



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

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CJEO Formal Opinion 2021-016

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**INDEPENDENT INVESTIGATION OF INFORMATION CONTAINED IN
ELECTRONIC COURT CASE MANAGEMENT SYSTEMS**

I. Question

The Committee on Judicial Ethics Opinions (CJEO) was asked to provide an opinion on whether, in a non-criminal matter, a judge¹ may search the court's electronic case management system (CMS) for information regarding a party, attorney, or facts relevant to the matter before the judge.

¹ As used in this opinion, judge refers to all judicial officers, including trial court judges, appellate justices, and other judicial officers who are subject to the California Code of Judicial Ethics. (Cal. Code Jud. Ethics, canon 6A [anyone who is an officer of the state judicial system and who performs judicial functions is a judge within the meaning of the code and shall comply with the code except as otherwise provided].)

II. Summary of Conclusions

Canon 3B(7) of the California Code of Judicial Ethics² provides that “[u]nless authorized by law, a judge shall not independently investigate facts in a proceeding and shall consider only the evidence presented or facts that may be properly judicially noticed. This prohibition extends to information available in *all media, including electronic*” (emphasis added). How this canon applies to using an electronic case management system (CMS) in all matters, whether civil or criminal, is the subject of this opinion.

It is the committee’s view that a judge may use a CMS to search for information that will assist in the proper performance of judicial duties. A judge may also use a CMS to independently investigate facts in a proceeding where the investigation is authorized by law. The committee advises that canon 3B(7) prohibits only those CMS searches that are performed to independently investigate adjudicative facts where the investigation is not authorized by law or where the information is not the proper subject of judicial notice. Adjudicative facts are those that may resolve factual issues or relate to evaluating credibility in the matter before the judge.

III. Authorities

A. Applicable Canons

Canon 2A: “A judge . . . shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”

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

Canon 3B(7): “A judge shall accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the full right to be heard according to law. Unless otherwise authorized by law, a judge shall not independently investigate facts in a

² All further references to the code, canons, or advisory committee commentary are to the California Code of Judicial Ethics.

proceeding and shall consider only the evidence presented or facts that may be properly judicially noticed. This prohibition extends to information available in all media, including electronic.”

Advisory Committee commentary following canon 3B(7): “A judge is statutorily authorized to investigate and consult witnesses informally in small claims cases. Code of Civil Procedure section 116.520, subdivision (c).”

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

Canon 3E(2): “In all trial court proceedings, a judge shall disclose on the record as follows: [¶] (a) Information relevant to disqualification. [¶] A judge shall disclose information that is reasonably relevant to the question of disqualification under Code of Civil Procedure section 170.1, even if the judge believes there is no actual basis for disqualification.”

Canon 3E(4): “An appellate justice shall disqualify himself or herself in any proceeding if for any reason: [¶] (a) the justice believes his or her recusal would further the interests of justice; or [¶] (b) the justice substantially doubts his or her capacity to be impartial; or [¶] (c) the circumstances are such that a reasonable person aware of the facts would doubt the justice’s ability to be impartial.”

B. Other Authorities

Code of Civil Procedure sections 116.520, 116.770, 170.1, 391, 391.2, 527.6, 527.8, 527.85

Civil Code section 1954.13

Evidence Code sections 450-460

Family Code sections 3031, 6306

Penal Code sections 18155, 18175

Probate Code section 2620

California Rules of Court, rules 3.300, 5.440, 5.445, 8.252

Catchpole v. Brannon (1995) 36 Cal.app.4th 237

Conservatorship of Presha (2018) 26 Cal.App.5th 487

Fremont Indemnity Co. v. Workers' Comp. Appeals Bd. (1984) 153 Cal.App.3d 965

Gimbel v. Laramie (1960) 181 Cal.App.2d 77

Harris v. Rivera (1981) 454 U.S. 339

In re Marriage of Davenport (2011) 194 Cal.App.4th 1507

Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc. (2005) 133 Cal.App. 4th 26

Planning & Conservation League v. Castaic Lake Water Agency (2009) 180 Cal.App.4th 210

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

CJEO Formal Opinion 2015-007 (2015), *Disqualification for Prior Appearance as a Deputy District Attorney in a Nonsubstantive Matter*, California Supreme Court Committee on Judicial Ethics Opinions

CJEO Oral Advice Summary 2019-029 (2019), *Appellate Disqualification for Prior Assignment as Coordinated Proceedings Judge*, California Supreme Court Committee on Judicial Ethics Opinions

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

Rothman et al., *California Judicial Conduct Handbook* (4th ed. 2017) appendix G

ABA Committee on Professional Ethics, Opinion Number 478 (Dec. 8, 2017)

Thornburg, *The Lure of the Internet and the Limits on Judicial Fact Research* (Summer/Fall 2012) 38:4 *Litigation* 41

IV. Discussion

A. Electronic Case Management Systems

At its most basic level, a CMS contains what was traditionally stored in paper files but is now stored electronically in searchable databases and other formats. A CMS receives, stores, organizes and retrieves case data, including documents that are

electronically filed with a court, created electronically by a court, or electronically stored with the court, as well as electronic copies or versions of documents that were originally paper records and have been digitized. Some CMSs may also contain calendar information and additional features that allow for the creation of and access to other information, such as comments, impressions, notes, research results, or to-do lists that are associated with a specific case or are created for general use by a judge or court staff. Judges usually access information contained in a CMS through a ‘viewer’ application, which provides total or limited access to all the information and data stored in a CMS. CMSs and companion judicial viewer applications provide immediate access to comprehensive data. Some CMSs may also link to or provide access to a court’s document management system, which may include templates, prior orders, frequently cited cases, or internal court memoranda, operating as a brief bank.

Unlike paper files, the information stored in a CMS is readily accessible, easily searchable, and may contain more than what is in a paper file. Depending on the features of a court’s individualized CMS, the system’s settings, other judges’ privacy settings, and a judge’s access rights, search results may be limited to matters assigned to a specific judge or may be more comprehensive. It is not unexpected that a CMS search will yield relevant results from all the case records and other information within the judge’s case type or discipline or from within the judge’s entire court.

B. Permissible CMS Searches

Electronic case management systems are an integral part of California court operations, providing an efficient mechanism for judges and court staff to electronically review court documents and effectively manage caseloads. These electronic systems provide easy and immediate access to court records as well as other information that can be searched and viewed instantaneously.

Canon 3B(7) of the code states that “[u]nless authorized by law, a judge shall not independently investigate facts in a proceeding and shall consider only the evidence

presented or facts that may be properly judicially noticed. This prohibition extends to information available in *all media, including electronic*” (emphasis added). For judges using their court’s CMS as a regular and necessary part of their judicial function, the question becomes: what electronically stored information are they authorized by law to search for or view?

There are many statutes, court rules, and cases that authorize a judge to search for and view information relevant to the matter assigned to the judge. In some instances, an independent investigation of relevant facts is required.³ In other instances, an independent investigation is permitted, such as to avoid inconsistencies with other orders⁴ or to determine whether there are grounds that justify issuing an order.⁵ In small claims cases, a judge may investigate the controversy with or without providing notice to the parties.⁶ In certain matters, a judge may engage in an independent investigation as part of the court’s supervisory duties.⁷

³ Fam. Code, § 6306 [a court shall ensure that a search is conducted to determine certain information regarding the subject of the proposed order].

⁴ Fam. Code, § 3031 [a court considering the issue of custody or visitation is encouraged to make a reasonable effort to ascertain whether there are other orders in effect that concern the parties or the minor]; Cal. Rules of Court, rules 5.440 & 5.445 [courts should identify cases and information related to a pending family law case to avoid inconsistent orders].

⁵ Pen. Code, §§ 18155, 18175 [gun violence restraining orders]; Code Civ. Proc., §§ 391, 391.2 [vexatious litigant findings based on prior unmeritorious litigation practices], §§ 527.6, subd. (i) [civil harassment], 527.8, subd. (j) [workplace harassment], 527.85, subd. (j) [harassment at postsecondary educational school campus or facility]; Civ. Code, § 1954.13, subd. (c) [transitional house participant abuse or program misconduct].

⁶ Code Civ. Proc., §§ 116.520, subd. (c); 116.770, subd. (c) [a judge may conduct an independent investigation in small claims court matters that are on appeal in superior court]; Advisory Com. com. foll. canon 3B(7) [a judge may investigate in small claims cases].

⁷ Prob. Code, §§ 2620, subd. (d) [a court may consider any information necessary to determine the accuracy of a conservatorship accounting]; *Conservatorship of Presha* (2018) 26 Cal.App.5th 487, 49-498 [a judge may consider a court-appointed conservator’s billing practices in other cases to determine whether the conservator is properly discharging the conservator’s duties].

A judge may also search the court's CMS for case management purposes. This includes searching a CMS to determine whether to coordinate, relate, or consolidate cases.⁸ A judge may also search the CMS to determine whether the judge should disqualify himself or herself based on prior involvement in the matter, prior representation of a party, or a financial interest in a party.⁹ These examples are not exhaustive. There are many other statutes, regulations, and rules of court, as well as case law, that authorize a judge to independently investigate a matter. An independent investigation using a CMS that is performed pursuant to such authority is permitted by canon 3B(7). (Canon 3B(7) [prohibiting independent investigation of facts in a proceeding unless otherwise authorized by law].)

A judge who searches a CMS for court records that are the proper subject of judicial notice also complies with canon 3B(7). (Canon 3B(7) [a judge may consider facts that may be properly judicially noticed]; Evid. Code, § 450 [judicial notice may not be taken of any matter unless authorized or required by law]; Evid. Code, § 452 [authorizing judicial notice of court records]; Evid. Code, § 455 [requiring a reasonable opportunity to be heard on any permissive judicial notice].)¹⁰ For example, a judge who

⁸ Cal. Rules of Court, rule 3.300(h) [a judge must determine whether certain cases should be ordered related], rule 5.440 [courts should identify cases related to a pending family law case to make effective use of court resources].

⁹ Code Civ. Proc., § 170.1 [setting forth the grounds for disqualification of trial court judges]; canon 3E(4)-(5) [setting forth the grounds for disqualification of appellate justices]; CJEO Formal Opinion 2015-007, *Disqualification for Prior Appearance as a Deputy District Attorney in a Nonsubstantive Matter*, Cal. Supreme Ct., Com. Jud. Ethics Formal Opn., p. 14 [a judge who appeared in a case as a deputy district attorney in a nonsubstantive role is not disqualified unless the judge actively participated in the case]; CJEO Oral Advice Summary 2019-029, *Appellate Disqualification for Prior Assignment as Coordinated Proceedings Judge*, Cal. Supreme Ct., Com. Jud. Ethics Oral Adv. Sum., p. 5 [a justice who served as a coordination judge is not required to disqualify where he was not actively involved nor made any decisions as the coordination judge on the matter on appeal or other related matters].

¹⁰ A comprehensive discussion of the law relating to mandatory and permissive judicial notice is beyond the scope of this opinion. With regard to the judicial ethics

must decide whether res judicata or collateral estoppel applies may perform a limited CMS search for the court’s prior ruling, which may be judicially noticed. (*Planning & Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 225 [judicial notice of court records in a separate action is permissible when considering a demurrer based on res judicata].)

C. Impermissible CMS Searches

The canon 3B(7) prohibition on the independent investigation of facts in a proceeding addresses two primary concerns — judicial impartiality and protecting due process rights. A judge who engages in fact-finding may demonstrate a lack of impartiality or embroilment and, if the judge relies on information obtained from an independent investigation, deprive a party of the opportunity to confront and respond to certain evidence. (Canon 2A [a judge shall act at all times in a manner that promotes public confidence in the impartiality of the judiciary]; canon 3B(7) [a judge shall accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the full right to be heard according to law]; *Catchpole v. Brannon* (1995) 36 Cal.App.4th 237, 259, fn. 9 [an independent factual inquiry is uncharacteristic of an impartial judge]; *Fremont Indemnity Co. v. Workers’ Comp. Appeals Bd.* 153 Cal.App.3d 965, 971, 974 [independent investigation in a case may violate the requirements of due process and erode public confidence in the integrity and impartiality of the judiciary].) These

issues raised by CMS searches, canon 3B(7) necessarily requires a judge to determine that a specific fact, document, court record, or other item of information is the legally permitted subject of judicial notice before engaging in an electronic search of the court’s system for that item. (Evid. Code § 451 [specifying matters subject to mandatory judicial notice; Evid. Code §§ 452-452.5 [specifying matters subject to permissive judicial notice]; Evid. Code §§ 453-460 [specifying procedures and rules regarding the propriety of taking judicial notice]; Cal. Rules of Court, rule 8.252(a) [specifying procedures for judicial notice on appeal]; *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App. 4th, 26, 39-42 [discussing and detailing documents that constitute cognizable legislative history for purposes of judicial notice].)

concerns are particularly applicable to independent investigations of adjudicative facts, which are facts that are specific to a particular case, such as “who did what, where, when, how, and with what motive or intent,” and that are usually resolved by a fact finder. (ABA Com. on Prof. Ethics, Opn. No. 478 (Dec. 8, 2017) pp. 4–5, quoting 2 Davis, *Administrative Law Treatise* (1958) § 15.03, p. 353; Thornburg, *The Lure of the Internet and the Limits on Judicial Fact Research* (Summer/Fall 2012) 38:4. *Litigation* 41, 44–45 [general information and background information about a party or the subject matter of a pending case constitutes adjudicative facts if it is of factual consequence in the matter].) It is, therefore, the committee’s opinion that an independent investigation of facts when the facts are adjudicative in nature is prohibited unless the review of such information is permitted by statute or is a proper subject of judicial notice.¹¹

D. Permissible CMS Searches that Produce Adjudicative Facts

The committee recognizes that judges regularly and routinely search case files and information using a CMS in furtherance of the proper performance of the duties of judicial office. Many of these tasks are predominately administrative in nature or conducted in connection with administrative functions. Using a court-provided CMS in furtherance of the duties of judicial office is not generally inconsistent with a judge’s ethical obligations. A judge who searches a CMS for non-adjudicative information and

¹¹ Limiting the prohibition on independent investigations to adjudicative facts is also consistent with other sections of canon 3B(7) that allow for ex parte communications in limited circumstances. For example, canon 3B(7)(a) permits ex parte communications among judges and court personnel that do not concern factual information. (*Ibid.* [a judge may consult with other judges and court personnel but should make reasonable efforts to avoid receiving factual information outside the record or an evaluation of that factual information].) Canon 3B(7)(b) also permits limited ex parte communications “where circumstances require, for scheduling, administrative purposes, or emergencies that do not deal with substantive matters” if no party will gain an advantage and the judge notifies the parties and provides an opportunity to respond.

reviews only those results that include non-adjudicative information complies with canon 3B(7).

Similar to internet searches, it is not uncommon to conduct a search not knowing what information will be provided. Due to the nature of CMSs, which provide immediate and easy access to large quantities of information, a judge should be aware that a CMS search could produce results that include some adjudicative and non-adjudicative facts. This is particularly the case when reviewing information that is not part of a case record but nonetheless available in a CMS. For example, a judge may have access to other judges' notes in an electronic CMS environment. Those notes may contain a judge's credibility assessments of parties or attorneys. When initiating a CMS search while performing necessary judicial functions, a judge should attempt to avoid reviewing adjudicative facts unless review of such information is authorized by law or if the adjudicative facts may be properly judicially noticed. A judge may not initiate or use a CMS search for the purpose of independently investigating adjudicative facts that pertain to resolving factual issues or to assess credibility in an assigned matter unless the judge has determined that review of those facts is permitted by statute or the facts are the proper subject of judicial notice.

E. Disqualification and Disclosure Considerations Following Inadvertent Review of Adjudicative Facts

A judge who inadvertently reviews adjudicative facts should first consider their capacity to remain impartial in the matter in light of the information that has been reviewed. (Canon 2A [a judge must act at all times in a manner that promotes public confidence in the impartiality of the judiciary]; canon 3 [a judge shall perform the duties of judicial office impartially].) A judge may determine that he or she is able to disregard this information, just as a judge is presumed to disregard irrelevant or inadmissible evidence presented by a party in the decision-making process. (*Harris v. Rivera* (1981) 454 U.S. 339, 346 [trial judges routinely hear inadmissible evidence that they are

presumed to ignore when acting as fact finders]; *In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1526 [the mere fact that a court reviewed evidence is not sufficient to overcome the presumption that a judge will distinguish and recognize only those facts that properly may be considered]; *Gimbel v. Laramie* (1960) 181 Cal.App.2d 77, 84 [the nature of judicial office and the judicial process requires a judge to divorce from the judge's mind inadmissible matters that may be brought to light in a trial].) However, if a judge determines that he or she is unable to disregard what has been inadvertently viewed, the judge must disqualify on the grounds of impartiality. (Code Civ. Proc., § 170.1, subd. (a)(6)(A)(ii) [a judge shall disqualify if the judge believes there is a substantial doubt regarding his or her impartiality]; canon 3E(1) [a judge shall disqualify where disqualification is required by law]; canon 3E(4)(b) [an appellate justice shall disqualify himself or herself where the justice substantially doubts his or her capacity to be impartial].)

A judge must also consider whether a person aware of the search and inadvertent review of adjudicative information would have reasonable doubts concerning impartiality, which would require disqualification. (Code Civ. Proc., § 170.1, subd. (a)(6)(A)(iii) [a judge shall disqualify if a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial]; canon 3E(4)(c) [an appellate justice shall disqualify himself or herself if the circumstances are such that a reasonable person aware of the facts would doubt the justice's ability to be impartial]; *Wechsler v. Superior Court* (2014) 224 Cal.App.4th 384, 391 [if a fully informed, reasonable member of the public would fairly entertain doubts that the judge is impartial, the judge is disqualified].)

A judge who inadvertently views adjudicative facts during a CMS search must also determine whether to disclose to the parties the details regarding any information that was inadvertently reviewed, as well as provide the parties with an opportunity to respond to the disclosure. (Canon 3E(2)(a) [a trial court judge must disclose on the record any information that is reasonably relevant to the question of disqualification even if the judge believes there is no actual basis for disqualification]; CJEO Oral Advice

Summary 2018-023, *Disqualification Responsibilities of Appellate Court Justices*, Cal. Supreme Ct., Com. Jud. Ethics Opns, p. 3 [an appellate court justice may, but is not required to, disclose information relevant to the decision to not disqualify himself or herself].)

In deciding whether to disclose, a judge should again evaluate whether a party aware that the judge had reviewed the information would reasonably doubt the judge's impartiality and whether the information provides a benefit to one side in a matter. (Rothman et al., Cal. Jud. Conduct Handbook (4th ed. 2017) appen. G, p. 923, citing Cal. Judges Assn., Jud. Ethics Update (1997) § I.D., p. 2 [a judge who learns information about a case from the court's computer system that may be useful to one side or the other in an ongoing trial is required to disclose this information to the parties].) If the judge is the fact finder in the matter, it is more likely that the judge should disclose the information. A judge should disclose and allow the parties an opportunity to respond if the judge intends to rely on the information in some manner to avoid due process concerns. (*Fremont Indemnity Co. v. Workers' Comp. Appeals Bd.*, *supra*, 153 Cal.App.3d at p. 971 [due process requires that all parties are fully apprised of the evidence considered and are provided with an opportunity to respond to the evidence and offer other evidence in explanation or rebuttal].)

Overall, a judge's decision to disqualify or to make a disclosure based on an inadvertent review of adjudicative information is a highly fact-specific evaluation. The nature of the matter before the judge and the adjudicative information that the judge reviewed should guide the judge's discretionary decision regarding disqualification or disclosure.

V. Conclusion

Judges are expected to and do use CMS searches for information that will assist in the proper performance of the duties of judicial office. Canon 3B(7) prohibits the use of a CMS to independently investigate adjudicative facts unless the investigation is authorized by law or the information is the proper subject of judicial notice. A judge

using a CMS should do so with awareness that a CMS search could produce results that include adjudicative information and attempt to avoid reviewing adjudicative information, unless it is legally authorized or judicially noticeable.

Judges who inadvertently review court records or other information that contains adjudicative facts as part of an otherwise permissible CMS search should consider (1) whether they are allowed by law or judicial notice to review the information; (2) whether the information they have viewed raises actual or reasonable doubt about impartiality; and (3) whether they should disclose the CMS search and the information reviewed and provide the parties with an opportunity to respond.



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