



Supreme Court of California 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 2018-012]

Title	Action Requested
Committee on Judicial Ethics Opinions Draft Formal Opinion 2018-012; Providing Educational Presentations at Specialty Bar Events	Review and submit comments by May 15, 2018
Prepared by	Proposed Adoption Date
Supreme Court of California Committee on Judicial Ethics Opinions Hon. Ronald B. Robie, Chair	To be determined
	Contact
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Summary

The Supreme Court of California 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)(2) 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 2018-012 provides guidance on whether a judge may provide educational presentations to specialty bar associations pursuant to canon 4B of the California Code of Judicial Ethics. The draft opinion advises that a judge may give an educational presentation to a specialty bar association but must avoid bias or the appearance of bias and avoid the appearance that the specialty bar association is in a special position to influence the judge. To determine whether there is an appearance of bias, the judge should

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evaluate the composition of the audience, frequency of presentations before a particular audience or type of audience, and be equally available to groups that represent opposing views. A judge should also examine the content of the presentation, which should be neutral, presented from a judicial perspective, and avoid coaching or providing a tactical advantage to the audience. The draft opinion advises that a judge should be able to give the same presentation to specialty bar associations that represent opposing viewpoints.

The opinion also advises that a judge should review in advance promotional materials that are related to the educational presentation. The judge should ensure that the promotional materials are neutral and accurately reflect the educational nature of the presentation. The judge has a duty to take corrective action if the materials create an appearance of bias or otherwise violate the code.

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)(2); CJEO rule 7(d).) Comments are due by **May 15, 2018**, and may be submitted as described below.

Comments submitted in response to this Invitation to Comment are confidential communications to the committee and precluded from disclosure under the CJEO rules. (Rule 9.80(h); CJEO rule 5(b).) However, confidentiality may be waived under those rules (Rule 9.80(h)(3); CJEO rule 5(b)(1), (e)) and the committee will post on the CJEO website, at the close of the comment period, any comments submitted with a statement of waiver of confidentiality or consent to disclose. The online comment form provided on the committee's website includes a waiver option.

CJEO Background

The Committee on Judicial Ethics Opinions was established by the Supreme Court of California 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 oral advice on proper judicial conduct under the California Code of Judicial Ethics, the California Constitution, statutes, rules, the decisions of the Supreme Court and the Commission on Judicial Performance, and other relevant sources. (Rule 9.80(e)(1); CJEO rule 1(b)(1).)

The Draft Opinion

The committee has been asked to provide an opinion on the following questions:

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“May a judge make educational presentations to specialty bar associations whose members primarily represent a particular class of litigants on one side in cases before the courts, such as district attorneys, public defenders, or attorneys in private civil practice representing plaintiffs or defendants?”

“What responsibility should a judge exercise over the program and promotional materials describing the judge's involvement?”

In the attached draft opinion, the committee explains that canon 4B permits judges to speak about and teach legal subject matters, subject to the requirements of the code. The Advisory Committee Commentary following canon 4B explains that a judge may speak and teach through bar associations. The opinion advises that a judge may give an educational presentation to a specialty bar association but must avoid bias or the appearance of bias or influence due to either the type of audience or content of the presentation. (Canon 2, 2A, 2B, 4A(1).) The opinion advises that a judge should consider the composition of the audience and content of the presentation when evaluating compliance with the canons. To avoid an appearance of bias, a judge must be able to give the same presentation and equally available to specialty bar associations that represent opposing viewpoints.

The draft opinion also provides guidance regarding promotional materials related to an educational presentation. Like the presentation itself, the promotional materials cannot create an appearance of bias or suggest that the judge endorses the specialty bar association's viewpoints, interests, goals, or agenda or has a special relationship with the group. If so, the judge has a duty to take corrective action. Therefore, the committee advises that a judge should review promotional materials in advance to ensure that the materials conform to the canons.

Invitation to Comment

The committee invites comment on the attached draft opinion by **May 15, 2018**. Comments may be submitted:

- online at <http://judicialethicsopinions.ca.gov/>;
- by email to Judicial.Ethics@jud.ca.gov; or
- by mail to:

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

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The committee will post on the CJEO website, at the close of the comment period, or after May 15, 2018, those comments submitted with a statement waving confidentiality or consenting to CJEO's public disclosure of the comment.

Attachment: CJEO Draft Formal Opinion 2018-012

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

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CJEO Draft Formal Opinion 2018-012

[Initial Draft Opinion; March 22, 2018]

**PROVIDING EDUCATIONAL PRESENTATIONS AT SPECIALTY BAR
EVENTS**

I. Questions Presented

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

May a judge make educational presentations to specialty bar associations whose members primarily represent a particular class of litigants on one side in cases before the courts, such as district attorneys, public defenders, or attorneys in private civil practice representing plaintiffs or defendants?

What responsibility should a judge exercise over the program and promotional materials describing the judge's involvement?

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II. Summary of Conclusions

Canon 4B of the California Code of Judicial Ethics¹ permits judges to speak about and teach legal subject matters, subject to the requirements of the code. The Advisory Committee commentary explains that this permits a judge to speak and teach through bar associations, so long as the other canons are observed. (Advisory Com. com. foll. canon 4B.)

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

An appearance of bias may be created by the composition of the audience or the content of a presentation. A judge must be equally available to give educational presentations to audiences with opposing interests or viewpoints. The judge should also evaluate whether the frequency of presentations before a particular specialty bar association or type of association would create an appearance of bias. The content of the presentation must be neutral, presented from a judicial perspective, and avoid coaching or providing a tactical advantage to the audience. The presentation cannot include statements that may cast doubt on the judge's capacity to act impartially. A presentation is sufficiently neutral if the judge can give the same presentation to specialty bar associations with members that represent opposing or competing interests or parties.

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

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Promotional materials related to an educational presentation may identify a judge by judicial title and must accurately reflect the neutral and educational nature of the presentation. The materials cannot create an appearance that the judge endorses the specialty bar association’s viewpoints, interests, goals, or agenda, or otherwise indicate that the judge has a special relationship with the group. (Advisory Com. com. foll. canon 4B.) The committee advises that a judge should review promotional materials in advance to ensure that the materials conform to the canons. If they do not, the judge has a duty to take corrective action.

III. Authorities

A. Applicable Canons

Canon 2: “A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.”

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

Advisory Committee commentary following canon 2A: “A judge must avoid all impropriety and appearance of impropriety. . . . [¶] The test for the appearance of impropriety is whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity, impartiality, and competence. . . . [¶] As to judges making statements that commit the judge with respect to cases, controversies, or issues that are likely to come before the courts, see Canon 3B(9) and its commentary concerning comments about a pending proceeding.”

Canon 2B(1): “A judge shall not allow . . . social . . . or other relationships to influence the judge’s judicial conduct or judgment, nor shall a judge convey or permit

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others to convey the impression that any individual is in a special position to influence the judge.”

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

Canon 3B(9): “A judge shall not make any public comment about a pending or impending proceeding in any court, and shall not make any nonpublic comment that might substantially interfere with a fair trial or hearing. . . . Other than cases in which the judge has personally participated, this canon does not prohibit judges from discussing, in legal education programs and materials, cases and issues pending in appellate courts. This educational exemption does not apply to cases over which the judge has presided or to comments or discussions that might interfere with a fair hearing of the case.”

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

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

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

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

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B. Other Authorities

Committee on Judicial Ethics Opinions, Formal Opinions 2016-008, 2014-006

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

California Judges Association, Opinion Number 47

District of Columbia Advisory Committee on Judicial Conduct, Advisory Opinion 4 (1994)

IV. Discussion

A. Educational Presentations at Specialty Bar Events

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

Specialty bar associations are commonly comprised of attorneys who represent particular types of clients, engage in particular practice areas, or advocate for the interests of a specific group of people. (Cal. Judges Assn., Opn. No. 47, p. 2 [specialty bar associations promote the interest of a limited segment of the bar]; D.C. Advisory Com. on Jud. Conduct, Advisory Opn. No. 4, p.1 (1994) [a blanket rule on judicial attendance at all specialty bar-related functions would be futile given the sheer number of organizations and the diverse missions and memberships of specialty bar associations].) There are stand-alone specialty bar associations and specialty bar associations that are a section of a larger bar association. Some specialty bar associations promote neutral

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interests, such as women, minority, or solo and small firm associations, or promote particular practice areas, such as family law, trusts and estates, or intellectual property. (Cal. Judges Assn., Opn. 47, p. 2.) Other groups promote one-sided interests, such as district attorney or public defender associations and plaintiff-oriented or defense-oriented associations. (*Ibid.*)

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

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

In most instances, it is possible to avoid creating an appearance of bias or influence and it is permissible to give an educational presentation to a specialty bar association; however, a judge must consider the audience and content of the presentation to comply with the canons.

1. Audience in Attendance at the Presentation

The composition of the audience at a specialty bar association event does not prevent a judge from giving an educational presentation, so long as an appearance of bias or influence is not reasonably created by the circumstances. In the committee's opinion, presenting to a specialty bar association, by itself, does not constitute an endorsement of the organization or its interests, views, goals, or agenda that may create an appearance of bias. However, there may be an appearance of bias if a judge frequently or exclusively speaks before a particular specialty bar association or associations with similar interests. For example, if a judge frequently gives presentations to public defender associations and never presents to prosecutorial associations, or vice versa, a reasonable person could conclude that the judge favors the group to which he or she frequently presents. The committee does not believe that a judge must present equally to specialty bar associations on each side of an issue; however, a judge should evaluate whether the frequency that he or she presents to a particular specialty bar association or to associations with similar interests would cause a reasonable person aware of the facts to think the judge is impartial. To avoid an appearance of bias, a judge must be equally available to groups that represent opposing viewpoints. (Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) §§ 6:38, 10:16, pp. 383, 685 (Rothman); Cal. Judges Assn., Opn. 47, p. 2.) A judge should also consider whether the specialty bar association advocates for a position on a disputed issue that is or may come before the judge. If so, a judge's participation in a presentation before that group may create an appearance of bias in favor

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of the group, regardless of the content of the presentation. (Canons 2B(1), 4A; Rothman, *supra*, § 10:16 pp. 684-685; Cal. Judges Assn., Opn. 47, p. 2.)

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

2. *Content of the Presentation*

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

A judge's education and experience make him or her uniquely qualified to contribute to the improvement of the law. (Advisory Com. com. foll. canon 4B [a judge is specially learned in the law and in a unique position to contribute to its improvement].) In Formal Opinion 2014-006, the committee advised that a judge's unique experience and perspective *as a judge* make it valuable for a judge to share his or her expertise in the law and the justice system outside of the duties of their office. (Comm. Jud. Ethics Opns., Formal Opn. 2014-006, pp. 2, 5-6 [advising that a judge may appear at public hearings or consult with the other branches of government or public officials on matters concerning the law, the legal system, or the administration of justice].) However, the committee advised that a judge's comments or consultation with other branches of government

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should not include his or her experience as an attorney. (*Id.* at p. 7.) It is the committee's opinion that when presenting to a specialty bar association, a judge may utilize his or her unique judicial perspective for the benefit of the audience and may also rely on his or her experience as an attorney. The judge must ensure that when discussing prior attorney experience, the judge maintains neutrality and avoids indicating a bias, particularly if the judge is presenting to former colleagues or attorneys from the judge's previous practice area. (Cal. Judges Assn., Opn. 47, p. 2 [recommending a neutral posture and avoidance of any impression that the goals espoused by the organization are shared by the judge].) A neutral presentation includes matters of equal interest to both sides of a legal issue, and does not benefit one side of an issue over the other or include advocacy for one position or another on unsettled areas of the law. (Rothman, *supra*, § 9:20 p. 602.)

A judge's presentation must also avoid coaching or providing strategic or tactical advantages that would benefit members of one specialty bar association to the disadvantage of members of another. (Rothman, *supra*, § 10:16, p. 685 [a judge may be the keynote speaker at a statewide conference of district attorney investigators if the judge does not coach and the content does not cast doubt on the judge's impartiality].) A judge may discuss proper procedures, trial or appellate techniques, and lecture on black letter law. It is also permissible to speak about best practices and provide tips to avoid common errors. (*Id.* at p. 686.) For example, a presenting justice may recommend to an audience that an attorney should avoid filing a writ at 5:00 p.m. on a Friday, as such advice would be equally beneficial to audiences representing competing interests or parties. A judge may also lecture on general voir dire procedures or give general advice on the best qualities of an expert witness, so long as that advice does not benefit one side over another. It is improper, however, to lecture on how to select a jury that would favor either plaintiffs or defendants. It is also improper to lecture on the ideal demeanor and testimony of a type of witness that favors a particular side, such as the proper use of

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police testimony in criminal cases, as it would give the appearance of coaching the audience and a reasonable person aware of this component of a presentation would doubt the impartiality of the judge. (*Id.* at p. 685.)

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

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

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

B. Promotional Materials

The use of judicial title for the limited purpose of promoting an educational presentation is permitted if the materials accurately reflect the neutral and educational nature of the presentation. The use of judicial title in promotional materials for an

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

If the promotional materials give the appearance that the judge endorses the specialty bar association's viewpoints, promotes its interests other than the educational program itself, or has a special relationship with the specialty bar association, then the judge has a duty to take corrective action such as having the association reprint corrected materials and clarify the judge's neutral role. (CJEO Formal Op. 2016-008, p. 20 [corrective action mandatory for impermissible use of judicial title in promotional materials for a political event]; Com.Jud.Perform. Ann. Rep. (1997), advisory letter 23, p. 22 [discipline imposed for failing to seek a retraction or otherwise correct an unauthorized endorsement of a candidate for nonjudicial office].) Given this duty, the committee advises that a judge inform event organizers of ethical restrictions and review the promotional materials in advance to ensure that the use of judicial title in the materials conform to the canons and the materials to not create an appearance of bias.

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(CJEO Formal Op. 2016-008, p. 20 [advising event organizers of the judge’s ethical obligations and previewing promotional materials eliminates need to take corrective action if the materials violate the canons].)

V. Conclusions

It is the committee’s opinion that a judge may give an educational presentation to a specialty bar association so long as the audience and content of the presentation do not create an appearance of bias or influence, or otherwise violate the canons. An appearance of bias is eliminated when a judge is available to give educational presentations to groups with opposing interests or viewpoints and when the judge is able to make the same neutral presentation to various groups. A judge should review in advance any promotional materials related to the presentation to ensure that the materials do not appear to endorse the specialty bar association’s viewpoints, interests, goals, or agenda, or otherwise indicate that the judge has a special relationship with the group.



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

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