities in traditional settings or in the social media context.

Finally, judges choosing to use social media must engage in a two-step process to ensure continued compliance with the code. First, they must carefully evaluate their own statements, using the guidelines above, before deciding to post something on social media. (See Discussion, *ante*, at pt. III.B. and III.C.) Second, they must monitor reactions to their statements and the social media forums they use. For example, if a judge's social media posts trigger online posts or comments that devolve into discussions undermining the judge's impartiality or demeaning the judicial office, the judge must use his or her best efforts to delete those posts. Or, just as in physical public forums, if the social media site itself suggests bias or impropriety, a judge may need to leave that site entirely. (CJEO Formal Opinion 2020-014*, supra*, p. 2) [judges must remain vigilant and be prepared to leave a demonstration or rally if remaining might result in a violation of their judicial duties or interfere with judicial obligations].) While it may not be feasible to track every social media page they have commented on or change the conduct of online contacts, a judge must make reasonable efforts to monitor social media pages or threads associated with the judge and take action to remedy any statements that compromise the integrity of the judiciary. (Canons 1 & 2A [judges must act to preserve public confidence in the integrity, independence, and impartiality of the judiciary]; Com. on Jud. Performance, Ann. Rep. (2018) Private Admonishment 2, p. 27 [judge admonished for failing to diligently monitor social media associated with the judge's name].)

IV. Conclusion

Social media has become a pervasive form of communication and socialization in our society, and the use of social media by judges is understandably growing. Judges choosing to participate in social media platforms must exercise caution and abide by the same ethical rules

that apply to in-person statements. In addition, judges must be mindful that they do not retain complete control over the technology, dissemination, or permanence of content and should assume the broadest possible audience. As in traditional settings, judges may comment on matters pertaining to the law, the legal system, or the administration of justice, provided they do not engage in prohibited political commentary or violate other canons in the code. Judges must expect public scrutiny when using social media, make reasonable efforts to monitor their online activities, and be prepared to leave virtual environments that undermine the integrity, independence, or impartiality of the judiciary.

This expedited advice opinion is advisory only. (Cal. Rules of Court, rule 9.80(a), (e); Cal. Supreme Ct. 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 views of the California Supreme Court or any other entity. (Cal. Rules of Court, rule 9.80(b); CJEO rule 1(a)).)

CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS
350 McAllister Street
San Francisco, CA 94102
(855) 854-5366
www.JudicialEthicsOpinions.ca.gov

CJEO Expedited Opinion[1] 2021-043

[Posted May 18, 2021]

SERVICE ON THE CALIFORNIA ACCESS TO JUSTICE COMMISSION OR CHILD WELFARE COUNCIL

I. Question

The Committee on Judicial Ethics Opinions (CJEO) has been asked whether judicial service on the California Access to Justice Commission or the Child Welfare Council is an ethically permissible activity related to the law, the legal system, or the administration of justice.

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[1] The California Supreme Court Committee on Judicial Ethics Opinions (CJEO) issues **Expedited Opinions**, formerly known as **Oral Advice Summaries**, pursuant to California Rules of Court, rule 9.80(i)(1) [eff. Jan. 1, 2021]. Expedited Opinions are issued to requesting judicial officers following a discretionary decision by CJEO to address the ethical issues raised in an expedited process that does not include posting draft opinions for public comment, as required for CJEO Formal Opinions. CJEO Expedited Opinions are published in full, without identifying information regarding the requesting judicial officer, to provide information and analysis to the bench and the public regarding judicial ethics.

II. Advice Provided

Judges are permitted under the California Code of Judicial Ethics[2] and encouraged by the California Standards of Judicial Administration to serve as members of the California Access to Justice Commission or the Child Welfare Council. Judges may engage in extrajudicial activities related to the law, the legal system, or the administration of justice but should consider other code requirements, such as ensuring public confidence in the judiciary and avoiding involvement in partisan matters. The central goals of both the California Access to Justice Commission and the Child Welfare Council are improving the legal system and enhancing services for court users, rather than broader policy matters that may involve the judiciary in controversies or create the appearance of impartiality.

III. Facts

A. California Access to Justice Commission

The California Access to Justice Commission (Access Commission) is a nonprofit corporation that was originally created in 1996 under the auspices of the California State Bar to ensure equal access to the legal system for all Californians. (The History, Purpose, and Importance of the Access Commission (History) p. 1 < https://www.calatj.org/wp-content/uploads/2021/01/The-History-Purpose-and-Importance-of-the-Access-Commission.pdf> [as of May 18, 2021].)[3] The Access Commission has two primary roles: (1) " 'to provide ongoing leadership in the effort to achieve fuller access to justice in California' "; and (2) " 'to oversee efforts to increase funding and improve methods of delivery of legal services for the poor and those of moderate income.' " (History, at p. 2) The Access Commission has a maximum of 31 authorized directors, which includes representatives appointed by the state executive branch, the state Legislature, the Chief Justice of California, the California Attorney

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[2] All further references to the code, terminology, canons, and advisory committee commentary are to the California Code of Judicial Ethics unless otherwise indicated.

[3] This document, the Access Commission's bylaws, and other background information can be found on the Access Commission's website at https://www.calatj.org/ (as of May 18, 2021).

General, the State Bar, and various other legal and nonprofit organizations. (Access Commission Bylaws, art. 3, § 3.4, pp. 5–6 <https://calatj.egnyte.com/dl/85GfGvtnJA/CURRENT_CalATJ_Bylaws.pdf_ > [as of May 18, 2021].)

The Access Commission's activities include the following: issuing reports on access gaps; encouraging pro bono participation by the State Bar; supporting programs that ensure access to non-English speakers and people in rural areas; supporting legislation impacting access to justice; and commenting on public policy issues that affect access to justice, such as the disparate impact that court fines and fees have on low and moderate income individuals and the importance of funding the courts. (History, *supra*, at p. 4.) The Access Commission operates through a variety of committees on specific issues, such as outreach, pro bono services, right to counsel, language access, rural access, racial justice, and amicus curiae. (Access Commission Committees <https://www.calatj.org/committees/> [as of May 18, 2021].) Certain committees, such as the amicus curiae committee, are limited to members who are not bench officers. (Access Commission, Amicus Curaie Committee <https://www.calatj.org/committee/amicus-curiae-committee/> [as of May 18, 2021].)[4]

B. Child Welfare Council

The Child Welfare Council was established by the Child Welfare Leadership and Performance Accountability Act of 2006, codified at Welfare and Institutions Code sections 16540–16545. The Child Welfare Council serves as "an advisory body responsible for improving the collaboration and processes of the multiple agencies and the courts that serve the children and youth in the child welfare and foster care systems." (Welf. & Inst. Code, § 16540.) The Child Welfare Council is cochaired by the Secretary of the California Health and Human

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[4] Because the amicus curiae committee is involved in filing briefs in active litigation, precluding bench officers from membership ensures compliance with the canons prohibiting judges from commenting on pending matters. (Canon 2A [a judge shall not comment on pending or potential pending matters]; canon 3B(9) [a judge shall not comment on proceedings in any court]; canon 4C(3)(c) [a judge shall not serve as an officer, director, or nonlegal advisor of an organization likely to be involved in proceedings before the judge or frequently engaged in adversarial proceedings in the court of which the judge is a member].)

Services Agency and the designee of the Chief Justice of California. The Child Welfare Council's other members include representatives from various state agencies, nonprofit groups, and other stakeholders. (Welf. & Inst. Code, § 16541, subds. (a)–(p).)

The Child Welfare Council is statutorily responsible for the following activities: issuing advisory reports with recommendations for ensuring coordination and collaboration among various agencies that provide services to children in the welfare or foster care systems; formulating policies for effective administration of child welfare and foster programs; developing data-sharing programs between agencies; and implementing legislative enactments in child welfare and foster care programs and the courts, among other things. (Welf. & Inst. Code, § 16540, subds. (a)–(m).) The Child Welfare Council has several committees on subtopics, such as child development and successful youth transitions, data linkage and information sharing, and behavioral health.[5] (Child Welfare Council Committee Meeting Information <https://www.chhs.ca.gov/home/committees/california-child-welfare-council/committee-meeting-information/> [as of May 18, 2021].)

IV. Discussion

The code broadly permits extrajudicial conduct relating to the law, the legal system, or the administration of justice. (Advisory Com. com. foll. canon 4B [judges are in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice because they are specially learned and experienced in the law]; canon 4C(1) [judges are prohibited from appearing before or officially consulting with an executive or legislative body except on matters relating to the law, the legal system, or the administration of justice, or on matters concerning the judge's personal economic interests]; canon 4C(2) [judges are prohibited from accepting appointments to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than

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[5] Information about the Child Welfare Council's committees, the Child Welfare Council's annual reports, and other background information can be found on the Child Welfare Council's website at https://www.chhs.ca.gov/home/committees/california-child-welfare-council/ (as of May 18, 2021).

improvement of the law, the legal system, or the administration of justice]; canon 4C(3)(a) [judges are permitted to act as officers and directors of, and nonlegal advisors to, organizations and government agencies devoted to the improvement of the law, the legal system, or the administration of justice, provided that such positions do not constitute a public office within the meaning of art. VI, § 17 of the Cal. Const.];[6] canon 5D [judges are permitted to engage in political activity relating to the law, the legal system, or the administration of justice, provided conduct is consistent with the code overall].)

The California Standards of Judicial Administration (standards) adopted by the Judicial Council promote judicial engagement in community outreach activities related to the law and administration of justice. For example, the standards specifically encourage judges to "[p]rovide active leadership within the community in identifying and resolving issues of access to justice within the court system." (Std. 10.5(b)(1).) The standards also encourage family and juvenile court judges to engage in community efforts to enhance services and resources for families and children in the court system (std. 5.30(f)(1), (5), and (7)), and to "[e]xercise a leadership role in the development and maintenance of permanent programs of interagency cooperation and coordination among the court and the various public agencies that serve at-risk children and their families" (std. 5.40(e)(4)). While nonbinding in nature, the standards reflect the Judicial Council's recommended goals for judges. (Cal. Rules of Court, rule 1.5(c) [standards are guidelines rather than mandatory]; std. 5.30(f) [to the extent it does not interfere with the adjudication process or ethical constraints, family courts are encouraged to engage in certain community-based activities to improve services for children].) These goals are subject to, yet consistent with, the code's requirements and broad permissions for activities relating to the law, the legal system, or the administration of justice.

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[6] In addition to membership in an "organization or governmental agency" devoted to the improvement of the law, the legal system, or the administration of justice under canon 4C(3)(a), service on the Child Welfare Council may also qualify as an "appointment to a governmental committee or commission or other governmental position" under canon 4C(2). In either case, judicial service is not permitted if it would qualify as "public office" under article VI, section 17 of the California Constitution. (Canon 4C(2) & (3); Advisory Com. com. foll. canon 4C(2).) The committee assumes for purposes of this opinion that service on the Child Welfare Council is not constitutionally barred.

When analyzing whether serving as a member of an organization or government agency is permissible, judges must determine whether service falls within the meaning of the phrase, "the law, the legal system, or the administration of justice,"[7] which is not defined with specificity in the code but requires consideration of other code obligations.[8] This requires a careful analysis of the facts. Nearly every topic can be described as relating to the law in some fashion, particularly in the governmental context. As Judge Rothman observes, "almost anything that government does can be characterized as related to 'improvement of the law,' " and therefore service on a governmental commission "must have a direct connection with the legal system" or be limited to "only those matters dealing with the administration of justice." (Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 10:10, p. 681 (Rothman)).

For instance, the committee has previously advised that "matters relating to purely administrative issues, such as court budgets, facilities, and docketing impacts, fall within the core of matters relating to the law, the legal system, and administration of justice." (CJEO Expedited Opinion 2021-041 (2021), *Service on a Governmental Task Force*, Cal. Supreme Ct. Com. Jud. Ethics Opns., p. 4 (CJEO Expedited Opinion 2021-041); CJEO Formal Opinion 2013-001 (2013), *Requesting Assistance from Attorneys*, Cal. Supreme Ct. Com. Jud. Ethics Opns., pp. 2, 5 [budget cuts impact access to justice and are directly related to the law, the legal system, and administration of justice].) However, as matters move from the procedural to the more substantive end of the policy spectrum, judicial involvement may impermissibly " 'encroach[] into the political (policy making) domain of the other branches' " of government.

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[7] In addition to being an organization devoted to the improvement the law, the legal system, or the administration of justice, the Access Commission is also an "educational . . . or civic organization not conducted for profit" under canon 4C3(b), which permits judges to serve as officers or directors of nonprofit organizations, whether or not related to the law, subject to other requirements of the code.

[8] Although the phrase, "the law, the legal system, or the administration of justice" is included in the Terminology section of the code, it is not defined. Instead, the Terminology section states that when a judge engages in an activity that relates to the law, the legal system, or the administration of justice, the judge should also consider other code requirements, such as upholding public confidence in the judiciary, not allowing extrajudicial activities to take precedence over judicial duties, and disqualification. (Cal. Judges Assn., Jud. Ethics Com., Opn. No. 75 (2018), p. 1 [acknowledging that the phrase is not precisely defined in the code].)

(CJEO Expedited Opinion 2021-041, *supra*, p. 4, quoting CJEO Formal Opinion 2014-006 (2014), *Judicial Comment at Public Hearings and Consultation with Public Officials and Other Branches of Government*, Cal. Supreme Ct. Com. Jud. Ethics Opns., pp. 2–3, 7–9 (CJEO Formal Opinion 2014-006) [judges testifying before the legislature should limit testimony to areas within the judiciary's expertise and made from the judicial branch's unique perspective])[9]; Rothman, *supra*, § 11:3, pp. 736–737 [judges must draw a distinction between inappropriate involvement with other branches of government in political matters as opposed to appropriate involvement in matters concerning the law, the legal system, or the administration of justice].)

This does not mean, however, that only administrative or procedural matters fall within the safe harbor of extrajudicial activities relating to the law, the legal system, or the administration of justice. Judicial engagement in substantive policy matters may fall within the law, the legal system, or the administration of justice if the primary focus is to benefit the court system and its users as a whole rather than favoring partisan causes or groups. (CJEO Formal Opinion 2014-006, *supra*, p. 7 [the clearest examples of permissible activities are those addressing the legal process; however, comment and consultation about substantive legal issues is also permissible where the purpose is to benefit the law and the legal system itself rather than any particular cause or group].)

Here, both the Access Commission and the Child Welfare Council are examples of organizations primarily focused on improving services to court users, which has a "direct connection with the legal system." (Rothman, *supra*, § 10:10, p. 681). The Access Commission seeks to equalize access to the legal system for all litigants regardless of income level, language barriers, or geographical barriers. The Child Welfare Council's objective is to improve services for children involved with, or at risk of involvement with, the child welfare system and the foster care system, "with an emphasis on collaboration among the state's multiple child serving agencies and the courts." (Child Welfare Council, 2018–2019 Annual Report, p. 4.). The

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[9] As one example, the committee referring to a proposed constitutional amendment to replace the death penalty with life without parole advised that a judge could comment before the Legislature about dysfunction in the current system from the judicial branch perspective, but that advocacy regarding the wisdom or morality of the death penalty as a policy matter would be improper. (CJEO Formal Opinion 2014-006, *supra*, p. 8.)

central goal of both organizations is improving the legal system for its users rather than "broader matters concerning . . . policies not directly linked to the courts." (CJEO Expedited Opinion 2021-041, *supra*, p. 5.)[10]

In addition, judicial membership in either organization is unlikely to involve the court in controversies or create the perception of impartiality. With respect to the governmental task force examined in CJEO Expedited Opinion 2021-041, the committee noted that its broad and varied agenda included issues that went beyond the law, the legal system, or the administration of justice, and that may be the subject of significant debate. (CJEO Expedited Opinion 2021-041, *supra*, p. 5.) This may improperly draw the court into controversies or compromise public confidence in the impartiality of the judiciary. *(Ibid.*; Advisory Com. com. foll. canon 4C(2) [when assessing whether to accept extrajudicial assignments, judges need to protect the courts from becoming involved in matters that may prove to be controversial and should not accept government appointments that interfere with judicial independence].) Here, in contrast, the Access Commission and Child Welfare Council are nonpartisan organizations pursuing such goals as systemic improvements for low-income litigants, children, and families interacting with the courts, and would not cause a reasonable person to doubt the impartiality or independence of judges serving as members. Judicial membership is these organizations is not only permitted under the code, but expressly encouraged by the standards, which recommend that judges take a

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[10] This opinion addresses the permissibility of the Access Commission and Child Welfare Council based on how they are currently described in publicly available materials but notes that the organizations' purposes may evolve over time. Judges have a duty to monitor the activities of organizations of which they are members to ensure ongoing compliance with the code. (Advisory Com. com. foll. canon 4C(3)(c) [the changing nature of some organizations and their relationship to the law makes it necessary for judges to regularly reexamine the activities of organizations with which they are affiliated to ensure that continued affiliation is proper].) The committee advises that judges monitor not only the general activities of the organizations of which they are members, but also the activities of each subcommittee or workgroup to which they are members or prospective members to determine whether membership is precluded by any of the canons.

leadership role in improving access to justice and services for children and at-risk youth. (Stds. 5.30, 5.40, and 10.5.)[11]

V. Conclusion

Judges may serve as members of the Access Commission or the Child Welfare Council, which are organizations devoted to the improvement of the law, the legal system, and the administration of justice. The central focus of both organizations is improved access and services for court users, such as low-income litigants, children, and families, rather than broader policy matters that may be the subject of controversy or that would create the appearance of impartiality. Judicial involvement in these organizations is permitted under the code and encouraged by the standards of judicial administration.

This expedited advice opinion is advisory only. (Cal. Rules of Court, rule 9.80(a), (e); Cal. Supreme Ct. 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

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[11] The committee has recognized that judicial membership is permissible on other types of organizations and governmental bodies "with a narrow focus directly related to the law, the legal system, and the administration of justice," provided membership does not raise ethical concerns under other canons. (CJEO Expedited Opinion 2021-041, *supra*, p. 6, fn. 6, citing CJEO Oral Advice Summary 2015-010 (2015), *Service by an Appellate Justice as a Compliance Officer in Pending Federal Proceedings*, Cal. Supreme Ct. Com. Jud. Ethics Opns., pp. 2–3 [a judge may accept appointment as a federal prison compliance officer]; CJEO Oral Advice Summary 2019-028 (2019), *Service on a Civil Liberties Program Advisory Panel for the State Library*, Cal. Supreme Ct. Com. Jud. Ethics Opns., pp. 3–4 [a judge may serve on a state library board concerning educational programs about Japanese internment and other civil rights violations]; see also Cal. Judges Assn., Jud. Ethics Com., Opn. No. 61 (2008), pp. 3–4 [providing examples of permissible membership on governmental bodies, such as serving on an advisory committee on international law or a committee to advise the Attorney General on how the Bureau of Identification might better serve the courts].)

CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS
350 McAllister Street
San Francisco, CA 94102
(855) 854-5366
www.JudicialEthicsOpinions.ca.gov

CJEO Expedited Opinion[1] 2021-044

[Posted October 28, 2021]

DISQUALIFICATION FOR CIVICS EDUCATION ACTIVITIES IN MATTERS INVOLVING SCHOOL DISTRICT MASK AND VACCINE MANDATES

I. Question

Is a judicial officer who participates in civics education programs, such as the California judiciary's Power of Democracy Steering Committee, disqualified from hearing cases against school districts regarding COVID-19-related mask and vaccine mandates?

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[1] The California Supreme Court Committee on Judicial Ethics Opinions (CJEO or committee) issues **Expedited Opinions**, formerly known as **Oral Advice Summaries**, pursuant to California Rules of Court, rule 9.80(i)(1) (eff. Jan. 1, 2021). Expedited Opinions are issued to requesting judicial officers following a discretionary decision by CJEO to address the ethical issues raised in an expedited process that does not include posting draft opinions for public comment, as required for CJEO Formal Opinions. CJEO Expedited Opinions are published in full, without identifying information regarding the requesting judicial officer, to provide information and analysis to the bench and the public regarding judicial ethics.

II. Advice Provided

A judicial officer who participates in civics education programs is not disqualified under mandatory grounds from hearing matters challenging school district mask and vaccine mandates. However, judicial officers must consider whether additional facts require disqualification, such as personal knowledge gained during participation in civics education activities regarding the reasons for a school district's mask or vaccine policies. There may be discretionary grounds for disqualification in such a circumstance if the judicial officer believes he or she cannot be impartial or if, based on certain facts, a reasonable observer would have cause to believe the judicial officer could not be impartial. In the committee's view, a reasonable person would not have reason to doubt a judicial officer's impartiality in cases involving mask or vaccine mandates based on participation in civics education programs alone. The analysis changes if there are other facts warranting disqualification, for example, if someone with whom the judge is closely associated in the civics education program is personally named as a defendant in a case. Judicial officers must balance public perception of impartiality against the duty to hear all cases from which a judicial officer is not disqualified. Even if a trial judge determines that disqualification is not required, the judge must disclose on the record all facts reasonably relevant to the judge's determination.

III. Facts

The California judiciary has created programs that involve partnering with schools to bring civics-based education to young people. For example, Supreme Court Chief Justice Tani Cantil-Sakauye has established the Power of Democracy Steering Committee, which includes stakeholders from the judiciary, the Department of Education, and other civics education leaders and supports educational initiatives to further Californians' understanding of their judiciary. (Judicial Council, Power of Democracy, <https://www.courts.ca.gov/21763.htm#panel22832>

[as of October 27, 2021].)[2] The steering committee carries out its work through various regional committees, and other programs, such as the "Judges in the Classroom" project, which partners volunteer judges with teachers and schools. Members of the judiciary are involved in the statewide committee, regional committees, and other educational programs that involve working closely with local school districts or school board members.

Given these facts, the committee has been asked about disqualification and disclosure obligations related to involvement in civics education programs in matters involving school district mask and vaccine mandates.

IV. Discussion

The disqualification and disclosure rules for judicial officers are laid out in canon 3 of the California Code of Judicial Ethics[3] and the Code of Civil Procedure sections 170 through 170.5. While only trial court judges are bound by the Code of Civil Procedure disqualification statute, appellate justices are subject to substantially similar rules as specified in canon 3E(4), (5), and (6). (CJEO Oral Advice Summary 2018-023 (2018), *Disqualification Responsibilities of Appellate Court Justices*, p. 3 [the specific grounds for disqualification of appellate justices in canon 3 largely track the statutory requirements for trial judges]; Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 7:1, p. 388 (Rothman) [because the canons governing disqualification for appellate justices parallel Code Civ. Proc., § 170.1 et seq., appellate justices can look to analysis of the statutory rules for guidance].)

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[2] One of the steering committee's stated accomplishments was to launch the Task Force on K-12 Civic Learning, which developed recommendations for civics-based curriculum in schools. According to the task force's 2014 report, the goal of educating children about the judicial system "came about because the courts interact daily with the broad range of Californians that come from our schools. The courts depend on an informed public to understand the importance of a fair and impartial judiciary and to understand their roles when they come to court as jurors, litigants or witnesses." (Revitalizing K-12 Civic Learning in California: A Blueprint for Action (2014) p. 1.)

[3] All further references to the code, terminology, canons, and advisory committee commentary are to the California Code of Judicial Ethics unless otherwise indicated.

When making a disqualification determination, judicial officers should be guided by the dual purposes of the disqualification rules, which are to: (1) "promote trust by precluding judges from presiding in those circumstances where there is a reasonable doubt as to impartiality"; and (2) "further the administration of justice by requiring judges to preside where there is no reasonable doubt as to impartiality." (CJEO Formal Opinion 2015-007 (2015), *Disqualification for Prior Appearance as a Deputy District Attorney in a Nonsubstantive Matter*, p. 9.) To ensure the efficient administration of justice, judicial officers have a duty to hear all cases from which they are not disqualified. (Canon 3B(1) [judicial officers have a duty to serve unless disqualified]; Code Civ. Proc., § 170 [applying the same rule to trial court judges].) Indeed, "'[t]he duty of a judge to sit where not disqualified is equally as strong as the duty not to sit when disqualified.'" (CJEO Formal Opinion 2015-007, *supra*, at p. 5, citing *United Farm Workers of America v. Superior Court* (1985) 170 Cal.App.3d 97, 100.)

As this committee has previously advised, the grounds for disqualification of judicial officers generally fall into two categories: mandatory and discretionary. (CJEO Oral Advice Summary 2020-036 (2020), *Appellate Disqualification for Judicial Council Service in Matters Challenging COVID-19 Emergency Rules and Orders*, p. 4.) All grounds for disqualification, once met, require a judicial officer to disqualify under the code and statute. (Canon 3E(4)-(5) [appellate disqualification is required if any specified grounds are met]; Code Civ. Proc., § 170.1 [trial court disqualification is required if any specified grounds are met].) The terms *mandatory* and *discretionary* are used to distinguish between (a) grounds that require disqualification when a judicial officer identifies mandatory criteria set by the statute or code that has been met in any proceeding (*mandatory grounds*), and (b) grounds that require disqualification when a judicial officer exercises discretion after evaluating whether objective or subjective disqualifying circumstances have been met in any proceeding (*discretionary grounds*). (CJEO Oral Advice Summary 2020-036, *supra*, at p. 4.)

A. Mandatory Disqualification

Most disqualification rules are mandatory; once a judicial officer determines that certain facts are present, he or she must disqualify. Examples of mandatory grounds for disqualification

include cases where a judicial officer previously served as a lawyer, or, in certain situations, was affiliated with lawyers in the case (canon 3E(5)(a)-(c); Code Civ. Proc., § 170.1, subd. (a)(2)); has a financial interest in the outcome of the case (canon 3E(5)(d)); Code Civ. Proc., § 170.1, subd. (a)(3); is closely related to a party or lawyer in the case (canon 3E(5)(e); Code Civ. Proc., § 170.1, subd. (a)(4) & (5)); has personal knowledge of disputed facts in the case (canon 3E(5)(f)(ii)); Code Civ. Proc., § 170.1, subd. (a)(1); or in the case of an appellate justice, presided over the case at an earlier stage (canon 3E(5)(f)(i)).

Participation in civics education programs does not per se give rise to any mandatory grounds for disqualification from cases involving school district mask or vaccine mandates. However, a judicial officer involved in such programs must determine if there are any additional facts requiring disqualification in a particular case. For example, if in the course of serving on a statewide or regional civics education committee, the judicial officer was present during discussions among school district representatives regarding the reasons for mask or vaccine mandates, that judicial officer may have personal knowledge of disputed facts in a case challenging those mandates; this would be a mandatory ground for disqualification. (Canon 3E(5)(f)(ii); Code Civ. Proc., § 170.1, subd. (a)(1).) Another example would be if the judicial officer, while serving on such a committee, made a statement that a person would reasonably believe commits the judicial officer to a particular outcome in a case challenging mask or vaccine mandates. (Canon 3E(3)(a).) While having made the statement is a factual determination and thus a mandatory ground for disqualification, this also has a discretionary component in terms of how the statement is perceived, as discussed further below. There may be other facts, not contemplated here, that constitute mandatory grounds for disqualification in a given case.

B. Discretionary Disqualification

Assuming there are no facts constituting mandatory grounds for disqualification, a judicial officer should consider whether participation in civics education programs triggers any discretionary grounds for disqualification from cases involving masks or vaccine mandates. For instance, a judicial officer may be disqualified from hearing a case if the judicial officer: (a)

believes that the interests of justice require it; (b) substantially doubts his or her capacity to be impartial; or (c) believes that a reasonable person aware of the facts would doubt the judicial officer's ability to be impartial. (Canon 3E(4)(a)–(b); Code Civ. Proc., § 170.1, subd. (a)(6)(A).) The reasonable person test for disqualification requires an objective analysis: "if a fully informed, reasonable member of the public would fairly entertain doubts that the judge is impartial, the judge should be disqualified." (*Wechsler v. Superior Court* (2014) 224 Cal.App.4th 384, 391; accord, *Jolie v. Superior Court* (2021) 66 Cal.App.5th 1040–1041.) This same standard applies when determining if a person would reasonably believe that a statement made by a judicial officer commits the judicial officer to a particular outcome in a case under canon 3E(3)(a).

In the committee's view, engagement in civics education programs would not, on its own, cause a reasonable person to doubt a judicial officer's ability to be impartial in a case involving mask or vaccine mandates because there is not a sufficient nexus between the educational purposes of such programs and legal challenges against COVID-19-related mandates. (CJEO Informal Opinion Summary 2012-003 (2012), *Disqualification and Disclosure: University Representation of a Party in a Matter Before a Justice Employed by the University*, p. 2 [a justice was not disqualified from hearing a case where a party was represented by a law school clinic at the university where the justice taught because the link between the university and the justice was too remote and unrelated to give a reasonable person sufficient doubt as to impartiality].)

However, the committee cautions that the analysis may change depending on particular facts. For instance, if a case against a school district personally named as a defendant someone with whom a judicial officer worked closely, had extensive communications with, or was publicly associated with, this might change a reasonable person's perception about the judicial officer's ability to be impartial. When making a determination concerning a reasonable person's perception of impartiality, a judicial officer should consider whether a case is likely to be subject to heightened public scrutiny. (CJEO Informal Opinion Summary 2018-005 (2018), *Disqualification for Spouse's Political Campaign Services*, p. 7 (CJEO Informal Opinion Summary 2018-005) [if a case is high profile or likely to garner publicity, a judge's impartiality

is more likely to be questioned].) This must be balanced against a judge's duty to hear a case, no matter how controversial, when there is no reasonable doubt as to the judicial officer's ability to be impartial. (*Id.* at p. 5 [the reasonable person test for disqualification strikes a balance between the parties' right to a decision based upon an objective evaluation of the facts and the law, and the public's right to a fair, yet efficient resolution of disputes]; canon 3B(1) [a judge shall hear all cases from which they are not disqualified]; canon 3B(2) [a judge shall be faithful to the law regardless of partisan interests, public clamor, or fear of criticism].)

C. Disclosure

Even if there are no mandatory or discretionary grounds for disqualification, a trial judge must consider whether civics education activities that involve interaction with school districts require disclosure on the record in cases challenging mask or vaccine mandates. The circumstances requiring disclosure are broader than those requiring disqualification. (CJEO Informal Opinion Summary 2018-005, *supra*, at p. 8.) A trial judge must 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." (Canon 3E(2)(a).) Reasonably relevant information includes any information on which the judge relies to make a determination whether to disqualify. (Rothman, *supra*, § 7:75, p. 500 [defining "relevant" to mean that the matter has a tendency in reason to prove or disprove something].) For example, if it were relevant to a trial judge's disqualification determination, the judge might disclose that he or she participates in civics education programs and interacts with members of the local school board but has never discussed and has no personal knowledge regarding the school district's mask or vaccine policies. Although not bound by the disclosure rules, an appellate justice also has the option of disclosing certain facts on the record within the justice's ability and discretion. (Canon 3E(2) [limiting disclosure rules to trial proceedings]; Rothman, *supra*, § 7:90, p. 502–503 [acknowledging that disclosure for appellate justices is complicated by the fact that a justice may not appear before the parties until after a case has been fully briefed].)

V. Conclusion

Judicial involvement in civics education programs does not, on its own, constitute mandatory grounds for disqualification from cases against school districts challenging COVID-19-related mask and vaccine mandates under the California Code of Judicial Ethics or Code of Civil Procedure. However, additional facts may require disqualification, for example, if through participation in civics education activities, the judicial officer gained personal knowledge of a school district's reasons for imposing mask or vaccine mandates. There may be discretionary grounds for disqualification if a judicial officer believes that a reasonable person might doubt the judicial officer's impartiality, for example, if the judicial officer works closely with someone personally named in a case. Judicial officers must balance public perceptions regarding impartiality against the duty to hear all cases from which they are not disqualified, no matter how controversial. Trial judges who determine that disqualification is not required must disclose on the record any information reasonably relevant to their disqualification determination.

This expedited advice opinion is advisory only. (Cal. Rules of Court, rule 9.80(a), (e); Cal. Supreme Ct. 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 views of the California Supreme Court or any other entity. (Cal. Rules of Court, rule 9.80(b); CJEO rule 1(a)).)

CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS
350 McAllister Street
San Francisco, CA 94102
(855) 854-5366
www.JudicialEthicsOpinions.ca.gov

CJEO Expedited Opinion[1] 2022-045

[Posted January 4, 2022]

DISQUALIFICATION OBLIGATIONS FOR PARTICIPANTS IN THE CALIFORNIA JUDICIAL MENTOR PROGRAM (CJMP)

I. Question

The Committee on Judicial Ethics Opinions has been asked for guidance regarding disqualification and disclosure obligations for judicial officers participating in the California Judicial Mentor Program (CJMP), a joint program of the executive and judicial branches recently launched by Governor Newsom to enhance diversity among judicial applicants.

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[1] The California Supreme Court Committee on Judicial Ethics Opinions (CJEO or committee) issues **Expedited Opinions**, formerly known as **Oral Advice Summaries**, pursuant to California Rules of Court, rule 9.80(i)(1) (eff. Jan. 1, 2021). Expedited Opinions are issued to requesting judicial officers following a discretionary decision by CJEO to address the ethical issues raised in an expedited process that does not include posting draft opinions for public comment, as required for CJEO Formal Opinions. CJEO Expedited Opinions are published in full, without identifying information regarding the requesting judicial officer, to provide information and analysis to the bench and the public regarding judicial ethics.

II. Advice Provided

Judicial officers participating in the CJMP as mentors should disqualify from hearing matters in which their mentee attorneys appear. The nature of the mentor-mentee relationship created through the CJMP, as detailed below, is such that a reasonable person aware of the facts would have cause to doubt impartiality in a case in which a mentee attorney appears before the mentor judge. Separate from how it may appear to a reasonable observer, a mentor judicial officer may become personally invested in a mentee's success to the point where the judicial officer substantially doubts his or her own capacity to be impartial. For the same reasons, appellate justices acting as mentors to trial court judge mentees should disqualify from hearing matters involving a review of their mentee's adjudicatory decisions. Because the committee advises that judicial officers acting as mentors disqualify from hearing matters in which their mentees appear, we do not reach the question of whether and to what extent trial judge mentors are required to disclose information related to participation in the CJMP.

III. Facts

In July 2021, Governor Gavin Newsom announced the launch of the CJMP, which is described as a joint program of the executive and judicial branches designed to support and encourage qualified candidates of all backgrounds to apply for judicial appointments. The program consists of an Appellate Court Mentor Program and a Trial Court Mentor Program and aims "to demystify the appellate and trial court application process and improve transparency and accessibility for all members of the legal community throughout California, fostering the development of a qualified and diverse judicial applicant pool." (Office of Governor Gavin Newsom, Governor Newsom Launches California Judicial Mentor Program to Promote a Diverse and Inclusive Judiciary (July 1, 2021) <https://www.gov.ca.gov/2021/07/01/governor-newsom-launches-california-judicial-mentor-program-to-promote-a-diverse-and-inclusive-judiciary/> [as of Jan. 3, 2022].) The CJMP is a statewide effort based in part on a successful pilot program that originated in Los Angeles County Superior Court. (Romero, *LA judge*

mentorship is a model for courts around the state, S.F. Daily J. (Dec. 17, 2021) [describing the role of judicial mentorship programs in broadening the judicial applicant base].)

The CJMP involves partnering mentor judicial officers with mentee prospective judicial applicants. Trial court judge mentors are paired with attorneys applying for superior court judgeships. Appellate justices may be paired with either attorneys or trial court judges applying to the appellate bench. Mentors are typically assigned to a mentee for one year, commit to meeting with mentees at least four times per year, and must be generally available to respond to mentees' inquiries. Mentors are expected to provide substantial leadership and guidance to mentees throughout the judicial application process; to share the mentor's personal experiences and advice about the skills and knowledge necessary to become a successful judge; and to encourage and counsel mentees on steps they can take to enhance their chances for appointment to the bench.[2]

IV. Discussion

The disqualification and disclosure rules for judicial officers are provided in canon 3 of the California Code of Judicial Ethics[3] and Code of Civil Procedure sections 170 through 170.5. While the Code of Civil Procedure disqualification statute (statute) expressly applies only to trial court judges, appellate justices are subject to substantially similar disqualification grounds as specified in canon 3E(4), (5), and (6). (CJEO Oral Advice Summary 2018-023 (2018), *Disqualification Responsibilities of Appellate Court Justices*, Cal. Supreme Ct. Com. Jud. Ethics Opns., p. 3 [grounds for disqualification of appellate justices in canon 3 track the statutory requirements for trial judges].)

When making a disqualification determination, judicial officers must be guided by the dual purposes of the disqualification rules, which are to: (1) "promote trust by precluding

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[2] The committee notes that participation in the CJMP has been publicly described as confidential in program-related documents; the committee does not opine on whether participation in the program is confidential as a matter of law.

[3] All further references to the code and canons are to the California Code of Judicial Ethics unless otherwise indicated.

judges from presiding in those circumstances where there is a reasonable doubt as to impartiality"; and (2) "further the administration of justice by requiring judges to preside where there is no reasonable doubt as to impartiality." (CJEO Formal Opinion 2015-007 (2015), *Disqualification for Prior Appearance as a Deputy District Attorney in a Nonsubstantive Matter*, Cal. Supreme Ct. Com. Jud. Ethics Opns., pp. 9, 10.)

As this committee has previously advised, the grounds for disqualification of judicial officers generally fall into two categories: mandatory and discretionary.[4] Mandatory grounds require judicial officers to disqualify when certain facts are present, for example, when the judicial officer is closely related to a party (canon 3E(5)(e); Code Civ. Proc., § 170.1, subd. (a)(4) & (5)) or has personal knowledge of disputed facts in the case (canon 3E(5)(f)(ii); Code Civ. Proc., § 170.1, subd. (a)(1)). In addition, a judicial officer must disqualify on discretionary grounds when the judicial officer: (a) believes that the interests of justice require it; (b) substantially doubts his or her capacity to be impartial; or (c) believes that a reasonable person aware of the facts would doubt the judicial officer's ability to be impartial. (Canon 3E(4)(a)–(c); Code Civ. Proc., § 170.1, subd. (a)(6)(A).) The reasonable person test for disqualification requires an objective analysis: "if a fully informed, reasonable member of the public would fairly entertain doubts that the judge is impartial, the judge should be disqualified." (*Wechsler v.*

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[4] See CJEO Expedited Opinion 2021-044 (2021), *Disqualification for Civics Education Activities in Matters Involving School District Mask and Vaccine Mandates*, California Supreme Court Committee on Judicial Ethics Opinions, page 4 and CJEO Oral Advice Summary 2020-036 (2020), *Appellate Disqualification for Judicial Council Service in Matters Challenging COVID-19 Emergency Rules and Orders*, California Supreme Court Committee on Judicial Ethics Opinions, page 4. All grounds for disqualification, once met, require a judicial officer to disqualify under the code and statute. (Canon 3E(4)–(5) [appellate disqualification is required if any specified grounds are met]; Code Civ. Proc., § 170.1 [trial court disqualification is required if any specified grounds are met].) The terms *mandatory* and *discretionary* are used to distinguish between (a) grounds that require disqualification when a judicial officer identifies mandatory criteria set by the statute or code that has been met in any proceeding (*mandatory grounds*), and (b) grounds that require disqualification when a judicial officer exercises discretion after evaluating whether objective or subjective disqualifying circumstances have been met in any proceeding (*discretionary grounds*). (CJEO Oral Advice Summary 2020-036, *supra*, at p. 4; *Eith v. Ketelhut* (2018) 31 Cal.App.5th 15–17).

Superior Court (2014) 224 Cal.App.4th 384, 391 (*Weschler*); accord, *Jolie v. Superior Court* (2021) 66 Cal.App.5th 1040–1041.)

A. Disqualification

Because mentorship through the CJMP implies an inherently close and influential relationship, judicial officers should disqualify from hearing matters in which their mentee attorneys appear on discretionary grounds. In the committee's view, the nature of a mentor-mentee relationship formed through the CJMP is such that a reasonable observer would doubt a judicial officer's impartiality in cases involving the judicial officer's mentee. As described by program documents, the CJMP requires a substantial commitment of a judicial officer's time, envisions an open line of communication with mentees, and involves substantive conversations about the mentor's personal experience with the aim of helping mentees reach their goal of becoming a judge. Based on how the program is designed and a common understanding of what mentorship entails, a reasonable person would have cause to doubt the impartiality of a mentor judicial officer who has committed to and works towards an appearing mentee's success. A CJMP mentor-mentee relationship may also suggest that a mentee is in a position of special influence or could influence the judicial officer's judicial decisionmaking, which must be avoided. (Canon 2B(1) [a judge shall not allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment, or convey or permit others to convey the impression that any individual is in a special position to influence the judge].) Regardless of the actual amount or quality of contact between a judicial officer and mentee, a judicial officer must consider and be guided by how participation in the CJMP " 'looks to the average person on the street.' " (*United Farm Workers of America v. Superior Court* (1985) 170 Cal.App.3d 97, 104.)

In addition to considering how a reasonable person aware of all facts might perceive the mentor-mentee relationship formed through the CJMP, a judicial officer must also evaluate his or her own subjective state of mind. In the course of mentoring an attorney through the CJMP, a judicial officer may become personally invested in his or her mentee's success to the point where the judicial officer can no longer impartially view the mentee as a legal advocate. As Judge Rothman advises in his treatise, in deciding what type of a relationship might require

disqualification or disclosure, a judge must "[p]ause and think" carefully about whether the judge would have difficulty finding against the party with whom the judge has the relationship. (Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) (Rothman), § 7:75, p. 500.) If a judicial officer substantially doubts his or her ability to be impartial, the judicial officer must disqualify.

In this sense, mentor-mentee relationships created through the CJMP are distinct from situations where a judicial officer is a member of the same professional organization or educational program as an attorney, such as a bar association or the Inns of Court. Merely having a professional relationship or acquaintanceship with an attorney is typically not enough to warrant disqualification. (*Wechsler*, *supra*, 224 Cal.App.4th at p. 393 [because virtually all judges are drawn from the ranks of the legal profession, prior professional or casual social relationships are not dispositive in disqualification motions]; Rothman, *supra*, § 7:32, p. 433 [the fact that a judge and attorney are members of the same professional legal organization, or that the judge has only a professional relationship with the attorney, does not normally require recusal or disclosure].) However, CJMP mentor-mentee relationships entail more than moving in the same professional circles; they involve, by design, building a one-on-one relationship over time with the specific goal of advancing the mentee's career. This level of individual connection and the role of a mentor as a personal advisor runs the risk of undermining public confidence in a judicial officer's impartiality in cases involving the mentee. (Canons 1, 2, and 2A [judges must preserve public confidence in the integrity and impartiality of the judiciary in all activities].)

For these same reasons, appellate justices acting as mentors through the CJMP should disqualify both from hearing matters in which their mentee attorneys appear and from matters that involve reviewing adjudicatory decisions of their mentees who are trial judges.

B. *Disclosure*

When a trial judge determines that disqualification is not required in a matter, the judge must disclose on the record all facts "reasonably relevant" to the decision not to disqualify. (Canon 3E(2)(a); CJEO Informal Opinion Summary 2018-005 (2018), *Disqualification for*

Spouse's Political Campaign Services, Cal. Supreme Ct. Com. Jud. Ethics Opns., p. 8 [the circumstances requiring disclosure are broader than those requiring disqualification].) Appellate justices, however, are not bound the disclosure rules. (Canon 3E(2) [limiting disclosure rules to trial proceedings]; Rothman, *supra*, § 7:90, pp. 502–503 [acknowledging that disclosure for appellate justices is complicated by the fact that a justice may not appear before the parties until after a case has been fully briefed].)

As discussed above, in the committee's view, participation in the CJMP as a mentor necessitates disqualification from matters involving mentees due to the frequent and substantial contact between mentors and mentees and the inherently close and influential relationship associated with that mentorship. Because the committee advises that judicial officer mentors disqualify from hearing matters involving their mentees, we do not reach the question of whether and to what extent trial judges must disclose facts related to participation in the CJMP.

V. Conclusion

Judicial officers acting as mentors in the CJMP should disqualify from hearing matters in which their mentee attorneys appear. Mentorship through the CJMP implies a close and influential relationship that would cause a reasonable person to doubt the judicial officer's impartiality in matters in which the judicial officer's mentee appears. Through mentorship, judicial officers may also become personally invested in their mentee's success to the point where the judicial officers substantially doubt their own capacity to be impartial. For these same reasons, appellate justices acting as mentors to trial court judge mentees should disqualify from hearing matters involving a review of mentees' adjudicatory decisions. Because the committee advises that judicial officers participating in the CMJP disqualify from hearing matters involving their mentees, the committee does not reach the question of whether or to what extent trial judge mentors must disclose information related to participation in the CJMP.

This expedited advice opinion is advisory only. (Cal. Rules of Court, rule 9.80(a), (e); Cal. Supreme Ct. 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 views of the California Supreme Court or any other entity. (Cal. Rules of Court, rule 9.80(b); CJEO rule 1(a)).)

CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS
350 McAllister Street
San Francisco, CA 94102
(855) 854-5366
www.JudicialEthicsOpinions.ca.gov

CJEO Expedited Opinion[1] 2022-046

[Posted February 2, 2022]

DISQUALIFICATION WHEN A JUDGE'S SPOUSE MAY BE A MATERIAL WITNESS

I. Question

The Committee on Judicial Ethics Opinions has been asked about the point at which a judge must disqualify from hearing a capital case when defense counsel has expressed an intent to interview the judge's spouse and possibly call the spouse as a witness during the sentencing phase of the capital case.

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II. Advice Provided

A judge must disqualify from the capital case as soon as, to the judge's knowledge, the judge's spouse is likely to be called as a material witness in the case. If the spouse's documents and testimony are ruled admissible at an evidentiary hearing conducted by a different judicial officer, this is a clear indication that the spouse is likely to be called as a material witness and the judge must immediately disqualify upon such a ruling. A judge may be required to disqualify prior to the evidentiary hearing if, based on the facts of the case, the judge determines earlier that the spouse is likely to be called as a witness. As in any case, a judge must also consider whether disqualification is required because a reasonable person aware of the facts would have cause to doubt the judge's impartiality. A judge's rulings prior to the point of disqualification are valid and need not be set aside unless the grounds for disqualification arose earlier.

III. Facts

A judge is assigned to a capital case for all purposes. The judge's spouse, who is also now a judge but previously worked at the public defender's office, represented the defendant in an earlier unrelated juvenile proceeding. Defense counsel in the capital case has indicated an intent to interview the judge's spouse in relation to the spouse's prior representation of the defendant and may seek to call the spouse as a witness during the sentencing phase of the capital case. An evidentiary hearing has been set to determine whether documents and testimony relating to the spouse's representation of the defendant will be admissible during sentencing. The evidentiary hearing will be conducted by an unrelated judicial officer.

IV. Discussion

The disqualification and disclosure rules for judicial officers are provided in canon 3 of the California Code of Judicial Ethics[2] and Code of Civil Procedure sections 170 through 170.5

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[2] All further references to the code and canons are to the California Code of Judicial Ethics unless otherwise indicated.

(disqualification statute). When making a disqualification determination, judicial officers must be guided by the dual purposes of the disqualification rules, which are to: (1) "promote trust by precluding judges from presiding in those circumstances where there is a reasonable doubt as to impartiality"; and (2) "further the administration of justice by requiring judges to preside where there is no reasonable doubt as to impartiality." (CJEO Formal Opinion 2015-007 (2015), *Disqualification for Prior Appearance as a Deputy District Attorney in a Nonsubstantive Matter*, Cal. Supreme Ct. Com. Jud. Ethics Opns., pp. 9, 10 (CJEO Formal Opinion 2015-007).) To ensure the efficient administration of justice, judicial officers have a duty to hear all cases from which they are not disqualified. (Canon 3B(1) [judicial officers have a duty to serve unless disqualified]; Code Civ. Proc., § 170 [applying the same rule to trial court judges].) Indeed, " '[t]he duty of a judge to sit where not disqualified is equally as strong as the duty not to sit when disqualified.' " (CJEO Formal Opinion 2015-007, *supra*, at p. 5, quoting *United Farm Workers of America v. Superior Court* (1985) 170 Cal.App.3d 97, 100.)

As this committee has previously advised, the grounds for disqualification of judicial officers generally fall into two categories: mandatory and discretionary.[3] Mandatory grounds require judicial officers to disqualify when certain facts are present regarding the judge's

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[3] See CJEO Expedited Opinion 2022-045 (2022), *Disqualification Obligations for Participants in the California Judicial Mentor Program (CJMP)*, California Supreme Court Committee on Judicial Ethics Opinions, page 4; CJEO Expedited Opinion 2021-044 (2021), *Disqualification for Civics Education Activities in Matters Involving School District Mask and Vaccine Mandates*, California Supreme Court Committee on Judicial Ethics Opinions, page 4; and CJEO Oral Advice Summary 2020-036 (2020), *Appellate Disqualification for Judicial Council Service in Matters Challenging COVID-19 Emergency Rules and Orders*, California Supreme Court Committee on Judicial Ethics Opinions, page 4. All grounds for disqualification, once met, require a judicial officer to disqualify under the code and statute. (Canon 3E(4)–(5) [appellate disqualification is required if any specified grounds are met]; Code Civ. Proc., § 170.1 [trial court disqualification is required if any specified grounds are met].) The terms *mandatory* and *discretionary* are used to distinguish between (a) grounds that require disqualification when a judicial officer identifies mandatory criteria set by the statute or code that has been met in any proceeding (*mandatory grounds*), and (b) grounds that require disqualification when a judicial officer exercises discretion after evaluating whether objective or subjective disqualifying circumstances have been met in any proceeding (*discretionary grounds*). (CJEO Oral Advice Summary 2020-036, *supra*, at p. 4; see *Eith v. Ketelhut* (2018) 31 Cal.App.5th 1, 15–17).

relationship to the parties, the lawyers, or the issues involved in a case. In addition, a judicial officer must disqualify on discretionary grounds when the judicial officer: (a) believes that the interests of justice require it; (b) substantially doubts his or her capacity to be impartial; or (c) believes that a reasonable person aware of the facts would doubt the judicial officer's ability to be impartial. (Canon 3E(4)(a)–(c); Code Civ. Proc., § 170.1, subd. (a)(6)(A).) The reasonable person test for disqualification requires an objective analysis: "[I]f a fully informed, reasonable member of the public would fairly entertain doubts that the judge is impartial, the judge should be disqualified." (*Wechsler v. Superior Court* (2014) 224 Cal.App.4th 384, 391 (*Weschler*); accord, *Jolie v. Superior Court* (2021) 66 Cal.App.5th 1025, 1040–1041.)

One mandatory ground for disqualification, relevant here, is when a judge "has personal knowledge of disputed evidentiary facts concerning the proceeding." (Code Civ. Proc., § 170.1, subd. (a)(1)(A).) A judge is deemed to have personal knowledge "if the judge, or the spouse of a judge, … is to the judge's knowledge *likely* to be a material witness in the proceeding." (Code Civ. Proc., § 170.1, subd. (a)(1)(B) [italics added].) This requires a judge to make a subjective determination, "to the judge's knowledge," as to the likelihood of the judge's spouse being called as a material witness in the case pending before the judge. (*Ibid.*)

In the facts provided, defense counsel has expressed an intent to interview the judge's spouse in connection with the spouse's prior representation of the defendant and may seek to call the spouse as a witness during the sentencing phase of the capital case. There is an evidentiary hearing pending to determine whether documents and testimony related to the spouse's prior representation of the defendant will be admissible. If the spouse's documents and testimony are ultimately ruled admissible, the spouse is almost certain to become a material witness and the judge must immediately disqualify upon such a ruling.

Whether the judge can determine the likelihood of the spouse being called as a material witness prior to the evidentiary hearing is a more difficult and fact-sensitive inquiry. Counsel's intent to call a witness, absent additional facts, may not be sufficient to create the likelihood of the judge's spouse actually appearing as a witness, particularly as the facts of the case suggest only a possibility that the spouse's testimony will be admitted. However, the judge must consider the totality of the circumstances, for example, the threshold for admissibility of

evidence during the sentencing phase of a capital case, defense counsel's level of motivation to compel the spouse's testimony,[4] and the likelihood of defense counsel's success in admitting the spouse's documents and testimony. If the judge determines that his or her spouse is likely to be a material witness based on specific facts known to the judge prior to an evidentiary hearing, the judge must disqualify and not wait for the outcome of the hearing.

In addition, as in any case, the judge must consider whether to disqualify on discretionary grounds because a reasonable observer aware of the facts would have cause to doubt the judge's impartiality. (Code Civ. Proc., § 170.1, subd. (a)(6)(A).) For example, if the judge's spouse's prior representation of the defendant was particularly high-profile or extensive, a reasonable observer might question the judge's ability to be impartial in the capital case. This is also a fact-specific inquiry that the judge must resolve. (Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 7:17, p. 413 (Rothman) [a judge is required to know the disqualification rules and must make a judicial determination as to disqualification rather than leaving the decision to others, such as the lawyers in the case].)

If the judge determines that disqualification is necessary for any reason, the judge must recuse and not take further action in the case except for certain administrative actions permitted by law. (Code Civ. Proc., § 170.3, subd. (a)(1).) The judge's rulings made prior to the point at which the judge learned of the grounds for disqualification are valid and need not be set aside. (Code Civ. Proc., § 170.3, subd. (b)(4) [absent good cause, rulings made by a judge prior to when the grounds for disqualification are first learned shall not be set aside].) However, if the grounds for disqualification arise earlier and the judge fails to timely disqualify, the judge's rulings made after the point at which disqualification was required are void or voidable and may require rehearing. (Rothman, *supra*, § 7:5, at p. 399 [once disqualified, a judge's prior rulings are void or voidable if the judge knew or should have known grounds for disqualification arose earlier but failed to disqualify in a timely manner]; *Christi v. City of El Centro* (2006) 135

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[4] For example, in this case, the judge's spouse is also now a judge. Therefore, defense counsel may be highly motivated to call the spouse as a witness in hopes that the spouse's testimony will be given significant weight.

Cal.App.4th 767, 776 [disqualification occurs when the facts creating disqualification arise, not when disqualification is established].)

V. Conclusion

A judge must disqualify from a capital case as soon as the judge determines that the judge's spouse is likely to be a material witness in the case. If documents and testimony of the judge's spouse are ruled admissible at an evidentiary hearing, this is a clear indication that the spouse is likely to be called as a material witness. The judge must disqualify immediately upon such a ruling. Depending on the facts of the case, the judge may determine prior to the evidentiary hearing that the judge's spouse is likely to be called as a material witness, at which point the judge must disqualify without waiting for the outcome of the hearing. The judge must also disqualify if a reasonable observer aware of the facts would have cause to doubt the judge's impartiality. The judge's rulings prior to disqualification are valid and will not be set aside unless the grounds for disqualification arose earlier.

This expedited advice opinion is advisory only. (Cal. Rules of Court, rule 9.80(a), (e); Cal. Supreme Ct. 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 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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