



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

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**SUPERVISING JUDGE’S DUTIES WHEN A PARTY COMPLAINS ABOUT
A JUDGE IN A PENDING MATTER**

I. Question Presented

When may a supervising judge¹ ethically disclose to a trial judge an ex parte communication made in connection with a complaint against the trial judge?

¹ Presiding judges and other judges who have been delegated responsibility to supervise judicial officers are referred to in this opinion collectively as “supervising judges.” The term “supervising judges” includes judges who have been designated by their presiding judge to supervise a division, district or branch court pursuant to California Rules of Court, rule 10.603(b)(1)(A), as well as judges who have been delegated supervisory responsibilities by their presiding judge pursuant to rule 10.603(d).

II. Summary of Conclusions

Supervising judges may disclose an ex parte communication to a trial judge in the discharge of their duty of oversight, but they should do so only when there is no alternative way to properly investigate and respond to a complaint. It would be preferable not to disclose ex parte communications to the trial judge if the complaint can be properly investigated and resolved without such disclosure, or if the disclosure can be delayed until the case from which the complaint arises is no longer pending, and no further proceedings in the case before the trial judge are anticipated. If the disclosure of the ex parte communication to the trial judge is required, then the supervising judge should only reveal information that is necessary to investigate the allegations of the complaint, remediate any harm relating to the complaint, or improve the trial judge's conduct in the future. If an ex parte communication is disclosed, the supervising judge remains responsible to take reasonable measures to ensure that the trial judge follows proper procedures that may be required by the disclosure of the ex parte communication to the trial judge.

III. Authorities

A. Applicable Canons²

Canon 1: "An independent, impartial, and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary is preserved."

Canon 2A: "A judge shall respect and comply with the law and shall act at all times in a manner that promotes confidence in the integrity and impartiality of the judiciary."

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

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

otherwise authorized by law, a judge shall not independently investigate facts in a proceeding and shall consider only the evidence presented or facts that may be properly judicially noticed. . . . A judge shall not initiate, permit, or consider ex parte communications, that is, any communications to or from the judge outside the presence of the parties concerning a pending or impending proceeding, and shall make reasonable efforts to avoid such communications, except as follows:

“(a) Except as stated below, a judge may consult with other judges. A judge presiding over a case shall not engage in discussions about that case with a judge who has previously been disqualified from hearing that case; likewise, a judge who knows he or she is or would be disqualified from hearing a case shall not discuss that matter with the judge assigned to the case. A judge also shall not engage in discussions with a judge who may participate in appellate review of the matter, nor shall a judge who may participate in appellate review of a matter engage in discussions with the judge presiding over the case.

“[¶] . . . [¶] In any discussion with judges or court personnel, a judge shall make reasonable efforts to avoid receiving factual information that is not part of the record or an evaluation of that factual information. In such consultations, the judge shall not abrogate the responsibility personally to decide the matter.

“[¶] . . . [¶] (b) A judge may initiate, permit, or consider ex parte communications, where circumstances require, for scheduling, administrative purposes, or emergencies that do not deal with substantive matters provided: [¶] (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and [¶] (ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

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

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

Canon 3C(1): “A judge shall diligently discharge the judge’s administrative responsibilities impartially, on the basis of merit, without bias or prejudice, free of conflict of interest, and in a manner that promotes public confidence in the integrity of the judiciary.”

Canon 3C(3): “A judge shall require staff and court personnel under the judge’s direction and control to observe appropriate standards of conduct and to refrain from (a) manifesting bias, prejudice, or harassment based upon race, sex, gender, gender identity,*

gender expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, or (b) sexual harassment in the performance of their official duties.”

Canon 3C(4): “A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to ensure the prompt disposition of matters before them and the proper performance of their other judicial duties.”

Canon 3D(1): “Whenever a judge has reliable information that another judge has violated any provision of the Code of Judicial Ethics, that judge must take appropriate corrective action, which may include reporting the violation to the appropriate authority.”

ADVISORY COMMITTEE COMMENTARY: Canons 3D(1) “[¶] Appropriate corrective action could include direct communication with the judge . . . who has committed the violation, writing about the misconduct in a judicial decision, or other direct action, such as a confidential referral to a judicial . . . assistance program, or a report of the violation to the presiding judge, appropriate authority, or other agency or body. . . . [¶] ‘Appropriate authority’ means the authority with responsibility for initiation of the disciplinary process with respect to a violation to be reported.”

B. Other Authorities

Code of Civil Procedure, sections 170.3, subdivision (b), 170.4, subdivision (c).

California Rules of Court, rules 10.603(b)(1)(A), (c)(4), (d), 10.703(g).

California Standards of Judicial Administration, standard 10.20(d).

Alameda County Superior Court, Local Rules, rule 2.0.

Contra Costa County Superior Court, Local Rules, rule 2.150.

San Diego County Superior Court, Local Rules, rule 1.2.1.

San Francisco Superior Court, Local Rules, rule 2.6.

Inquiry Concerning Schnider (Aug. 31, 2009) <https://cjp.ca.gov/wp-content/uploads/sites/40/2016/08/Schnider_DO_08-31-09.pdf> (as of Nov. 5, 2020).

Inquiry Concerning Velasquez (2007) 49 Cal.4th CJP Supp. 175.

Inquiry Concerning Ross (2005) 49 Cal.4th CJP Supp. 79.

Inquiry Concerning Platt, (2002) 48 Cal.4th CJP Supp. 227.

Rothman et al., California Judicial Conduct Handbook (4th ed. 2017) sections 5:2, 6:2.

Commission on Judicial Performance, Annual Reports for 2011, 2010, 2009, 2002, 2000, 1998, 1995, 1994, 1993, 1992, 1990 and 1988.

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

IV. Discussion

Supervising judges are required to exercise proper oversight of the judicial officers they supervise, regardless of the size of their court or the way in which supervisory duties are delegated within the court. (Canon 3C(4); Cal. Rules of Court, rule 10.603(c)(4), (d).) As part of their oversight obligations, supervising judges frequently must handle complaints against trial judges under their supervision from parties, witnesses, court staff or others. (Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 6:2, pp. 339-340 (Rothman).) Supervising judges must respond to such complaints appropriately and in a timely manner, or face discipline for having failed to do so. (*Inquiry Concerning Schnider* (Aug. 31, 2009) pp. 4-5 (*Schnider*) [supervising family law judge disciplined for failing to respond to complaints about commissioner under his supervision from three different litigants and two attorneys];³ Com. on Jud. Performance, Ann. Rep. (2011) Private Admonishment 9, p. 24 [presiding judge failed to take appropriate corrective action after receiving reliable information about serious wrongdoing by another judge on the court]; Com. on Jud. Performance, Ann. Rep. (2010)

³ A supervising judge's primary ethical duties are the same regardless of whether the individuals supervised are commissioners, superior court judges or any other kind of judge. (*Schnider* at p. 2 [canon 3C(3) "requires judges with supervisory authority for the judicial performance of other judges and commissioners to take reasonable measures to ensure the prompt disposition of matters before them"; canon 3D(1) "requires judges to take appropriate corrective action when they have reliable information that another judge has violated provision of the Code of Judicial Ethics"].)

Advisory Letter 22, p. 27 [presiding judge did not properly respond to a complaint about a delay by a commissioner in a family law case]; Com. on Jud. Performance, Ann. Rep. (2009) Advisory Letter 14, p. 19 [judge charged with duty to supervise failed to ensure timely responses to litigants' complaints]; Com. on Jud. Performance, Ann. Rep. (2002) Advisory Letters 1, 15, pp. 23-24 [presiding judge did not respond to a litigant's complaint in a timely manner, or to a letter from the Commission on Judicial Performance inquiring about the status of the matter; another presiding judge failed to process a complaint for nine months]; Com. on Jud. Performance, Ann. Rep. (2000) Advisory Letters 17, 18, p. 22 [presiding judge failed to respond in a timely manner to a complaint; in another case, a presiding judge acted promptly but delayed before notifying complainant about the outcome of investigation]; Com. on Jud. Performance, Ann. Rep. (1998) Advisory Letters 28, 29, p. 28 [supervising judge failed to respond to a complaint against two commissioners and respond timely to a complaint against another commissioner]; Com. on Jud. Performance, Ann. Rep. (1995) Advisory Letters 35, 36, p. 27 [supervising judges delayed response to complaints about commissioners]; Com. on Jud. Performance, Ann. Rep. (1994) Advisory Letters 19, 21, 25, p. 19 [discipline imposed for failures to respond to complaints]; Com. on Jud. Performance, Ann. Rep. (1993) Private Admonishment G, p. 16 [same]; Com. on Jud. Performance, Ann. Rep. (1993) Advisory Letters 14, 19, pp. 18-19 [same]; Com. on Jud. Performance, Ann. Rep. (1992) Advisory Letter 20, p. 15; [same]; Com. on Jud. Performance, Ann. Rep. (1990) Advisory Letter 29, p. 24 [same]; Com. on Jud. Performance, Ann. Rep. (1988) Advisory Letter 44, p. 16 [same].)⁴

When responding to a complaint against a trial judge under their supervision, supervising judges should first determine if the court's local rules require them to follow any specific procedures. (Cal. Stds. Jud. Admin., std. 10.20(d) [a court's informal complaint procedure "should be memorialized in the applicable local rules of court"];

⁴ To ensure that there is a clear record if needed, supervising judges should consider documenting in writing all steps taken in response to a complaint against a trial judge.

see, e.g., Super. Ct. Alameda County, Local Rules, rule 2.0 [mandating that violations of the court’s policy against bias be reported to the presiding judge, but reserving for a future time implementation of Standard 10.20]; Super. Ct. Contra Costa County, Local Rules, rule 2.150 [describing procedures presiding judge should follow when in receipt of complaint against a bench officer]; Super. Ct. San Diego County, Local Rules, rule 1.2.1 [describing court’s policy against bias and access to court services]; Super. Ct. San Francisco, Local Rules, rule 2.6 [outlining procedures after a complaint has been filed].) But whether or not a court has adopted a local rule governing complaint procedures, a supervising judge should always take reasonable measures to review, investigate and respond to a complaint in a way that is designed to take appropriate corrective action when the supervising judge has determined that the information is reliable. (*Schnider, supra*, at p. 2 [citing canon 3C(3), which requires judges with supervisory authority to take reasonable measures to ensure the prompt disposition of matters in their courts, and canon 3D(1), which requires judges to take appropriate corrective action when they have reliable information that another judge has violated the code].)

The “reasonable measures” that a supervising judge should take in response to a complaint will depend on the facts and circumstances of each particular complaint. (*Schnider, supra*, at pp. 4-5 [noting that a supervising judge’s knowledge that a commissioner had a history of delay should have prompted the supervising judge to investigate further]; see also Cal. Rules of Court, rule 703(g) [describing alternative actions that a supervising judge may take after reviewing a complaint, depending on whether the allegations merit further investigation].) That is particularly true with regard to the decision whether to contact the trial judge accused of wrongdoing. For example, if it is clear that a party is protesting a legal ruling that the trial judge has made in a case, rather than an alleged breach of ethics, then it would not be necessary for the supervising judge to communicate with the trial judge about the matter. Similarly, if the supervising judge is able to determine that the complaint on its face is not reliable because it utterly lacks credibility, it may be reasonable not to pursue an investigation. Where the

complaint seems at first blush to be reliable, a supervising judge may be able to test the complaint's reliability and resolve the matter by reviewing transcripts, minute orders and other recordings of trial court proceedings, by speaking with percipient witnesses including court staff, or by employing an observer to attend proceedings and report to the supervising judge about whether the trial judge's behavior on the bench corroborates the allegations of the complaint. If a supervising judge is not able to fully resolve a complaint this way, he or she may be obligated by the duty of oversight to communicate with the trial judge who is the subject of a complaint, either as part of an investigation into the reliability of the complaint's allegations or, if the supervising judge is convinced of the reliability of the complaint, to confer with the trial judge about appropriate corrective action. (Canon 3D(1); Cal. Judges Assn., Judicial Ethics Update (Jan. 2016) § I.D, p. 4 [a presiding judge who receives a complaint by a litigant in a pending case has a duty to investigate the complaint which may include discussing the matter with the judge].)

In cases where the duty of oversight requires communication with the trial judge about a complaint, the supervising judge should give careful consideration to whether it is necessary to refer to specific facts and circumstances that relate to a proceeding pending before the trial judge. Disclosure of such information by the supervising judge to the trial judge would constitute an *ex parte* communication, which canon 3B(7) defines as "any communications to or from the judge outside the presence of the parties concerning a pending or impending proceeding." Generally speaking, such *ex parte* communications are prohibited. With certain exceptions discussed below, judges must "not initiate, permit, or consider *ex parte* communications" and must "make reasonable efforts to avoid such communications." (Canon 3B(7).) For that reason, if discussion of a case currently before the trial judge is required, the supervising judge should consider whether it would be appropriate and practicable to avoid an *ex parte* communication by delaying the discussion while the case proceeds to conclusion, and then resuming the inquiry with the

trial judge when the case is no longer pending and no further proceedings before the trial judge are reasonably anticipated.⁵

It may not be appropriate or practicable in every instance to delay speaking with the trial judge who is the subject of a complaint. For example, if the allegations of a complaint set forth facts that might affect the outcome of a currently pending case, then the supervising judge may conclude that it would be improper to delay discussing the matter with the trial judge. Or, if the complaint alleges sexual misconduct or racism or other bias, then the supervising judge may feel compelled to proceed in order to mitigate any harm should the allegations be established as true. Further, if a complaint arises in the context of a family law case, probate, juvenile dependency or another kind of matter that may last many years, or in a matter that is likely to be appealed and thereafter remanded to the trial court, then it may not be possible to stay an investigation long enough for the case to finally conclude. In those circumstances, there are exceptions to the general prohibition on ex parte communications that permit disclosures of case-related information to trial judges when necessary to fulfill the supervising judges' oversight obligations, so long as certain conditions are met, as discussed below. (Cal. Judges Assn., Judicial Ethics Update (Jan. 2016) § I.D, p. 4 [where a presiding judge discloses a complaint to the judge it becomes an ex parte communication which the judge would have to disclose].) For example, Canon 3B(7)(b) allows ex parte communications for administrative purposes (such as judicial oversight) "where circumstances require." (*Inquiry Concerning Ross* (2005) 49 Cal.4th CJP Supp. 79, 104, fn. 6 [ex parte communication by supervising judge while investigating complaint against trial judge was part of legitimate administrative duties pursuant to canon 3C(3), and for that reason it was not improper]; Rothman, *supra*, § 5.5, p. 268-269 [it is "essential" that the communication be necessary for it to be ethically permissible].) Canon 3B(7)(a) allows

⁵ If a stay of an investigation is appropriate in order to delay a communication with the judge who is the subject of the complaint, then the supervising judge should consider whether to inform the complainant and other parties in the case of the stay as well as the reasons for the stay.

ex parte communications between trial judges and “court personnel and others authorized by law” (including a supervising judge) “as long as the communication relates to that person’s duty to aid the judge in carrying out the judge’s adjudicative responsibilities.” A supervising judge’s communication with a trial judge to investigate a complaint or correct the trial judge’s violation of judicial ethics falls within this carve-out to the general prohibition on ex parte communications.

Even where ex parte communications are allowed in the circumstances described above, supervising judges should exercise caution to avoid unnecessary disclosure of facts or other specific information about a case pending before the trial judge who is the subject of the complaint. A trial judge does not have a right to know case-specific information that is not necessary to evaluate the allegations raised in a complaint against the trial judge or to take appropriate corrective action. (*Inquiry Concerning Velasquez* (2007) 49 Cal.4th CJP Supp. 175, 209 [trial judge disciplined for demanding copies of letters of complaint that had been submitted to his presiding judge].) “In any discussion with judges or court personnel, a judge shall make reasonable efforts to avoid receiving factual information that is not part of the record or an evaluation of that factual information.” (Canon 3B(7)(a); accord canon 3B(7)(b) [allowing ex parte communications for administrative purposes only “where circumstances require”].) For that reason, the supervising judge should narrow the focus of any discussion with the trial judge to issues related to the administration of justice, the remediation of a violation of the trial judge’s ethical duties, or the improvement of the trial judge’s conduct in future matters. No extraneous information about cases pending before the trial judge, or that are impending, should be disclosed. (*Inquiry Concerning Platt*, (2002) 48 Cal.4th CJP Supp. 227, 245, fn. 4 [general inquiry into administrative matters does not become an ex parte communication unless and until it is linked to some specific case].) In addition, the supervising judge should not disclose information to the trial judge that would provide a procedural or tactical advantage to a party appearing before the trial judge in pending litigation. (Canon 3B(7)(b)(ii).) Furthermore, supervising judges should limit their

interactions with the trial judge as much as possible to written communications, so that there is a clear record of what has been disclosed to the trial judge in case the content or propriety of the communications is ever called into question. In the event that the supervising judge verbally discloses ex parte communications to the trial judge, the supervising judge should soon thereafter commit to writing any conversations regarding the disclosure. The supervising judge remains responsible to take reasonable measures to ensure that the trial judge follows proper procedures that may be required by the disclosure of an ex parte communication to the trial judge. (*See Schnider* at p. 4 [discipline imposed on supervising judge who failed to follow up with commissioner under his supervision after instructing her to take measures to remedy her ethical violations].)

V. Conclusion

The proper handling of a complaint may require a supervising judge to disclose an ex parte communication to the trial judge who is the subject of the complaint. Before making such a disclosure, the supervising judge should determine if there are any appropriate alternative ways to proceed with the investigation and resolution of the complaint that would not require disclosure. If disclosure is required, it should be limited to what is necessary.



This opinion is advisory only (Cal. Rules of Court, rule 9.80(a), (e); Cal. Com. Jud. Ethics Opns., Internal Operating Rules & Proc. (CJEO) rule 1(a), (b)). It is based on facts and issues, or topics of interest, presented to the California Supreme Court Committee on Judicial Ethics Opinions in a request for an opinion (Cal. Rules of Court, rule 9.80(i)(3); CJEO rule 2(f), 6(c)), or on subjects deemed appropriate by the committee (Cal. Rules of Court, rule 9.80(i)(1); CJEO rule 6(a)). The conclusions expressed in this summary are those of the committee and do not necessarily reflect the

views of the California Supreme Court or any other entity. (Cal. Rules of Court, rule 9.80(b); CJEO rule 1(a).)