



California Supreme Court Committee on Judicial Ethics Opinions

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

JudicialEthicsOpinions.ca.gov

INVITATION TO COMMENT [CJEO Draft Formal Opinion 2021-017]

Title

Committee on Judicial Ethics Opinions
Draft Formal Opinion 2021-017;
Providing Close Family Members with
Advice that Implicates Legal Issues

Action Requested

Review and submit comments by
March 22, 2021

Proposed Adoption Date

To be determined

Prepared by

California Supreme Court Committee on
Judicial Ethics Opinions
Hon. Ronald B. Robie, Chair

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Summary

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

CJEO Draft Formal Opinion 2021-017 provides guidance for judges who are asked by family members for advice on matters that implicate legal issues. The opinion notes that judges are prohibited by both the constitution and the canons of ethics from providing advice if by doing so they would be practicing law, and provides an appendix of cases to help judges determine whether advice that they might provide to a family member would be considered “legal advice”

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and for that reason would constitute the practice of law. In the absence of precedent on point, the opinion advises that judge should evaluate whether providing the requested advice would undermine the dual purposes underlying the prohibition on judicial practice of law, to: (1) ensure the performance of official judicial duties; and (2) maintain the integrity of the judiciary. If the judge's advice would not align with these purposes, then it is ethically impermissible.

After receiving and reviewing comments, the committee will decide whether the draft opinion should be published in its original form, modified, or withdrawn (rule 9.80(j); CJEO rule 7(d)). Comments are due by **March 22, 2021**, and may be submitted as described below.

All comments submitted to the committee are deemed not to be confidential communications and may be posted on the committee's website for public review at the committee's discretion. (Cal. Rules of Court, rule 9.80(h)(1) & (4).) All comments the committee receives will be carefully considered by the CJEO members when finalizing and approving the opinion.

CJEO Background

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

The Draft Opinion

The committee has been asked to provide an opinion about whether and to what extent a judge may ethically provide advice to a member of the judge's family about a matter that implicates legal issues.

In the attached draft opinion, the committee notes that both article VI, section 17 of the constitution and canon 4G prohibit judges from offering legal advice that would constitute the practice of law. To provide guidance about the extent to which a judge may advise a family member regarding law-related matters, the opinion includes an appendix of cases that have interpreted the prohibition on law practice and examined what kinds of activities and advice constitute the practice of law.

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Where case law does not provide adequate guidance, the opinion advises that judges cannot advise their family members if doing so would undermine the dual purposes underlying the prohibition on judicial practice of law, to: (1) ensure the performance of official judicial duties; and (2) maintain the integrity of the judiciary. Specifically, the opinion states that judges are not permitted to: (1) accept compensation for help with legal matters; (2) provide advice that could lead to the judge's disqualification; (3) neglect official duties in favor of a matter involving a family member; (4) provide advice that would cause a reasonable person to question the judge's independence or integrity; or (5) act, or appear to act, as an advocate.

The opinion concludes that a judge can provide limited law-related advice to a family member similar to the kinds of information that the judge would be able to provide a self-represented party appearing before the judge's bench. A judge also may provide advice relating to a matter in which the judge is personally involved when the judge is acting in his or her own personal interest. The opinion notes that the risks that a judge would be engaged in the practice of law when advising a family member are lowered if the judge limits the advice given to the kind of guidance and information that a nonlawyer might provide a family member in a similar situation and, in addition, if the judge does not appear publicly on behalf of the family member or act in a representative capacity.

Invitation to Comment

The committee invites comment on the attached draft opinion by **March 22, 2021**. Comments may be submitted:

- online at <https://www.judicialethicsopinions.ca.gov/opinions/invitations-to-comment/>; or
- by email to Judicial.Ethics@jud.ca.gov.

The committee will post on the CJEO website, at the close of the comment period, or after March 22, 2021, those comments submitted with a statement waving confidentiality or consenting to CJEO's public disclosure of the comment.

Attachment: CJEO Draft Formal Opinion 2021-017

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

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CJEO Draft Formal Opinion 2021-017

**PROVIDING CLOSE FAMILY MEMBERS WITH ADVICE
THAT IMPLICATES LEGAL ISSUES**

I. Question Presented

The Committee on Judicial Ethics Opinions (CJEO) has been asked to advise whether and to what extent a judge may ethically provide advice to a member of the judge's family about a matter that implicates legal issues.

II. Summary of Conclusions

Judges are prohibited by the California Constitution and the Code of Judicial

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Ethics¹ from providing legal advice to a family member if by doing so they would be practicing law. Numerous decisions from the Supreme Court and the Courts of Appeal, collected in the Appendix to this opinion, can help judges determine whether advice that they might provide to a family member would be considered “legal advice” and for that reason would constitute the practice of law. If there is no precedent that would resolve whether advising a family member in a given circumstance would constitute the practice of law, the judge should evaluate whether providing the requested advice would undermine the dual purposes underlying the prohibition on judicial practice of law, to: (1) ensure the performance of official judicial duties; and (2) maintain the integrity of the judiciary. If the judge’s advice would not align with these purposes, then it is ethically impermissible.

A judge is not ethically permitted to: (1) accept compensation for help with legal matters; (2) provide advice that could lead to the judge’s disqualification; (3) neglect official duties in favor of a matter involving a family member; (4) provide advice that would cause a reasonable person to question the judge’s independence or integrity; or (5) act, or appear to act, as an advocate.

Even so, a judge can provide limited law-related advice to a family member. Such advice may include statements of law, explanations of court procedures and court rules, and guidance about legal requirements, similar to the kinds of information that the judge would be able to provide a self-represented party appearing before the judge’s bench. A judge also may provide advice relating to a matter in which the judge is personally involved when the judge is acting in his or her own personal interest.

¹ All further references to the code, canons, preamble, terminology and Advisory Committee commentary are to the California Code of Judicial Ethics unless otherwise indicated.

The risks that a judge would be engaged in the practice of law when advising a family member are lowered if the judge limits the advice given to the kind of guidance and information that a nonlawyer might provide a family member in a similar situation and, in addition, if the judge does not appear publicly on behalf of the family member or act in a representative capacity.

III. Authorities

A. Applicable Canons

Preamble: “The canons should be read together as a whole, and each provision should be construed in context and consistent with every other provision. They are to be applied in conformance with constitutional requirements, statutes, other court rules, and decisional law. Nothing in the code shall either impair the essential independence of judges in making judicial decisions or provide a separate basis for civil liability or criminal prosecution.

“The code governs the conduct of judges and candidates for judicial office and is binding upon them. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, requires a reasoned application of the text and consideration of such factors as the seriousness of the transgression, if there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system.”

Terminology: “ ‘Member of the judge’s family’ means a spouse, registered domestic partner, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship.”

Canon 1: “A judge shall uphold the integrity and independence of the judiciary.

“An independent, impartial, and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary is preserved. The provisions of this code are to be construed and applied to further that objective. A judicial decision or administrative act later determined to be incorrect legally is not itself a violation of this code.”

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Canon 2A: “A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. A judge shall not make statements, whether public or nonpublic, that commit the judge with respect to cases, controversies, or issues that are likely to come before the courts or that are inconsistent with the impartial performance of the adjudicative duties of judicial office.”

Advisory Committee commentary following canon 3B(8): “The obligation of a judge to dispose of matters promptly and efficiently must not take precedence over the judge’s obligation to dispose of the matters fairly and with patience. For example, when a litigant is self-represented, a judge has the discretion to take reasonable steps, appropriate under the circumstances and consistent with the law and the canons, to enable the litigant to be heard. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs.”

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

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

“(a) the justice believes his or her recusal would further the interests of justice; or

“(b) the justice substantially doubts his or her capacity to be impartial; or

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

Canon 3E(5): “Disqualification of an appellate justice is also required in the following instances: [¶] . . . [¶] (d) The appellate justice, his or her spouse or registered domestic partner, or a minor child residing in the household, has a financial interest or is either a fiduciary who has a financial interest in the proceeding, or is a director, advisor, or other active participant in the affairs of a party. . . .

“(e)(i) The justice or his or her spouse or registered domestic partner, or a person within the third degree of relationship to either of them, or the spouse or registered

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domestic partner thereof, is a party or an officer, director, or trustee of a party to the proceeding, or

“(ii) a lawyer or spouse or registered domestic partner of a lawyer in the proceeding is the spouse, registered domestic partner, former spouse, former registered domestic partner, child, sibling, or parent of the justice or of the justice’s spouse or registered domestic partner, or such a person is associated in the private practice of law with a lawyer in the proceeding.

“(f) The justice [¶] . . . [¶] (iii) has a personal bias or prejudice concerning a party or a party’s lawyer.

. . .

“(i) The justice’s spouse or registered domestic partner a person within the third degree of relationship to the justice or his or her spouse or registered domestic partner, or the person’s spouse or registered domestic partner, was a witness in the proceeding.”

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

“(1) cast reasonable doubt on the judge’s capacity to act impartially,

“(2) demean the judicial office,

“(3) interfere with the proper performance of judicial duties, or

“(4) lead to frequent disqualification of the judge.”

Canon 4G: “A judge shall not practice law.”

Advisory Committee commentary following canon 4G: “This prohibition refers to the practice of law in a representative capacity and not in a pro se capacity. A judge may act for himself or herself in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with legislative and other governmental bodies. However, in so doing, a judge must not abuse the prestige of office to advance the interests of the judge or member of the judge’s family. See Canon 2B.

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“This prohibition applies to subordinate judicial officers, magistrates, special masters, and judges of the State Bar Court.”

Canon 4H: “A judge may receive compensation and reimbursement of expenses as provided by law for the extrajudicial activities permitted by this code, if the source of such payments does not give the appearance of influencing the judge’s performance of judicial duties or otherwise give the appearance of impropriety.”

B. Other Authorities²

California Constitution article VI sections 9, 17.

Code of Civil Procedure sections 170.1 subdivision (a)(1), (3) (4) and (5), 170.5 subdivision (b).

Adams v. Commission on Judicial Performance (1995) 10 Cal.4th 866.

Altizer v. Highsmith (2020) 52 Cal.App.5th 331.

Baron v. City of Los Angeles (1970) 2 Cal.3d 535.

Birbrower, Montalbano, Condon & Frank v. Superior Court (1998) 17 Cal.4th 119.

Doan v. Commission on Judicial Performance (1995) 11 Cal.4th 294.

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

Holloway v. Quetel (2015) 242 Cal.App.4th 1425.

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

Inquiry Concerning Saucedo (2015) 62 Cal.4th CJP Supp. 1.

Inquiry Concerning Judge Stanford (2012) 53 Cal.4th CJP Supp. 1.

² Inquiries issued by the Commission on Judicial Performance.

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People v. Merchants' Protective Corp. (1922) 189 Cal. 531.

Public Repeal of Judge Schatz (1989) Com. on Jud. Performance.

State Bar of California v. Superior Court (1929) 207 Cal. 323.

Commission on Judicial Performance, Annual Reports for 2010, 1993 and 1992.

CJEO Oral Advice Summary No. 2013-001, *Disclosure When A Judge's Spouse Serves on a City Commission*, California Supreme Court, Committee on Judicial Ethics Opinions Oral Advice Summary.

Rothman et al., California Judicial Conduct Handbook (4th ed. 2017) § 2:28.

California Judges Association, Judicial Ethics Update (Jan. 2016).

Senate Committee on Judiciary, Hearing on Assembly Constitutional Amendment No. 17 (1987-1988 Reg. Sess.) June 28, 1988.

Ballot Pamphlet, General Election (Nov. 4, 1930) argument in favor of Proposition 19 (Assem. Const. Amend. No. 17), page 24.

IV. Discussion

A. Introduction

It can be hard to resist the human impulse to assist family members when they ask for advice. Whether out of love, obligation or a sense of responsibility to “one of their own,” many parents, children, siblings and other relatives would not think twice about providing whatever kind of advice they can to a member of their family who needs guidance, even when the advice relates to a legal matter. For a judge, however, the

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decision whether to advise a member of the judge’s family³ on law-related matters can be complicated, and often difficult. Family members who are certainly aware of the judge’s professional background may expect that, in light of the normal instinct to assist loved ones, the judge would draw on his or her legal training and experience to help them. Family members seeking advice may not be aware that the judge, although naturally inclined to help, is prohibited by the Constitution and by the judge’s ethical obligations from practicing law on the family members’ behalf. (Cal. Const., art. VI, § 17 [“A judge of a court of record may not practice law”]; canon 4G [“A judge shall not practice law.”]; see also Preamble [judicial officers are required to conform their conduct to constitutional requirements and other laws that govern their activities].) Indeed, despite having been admitted and licensed to practice law, judges cease to be members of the Bar during their period in office. (Cal. Const., art. VI, § 9.) These restrictions can put judges in an awkward situation of having to decline a request for legal advice, or to limit the kind of information and guidance that they can provide family members who come to them with questions about law-related matters. Determining what is permissible advice, on the one hand, and what is prohibited law practice on the other, can also be difficult.

B. Prohibited Practice of Law

Case law can assist judges to determine where they should draw the line on what is and is not ethically permissible when advising family members about a matter that implicates legal issues. The Supreme Court has said that the practice of law “includes legal advice and counsel,” (*California v. Superior Court* (1929) 207 Cal. 323, 335), and further that “[i]n close cases, the courts have determined that the resolution of legal

³ For purposes of this opinion, CJEO adopts the code’s definition of “member of the judge’s family” to include a spouse, registered domestic partner, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. (See Terminology, citing canons 2B & 4G.)

questions for another by advice and action is practicing law ‘if difficult or doubtful legal questions are involved which, to safeguard the public, reasonably demand the application of a trained legal mind’ ” (*Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 543).

Instructed by those decisions, a number of courts have identified certain specific instances where providing legal advice and other law-related assistance would constitute the law practice. (Appendix A [“Cases Defining the Practice of Law”].) But the Supreme Court has also noted that the practice of law “does not encompass all professional activities,” and judges are not prohibited from offering their family members any law-related advice at all. (*Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119, 129 [citing *Baron*].) Certain guidance and information, although law-related, may be given by a judge to a family member. (See Appen. A.)

In circumstances not already addressed by case law, however, judges may find it hard to determine whether and to what extent they may provide guidance or other information when a family member approaches them for advice on a law-related matter. Numerous situations may fall into this gray area. For example, to what extent may a judge help a member of the judge’s family writing a demand letter? When and to what extent may a judge review and comment on a contract involving a family member? Can a judge ever advise a member of the judge’s family about litigation in which the family member is a party, or comment on decisions made or actions taken by the attorneys representing the family member? When asked for help in these kinds of situations, the natural instinct of most judges is not to stand mute and shrug their shoulders, even though they know that the kind of assistance they can ethically provide their family members is limited.

In such cases, where precedent may not provide adequate clarity on what is permissible, a judge weighing the nature and extent of advice he or she can provide a family member can look for guidance to the original rationales for the prohibition on

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judicial practice of law. Initially, the prohibition was thought to ensure that judges would conserve their time and focus their energy on their judicial duties, rather than becoming distracted by the competing demands of a law practice. Thereafter, the prohibition was increasingly considered necessary to keep the judiciary above reproach or suspicion by eliminating the opportunity for fraud and the potential for undisclosed conflicts of interest that might arise if a judge were representing private clients as a lawyer. (*Gilbert v. Chiang* (2014) 227 Cal.App.4th 537, 549-550.)⁴ During the legislative debate prior to the most recent amendment of the constitutional prohibition in 1988, the Senate Judiciary Committee confirmed that the reasons judges are prohibited from practicing law have remained the same, “to avoid conflict of interest and to ensure that other duties do not distract from their performance as judicial officials.” (Sen. Com. on Judiciary, Hearing on Assem. Const. Amend. No. 17 (1987-1988 Reg. Sess.) June 28, 1988, p. 3.)

Before helping a family member with a law-related matter, judges should evaluate whether the advice or assistance they would give is consistent with or contrary to either of the twin purposes behind the prohibition on judicial practice, to avoid distractions from judicial duties and to maintain the judiciary above reproach. If the advice or assistance would undermine either purpose, or both purposes, then it is not ethically permissible.⁵

⁴ The earliest prohibition on judicial practice of law was added to the California Constitution in the 19th century and applied only to a judge’s activities in court. In 1930, the Constitution was amended by popular referendum to extend the prohibition on law practice to a judge’s conduct both in and out of court. The ballot argument in favor of the expansion of the 1930 amendment noted, “Citizens will not feel properly confident of justice if they know their judges are advising or aiding corporations, groups, or individuals in a legal capacity, on the side, in spare time. No matter how innocent the practice, it is liable to vicious abuse.” (Ballot Pamp., Gen. Elec. (Nov. 4, 1930) argument in favor of Prop. 19, p. 24.)

⁵ Following the lead of rule 3.10 of the ABA Model Code of Judicial Conduct, 45 United States jurisdictions have concluded that the concerns that gave rise to the

C. What Constitutes Impermissible Legal Advice and Permissible Law-Related Advice

As noted in the preceding part, judges are not permitted to advise their family members in law-related matters if the advice would undermine the dual purposes behind the prohibition on judicial practice of law. (*Gilbert v. Chiang* (2014) 227 Cal.App.4th 537, 550.) As a result, it would be impermissible for judges to advise a family member while acting as an advocate on behalf of either the family member or a particular legal

prohibition on judicial practice of law are not implicated when a judge provides limited legal assistance to their family members without compensation. See Alaska Code of Judicial Conduct, canon 4g; Arizona Code of Judicial Conduct, rule 3.10; Arkansas Code of Judicial Conduct, rule 3.10; Colorado Code of Judicial Conduct, rule 3.10; Connecticut Code of Judicial Conduct, rule 3.10; Delaware Code of Judicial Conduct, rule 3.10(B); District of Columbia Code of Judicial Conduct, rule 3.10; Florida Code of Judicial Conduct, canon 5G; Guam Code of Judicial Conduct, canon 4G; Hawaii Code of Judicial Conduct, rule 3.10; Idaho Code of Judicial Conduct, rule 3.10; Indiana Code of Judicial Conduct, rule 3.10; Iowa Court Rules, rule 51:3.10; Kentucky Supreme Court Rules, rule 3.10; Maine Code of Judicial Conduct, rule 3.10; Maryland Code of Judicial Conduct, rule 18-103.10(b)(1); Massachusetts Code of Judicial Conduct, rule 3.10(A); Minnesota Code of Judicial Conduct, rule 3.10; Mississippi Code of Judicial Conduct, canon 4G; Missouri Supreme Court Rules, rule 2-3.10; Montana Code of Judicial Conduct, rule 3.10(B); Nebraska Code of Judicial Conduct section 5-303.10; Nevada Code of Judicial Conduct, rule 3.10; New Hampshire Code of Judicial Conduct, rule 3.10; New Mexico Rules of Court, rule 21-310; New York Code of Judicial Conduct, canon 4G; North Dakota Code of Judicial Conduct, rule 3.10; Ohio Code of Judicial Conduct, rule 3.10; Oklahoma Code of Judicial Conduct, rule 3.10; Oregon Code of Judicial Conduct, rule 4.8; Pennsylvania Code of Judicial Conduct, rule 3.10; Rhode Island Code of Judicial Conduct, rule 3.10(A); South Carolina Appellate Court Rules, canon 4G; South Dakota Code of Judicial Conduct, canon 4G; Tennessee Code of Judicial Conduct, rule 3.10; Texas Code of Judicial Conduct, canon 4G; Utah Code of Judicial Conduct, rule 3.10; Vermont Code of Judicial Conduct, rule 3.10; Virginia Canons of Judicial Conduct, canon 4H; Virgin Islands Supreme Court Rules, rule 231.3.10; Washington Code of Judicial Conduct, rule 3.10(A); West Virginia Code of Judicial Conduct, rule 3.10; Wisconsin Supreme Court Rules, rule 60.05(7); Wyoming Code of Judicial Conduct, rule 3.10.

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position. (*Holloway v. Quetel* (2015) 242 Cal.App.4th 1425, 1434; Com. on Jud. Performance, Ann. Rep. (1992), Private Admonishment I, p. 13 [judge advised relative and negotiated settlement on their behalf].) Similarly, it would not be permissible for judges to accept compensation for their advice, provide assistance that could lead to disqualification, neglect official duties in favor of matters involving family members, or engage in activities that would cause a reasonable person to question their independence or integrity. (Canons 1, 4A(1), (3) and (4), 4H.)

Keeping those prohibitions in mind, judges are permitted to provide family members with certain limited advice about law-related matters. Specifically, a judge is permitted to provide a family member with general legal information, including for example statements of law, explanations of court procedures and court rules, and guidance about legal requirements--similar to the kinds of information that the judge would be able to provide a self-represented party appearing before the judge's bench.⁶ (Advisory Com. commentary foll. canon 3B(8); Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 2:28 pp. 98-100); compare *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 907 (*Adams*) [judge disciplined for suggesting that a close friend file a particular motion].)

⁶ The risks that a judge would undermine the prohibition on judicial practice by providing such law-related information and guidance is usually even less with a family member than with an unrelated litigant, because the judge is automatically disqualified from presiding over any matter in which a close family member is a party, has a financial interest, or has personal knowledge of disputed evidentiary facts concerning the proceeding. (Code Civ. Proc., §§ 170.1 subd. (a)(1), (3) (4) &) (5), 170.5 subd. (b); canons 3E(4), 3E(5)(d), (e), (f)(iii), (i); CJEO Oral Advice Summary No. 2013-001, *Disclosure When A Judge's Spouse Serves on a City Commission*, Cal. Supreme Ct., Com. Jud. Ethics Opns., p. 2.)

If a judge is advising a family member in connection with a matter in which the judge is personally involved or the judge’s personal interests are implicated, such advice is permissible. (Advisory Com. commentary foll. canon 4G [judges may act for themselves in all legal matters].) Additionally, a judge is more likely permitted to provide law-related advice where the judge does not appear publicly on behalf of the family member or act in a representative capacity, and the advice given to the family member is limited to the kind and quality of information that a nonlawyer might provide in a similar situation. (*Altizer v. Highsmith* (2020) 52 Cal.App.5th 331, 341 [acting in a “clerical” capacity, or as a “scrivener,” is not the unauthorized practice of law]; compare *Inquiry Concerning Judge Saucedo* (2015) 62 Cal.4th CJP Supp. 1, 11-12, 42-43 [judge disciplined for offering to “find out and let [a friend’s son] know how Fresno County handles minor in possession of alcohol cases whether filed as infractions or misdemeanors”].) In general, assisting a family member in these circumstances would not impair a judge from fulfilling his or her official duties or create an undisclosed conflict of interest.

D. Applying the Factors

While each case ultimately must be determined on its own specific facts, and the factors described above are not an exhaustive list, these factors can assist judges to determine whether they are permitted to provide advice requested by a family member.

Looking at the examples described above (see *ante*, at p. 8), the most obvious risks arise in the context of a family member asking a judge for advice about active litigation in which the family member is involved, whether as a party or otherwise. The judge can certainly offer the family member a sympathetic ear and a shoulder to cry on, if needed. But the judge risks engaging in the practice of law if he or she offers advice on legal issues in the case, provides or offers to provide research on any legal issues in the case, or in any way acts or appears to act as an advocate arguing on behalf of the family member.

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(Canons 2B(1), (2) & 4G; *Doan v. Commission on Judicial Performance* (1995) 11 Cal.4th 294, 320-321, 336-337 [judge’s offer to conduct legal research constituted the practice of law].) These restrictions on the practice of law prohibit any substantive involvement by a judge in the prosecution, defense or settlement of any litigation on behalf of a member of the judge’s family.⁷ Beyond these practice-of-law issues, a judge who actively assists a family member involved in litigation runs the risk of violating the prohibition against improper ex parte communications by commenting on pending or impending cases. (Canons 3B(7) & 3B(9); *Inquiry Concerning Judge Stanford* (2012) 53 Cal.4th CJP Supp. 1, 13-14, 21 [judge’s discussion of a speeding ticket with his son-in-law constituted ex parte communication]; *Doan*, at pp. 318-319 [judge’s discussion of criminal charges filed against her gardener was an improper ex parte contact].) In sum, a judge is only permitted to offer limited assistance to a family member involved in litigation. Beyond providing moral support, the judge risks violating ethical and constitutional prohibitions against practicing law.

Judges should also tread carefully when asked for law-related advice in other contexts as well. For example, if a family member asks for help drafting a demand letter, a judge could agree to assist with clerical tasks such as proofreading the letter or acting as a scrivener to fill in the blanks of an incomplete draft with information that the family member provides or that is generally known. But if asked to advise on what to include in the letter or how to write it, the judge must consider whether providing such guidance would put the judge in the role of an advocate, either on behalf of the family member or of a legal position that advances the interests of the family member, and for that reason

⁷ As noted at page 13, ante, a judge may act on the judge’s own behalf in connection with litigation that also involves a member of the judge’s family. (Advisory Com. Commentary foll. canon 4G.)

would be impermissible. (*Adams, supra*, 10 Cal.4th at pp. 906-908) [providing an “issue analysis” constituted the practice of law]; *Holloway, supra*, 242 Cal.App.4th at p. 1434.)

Looking at another scenario, a judge would be permitted to assist a family member asking for help with an employment offer by discussing standard, purely business terms (e.g., amount of compensation, location of the position, hours required, etc.) included in the offer. It may also be permissible for the judge to provide generalized, abstract information about provisions usually included in a standard employment offer. But before discussing any of the law-related terms actually included in an offer, or advising the family member on terms that may be missing from it, the judge should evaluate whether such advice would cross the line into advocacy or negotiation and therefore constitute the practice of law.

V. Conclusion

It can be difficult for judges to assess whether and to what extent their advice to family members in law-related matters might constitute the practice of law, is impermissible under the Constitution and the code. If providing such advice would either distract the judge from official duties or in any way undermine the integrity of the judiciary, then clearly it is not ethically permissible. The factors and considerations described in this opinion can help judges to evaluate whether the advice that they have been asked to provide a family member would align with their ethical obligations and for that reason be permissible.



This opinion is advisory only (Cal. Rules of Court, rule 9.80(a), (e); Cal. Com. Jud. Ethics Opns., Internal Operating Rules & Proc. (CJEO) rule 1(a), (b)). It is based on facts and issues, or topics of interest, presented to the California Supreme Court Committee on Judicial Ethics Opinions in a request for an opinion (Cal. Rules of Court, rule 9.80(i)(3); CJEO rule 2(f), 6(c)), or on subjects deemed appropriate by the

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committee (Cal. Rules of Court, rule 9.80(i)(1); CJEO rule 6(a)). The conclusions expressed in this summary are those of the committee and do not necessarily reflect the views of the California Supreme Court or any other entity. (Cal. Rules of Court, rule 9.80(b); CJEO rule 1(a).)

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Appendix A - Cases Defining the Practice of Law

Acts That Are Clearly Prohibited as The Practice of Law

- a. Performing professional services in a court proceeding (*People v. Merchants' Protective Corp.* (1922) 189 Cal. 531, 535) (*Merchants' Protective*);
- b. Preparing a legal instrument or contract (*Merchants' Protective, supra*, 189 Cal. at p. 535);
- c. Assuming the role of an advocate (*Holloway v. Quetel* (2015) 242 Cal.App.4th 1425, 1434);
- d. Assisting in the preparation of settlement conference briefs (*Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 906-908 (*Adams*) [including drafting an “issue analysis” that was incorporated almost verbatim into a brief]);
- e. Advising the filing of a particular motion (*Adams, supra*, 10 Cal.4th at pp. 906-908 [including reviewing and approving of the motion]);
- f. Attempting to negotiate a dismissal of son's criminal matters (*Public Reproval of Judge Schatz* (1989) Com. on Jud. Performance, pp. 1-3);
- g. Negotiating the settlement of a claim on behalf of a relative (Com. on Jud. Performance, Ann. Rep. (1992), Private Admonishment I, p. 13);
- h. Providing advice about potential penalties and defenses to an alcohol-related citation (*Inquiry Concerning Saucedo* (2015) 62 Cal.4th CJP Supp. 1, 11-12, 42-43; see *id.* at p. CJP Supp. 12 [including writing a letter that detailed the potential penalties for the offense, identified several potential defenses to the charge, and said that if a further notice to appear was issued, he would “ ‘find out and let [Tovar's son] know how Fresno County handles minor in possession of alcohol cases whether filed as infractions or misdemeanors’ ”]);
- i. Offering to conduct legal research (*Doan v. Commission on Judicial Performance* (1995) 11 Cal.4th 294, 320-321, 336-337 [including reviewing trial transcripts and briefs]);

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- j. Offering unsolicited advice to defendants on what they should tell potential employers about indictments against them (*Inquiry Concerning Judge Kreep* (2017) 3 Cal.5th CJP Supp. 1, 35);
- k. Attending the deposition of a fiancée where the parties were aware of the judge’s position, which created the appearance that the judge was acting as a legal advocate and was using the prestige of office to benefit the deponent (Com. on Jud. Performance, Ann. Rep. (2010) Advisory Letter 11, p. 25).

Some Examples of Acts That Are Permitted

- a. Directing a person to community resources for finding a lawyer (Advisory Com. commentary foll. canon 3B(8); Rothman et al., *California Judicial Conduct Handbook* (4th ed. 2017) § 2:28 (Rothman));
- b. Explaining court procedures (Advisory Com. Commentary foll. canon 3B(8); Rothman, *supra*, § 2:28);
- c. Informing a party of the process for securing witnesses (Advisory Com. commentary foll. canon 3B(8); Rothman, *supra*, § 2:28);
- d. Informing a party of missing elements of proof or other legal requirements (Advisory Com. Commentary foll. canon 3B(8); Rothman, *supra*, § 2:28).

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