



California Supreme Court Committee on Judicial Ethics Opinions

350 McAllister Street, San Francisco, California 94102

www.JudicialEthicsOpinions.ca.gov

INVITATION TO COMMENT

[CJEO Draft Formal Opinion 2022-020]

Title

CJEO Draft Formal Opinion 2022-020,
Judicial Consultations with Other Judges

Action Requested

Review and submit comments by
October 24, 2022

Prepared by

The California Supreme Court
Committee on Judicial Ethics Opinions

Proposed Date of Adoption or Other Action

To be determined

For information about the committee and its
members, visit the [CJEO website](http://www.CJEO.org)

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CJEO Invites Public Comment

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, or other action.

This CJEO Draft Formal Opinion has not been adopted by the committee in final form and is circulated for comment purposes only.

CJEO Draft Formal Opinion 2022-020 provides guidance on the types of judicial conversations that fall within the canon permitting judges to consult with other judges under the California Code of Judicial Ethics.

After receiving and reviewing comments, the committee will decide whether the draft opinion should be published in its original form, modified, or formally withdrawn. (Rule 9.80(j)(2); CJEO rule 7(d)). Comments are due by **October 24, 2022**, and may be submitted as described below.

How to Submit Comments

Comments may be submitted: (1) [online](#); (2) by email to Judicial.Ethics@jud.ca.gov; or (3) by regular mail to:

The California Supreme Court Committee on Judicial Ethics Opinions
350 McAllister Street
San Francisco, California 94102

Comments Due by October 24, 2020

At the close of the comment period, or after **October 24, 2022**, the committee will post on its [website](#) all comments that are not clearly identified as confidential.

Attachment: CJEO Draft Formal Opinion 2022-020



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

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CJEO Draft Formal Opinion 2022-020

JUDICIAL CONSULTATIONS WITH OTHER JUDGES

I. Question

What types of judicial conversations fall within the canon permitting judges to consult with other judges under the California Code of Judicial Ethics?¹

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

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II. Summary of Conclusions

Canon 3B(7)(a) expressly permits judges to consult with other judges subject to limited exceptions. For instance, a judicial officer may not consult with judicial officers who are disqualified from the matter or who may be involved in appellate review of the matter.

The code does not define consultation; however, courts have interpreted the term broadly. The committee interprets consultation to mean any conversation among judges that assists a judicial officer in carrying out judicial functions, facilitates independent decision-making, and does not otherwise violate the code. Permissible consultation need not be phrased as a question or request for advice, initiated by the deciding judge, or follow a particular format. Consultation may include a discussion of the facts or legal issues in a case; however, a judge should make reasonable efforts to avoid receiving facts that are outside of the record.

Judicial consultation may necessarily involve a discussion of facts, parties, or witnesses that another judge might potentially encounter in a future proceeding; this is permissible under the code. There is a presumption of honesty and integrity in the judiciary, and judicial officers must be entrusted with the ability to disregard information that would be inadmissible in their own matters.

III. Authorities

A. Applicable Canons

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.”

Canon 3B(5): “A judge shall perform duties without bias or prejudice.”

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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 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. 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...”

Canon 3B(7)(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.

A judge may consult with court personnel or others authorized by law, as long as the communication relates to that person’s duty to aid the judge in carrying out the judge’s adjudicative responsibilities.

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.

For purposes of Canon 3B(7)(a), ‘court personnel’ includes bailiffs, court reporters, court externs, research attorneys, courtroom clerks, and other employees of the court, but does not include the lawyers in a proceeding before a judge, persons who are appointed by the court to serve in some capacity in a proceeding, or employees of other governmental entities, such as lawyers, social workers, or representatives of the probation department.”

Advisory Committee commentary following canon 3B(7)(a): “*Regarding communications between a judge presiding over a matter and a judge of a court with appellate jurisdiction over that matter, see Government Code section 68070.5...*”

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This canon prohibits a judge who is presiding over a case from discussing that case with another judge who has already been disqualified from hearing that case. A judge also must be careful not to talk to a judge whom the judge knows would be disqualified from hearing the matter.”

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.”

Advisory Committee commentary following canon 3B(9): “*Although a judge is permitted to make nonpublic comments about pending or impending cases that will not substantially interfere with a fair trial or hearing, the judge should be cautious when making any such comments. There is always a risk that a comment can be misheard, misinterpreted, or repeated. A judge making such a comment must be mindful of the judge’s obligation under Canon 2A to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. When a judge makes a nonpublic comment about a case pending before that judge, the judge must keep an open mind and not form an opinion prematurely or create the appearance of having formed an opinion prematurely.*”

Canon 3E(4): “An appellate justice shall disqualify himself or herself in any proceeding if for any reason... (b) the justice substantially doubts his or her capacity to be impartial...”

Canon 3E(5): “Disqualification of an appellate justice is also required in the following instances... (f) The justice... (ii) has personal knowledge of disputed evidentiary facts concerning the proceeding...”

B. Constitutional Provisions, Statutes, and Other Authorities

Code of Civil Procedure sections 170.1 and 170.3

Government Code section 68070.5

Withrow v. Larkin (1974) 421 U.S. 35, 47

People v. Farmer (1989) 47 Cal. 3d 888, 923

People v. Hernandez (1984) 160 Cal. App. 3d 725

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Andrews v. State (Ind. Ct. App. 1987) 505 N.E. 2d 815

Commission on Judicial Performance, *Public Admonishment of Judge Lisa A. Novak* (2018)

CJEO Formal Opinion 2021-016 (2021), *Independent Investigation of Information Contained in Electronic Case Management Systems*, California Supreme Court Committee on Judicial Ethics Opinions

Rothman et al., California Judicial Conduct Handbook (4th ed. 2017) sections 5:9 and 5:50

Alabama Judicial Inquiry Commission Opinion No. 94-523 (1994)

Colorado Judicial Ethics Advisory Board Opinion No. 2004-02 (2004)

Geyh et al., Judicial Conduct and Ethics (6th ed. 2020) section 1.02

IV. Discussion

One of the tenets of our legal system is the independence of the judiciary. Judges must make their own judicial decisions based on the record before them, free of external pressures or influences. (Geyh et al., Judicial Conduct and Ethics (6th ed. 2020) (Geyh) § 1.02, pp. 1-2 [judicial independence promotes the rule of law by insulating judges from external sources of influence].) At the same time, judges must be allowed, when in doubt or need of guidance, to ask questions or confer with judicial colleagues and supervisors to help reach the right judicial result. (Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) (Rothman) § 5:9, p. 274 [it is desirable for a judge faced with any question in a case to discuss the matter, whether it relates to legal, substantive, or factual issues, with other judges to aid the judge in arriving at a correct decision].) This opinion is intended to provide guidance regarding the scope of permissible judicial consultation in light of these competing concerns.

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A. Scope of Judicial Consultation

While ex parte communications concerning facts, parties, or witnesses in a pending matter are generally improper, the code expressly permits judicial officers to “consult with other judges.” (Canon 3B(7)(a).) This express permission has limited exceptions. For example, a judicial officer may not consult with judicial officers who are disqualified from the matter or who may be involved in appellate review of the matter. (Canon 3B(7)(a) and Advisory Comm. commentary foll. canon 3B(7)(a) [a judge presiding over a case shall not engage in discussions with a judge who is disqualified or involved in appellate review; nor shall a judge who knows he or she would be disqualified or who may be involved in appellate review engage in discussions with the judge presiding over the case]; Code Civ. Proc., § 170.3(a)(1) [a judge who is disqualified shall not further participate in the proceeding]; Gov. Code, § 68070.5 [when a case is appealed, there shall be no communication direct or indirect between the judge who heard the case and any judge of the reviewing court concerning the facts or merits of the case].)

The code does not define consultation; however, courts have interpreted the term expansively. (Rothman, *supra*, §5:9, p. 274 [interpreting judicial consultation broadly to include any communication that is otherwise proper on any subject involving adjudication of the matter before the deciding judge].) In *People v. Hernandez*, the court held that a sentencing judge did not violate ethical rules or a criminal defendant’s due process rights when the judge conferred with a judge in another jurisdiction regarding sentencing rules. (*People v. Hernandez* (1984) 160 Cal. App. 3d 725, 738-750.) The court found that it was “not inconsistent with public expectations of the decision-making process or erosive of public confidence in the judiciary” for judges to consult with one another. (*Id.* at 740.) Therefore, it was proper for the judge to confer with another judge on legal concepts and even the application of the facts to the law. (*Id.* at 742.)

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In reaching its holding, the court gave great weight to the “presumption in the honesty and integrity of our judicial officers.” (*Hernandez, supra*, at p. 746, citing *Withrow v. Larkin* (1974) 421 U.S. 35, 47). The court found that the deciding judge did not learn any facts outside the record during his consultation with the judge from the other jurisdiction, and to the extent there was any risk of that occurring, judges must be trusted to disregard such information. The court explained: “[W]e must depend upon the integrity of the judge to reject that which he may not consider. The circumstance is really not much different from our expectations of a judge who, in a court trial, must exclude a confession and then proceed to determine a question of guilt or innocence....” (*Id.* at 747.) The court also discussed the practical need for judges to consult with another, noting the tremendous caseload burdens on judges and the necessity of discussing issues with other judges and staff² to carry out judicial functions. (*Id.* at 739.) Rather than undermine public confidence in the judiciary, the court found that such conversations furthered “governmental interests in a knowledgeable judiciary” and “facilitate[ed] “the judiciary’s ability to exercise its discretion wisely.” (*Id.* at 749.) The *Hernandez* court recognized that ultimate responsibility for decision-making rests with the deciding judge but found no evidence that the judge’s consultation with his counterpart in another jurisdiction had interfered with the deciding judge’s independent judgment. To the contrary, the conversation served to “facilitate the independent decision-making process rather than replace it.” (*Id.* at 750.)

² *Hernandez* refers to the importance of a judge being able to consult with other judges, as well as a judge’s own law clerks. (*Hernandez, supra*, at p. 739.) Distinct from consultations with other judges, discussions with court personnel are addressed in a separate section of canon 3B(7)(a), which permits such discussions provided they relate to the staff person’s duties to aid the judge. (Canon 3B(7)(a) [a judge may consult with court personnel or others authorized by law, as long as the communication relates to that person’s duty to aid the judge in carrying out the judge’s adjudicative responsibilities].)

This view of consultation is consistent with case law and advisory opinions from other jurisdictions, which hold that judges may consult with one another provided they retain sole discretion over their own decision-making and are not improperly influenced by facts outside the record. (*Andrews v. State* (Ind. Ct. App. 1987) 505 N.E. 2d 815, 826-827 [judge did not exhibit prejudice by stating that he had discussed the admissibility of offered evidence with other judges but made the decision solely on his own]; Colorado Judicial Ethics Advisory Board Opinion No. 2004-02 (2004), p. 1 [permissible consultations are limited to aiding a judge in reaching a final decision on a matter and should not actually influence, or appear to influence, the judge who has final adjudicative responsibility]; Alabama Judicial Inquiry Commission Opinion No. 94-523 (1994), p. 1 [a judge is not disqualified for conferring with another judge on a factual issue unless the judge obtained information about disputed evidentiary facts and that information will influence the judge's opinion on the substantive merits of the case].)

In summary, the committee interprets consultation to include any conversation among judicial colleagues that assists a judge in carrying out his or her judicial functions, facilitates independent decision-making, and is otherwise consistent with the code. Consultation need not be framed as a question, or initiated by the deciding judge, or follow a particular format. Rather, consultation is broad enough to include those judicial conversations necessary for the effective administration of justice and to enable judicial officers to reach the correct judicial result, provided the judge retains ultimate adjudicatory discretion. (Canon 3B(7)(a) [in consultations with other judges or court personnel, the judge shall not abrogate responsibility to personally decide the matter].) Consultation may include discussion of the facts or legal issues in a case. (*Hernandez, supra*, at 742; accord *People v. Farmer* (1989) 47 Cal. 3d 888, 923, disapproved on separate grounds [collegial interchanges on abstract legal matters are not improper].) At the same time, judges should make reasonable efforts to avoid receiving facts that are outside of the record in their own matters. (Canon 3B(7)(a) [in any discussion with

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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].)

B. The *Novak* Decision

In 2018, the Commission on Judicial Performance (CJP) disciplined a judge based on remarks she made about a pending case in a judges' meeting.³ (Com. on Jud. Performance, *Public Admonishment of Judge Lisa A. Novak* (2018) (*Novak*), pp. 7-9.) The CJP found that although the judge's statements were directed to her judicial colleagues, the statements did not fall within the canon permitting judicial consultation, might substantially interfere with a fair trial or hearing, and called into question the judge's impartiality and gave an appearance of bias and embroilment. (*Id.* at pp. 8-9.) In the committee's view, the *Novak* decision does not narrow the scope of permissible consultation.

In *Novak*, a judge attended a superior court judges' meeting and announced to all assembled that she had made a finding at a motion hearing in a criminal case that a particular sergeant in the sheriff's office had perjured himself. The judge described the hearing in detail and stated that she was sharing this information with the other judges as an "FYI," and they could do with it as they wished. Later, in her defense to the CJP, the judge stated that she believed her disclosure of her findings on the sergeant's credibility was "mandated" due to the close relationship between the court and the sheriff's office. (*Novak, supra*, at pp. 7-9.) The CJP found the judge's conduct improper for a constellation of reasons, noting that, "although judges are permitted to consult with each other and assist in their adjudicative responsibilities," the judge "was not *consulting* with other judges and seeking their advice, but was instead *informing* them of her evaluation

³ In the same decision, the CJP admonished the judge for two separate and unrelated incidents of improper conduct. (*Novak, supra*, at pp. 1, 9.)

of the evidence in a pending case and potentially impairing their independence and impartiality.” (*Novak, supra*, at p. 8 [italics added].)

Having determined that the judge’s statements did not fall within the scope of consultation, the CJP found that the judge’s comments potentially violated the express prohibition against discussing matters with judges who may be involved in appellate review and interfered with the duty of other judges (who might hear later proceedings in the same case) to make reasonable efforts to avoid information outside the record in their own matters under canon 3B(7)(a). (*Novak, supra*, at p. 8.)⁴ The judge’s indiscriminate comments to a large gathering of judges also constituted nonpublic comments that might substantially interfere with a fair trial or hearing in violation of canon 3B(9) [judges shall not make public comments about a pending proceeding or nonpublic comments that might substantially interfere with a fair trial or hearing].) (*Novak, supra*, at p. 8; Advisory Com. commentary foll. canon 3B(9) [a judge making a nonpublic comment must be mindful of the judge’s obligation under Canon 2A to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary].) Finally, the judge’s comments exhibited bias and embroilment in violation of canons 2A and 3B(5). (*Novak, supra*, at p. 9.)

⁴ As a corollary to canon 3B(7)(a)’s requirement that judges make reasonable efforts to avoid receiving facts outside the record, canon 3B(7) specifies that judges “shall not independently investigate facts in a proceeding and shall consider only the evidence presented or facts that may be properly judicially noticed.” The policy reasons for both requirements are the same: preservation of judicial impartiality and protecting the parties’ due process rights. (CJEO Formal Opinion 2021-016 (2021), *Independent Investigation of Information Contained in Electronic Case Management Systems*, Cal. Supreme Ct. Com. Jud. Ethics Opns., p. 8 [a judge who engages in independent 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].)

Novak does not change the committee's view that, as discussed above, judicial consultation may necessitate and properly include a discussion of the law or facts of a particular case. Judges within the same court, and particularly judges in criminal divisions, may regularly encounter similar fact patterns and the same parties, lawyers, witnesses, and experts. The code cannot be read so strictly that a deciding judge may not consult with another judge on any matter for fear that the second judge might one day, hypothetically, need to decide similar facts or assess the credibility of the same witnesses. Even if a judge were, in the course of consultation, inadvertently exposed to facts or an assessment of witnesses that the judge would later have to adjudicate in some manner, judicial officers are trusted to disregard such information as they would any other inadmissible evidence.⁵ (*Hernandez, supra*, at 747; Rothman, *supra*, § 5:50, p. 314 [a competent judge has the ability to hear many things that might be disregarded in reaching a final decision].) However, in the *Novak* matter, the judge made a pronouncement about the credibility of a witness with no consultative purpose, which had more than a hypothetical risk of substantially interfering with a fair trial or hearing given the audience and created the appearance of embroilment. Such conduct is antithetical to the reason the code expressly permits judicial officers to consult with other judges, which is to assist judges in carrying out their judicial responsibilities impartially.

⁵ In the unusual circumstance that a judge being consulted on a factual or legal issue was exposed to a fact or assessment of a witnesses that the judge determined he or she could not disregard in a later proceeding, the judge may need to disqualify from the later proceeding. (Canon 3E(4)(b) [appellate justice shall disqualify if the justice substantially doubts his or her capacity to be impartial; Code Civ. Proc., §170.1, subd. (a)(6)(A) [same rule for trial court judges]; canon 3E(5)(f)(ii) [appellate justice shall disqualify if the justice has personal knowledge of disputed facts]; Code Civ. Proc., § 170.1, subd. (a)(1)(A) [same rule for trial court judges].) However, in the committee's view, the policy reasons for permitting judges to consult with another outweigh the risk that such a circumstance may arise on rare occasion.

V. Conclusion

Judicial officers may consult with one another any on any matter, provided the judge being consulted is not disqualified or involved in appellate review of the matter. While consultation is not defined in the code, courts have interpreted it broadly. The committee interprets consultation to include any conversation among judicial colleagues that assists a judge in carrying out his or her judicial functions, facilitates independent decision-making, and is otherwise consistent with the code. Consultation may include a discussion of the facts or the law. However, judges should make reasonable efforts to avoid facts outside the record in their own matters. Even if a judicial officer, in the course of permissible consultation, is inadvertently exposed to facts or an assessment of the credibility of witnesses that the judicial officer may later have to adjudicate in some manner, there is a presumption in the integrity of judicial officers and their ability to disregard inadmissible information.



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 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).)

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