

CJEO Draft Formal Opinion 2020-015:
SUPERVISING JUDGE’S DUTIES WHEN PARTY COMPLAINS ABOUT
JUDGE IN PENDING MATTER

Public Comments Received With A Waiver Of Confidentiality

(Listed in Order of Date of Receipt)

Table of Contents

<i>Comment No.</i>	<i>Commenter</i>	<i>Page No.</i>
1.	Arnold Berschler, Esq. (received August 31, 2020)	1
2.	Steve Acquisto, Judge, Sacramento County Superior Court (received September 22, 2020)	2
3.	Lawrence P. Riff, Supervising Judge, Family Law Division, Los Angeles Superior Court, Lon Hurwitz, Supervising Judge, Family Law Division Orange County Superior Court, and Margo Hoy, Supervising Judge, Family Law Division, San Diego County Superior Court (Received October 6, 2020)	5
4.	Children's Law Center of California (Received October 9, 2020)	8
5.	Los Angeles County Superior Court (Received October 13, 2020)	10
6.	Jodi Cleesattle (Received October 13, 2020)	12
7.	Beth W. Mora (Received October 13, 2020)	15

Comment No. 1

Name: ARNOLD BERSCHLER

Title: Attorney at Law

Organization:

Comment on Behalf of Org.: No

COMMENT:

The following language invites further refinement to reduce or eliminate discretion re procedure: (1) "when there is no other way to properly investigate . . ." ought not benchmarks or examples be supplied; similar to restatement comments? (2) " judge persistently fails to carry out directives . . ." ought not there be some quantity definition of "persistently"?

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Comment No. 2

From: Acquisto, Stephen

Subject: Comment on Draft Opinion 2020-015

John S. Throckmorton

Committee on Judicial Ethics Opinions

Committee Counsel

Re: Draft Formal Opinion 2020-015—Supervising Judge’s Duties When Part Complains About Judge in Pending Matter

Dear Mr. Throckmorton,

I write to express a concern I have about an assumption upon which the above-referenced draft opinion seems to be based. To be clear, I don’t have any thoughts or concerns about the primary issue the opinion addresses, which is when a supervising judge may disclose an ex parte communication to a trial judge when investigating and responding to a complaint. Rather, my concern is that the draft opinion seems to assume that a supervising judge has a duty—at all—to investigate complaints about fellow judges, as opposed to subordinate judicial officers.

I have reviewed the applicable Rules of Court and Rothman’s California Judicial Conduct Handbook, and I do not see that a presiding or supervising judge has authority to conduct an investigation into a judge or provide a substantive response to an ex parte complainant about a judge’s performance. The rules governing a presiding judge’s oversight of a subordinate judicial officer are significantly different than those governing oversight of fellow judges.

A presiding judge’s duties with respect to handling complaints about a subordinate judicial officer are set forth in California Rule of Court, rule 10.703. This rule clearly and explicitly authorizes a presiding judge to conduct an investigation of a subordinate judicial officer in response to a complaint. Subdivisions (f), (g), (h), (i), (j), and (k) of Rule 10.703 lay out in detail all of the presiding judge’s powers and duties with respect to conducting an investigation, communicating with the subordinate judicial officer, communicating with the complainant, taking disciplinary actions against the subordinate judicial officer, and notifying the Commission on Judicial Performance.

But Rule 10.703 provides no authority for the presiding judge (or a supervising judge) to investigate another judge. A different rule of court—Rule 10.603—sets forth the authority and duties of the presiding judge with respect to the oversight of other judges. Unlike rule 10.703, rule 10.603 does not contain any provision authorizing a presiding judge to conduct an investigation into a complaint

about a judge. The part of the rule governing the presiding judge's oversight of judges, provides only that:

The presiding judge must notify the Commission on Judicial Performance of:

- (i) A judge's substantial failure to perform judicial duties, including any habitual neglect of duty, persistent refusal to carry out assignments as assigned by the presiding judge, or persistent refusal to carry out the directives of the presiding judge as authorized by the rules of court; or
- (ii) Any absences caused by disability totaling more than 90 court days in a 12-month period, excluding absences authorized under (c)(2)[.]

(Cal. Rules of Court, rule 10.603(c)(4).)

The authority to investigate complaints about a judge could have been written into Rule 10.603, but it wasn't. And it should not just be assumed that a presiding judge has the power to investigate fellow judges whenever he or she receives an ex parte complaint. The question of whether a presiding judge has that authority at all—let alone the extent and contours of that authority given its lack of definition by a rule of court—warrants a careful consideration and analysis of the governing authority.

My concern is that the draft opinion seems to assume (without addressing the differences in the applicable rules) that a presiding or supervising judge has the authority to investigate a fellow judge and substantively respond to an ex parte complainant. That assumption may be wrong. And by embedding the assumption in the opinion, the opinion may inadvertently lend some support for the notion that a presiding or supervising judge does have that authority. (I would note that, although I have not reviewed the CJP opinions referenced on page 5 of the draft opinion, the bracketed case summaries themselves reveal that several of them pertain to investigations of commissioners, rather than judges.)

If the committee agrees with this concern, I ask that it reconsider the general applicability of the opinion to complaints against judges. If the committee concludes the opinion still has applicability to judges, perhaps the opinion could be clarified to note that while a presiding judge's power to investigate a subordinate judicial officer is clearly set forth in Rule 10.703, there are no similar provisions in Rule 10.603, which governs a presiding judge's authority with respect to other judges. The opinion could further state that the committee is not expressing any opinion as to a presiding judge's authority with respect to investigating judges or providing a substantive response to a complainant about judges.

Thank you for your time and consideration. I'd be happy to discuss my thoughts further if it would be helpful.

Sincerely,

Steve Acquisto

Judge, Sacramento County Superior Court

720 Ninth Street, Department 36

Sacramento, CA 95814

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Comment No. 3

From: Judge Lawrence Riff

Sent: Tuesday, October 6, 2020 4:34 PM

Cc: Hurwitz, Lon F.; Hoy, Margo Lewis

Subject: Comment on CJEO Draft Formal Opinion 2020-015

Dear Mr. Throckmorton:

We are the Supervising Judges ("SJ") of the Family Law Divisions of the Superior Court for Los Angeles, Orange and San Diego counties. Investigating and responding to complaints is a material element of our job duties.

We often wrestle with the principal issues presented in the draft opinion: May an SJ communicate ex parte to a judicial officer about a complaint made against her or him in a pending matter? And if so, how, in light of the adverse consequences that may follow? The draft opinion correctly observes that in family law proceedings such complaints are often received in proceedings years after entry of judgment, vastly extending the notion of a "pending matter".

We question whether the draft opinion will lead to an unintended consequence, namely, that an SJ will not communicate ex parte with the subject of a complaint because the SJ will not be able to discharge his or her ethical duties thereafter. We explain our concern.

The draft opinion at page 9, first full paragraph, provides in part, "That oversight duty includes monitoring and supervising additional procedures that the trial judge may need to follow to prevent the ex parte communication from undermining the appearance of impropriety or affecting the fundamental fairness of the proceedings before the trial judge." The draft opinion provides one example of such a procedure, namely, ensuring that the trial judge disclose the ex parte communication to the parties.

We suggest the duty as presently described is impracticable to discharge even in a smaller county and more so in large counties like ours.

We have tried to identify what such procedures we might employ. Here is our list:

*Require that the SJ be notified (if so, how or by whom?) of each hearing in the matter before that judicial officer after the disclosure.

*The SJ's or a surrogate's attendance at such hearings.

*Ordering a transcript of each such hearing (at a cost to the Court).

*The SJ's or a surrogate's review of each transcript.

*The SJ's or a surrogate's interviewing staff as whether all appears to be impartial and fundamentally fair, presumably not telling the JO that such interviews are occurring although it is foreseeable that the JO will learn of it nonetheless.

*The SJ's or a surrogate's interviewing the parties or their lawyers from time to time as whether all appears to be impartial and fundamentally fair.

*The SJ's or a surrogate's consulting with the trial judge from time to time as whether all appears to be impartial and fundamentally fair.

And if the SJ is to do any of these things--for how long in a given matter? The life of the case—which in some family law matters might be a decade or more?

Many of the items on this list are obviously bad ideas and we include them only for completeness. Frankly, none of the items on the list strikes us as good ideas. If there are other procedures that are good ideas, we suggest they be identified in the draft opinion.

We think that the draft opinion does not sufficiently circumscribe the scope or duration of the continuing oversight duty following the ex parte disclosure. We also think that, upon consideration of all relevant factors, the ultimate answer to the question whether such ex parte communications are proper may be “no”.

Thank you for your consideration of our comments.

Lawrence P. Riff

Supervising Judge, Family Law Division

Los Angeles Superior Court

Lon Hurwitz

Supervising Judge, Family Law Division

Orange County Superior Court

Margo Hoy

Supervising Judge, Family Law Division

San Diego County Superior Court

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Comment No. 4

Name: David Estep

Title: Law Firm Director

Organization: Children's Law Center of California

Comment on Behalf of Org.: Yes

COMMENT:

October 9, 2020

California Supreme Court Committee on Judicial Ethics

350 McAllister St., Rm. 1144A

San Francisco, CA 94109-3688

Re: Draft Formal Opinion 2020-105 Public Comments

To the Committee on Judicial Ethics:

Children's Law Center of California ("CLC") is the largest nonprofit law firm in the nation, advocating for over 33,000 children and youth in the foster care systems of Los Angeles, Sacramento, and Placer Counties. Every year, CLC's investigators conduct over 24,000 independent investigations into the well-being and safety of our clients, while CLC attorneys make over 100,000 court appearances. Our advocacy draws on the expertise of in-house mental health specialists, certified child welfare law specialists, and other experts who specialize in education, the prevention of commercial sexual exploitation of children, and juvenile justice. CLC has sponsored over forty pieces of child-welfare legislation between 1999 and 2019, and CLC continues to advocate for the advancement of the law.

CLC supports the adoption of Formal Opinion 2020-105 and submits the following recommended modifications. We are mindful of the many competing considerations that this Opinion addresses. Our suggested changes are intended to strengthen protections for parties and their attorneys and to provide as much transparency as possible in the judicial disciplinary process. In addition, we would encourage the Committee to include juvenile dependency among those types of matters that may take years to resolve: many of our clients' matters span from birth through their 21st birthdays.

Each addition CLC suggests for the Opinion is identified with [ADD] at beginning and end. Each deletion is marked with [DELETE] at beginning and end.

We are available to discuss further any questions or comments you may have. We may be reached at [REDACTED].

Sincerely,

Leslie Heimov, Executive Director

David Estep, Director, CLCLA 1

Juan Valles, Attorney Supervisor, CLCLA 1

Confidentiality Waived by Email: This Comment Will Be Posted For Public Review

Comment No. 5

Name: Bryan Borys

Title: Director, Research and Data Management

Organization: Los Angeles Superior Court

Comment on Behalf of Org.: Yes

COMMENT:

Thank you for the opportunity to comment. Draft Formal Opinion 2020-015 raises important issues about the interaction of competing principles. It is particularly helpful in clarifying that an ex parte communication by a supervising judge can, in some limited situations, be appropriate.

The advice in the Draft Formal Opinion is quite general. A more detailed discussion of specific factual situations and guidelines about the steps to take in those situations would be very helpful to the supervising judges needing to make the decision about whether to disclose an ex parte communication and then conduct the required oversight.

For example, while the Draft Formal Opinion cites numerous instances of discipline against supervising judges for failing to take swift action (many of which are private admonishment letters), it also states that the preferred course when handling a complaint is to wait until the pending matter is concluded, if possible, so as to avoid the necessity of an ex parte communication that could affect the proceedings. Of course, the facts and circumstances of each case will be different, and we support giving supervising judges all appropriate discretion to determine the course of action. However, given the existence of the potentially contradictory goals of (1) swift, appropriate action on the one hand, and (2) considering delay in communicating to a trial judge in the appropriate case on the other hand, we ask that the Opinion provide additional guidance to supervising judges about where the line should be drawn. We understand that drawing bright lines or setting out specific steps is difficult here because each situation presents multiple factors to consider, but additional examples of circumstances when an ex parte communication is appropriate would be helpful.

Likewise, the discussion starting on page 9 about the supervising judge's continued duty of oversight after disclosure of ex parte communications would benefit from more specific examples of how the supervising judge should monitor a trial judge. As the Draft Formal Opinion notes, certain types of cases, such as family law and probate, may last many years. Guidance about factors a supervising judge can and should consider in determining the means, extent, and duration of the oversight would assist supervising judges fulfill this duty. In addition, when a supervising judge discloses an ex parte communication to a trial judge, the trial judge may retain legal counsel. An exploration of the supervising judge's continued oversight responsibilities in this event and the impact of the retention of counsel on those duties would be useful.

The Draft Formal Opinion does not discuss the Presiding Judge's duties in much detail. The Presiding Judge is ultimately responsible for the supervision and management of the trial judges. The Draft Formal Opinion would benefit from more specific examples and guidance about the Presiding

Judge's duties when a supervising judge has an ex parte communication with a trial judge, both the Presiding Judge's responsibilities towards the trial judge and the supervising judge.

Thank you for considering these comments.

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Comment No. 6

Name: Jodi Cleesattle
Title: Supervising Deputy Attorney General
Organization: California Department of Justice
Comment on Behalf of Org.: No

COMMENT:

Thank you for inviting comments on the Committee on Judicial Ethics Opinions Draft Formal Opinion 2020-2015 – Supervising Judge’s Duties When Party Complains About Judge in Pending Matter.

This is an important issue that is timely and relevant in an era in which courts – and our communities – are evaluating the impact of conscious and unconscious bias. The question of how to handle complaints against sitting judges is one that requires a delicate balance of fairness to the judge, who may need information to evaluate and respond to a complaint, and protection for the complainant, who may be an attorney or litigant in a case pending before that judge.

The draft opinion attempts, with some success, to achieve that balance. I offer some suggestions, however, that may result in a more efficient and fair procedure.

As a preliminary matter, the draft opinion is somewhat confusing in its apparent use of the term “ex parte communications” when referencing both information received by the supervising judge from a complainant and information that the supervising judge may present to the trial judge who is the subject of a complaint. Revisions to more clearly illustrate which type of communications are being referenced would enhance the opinion.

More substantively, the draft opinion properly advises that a supervising judge who receives a complaint about a trial judge should provide only limited information to the subject of the complaint so that the trial judge cannot easily guess the identity of the complaining party, while recognizing that certain facts may need to be shared with the trial judge in the course of an investigation. This portion of the opinion should be bolstered, however, to state that it will be the presumption that the supervising judge will not share information with the trial judge who is the subject of the complaint if that information necessarily would identify the complaining party, unless such disclosure is unavoidable to fairly conduct the investigation. Without some assurance that the supervising judge will attempt to maintain some level of confidentiality, complainants may be dissuaded from raising legitimate concerns, especially when the complainant is an attorney or litigant in a pending case.

In addition, the draft opinion should include a more explicit course of action the supervising judge may take if information is disclosed to a trial judge who is the subject of a complaint, particularly if the complaint is found to be substantiated. The draft opinion addresses the supervising judge’s duty of oversight by stating that the duty “includes monitoring and supervising additional procedures that the trial judge may need to follow to prevent the ex parte communication from undermining the appearance of impartiality or affecting the

fundamental fairness of the proceedings before the trial judge.” (Draft Op., p. 9.) The draft opinion offers only one example of the procedures or actions that may be taken – a direction that the trial judge notify all other parties of the substance of the ex parte communication (that is, the information about the complaint that was disclosed to the trial judge) and allow them an opportunity to respond. This direction makes sense in many contexts. However, if the trial judge notifies the parties in a pending case, and the complaint was made by one of the attorneys or litigants in that case, the complainant is placed in an untenable situation that potentially results in the complainant’s outing as the complaining party. If a supervising judge must make a disclosure to a trial judge that likely will reveal the identity of the complainant, or if a supervising judge directs a trial judge to provide notice about a complaint to the parties in a case in which the complainant is an attorney or party, the supervising judge should consider reassigning the trial judge from that case to ensure that there is no appearance of bias or conflict. Such reassignments would not be necessary in every case, but in cases where a complaint is substantiated and the trial judge has been provided information about the complaint that may bias the judge or create the appearance of bias against one of the parties in a case, reassignment provides protection to both the judge and the litigants.

Similarly, the draft opinion would benefit from additional guidance on what a supervising judge should do if a trial judge does not follow the supervising judge’s directives. Currently, the draft opinion provides that, if a supervising judge shares information about a complaint with a trial judge, and that trial judge does not follow the instructions for corrective action, “others with judicial oversight duties can be enlisted to encourage the trial judge to comply. If the trial judge persistently refuses to comply with his or her ethical duties, then in appropriate circumstances, the supervising judge may need to inform the Commission on Judicial Performance of the trial judge’s conduct.” If the supervising judge directs the trial judge to do something, and the trial judge declines to do it, it is not clear that having additional supervising judges give the same direction would necessarily help or would simply open the process to further delay, cause the complainant distress, and subject the complainant to potential retaliation. An interim step may be helpful. Again, one option is reassignment of the trial judge from a case in which the complaint arose or which involves the complainant as a litigant. Thus, if a trial judge does not follow the instructions for corrective action, but the supervising judge does not believe the trial judge’s conduct requires a report to the Commission on Judicial Performance, reassignment is a reasonable option.

Trial judges should be reassured that actions such as reassignment would not be taken in cases in which a complaint merely attacks a legal ruling, rather than alleging an ethical breach, or appears to lack credibility on its face.

Overall, the draft opinion provides a comprehensive analysis of the issues that arise when a supervising judge must consider disclosing information to a trial judge about a complaint made against that judge. This situation requires a careful balance between the interests of the court, the trial judge named in a complaint, and the complaining party. The supervising judge must be able to obtain all information necessary to fully investigate complaints; the subject of a complaint must have an opportunity to respond to substantive complaints; and the complaining party must be assured that making a complaint will not cause prejudice to that party in pending litigation.

Again, thank you to the Committee for undertaking to achieve the proper balance for handling complaints against judges and for considering these comments.

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Comment No. 7:

Name: Beth W. Mora, Esq.

Title: Co-Chair, Committee on Bias in the Judiciary

Organization: California Employment Lawyers Association

Comment on Behalf of Org.: Yes

COMMENT:

The California Employment Lawyers Association, Committee on Bias in the Judiciary presents the forgoing in response to the request for comments by the Committee on Judicial Ethics Opinions (CJEO), regarding the August 28, 2020, Committee on Judicial Ethics Opinions Draft Formal Opinion 2020-2015; Supervising Judge's Duties When Party Complains About Judge in Pending Matter.

The draft opinion, though appreciated, can be confusing in the use of the term "ex parte communications" when referencing both information received by the supervising judge from a complainant, and information that the supervising judge may present to the trial judge who is the subject of a complaint. Clarification as to the intent would be appreciated.

In addition, the draft opinion attempt to limited information, such as within limited circumstances, where information is presented to the trial judge, with the design that the trial judge cannot easily guess the identity of the complaining party, while recognizing that certain facts may need to be shared in the course of an investigation. However, to avoid confusion, it would be best to include a presumption that certain information not be shared with the trial judge unless unavoidable to conduct the investigation with clarity as to type of information which would trigger disclosure. The lack of clarity here can cause attorneys to be concerned about retaliation, especially if an attorney or litigant is within a pending case. Thus, California Employment Lawyers Association is happy to work with CJEO to designate a list of information which would require disclosure.

Further, of great concern for attorneys who may consider making a complaint, the draft opinion provides insufficient guidance, which is far too subjective for the presiding or supervising judge. For example, if information is shared and a trial judge does not follow instructions for corrective action or engages in retaliation the opinion states: "If the trial judge fails to carry out the supervising judge's directives with regard to the ex parte communication, then others with judicial oversight duties can be enlisted to encourage the trial judge to comply. If the trial judge persistently refuses to comply with his or her ethical duties, then in appropriate circumstances, the supervising judge may need to inform the Commission on Judicial Performance of the trial judge's conduct." It is utterly unclear, what this truly means, and as a result it is not helpful to the potential complainant, attorney and the supervising or presiding judge. If the supervising or presiding judge directs the trial judge to do something, and the trial judge declines to do it, it is not clear that having additional supervising judges give the same direction would necessarily help or simply open the process to further delay, cause the complaint distress and potential retaliation. Accordingly, there should be clear steps and guidance; this section of the opinion should include another possible course of action, such as steps for removal of the trial judge from the case involved in the complaint if the trial judge does not follow the instructions for corrective action.

Overall, while the draft opinion appears to be an attempt to strike a balance between ex parte communications and a complaint process, a subjective procedure has arisen. Within this subjective process, the supervising or presiding judge is permitted to make a significant amount of judgment calls while the complaining attorney or attorney attempting to decide if they will make a complaint would be forced to simply trust in the process. This is a significant leap of faith to ask anyone to take, especially for an attorney who must balance how making a complaint against a trial judge may affect the attorney's ability to zealously represent a client before that judge. Accordingly, California Employment Lawyers Association formally requests the CJEO engage a redraft of the opinion with an advisory committee which includes at least four (4) attorneys.

We appreciate your willingness to consider the foregoing. Please advise if you have any comments or questions.

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