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 Draft Formal Opinion 2019-014

INDEPENDENT INVESTIGATION OF COURT CASE MANAGEMENT SYSTEMS

Public Comments Submitted with a Waiver of Confidentiality

Comments from members of the public submitted in response to an Invitation to Comment on a CJEO Draft Formal Opinion are confidential communications to the committee that may not be disclosed unless confidentiality is affirmatively waived (Cal. Rules of Court, rule 9.80(h)(3); Cal. Com. Jud. Ethics Opns., rule 5(b)(1), (e)).

The following comments received by the committee on CJEO Draft Formal Opinion 2019-014 were submitted with a statement waiving confidentiality or consenting to disclosure.

Comment 1:

Submitted by: Hon. Frank Birchak, Judge of the Superior Court of California, County of San Diego

Received on: April 5, 2019

Confidentiality Waived

Would a search of local criminal records—as is required under Family Code section 6306—include a CMS search?

I saw reference to civil restraining order provisions, but not Family Code provisions. It seems that if a CMS search would be appropriate under Family Code section 6306, including language about that in the Formal Opinion would be helpful. Or language saying explicitly that it is not included and should not be reviewed as part of Family Code section 6306 review.

Thank you,

Hon. Frank Birchak

Judge, San Diego Superior Court

Comment 2:

Submitted by: Hon. Matthew Brower, Judge of the Superior Court of California, County of San Diego

Received on: April 5, 2019

Confidentiality Waived

Ms. Black,

I noticed that the attached opinion lists several exceptions to the proposed prohibition on CMS searches on Civil Department Judges, primarily in small claims and particularly several varieties of civil harassment matters (bottom of pg. 7). I handle civil harassment matters in San Diego County, and I wanted to make sure Pen. Code, sections 18175 and 18155 are included as exceptions in the final product to give judges the ability to look at Respondents' RAPs in gun violence restraining order (GVRO) cases. GVROs are technically civil proceedings that are nevertheless governed by the Penal Code. Should this rule become finalized and not expressly address a judge's ability to review RAPS in GVRO cases it could cause ethical uncertainty and a reticence on the part of judges to review such criminal histories (as I believe the two cited penal code sections permit) which could operate to the detriment of public safety. Thanks.

Very Respectfully,

Matt Brower
Judge of the Superior Court
State of California

Comment 3:

Submitted by: Hon. David J. Cowan, Judge of the Superior Court of California, County of Los Angeles

Received on: April 9, 2019

Confidentiality Waived

The following is my comment on the above opinion related to judges' review of case management systems:

Without further clarification of the words "search" and "investigation." this opinion might be seen to preclude a judge performing a necessary task of determining if a case to which she is not then assigned is or should be related to a pending case to which she is assigned. This arises routinely in Probate as between a conservatorship case, a trust case and when the conservatee passes away, with a decedent's estate case. In addition, there is often more than one trust involved with the same family. Each trust is required to have a separate case number. Further, there might also be a Civil or Family case to which there may be an issue of whether it should be related to a Probate case – which would not have been assigned to a judge hearing only Probate cases. Making this determination may require review of documents filed in those cases; i.e., potentially more than just taking judicial notice of documents. Further, a Supervising Judge, to whom no case is assigned, but with the duty sometimes of assigning cases as between other judges to whom a related case may already be assigned, or for other reasons, may be seen to have violated this rule. Could the opinion clarify that the foregoing would fall within the exception for "where independent investigation is otherwise authorized by law?"

Thank you for your consideration.

DAVID J. COWAN
Supervising Judge
Probate & Mental Health Depts.
Los Angeles County Superior Court

Comment 4:

Submitted by: Hon. Alan Perkins, Judge of the Superior Court of California, County of Sacramento

Received on: April 9, 2019

Confidentiality Waived

Attn: Ms. Nancy Black

Dear Ms. Black,

I attempted to submit a comment via the online form was told 3 times there was a problem submitting the form and to try later. Therefore I am using the suggested alternate and routing the comment to you. I waive any confidential and consent to the disclosure of my comment. Here is my comment:

Thank you for the opportunity to comment. For the reasons stated below, I recommend that the opinion not be adopted in its current form.

The opinion appears to be meant to include the searching of a CMS within the types of searches that a judge should not make as part of a process of finding facts in a particular case. To that extent I do not object to the opinion. We tell jurors to not consider facts outside the evidentiary record and judges should also be held to that standard.

A significant problem with the draft opinion is that it does not state that it is meant to apply only to fact finding. Judges are frequently asked to determine whether other cases are related, etc. and cannot do this without consulting a CMS. Even if they could do so it would be a waste of time to not consult a CMS to determine whether a case was related, etc. Similarly judges frequently review cases on their calendars to determine the duration of a

matter, etc. Also, especially in Probate, for example, there could be many separate petitions within a probate case and a judge would have to periodically look at the CMS (suppose there were both a probate and a trust proceedings pending, for example) to manage the cases. By not excluding searches of a CMS that are not directed to obtaining evidence in a disputed trial or hearing, the current form of the rule would needlessly put judges in fear of violating the opinion when they are simply doing their jobs.

In summary, I am not sure there is a problem that needs to be addressed. If there is, the opinion should be revised to specify that it applies only to consulting a CMS for the purpose of obtaining evidence to be used in a contested hearing or trial that is currently open before the judicial officer.

Alan G. Perkins

Judge

Sacramento Superior Court

Comment 5:

Submitted by: Hon. Luis Lavin, Associate Justice of the Court of Appeal, Second Appellate District, Division 3

Received on: April 10, 2019

Confidentiality Waived

Many appellate court justices served on the trial court before they were elevated. Canon 3E(5)(f)(i) requires recusal or disqualification if the appellate justice served as the judge before whom the proceeding was tried or heard in the lower court. The opinion should clarify that a CMS search is permitted to allow appellate justices to determine if they are disqualified from hearing an appeal because they presided over a proceeding or trial in the lower court.

Comment 6:

Submitted by: Hon. Donald Shaver (Ret.), Judge of the Superior Court of California, County of Merced

Received on: April 18, 2019

Confidentiality Waived

I routinely handle a family law assignment and as such review requests for DVTROs. Our court grants or denies the TRO based on the declaration only prior to the hearing. In some cases it is helpful to review the history of the parties by referring to the Court's CMS history to find out if there are prior DV offenses by either party, prior applications, pending 300 actions, etc. Almost all of our DVTRO apps are pro per and sometimes a bit hard to follow, so this helps to flesh out details the requesting party may have omitted or was unclear about, as well as helping to evaluate credibility. Would this be prohibited under the new proposed rule?

Judge Don Shaver, ret. (acting as a commissioner) Merced Superior Court

Comment 7:

Submitted by: Hon. Donald Segerstrom, Judge of the Superior Court of California, County of Tuolumne

Received on: April 26, 2019

Confidentiality Waived

Ms. Black –

I originally sent in my comments using the online comment form that accompanied the invitation to comment on the proposed opinion. Having been notified that the comments may not have been retained, I will try to repeat them.

My concerns revolve around civil cases where the court has as its goal the protection of a minor or the protection of a victim of domestic violence or other type of violence. In dependency cases, which are civil proceedings, the parents (or other people who are alleged to have neglected or abused a child) will frequently have other cases in the same county which are relevant to the issues present in the dependency case. The social service agency tries to put as much information as they can in the reports they submit to the court. Frequently, however, that information is inaccurate or incomplete. For example, the agency (CWS) will run a search using the California Law Enforcement Telecommunications System (CLETS) on a parent. Despite the best efforts of the Department of Justice, the CLETS information provided is often incorrect or incomplete. If the person's name is not exactly the same as the CLETS search, substantial information may be missed. Often, an entry will say that there is no disposition of a case, when, in fact, there has been a disposition. Further, one party may have sought a restraining order, the results of which do not appear in CLETS. There is a wealth of information in the case management system (CMS) which is highly relevant to the court's decision on what disposition of a case is in the best interest of the minor. By discouraging a search of the CMS in such circumstances, the draft opinion is asking a dependency judge to ignore a resource that could provide crucial information to a jurisdictional or dispositional finding. For example, a jurisdictional allegation of parental substance abuse could be decided without knowing that the parent at issue has convictions in the same jurisdiction for possession/use/sales of controlled substances about which CWS is unaware. Just today, I had a case where CWS said the whereabouts of a parent was unknown. By looking in the CMS, I was able to find the parent's most recent address and the fact the

parent was on probation. This information will allow CWS to contact the parent and make sure they have notice of the proceeding. I can think of numerous other examples. A primary goal of the dependency system is the protection of children. There is certainly a risk that by conducting a search of a CMS a judge will come upon information that may benefit one party over the other. As long as that information is disclosed, however, with an opportunity to respond, it seems to me that risk is outweighed by the benefit of having a fully informed judge charged with the protection of the minor.

The same thing is true in domestic violence restraining order cases. Most commonly, these are brought by self-represented litigants. Often, the petitioner will not know that the respondent has other domestic violence cases. To the extent that the court does not have access to CLETS itself, or does not contact a prosecuting agency to get a CLETS print out on the respondent, the judge would be completely unaware that the respondent might have been the subject of other restraining orders, either civil or criminal. My experience is that self-represented petitioners in domestic violence restraining order cases are often intimidated by the court proceedings, unsure how to proceed and confused by how to present relevant information to the judge. Discouraging a judge from a simple CMS search for other domestic violence or criminal cases against the respondent will result in the judge not having what could be critical information in determining whether the petitioner is indeed in danger of abuse. This comment may also apply to civil harassment restraining order cases and workplace violence restraining order cases.

Finally, delinquency cases are also civil proceedings. While probation officers do their best to provide the court with accurate information, they often do not have complete information about parents, persons who are potential placement options, and other persons with whom the juvenile associates. Having the ability to access and search the CMS can often provide the judge with important information that will assist in determining what action is in the best interest of the minor.

A potential response to these comments is that CWS, county counsel, probation or the party in a domestic violence case could access the CMS system to provide the judge this information. That would depend upon what access the court allows the agency or party to have. As I am sure you are aware, different counties have different CMS systems,

with varying levels of access and confidentiality. Further, counting on a self-represented litigant to access and understand how to use a CMS is expecting too much.

I apologize if this is duplicative of my earlier comments. On the other hand, I thank you for the opportunity to comment and trust that the CJEO will take my comments into consideration. If I can provide any further information, please feel free to contact me.

Donald Segerstrom

Judge of the Superior Court

THE SUPERIOR COURT OF CALIFORNIA
COUNTY OF TUOLUMNE

Comment 8:

Submitted by: Sunil "Neil" Gupta, Principal Attorney to Hon. Tani G. Cantil-Sakauye, Chief Justice of the California Supreme Court; submitted in Mr. Gupta's individual capacity

Received on: April 26, 2019

Confidentiality Waived

Dear CJEO,

Thanks for extending the opportunity to comment to this draft CJEO opinion.

As I understand it, the draft opinion concludes that a judge may use a CMS to search for and to view documents submitted by a party or attorney in a matter assigned to the judge *but may not* search for or view other documents and information contained in a court's CMS that could be relevant to the matter before the judge *unless the search is authorized by law* or the search results may be properly judicially noticed.

As to whether the search may be authorized by law, footnote 5 of the draft opinion states "there is very limited authority that authorizes a judge to conduct an independent investigation and would permit a judge to search the CMS regarding the matter currently before him or her" and that "[a]bsent specific authorization to conduct a search," a judge should not search a CMS.

I am concerned that, as currently drafted, the opinion would foreclose the ability of a judge to search a CMS to determine whether the judge may have a conflict with either a party or an attorney that might require the judge's recusal. Because Canon 2 of the Code of Judicial Ethics requires that a judge avoid impropriety as well as "the appearance of impropriety," it would not be unreasonable for a judge to search a CMS to ensure that the judge is not conflicted within the meaning of that canon.

For instance, a party could be engaged in litigation outside of the matter assigned to the judge in which the judge might have an interest in the outcome. Alternatively, an attorney representing a party might belong to a firm engaged in litigation in another matter in which the judge might have an interest. A conflicts check using a CMS would reveal these possible appearances of impropriety (or dispel them). Yet, it is not clear whether such conflicts checks are specifically authorized by law within the meaning of the draft opinion.

Although, as the draft opinion warns, a judge attempting to run a conflicts check through a CMS might risk "uncovering court records and other information that cannot be judicially noticed" and that a judge may "not know whether a CMS search violates canon 3B(7) until it is too late," this assumes that a competent judge cannot perform his or her task of being an impartial and disregard otherwise inadmissible information. (See *Estate of Pierce* (1948) 32 Cal.2d 265, 277 ["it is presumed that the trial court disregards inadmissible evidence which has crept into the record"].)

As a result, I wonder whether the draft opinion might address this use of a CMS.

Sunil "Neil" Gupta

Principal Attorney to

Chief Justice Tani G. Cantil-Sakauye

California Supreme Court

Comment 9:

Submitted by: An Individual Judge, Superior Court of California, County of Orange

Received on: April 26, 2019

Confidentiality Waived

I am against the adoption of the new rule set forth in CJEO Draft Formal Opinion 2019-014. Judges are, or are expected to be, capable of knowing when they should disregard information that arises during a perfectly innocent court-records search but which should be disregarded. This situation is analogous to a court trial, when one party moves an exhibit into evidence and the other side objects. The judge is required to review the document to determine if it should be admitted. If the court sustains the objection, we count on the judge to be able to disregard that inadmissible evidence in reaching the court's ultimate ruling in the case. Similarly, we should count on a judge to disregard material encountered during a court records search if it should be disregarded. There are too many legitimate reasons for a court records search to impose any blanket rule against such searches.

Comment 10:

Submitted by: Superior Court of California, County of Alameda

Received on: May 1, 2019

Confidentiality Waived

Januarv

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

CHAMBERS OF
WYNNE S. CARVILL
Presiding Judge
Department 1

René C. Davidson Courthouse
1225 Fallon Street
Oakland, CA 94612

May 1, 2019

Ms. Nancy A. Black, Committee Counsel
The Supreme Court of California
Committee on Judicial Ethics Opinions
350 McAllister Street
San Francisco, California 94102
(Judicial.Ethics@jud.ca.gov)

Re: Public Comments on CJEO Draft Formal Opinion 2019-014

Dear Ms. Black:

We write to offer public comment to Committee on Judicial Ethics Opinions ("CJEO") Draft Formal Opinion 2019-014 (the "Draft Opinion") concerning a judge's ability to search a court's electronic case management system ("CMS") for records pertaining to a matter before the judge.

The Draft Opinion sets out a broad ethical constraint on the use of a CMS to address the important, but narrow, ethical concern that judges might use a CMS to obtain and then consider adjudicative facts that are not in the record for purposes of resolving fact issues. While that is a bona fide concern, the opinion is overbroad, confusing, and overly restrictive. The Draft Opinion is also contrary to several objectives set forth in the Report to the Chief Justice of the Commission on the Future of California's Court System ("Futures Report") and does not consider and account for the numerous legitimate and unexceptional reasons why a judge would search a CMS. Specifically:

- The Draft Opinion does not distinguish adjudicative facts, case management facts, legal research, court records, and other types of information.
- The Draft Opinion does not consider that judicial initiative in looking for and using case management facts about cases is permitted, appropriate, and to be encouraged.
- The Draft Opinion does not consider that judges can properly use case management facts and court records in a CMS for case management, assisting litigants, supervision of litigants and attorneys, and court administration.

- The Draft Opinion does not consider that a CMS is a court's "brief bank" and that judges can properly use it for legal research.
- The Draft Opinion does not distinguish between the particular knowledge of an individual judge and the collective knowledge of the judges in the court. A CMS is in part a high-tech means for judges to exchange case management facts about cases, and there is no prohibition on judges sharing information other than adjudicative facts. (Canon 3B(7)(b) ["A judge may consult ... with other judges"].)
- The Draft Opinion does not adequately distinguish between concerns about a judge's impartiality (which is an ethics issue), concerns about a judge's awareness of facts outside the record (which is an evidence issue), and concerns about a judge's reliance on facts outside the record (which is a due process issue).

The Draft Opinion has no explanation why it is limited to non-criminal matters. The Code of Judicial Ethics does not distinguish between criminal and non-criminal matters.

For these reasons, which are set forth in greater detail below, we ask that the CJEO withdraw and reconsider Draft Opinion 2019-014.

THE DRAFT OPINION

CJEO Draft Formal Opinion 2019-014 addressed the question of whether "[i]n a non-criminal matter, may a judge search the court's case management system for information regarding a party, attorney, or facts relevant to the matter before the judge?" (Draft Opinion at 1.)

The draft opinion advises that Canon 3B(7) of the California Code of Judicial Ethics, which prohibits independent investigation of facts in a proceeding absent limited exceptions, extends to a judge's use of a CMS. The draft opinion concludes that a judge may only search a CMS in limited instances when a search is authorized by law and the search results may be properly judicially noticed. (Draft Opinion at 2.)

The Draft Opinion suggests that a judge should use a CMS only to review documents in a case that has been assigned to her. Although the Draft Opinion has qualifiers and exceptions, the final conclusion is, "[t]he committee cautions against performing a CMS search regarding a party, attorney, or other information that may be relevant to the matter before the judge. A judge may conduct an independent investigation of a court's CMS only if the search is authorized by law or if the judge is certain that all of the search results may be properly judicially noticed." (Draft Opinion at 14.)

The Draft Opinion's conclusion that a trial judge must have "certainty" that "all" search results would result in judicially noticeable information would deter trial judges from using a CMS in the myriad ways that judges can and should use a CMS to manage cases and conduct legal research.

DISTINGISHING BETWEEN TYPES OF FACTS

Perhaps the most fundamental problem with the Draft Opinion is its concern for searches of a CMS for "information" generally and without adequately addressing the categories of facts or information. There are categories of information.

The Invitation to Comment on the Draft Opinion at page ii actually recognizes this issue when it states that a CMS can "provide electronic access to case documents, court records, and calendar information, as well as other information created by judicial officers and court staff." (See also California Judges Assn, Judicial Ethics Committee, Opinion 68 at 3-4 [noting existence of "ultimate facts, adjudicative facts, legislative facts, etc."]; ABA Ethics Opinion 478, at 4-5 [similar].)

Setting out at least part of the range of facts or information:

- Adjudicative facts relate to the parties, their activities, their properties, and their business. These are facts that normally go to a jury and are relevant to the merits of a case. ("Ethics of Internet Research of Facts by Trial Judges," California Judges Assn, Judicial Ethics Committee, Opinion 68 at 3-4; "Independent Factual Research by Judges via the Internet," ABA Formal Opinion 478 at 4-5.)
- Facts concerning the administrative interpretation of a statute under *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7-8, must be presented as evidence but concern legal issues and would not normally go to a jury.
- Legislative facts are facts that the court can consider, which relate to society generally and are not based on evidence presented to the court. (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 775 fn 5; *California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 174.)
- Legislative facts are facts that the legislature has found, which can provide a rational basis for legislation. (*Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 510-511.)
- Legislative history consists of facts related to the enactment of legislation, which are subject to judicial notice. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 306 fn 2; *People v. Morales* (2018) 25 Cal.App.5th 502, 511 fn 7.)
- Case management facts and/or court records are facts that relate to the existence, nature, scheduling, and status of cases and do not concern either adjudicative facts or legal issues.

The Draft Opinion does not appear to distinguish between the categories and how they are used. The Draft Opinion at page 6 states that it applies when "a judge may be inclined to look up a party, an attorney, a pending or past proceeding, specific court records, or other information to fill in the gaps in the proceeding, to inform himself or herself about other cases or orders involving the parties, or to satisfy his or her curiosity regarding a party, attorney, or facts or issues related to the matter." (Draft Opinion at 6.) That language is extraordinarily overbroad

because it would set ethical boundaries on when a judge may search a CMS for any type of facts, including even case management facts, and would set boundaries on when a judge can use a CMS as a brief bank to look up legal issues.

This is particularly puzzling when one considers how these strictures should apply to a judge's communications with research attorneys and other staff. The California Code of Judicial Ethics expressly provides that "[a] judge may consult with court personnel or others authorized by law, as long as the communication relates to that person's duty to aid the judge in carrying out the judge's adjudicative responsibilities." (Cal. Code Jud. Ethics, Canon 3(B)(7)(a).) (Compare California Judges Assn, Formal Ethics Opinion No. 77 [communications with persons who work with the court but who are not court staff].) Judicial officers rely on court research attorneys "to aid in assessing the merits of legal contentions and to check the accuracy of parties' citations to the court record." (*People v. Jones* (2014) 2014 WL 3734541 at *8.) Judicial officers rely on courtroom clerks to manage calendars and set dates for CMCs and hearings.

Court staff is not subject to the Canons of Judicial Ethics, but it would be problematic if either court staff had more latitude in using a CMS than judges or if a judge could accomplish indirectly through court staff what the judge could not accomplish directly. Is a judge supposed to direct staff not to communicate information to her outside the scope of what is permitted by the Draft Opinion?

CASE MANAGEMENT

Judges should be able to search a CMS for purposes of case management, which can include looking at both the present case and other cases.

Trial judges have the obligation to actively manage their cases. The Trial Court Delay Reduction Act, Govt Code 68607, states: "judges shall have the responsibility … to actively manage the processing of litigation from commencement to disposition." (See also CRC 3.713(c) ["It is the responsibility of judges to achieve a just and effective resolution of each general civil case through active management and supervision of the pace of litigation from the date of filing to disposition."].)

Trial judges who are assigned to manage complex civil cases have a more specific and emphatic obligation to actively manage their cases. Std Jud Perf., 3.10(a) states, "judicial management should begin early and be applied continuously and actively."

Consistent with their obligation to actively manage cases, it is appropriate for judges to look at a CMS for matters relevant to case management. Frequent scenarios include the following.

Identification of related cases. CRC 3.300 requires the parties to file notices of related cases. Sometimes parties fail to make the required filings and judges learn through other means of cases

that might be related. Judges should be able to look at a CMS for cases that might be related and to then review the case file to determine if they should be related.

Sometimes a party will file a duplicate action concerning or relating to the same cause of action because the party wants to include new causes of action or parties but doesn't know how to amend complaints or request joinder. Other times a party will file a duplicate action because she does not like a decision made in a previously heard case, and is trying to have the matter re-heard by a different judge on the assumption that the new judge will not be aware of the earlier decision. A judge should be ethically permitted to use CMS to identify related cases and to bring them together for efficient management.

The Draft Order at page 10 acknowledges that "a judge can properly search the CMS for a complaint when considering whether to relate two or more cases." The Draft Order then cautions at pages 10-11 that a judge might uncover other information and suggests that searching a CMS for information to assist in determining whether cases are related might ethically compromise a judge. This is a hyper-vigilant approach to a routine case management exercise.

Management of related cases. If cases are related, whether formally or not, judges should be able to look at a CMS to determine the status of a related case for case management purposes. Common examples include:

- A judge in a UD case checking the status and schedule of a Probate, Family, or quiet title case for purposes of determining when ownership issues regarding property will be resolved in the related case.
- A judge in a surplus funds from sale of real property case (Civil Code §2924j) checking persons served in a Probate case to identify potential claimants to the surplus funds.
- A judge in a UD case checking the register of actions for prior UDs concerning the same property to clarify for the judge which 3 or 30 or 60 day notice applies to which case.

If a judge cannot look at related cases in a CMS, then the judge is setting CMC, hearing, and trial dates in ignorance. This can lead to court dates that are set and then continued, which is a waste of time for the judge, clerk, and litigant. (Futures Report at 53 ["There is no disputing that continuances are costly to both parties and the courts"].)

The California Supreme Court can manage related cases by issuing a "grant and hold" order. (CRC 8.512(d)(2); *People v. Orozco* (2018) 24 Cal.App.5th 667, 671.) The Supreme Court is presumably permitted to review its CMS to look at the filings and issues in other cases even if no party filed a notice of related cases.

Consistent orders. If cases are related, whether formally or not, judges should be able to look at a CMS for the purpose of considering similar orders so that the judge can at least know whether she is issuing a consistent order regarding a party. Trial judges hear many cases that cross over different case types. For example, a case arising out of a domestic violence incident may have

emergency actions pending on a Civil Harassment and/or Domestic Violence calendars, an open Family Law action, and a new criminal case or cases (new complaints, as well as probation or parole revocations). A judge hearing any one of these actions should be able to use a CMS to learn the procedural posture of the related cases and to review the orders in those cases so the judge can both schedule future hearings appropriately and issue consistent, or at least not conflicting, orders.

Consolidation. The Court of Appeal consolidates cases on its own motion and is presumably permitted to look at its CMS in making those decisions. (*In re Anthony B.* (1999) 72 Cal.App.4th 1017, 1020 ["on this court's own motion, the appeals in F031048 and F031750 were consolidated"]; *People v. Sanchez* (1987) 190 Cal.App.3d 224, 228 ["Upon this court's own motion, the appeals of appellants Sanchez and Castillo were ordered consolidated"].) Trial courts do not consolidate cases on their own motion, but a judge should be able to review a CMS so the judge can raise the issue of consolidation as part of case management.

Coordination. If cases in different counties appear to share a common issue of fact or law, then the trial court can submit a petition for coordination to the Judicial Council. (CCP §404.) A petition for coordination must state facts showing why the cases are complex and why they should be coordinated. (CCP §404.1.) A judge considering a petition for coordination should be able to use a CMS to review any cases that might be the subject of a petition for coordination.

Status of case in Court of Appeal. If a petition for a writ has been filed in a case, then a trial judge should be able to look at the register of actions in the Court of Appeal to determine the status of the briefing, whether oral argument has been set, and to evaluate when the appellate proceedings are likely to conclude. Tracking proceedings in the Court of Appeal assists in scheduling hearings in the trial court. The prohibition on internet research for "facts" in the Court of Appeal's public CMS should not preclude this effort.

Status of related cases in federal court. If a case has been removed to federal court or has been stayed due to the filing of bankruptcy in federal court, then the trial judge should be able to look at the register of actions in the federal courts to evaluate when the federal proceedings are likely to conclude.

ASSISTING LITIGANTS

Judges should be able to search a CMS for the purpose of assisting litigants.

The California courts are committed to provide access to justice. (Std. Jud. Admin, 10.17(b)(1).) The Futures Report states: "As the neutral adjudicator, the court is not in a position to advise or represent SRLs. However, the court system does have a role in ensuring that SRLs are provided with the knowledge necessary to better represent themselves." (Futures Report at 30.) The Futures Report also states: "Providing critical information and support early in the

process allows outcomes based on the merits unhindered by procedural mistakes." (Futures Report at 32.)

An earlier report by the Judicial Council states that trial judges have "broad discretion to adjust procedures to make sure a self-represented litigant is heard." (Handling Cases Involving Self-Represented Litigants, A Bench Guide for Judicial Officers, Admin Office of the Courts, January 2007, at 3-12.)

It is common for parties unfamiliar with the court system to not know the difference between their various pending matters. The court has the discretion, if not the obligation, to assist these parties. Often the best way to do that is to be able to look up related cases on a CMS and to share that information with the parties. For example, if parties are setting a date for a Family Law hearing, it can assist the parties if the judge looks up pending dates in related criminal matters. Similarly, it can assist the parties if the judge in an unlawful detainer case looks up pending dates in a related probate case.

Even in circumstances where all parties are equally informed as to the existence of related cases, the parties might appear at a hearing without all the calendar information in each of their cases. A judge helps provide access to justice by looking up future dates in a CMS and sharing that information with the parties rather than letting them fend for themselves.

LEGAL RESEARCH

Judges should be able to search a CMS for orders and internal court memoranda that might contain relevant legal analysis.

A court's CMS contains the prior orders of judges in the court and functions as the court's "brief bank." At its most basic, a judge might want to use a prior order in a different case as a template for a new order. In addition, a judge might recall having considered an issue previously or know that another judge had and want to look at those prior orders in different cases to save time conducting research in the current case and to consider whether the judge is taking a consistent position on a legal issue.

Judges are permitted and encouraged to conduct independent legal research. *Giraldo v. Department of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 231, 251, states: "[W]e are certainly not constrained by the authorities cited by the parties … [I]ndependent research is indispensable to an efficient appellate system. … [T]he parties should rest assured we will uncover the applicable law." (*Baglione v. Leue* (1958) 160 Cal.App.2d 731, 736 ["Independent legal research by a court after a case is submitted is sometimes necessary and is to be commended."].) (See also ABA Ethics Opinion No. 478 at 3 ["Judges may conduct legal research beyond the cases and authorities cited or provided by counsel"].)

Judges should be permitted to conduct independent legal research by using a CMS to locate and review briefs and orders in other cases for the purpose of legal research. This is not materially different from the traditional low-tech procedure where one judge asks another judge if the judge has seen the same or a similar issue before and soliciting advice on the legal issue. (Canon 3B(7)(b) ["A judge may consult ... with other judges."].)

Westlaw or Nexis both have California trial court briefs and orders on their databases. It should be immaterial whether a judge conducts legal research on the court's CMS system or on Westlaw or Nexis.

There should be no ethical concerns if a judge reviews another judge's or a court employee's case notes on a legal issue. (Compare Draft Order at 9-10.) Judges and research attorneys conduct legal research on legal issues and may save that research in a CMS. A judge should be able to take advantage of the legal research conducted by her peers even if the research did not end up in an order.

There might be due process concerns if the judge through her independent research identifies new legal issues and bases a decision on the new legal issues without providing the parties with notice and an opportunity to be heard. There is a distinction between a judge citing to new authorities that apply to the issue presented and the judge identifying new issues. (*Giraldo v. Department of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 231, 251.)

If a judge identifies new issues, then the judge could continue a hearing and request supplemental briefing. (*Williams v. Southern California Gas Co.* (2009) 176 Cal.App.4th 591, 601; *Monarch Healthcare v. Superior Court* (2000) 78 Cal.App.4th 1282, 1286.) A judge could also address the due process concerns by informing the parties of the new authorities in the court's tentative decision and providing the opportunity to discuss the authorities at the hearing. (CRC 3.1308.) The due process concern with alerting the parties to a new legal issue should not, however, be confused with the Draft Opinion's ethical concerns about judges using a CMS to assist in legal research generally.

SUPERVISION OF LITIGANTS AND ATTORNEYS

Judges should be able to search a CMS to obtain information relevant to the supervision of litigants and attorneys.

Regarding litigants, a court can declare a person to be a vexatious litigant. (CCP §391 et seq.) A person who is a vexatious litigant directly impacts the operations and procedures of the court and through the use of court resources indirectly imposes financial obligations that directly affect the court's operations.

A court may on its own motion issue an order to show cause why a person should not be declared a vexatious litigant. (*In re Shieh* (1993) 17 Cal.App.4th 1154, 1155.)

For a judge to be able to issue an OSC under CCP §391(b)(1), the judge must be able to review the court's CMS to determine whether a pro se litigant has commenced, prosecuted, or maintained at least five litigations in the prior seven years that have been finally determined adversely to the person. The court is powerless to set an OSC under CCP §391(b)(1) without the ability to review the CMS.

For a judge to be able to issue an OSC under CCP §391(b)(3), the judge must be able to review the court's CMS to determine whether a pro se litigant has "repeatedly file[d] unmeritorious motions, pleadings, or other papers, conduct[ed] unnecessary discovery, or engage[d] in other tactics that are frivolous or solely intended to cause unnecessary delay." The court can make a vexatious litigant finding based in "repeated" unmeritorious motions both in the pending case and in other cases. (*In re Natural Gas Antitrust Cases* (2006) 137 Cal.App.4th 387, 398; *In re Luckett* (1991) 232 Cal.App.3d 107, 109.) The court is restricted in its ability to set an OSC under CCP §391(b)(3) without the ability to review the CMS to identify unmeritorious motions in other cases.

An example of an OSC under CCP §391(b)(3) is *California State Automobile Ass'n v. al-Hakim*, Alameda County Case No C-811337, Order to Show Cause dated 2/28/19. The judge reviewed the CMS for filings in the pending case and in four other cases. The judge's OSC identified what appeared to be a pattern of filing unmeritorious challenges for cause under CCP §170.1 before almost every hearing in all five cases.

Regarding counsel, trial courts can "sanction attorneys for improper conduct [and] control the proceedings before them to prevent injustice." (*Sheller v. Superior Court* (2008) 158 Cal.App.4th 1697, 1710.) Consistent with this authority, the court should be able to use a CMS to investigate whether an attorney is mis-using or abusing the judicial system.

An example where court searched its own CMS for the purpose of supervising counsel is *Brookwood Loans of California v. Griffin*, Alameda Case No. RG14-748102, Order dated 10/15/15. The judge's OSC identified multiple cases in which an attorney had filed proofs of service stating that a process server had served documents in different locations at the same time.

COURT ADMINISTRATION

The presiding judge is responsible for the administration of all the cases in a court. (CRC 10.603.) The presiding judge "should take an active role in advancing the goals of delay reduction." (Std Jud Perf 2.1(c).)

The presiding judge must supervise the judges and the court staff. (CRC 10.603(a) and (c)(4).) The presiding judge must use the CMS to monitor judicial caseloads, review complaints against judicial officers, and perform the various administrative roles required of a court manager.

The presiding judge must specifically "supervise and monitor the number of causes under submission before the judges of the court and ensure that no cause under submission remains

undecided and pending for longer than 90 days." (CRC 10.603(c)(3).) The presiding judge must use a CMS to both to collect data on how long motions have been under submission and to look at the register of actions in specific cases to determine why motions might be under submission. (California Judges Assn, Formal Ethics Opinion No. 77 at V.A.7 on 5 [example where "PJ discovered a new violation and determined that several cases under submission for more than ninety days had unsigned orders"].)

All of the above tasks may in some courts be delegated to a supervising judge for a courthouse or area of law, in which case these supervising judges have the same need to use the CMS to discharge their responsibilities.

REMEDY WHEN A JUDGE SEARCHES/SEES NON-ADJUDICATIVE FACTS IN A CMS

A judge should not have to disqualify or disclose if she has searched a CMS for and/or found non-adjudicative facts.

There are two ethical concerns with a judge doing independent investigation: impartiality (Canon 2A) and reliance on factual information that is not in the record (Canon 3B(7) and (7)(a)). These are consistent with the Constitutional interests in separating the prosecutorial and adjudicative functions, which are neutrality and record exclusivity. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1, 10-11.)

The ethical concerns about impartiality and record exclusivity should not be present simply because a judge used a CMS to search for and obtain case management facts or to conduct legal research and the judge is now managing the case, hearing a motion, or conducting a trial.

Looking at impartiality, a reasonable member of the public would not fairly entertain a doubt about a judge's impartiality simply because the judge took the initiative to obtain case management facts about the case from the court's CMS in the process of managing the case. (*Wechsler v. Superior Court* (2014) 224 Cal.App.4th 384, 391.)

The Draft Opinion at page 13 cites several cases for the proposition that judges should not initiate independent investigations into adjudicative facts. (*Catchpole v. Brannon* (1995) 36 Cal.App.4th 237, 259 fn 9 [judge took judicial notice of the rainfall on the days in question "and used the putative discrepancy between this fact and appellant's testimony as a reason to question her overall credibility"]; *People v. Handcock* (1983) 145 Cal.App.3d Supp. 25, 28 [judge went to car dealer mid-trial, obtained replacement part, and called dealer employee to testify to jury]; Public Admonishment of Judge Connolly (2016) at 2-4 [Judge setting OSC re contempt for attorney sought court records regarding alleged contempt by same attorney in another court]; Public Admonishment of Commissioner Friedlander (2010) at 10-11 [Commissioner looked at respondent's divorce file and other files of parties before hearing on civil restraining order].) All of these cases concern a judge obtaining adjudicative facts for resolution of disputed issues of fact. None of those cases address a judge's consideration of non-adjudicative facts for case management purposes.

There is a distinction between a judge who considers case management facts for case management purposes and who later makes decisions about disputed facts in the case and a judge who independently investigates adjudicative facts. The former is simply serving different judicial functions at different times. The latter is stepping outside the neutral judicial role and is plausibly embroiled.

The use of a CMS for case management and legal research purposes is such a common part of a judge's job that requiring disqualification would be debilitating to the single assignment of cases.

California Judges Assn Ethics Formal Opinion No. 2015-17 suggests that disqualification should not be required. This opinion concerns "[i]s 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?" The Formal Opinion reasons that disqualification is required only where the prior participation in a case was "active participation." The Formal Opinion concludes that disqualification for any participation is not required because "[t]o conclude otherwise would impede the administration of justice where there is no reason to doubt impartiality, contrary to the purposes of the disqualification statutes."

Similarly, keeping track of all uses of a CMS for case management facts and making all such disclosures would be unduly time consuming and produce little resulting benefit to judicial integrity. The Draft Opinion states at page 12 that a judge must disclose any review of any facts in a CMS that are not in the record of the case at issue.

California Judges Assn Ethics Opinion No. 45, Section III.J, suggests that disclosures should not be required. Ethics Opinion 45 states: "[A] Judge need not disclose or disqualify merely because an attorney has appeared often before the judge even when the judge holds that attorney in high esteem, provided the judge believes self not to be prejudiced for or against anyone in the case. If the rule were otherwise, it would simply be impossible for an experienced, well-known judge to get through a lengthy calendar."

ADJUDICATIVE FACTS

A judge cannot use a CMS to conduct an independent investigation regarding adjudicative facts.

The Draft Opinion focuses on ethical issues particular to adjudicative facts. In considering exceptions to the rule, the Draft Opinion focuses on the ability of a court to take judicial notice of adjudicative facts not in the evidentiary record. (Draft Opinion, at 8-11.)

The Draft Opinion acknowledges that a judge can take judicial notice of court records when considering issues of claim preclusion and issue preclusion. (Draft Opinion at 9.) This is relevant to the ethical question because Evidence Code §452(d) expressly permits judicial notice of court records and a judge who uses the Evidence Code 453 procedure eliminates the concern with record exclusivity and due process. The ability to take judicial notice does not, however,

address whether judicial initiative in sua sponte taking judicial notice suggests a lack of neutrality.

The cases cited in the Draft Opinion are not relevant for the issue of whether the court can sua sponte take judicial notice of court records. *In Planning & Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 225, it is unclear whether the court sua sponte took judicial notice or whether a party requested the court to take judicial notice. In *Western Mutual Ins. Co. v. Yamamoto* (1994) 29 Cal.App.4th 1474, 1485 fn 3, the record was similar and, in addition, the court stated, "we need not determine whether the trial court erred in taking judicial notice of the 'entire' juvenile court file."

REMEDY WHEN A JUDGE SEARCHES/SEES ADJUDICATIVE FACTS IN A CMS

Whether a judge should have to disqualify, disclose, or permit supplemental briefing if she has searched a CMS for and/or found adjudicative facts should depend on the circumstances. As noted above, there are distinctions between and among concerns about a judge's impartiality (which is an ethics issue), concerns about a judge's awareness of facts outside the record (which is an evidence issue), and concerns about a judge's reliance on facts outside the record (which is a due process issue).

Looking at impartiality, a reasonable member of the public could fairly entertain a doubt about a judge's impartiality if the judge took the initiative to obtain adjudicative facts and it might appear to be for the purpose of resolving a fact issue in favor of a particular party. (*Wechsler v. Superior Court* (2014) 224 Cal.App.4th 384, 391.) (See also Draft Opinion at 13 [cases where judges investigated adjudicative facts].)

A judge can, however, lawfully investigate adjudicative facts on the record by calling and questioning witnesses at trial. (Evid Code §775.) "[T]he court has a duty to see that justice is done and to bring out facts relevant to the jury's determination. … "[I]t is not merely the right but the duty of a trial judge to see that the evidence is fully developed before the trier of fact." (*People v. Abel* (2012) 53 Cal.4th 891, 917.) (See also *People v. Handcock* (1983) 145 Cal.App.3d Supp. 25, 29 fn 2 [collecting law].) Given the ability of judges to call and question witnesses, the concern with a judge searching a CMS for adjudicatory facts is perhaps more a concern with transparency than a concern with lack of neutrality.

Looking at a judge's awareness of facts outside the record (record exclusivity), a reasonable member of the public would not entertain a doubt about a judge's impartiality if the judge had information that was not in the evidentiary record.

A judge who is single assigned to a case might learn information about the parties, the attorneys, and the facts of the case in the context of case management and discovery motions. If the case proceeds to a court trial, however, the judge will decide the case based only on the evidence that is admitted at trial. (*Gimbel v. Laramie* (1960) 181 Cal.App.2d 77, 84, 85 ["…the mere fact that

the judge knew of the criminal trial of the doctor and his two years' suspension of license standing alone is not a ground for a mistrial, a new trial, or a reversal of the judgment. From the very nature of the office he occupies and of the judicial processes a judge is required to divorce from his mind many inadmissible matters which are inevitably brought to light during the course of a trial."].)

A judge conducting a court trial can be presented with evidence, the opposition can object, the judge can then look at the evidence and consider if the evidence is admissible, sustain the objection to the evidence, and then proceed with the trial as though the judge had not seen the evidence. That is not unusual.

Judges are routinely expected to partition off information they know and make decisions only on admissible information. The implicit concern is more the lack of transparency about what adjudicative facts the judge knows and is not considering than the fact that the judge knows the off-the-record adjudicative facts in the first place.

The Draft Opinion is inconsistent with the law that judges can be aware of facts but set them aside when they evaluating the evidence in a case. By way of analogy, a judge can have friends in the legal community but still be impartial when she is on the bench. In *People v. Carter* (2005) 36 Cal.4th 1215, 1240-1245, the court rejected the defendant's claims that a trial judge's act of officiating at the prosecutor's daughter's wedding several months before the commencement of a death penalty trial created an appearance of partiality. (See also *Wechsler v. Superior Court* (2014) 224 Cal.App.4th 384 [Court commissioner could preside over dissolution of marriage proceeding after agreeing to officiate at wedding of wife's counsel].) If these personal connections do not raise a doubt about a judge's impartiality, then it is difficult to see how a judge's use of a CMS and the awareness of information obtained in a judicial capacity for judicial purposes would raise a doubt about a judge's partiality.

The Draft Opinion does not cite to CJA Ethics Update 1997 at D, which takes an interesting approach to what a judge should do if she becomes aware of adjudicatory facts outside the record. The CJA Ethics Update 1997 states: "A judge who learns of facts from the court's computer system which may be useful to one side or the other in an ongoing trial should disclose this information to all parties in the trial. Canon 3B(7)."

If the "ongoing trial" were a bench trial, then this makes sense if the facts are adjudicative facts and the judge planned to rely on the facts. If, however, the judge decided to ignore the facts from the court's computer system and limit herself to information in the evidentiary record, then that would be equivalent to the judge sustaining her own objection to the information, and it would be arguably unnecessary to disclose that the judge knows excluded adjudicative facts.

If the "ongoing trial" were a jury trial, then the required disclosure appears to make little sense because if the judge said nothing, then the parties would simply present their evidence to the trier of fact without regard to what the judge knew. Disclosing the information to the parties at trial

would arguably be an improper implicit suggestion that one party or the other should present the information to the jury. Alternatively, disclosing the information might consistent with a judge's ability to call and question witnesses at trial. (Evid Code §775.) This comment is of the opinion that CJA Ethics Update 1997 at D provides questionable guidance.

Looking at a judge's reliance on facts outside the record, a judge who through a CMS learns adjudicative facts must not consider that information unless either a party formally presents the facts as evidence on the merits of a motion or at trial or the court notifies the parties that it plans to consider the facts. (CJA Ethics Opinion No 68 at II.B.12 at 8 [judge who has seen an adjudicative fact in a CMS and plans to rely on it must give notice to the parties of intent to do so].) (See also *Monarch Healthcare v. Superior Court* (2000) 78 Cal.App.4th 1282, 1286.)

LIMITATION OF DRAFT OPINION TO NON-CRIMINAL MATTERS

The Draft Opinion applies only to a "non-criminal matter."

On the level of principle, the Code of Judicial Ethics appears to apply uniformly and without regard to whether a judge is assigned to a civil, criminal, family, or juvenile matter. The integrity of the judiciary might suffer if the ethical responsibilities of judges varied depending on their specific case assignments.

On the level of practicality, there can be little difference between a hearing on a Domestic Violence Restraining Order and a hearing relating to criminal charges related to domestic violence. It would be peculiar if a judge hearing the former could not use case management facts in a CMS to coordinate scheduling but a judge in the latter could do so.

The issues of principle and practicality are presented in the Draft Opinion at page 10, which cautions that "[i]f the judge [on a civil matter] performs a term search of the CMS using a party's name to determine whether there are other matters that also should be related, the judge could uncover … a party's criminal history, which is very unlikely to be the proper subject of judicial notice." If a judge hearing a civil matter should be concerned about inadvertently finding a party's criminal history, then a judge hearing a criminal matter should be similarly concerned about inadvertently finding a party's family law, restraining order, or unlawful detainer history.

The commenters suggest that the Committee consider how the proposed ethical limits on the use of a CMS would affect the case management of civil, criminal, family, and juvenile matters.

CONCLUSION

We ask that the CJEO withdraw and reconsider Draft Opinion 2019-014. The Draft Opinion does not distinguish between adjudicative facts, case management facts, or legal research. The Draft Opinion does not consider the myriad ways that trial judges can properly use a CMS to find case management facts to assist in managing cases. It also raises a host of issues regarding how judges should interact with legal research attorneys and staff. In its current form, the Draft

Opinion is overbroad and would result in the rigid compartmentalization of case information, which would restrict and impair effective case management, legal research, supervision of litigants and attorneys, and court administration.

Very truly yours,

Hon. Wynne S. Carvill
Presiding Judge
Alameda County Superior Court

Hon. Tara M. Desautels
Assistant Presiding Judge
Alameda County Superior Court

Chad Finke
Court Executive Officer
Alameda Superior Court

Comment 11:

Submitted by: Judge Thomas H. Cahraman, Superior Court of California, County of Riverside

Received on: May 6, 2019

Confidentiality Waived

Chambers of
Thomas H. Cahraman
Judge of the Superior Court

4050 Main Street, D-8
Riverside, CA 92501
Telephone 951-777-3067
Fax 951-777-3112

Superior Court of California
County of Riverside

May 6, 2019

Sent via U.S. Mail, and via email to Judicial.Ethics@jud.ca.gov

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

RE: CJEO Draft Formal Opinion 2019-014

Dear Ms. Black:

I am the supervising judge of probate for the Riverside County Superior Court, and also serve on the Probate and Mental Health Advisory Committee of the Judicial Council. For the reasons outlined below, I request that CJEO draft opinion 2019-014 be modified or withdrawn to avoid a conflict between the opinion and the court's duty to supervise fiduciaries under the Probate Code.

In proceedings under the Probate Code, the court has the duty to regulate and control fiduciaries supervised by the court, and to intervene to prevent or rectify abuses to protect the estate from possible injury or loss. *See, Conservatorship of Presha* (2018) 26 Cal. App. 5th 487; *Schwartz v. Labow* (2008) 164 Cal. App. 4th 417, 427-9, *as modified* (July 9, 2008); see also *Estate of Tierney* (1945) 68 Cal.App.2d 621, 626; see also *In re Guardianship of Lamb (2011) 173 Wn.2d 173, 190, 265 P.3d 876, 886; Kicherer v. Kicherer* (1979) 285 Md. 114, 118, 400 A.2d 1097, 1100, Commentary from National Probate Court Standard 3.1.4. This duty is also compelled by the *in rem* nature of probate proceedings, which are binding and conclusive as to the rights of all interested persons, including those unborn or unascertained. See Probate Code 8007, 8226(a), 8270(b), 10954(b)(6), 11605, and 11705(b), 15405(d) to (f), and 19507; CCP 1908(a)(1); *McLellan v. McLellan* (1941) 17 Cal.2d 552, 554. In fulfillment of this duty, the court must uphold the integrity of accountings by raising objections on the court's own motion, even in the absence of an objection from any party. *Estate of Tierney* (1945) 68 Cal.App.2d 621, 626; *McLellan v. McLellan* (1941) 17 Cal.2d 552, 554. When fees are requested, the protected person is unlikely to have the ability to evaluate and challenge the fees; therefore, the court must independently research the request to determine its validity, and develop and resolve any counterarguments on behalf of the person protected by the proceeding to ensure the interests of the protected person are adequately

represented and excessive fees are not awarded. *Gonzales v. Chen* (2011) 197 Cal.App.4th 881, 887-88; *Estate of Moore* (2015) 240 Cal.App.4th 1101, 1111; *Estate of Nazro* (1971) 15 Cal.App.3d 218, 223. To approve fee requests using an overly deferential approach has been found to be reversible error. *Donahue v. Donahue* (2010) 182 Cal.App.4th 259, 270-274; *Conservatorship of Lefkowitz* (1996) 50 Cal.App.4th 1310, 1316.

To fulfill the court's supervisory role, party name searches often must be performed in the court's case management system in order to locate other cases. Recurring situations where a search is necessary include the following:

- To determine if a will has been lodged with the court concerning the decedent who is the subject of a petition for letters of administration and, if so, whether the petitioner should be required to give notice to the affected beneficiaries of the will. See Probate Code 1202, 8005(a)(4), 8226(b); e.g. Riverside County Local Rule 7201.
- To determine if a juvenile case is pending concerning a proposed ward or ward who is the subject of a probate guardianship petition. Welfare and Institutions Code 304.
- To determine if a party seeking appointment as a fiduciary is required to be licensed by the professional fiduciaries bureau. Probate Code 60.1, 2340, 17200(c); Business and Professions code 6501(f).
- To determine the reasonableness of fees requested by a court-appointed fiduciary or their counsel. See, e.g., *Conservatorship of Presha* (2018) 26 Cal. App. 5th 487.
- To coordinate the terms of protective orders made in criminal, domestic violence, elder abuse, and civil harassment cases. CRC 5.445.
- To coordinate distribution of money from one estate to another, including accountings and timing and amount of bond. Probate Code 2630, 10902.

If applied to judicial officers hearing proceedings under the Probate Code, the draft opinion would prevent the court from taking the necessary action to fulfill its supervisory duties. Again, I would respectfully ask that the draft opinion be withdrawn, or modified to exempt matters heard under the Probate Code.

In addition to the above points, I join in the letter submitted by the Alameda County Superior Court on May 1st, 2019.

Thank you for considering this point of view.

Sincerely,

Hon. Thomas H. Cahraman
Supervising Judge of Probate
Riverside County Superior Court

cc Hon. John Sugiyama, Chair, Probate and Mental Health Advisory Committee

Comment 12:

Submitted by: Superior Court of California, County of Sutter

Received on: May 7, 2019

Confidentiality Waived

Superior Court of California
County of Sutter
1175 Civic Center Blvd. • Yuba City, California 95993
Telephone 530-822-3304 • Fax 530-822-3504

Susan E. Green
Superior Court Judge

May 6, 2019

Ms. Nancy A. Black, Committee Counsel
Supreme Court of California
Committee on Judicial Ethics Opinions
350 McAllister Street
San Francisco, California 94102
Judicial.ethics@jud.ca.gov

Re: Public Comments on CJEO Draft Formal Opinion 2019-014

Dear Ms. Black:

We write to join in the public comment submitted by Alameda County Superior Court Presiding Judge Wynne S. Carville, Assistant Presiding Judge Tara M. Desautels, and Court Executive Officer Chad Finke. Please see attached letter dated May 1, 2019.

In addition to the detailed reasons in the attached letter, we often use our case management system to avoid delays due to attorney conflicts. In our small county, the Public Defenders represent parties in all case types (including but not limited to conservatorships, family law contempt proceedings, mental health proceedings, juvenile dependency and delinquency and criminal matters) and access to the case management system avoids conflicted appointments and delays in the proceedings.

We also ask that you withdraw and reconsider the Draft Opinion 2019-014.

Very truly yours,

Hon. Susan E. Green
Presiding Judge

Hon. David I. Ashby
Judge

Hon. Laura J. Davis
Judge

Hon. Sarah H. Heckman
Judge

Hon. Perry Parker
Judge

Stephanie M. Hansel
Court Executive Officer

SG/jll

Enclosure

Januarv

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

CHAMBERS OF
WYNNE S. CARVILL
Presiding Judge
Department 1

René C. Davidson Courthouse
1225 Fallon Street
Oakland, CA 94612

May 1, 2019

Ms. Nancy A. Black, Committee Counsel
The Supreme Court of California
Committee on Judicial Ethics Opinions
350 McAllister Street
San Francisco, California 94102
(Judicial.Ethics@jud.ca.gov)

Re: Public Comments on CJEO Draft Formal Opinion 2019-014

Dear Ms. Black:

We write to offer public comment to Committee on Judicial Ethics Opinions ("CJEO") Draft Formal Opinion 2019-014 (the "Draft Opinion") concerning a judge's ability to search a court's electronic case management system ("CMS") for records pertaining to a matter before the judge.

The Draft Opinion sets out a broad ethical constraint on the use of a CMS to address the important, but narrow, ethical concern that judges might use a CMS to obtain and then consider adjudicative facts that are not in the record for purposes of resolving fact issues. While that is a bona fide concern, the opinion is overbroad, confusing, and overly restrictive. The Draft Opinion is also contrary to several objectives set forth in the Report to the Chief Justice of the Commission on the Future of California's Court System ("Futures Report") and does not consider and account for the numerous legitimate and unexceptional reasons why a judge would search a CMS. Specifically:

- The Draft Opinion does not distinguish adjudicative facts, case management facts, legal research, court records, and other types of information.
- The Draft Opinion does not consider that judicial initiative in looking for and using case management facts about cases is permitted, appropriate, and to be encouraged.
- The Draft Opinion does not consider that judges can properly use case management facts and court records in a CMS for case management, assisting litigants, supervision of litigants and attorneys, and court administration.

- The Draft Opinion does not consider that a CMS is a court's "brief bank" and that judges can properly use it for legal research.
- The Draft Opinion does not distinguish between the particular knowledge of an individual judge and the collective knowledge of the judges in the court. A CMS is in part a high-tech means for judges to exchange case management facts about cases, and there is no prohibition on judges sharing information other than adjudicative facts. (Canon 3B(7)(b) ["A judge may consult ... with other judges"].)
- The Draft Opinion does not adequately distinguish between concerns about a judge's impartiality (which is an ethics issue), concerns about a judge's awareness of facts outside the record (which is an evidence issue), and concerns about a judge's reliance on facts outside the record (which is a due process issue).

The Draft Opinion has no explanation why it is limited to non-criminal matters. The Code of Judicial Ethics does not distinguish between criminal and non-criminal matters.

For these reasons, which are set forth in greater detail below, we ask that the CJEO withdraw and reconsider Draft Opinion 2019-014.

THE DRAFT OPINION

CJEO Draft Formal Opinion 2019-014 addressed the question of whether "[i]n a non-criminal matter, may a judge search the court's case management system for information regarding a party, attorney, or facts relevant to the matter before the judge?" (Draft Opinion at 1.)

The draft opinion advises that Canon 3B(7) of the California Code of Judicial Ethics, which prohibits independent investigation of facts in a proceeding absent limited exceptions, extends to a judge's use of a CMS. The draft opinion concludes that a judge may only search a CMS in limited instances when a search is authorized by law and the search results may be properly judicially noticed. (Draft Opinion at 2.)

The Draft Opinion suggests that a judge should use a CMS only to review documents in a case that has been assigned to her. Although the Draft Opinion has qualifiers and exceptions, the final conclusion is, "[t]he committee cautions against performing a CMS search regarding a party, attorney, or other information that may be relevant to the matter before the judge. A judge may conduct an independent investigation of a court's CMS only if the search is authorized by law or if the judge is certain that all of the search results may be properly judicially noticed." (Draft Opinion at 14.)

The Draft Opinion's conclusion that a trial judge must have "certainty" that "all" search results would result in judicially noticeable information would deter trial judges from using a CMS in the myriad ways that judges can and should use a CMS to manage cases and conduct legal research.

DISTINGISHING BETWEEN TYPES OF FACTS

Perhaps the most fundamental problem with the Draft Opinion is its concern for searches of a CMS for "information" generally and without adequately addressing the categories of facts or information. There are categories of information.

The Invitation to Comment on the Draft Opinion at page ii actually recognizes this issue when it states that a CMS can "provide electronic access to case documents, court records, and calendar information, as well as other information created by judicial officers and court staff." (See also California Judges Assn, Judicial Ethics Committee, Opinion 68 at 3-4 [noting existence of "ultimate facts, adjudicative facts, legislative facts, etc."]; ABA Ethics Opinion 478, at 4-5 [similar].)

Setting out at least part of the range of facts or information:

- Adjudicative facts relate to the parties, their activities, their properties, and their business. These are facts that normally go to a jury and are relevant to the merits of a case. ("Ethics of Internet Research of Facts by Trial Judges," California Judges Assn, Judicial Ethics Committee, Opinion 68 at 3-4; "Independent Factual Research by Judges via the Internet," ABA Formal Opinion 478 at 4-5.)
- Facts concerning the administrative interpretation of a statute under *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7-8, must be presented as evidence but concern legal issues and would not normally go to a jury.
- Legislative facts are facts that the court can consider, which relate to society generally and are not based on evidence presented to the court. (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 775 fn 5; *California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 174.)
- Legislative facts are facts that the legislature has found, which can provide a rational basis for legislation. (*Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 510-511.)
- Legislative history consists of facts related to the enactment of legislation, which are subject to judicial notice. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 306 fn 2; *People v. Morales* (2018) 25 Cal.App.5th 502, 511 fn 7.)
- Case management facts and/or court records are facts that relate to the existence, nature, scheduling, and status of cases and do not concern either adjudicative facts or legal issues.

The Draft Opinion does not appear to distinguish between the categories and how they are used. The Draft Opinion at page 6 states that it applies when "a judge may be inclined to look up a party, an attorney, a pending or past proceeding, specific court records, or other information to fill in the gaps in the proceeding, to inform himself or herself about other cases or orders involving the parties, or to satisfy his or her curiosity regarding a party, attorney, or facts or issues related to the matter." (Draft Opinion at 6.) That language is extraordinarily overbroad

because it would set ethical boundaries on when a judge may search a CMS for any type of facts, including even case management facts, and would set boundaries on when a judge can use a CMS as a brief bank to look up legal issues.

This is particularly puzzling when one considers how these strictures should apply to a judge's communications with research attorneys and other staff. The California Code of Judicial Ethics expressly provides that "[a] judge may consult with court personnel or others authorized by law, as long as the communication relates to that person's duty to aid the judge in carrying out the judge's adjudicative responsibilities." (Cal. Code Jud. Ethics, Canon 3(B)(7)(a).) (Compare California Judges Assn, Formal Ethics Opinion No. 77 [communications with persons who work with the court but who are not court staff].) Judicial officers rely on court research attorneys "to aid in assessing the merits of legal contentions and to check the accuracy of parties' citations to the court record." (*People v. Jones* (2014) 2014 WL 3734541 at *8.) Judicial officers rely on courtroom clerks to manage calendars and set dates for CMCs and hearings.

Court staff is not subject to the Canons of Judicial Ethics, but it would be problematic if either court staff had more latitude in using a CMS than judges or if a judge could accomplish indirectly through court staff what the judge could not accomplish directly. Is a judge supposed to direct staff not to communicate information to her outside the scope of what is permitted by the Draft Opinion?

CASE MANAGEMENT

Judges should be able to search a CMS for purposes of case management, which can include looking at both the present case and other cases.

Trial judges have the obligation to actively manage their cases. The Trial Court Delay Reduction Act, Govt Code 68607, states: "judges shall have the responsibility … to actively manage the processing of litigation from commencement to disposition." (See also CRC 3.713(c) ["It is the responsibility of judges to achieve a just and effective resolution of each general civil case through active management and supervision of the pace of litigation from the date of filing to disposition."].)

Trial judges who are assigned to manage complex civil cases have a more specific and emphatic obligation to actively manage their cases. Std Jud Perf., 3.10(a) states, "judicial management should begin early and be applied continuously and actively."

Consistent with their obligation to actively manage cases, it is appropriate for judges to look at a CMS for matters relevant to case management. Frequent scenarios include the following.

Identification of related cases. CRC 3.300 requires the parties to file notices of related cases. Sometimes parties fail to make the required filings and judges learn through other means of cases

that might be related. Judges should be able to look at a CMS for cases that might be related and to then review the case file to determine if they should be related.

Sometimes a party will file a duplicate action concerning or relating to the same cause of action because the party wants to include new causes of action or parties but doesn't know how to amend complaints or request joinder. Other times a party will file a duplicate action because she does not like a decision made in a previously heard case, and is trying to have the matter re-heard by a different judge on the assumption that the new judge will not be aware of the earlier decision. A judge should be ethically permitted to use CMS to identify related cases and to bring them together for efficient management.

The Draft Order at page 10 acknowledges that "a judge can properly search the CMS for a complaint when considering whether to relate two or more cases." The Draft Order then cautions at pages 10-11 that a judge might uncover other information and suggests that searching a CMS for information to assist in determining whether cases are related might ethically compromise a judge. This is a hyper-vigilant approach to a routine case management exercise.

Management of related cases. If cases are related, whether formally or not, judges should be able to look at a CMS to determine the status of a related case for case management purposes. Common examples include:

- A judge in a UD case checking the status and schedule of a Probate, Family, or quiet title case for purposes of determining when ownership issues regarding property will be resolved in the related case.
- A judge in a surplus funds from sale of real property case (Civil Code §2924j) checking persons served in a Probate case to identify potential claimants to the surplus funds.
- A judge in a UD case checking the register of actions for prior UDs concerning the same property to clarify for the judge which 3 or 30 or 60 day notice applies to which case.

If a judge cannot look at related cases in a CMS, then the judge is setting CMC, hearing, and trial dates in ignorance. This can lead to court dates that are set and then continued, which is a waste of time for the judge, clerk, and litigant. (Futures Report at 53 ["There is no disputing that continuances are costly to both parties and the courts"].)

The California Supreme Court can manage related cases by issuing a "grant and hold" order. (CRC 8.512(d)(2); *People v. Orozco* (2018) 24 Cal.App.5th 667, 671.) The Supreme Court is presumably permitted to review its CMS to look at the filings and issues in other cases even if no party filed a notice of related cases.

Consistent orders. If cases are related, whether formally or not, judges should be able to look at a CMS for the purpose of considering similar orders so that the judge can at least know whether she is issuing a consistent order regarding a party. Trial judges hear many cases that cross over different case types. For example, a case arising out of a domestic violence incident may have

emergency actions pending on a Civil Harassment and/or Domestic Violence calendars, an open Family Law action, and a new criminal case or cases (new complaints, as well as probation or parole revocations). A judge hearing any one of these actions should be able to use a CMS to learn the procedural posture of the related cases and to review the orders in those cases so the judge can both schedule future hearings appropriately and issue consistent, or at least not conflicting, orders.

Consolidation. The Court of Appeal consolidates cases on its own motion and is presumably permitted to look at its CMS in making those decisions. (*In re Anthony B.* (1999) 72 Cal.App.4th 1017, 1020 ["on this court's own motion, the appeals in F031048 and F031750 were consolidated"]; *People v. Sanchez* (1987) 190 Cal.App.3d 224, 228 ["Upon this court's own motion, the appeals of appellants Sanchez and Castillo were ordered consolidated"].) Trial courts do not consolidate cases on their own motion, but a judge should be able to review a CMS so the judge can raise the issue of consolidation as part of case management.

Coordination. If cases in different counties appear to share a common issue of fact or law, then the trial court can submit a petition for coordination to the Judicial Council. (CCP §404.) A petition for coordination must state facts showing why the cases are complex and why they should be coordinated. (CCP §404.1.) A judge considering a petition for coordination should be able to use a CMS to review any cases that might be the subject of a petition for coordination.

Status of case in Court of Appeal. If a petition for a writ has been filed in a case, then a trial judge should be able to look at the register of actions in the Court of Appeal to determine the status of the briefing, whether oral argument has been set, and to evaluate when the appellate proceedings are likely to conclude. Tracking proceedings in the Court of Appeal assists in scheduling hearings in the trial court. The prohibition on internet research for "facts" in the Court of Appeal's public CMS should not preclude this effort.

Status of related cases in federal court. If a case has been removed to federal court or has been stayed due to the filing of bankruptcy in federal court, then the trial judge should be able to look at the register of actions in the federal courts to evaluate when the federal proceedings are likely to conclude.

ASSISTING LITIGANTS

Judges should be able to search a CMS for the purpose of assisting litigants.

The California courts are committed to provide access to justice. (Std. Jud. Admin, 10.17(b)(1).) The Futures Report states: "As the neutral adjudicator, the court is not in a position to advise or represent SRLs. However, the court system does have a role in ensuring that SRLs are provided with the knowledge necessary to better represent themselves." (Futures Report at 30.) The Futures Report also states: "Providing critical information and support early in the

process allows outcomes based on the merits unhindered by procedural mistakes." (Futures Report at 32.)

An earlier report by the Judicial Council states that trial judges have "broad discretion to adjust procedures to make sure a self-represented litigant is heard." (Handling Cases Involving Self-Represented Litigants, A Bench Guide for Judicial Officers, Admin Office of the Courts, January 2007, at 3-12.)

It is common for parties unfamiliar with the court system to not know the difference between their various pending matters. The court has the discretion, if not the obligation, to assist these parties. Often the best way to do that is to be able to look up related cases on a CMS and to share that information with the parties. For example, if parties are setting a date for a Family Law hearing, it can assist the parties if the judge looks up pending dates in related criminal matters. Similarly, it can assist the parties if the judge in an unlawful detainer case looks up pending dates in a related probate case.

Even in circumstances where all parties are equally informed as to the existence of related cases, the parties might appear at a hearing without all the calendar information in each of their cases. A judge helps provide access to justice by looking up future dates in a CMS and sharing that information with the parties rather than letting them fend for themselves.

LEGAL RESEARCH

Judges should be able to search a CMS for orders and internal court memoranda that might contain relevant legal analysis.

A court's CMS contains the prior orders of judges in the court and functions as the court's "brief bank." At its most basic, a judge might want to use a prior order in a different case as a template for a new order. In addition, a judge might recall having considered an issue previously or know that another judge had and want to look at those prior orders in different cases to save time conducting research in the current case and to consider whether the judge is taking a consistent position on a legal issue.

Judges are permitted and encouraged to conduct independent legal research. *Giraldo v. Department of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 231, 251, states: "[W]e are certainly not constrained by the authorities cited by the parties … [I]ndependent research is indispensable to an efficient appellate system. … [T]he parties should rest assured we will uncover the applicable law." (*Baglione v. Leue* (1958) 160 Cal.App.2d 731, 736 ["Independent legal research by a court after a case is submitted is sometimes necessary and is to be commended."].) (See also ABA Ethics Opinion No. 478 at 3 ["Judges may conduct legal research beyond the cases and authorities cited or provided by counsel"].)

Judges should be permitted to conduct independent legal research by using a CMS to locate and review briefs and orders in other cases for the purpose of legal research. This is not materially different from the traditional low-tech procedure where one judge asks another judge if the judge has seen the same or a similar issue before and soliciting advice on the legal issue. (Canon 3B(7)(b) ["A judge may consult ... with other judges."].)

Westlaw or Nexis both have California trial court briefs and orders on their databases. It should be immaterial whether a judge conducts legal research on the court's CMS system or on Westlaw or Nexis.

There should be no ethical concerns if a judge reviews another judge's or a court employee's case notes on a legal issue. (Compare Draft Order at 9-10.) Judges and research attorneys conduct legal research on legal issues and may save that research in a CMS. A judge should be able to take advantage of the legal research conducted by her peers even if the research did not end up in an order.

There might be due process concerns if the judge through her independent research identifies new legal issues and bases a decision on the new legal issues without providing the parties with notice and an opportunity to be heard. There is a distinction between a judge citing to new authorities that apply to the issue presented and the judge identifying new issues. (*Giraldo v. Department of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 231, 251.)

If a judge identifies new issues, then the judge could continue a hearing and request supplemental briefing. (*Williams v. Southern California Gas Co.* (2009) 176 Cal.App.4th 591, 601; *Monarch Healthcare v. Superior Court* (2000) 78 Cal.App.4th 1282, 1286.) A judge could also address the due process concerns by informing the parties of the new authorities in the court's tentative decision and providing the opportunity to discuss the authorities at the hearing. (CRC 3.1308.) The due process concern with alerting the parties to a new legal issue should not, however, be confused with the Draft Opinion's ethical concerns about judges using a CMS to assist in legal research generally.

SUPERVISION OF LITIGANTS AND ATTORNEYS

Judges should be able to search a CMS to obtain information relevant to the supervision of litigants and attorneys.

Regarding litigants, a court can declare a person to be a vexatious litigant. (CCP §391 et seq.) A person who is a vexatious litigant directly impacts the operations and procedures of the court and through the use of court resources indirectly imposes financial obligations that directly affect the court's operations.

A court may on its own motion issue an order to show cause why a person should not be declared a vexatious litigant. (*In re Shieh* (1993) 17 Cal.App.4th 1154, 1155.)

For a judge to be able to issue an OSC under CCP §391(b)(1), the judge must be able to review the court's CMS to determine whether a pro se litigant has commenced, prosecuted, or maintained at least five litigations in the prior seven years that have been finally determined adversely to the person. The court is powerless to set an OSC under CCP §391(b)(1) without the ability to review the CMS.

For a judge to be able to issue an OSC under CCP §391(b)(3), the judge must be able to review the court's CMS to determine whether a pro se litigant has "repeatedly file[d] unmeritorious motions, pleadings, or other papers, conduct[ed] unnecessary discovery, or engage[d] in other tactics that are frivolous or solely intended to cause unnecessary delay." The court can make a vexatious litigant finding based in "repeated" unmeritorious motions both in the pending case and in other cases. (*In re Natural Gas Antitrust Cases* (2006) 137 Cal.App.4th 387, 398; *In re Luckett* (1991) 232 Cal.App.3d 107, 109.) The court is restricted in its ability to set an OSC under CCP §391(b)(3) without the ability to review the CMS to identify unmeritorious motions in other cases.

An example of an OSC under CCP §391(b)(3) is *California State Automobile Ass'n v. al-Hakim*, Alameda County Case No C-811337, Order to Show Cause dated 2/28/19. The judge reviewed the CMS for filings in the pending case and in four other cases. The judge's OSC identified what appeared to be a pattern of filing unmeritorious challenges for cause under CCP §170.1 before almost every hearing in all five cases.

Regarding counsel, trial courts can "sanction attorneys for improper conduct [and] control the proceedings before them to prevent injustice." (*Sheller v. Superior Court* (2008) 158 Cal.App.4th 1697, 1710.) Consistent with this authority, the court should be able to use a CMS to investigate whether an attorney is mis-using or abusing the judicial system.

An example where court searched its own CMS for the purpose of supervising counsel is *Brookwood Loans of California v. Griffin*, Alameda Case No. RG14-748102, Order dated 10/15/15. The judge's OSC identified multiple cases in which an attorney had filed proofs of service stating that a process server had served documents in different locations at the same time.

COURT ADMINISTRATION

The presiding judge is responsible for the administration of all the cases in a court. (CRC 10.603.) The presiding judge "should take an active role in advancing the goals of delay reduction." (Std Jud Perf 2.1(c).)

The presiding judge must supervise the judges and the court staff. (CRC 10.603(a) and (c)(4).) The presiding judge must use the CMS to monitor judicial caseloads, review complaints against judicial officers, and perform the various administrative roles required of a court manager.

The presiding judge must specifically "supervise and monitor the number of causes under submission before the judges of the court and ensure that no cause under submission remains

undecided and pending for longer than 90 days." (CRC 10.603(c)(3).) The presiding judge must use a CMS to both to collect data on how long motions have been under submission and to look at the register of actions in specific cases to determine why motions might be under submission. (California Judges Assn, Formal Ethics Opinion No. 77 at V.A.7 on 5 [example where "PJ discovered a new violation and determined that several cases under submission for more than ninety days had unsigned orders"].)

All of the above tasks may in some courts be delegated to a supervising judge for a courthouse or area of law, in which case these supervising judges have the same need to use the CMS to discharge their responsibilities.

REMEDY WHEN A JUDGE SEARCHES/SEES NON-ADJUDICATIVE FACTS IN A CMS

A judge should not have to disqualify or disclose if she has searched a CMS for and/or found non-adjudicative facts.

There are two ethical concerns with a judge doing independent investigation: impartiality (Canon 2A) and reliance on factual information that is not in the record (Canon 3B(7) and (7)(a)). These are consistent with the Constitutional interests in separating the prosecutorial and adjudicative functions, which are neutrality and record exclusivity. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1, 10-11.)

The ethical concerns about impartiality and record exclusivity should not be present simply because a judge used a CMS to search for and obtain case management facts or to conduct legal research and the judge is now managing the case, hearing a motion, or conducting a trial.

Looking at impartiality, a reasonable member of the public would not fairly entertain a doubt about a judge's impartiality simply because the judge took the initiative to obtain case management facts about the case from the court's CMS in the process of managing the case. (*Wechsler v. Superior Court* (2014) 224 Cal.App.4th 384, 391.)

The Draft Opinion at page 13 cites several cases for the proposition that judges should not initiate independent investigations into adjudicative facts. (*Catchpole v. Brannon* (1995) 36 Cal.App.4th 237, 259 fn 9 [judge took judicial notice of the rainfall on the days in question "and used the putative discrepancy between this fact and appellant's testimony as a reason to question her overall credibility"]; *People v. Handcock* (1983) 145 Cal.App.3d Supp. 25, 28 [judge went to car dealer mid-trial, obtained replacement part, and called dealer employee to testify to jury]; Public Admonishment of Judge Connolly (2016) at 2-4 [Judge setting OSC re contempt for attorney sought court records regarding alleged contempt by same attorney in another court]; Public Admonishment of Commissioner Friedlander (2010) at 10-11 [Commissioner looked at respondent's divorce file and other files of parties before hearing on civil restraining order].) All of these cases concern a judge obtaining adjudicative facts for resolution of disputed issues of fact. None of those cases address a judge's consideration of non-adjudicative facts for case management purposes.

There is a distinction between a judge who considers case management facts for case management purposes and who later makes decisions about disputed facts in the case and a judge who independently investigates adjudicative facts. The former is simply serving different judicial functions at different times. The latter is stepping outside the neutral judicial role and is plausibly embroiled.

The use of a CMS for case management and legal research purposes is such a common part of a judge's job that requiring disqualification would be debilitating to the single assignment of cases.

California Judges Assn Ethics Formal Opinion No. 2015-17 suggests that disqualification should not be required. This opinion concerns "[i]s 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?" The Formal Opinion reasons that disqualification is required only where the prior participation in a case was "active participation." The Formal Opinion concludes that disqualification for any participation is not required because "[t]o conclude otherwise would impede the administration of justice where there is no reason to doubt impartiality, contrary to the purposes of the disqualification statutes."

Similarly, keeping track of all uses of a CMS for case management facts and making all such disclosures would be unduly time consuming and produce little resulting benefit to judicial integrity. The Draft Opinion states at page 12 that a judge must disclose any review of any facts in a CMS that are not in the record of the case at issue.

California Judges Assn Ethics Opinion No. 45, Section III.J, suggests that disclosures should not be required. Ethics Opinion 45 states: "[A] Judge need not disclose or disqualify merely because an attorney has appeared often before the judge even when the judge holds that attorney in high esteem, provided the judge believes self not to be prejudiced for or against anyone in the case. If the rule were otherwise, it would simply be impossible for an experienced, well-known judge to get through a lengthy calendar."

ADJUDICATIVE FACTS

A judge cannot use a CMS to conduct an independent investigation regarding adjudicative facts.

The Draft Opinion focuses on ethical issues particular to adjudicative facts. In considering exceptions to the rule, the Draft Opinion focuses on the ability of a court to take judicial notice of adjudicative facts not in the evidentiary record. (Draft Opinion, at 8-11.)

The Draft Opinion acknowledges that a judge can take judicial notice of court records when considering issues of claim preclusion and issue preclusion. (Draft Opinion at 9.) This is relevant to the ethical question because Evidence Code §452(d) expressly permits judicial notice of court records and a judge who uses the Evidence Code 453 procedure eliminates the concern with record exclusivity and due process. The ability to take judicial notice does not, however,

address whether judicial initiative in sua sponte taking judicial notice suggests a lack of neutrality.

The cases cited in the Draft Opinion are not relevant for the issue of whether the court can sua sponte take judicial notice of court records. *In Planning & Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 225, it is unclear whether the court sua sponte took judicial notice or whether a party requested the court to take judicial notice. In *Western Mutual Ins. Co. v. Yamamoto* (1994) 29 Cal.App.4th 1474, 1485 fn 3, the record was similar and, in addition, the court stated, "we need not determine whether the trial court erred in taking judicial notice of the 'entire' juvenile court file."

REMEDY WHEN A JUDGE SEARCHES/SEES ADJUDICATIVE FACTS IN A CMS

Whether a judge should have to disqualify, disclose, or permit supplemental briefing if she has searched a CMS for and/or found adjudicative facts should depend on the circumstances. As noted above, there are distinctions between and among concerns about a judge's impartiality (which is an ethics issue), concerns about a judge's awareness of facts outside the record (which is an evidence issue), and concerns about a judge's reliance on facts outside the record (which is a due process issue).

Looking at impartiality, a reasonable member of the public could fairly entertain a doubt about a judge's impartiality if the judge took the initiative to obtain adjudicative facts and it might appear to be for the purpose of resolving a fact issue in favor of a particular party. (*Wechsler v. Superior Court* (2014) 224 Cal.App.4th 384, 391.) (See also Draft Opinion at 13 [cases where judges investigated adjudicative facts].)

A judge can, however, lawfully investigate adjudicative facts on the record by calling and questioning witnesses at trial. (Evid Code §775.) "[T]he court has a duty to see that justice is done and to bring out facts relevant to the jury's determination. … "[I]t is not merely the right but the duty of a trial judge to see that the evidence is fully developed before the trier of fact." (*People v. Abel* (2012) 53 Cal.4th 891, 917.) (See also *People v. Handcock* (1983) 145 Cal.App.3d Supp. 25, 29 fn 2 [collecting law].) Given the ability of judges to call and question witnesses, the concern with a judge searching a CMS for adjudicatory facts is perhaps more a concern with transparency than a concern with lack of neutrality.

Looking at a judge's awareness of facts outside the record (record exclusivity), a reasonable member of the public would not entertain a doubt about a judge's impartiality if the judge had information that was not in the evidentiary record.

A judge who is single assigned to a case might learn information about the parties, the attorneys, and the facts of the case in the context of case management and discovery motions. If the case proceeds to a court trial, however, the judge will decide the case based only on the evidence that is admitted at trial. (*Gimbel v. Laramie* (1960) 181 Cal.App.2d 77, 84, 85 ["…the mere fact that

the judge knew of the criminal trial of the doctor and his two years' suspension of license standing alone is not a ground for a mistrial, a new trial, or a reversal of the judgment. From the very nature of the office he occupies and of the judicial processes a judge is required to divorce from his mind many inadmissible matters which are inevitably brought to light during the course of a trial."].)

A judge conducting a court trial can be presented with evidence, the opposition can object, the judge can then look at the evidence and consider if the evidence is admissible, sustain the objection to the evidence, and then proceed with the trial as though the judge had not seen the evidence. That is not unusual.

Judges are routinely expected to partition off information they know and make decisions only on admissible information. The implicit concern is more the lack of transparency about what adjudicative facts the judge knows and is not considering than the fact that the judge knows the off-the-record adjudicative facts in the first place.

The Draft Opinion is inconsistent with the law that judges can be aware of facts but set them aside when they evaluating the evidence in a case. By way of analogy, a judge can have friends in the legal community but still be impartial when she is on the bench. In *People v. Carter* (2005) 36 Cal.4th 1215, 1240-1245, the court rejected the defendant's claims that a trial judge's act of officiating at the prosecutor's daughter's wedding several months before the commencement of a death penalty trial created an appearance of partiality. (See also *Wechsler v. Superior Court* (2014) 224 Cal.App.4th 384 [Court commissioner could preside over dissolution of marriage proceeding after agreeing to officiate at wedding of wife's counsel].) If these personal connections do not raise a doubt about a judge's impartiality, then it is difficult to see how a judge's use of a CMS and the awareness of information obtained in a judicial capacity for judicial purposes would raise a doubt about a judge's partiality.

The Draft Opinion does not cite to CJA Ethics Update 1997 at D, which takes an interesting approach to what a judge should do if she becomes aware of adjudicatory facts outside the record. The CJA Ethics Update 1997 states: "A judge who learns of facts from the court's computer system which may be useful to one side or the other in an ongoing trial should disclose this information to all parties in the trial. Canon 3B(7)."

If the "ongoing trial" were a bench trial, then this makes sense if the facts are adjudicative facts and the judge planned to rely on the facts. If, however, the judge decided to ignore the facts from the court's computer system and limit herself to information in the evidentiary record, then that would be equivalent to the judge sustaining her own objection to the information, and it would be arguably unnecessary to disclose that the judge knows excluded adjudicative facts.

If the "ongoing trial" were a jury trial, then the required disclosure appears to make little sense because if the judge said nothing, then the parties would simply present their evidence to the trier of fact without regard to what the judge knew. Disclosing the information to the parties at trial

would arguably be an improper implicit suggestion that one party or the other should present the information to the jury. Alternatively, disclosing the information might consistent with a judge's ability to call and question witnesses at trial. (Evid Code §775.) This comment is of the opinion that CJA Ethics Update 1997 at D provides questionable guidance.

Looking at a judge's reliance on facts outside the record, a judge who through a CMS learns adjudicative facts must not consider that information unless either a party formally presents the facts as evidence on the merits of a motion or at trial or the court notifies the parties that it plans to consider the facts. (CJA Ethics Opinion No 68 at II.B.12 at 8 [judge who has seen an adjudicative fact in a CMS and plans to rely on it must give notice to the parties of intent to do so].) (See also *Monarch Healthcare v. Superior Court* (2000) 78 Cal.App.4th 1282, 1286.)

LIMITATION OF DRAFT OPINION TO NON-CRIMINAL MATTERS

The Draft Opinion applies only to a "non-criminal matter."

On the level of principle, the Code of Judicial Ethics appears to apply uniformly and without regard to whether a judge is assigned to a civil, criminal, family, or juvenile matter. The integrity of the judiciary might suffer if the ethical responsibilities of judges varied depending on their specific case assignments.

On the level of practicality, there can be little difference between a hearing on a Domestic Violence Restraining Order and a hearing relating to criminal charges related to domestic violence. It would be peculiar if a judge hearing the former could not use case management facts in a CMS to coordinate scheduling but a judge in the latter could do so.

The issues of principle and practicality are presented in the Draft Opinion at page 10, which cautions that "[i]f the judge [on a civil matter] performs a term search of the CMS using a party's name to determine whether there are other matters that also should be related, the judge could uncover … a party's criminal history, which is very unlikely to be the proper subject of judicial notice." If a judge hearing a civil matter should be concerned about inadvertently finding a party's criminal history, then a judge hearing a criminal matter should be similarly concerned about inadvertently finding a party's family law, restraining order, or unlawful detainer history.

The commenters suggest that the Committee consider how the proposed ethical limits on the use of a CMS would affect the case management of civil, criminal, family, and juvenile matters.

CONCLUSION

We ask that the CJEO withdraw and reconsider Draft Opinion 2019-014. The Draft Opinion does not distinguish between adjudicative facts, case management facts, or legal research. The Draft Opinion does not consider the myriad ways that trial judges can properly use a CMS to find case management facts to assist in managing cases. It also raises a host of issues regarding how judges should interact with legal research attorneys and staff. In its current form, the Draft

Opinion is overbroad and would result in the rigid compartmentalization of case information, which would restrict and impair effective case management, legal research, supervision of litigants and attorneys, and court administration.

Very truly yours,

Hon. Wynne S. Carvill
Presiding Judge
Alameda County Superior Court

Hon. Tara M. Desautels
Assistant Presiding Judge
Alameda County Superior Court

Chad Finke
Court Executive Officer
Alameda Superior Court

Comment 13:

Submitted by: Superior Court of California, County of Monterey

Received on: May 8, 2019

Confidentiality Waived

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MONTEREY
240 Church Street, Salinas, California 93901 - (831) 775-5400
www.monterey.courts.ca.gov

LYDIA M. VILLARREAL
Presiding Judge
2018 - 2020

JULIE R. CULVER
Asst. Presiding Judge

CHRIS RUHL
Court Executive Officer

May 8, 2019

Nancy A. Black, Committee Counsel
The Supreme Court of California
Committee on Judicial Ethics Opinions
350 McAllister Street
San Francisco, CA 94102
Judicial.ethics@jud.ca.gov

RE: Public Comments on CJEO Draft Formal Opinion 2019-014

Dear Ms. Black:

Please accept our public comment to Committee on Judicial Ethics Opinions ("CJEO") Draft Formal Opinion 2019-014 concerning a judge's ability to search a court's electronic case management system ("CMS") for records pertaining to a matter before the judge.

We wholeheartedly concur with all of the public comments submitted to you by Presiding Judge Wynne S. Carvill and Assistant Presiding Judge Tara M. Desautels of the Alameda County Superior Court in their letter of May 1, 2019, a copy of which is attached hereto. Their comments are very thorough and well reasoned and we too ask that the CJEO withdraw and reconsider Draft Opinion 2019-014.

Respectfully,

Hon. Lydia M. Villarreal, Presiding Judge

Hon. Julie R. Culver, Assistant Presiding Judge

Hon. Larry E. Hayes

Hon. Susan J. Matcham

Hon. Sam Lavorato, Jr.

Hon. Carrie M. Panetta

Hon. Thomas W. Wills

Hon. Stephanie E. Hulsey

Hon. Mark E. Hood

Hon. Rafael Vazquez

Hon. Robert A. Burlison

Hon. Heidi K. Whilden

Hon. Andrew G. Liu

Hon. Elisabeth K. Mineta

Hon. Timothy P. Roberts

Hon. Marla O. Anderson

Hon. Vanessa W. Vallarta

Hon. Pamela L. Butler

Hon. Efren N. Iglesia

Hon. Diana C. Baker

Hon. Christopher R. Martin

Hon. Katherine E. Stoner

Chris Ruhl, CEO

Attachments Enclosed

Januarv

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

CHAMBERS OF
WYNNE S. CARVILL
Presiding Judge
Department 1

René C. Davidson Courthouse
1225 Fallon Street
Oakland, CA 94612

May 1, 2019

Ms. Nancy A. Black, Committee Counsel
The Supreme Court of California
Committee on Judicial Ethics Opinions
350 McAllister Street
San Francisco, California 94102
(Judicial.Ethics@jud.ca.gov)

Re: Public Comments on CJEO Draft Formal Opinion 2019-014

Dear Ms. Black:

We write to offer public comment to Committee on Judicial Ethics Opinions ("CJEO") Draft Formal Opinion 2019-014 (the "Draft Opinion") concerning a judge's ability to search a court's electronic case management system ("CMS") for records pertaining to a matter before the judge.

The Draft Opinion sets out a broad ethical constraint on the use of a CMS to address the important, but narrow, ethical concern that judges might use a CMS to obtain and then consider adjudicative facts that are not in the record for purposes of resolving fact issues. While that is a bona fide concern, the opinion is overbroad, confusing, and overly restrictive. The Draft Opinion is also contrary to several objectives set forth in the Report to the Chief Justice of the Commission on the Future of California's Court System ("Futures Report") and does not consider and account for the numerous legitimate and unexceptional reasons why a judge would search a CMS. Specifically:

- The Draft Opinion does not distinguish adjudicative facts, case management facts, legal research, court records, and other types of information.
- The Draft Opinion does not consider that judicial initiative in looking for and using case management facts about cases is permitted, appropriate, and to be encouraged.
- The Draft Opinion does not consider that judges can properly use case management facts and court records in a CMS for case management, assisting litigants, supervision of litigants and attorneys, and court administration.

- The Draft Opinion does not consider that a CMS is a court's "brief bank" and that judges can properly use it for legal research.
- The Draft Opinion does not distinguish between the particular knowledge of an individual judge and the collective knowledge of the judges in the court. A CMS is in part a high-tech means for judges to exchange case management facts about cases, and there is no prohibition on judges sharing information other than adjudicative facts. (Canon 3B(7)(b) ["A judge may consult ... with other judges"].)
- The Draft Opinion does not adequately distinguish between concerns about a judge's impartiality (which is an ethics issue), concerns about a judge's awareness of facts outside the record (which is an evidence issue), and concerns about a judge's reliance on facts outside the record (which is a due process issue).

The Draft Opinion has no explanation why it is limited to non-criminal matters. The Code of Judicial Ethics does not distinguish between criminal and non-criminal matters.

For these reasons, which are set forth in greater detail below, we ask that the CJEO withdraw and reconsider Draft Opinion 2019-014.

THE DRAFT OPINION

CJEO Draft Formal Opinion 2019-014 addressed the question of whether "[i]n a non-criminal matter, may a judge search the court's case management system for information regarding a party, attorney, or facts relevant to the matter before the judge?" (Draft Opinion at 1.)

The draft opinion advises that Canon 3B(7) of the California Code of Judicial Ethics, which prohibits independent investigation of facts in a proceeding absent limited exceptions, extends to a judge's use of a CMS. The draft opinion concludes that a judge may only search a CMS in limited instances when a search is authorized by law and the search results may be properly judicially noticed. (Draft Opinion at 2.)

The Draft Opinion suggests that a judge should use a CMS only to review documents in a case that has been assigned to her. Although the Draft Opinion has qualifiers and exceptions, the final conclusion is, "[t]he committee cautions against performing a CMS search regarding a party, attorney, or other information that may be relevant to the matter before the judge. A judge may conduct an independent investigation of a court's CMS only if the search is authorized by law or if the judge is certain that all of the search results may be properly judicially noticed." (Draft Opinion at 14.)

The Draft Opinion's conclusion that a trial judge must have "certainty" that "all" search results would result in judicially noticeable information would deter trial judges from using a CMS in the myriad ways that judges can and should use a CMS to manage cases and conduct legal research.

DISTINGISHING BETWEEN TYPES OF FACTS

Perhaps the most fundamental problem with the Draft Opinion is its concern for searches of a CMS for "information" generally and without adequately addressing the categories of facts or information. There are categories of information.

The Invitation to Comment on the Draft Opinion at page ii actually recognizes this issue when it states that a CMS can "provide electronic access to case documents, court records, and calendar information, as well as other information created by judicial officers and court staff." (See also California Judges Assn, Judicial Ethics Committee, Opinion 68 at 3-4 [noting existence of "ultimate facts, adjudicative facts, legislative facts, etc."]; ABA Ethics Opinion 478, at 4-5 [similar].)

Setting out at least part of the range of facts or information:

- Adjudicative facts relate to the parties, their activities, their properties, and their business. These are facts that normally go to a jury and are relevant to the merits of a case. ("Ethics of Internet Research of Facts by Trial Judges," California Judges Assn, Judicial Ethics Committee, Opinion 68 at 3-4; "Independent Factual Research by Judges via the Internet," ABA Formal Opinion 478 at 4-5.)
- Facts concerning the administrative interpretation of a statute under *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7-8, must be presented as evidence but concern legal issues and would not normally go to a jury.
- Legislative facts are facts that the court can consider, which relate to society generally and are not based on evidence presented to the court. (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 775 fn 5; *California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 174.)
- Legislative facts are facts that the legislature has found, which can provide a rational basis for legislation. (*Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 510-511.)
- Legislative history consists of facts related to the enactment of legislation, which are subject to judicial notice. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 306 fn 2; *People v. Morales* (2018) 25 Cal.App.5th 502, 511 fn 7.)
- Case management facts and/or court records are facts that relate to the existence, nature, scheduling, and status of cases and do not concern either adjudicative facts or legal issues.

The Draft Opinion does not appear to distinguish between the categories and how they are used. The Draft Opinion at page 6 states that it applies when "a judge may be inclined to look up a party, an attorney, a pending or past proceeding, specific court records, or other information to fill in the gaps in the proceeding, to inform himself or herself about other cases or orders involving the parties, or to satisfy his or her curiosity regarding a party, attorney, or facts or issues related to the matter." (Draft Opinion at 6.) That language is extraordinarily overbroad

because it would set ethical boundaries on when a judge may search a CMS for any type of facts, including even case management facts, and would set boundaries on when a judge can use a CMS as a brief bank to look up legal issues.

This is particularly puzzling when one considers how these strictures should apply to a judge's communications with research attorneys and other staff. The California Code of Judicial Ethics expressly provides that "[a] judge may consult with court personnel or others authorized by law, as long as the communication relates to that person's duty to aid the judge in carrying out the judge's adjudicative responsibilities." (Cal. Code Jud. Ethics, Canon 3(B)(7)(a).) (Compare California Judges Assn, Formal Ethics Opinion No. 77 [communications with persons who work with the court but who are not court staff].) Judicial officers rely on court research attorneys "to aid in assessing the merits of legal contentions and to check the accuracy of parties' citations to the court record." (*People v. Jones* (2014) 2014 WL 3734541 at *8.) Judicial officers rely on courtroom clerks to manage calendars and set dates for CMCs and hearings.

Court staff is not subject to the Canons of Judicial Ethics, but it would be problematic if either court staff had more latitude in using a CMS than judges or if a judge could accomplish indirectly through court staff what the judge could not accomplish directly. Is a judge supposed to direct staff not to communicate information to her outside the scope of what is permitted by the Draft Opinion?

CASE MANAGEMENT

Judges should be able to search a CMS for purposes of case management, which can include looking at both the present case and other cases.

Trial judges have the obligation to actively manage their cases. The Trial Court Delay Reduction Act, Govt Code 68607, states: "judges shall have the responsibility … to actively manage the processing of litigation from commencement to disposition." (See also CRC 3.713(c) ["It is the responsibility of judges to achieve a just and effective resolution of each general civil case through active management and supervision of the pace of litigation from the date of filing to disposition."].)

Trial judges who are assigned to manage complex civil cases have a more specific and emphatic obligation to actively manage their cases. Std Jud Perf., 3.10(a) states, "judicial management should begin early and be applied continuously and actively."

Consistent with their obligation to actively manage cases, it is appropriate for judges to look at a CMS for matters relevant to case management. Frequent scenarios include the following.

Identification of related cases. CRC 3.300 requires the parties to file notices of related cases. Sometimes parties fail to make the required filings and judges learn through other means of cases

that might be related. Judges should be able to look at a CMS for cases that might be related and to then review the case file to determine if they should be related.

Sometimes a party will file a duplicate action concerning or relating to the same cause of action because the party wants to include new causes of action or parties but doesn't know how to amend complaints or request joinder. Other times a party will file a duplicate action because she does not like a decision made in a previously heard case, and is trying to have the matter re-heard by a different judge on the assumption that the new judge will not be aware of the earlier decision. A judge should be ethically permitted to use CMS to identify related cases and to bring them together for efficient management.

The Draft Order at page 10 acknowledges that "a judge can properly search the CMS for a complaint when considering whether to relate two or more cases." The Draft Order then cautions at pages 10-11 that a judge might uncover other information and suggests that searching a CMS for information to assist in determining whether cases are related might ethically compromise a judge. This is a hyper-vigilant approach to a routine case management exercise.

Management of related cases. If cases are related, whether formally or not, judges should be able to look at a CMS to determine the status of a related case for case management purposes. Common examples include:

- A judge in a UD case checking the status and schedule of a Probate, Family, or quiet title case for purposes of determining when ownership issues regarding property will be resolved in the related case.
- A judge in a surplus funds from sale of real property case (Civil Code §2924j) checking persons served in a Probate case to identify potential claimants to the surplus funds.
- A judge in a UD case checking the register of actions for prior UDs concerning the same property to clarify for the judge which 3 or 30 or 60 day notice applies to which case.

If a judge cannot look at related cases in a CMS, then the judge is setting CMC, hearing, and trial dates in ignorance. This can lead to court dates that are set and then continued, which is a waste of time for the judge, clerk, and litigant. (Futures Report at 53 ["There is no disputing that continuances are costly to both parties and the courts"].)

The California Supreme Court can manage related cases by issuing a "grant and hold" order. (CRC 8.512(d)(2); *People v. Orozco* (2018) 24 Cal.App.5th 667, 671.) The Supreme Court is presumably permitted to review its CMS to look at the filings and issues in other cases even if no party filed a notice of related cases.

Consistent orders. If cases are related, whether formally or not, judges should be able to look at a CMS for the purpose of considering similar orders so that the judge can at least know whether she is issuing a consistent order regarding a party. Trial judges hear many cases that cross over different case types. For example, a case arising out of a domestic violence incident may have

emergency actions pending on a Civil Harassment and/or Domestic Violence calendars, an open Family Law action, and a new criminal case or cases (new complaints, as well as probation or parole revocations). A judge hearing any one of these actions should be able to use a CMS to learn the procedural posture of the related cases and to review the orders in those cases so the judge can both schedule future hearings appropriately and issue consistent, or at least not conflicting, orders.

Consolidation. The Court of Appeal consolidates cases on its own motion and is presumably permitted to look at its CMS in making those decisions. (*In re Anthony B.* (1999) 72 Cal.App.4th 1017, 1020 ["on this court's own motion, the appeals in F031048 and F031750 were consolidated"]; *People v. Sanchez* (1987) 190 Cal.App.3d 224, 228 ["Upon this court's own motion, the appeals of appellants Sanchez and Castillo were ordered consolidated"].) Trial courts do not consolidate cases on their own motion, but a judge should be able to review a CMS so the judge can raise the issue of consolidation as part of case management.

Coordination. If cases in different counties appear to share a common issue of fact or law, then the trial court can submit a petition for coordination to the Judicial Council. (CCP §404.) A petition for coordination must state facts showing why the cases are complex and why they should be coordinated. (CCP §404.1.) A judge considering a petition for coordination should be able to use a CMS to review any cases that might be the subject of a petition for coordination.

Status of case in Court of Appeal. If a petition for a writ has been filed in a case, then a trial judge should be able to look at the register of actions in the Court of Appeal to determine the status of the briefing, whether oral argument has been set, and to evaluate when the appellate proceedings are likely to conclude. Tracking proceedings in the Court of Appeal assists in scheduling hearings in the trial court. The prohibition on internet research for "facts" in the Court of Appeal's public CMS should not preclude this effort.

Status of related cases in federal court. If a case has been removed to federal court or has been stayed due to the filing of bankruptcy in federal court, then the trial judge should be able to look at the register of actions in the federal courts to evaluate when the federal proceedings are likely to conclude.

ASSISTING LITIGANTS

Judges should be able to search a CMS for the purpose of assisting litigants.

The California courts are committed to provide access to justice. (Std. Jud. Admin, 10.17(b)(1).) The Futures Report states: "As the neutral adjudicator, the court is not in a position to advise or represent SRLs. However, the court system does have a role in ensuring that SRLs are provided with the knowledge necessary to better represent themselves." (Futures Report at 30.) The Futures Report also states: "Providing critical information and support early in the

process allows outcomes based on the merits unhindered by procedural mistakes." (Futures Report at 32.)

An earlier report by the Judicial Council states that trial judges have "broad discretion to adjust procedures to make sure a self-represented litigant is heard." (Handling Cases Involving Self-Represented Litigants, A Bench Guide for Judicial Officers, Admin Office of the Courts, January 2007, at 3-12.)

It is common for parties unfamiliar with the court system to not know the difference between their various pending matters. The court has the discretion, if not the obligation, to assist these parties. Often the best way to do that is to be able to look up related cases on a CMS and to share that information with the parties. For example, if parties are setting a date for a Family Law hearing, it can assist the parties if the judge looks up pending dates in related criminal matters. Similarly, it can assist the parties if the judge in an unlawful detainer case looks up pending dates in a related probate case.

Even in circumstances where all parties are equally informed as to the existence of related cases, the parties might appear at a hearing without all the calendar information in each of their cases. A judge helps provide access to justice by looking up future dates in a CMS and sharing that information with the parties rather than letting them fend for themselves.

LEGAL RESEARCH

Judges should be able to search a CMS for orders and internal court memoranda that might contain relevant legal analysis.

A court's CMS contains the prior orders of judges in the court and functions as the court's "brief bank." At its most basic, a judge might want to use a prior order in a different case as a template for a new order. In addition, a judge might recall having considered an issue previously or know that another judge had and want to look at those prior orders in different cases to save time conducting research in the current case and to consider whether the judge is taking a consistent position on a legal issue.

Judges are permitted and encouraged to conduct independent legal research. *Giraldo v. Department of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 231, 251, states: "[W]e are certainly not constrained by the authorities cited by the parties … [I]ndependent research is indispensable to an efficient appellate system. … [T]he parties should rest assured we will uncover the applicable law." (*Baglione v. Leue* (1958) 160 Cal.App.2d 731, 736 ["Independent legal research by a court after a case is submitted is sometimes necessary and is to be commended."].) (See also ABA Ethics Opinion No. 478 at 3 ["Judges may conduct legal research beyond the cases and authorities cited or provided by counsel"].)

Judges should be permitted to conduct independent legal research by using a CMS to locate and review briefs and orders in other cases for the purpose of legal research. This is not materially different from the traditional low-tech procedure where one judge asks another judge if the judge has seen the same or a similar issue before and soliciting advice on the legal issue. (Canon 3B(7)(b) ["A judge may consult ... with other judges."].)

Westlaw or Nexis both have California trial court briefs and orders on their databases. It should be immaterial whether a judge conducts legal research on the court's CMS system or on Westlaw or Nexis.

There should be no ethical concerns if a judge reviews another judge's or a court employee's case notes on a legal issue. (Compare Draft Order at 9-10.) Judges and research attorneys conduct legal research on legal issues and may save that research in a CMS. A judge should be able to take advantage of the legal research conducted by her peers even if the research did not end up in an order.

There might be due process concerns if the judge through her independent research identifies new legal issues and bases a decision on the new legal issues without providing the parties with notice and an opportunity to be heard. There is a distinction between a judge citing to new authorities that apply to the issue presented and the judge identifying new issues. (*Giraldo v. Department of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 231, 251.)

If a judge identifies new issues, then the judge could continue a hearing and request supplemental briefing. (*Williams v. Southern California Gas Co.* (2009) 176 Cal.App.4th 591, 601; *Monarch Healthcare v. Superior Court* (2000) 78 Cal.App.4th 1282, 1286.) A judge could also address the due process concerns by informing the parties of the new authorities in the court's tentative decision and providing the opportunity to discuss the authorities at the hearing. (CRC 3.1308.) The due process concern with alerting the parties to a new legal issue should not, however, be confused with the Draft Opinion's ethical concerns about judges using a CMS to assist in legal research generally.

SUPERVISION OF LITIGANTS AND ATTORNEYS

Judges should be able to search a CMS to obtain information relevant to the supervision of litigants and attorneys.

Regarding litigants, a court can declare a person to be a vexatious litigant. (CCP §391 et seq.) A person who is a vexatious litigant directly impacts the operations and procedures of the court and through the use of court resources indirectly imposes financial obligations that directly affect the court's operations.

A court may on its own motion issue an order to show cause why a person should not be declared a vexatious litigant. (*In re Shieh* (1993) 17 Cal.App.4th 1154, 1155.)

For a judge to be able to issue an OSC under CCP §391(b)(1), the judge must be able to review the court's CMS to determine whether a pro se litigant has commenced, prosecuted, or maintained at least five litigations in the prior seven years that have been finally determined adversely to the person. The court is powerless to set an OSC under CCP §391(b)(1) without the ability to review the CMS.

For a judge to be able to issue an OSC under CCP §391(b)(3), the judge must be able to review the court's CMS to determine whether a pro se litigant has "repeatedly file[d] unmeritorious motions, pleadings, or other papers, conduct[ed] unnecessary discovery, or engage[d] in other tactics that are frivolous or solely intended to cause unnecessary delay." The court can make a vexatious litigant finding based in "repeated" unmeritorious motions both in the pending case and in other cases. (*In re Natural Gas Antitrust Cases* (2006) 137 Cal.App.4th 387, 398; *In re Luckett* (1991) 232 Cal.App.3d 107, 109.) The court is restricted in its ability to set an OSC under CCP §391(b)(3) without the ability to review the CMS to identify unmeritorious motions in other cases.

An example of an OSC under CCP §391(b)(3) is *California State Automobile Ass'n v. al-Hakim*, Alameda County Case No C-811337, Order to Show Cause dated 2/28/19. The judge reviewed the CMS for filings in the pending case and in four other cases. The judge's OSC identified what appeared to be a pattern of filing unmeritorious challenges for cause under CCP §170.1 before almost every hearing in all five cases.

Regarding counsel, trial courts can "sanction attorneys for improper conduct [and] control the proceedings before them to prevent injustice." (*Sheller v. Superior Court* (2008) 158 Cal.App.4th 1697, 1710.) Consistent with this authority, the court should be able to use a CMS to investigate whether an attorney is mis-using or abusing the judicial system.

An example where court searched its own CMS for the purpose of supervising counsel is *Brookwood Loans of California v. Griffin*, Alameda Case No. RG14-748102, Order dated 10/15/15. The judge's OSC identified multiple cases in which an attorney had filed proofs of service stating that a process server had served documents in different locations at the same time.

COURT ADMINISTRATION

The presiding judge is responsible for the administration of all the cases in a court. (CRC 10.603.) The presiding judge "should take an active role in advancing the goals of delay reduction." (Std Jud Perf 2.1(c).)

The presiding judge must supervise the judges and the court staff. (CRC 10.603(a) and (c)(4).) The presiding judge must use the CMS to monitor judicial caseloads, review complaints against judicial officers, and perform the various administrative roles required of a court manager.

The presiding judge must specifically "supervise and monitor the number of causes under submission before the judges of the court and ensure that no cause under submission remains

undecided and pending for longer than 90 days." (CRC 10.603(c)(3).) The presiding judge must use a CMS to both to collect data on how long motions have been under submission and to look at the register of actions in specific cases to determine why motions might be under submission. (California Judges Assn, Formal Ethics Opinion No. 77 at V.A.7 on 5 [example where "PJ discovered a new violation and determined that several cases under submission for more than ninety days had unsigned orders"].)

All of the above tasks may in some courts be delegated to a supervising judge for a courthouse or area of law, in which case these supervising judges have the same need to use the CMS to discharge their responsibilities.

REMEDY WHEN A JUDGE SEARCHES/SEES NON-ADJUDICATIVE FACTS IN A CMS

A judge should not have to disqualify or disclose if she has searched a CMS for and/or found non-adjudicative facts.

There are two ethical concerns with a judge doing independent investigation: impartiality (Canon 2A) and reliance on factual information that is not in the record (Canon 3B(7) and (7)(a)). These are consistent with the Constitutional interests in separating the prosecutorial and adjudicative functions, which are neutrality and record exclusivity. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1, 10-11.)

The ethical concerns about impartiality and record exclusivity should not be present simply because a judge used a CMS to search for and obtain case management facts or to conduct legal research and the judge is now managing the case, hearing a motion, or conducting a trial.

Looking at impartiality, a reasonable member of the public would not fairly entertain a doubt about a judge's impartiality simply because the judge took the initiative to obtain case management facts about the case from the court's CMS in the process of managing the case. (*Wechsler v. Superior Court* (2014) 224 Cal.App.4th 384, 391.)

The Draft Opinion at page 13 cites several cases for the proposition that judges should not initiate independent investigations into adjudicative facts. (*Catchpole v. Brannon* (1995) 36 Cal.App.4th 237, 259 fn 9 [judge took judicial notice of the rainfall on the days in question "and used the putative discrepancy between this fact and appellant's testimony as a reason to question her overall credibility"]; *People v. Handcock* (1983) 145 Cal.App.3d Supp. 25, 28 [judge went to car dealer mid-trial, obtained replacement part, and called dealer employee to testify to jury]; Public Admonishment of Judge Connolly (2016) at 2-4 [Judge setting OSC re contempt for attorney sought court records regarding alleged contempt by same attorney in another court]; Public Admonishment of Commissioner Friedlander (2010) at 10-11 [Commissioner looked at respondent's divorce file and other files of parties before hearing on civil restraining order].) All of these cases concern a judge obtaining adjudicative facts for resolution of disputed issues of fact. None of those cases address a judge's consideration of non-adjudicative facts for case management purposes.

There is a distinction between a judge who considers case management facts for case management purposes and who later makes decisions about disputed facts in the case and a judge who independently investigates adjudicative facts. The former is simply serving different judicial functions at different times. The latter is stepping outside the neutral judicial role and is plausibly embroiled.

The use of a CMS for case management and legal research purposes is such a common part of a judge's job that requiring disqualification would be debilitating to the single assignment of cases.

California Judges Assn Ethics Formal Opinion No. 2015-17 suggests that disqualification should not be required. This opinion concerns "[i]s 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?" The Formal Opinion reasons that disqualification is required only where the prior participation in a case was "active participation." The Formal Opinion concludes that disqualification for any participation is not required because "[t]o conclude otherwise would impede the administration of justice where there is no reason to doubt impartiality, contrary to the purposes of the disqualification statutes."

Similarly, keeping track of all uses of a CMS for case management facts and making all such disclosures would be unduly time consuming and produce little resulting benefit to judicial integrity. The Draft Opinion states at page 12 that a judge must disclose any review of any facts in a CMS that are not in the record of the case at issue.

California Judges Assn Ethics Opinion No. 45, Section III.J, suggests that disclosures should not be required. Ethics Opinion 45 states: "[A] Judge need not disclose or disqualify merely because an attorney has appeared often before the judge even when the judge holds that attorney in high esteem, provided the judge believes self not to be prejudiced for or against anyone in the case. If the rule were otherwise, it would simply be impossible for an experienced, well-known judge to get through a lengthy calendar."

ADJUDICATIVE FACTS

A judge cannot use a CMS to conduct an independent investigation regarding adjudicative facts.

The Draft Opinion focuses on ethical issues particular to adjudicative facts. In considering exceptions to the rule, the Draft Opinion focuses on the ability of a court to take judicial notice of adjudicative facts not in the evidentiary record. (Draft Opinion, at 8-11.)

The Draft Opinion acknowledges that a judge can take judicial notice of court records when considering issues of claim preclusion and issue preclusion. (Draft Opinion at 9.) This is relevant to the ethical question because Evidence Code §452(d) expressly permits judicial notice of court records and a judge who uses the Evidence Code 453 procedure eliminates the concern with record exclusivity and due process. The ability to take judicial notice does not, however,

address whether judicial initiative in sua sponte taking judicial notice suggests a lack of neutrality.

The cases cited in the Draft Opinion are not relevant for the issue of whether the court can sua sponte take judicial notice of court records. *In Planning & Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 225, it is unclear whether the court sua sponte took judicial notice or whether a party requested the court to take judicial notice. In *Western Mutual Ins. Co. v. Yamamoto* (1994) 29 Cal.App.4th 1474, 1485 fn 3, the record was similar and, in addition, the court stated, "we need not determine whether the trial court erred in taking judicial notice of the 'entire' juvenile court file."

REMEDY WHEN A JUDGE SEARCHES/SEES ADJUDICATIVE FACTS IN A CMS

Whether a judge should have to disqualify, disclose, or permit supplemental briefing if she has searched a CMS for and/or found adjudicative facts should depend on the circumstances. As noted above, there are distinctions between and among concerns about a judge's impartiality (which is an ethics issue), concerns about a judge's awareness of facts outside the record (which is an evidence issue), and concerns about a judge's reliance on facts outside the record (which is a due process issue).

Looking at impartiality, a reasonable member of the public could fairly entertain a doubt about a judge's impartiality if the judge took the initiative to obtain adjudicative facts and it might appear to be for the purpose of resolving a fact issue in favor of a particular party. (*Wechsler v. Superior Court* (2014) 224 Cal.App.4th 384, 391.) (See also Draft Opinion at 13 [cases where judges investigated adjudicative facts].)

A judge can, however, lawfully investigate adjudicative facts on the record by calling and questioning witnesses at trial. (Evid Code §775.) "[T]he court has a duty to see that justice is done and to bring out facts relevant to the jury's determination. … "[I]t is not merely the right but the duty of a trial judge to see that the evidence is fully developed before the trier of fact." (*People v. Abel* (2012) 53 Cal.4th 891, 917.) (See also *People v. Handcock* (1983) 145 Cal.App.3d Supp. 25, 29 fn 2 [collecting law].) Given the ability of judges to call and question witnesses, the concern with a judge searching a CMS for adjudicatory facts is perhaps more a concern with transparency than a concern with lack of neutrality.

Looking at a judge's awareness of facts outside the record (record exclusivity), a reasonable member of the public would not entertain a doubt about a judge's impartiality if the judge had information that was not in the evidentiary record.

A judge who is single assigned to a case might learn information about the parties, the attorneys, and the facts of the case in the context of case management and discovery motions. If the case proceeds to a court trial, however, the judge will decide the case based only on the evidence that is admitted at trial. (*Gimbel v. Laramie* (1960) 181 Cal.App.2d 77, 84, 85 ["…the mere fact that

the judge knew of the criminal trial of the doctor and his two years' suspension of license standing alone is not a ground for a mistrial, a new trial, or a reversal of the judgment. From the very nature of the office he occupies and of the judicial processes a judge is required to divorce from his mind many inadmissible matters which are inevitably brought to light during the course of a trial."].)

A judge conducting a court trial can be presented with evidence, the opposition can object, the judge can then look at the evidence and consider if the evidence is admissible, sustain the objection to the evidence, and then proceed with the trial as though the judge had not seen the evidence. That is not unusual.

Judges are routinely expected to partition off information they know and make decisions only on admissible information. The implicit concern is more the lack of transparency about what adjudicative facts the judge knows and is not considering than the fact that the judge knows the off-the-record adjudicative facts in the first place.

The Draft Opinion is inconsistent with the law that judges can be aware of facts but set them aside when they evaluating the evidence in a case. By way of analogy, a judge can have friends in the legal community but still be impartial when she is on the bench. In *People v. Carter* (2005) 36 Cal.4th 1215, 1240-1245, the court rejected the defendant's claims that a trial judge's act of officiating at the prosecutor's daughter's wedding several months before the commencement of a death penalty trial created an appearance of partiality. (See also *Wechsler v. Superior Court* (2014) 224 Cal.App.4th 384 [Court commissioner could preside over dissolution of marriage proceeding after agreeing to officiate at wedding of wife's counsel].) If these personal connections do not raise a doubt about a judge's impartiality, then it is difficult to see how a judge's use of a CMS and the awareness of information obtained in a judicial capacity for judicial purposes would raise a doubt about a judge's partiality.

The Draft Opinion does not cite to CJA Ethics Update 1997 at D, which takes an interesting approach to what a judge should do if she becomes aware of adjudicatory facts outside the record. The CJA Ethics Update 1997 states: "A judge who learns of facts from the court's computer system which may be useful to one side or the other in an ongoing trial should disclose this information to all parties in the trial. Canon 3B(7)."

If the "ongoing trial" were a bench trial, then this makes sense if the facts are adjudicative facts and the judge planned to rely on the facts. If, however, the judge decided to ignore the facts from the court's computer system and limit herself to information in the evidentiary record, then that would be equivalent to the judge sustaining her own objection to the information, and it would be arguably unnecessary to disclose that the judge knows excluded adjudicative facts.

If the "ongoing trial" were a jury trial, then the required disclosure appears to make little sense because if the judge said nothing, then the parties would simply present their evidence to the trier of fact without regard to what the judge knew. Disclosing the information to the parties at trial

would arguably be an improper implicit suggestion that one party or the other should present the information to the jury. Alternatively, disclosing the information might consistent with a judge's ability to call and question witnesses at trial. (Evid Code §775.) This comment is of the opinion that CJA Ethics Update 1997 at D provides questionable guidance.

Looking at a judge's reliance on facts outside the record, a judge who through a CMS learns adjudicative facts must not consider that information unless either a party formally presents the facts as evidence on the merits of a motion or at trial or the court notifies the parties that it plans to consider the facts. (CJA Ethics Opinion No 68 at II.B.12 at 8 [judge who has seen an adjudicative fact in a CMS and plans to rely on it must give notice to the parties of intent to do so].) (See also *Monarch Healthcare v. Superior Court* (2000) 78 Cal.App.4th 1282, 1286.)

LIMITATION OF DRAFT OPINION TO NON-CRIMINAL MATTERS

The Draft Opinion applies only to a "non-criminal matter."

On the level of principle, the Code of Judicial Ethics appears to apply uniformly and without regard to whether a judge is assigned to a civil, criminal, family, or juvenile matter. The integrity of the judiciary might suffer if the ethical responsibilities of judges varied depending on their specific case assignments.

On the level of practicality, there can be little difference between a hearing on a Domestic Violence Restraining Order and a hearing relating to criminal charges related to domestic violence. It would be peculiar if a judge hearing the former could not use case management facts in a CMS to coordinate scheduling but a judge in the latter could do so.

The issues of principle and practicality are presented in the Draft Opinion at page 10, which cautions that "[i]f the judge [on a civil matter] performs a term search of the CMS using a party's name to determine whether there are other matters that also should be related, the judge could uncover … a party's criminal history, which is very unlikely to be the proper subject of judicial notice." If a judge hearing a civil matter should be concerned about inadvertently finding a party's criminal history, then a judge hearing a criminal matter should be similarly concerned about inadvertently finding a party's family law, restraining order, or unlawful detainer history.

The commenters suggest that the Committee consider how the proposed ethical limits on the use of a CMS would affect the case management of civil, criminal, family, and juvenile matters.

CONCLUSION

We ask that the CJEO withdraw and reconsider Draft Opinion 2019-014. The Draft Opinion does not distinguish between adjudicative facts, case management facts, or legal research. The Draft Opinion does not consider the myriad ways that trial judges can properly use a CMS to find case management facts to assist in managing cases. It also raises a host of issues regarding how judges should interact with legal research attorneys and staff. In its current form, the Draft

Opinion is overbroad and would result in the rigid compartmentalization of case information, which would restrict and impair effective case management, legal research, supervision of litigants and attorneys, and court administration.

Very truly yours,

Hon. Wynne S. Carvill
Presiding Judge
Alameda County Superior Court

Hon. Tara M. Desautels
Assistant Presiding Judge
Alameda County Superior Court

Chad Finke
Court Executive Officer
Alameda Superior Court

Comment 14:

Submitted by: Hon. Leonard Edwards (Ret.), Judge of the Superior Court of California, County of Santa Clara

Received on: May 9, 2019

Confidentiality Waived

May 8, 2019

Honorable Ronald Robie
Associate Justice of the Court of Appeal
Chair, Committee on Judicial Ethics Opinions
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: CJEO Draft Formal Opinion 2019-014
Comments of California Juvenile Court Judicial Officers

Dear Justice Robie:

I respectfully request that the CJEO Draft Opinion 2019-014 be withdrawn. I believe that the opinion will result in judicial officers (particularly those in juvenile, family and probate courts) failing to use their court's case management system, and that will result in uninformed and possibly conflicting decisions. It does not appear that the drafters considered several situations these courts face where searches on the court's CMS are necessary for the judicial officer to make informed decisions.

For example, juvenile court judges face situations in which a minor before the court in a juvenile justice case is also before the dependency court in a separate matter. These children are referred to as dual status minors. Searches by one judge on the court's CMS for the records relating to the other case is important to avoid conflicting orders.

Another example involves cases involves a family in Family Court litigating child custody issues and a dependency case addressing the needs and custody of the same child. Each judge needs to know the existence and the orders made in the other proceeding. The same is true for custody decisions made in Probate Court when there are parallel cases in Juvenile Dependency court and/or Family Court.

Determining whether a party is the subject of a restraining order is another situation in which a judge should have the ability to search the court's CMS. Restraining orders can be issued by a variety of judges sitting in different assignments (juvenile, family, restraining order calendar), and judges need to know the existence of such an order.

Related to this example is the need to know whether the criminal court has issued a protective order or a stay away order as a part of a criminal proceeding. Such orders take precedence over civil restraining orders. Civil, juvenile and family court judges should be aware of such criminal orders so that they can make intelligent and effective decisions. Judges sitting in dependency court ordering reunification services (including visitation) need to know if there is a criminal protective order forbidding contact between the parent and child. Without that knowledge the parent will be subject to conflicting judicial orders.

In all of these courts (juvenile, family, and probate) the judge has the power to issue restraining orders. Whether another judge has issued such an order is important information the judge needs to know. Using the court's CMS system is the best way to gain this information.

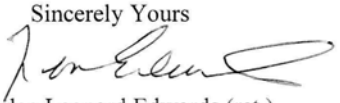
In both family and juvenile court proceedings paternity is a critical issue that the judge often addresses. Whether there has been a child support proceeding in which paternity was addressed by the child support commissioner is an issue that must be determined, and the court's CMS system is the place to start.

It may be that the same attorneys appear in related court proceedings and that these attorneys can inform the court of the status of parallel proceedings. However, just as often different attorneys represent the same parties in the parallel proceedings, and they do not know the status of the court orders in those related proceedings.

I conclude that this draft opinion is not helpful to the judiciary and, in fact, it will discourage judicial officer from using their court's CMS system. This will be detrimental to judicial officers serving in the juvenile, family and probate courts as well as to the clients appearing in their courts. I suggest that it be withdrawn.

Thank you for considering my comments.

Sincerely Yours



Judge Leonard Edwards (ret.)

Comment 15:

Submitted by: Superior Court of California, County of Riverside

Received on: May 14, 2019

Confidentiality Waived

Chambers of
JOHN W. VINEYARD
Presiding Judge

JOHN M. MONTEROSSO
Assistant Presiding Judge

Superior Court of California
County of Riverside

4050 Main Street
Riverside, CA 92501

May 10, 2019

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

RE: Public Comments on CJEO Draft Formal Opinion 2019-014

Dear Ms. Black,

On behalf of the Riverside Superior Court, please add our names to the list of those who urge the CJEO to withdraw and reconsider the Draft Opinion regarding a judge's ability to search a court's case management system for records pertaining to matters before the judge. In particular, we endorse the points and concerns raised by our colleagues from the Alameda Superior Court as detailed in the letter authored by Presiding Judge Wynne Carvill, Assistant Presiding Judge Tara Desautels, and Court Executive Officer Chad Finke. The thorough and detailed analysis in their letter makes it clear that there are too many questions and legitimate concerns among the judiciary to move forward on adopting the opinion.

In addition, another specific concern we have is that the Draft Opinion may restrict judges from performing their ethical duty to ensure they have no conflicts on matters assigned to them. All judges come from prior employment in either the public or private sector. Often a judge must review a litigant's prior case history in their case management system to ensure that they were not previously involved with that litigant as a lawyer. This is especially true of former prosecutors and public defenders who may be presiding over a civil, juvenile, family, or criminal matter involving one of their former clients or persons who they previously prosecuted. Restricting a judge's ability to search records in this situation would put the judge in a precarious position and subject to possible discipline for failing to recuse or disclose past involvement with a litigant. Certainly, the goal of the Committee is to enhance ethical conduct by judges, not impede it.

We appreciate and share the goal of the Committee to ensure that judges do not use their case management systems for any improper purpose. We strongly suggest that this goal can be achieved without unduly restricting judges from using their systems legitimately. We ask that the Committee to withdraw the Draft Opinion and begin anew with the input you've received in this process.

Sincerely,

JOHN W. VINEYARD
Presiding Judge

JOHN M. MONTEROSSO
Assistant Presiding Judge

Comment 16:

Submitted by: California Juvenile Court Judicial Officers

Received on: May 14, 2019

Confidentiality Partially Waived. 92 judicial officers signed this comment. Those who elected to maintain confidentiality or who did not respond to an inquiry regarding confidentiality are redacted. (Cal. Rules of Ct., rule 9.80(h)(1); Cal. Com. Jud. Ethics Opns., rule 5.)

Superior Court of California

May 14, 2019

Honorable Ronald Robie
Associate Justice of the Court of Appeal
Chair, Committee on Judicial Ethics Opinions
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: CJEO Draft Formal Opinion 2019-014
Comments of California Juvenile Court Judicial Officers

Dear Justice Robie:

The undersigned are current and former judicial officers presiding over juvenile court matters in California. We write to respectfully offer our comments to the Committee on Judicial Ethics Opinions (CJEO) regarding Draft Formal Opinion 2019-014, and request that the committee withdraw and reconsider the proposed opinion.

We are concerned that the proposed opinion will have the effect of discouraging judges from searching a court's case management system for information relevant to the efficient and efficacious handling of cases, particularly when a party and/or his or her family have multiple cases across different case types.

We express our concerns from the perspective of our statutory obligation "to provide for the protection and safety of the public and each minor under the jurisdiction of the juvenile court and preserve and strengthen the minor's family ties whenever possible", and because we are required to "hold [ourselves] accountable" for the results of the juvenile justice system. Section 202, subdiv. (a) & (d), Welfare and Institutions Code.

In recent years, judges presiding over family serving courts – family law, juvenile dependency, juvenile delinquency, and probate – have sought to become aware of all of the cases and orders of the court involving the members of a family, to avoid conflicting orders and/or a multiplicity of court ordered obligations that sets a person or family up to fail.

For example, for a family with a history of domestic violence, it is not uncommon to have parallel simultaneous matters pending in multiple courts, such as criminal court (for the offender), dependency court (for the children and parents), family law court (a preexisting DV restraining order), and delinquency court (for a child's reactive conduct). Often the county agencies involved in these situations (child welfare, probation, behavioral health, children and family services) are institutionally siloed, failing to be aware and take into consideration the multiple legal matters impacting the family. Similarly, in an era of specialization, attorneys are not aware or are not conversant in all of these case types and/or do not effectively communicate with other counsel representing persons in the family.

Given this reality, we have learned that the best practice for judicial officers handling these cases and families is to survey the entire forest and issue orders that promote successful outcomes. Historically, this was difficult, burdensome and costly in the days of paper files, stored and accessed in different courthouses. But today, with the advent of digitally imaged files and accessible case management systems judges have the capability to take a more holistic view of what is going on with a family and make meaningful and effective orders.

The Committee's concern that a judge's search of a court CMS might provide irrelevant information is understandable. But this is not a new problem, particularly in our direct calendar family and juvenile courts where judges historically have acted simultaneously as the trier of fact and determiner of the admissibility – including relevancy – of evidence. Under the "one court one family" model that is the rule in California for family serving courts, a judge may be assigned to oversee a family's cases over a span of years, often with new counsel substituting into the case. In the event of a contested evidentiary hearing, a judge often is cognizant of an enormous body of information about the parties, based upon the judge's historical handling of the family, some information that may be wholly irrelevant to the particular litigated issue. Trial judges and the appellate courts addressed this situation long before the advent of the technology represented by today's case management systems.

The proposed CJEO opinion does not acknowledge the "various – and numerous – presumptions" that address judges being exposed to irrelevant evidence. *In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1526, noted: "'As an aspect of the presumption that judicial duty is properly performed [Evid. Code, §664], we presume…that a court knows and applies the correct statutory and case law [citation] and is able to distinguish admissible from inadmissible evidence, relevant from irrelevant fact, and to recognize those facts which properly may be considered in the judicial decisionmaking process.'" *Id.*, at 1526; quoting *People v. Coddington* (2000) 23 Cal.4th 529, 644. Underlying this presumption of doing the right thing is the fact that judges "possess that trained and disciplined mind" that can separate the wheat from the chaff. *Marriage of Davenport, id.*, at 1526.

Among the duties that judges must be presumed to properly perform is following our ethical Canons, including an assessment as to whether the judge has the capacity to remain impartial, the avoidance of embroilment and the appearance of bias. Additionally, we must presume that judges searching a court's CMS will comply with the concomitant duty to disclose the fact and results of such a search. Regrettably, the proposed opinion appears to presume the opposite, that judges will not properly perform our ethical duties in this regard.

It is a "grave task" for judges in our family serving courts, to seek to ascertain all that is known about a family and is consistent with "'not only the right but the duty of a trial judge to clearly bring out the facts so that the important functions of his office may be fairly and justly performed.'" *In re Emily D.* (2015) 234 Cal.App.4th 438, 447; quoting *Conservatorship of Pamela J.* (2005) 133 Cal.App.4th 807, 827. Our very real and practical concern is that judges, seeking to comply with the proposed CJEO opinion, and with the ever-present anxiety of running afoul of the CJP, will bend over backwards and never search a court's CMS information, and in doing so, will be unaware of critical information bearing upon judicial decisions that affect the outcomes of the families and children that come before our courts.

Certainly, as technology brings more and more tools to aid judges in our decision-making, the ethical issues those new tools also bring must be discussed and understood. The CJEO is right to consider the ethical issue tied to judges' use of CMS systems, but these issues require more discussion and thought before a formal opinion is published. We respectfully ask that the CJEO withdraw and reconsider Draft Opinion 2019-014.

Sincerely,

Hon. Anthony Trendacosta
Judge of the Superior Court
Superior Court, County of Los Angeles

Hon. Craig Arthur
Judge of the Superior Court
Superior Court, County of Orange

Hon. Ruben Villalobos
Judge of the Superior Court
Superior Court, County of Stanislaus

Hon. Arthur Garcia
Judge of the Superior Court
Presiding Judge of Juvenile Court
Superior Court, County of Santa Barbara

Hon. Monica Wiley
Judge of the Superior Court
Supervising Judge, Unified Family Court
Superior Court, County of San Francisco

Judge Stephanie Hulsey
Judge of the Superior Court
Superior Court, County of Monterey

[redacted]

Hon. Lorna Brumfield
Judge of the Superior Court
Superior Court, County of Kern

Hon. Marian Gaston
Judge of the Superior Court
Superior Court, County of San Diego

[redacted]

Hon. Joanne Motoike
Judge of the Superior Court
Presiding Judge of Juvenile Court
Superior Court, County of Orange

[redacted]

[redacted]

Hon. Douglas Hatchimonji
Judge of the Superior Court
Superior Court, County of Orange

Hon. Maria Hernandez
Judge of the Superior Court
Superior Court, County of Orange

[redacted]

Judge Kevin McGee
Judge of the Superior Court
Superior Court, County of Ventura

Hon. Sean Lafferty
Judge of the Superior Court
Superior Court, County of Riverside

Hon. Debra Givens
Judge of the Superior Court
Presiding Judge of Juvenile Court
Superior Court, County of Yuba

[redacted]

Hon. Linda McFadden
Judge of the Superior Court
Superior Court, County of Stanislaus

[redacted]

Hon. Charles Crandall
Judge of the Superior Court
Presiding Judge of Juvenile Court
Superior Court, County of San Luis Obispo

[redacted]

[redacted]

Hon. D. Zeke Zeidler
Judge of the Superior Court
Superior Court, County of Los Angeles

[redacted]

Hon. Tari Cody
Judge of the Superior Court
Superior Court, County of Ventura

Hon. Gary Gibson
Judge of the Superior Court
Superior Court, County of Shasta

[redacted]

[redacted]

Hon. Kimberly Menninger
Judge of the Superior Court
Superior Court, County of Orange

Hon. Jerilyn Borack
Judge of the Superior Court
Presiding Judge of Juvenile Court
Superior Court, County of Sacramento

Hon. Lewis Clapp
Judge of the Superior Court
Superior Court, County of Orange

Hon. Gary Bischoff
Commissioner of the Superior Court (Ret.)
Superior Court, County of Orange

Hon. Janet Hilde
Judge of the Superior Court
Presiding Judge
Superior Court, County of Plumas

Hon. Ken Gnoss
Judge of the Superior Court
Presiding Judge of Juvenile Court
Superior Court, County of Sonoma

Hon. Brett Morgan
Judge of the Superior Court
Superior Court, County of San Joaquin

Hon. Patrick Tondreau
Judge of the Superior Court
Superior Court, County of Santa Clara

Hon. Rochelle East
Judge of the Superior Court
Superior Court, County of San Francisco

Hon. Gus Barrera II
Judge of the Superior Court
Superior Court, County of San Joaquin

[redacted]

Hon. Katherine Lucero
Judge of the Superior Court
Presiding Judge of Juvenile Court
Superior Court, County of San Clara

Hon. Judith Clark
Judge of the Superior Court
Presiding Judge of Juvenile Court
Superior Court, County of Riverside

Hon. Bradley Erdosi
Judge of the Superior Court
Superior Court, County of Orange

Hon. Colleen Nichols
Judge of the Superior Court
Presiding Judge of Juvenile Court
Superior Court, County of Placer

[redacted]

Hon. Kimberly Nystrom-Geist
Judge of the Superior Court
Presiding Judge, Delinquency
Superior Court, County of Fresno

Hon. Ann Moorman
Judge of the Superior Court
Presiding Judge
Superior Court, County of Mendocino

Hon Robin Wolfe
Judge of the Superior Court
Superior Court, County of Tulare

[redacted]

Hon. Nancy Davis
Judge of the Superior Court (Ret.)
Superior Court, County of San Francisco

Hon. Andria Richey
Judge of the Superior Court (Ret.)
Superior Court, County of Los Angeles

Hon. Elizabeth Tucker
Commissioner of the Superior Court
Superior Court, County of Riverside

Hon. Beverly Wood
Judge of the Superior Court
Superior Court, County of Marin

Hon. Anne-Christine Massullo
Judge of the Superior Court
Superior Court, County of San Francisco

Hon Michael Kenny
Judge of the Superior Court
Superior Court, County of Sacramento

Hon Judy Holzer Hersher
Judge of the Superior Court
Superior Court, County of Sacramento

Hon. Cynthia Smith
Judge of the Superior Court
Presiding Judge of Juvenile Court
Superior Court, County of Napa

Hon. Roger Luebs
Judge of the Superior Court
Superior Court, County of Riverside

Hon. Donald Proietti
Judge of the Superior Court
Presiding Judge of Juvenile Court
Superior Court, County of Merced

[redacted]

Hon. Joyce Hindrichs
Judge of the Superior Court
Superior Court, County of Humboldt

Hon. Donald Segerstrom
Judge of the Superior Court
Superior Court, County of Tuolumne

Hon. Donna Hitchens
Judge of the Superior Court (Ret.)
Superior Court, County of San Francisco

[redacted]

Hon. Robert Fracchia
Judge of the Superior Court
Presiding Judge of Juvenile Court
Superior Court, County of Solano

Hon. Heidi Whilden
Judge of the Superior Court
Presiding Judge of Juvenile Court
Superior Court, County of Monterey

Hon. Alyson Lewis
Judge of the Superior Court
Superior Court, County of Sacramento

Hon. Barbara Hinton
Judge of the Superior Court
Superior Court, County of Contra Costa

Hon. Susan Breall
Judge of the Superior Court
Superior Court, County of San Francisco

[redacted]

Hon. Stephen Place
Judge of the Superior Court
Superior Court, County of Inyo

[redacted]

Hon. Jeremy Dolnick
Judge of the Superior Court
Superior Court, County of Orange

Hon. Christopher Marshall
Judge of the Superior Court
Superior Court, County of San Bernardino

[redacted]

Hon. Dean Stout
Judge of the Superior Court (Ret.)
Superior Court, County of Inyo

Hon. Joni Hiramoto
Judge of the Superior Court
Superior Court, County of Contra Costa

Hon. Yvette Durant
Judge of the Superior Court
Assistant Presiding Judge
Superior Court, County of Sierra

[redacted]

Hon. Kimberlee Lagotta
Judge of the Superior Court
Presiding Judge of Juvenile Court
Superior Court, County of San Diego

Hon. Christopher Smith
Judge of the Superior Court
Superior Court, County of Los Angeles

Hon. Karen Dixon
Judge of the Superior Court
Superior Court, County of Siskiyou

Hon. Roger Chan
Judge of the Superior Court
Superior Court, County of San Francisco

Hon. Carrie Stephens
Judge of the Superior Court
Superior Court, County of Stanislaus

[redacted]

Hon. Charles Ervin
Judge of the Superior Court
Presiding Judge
Superior Court, County of Sierra

Hon. Irma Brown
Judge of the Superior Court
Superior Court, County of Los Angeles

Hon. Denine Guy
Judge of the Superior Court
Superior Court, County of Santa Cruz

Comment 17:

Submitted by: Hon. Margaret S. Henry, Judge of the Superior Court of California, County of Los Angeles

Received on: May 14, 2019

Confidentiality Waived

May 13, 2019

Honorable Ronald Robie
Associate Justice of the court of Appeal
Chair, Committee on Judicial Ethics Opinions
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: CJEO Draft Formal Opinion 2019-014

Dear Justice Robie:

As a Judge of 18 years who has sat in Juvenile Court for all but 6 months of that time, I write to suggest that this Draft Opinion be withdrawn and rewritten to give meaningful guidance to judicial officers. I endorse the comments made by Califonia Juvenile Court Judicial Officers that were drafted and forwarded by Judge Douglas Hatchimonji, as well as comments made by the CJA Ethics Committee.

I particularly am concerned about the following language in the Draft Opinion on page 11, first full paragraph:

> "The committee cautions the uncertainty of the search results should deter a judge from performing a CMS search unless the judge **is certain** that the entirety of the results may be judicially noticed in the matter before the judge."

There may be documents misfiled and/or mislabeled in any CMS file. There can be no certainty that the entirety of the results may be judicially noticed, and therefore under the language of this Draft Opinion, no search may ever be done. If, for example, a judge does not do the search of a related criminal case while hearing a dependency case involving domestic violence, and issues an order allowing visits with children when there is a criminal restraining order prohibiting visits, the judge may look fair but also will look incompetent, and a child may suffer for it.

Cautionary language against reviewing another judge's notes is warranted, as are the cautions regarding considering evidence from another case. However, judges should be encouraged to review CMS files in appropriate instances, particularly for other court orders affecting the parties and the proceedings, and provided proper guidance and examples in an ethics opinion on this subject.

I urge the Committee to withdraw this Draft and issue one which is more helpful and constructive.

Sincerely,

Margaret S. Henry
Judge, Los Angeles Superior Court, Dependency
201 Centre Plaza Drive, Dept. 418
Monterey Park, CA 91754

Comment 18:

Submitted by: Superior Court of California, County of Ventura

Received on: May 14, 2019

Confidentiality Waived

Chambers of
The Superior Court
KENT M. KELLEGREW
Presiding Judge
800 S. Victoria Avenue
Ventura, California 93009
Telephone: 805.289.8705

May 13, 2019

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

Re: Public Comments on CJEO Draft Formal Opinion 2019-014

Dear Ms. Black:

The Superior Court of California, County of Ventura, joins and concurs in the public comments submitted by the Superior Court of California, County of Alameda by letter dated May 1, 2019. The public comments are regarding Committee on Judicial Ethics Opinions (CJEO) Draft Formal Opinion 2019-14, on a judge's ability to search a court's electronic case management system for records pertinent to a matter before the judge.

Thank you to the Committee for its work and consideration of the expressed concerns.

Sincerely,

Kent M. Kellegrew
Presiding Judge
Superior Court, County of Ventura

Bruce A. Young
Assistant Presiding Judge
Superior Court, County of Ventura

Michael D. Planet
Court Executive Officer
Superior Court, County of Ventura

KMK:vjb

Comment 19:

Submitted by: Hon. Marsha G. Slough, Chair, Judicial Council Technology Committee, Associate Justice of the Court of Appeal, Fourth Appellate District, Division Two
Hon. Sheila F. Hanson, Chair, Information Technology Advisory Committee, Judge of the Superior Court of California, County of Orange

Received on: May 14, 2019

Confidentiality Waived

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue
San Francisco, CA 94102-3688
Tel 415-865-4200
TDD 415-865-4272
Fax 415-865-4205
www.courts.ca.gov

Date
May 14, 2019

Action Requested
Please Review

To
Hon. Ronald B. Robie, Chair
Ms. Nancy A. Black, Committee Counsel
The Supreme Court of California
Committee on Judicial Ethics Opinions
350 McAllister Street
San Francisco, California 94102

Contact
Hon. Marsha G. Slough
Marsha.Slough@jud.ca.gov

Hon. Sheila F. Hanson
shanson@occourts.org

From
Hon. Marsha G. Slough,
Chair, Judicial Council Technology Committee

Hon. Sheila F. Hanson,
Chair, Information Technology Advisory Committee

Subject
Joint Comments from Chairs of Judicial Council Technology Committee (JCTC) and Information Technology Advisory Committee (ITAC) on Committee on Judicial Ethics Opinions (CJEO) Draft Formal Opinion no. 2019-014

The Committee on Judicial Ethics Opinions (CJEO) has circulated a draft opinion (no. 2019-014) answering the following question: "In a non-criminal matter, may a judge search the court's case management system [CMS] for information regarding a party, attorney, or facts relevant to the matter before the judge?" As Chair of the Judicial Council Technology Committee (JCTC) and Chair of the Information Technology Advisory Committee (ITAC), we agree that "the prohibition on independent investigations extends to CMS searches." (Draft opn. at p. 2.) However, we also believe that revising the draft

opinion would benefit judges,[1] the judicial branch as a whole, and all court users.

The committees we chair collectively play a key role in governing the technology of the judicial branch. JCTC oversees the Judicial Council's technology policies and assists the council by providing technology recommendations. It establishes policies that emphasize long-term strategic leadership and align with judicial branch goals. It also oversees specific council-approved projects and ensures they stay on schedule and within scope and budget.[2] ITAC reports to JCTC, makes recommendations for improving the administration of justice through technology, and fosters cooperative endeavors to resolve common technological issues with other stakeholders in the justice system. ITAC promotes, coordinates, and acts as executive sponsor for projects and initiatives that apply technology to the work of the courts.[3]

We respectfully ask the CJEO to reconsider its draft opinion.

The opinion as currently drafted is overbroad and does not reflect a detailed understanding of how a CMS operates.

As currently written, the draft opinion could be improved by removing language that does not adequately consider how a CMS operates.

There are several aspects of the draft opinion that insufficiently consider the details of a CMS's operation. For example:

- The opinion warns against searches that might reveal another judge's notes about a case. (Draft opn. at pp. 9-10.) The way in which those notes are displayed, including the judge's privacy settings when creating notes, would presumably inform the ethical question considered by the committee, but those display options or privacy settings are not addressed.
- The opinion states "CMS searches can also yield results that include sealed records, which may be unavailable to one or both of the parties but still relevant to the matter before the judge." (Draft opn. at p. 10.) The accessibility of sealed documents is a complicated question, raising a host of competing interests, but is an ongoing concern in CMS implementations across the state. The opinion does not address the various

[1] The draft opinion uses "judge" to refer to "all judicial officers, including trial court judges, appellate justices, and other judicial officers who are subject to the California Code of Judicial Ethics." (Draft opn. at p. 1, fn. 1.) Our comment uses "judge" in the same sense.

2 A full description of JCTC's charge can be found at https://www.courts.ca.gov/jctc.htm.

3 A full description of ITAC's charge can be found at https://www.courts.ca.gov/itac.htm.

possible CMS configurations, or the rights and roles policies available within a CMS implementation that can limit such access.

- In considering the scope of a judge's use of a CMS, the opinion concludes that "More general searches ... are more problematic." (Draft opn. at p. 9.) The opinion does not, however, account for other limits that might be placed into a seemingly "general" search that will focus the results. Instead, it speculates about the "more likely" results of what a search "could" reveal. (Draft opn. at p. 10.) The opinion does not explain how it came to that conclusion.
- The opinion implies a judge will learn about other matters involving a party only after specifically searching for those matters (see draft opn. at p. 9), but the extent of what information may be automatically displayed within the ethical limitations (even absent a search) is not discussed.

Each of those statements reflect an incomplete picture of CMS architecture and configuration. We would prefer the draft opinion be tailored to address the ways a CMS is implemented and used. If the committee believes a detailed discussion of CMS searches is necessary – and, as discussed below, we believe it is not – that omission should be corrected.

The opinion's overbreadth and lack of detail creates uncertainty and may deter judges from performing their ethical obligation to decide cases using available tools.

The draft opinion properly recognizes a modern CMS carries powerful abilities to access data, and that the CMS allows judges to "effectively and efficiently manage a caseload."[4] (Draft opn. at p. 5.) As the committee knows, judges have an ethical obligation to decide cases, and because CMS's "are an integral part of California court operations" (draft opn. at p. 2), judges must use them, just as they must routinely use paper files. There are no self-evident ethical implications inherent in that new tool, because although the programming in a modern CMS gives judges new data organization and search tools, it does not tell judges anything that could not have theoretically been obtained even before courts began using computers.

It would be enough to say that independent investigations may not be conducted by using a CMS, just as they may not be conducted in paper files. Unfortunately, the opinion also contains

[4] That need extends to criminal and non-criminal matters. Although the opinion phrases the question as being driven by "non-criminal" matters, it does not expressly state it would not apply in a criminal context, and we are unaware of any precedent for applying the canons of judicial ethics differently in criminal and non-criminal matters. In any event, judges will need to use a CMS regardless of the calendar they hear.

such broad admonitions against using technology that following its guidance may make it functionally impossible for a judge to use a CMS at all.

Every file or document put before a judge is obtained after some sort of search. In that regard, the act of retrieving and opening an electronic file is fundamentally no different from retrieving and opening a paper file, because a CMS does nothing more than receive, store, organize and retrieve data; it does not independently generate information. Regardless of whether a court record is stored electronically or in a paper file, once a judge is given information about (for example) a potentially related case, she has a choice: does she search for and then open that case? Or does she persist in her ignorance? The opinion suggests that if a court uses electronic files, the better course of action is the latter: "the uncertainties of the search results should deter a judge from performing a CMS search unless the judge is certain that the entirety of the results may be judicially noticed in the matter before the judge." (Draft opn. at p. 11.)

There is no search that could ever meet the draft opinion's certainty standard. Just as paper files contain irrelevant information, a CMS search will also miss the mark on occasion, as any search algorithm can only go so far in filtering results. That phenomenon is not new to anyone who has searched for anything on any computer. A perfectly-narrowed search remains an elusive goal across the information technology landscape.

We also have concerns about the following language from the opinion: "Even where a judge is certain that he or she may take judicial notice of the results of a CMS search ..., the judge should still consider whether the fact that the judge engaged in the search could create an appearance of judicial bias or reflect embroilment in the matter." (Draft opn. at p. 12.) The breadth of that admonition should give even the most technologically savvy judge considerable pause. No judge sets out to test the boundaries of an ethical canon. Faced with the risk of straying across those boundaries, a judge could reasonably decide to not even begin the journey into the land of the court's CMS. The committee has created an ethical paradox: judges may not ethically use the tool they need to fulfil their ethical duties.

We are not suggesting the judicial branch's technology needs override ethical principles. To the contrary, we appreciate that technology is merely a tool for conducting court business, not an end in and of itself, and that ethics need to drive technological decisions, not the other way around. However, the draft opinion should recognize using a CMS to search for and retrieve data is not generally inconsistent with the canons of judicial ethics, and the committee should clarify language suggesting the contrary.

The CJEO should revise its opinion to eliminate the focus on CMS searches.

It does not require a deep discussion of CMS architecture or the policies governing the judicial branch's use of technology to conclude the ethical limitations governing independent investigations by judges do not change when a judge uses a court's CMS. (Draft opn. at p. 2.) We maintain that the current language focusing on the details of CMS searches should be eliminated.

A CMS is a key component of the future of California's courts, as articulated by California Chief Justice Cantil-Sakauye in her vision for full and meaningful access to justice for all Californians, called Access 3D, which includes allowing court users to conduct their business online.[5]

A CMS is a complicated application. They are developed by private vendors, then implemented to integrate with a wide variety of existing systems, a process requiring vast amounts of time, energy, and resources. It also requires extensive coordination with various justice partners, each of whom depends on certain CMS functionality being available. The effort of California's courts implementing their new CMS cannot be overstated.

In carrying out our duties, JCTC and ITAC routinely engage with individual courts, various technology-related working groups and consortia as they incorporate technology into court operations, which gives us a rich understanding of the technology challenges faced by courts around the state. We have built constructive working relationships with the best and brightest members of the judicial branch's technology community. The judicial branch's collective level of expertise is a powerful asset, and we would welcome the opportunity to assist you in crafting a revised opinion.

We hope that we can work together with the Committee on Judicial Ethics Opinions to craft language that more precisely defines the scope of permissible CMS use. If there is any way we or the committees we chair can assist you by clarifying the functionality of a CMS, we are ready and willing to assist.

Conclusion

As new methods displace the old, judges have been understandably concerned about how to best use new technology; the draft opinion is a laudable attempt to address some of those concerns. Unfortunately, the most obvious conclusion drawn from the opinion is that judges

[5]See https://newsroom.courts.ca.gov/access-3d.

should keep any interaction with the CMS to a bare minimum, if they interact with it at all. We do not believe the ethical canons compel such a conclusion.

The canons of judicial ethics already generally prohibit judges from conducting independent investigations. We suggest the CJEO provide adequate guidance if it were to simply point out that a CMS does not change that rule. An otherwise prohibited investigation does not become authorized merely because the judge uses the court's CMS to conduct it. To say more injects ill-advised uncertainty into a rapidly changing landscape, and we urge the CJEO to take these concerns into account and revise its draft opinion accordingly.

Sincerely,

Marsha G. Slough, Chair
Technology Committee

Sheila F. Hanson, Chair
Information Technology Advisory Committee

CC: Judicial Council Technology Committee
Information Technology Advisory Committee
Mr. Martin Hoshino, Administrative Director

Comment 20:

Submitted by: Los Angeles Superior Court

Received on: May 14, 2019

Confidentiality Waived

Response – CJEO Draft Opinion No. 2019-014

TITLE: Committee on Judicial Ethics Opinions Draft Formal Opinion No. 2019-014; Independent Investigation of Court Case Management Systems

	Agree
X	**Agree only if modified**
	Do not agree

Comments:

As presiding judges from around the state have already given extensive comments, these comments are limited to two additional points.

First, in cases involving self-represented parties, bench officers cannot rely on the parties to inform them about, or request judicial notice of, appropriate information from other cases. This situation often arises in family law, which has numerous rules requiring the bench officer to collect information from other cases. For example:

1. In domestic violence matters, Family Code section 6306 (a) instructs the bench officer to review the criminal history of the alleged offender if available. Also, where there is a criminal matter involving domestic violence, it is prudent to review the status of any criminal restraining order so as to refrain from making civil orders inconsistent with the criminal order, decide if a Fifth Amendment admonition should be given, and determine if the criminal protective order authorizes custody or visitation orders for children who are protected parties.

2. Parents frequently file separate requests for domestic violence restraining orders at different times or in different courthouses based on the same events, resulting in two cases being initiated. A review of the file in the other case is typically necessary to avoid inconsistent orders, especially inconsistent custody orders.

3. Parties sometimes have a history of filing multiple requests for domestic violence restraining orders against each other based on the same allegations, leading to numerous separate domestic violence cases. A review of the other case files may be required to know whether an issue was previously decided and is res judicata.

ORGANIZATION: **LOS ANGELES SUPERIOR COURT**
111 N. Hill Street, Los Angeles, California 90012

RESPONSE TO: The California Supreme Court
Committee on Judicial Ethics Opinions
350 McAllister Street, Room 1144A
San Francisco, California 94102-3688

DEADLINE FOR COMMENT: 5:00 p.m., Wednesday, May 15, 2019
Your comments may be written on this Response Form or as a letter. Make sure your letter includes all of the above identifying information. All comments will become part of the public record for this proposal.

4. Parties may file a domestic violence case and a separate civil harassment case based on the same event. A review of both cases is necessary to decide if the cases should be related and heard by the same bench officer.

5. Family law judges must regularly consult the children's index to check for other cases involving the same child. If the dependency court has jurisdiction, the family court cannot issue custody or visitation orders. Or a related guardianship action may be pending, which the family court may need to review to avoid inconsistent orders.

6. Welfare and Institutions Code section 827.10 (a)(1) authorizes a child welfare agency to make its files and records relating to a child, including documents from dependency court case files, available for inspection by the family law or probate bench officer assigned to a case involving custody of the child.

Second, we are concerned about the proposed requirement that a bench officer should inform the parties of CMS searches of other cases and give the parties an opportunity to respond when the judge has reviewed information that is not properly the subject of judicial notice, even if the information does not create judicial bias or the appearance of bias. As described above, in certain types of cases, bench officers must frequently review information from other cases and in that process, may come across information not subject to judicial notice. We recommend limiting the disclosure requirement to instance when the bench officer learns of information that could cause a person to reasonably doubt the bench officer's impartiality. Requiring disclosure and an opportunity to respond about other searches would create unnecessary work for court staff, increase the number of hearings, and potentially place a bench officer in the position of violating the Draft Formal Opinion if the disclosure did not occur, even where the bench officer did not learn any information that could create the appearance of bias. Also, holding a hearing may not be viable in time-sensitive matters, and such hearings would increase calendar sizes and slow down litigation.

Please note that these comments are from the Los Angeles Superior Court and not from any one person in particular.

We waive confidentiality under the CJEO rules and consent to disclosure of this comment by posting on the CJEO website for public review after the deadline for comments.

Comment 21:

Submitted by: Hon. Barbara A. Kronlund, Judge of the Superior Court of California, County of San Joaquin

Received on: May 14, 2019

Confidentiality Waived

I waive confidentiality regarding my comments.

I am rather confused as to the impetus for this Opinion, since to my knowledge, the use of CMS by judges has not been an ethical problem. In the most recent CJP Annual Report, I saw no mention of misuse of CMS searches, and as a past member of the CJA Judicial Ethics Committee for 10+ years, I didn't see a problem in this area either. I'm not certain what "problem" this Opinion seeks to fix, but I am confident that there are much better ways to achieve the desired result than what this very overbroad Opinion offers.

There are a myriad of legitimate uses of a court's CMS, and it seems the evils this Opinion is seeking to redress are already covered by the ex parte prohibitions of Canon 3B(7). The exceptions to the advice in the Opinion swallow up the rule and were not addressed or considered in this Draft Opinion.

I concur with and join the Alameda County Superior Court bench, as well as Justice Ronald Robie of the 3rd DCA and Judge Leonard Edwards, Ret., in all of their thoughtful, valid comments. Likewise, I request this Opinion be withdrawn.

Thank you for considering my comments.

Barbara A. Kronlund, Civil Judge
Superior Court, Dept. 10D, San Joaquin County

Comment 22:

Submitted by: Hon. Gary Nadler, Chair, Trial Court Presiding Judges Advisory Committee, Presiding Judge of the Superior Court of California, County of Sonoma

Received on: May 15, 2019

Confidentiality Waived

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue
San Francisco, CA 94102-3688
Tel 415-865-4200
TDD 415-865-4272
Fax 415-865-4205
www.courts.ca.gov

HON. TANI G. CANTIL-SAKAUYE
Chief Justice of California
Chair of the Judicial Council

MR. MARTIN HOSHINO
Administrative Director,
Judicial Council

TRIAL COURT PRESIDING JUDGES ADVISORY COMMITTEE

HON. GARY NADLER
Chair

HON. JOYCE D. HINRICHS
Vice-chair

COMMITTEE STAFF
Mr. Corey Rada
Tel 916-643-7044
Fax 916-263-1966

May 15, 2019

Hon. Ronald B. Robie
Associate Justice
Court of Appeal, Third Appellate District
914 Capitol Mall
Sacramento, California 95814

Re: Committee on Judicial Ethics Opinions (CJEO) Draft Formal Opinion 2019-014

Dear Justice Robie:

Thank you for your extended invitation to comment as to the CJEO Draft Formal Opinion 2019-014.

I present this in my capacity as Chair of the Trial Court Presiding Judges Advisory Committee. The presiding judges of the trial courts of this state communicate and meet regularly and, as Chair, I am tasked with presenting their concerns and opinions.

Superior Court of Alameda County Presiding Judge Wynne S. Carvill, Assistant Presiding Judge Tara M. Desautels, and Court Executive Officer Chad Finke, wrote to Committee Counsel by letter dated May 1, 2019. This correspondence includes a detailed response to the above-referenced Draft Formal Opinion which was also provided to the Trial Court Presiding Judges Advisory Committee. A copy of this letter is attached hereto.

I solicited feedback on the Alameda letter from Trial Court Presiding Judges Advisory Committee members and received endorsements from the following courts:

Amador	Inyo	Nevada	Santa Clara
Butte	Kern	Orange	Santa Cruz
Calaveras	Lassen	Plumas	Shasta
Colusa	Los Angeles	Riverside	Sierra
Contra Costa	Madera	Sacramento	Solano
Del Norte	Marin	San Benito	Sonoma
El Dorado	Mendocino	San Bernardino	Sutter
Fresno	Merced	San Diego	Tulare
Glenn	Modoc	San Francisco	Tuolumne
Humboldt	Mono	San Luis Obispo	Yuba
Imperial	Monterey	San Mateo	

As you can see from the aforementioned endorsements, there is considerable concern as to the scope and effect of the subject draft opinion. As stated by one responder, a case management system puts into electronic form that which was traditionally in paper form. It thus stands to reason that ethical considerations applicable to traditional files should not be modified where that same information is accessible in electronic format. If the draft opinion is adopted, the very utility of courts' case management systems will be compromised.

Additional comments were made as to the effect of the proposal on juvenile court matters. In that regard, I understand that you have received a detailed letter addressing these concerns by separate correspondence.

Thank you for your consideration of the foregoing. If you have any questions, feel free to contact me.

Sincerely,

Gary Nadler
Chair, Trial Court Presiding Judges Advisory Committee and Presiding Judge, Superior Court of Sonoma County

GN/CR
Enclosure
cc: Hon. Joyce D. Hinrichs, Vice-chair, Trial Court Presiding Judges Advisory Committee and Presiding Judge, Superior Court of Humboldt County
Members of the Trial Court Presiding Judges Advisory Committee
Ms. Nancy A. Black, Committee Counsel, Committee on Judicial Ethics Opinions

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

CHAMBERS OF
WYNNE S. CARVILL
Presiding Judge
Department 1

René C. Davidson Courthouse
1225 Fallon Street
Oakland, CA 94612

May 1, 2019

Ms. Nancy A. Black, Committee Counsel
The Supreme Court of California
Committee on Judicial Ethics Opinions
350 McAllister Street
San Francisco, California 94102
(Judicial.Ethics@jud.ca.gov)

Re: Public Comments on CJEO Draft Formal Opinion 2019-014

Dear Ms. Black:

We write to offer public comment to Committee on Judicial Ethics Opinions ("CJEO") Draft Formal Opinion 2019-014 (the "Draft Opinion") concerning a judge's ability to search a court's electronic case management system ("CMS") for records pertaining to a matter before the judge.

The Draft Opinion sets out a broad ethical constraint on the use of a CMS to address the important, but narrow, ethical concern that judges might use a CMS to obtain and then consider adjudicative facts that are not in the record for purposes of resolving fact issues. While that is a bona fide concern, the opinion is overbroad, confusing, and overly restrictive. The Draft Opinion is also contrary to several objectives set forth in the Report to the Chief Justice of the Commission on the Future of California's Court System ("Futures Report") and does not consider and account for the numerous legitimate and unexceptional reasons why a judge would search a CMS. Specifically:

- The Draft Opinion does not distinguish adjudicative facts, case management facts, legal research, court records, and other types of information.
- The Draft Opinion does not consider that judicial initiative in looking for and using case management facts about cases is permitted, appropriate, and to be encouraged.
- The Draft Opinion does not consider that judges can properly use case management facts and court records in a CMS for case management, assisting litigants, supervision of litigants and attorneys, and court administration.

- The Draft Opinion does not consider that a CMS is a court's "brief bank" and that judges can properly use it for legal research.
- The Draft Opinion does not distinguish between the particular knowledge of an individual judge and the collective knowledge of the judges in the court. A CMS is in part a high-tech means for judges to exchange case management facts about cases, and there is no prohibition on judges sharing information other than adjudicative facts. (Canon 3B(7)(b) ["A judge may consult ... with other judges"].)
- The Draft Opinion does not adequately distinguish between concerns about a judge's impartiality (which is an ethics issue), concerns about a judge's awareness of facts outside the record (which is an evidence issue), and concerns about a judge's reliance on facts outside the record (which is a due process issue).

The Draft Opinion has no explanation why it is limited to non-criminal matters. The Code of Judicial Ethics does not distinguish between criminal and non-criminal matters.

For these reasons, which are set forth in greater detail below, we ask that the CJEO withdraw and reconsider Draft Opinion 2019-014.

THE DRAFT OPINION

CJEO Draft Formal Opinion 2019-014 addressed the question of whether "[i]n a non-criminal matter, may a judge search the court's case management system for information regarding a party, attorney, or facts relevant to the matter before the judge?" (Draft Opinion at 1.)

The draft opinion advises that Canon 3B(7) of the California Code of Judicial Ethics, which prohibits independent investigation of facts in a proceeding absent limited exceptions, extends to a judge's use of a CMS. The draft opinion concludes that a judge may only search a CMS in limited instances when a search is authorized by law and the search results may be properly judicially noticed. (Draft Opinion at 2.)

The Draft Opinion suggests that a judge should use a CMS only to review documents in a case that has been assigned to her. Although the Draft Opinion has qualifiers and exceptions, the final conclusion is, "[t]he committee cautions against performing a CMS search regarding a party, attorney, or other information that may be relevant to the matter before the judge. A judge may conduct an independent investigation of a court's CMS only if the search is authorized by law or if the judge is certain that all of the search results may be properly judicially noticed." (Draft Opinion at 14.)

The Draft Opinion's conclusion that a trial judge must have "certainty" that "all" search results would result in judicially noticeable information would deter trial judges from using a CMS in the myriad ways that judges can and should use a CMS to manage cases and conduct legal research.

DISTINGISHING BETWEEN TYPES OF FACTS

Perhaps the most fundamental problem with the Draft Opinion is its concern for searches of a CMS for "information" generally and without adequately addressing the categories of facts or information. There are categories of information.

The Invitation to Comment on the Draft Opinion at page ii actually recognizes this issue when it states that a CMS can "provide electronic access to case documents, court records, and calendar information, as well as other information created by judicial officers and court staff." (See also California Judges Assn, Judicial Ethics Committee, Opinion 68 at 3-4 [noting existence of "ultimate facts, adjudicative facts, legislative facts, etc."]; ABA Ethics Opinion 478, at 4-5 [similar].)

Setting out at least part of the range of facts or information:

- Adjudicative facts relate to the parties, their activities, their properties, and their business. These are facts that normally go to a jury and are relevant to the merits of a case. ("Ethics of Internet Research of Facts by Trial Judges," California Judges Assn, Judicial Ethics Committee, Opinion 68 at 3-4; "Independent Factual Research by Judges via the Internet," ABA Formal Opinion 478 at 4-5.)
- Facts concerning the administrative interpretation of a statute under *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7-8, must be presented as evidence but concern legal issues and would not normally go to a jury.
- Legislative facts are facts that the court can consider, which relate to society generally and are not based on evidence presented to the court. (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 775 fn 5; *California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 174.)
- Legislative facts are facts that the legislature has found, which can provide a rational basis for legislation. (*Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 510-511.)
- Legislative history consists of facts related to the enactment of legislation, which are subject to judicial notice. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 306 fn 2; *People v. Morales* (2018) 25 Cal.App.5th 502, 511 fn 7.)
- Case management facts and/or court records are facts that relate to the existence, nature, scheduling, and status of cases and do not concern either adjudicative facts or legal issues.

The Draft Opinion does not appear to distinguish between the categories and how they are used. The Draft Opinion at page 6 states that it applies when "a judge may be inclined to look up a party, an attorney, a pending or past proceeding, specific court records, or other information to fill in the gaps in the proceeding, to inform himself or herself about other cases or orders involving the parties, or to satisfy his or her curiosity regarding a party, attorney, or facts or issues related to the matter." (Draft Opinion at 6.) That language is extraordinarily overbroad

because it would set ethical boundaries on when a judge may search a CMS for any type of facts, including even case management facts, and would set boundaries on when a judge can use a CMS as a brief bank to look up legal issues.

This is particularly puzzling when one considers how these strictures should apply to a judge's communications with research attorneys and other staff. The California Code of Judicial Ethics expressly provides that "[a] judge may consult with court personnel or others authorized by law, as long as the communication relates to that person's duty to aid the judge in carrying out the judge's adjudicative responsibilities." (Cal. Code Jud. Ethics, Canon 3(B)(7)(a).) (Compare California Judges Assn, Formal Ethics Opinion No. 77 [communications with persons who work with the court but who are not court staff].) Judicial officers rely on court research attorneys "to aid in assessing the merits of legal contentions and to check the accuracy of parties' citations to the court record." (*People v. Jones* (2014) 2014 WL 3734541 at *8.) Judicial officers rely on courtroom clerks to manage calendars and set dates for CMCs and hearings.

Court staff is not subject to the Canons of Judicial Ethics, but it would be problematic if either court staff had more latitude in using a CMS than judges or if a judge could accomplish indirectly through court staff what the judge could not accomplish directly. Is a judge supposed to direct staff not to communicate information to her outside the scope of what is permitted by the Draft Opinion?

CASE MANAGEMENT

Judges should be able to search a CMS for purposes of case management, which can include looking at both the present case and other cases.

Trial judges have the obligation to actively manage their cases. The Trial Court Delay Reduction Act, Govt Code 68607, states: "judges shall have the responsibility … to actively manage the processing of litigation from commencement to disposition." (See also CRC 3.713(c) ["It is the responsibility of judges to achieve a just and effective resolution of each general civil case through active management and supervision of the pace of litigation from the date of filing to disposition."].)

Trial judges who are assigned to manage complex civil cases have a more specific and emphatic obligation to actively manage their cases. Std Jud Perf., 3.10(a) states, "judicial management should begin early and be applied continuously and actively."

Consistent with their obligation to actively manage cases, it is appropriate for judges to look at a CMS for matters relevant to case management. Frequent scenarios include the following.

Identification of related cases. CRC 3.300 requires the parties to file notices of related cases. Sometimes parties fail to make the required filings and judges learn through other means of cases

that might be related. Judges should be able to look at a CMS for cases that might be related and to then review the case file to determine if they should be related.

Sometimes a party will file a duplicate action concerning or relating to the same cause of action because the party wants to include new causes of action or parties but doesn't know how to amend complaints or request joinder. Other times a party will file a duplicate action because she does not like a decision made in a previously heard case, and is trying to have the matter re-heard by a different judge on the assumption that the new judge will not be aware of the earlier decision. A judge should be ethically permitted to use CMS to identify related cases and to bring them together for efficient management.

The Draft Order at page 10 acknowledges that "a judge can properly search the CMS for a complaint when considering whether to relate two or more cases." The Draft Order then cautions at pages 10-11 that a judge might uncover other information and suggests that searching a CMS for information to assist in determining whether cases are related might ethically compromise a judge. This is a hyper-vigilant approach to a routine case management exercise.

Management of related cases. If cases are related, whether formally or not, judges should be able to look at a CMS to determine the status of a related case for case management purposes. Common examples include:

- A judge in a UD case checking the status and schedule of a Probate, Family, or quiet title case for purposes of determining when ownership issues regarding property will be resolved in the related case.
- A judge in a surplus funds from sale of real property case (Civil Code §2924j) checking persons served in a Probate case to identify potential claimants to the surplus funds.
- A judge in a UD case checking the register of actions for prior UDs concerning the same property to clarify for the judge which 3 or 30 or 60 day notice applies to which case.

If a judge cannot look at related cases in a CMS, then the judge is setting CMC, hearing, and trial dates in ignorance. This can lead to court dates that are set and then continued, which is a waste of time for the judge, clerk, and litigant. (Futures Report at 53 ["There is no disputing that continuances are costly to both parties and the courts"].)

The California Supreme Court can manage related cases by issuing a "grant and hold" order. (CRC 8.512(d)(2); *People v. Orozco* (2018) 24 Cal.App.5th 667, 671.) The Supreme Court is presumably permitted to review its CMS to look at the filings and issues in other cases even if no party filed a notice of related cases.

Consistent orders. If cases are related, whether formally or not, judges should be able to look at a CMS for the purpose of considering similar orders so that the judge can at least know whether she is issuing a consistent order regarding a party. Trial judges hear many cases that cross over different case types. For example, a case arising out of a domestic violence incident may have

emergency actions pending on a Civil Harassment and/or Domestic Violence calendars, an open Family Law action, and a new criminal case or cases (new complaints, as well as probation or parole revocations). A judge hearing any one of these actions should be able to use a CMS to learn the procedural posture of the related cases and to review the orders in those cases so the judge can both schedule future hearings appropriately and issue consistent, or at least not conflicting, orders.

Consolidation. The Court of Appeal consolidates cases on its own motion and is presumably permitted to look at its CMS in making those decisions. (*In re Anthony B.* (1999) 72 Cal.App.4th 1017, 1020 ["on this court's own motion, the appeals in F031048 and F031750 were consolidated"]; *People v. Sanchez* (1987) 190 Cal.App.3d 224, 228 ["Upon this court's own motion, the appeals of appellants Sanchez and Castillo were ordered consolidated"].) Trial courts do not consolidate cases on their own motion, but a judge should be able to review a CMS so the judge can raise the issue of consolidation as part of case management.

Coordination. If cases in different counties appear to share a common issue of fact or law, then the trial court can submit a petition for coordination to the Judicial Council. (CCP §404.) A petition for coordination must state facts showing why the cases are complex and why they should be coordinated. (CCP §404.1.) A judge considering a petition for coordination should be able to use a CMS to review any cases that might be the subject of a petition for coordination.

Status of case in Court of Appeal. If a petition for a writ has been filed in a case, then a trial judge should be able to look at the register of actions in the Court of Appeal to determine the status of the briefing, whether oral argument has been set, and to evaluate when the appellate proceedings are likely to conclude. Tracking proceedings in the Court of Appeal assists in scheduling hearings in the trial court. The prohibition on internet research for "facts" in the Court of Appeal's public CMS should not preclude this effort.

Status of related cases in federal court. If a case has been removed to federal court or has been stayed due to the filing of bankruptcy in federal court, then the trial judge should be able to look at the register of actions in the federal courts to evaluate when the federal proceedings are likely to conclude.

ASSISTING LITIGANTS

Judges should be able to search a CMS for the purpose of assisting litigants.

The California courts are committed to provide access to justice. (Std. Jud. Admin, 10.17(b)(1).) The Futures Report states: "As the neutral adjudicator, the court is not in a position to advise or represent SRLs. However, the court system does have a role in ensuring that SRLs are provided with the knowledge necessary to better represent themselves." (Futures Report at 30.) The Futures Report also states: "Providing critical information and support early in the

process allows outcomes based on the merits unhindered by procedural mistakes." (Futures Report at 32.)

An earlier report by the Judicial Council states that trial judges have "broad discretion to adjust procedures to make sure a self-represented litigant is heard." (Handling Cases Involving Self-Represented Litigants, A Bench Guide for Judicial Officers, Admin Office of the Courts, January 2007, at 3-12.)

It is common for parties unfamiliar with the court system to not know the difference between their various pending matters. The court has the discretion, if not the obligation, to assist these parties. Often the best way to do that is to be able to look up related cases on a CMS and to share that information with the parties. For example, if parties are setting a date for a Family Law hearing, it can assist the parties if the judge looks up pending dates in related criminal matters. Similarly, it can assist the parties if the judge in an unlawful detainer case looks up pending dates in a related probate case.

Even in circumstances where all parties are equally informed as to the existence of related cases, the parties might appear at a hearing without all the calendar information in each of their cases. A judge helps provide access to justice by looking up future dates in a CMS and sharing that information with the parties rather than letting them fend for themselves.

LEGAL RESEARCH

Judges should be able to search a CMS for orders and internal court memoranda that might contain relevant legal analysis.

A court's CMS contains the prior orders of judges in the court and functions as the court's "brief bank." At its most basic, a judge might want to use a prior order in a different case as a template for a new order. In addition, a judge might recall having considered an issue previously or know that another judge had and want to look at those prior orders in different cases to save time conducting research in the current case and to consider whether the judge is taking a consistent position on a legal issue.

Judges are permitted and encouraged to conduct independent legal research. *Giraldo v. Department of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 231, 251, states: "[W]e are certainly not constrained by the authorities cited by the parties ... [I]ndependent research is indispensable to an efficient appellate system. ... [T]he parties should rest assured we will uncover the applicable law." (*Baglione v. Leue* (1958) 160 Cal.App.2d 731, 736 ["Independent legal research by a court after a case is submitted is sometimes necessary and is to be commended."].) (See also ABA Ethics Opinion No. 478 at 3 ["Judges may conduct legal research beyond the cases and authorities cited or provided by counsel"].)

Judges should be permitted to conduct independent legal research by using a CMS to locate and review briefs and orders in other cases for the purpose of legal research. This is not materially different from the traditional low-tech procedure where one judge asks another judge if the judge has seen the same or a similar issue before and soliciting advice on the legal issue. (Canon 3B(7)(b) ["A judge may consult ... with other judges."].)

Westlaw or Nexis both have California trial court briefs and orders on their databases. It should be immaterial whether a judge conducts legal research on the court's CMS system or on Westlaw or Nexis.

There should be no ethical concerns if a judge reviews another judge's or a court employee's case notes on a legal issue. (Compare Draft Order at 9-10.) Judges and research attorneys conduct legal research on legal issues and may save that research in a CMS. A judge should be able to take advantage of the legal research conducted by her peers even if the research did not end up in an order.

There might be due process concerns if the judge through her independent research identifies new legal issues and bases a decision on the new legal issues without providing the parties with notice and an opportunity to be heard. There is a distinction between a judge citing to new authorities that apply to the issue presented and the judge identifying new issues. (*Giraldo v. Department of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 231, 251.)

If a judge identifies new issues, then the judge could continue a hearing and request supplemental briefing. (*Williams v. Southern California Gas Co.* (2009) 176 Cal.App.4th 591, 601; *Monarch Healthcare v. Superior Court* (2000) 78 Cal.App.4th 1282, 1286.) A judge could also address the due process concerns by informing the parties of the new authorities in the court's tentative decision and providing the opportunity to discuss the authorities at the hearing. (CRC 3.1308.) The due process concern with alerting the parties to a new legal issue should not, however, be confused with the Draft Opinion's ethical concerns about judges using a CMS to assist in legal research generally.

SUPERVISION OF LITIGANTS AND ATTORNEYS

Judges should be able to search a CMS to obtain information relevant to the supervision of litigants and attorneys.

Regarding litigants, a court can declare a person to be a vexatious litigant. (CCP §391 et seq.) A person who is a vexatious litigant directly impacts the operations and procedures of the court and through the use of court resources indirectly imposes financial obligations that directly affect the court's operations.

A court may on its own motion issue an order to show cause why a person should not be declared a vexatious litigant. (*In re Shieh* (1993) 17 Cal.App.4th 1154, 1155.)

For a judge to be able to issue an OSC under CCP §391(b)(1), the judge must be able to review the court's CMS to determine whether a pro se litigant has commenced, prosecuted, or maintained at least five litigations in the prior seven years that have been finally determined adversely to the person. The court is powerless to set an OSC under CCP §391(b)(1) without the ability to review the CMS.

For a judge to be able to issue an OSC under CCP §391(b)(3), the judge must be able to review the court's CMS to determine whether a pro se litigant has "repeatedly file[d] unmeritorious motions, pleadings, or other papers, conduct[ed] unnecessary discovery, or engage[d] in other tactics that are frivolous or solely intended to cause unnecessary delay." The court can make a vexatious litigant finding based in "repeated" unmeritorious motions both in the pending case and in other cases. (*In re Natural Gas Antitrust Cases* (2006) 137 Cal.App.4th 387, 398; *In re Luckett* (1991) 232 Cal.App.3d 107, 109.) The court is restricted in its ability to set an OSC under CCP §391(b)(3) without the ability to review the CMS to identify unmeritorious motions in other cases.

An example of an OSC under CCP §391(b)(3) is *California State Automobile Ass'n v. al-Hakim*, Alameda County Case No C-811337, Order to Show Cause dated 2/28/19. The judge reviewed the CMS for filings in the pending case and in four other cases. The judge's OSC identified what appeared to be a pattern of filing unmeritorious challenges for cause under CCP §170.1 before almost every hearing in all five cases.

Regarding counsel, trial courts can "sanction attorneys for improper conduct [and] control the proceedings before them to prevent injustice." (*Sheller v. Superior Court* (2008) 158 Cal.App.4th 1697, 1710.) Consistent with this authority, the court should be able to use a CMS to investigate whether an attorney is mis-using or abusing the judicial system.

An example where court searched its own CMS for the purpose of supervising counsel is *Brookwood Loans of California v. Griffin*, Alameda Case No. RG14-748102, Order dated 10/15/15. The judge's OSC identified multiple cases in which an attorney had filed proofs of service stating that a process server had served documents in different locations at the same time.

COURT ADMINISTRATION

The presiding judge is responsible for the administration of all the cases in a court. (CRC 10.603.) The presiding judge "should take an active role in advancing the goals of delay reduction." (Std Jud Perf 2.1(c).)

The presiding judge must supervise the judges and the court staff. (CRC 10.603(a) and (c)(4).) The presiding judge must use the CMS to monitor judicial caseloads, review complaints against judicial officers, and perform the various administrative roles required of a court manager.

The presiding judge must specifically "supervise and monitor the number of causes under submission before the judges of the court and ensure that no cause under submission remains

undecided and pending for longer than 90 days." (CRC 10.603(c)(3).) The presiding judge must use a CMS to both to collect data on how long motions have been under submission and to look at the register of actions in specific cases to determine why motions might be under submission. (California Judges Assn, Formal Ethics Opinion No. 77 at V.A.7 on 5 [example where "PJ discovered a new violation and determined that several cases under submission for more than ninety days had unsigned orders"].)

All of the above tasks may in some courts be delegated to a supervising judge for a courthouse or area of law, in which case these supervising judges have the same need to use the CMS to discharge their responsibilities.

REMEDY WHEN A JUDGE SEARCHES/SEES NON-ADJUDICATIVE FACTS IN A CMS

A judge should not have to disqualify or disclose if she has searched a CMS for and/or found non-adjudicative facts.

There are two ethical concerns with a judge doing independent investigation: impartiality (Canon 2A) and reliance on factual information that is not in the record (Canon 3B(7) and (7)(a)). These are consistent with the Constitutional interests in separating the prosecutorial and adjudicative functions, which are neutrality and record exclusivity. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1, 10-11.)

The ethical concerns about impartiality and record exclusivity should not be present simply because a judge used a CMS to search for and obtain case management facts or to conduct legal research and the judge is now managing the case, hearing a motion, or conducting a trial.

Looking at impartiality, a reasonable member of the public would not fairly entertain a doubt about a judge's impartiality simply because the judge took the initiative to obtain case management facts about the case from the court's CMS in the process of managing the case. (*Wechsler v. Superior Court* (2014) 224 Cal.App.4th 384, 391.)

The Draft Opinion at page 13 cites several cases for the proposition that judges should not initiate independent investigations into adjudicative facts. (*Catchpole v. Brannon* (1995) 36 Cal.App.4th 237, 259 fn 9 [judge took judicial notice of the rainfall on the days in question "and used the putative discrepancy between this fact and appellant's testimony as a reason to question her overall credibility"]; *People v. Handcock* (1983) 145 Cal.App.3d Supp. 25, 28 [judge went to car dealer mid-trial, obtained replacement part, and called dealer employee to testify to jury]; Public Admonishment of Judge Connolly (2016) at 2-4 [Judge setting OSC re contempt for attorney sought court records regarding alleged contempt by same attorney in another court]; Public Admonishment of Commissioner Friedlander (2010) at 10-11 [Commissioner looked at respondent's divorce file and other files of parties before hearing on civil restraining order].) All of these cases concern a judge obtaining adjudicative facts for resolution of disputed issues of fact. None of those cases address a judge's consideration of non-adjudicative facts for case management purposes.

There is a distinction between a judge who considers case management facts for case management purposes and who later makes decisions about disputed facts in the case and a judge who independently investigates adjudicative facts. The former is simply serving different judicial functions at different times. The latter is stepping outside the neutral judicial role and is plausibly embroiled.

The use of a CMS for case management and legal research purposes is such a common part of a judge's job that requiring disqualification would be debilitating to the single assignment of cases.

California Judges Assn Ethics Formal Opinion No. 2015-17 suggests that disqualification should not be required. This opinion concerns "[i]s 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?" The Formal Opinion reasons that disqualification is required only where the prior participation in a case was "active participation." The Formal Opinion concludes that disqualification for any participation is not required because "[t]o conclude otherwise would impede the administration of justice where there is no reason to doubt impartiality, contrary to the purposes of the disqualification statutes."

Similarly, keeping track of all uses of a CMS for case management facts and making all such disclosures would be unduly time consuming and produce little resulting benefit to judicial integrity. The Draft Opinion states at page 12 that a judge must disclose any review of any facts in a CMS that are not in the record of the case at issue.

California Judges Assn Ethics Opinion No. 45, Section III.J, suggests that disclosures should not be required. Ethics Opinion 45 states: "[A] Judge need not disclose or disqualify merely because an attorney has appeared often before the judge even when the judge holds that attorney in high esteem, provided the judge believes self not to be prejudiced for or against anyone in the case. If the rule were otherwise, it would simply be impossible for an experienced, well-known judge to get through a lengthy calendar."

ADJUDICATIVE FACTS

A judge cannot use a CMS to conduct an independent investigation regarding adjudicative facts.

The Draft Opinion focuses on ethical issues particular to adjudicative facts. In considering exceptions to the rule, the Draft Opinion focuses on the ability of a court to take judicial notice of adjudicative facts not in the evidentiary record. (Draft Opinion, at 8-11.)

The Draft Opinion acknowledges that a judge can take judicial notice of court records when considering issues of claim preclusion and issue preclusion. (Draft Opinion at 9.) This is relevant to the ethical question because Evidence Code §452(d) expressly permits judicial notice of court records and a judge who uses the Evidence Code 453 procedure eliminates the concern with record exclusivity and due process. The ability to take judicial notice does not, however,

address whether judicial initiative in sua sponte taking judicial notice suggests a lack of neutrality.

The cases cited in the Draft Opinion are not relevant for the issue of whether the court can sua sponte take judicial notice of court records. *In Planning & Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 225, it is unclear whether the court sua sponte took judicial notice or whether a party requested the court to take judicial notice. In *Western Mutual Ins. Co. v. Yamamoto* (1994) 29 Cal.App.4th 1474, 1485 fn 3, the record was similar and, in addition, the court stated, "we need not determine whether the trial court erred in taking judicial notice of the 'entire' juvenile court file."

REMEDY WHEN A JUDGE SEARCHES/SEES ADJUDICATIVE FACTS IN A CMS

Whether a judge should have to disqualify, disclose, or permit supplemental briefing if she has searched a CMS for and/or found adjudicative facts should depend on the circumstances. As noted above, there are distinctions between and among concerns about a judge's impartiality (which is an ethics issue), concerns about a judge's awareness of facts outside the record (which is an evidence issue), and concerns about a judge's reliance on facts outside the record (which is a due process issue).

Looking at impartiality, a reasonable member of the public could fairly entertain a doubt about a judge's impartiality if the judge took the initiative to obtain adjudicative facts and it might appear to be for the purpose of resolving a fact issue in favor of a particular party. (*Wechsler v. Superior Court* (2014) 224 Cal.App.4th 384, 391.) (See also Draft Opinion at 13 [cases where judges investigated adjudicative facts].)

A judge can, however, lawfully investigate adjudicative facts on the record by calling and questioning witnesses at trial. (Evid Code §775.) "[T]he court has a duty to see that justice is done and to bring out facts relevant to the jury's determination. … "[I]t is not merely the right but the duty of a trial judge to see that the evidence is fully developed before the trier of fact." (*People v. Abel* (2012) 53 Cal.4th 891, 917.) (See also *People v. Handcock* (1983) 145 Cal.App.3d Supp. 25, 29 fn 2 [collecting law].) Given the ability of judges to call and question witnesses, the concern with a judge searching a CMS for adjudicatory facts is perhaps more a concern with transparency than a concern with lack of neutrality.

Looking at a judge's awareness of facts outside the record (record exclusivity), a reasonable member of the public would not entertain a doubt about a judge's impartiality if the judge had information that was not in the evidentiary record.

A judge who is single assigned to a case might learn information about the parties, the attorneys, and the facts of the case in the context of case management and discovery motions. If the case proceeds to a court trial, however, the judge will decide the case based only on the evidence that is admitted at trial. (*Gimbel v. Laramie* (1960) 181 Cal.App.2d 77, 84, 85 ["…the mere fact that

the judge knew of the criminal trial of the doctor and his two years' suspension of license standing alone is not a ground for a mistrial, a new trial, or a reversal of the judgment. From the very nature of the office he occupies and of the judicial processes a judge is required to divorce from his mind many inadmissible matters which are inevitably brought to light during the course of a trial."].)

A judge conducting a court trial can be presented with evidence, the opposition can object, the judge can then look at the evidence and consider if the evidence is admissible, sustain the objection to the evidence, and then proceed with the trial as though the judge had not seen the evidence. That is not unusual.

Judges are routinely expected to partition off information they know and make decisions only on admissible information. The implicit concern is more the lack of transparency about what adjudicative facts the judge knows and is not considering than the fact that the judge knows the off-the-record adjudicative facts in the first place.

The Draft Opinion is inconsistent with the law that judges can be aware of facts but set them aside when they evaluating the evidence in a case. By way of analogy, a judge can have friends in the legal community but still be impartial when she is on the bench. In *People v. Carter* (2005) 36 Cal.4th 1215, 1240-1245, the court rejected the defendant's claims that a trial judge's act of officiating at the prosecutor's daughter's wedding several months before the commencement of a death penalty trial created an appearance of partiality. (See also *Wechsler v. Superior Court* (2014) 224 Cal.App.4th 384 [Court commissioner could preside over dissolution of marriage proceeding after agreeing to officiate at wedding of wife's counsel].) If these personal connections do not raise a doubt about a judge's impartiality, then it is difficult to see how a judge's use of a CMS and the awareness of information obtained in a judicial capacity for judicial purposes would raise a doubt about a judge's partiality.

The Draft Opinion does not cite to CJA Ethics Update 1997 at D, which takes an interesting approach to what a judge should do if she becomes aware of adjudicatory facts outside the record. The CJA Ethics Update 1997 states: "A judge who learns of facts from the court's computer system which may be useful to one side or the other in an ongoing trial should disclose this information to all parties in the trial. Canon 3B(7)."

If the "ongoing trial" were a bench trial, then this makes sense if the facts are adjudicative facts and the judge planned to rely on the facts. If, however, the judge decided to ignore the facts from the court's computer system and limit herself to information in the evidentiary record, then that would be equivalent to the judge sustaining her own objection to the information, and it would be arguably unnecessary to disclose that the judge knows excluded adjudicative facts.

If the "ongoing trial" were a jury trial, then the required disclosure appears to make little sense because if the judge said nothing, then the parties would simply present their evidence to the trier of fact without regard to what the judge knew. Disclosing the information to the parties at trial

would arguably be an improper implicit suggestion that one party or the other should present the information to the jury. Alternatively, disclosing the information might consistent with a judge's ability to call and question witnesses at trial. (Evid Code §775.) This comment is of the opinion that CJA Ethics Update 1997 at D provides questionable guidance.

Looking at a judge's reliance on facts outside the record, a judge who through a CMS learns adjudicative facts must not consider that information unless either a party formally presents the facts as evidence on the merits of a motion or at trial or the court notifies the parties that it plans to consider the facts. (CJA Ethics Opinion No 68 at II.B.12 at 8 [judge who has seen an adjudicative fact in a CMS and plans to rely on it must give notice to the parties of intent to do so].) (See also *Monarch Healthcare v. Superior Court* (2000) 78 Cal.App.4th 1282, 1286.)

LIMITATION OF DRAFT OPINION TO NON-CRIMINAL MATTERS

The Draft Opinion applies only to a "non-criminal matter."

On the level of principle, the Code of Judicial Ethics appears to apply uniformly and without regard to whether a judge is assigned to a civil, criminal, family, or juvenile matter. The integrity of the judiciary might suffer if the ethical responsibilities of judges varied depending on their specific case assignments.

On the level of practicality, there can be little difference between a hearing on a Domestic Violence Restraining Order and a hearing relating to criminal charges related to domestic violence. It would be peculiar if a judge hearing the former could not use case management facts in a CMS to coordinate scheduling but a judge in the latter could do so.

The issues of principle and practicality are presented in the Draft Opinion at page 10, which cautions that "[i]f the judge [on a civil matter] performs a term search of the CMS using a party's name to determine whether there are other matters that also should be related, the judge could uncover … a party's criminal history, which is very unlikely to be the proper subject of judicial notice." If a judge hearing a civil matter should be concerned about inadvertently finding a party's criminal history, then a judge hearing a criminal matter should be similarly concerned about inadvertently finding a party's family law, restraining order, or unlawful detainer history.

The commenters suggest that the Committee consider how the proposed ethical limits on the use of a CMS would affect the case management of civil, criminal, family, and juvenile matters.

CONCLUSION

We ask that the CJEO withdraw and reconsider Draft Opinion 2019-014. The Draft Opinion does not distinguish between adjudicative facts, case management facts, or legal research. The Draft Opinion does not consider the myriad ways that trial judges can properly use a CMS to find case management facts to assist in managing cases. It also raises a host of issues regarding how judges should interact with legal research attorneys and staff. In its current form, the Draft

Opinion is overbroad and would result in the rigid compartmentalization of case information, which would restrict and impair effective case management, legal research, supervision of litigants and attorneys, and court administration.

Very truly yours,

Hon. Wynne S. Carvill
Presiding Judge
Alameda County Superior Court

Hon. Tara M. Desautels
Assistant Presiding Judge
Alameda County Superior Court

Chad Finke
Court Executive Officer
Alameda Superior Court

Comment 23:

Submitted by: Superior Court of California, County of Kern

Received on: May 15, 2019

Confidentiality Waived

SUPERIOR COURT OF CALIFORNIA
COUNTY OF KERN

Superior Court of California
County of Kern
1415 Truxtun Avenue
Bakersfield, CA 93301
(661) 868-4934

May 15, 2019

Nancy A. Black, Committee Counsel
Supreme Court of California
Committee on Judicial Ethics Opinions
350 McAllister Street, Room 1144A
San Francisco, CA 94102-3688

Delivered by email to Judicial.Ethics@jud.ca.gov

Re: Comments on CJEO Draft Formal Opinion 2019-014

Dear Ms. Black:

In response to the Committee's request for comments on Draft Formal Opinion 2019-014, we have had an opportunity to review Alameda County Superior Court's comment submitted on May 1, 2019 and we agree with its analysis and concerns.

We write separately to voice our concern that the Draft Opinion does not address unified family court programs or the need for information sharing across family and custody courts. Kern County Superior Court's family law, probate, and juvenile divisions are considering implementing a unified child custody model based on the Center for Families, Children & the Courts' (CFCC) Unified Courts for Families (UFC) published guidelines (at https://www.courts.ca.gov/cfcc-unifiedcourts.htm). The Draft Opinion appears to us to conflict with these guidelines.

The Draft Opinion concludes that a judge may not search for or view information included in a court's case management system (CMS) that might be relevant to a pending proceeding before the judge unless the search is authorized by law or the information may be properly judicially noticed, in accordance with canon 3B(7) of the California Code of Judicial Ethics. The Draft Opinion does not state whether the prohibition would also apply to court staff. But, assuming the answer is yes, it is difficult to imagine how UFC programs, which require courts to identify and coordinate cases involving the same child or family, could continue to operate.

Briefly, unified family courts seek to identify cases involving the same family or child, then unify or coordinate the related cases, court ordered services, and relevant information. The goal is to improve justice for litigants by providing more complete information to judicial officers, reducing court appearances, avoiding conflicting orders, facilitating linkage to services, and effectively

managing cases involving self-represented litigants.[1] Unified family courts also aim to reduce the burden on courts by reducing courtroom time, records maintenance, and information management.[2]

The two main unified family court models are one judge/one family, and one team/one family. In the one judge/one family model, all cases involving the same family are heard by the same judge. In the more common one team/one family model, each family has a case manager that coordinates the family's multiple cases in various courts. It is essentially an information-sharing model. Hearing officers communicate with each other and case management staff provide coordination.[3] The most common case types for inclusion in a UFC program are family law, juvenile dependency and delinquency, probate guardianship and conservatorship, and occasionally overlapping criminal court cases.[4]

The San Francisco Superior Court operates a comprehensive unified family court.[5]

In funding and evaluating a number of UFC pilot projects around the state, CFCC concluded that use of a court-based case manager to search court databases for related cases, create case summary sheets, and brief bench officers and other court personnel on relevant case issues was critical to the programs' success.[6]

The UFC guidelines also stress the importance of developing appropriate technology to coordinate proceedings and share information. The Los Angeles Superior Court's creation of the Children's Index, an automated search process that searches the case management systems used in dependency, delinquency, family law, child support, and probate for crossover cases involving an individual child, is cited as a model for other courts.[7]

The UFC materials advise courts to craft protocols and rules to ensure that parties receive notice of information that will be considered by the court and an

---

[1] Judicial Council of California, *Unified Courts for Families: Improving Coordination of Cases Involving Families and Children* (2008) p. 3 at https://www.courts.ca.gov/documents/ImprovingCoordination.pdf.

[2] Judicial Council of California, *Unified Courts for Families Deskbook: A Guide for California Courts on Unifying and Coordinating Family and Juvenile Law Matters* (2004) p. I-5 at https://www.courts.ca.gov/documents/UCFdeskbook.pdf.

[3] *Unified Courts for Families Deskbook, supra,* pp. I-6–I-7.

[4] *Improving Coordination of Cases Involving Families and Children, supra*, pp. 23-24.

[5] See https://sfsuperiorcourt.org/divisions/ufc.

[6] *Improving Coordination of Cases Involving Families and Children, supra*, pp. 6-7; Judicial Council of California, *Unified Courts for Families Program: Mentor Court Project Final Evaluation Report* (July 2007) p. 41 at https://www.courts.ca.gov/documents/UCFEDITFinal-online.pdf.

[7] *Improving Coordination of Cases Involving Families and Children, supra*, pp. 15-16.

opportunity to be heard, and to make sure that confidential information remains confidential.[8]

Recently, a California Court Innovation Grants Fund grant was awarded to the El Dorado Superior Court to develop a unified family court program that will coordinate domestic violence and child welfare cases to be heard by the same judge. Thomson-Reuters is developing a case management system to allow the court to link cases involving families with a co-occurrence of domestic violence and child delinquency or dependency in the CMS and to bundle hearings for the identified families. (National Center for State Courts, El Dorado County, California Family Court Model Study Report and Draft Final Plan, July 2018.)

If the Draft Opinion is adopted, unified court judges will be constrained from utilizing the same CMS systems that the Court is promoting to enable courts to identify and coordinate child and family cases.

Moreover, regardless of whether a court uses a unified model, family, juvenile, and probate judges need to be able to access information about other orders and proceedings concerning a child before the court in order to fulfill their obligation to act in a child's best interests. (See Fam. Code, §§ 3011, 3020, subd. (a), 3040; Prob. Code, § 1514, subd. (b); Welf. & Inst. Code, § 202, subd. (b), (d); Cal. Stds. Jud. Admin., §§ 5.30, 5:40.) A judge who is unaware of other orders and proceedings affecting a child cannot ensure that his or her orders will serve the child's interests.

Rule 5.445 of the California Rules of Court requires courts that hear child custody matters to investigate and identify other orders affecting a child. The rule mandates that courts dealing with custody and visitation adopt a court communication protocol that includes: "(A) A procedure requiring courts issuing any orders involving child custody or visitation to make reasonable efforts to determine whether there exists a criminal court protective order that involves any party to the action; and (B) A procedure requiring courts issuing criminal court protective orders to make reasonable efforts to determine whether there exist any child custody or visitation orders that involve any party to the action."

If the Committee intends to adopt the Draft Opinion, the tension between the rules and protocols that encourage or require courts handing child and family matters to gather and share appropriate information and canon 3B(7)'s prohibition against independent fact investigations by a judge should be analyzed and addressed.

[8] *Improving Coordination of Cases Involving Families and Children, supra*, pp. 27-28; *Unified Courts for Families Deskbook, supra,* pp. 2-1–2-7, 3-1–3-20.

We appreciate the opportunity to provide input to the Committee. We also waive confidentiality and consent to the posting of our comment on the CJEO website.

Respectfully submitted,

Commissioner Andrew B. Kendall
Probate Division, Kern County Superior Court

Cameryn Stein
Associate Attorney
Probate Division, Kern County Superior Court

Comment 24:

Submitted by: Superior Court of California, County of Santa Clara

Received on: May 15, 2019

Confidentiality Waived

Superior Court of California
County of Santa Clara

191 North First Street
San José, California 95113
(408) 882-2700

Chambers of
HON. DEBORAH A. RYAN, Presiding Judge

May 15, 2019

Ms. Nancy A. Black, Committee Counsel
The Supreme Court of California
Committee on Judicial Ethics Opinions
350 McAllister Street
San Francisco, California 94201
(Judicial.Ethics@jud.ca.gov)

Re: Public Comment on CJEO Draft Formal Opinion 2019-04

Dear Ms. Black:

We write to add our court's public comment to CJEO Draft Formal Opinion 2019-04, concerning a judge's ability to utilize a court's electronic case management system ("CMC") for records and information pertaining to a matter before the judge, in the ordinary course of the judge's duties.

We share and join in the concerns expressed by our colleagues of the Alameda County Superior Court. Their public comment is a well-researched, thorough presentation of concerns about the Draft Opinion.

The court also endorses and supports the thoughtful position taken by the California Judges Association Ethics Committee, which is reiterated as follows:

The Court concurs that ethical issues related to a Judge's ability to conduct an independent investigation of the Court Case Management Systems is an important topic for the CJEO to consider. However, The CJEO Draft Opinion, in its present form, has the potential effect of discouraging judges from searching a court's case management system for information relevant to the efficient and efficacious handling of cases—particularly when a party and/or his or her family have multiple cases across different case types.

Judges in family, juvenile dependency, juvenile delinquency and criminal have an obligation to insure that orders that are being made do not conflict with or unintentionally supersede parallel orders made by a different division. Attorneys and parties are not always the best source of information about existing parallel court orders which come from multiple divisions within the court. Judges in these areas need to be particularly mindful that a litigant is not subject to multiple court orders which make it impossible for the litigant to comply—in other words setting the litigant up for failure.

The concern that a judge's search of a court CMS might provide irrelevant information is well founded. However, this concern is addressed in the same manner that a judge who presides over a court trial or court hearing addresses the same issue related to the presentation of irrelevant evidence. A judge who rules a piece of evidence irrelevant in a court trial or hearing

simply sets aside knowledge of that particular piece of evidence and considers only relevant evidence.

Additionally, the proposed CJEO opinion does not acknowledge the "various – and numerous – presumptions" that address judges being exposed to irrelevant evidence. *In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1526. "'As an aspect of the presumption that judicial duty is properly performed [Evid. Code, §664], we presume…that a court knows and applies the correct statutory and case law [citation] and is able to distinguish admissible from inadmissible evidence, relevant from irrelevant fact, and to recognize those facts which properly may be considered in the judicial decision making process.'" *Id.*, at 1526; quoting *People v. Coddington* (2000) 23 Cal.4th 529, 644. Underlying this presumption of doing the right thing is the fact that judges "possess that trained and disciplined mind" that can separate the wheat from the chaff. *Marriage of Davenport, id.*, at 1526.

Judges are expected to properly perform judicial functions in accordance with the Code of Judicial Ethics. Before undertaking a matter, a judge must assess whether the judge has the ability to remain impartial, avoid embroilment, and avoid any appearance of bias for or against any party or attorney in the proceedings. Presumably, judges will also recognize their duty to disclose the results of any search of the court's CMS to the parties and/or attorneys in the proceeding.

If Judges are required to comply with the proposed CJEO opinion, most, if not all, judges will decline to do any search of a CMS and, in doing so, critical information (which is subject to disclosure as set forth above) will be missed. This has the potential of creating adverse outcomes for the parties and public who use our court system.

As currently proposed, the Draft Opinion is unduly and unnecessarily restrictive, and it would impede and, in fact, vitiate the entire purpose and utility of a CMS to enable judges and courts to efficiently manage and decide cases, with all the information necessary to do so. Judges and courts should not be precluded from providing efficient, full and fair access to justice by what we agree appear to be overly broad and unduly restrictive limitations on a judge's appropriate and necessary use of a court CMS.

The Santa Clara County Superior Court recommends that the proposed CJEO opinion be withdrawn and reconsidered by the Committee – and that it not be published as currently drafted.

Sincerely,

Deborah A. Ryan
Presiding Judge
Santa Clara County Superior Court

Theodore C. Zayner
Assistant Presiding Judge
Santa Clara County Superior Court

Comment 25:
Submitted by: Justices of the Court of Appeal, First Appellate District
Received on: May 15, 2019
Confidentiality Waived

Dear Justice Robie and members of the Committee on Judicial Ethics Opinions (CJEO):

I, and my colleagues on the First District Court of Appeal listed below, strongly urge the CJEO to consider the issues and concerns set forth in the letter submitted by the Alameda County Superior Court, dated May 1, 2019, regarding CJEO Draft Formal Opinion 2019-014.

- Jim Humes, Administrative Presiding Justice
- Barbara J.R. Jones, Presiding Justice
- Peter J. Siggins, Presiding Justice
- Kathleen M. Banke, Associate Justice
- Carin T. Fujisaki, Associate Justice
- Sandra L. Margulies, Associate Justice
- Mark B. Simons, Associate Justice
- Therese M. Stewart, Associate Justice
- Jon B. Streeter, Associate Justice
- Alison M. Tucher, Associate Justice

Sincerely,

Ioana Petrou

Ioana Petrou

Associate Justice, Division 3

First District Court of Appeal

350 McAllister Street

San Francisco, CA 94102