



**CALIFORNIA SUPREME COURT  
COMMITTEE ON JUDICIAL ETHICS OPINIONS**  
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**CJEO Draft Formal Opinion 2021-018**

**PROVIDING FEEDBACK ON ATTORNEY COURTROOM  
PERFORMANCE**

**Public Comments Submitted**

*Comments from members of the public submitted in response to an Invitation to Comment on a CJEO Draft Formal Opinion are deemed not confidential communications and may be posted on the CJEO website for public review at the committee's discretion. (Cal. Rules of Court, rule 9.80(h)(4).)*

## **Comment 1**

**Submitted by:** Michael Dea

**Received:** October 8, 2021

**Subject:** Submission: Public Comments on CJEO Draft Formal Opinions (2021-018)

Bad idea. Judges should remain neutral at all times. Providing feedback to attorneys amounts to being a "coach" for those who appear in court. It also leads to blurring the line with being impartial. Why get the judges involved when the attorney need only ask a colleague, boss, friend or member of the jury after the trial itself for advice on his or her performance.

## **Comment 2**

**Submitted by:** Richard W. Nichols

**Received:** October 8, 2021

**Subject:** CJEO Draft Formal Opinion 2021-018

As an attorney who was admitted to the Bar approximately 60 years ago, the first thing that came to my mind when reading this Draft Formal Opinion was to wonder how many collective hours, and dollars, have been spent on this project. In my opinion, the essence of the draft opinion can be stated in three words: “Don’t Do It!” All the rest is fluff! And while because of my age and inactive status with the Bar I am no longer compelled to pay Bar dues to support this kind of “make work” foolishness, I have considerable sympathy for those of my former colleagues who are being charged every year for such anodyne “advice.” How is it that the levels and expectations of professionalism in this State’s legal community have fallen so low?

Richard W. Nichols  
State Bar No. 32604

### **Comment 3**

**Submitted by:** Mark B. Baer

**Received:** October 11, 2021

**Subject:** Submission: Public Comments on CJEO Draft Formal Opinions (2021-018)

The Opinion provides in part as follows:

"Judicial officers are also prohibited from providing attorney feedback that exhibits favoritism or otherwise undermines the judicial officer's impartiality. (Canons 1, 2, and 2A [judges must preserve the integrity and impartiality of the judiciary in all activities]. "

However, actual and perceived biases aren't the problem. The problem involves a lack of character and integrity to do that which is required for judges to keep their biases in check.

The following is a quote from a program by the American Bar Association titled "Is There a Case for Structural Reform of the U.S. Supreme Court?" presented by the Committee on Issues of Concern to the Legal Profession. Judge M. Margaret McKeown of the U.S. Court of Appeals for the 9th Circuit served as moderator:

"Ultimately, the best protection for the integrity of the bench – in the sense of avoiding conflicts (of interest), biases, and prejudices – is the selection of judges and Justices who are genuinely people of integrity."

([https://lnkd.in/gEq9\\_QHp](https://lnkd.in/gEq9_QHp))

On September 21, 2021, the Daily Journal published an article by me titled Is Focusing On Perceived And Actual Biases Misplaced?. A link to that article is as follows:

<https://www.markbaeresq.com/images/Daily-Journal-Article.pdf>

The Bar can continue engaging in optics or it can actually do that which is required to actually address the problems it claims to want to address. Engaging in optics will not solve the problem, nor will trying to address an issue the Bar clearly does not properly understand.

#### **Comment 4**

**Submitted by:** Hon. L. Michael Clark, Santa Clara County Superior Court

**Received:** October 12, 2021

**Subject:** Comment on CJEO Draft Formal Opinion 2021-018

Dear CJEO,

I tried submitting this comment on the CJEO's online comment form on 10/12/2021 but kept receiving error messages.

Here is my comment on the draft opinion discussing providing feedback on attorney courtroom performance.

I concur with the draft formal opinion. Very well written. Thank you.

One suggestion: At page 6, with regard to supervisors at public agencies seeking feedback on attorneys who regularly appear before the judge, there is one further consideration. Once the judge provides feedback to a supervisor, the judge can no longer control what information is actually shared with the attorney nor the manner in which it is shared. This can be problematic all the way around.

Judge L. Michael Clark  
Santa Clara County Superior Court  
Administrative Criminal Supervising Judge  
Department 63, Collaborative/Drug Court Division  
Family Justice Center Courthouse  
201 N. First Street, San Jose, CA 95113  
Pronouns: he, him, his

## **Comment 5**

**Submitted by:** Hon. B. McCann, San Bernardino County Superior Court

**Received:** October 12, 2021

**Subject:** Submission: Public Comments on CJEO Draft Formal Opinions (2021-018)

I believe it is important that judges be able to give comments to attorneys (especially newer ones) on all sides who seek them.

It goes without saying that no comments should ever be given on facts of a case until such case is closed and the appeal process has run its course.

To be able to comment on a lawyer's performance, avoiding the facts of the case if not final, is paramount in assisting new attorneys become better at their craft.

I have not encountered any judges who only give comments to one side and not the other, but know that both sides don't always request comments.

## **Comment 6**

**Submitted by:** Tisha Marie Cain

**Received:** October 16, 2021

**Subject:** Submission: Public Comments on CJEO Draft Formal Opinions (2021-018)

No, judges do not need to comment on attorneys performance in the courtrooms. They should be well trained and this leaves room for over stepping boundaries.

## **Comment 7**

**Submitted by:** Amir Sam Dibaei

**Received:** October 31, 2021

**Subject:** Submission: Public Comments on CJEO Draft Formal Opinions (2021-018)

I believe the answer is a firm "no." It only increases potential for subjectivity and non-legal discussions to become part of legal system. This is reflected by the proposed terms which spend more time contemplating what is still disallowed. This implies a tacit consent to the disallowed behavior arising more often. Finally, what is the purported benefit? And when the day comes that a judge comments on an attorney's appearance or fashion? What then?

The Court should act as the last bastion for reform. In that sense I believe its role as a classic institution should remain in form that can be recognized by Justinian the Great; Cicero; Charlemagne etc.

Finally, the timing of such a proposal could not be less proper given the increasing frequency of remote appearances. Such comments should be reserved for law law school; mock trial; or even continuing education.

The extra dialogue could and would extend tense exchanges and ultimately end up being an inconsistent; subjective; and non-beneficial element of theater which could also leave this judiciary to typified as a "hollywood" trope—something pro-tem judges already demonstrate a propensity to follow.



## **Comment 8**

**Submitted by:** Dr. Bryan Borys on behalf of Los Angeles County Superior Court

**Received:** November 12, 2021

**Subject:** Comments from the Los Angeles Superior Court on ITC 2021-018

### **Proposed Comments to Draft Formal Opinion 2021-018**

Thank you for the opportunity to comment. In general, we approve of Draft Formal Opinion 2021-018, which provides important guidance on handling requests for feedback from attorneys. We have the following comments.

We agree a judicial officer must ensure that individualized feedback is prohibited to the extent it suggests an attorney has a special relationship with a judicial officer in violation of Canon 2B(1). We recommend adding specific examples of situations in which feedback is permissible. For example, if an attorney who frequently appears in a judicial officer's court on a variety of cases asks for the judicial officer's impression of the lawyer's advocacy skills separate from any particular case, may a judicial officer provide such feedback so long as no ex parte communications relating to any specific case occur?

One such situation may arise pursuant to Title 5, Judicial Administration Standards, Rule 5.40. Rule 5.40(d) requires the presiding judge of juvenile court to "[e]stablish relevant prerequisites for court-appointed attorneys and advocates in juvenile court...[and] [e]nsure that attorneys who appear in juvenile court have sufficient training to perform their jobs competently..." (See Rule 5.40(d)(1) and (4).) In Los Angeles County, the presiding judge of juvenile court delegates this duty to each juvenile court judicial officer. Those judicial officers provide feedback when requested by an attorney's supervisor to ensure the attorney meets the relevant prerequisites, education, skill, and experience to serve as competent appointed counsel in this highly specialized area of law. Such feedback could be construed as an evaluation of attorney job performance. We recommend adding the following footnote at pages 10-11 of the Draft Formal Opinion acknowledging the duties of a juvenile court judicial officer under Rule 5.40: "In providing individualized feedback to court-appointed attorneys in juvenile court, this Formal Opinion is not intended to conflict with or revise the mandated responsibilities of the presiding judge of juvenile court as set forth in Title 5, Judicial Administration Standards, Rule 5.40."

In addition, we note inconsistencies between the conclusory statement that judicial officers "should avoid acting as evaluators of attorney job performance" (Draft Formal Opinion at p. 13) and other parts of the Draft Formal Opinion. Generally the Draft

Formal Opinion addresses how a judicial officer *may* provide feedback on attorney courtroom performance. The specific language in the conclusion could be interpreted as inconsistent with the thoughtful restrictions, but not outright prohibition, on evaluating attorney performance. An example occurs at pages 10-11 where the Draft Formal Opinion states it is the “better practice” to avoid acting as an employment evaluator, but not that it is ethically impermissible. Because the Draft Formal Opinion does not appear to set an outright prohibition on evaluating attorney performance, we suggest revising the conclusion to make that clear.

Thank you for considering these comments.

## **Comment 9**

**Submitted by:** Hon. Barbara Kronlund, San Joaquin County Superior Court

**Received:** November 15, 2021

**Subject:** Submission: Public Comments on CJEO Draft Formal Opinions (2021-018)

11/15/2021

Comment re: Draft Formal Opinion 2021-018

Dear CJEO Members:

I request that the Committee consider withdrawing this Opinion as I believe it presents dangerous advice. Further, the California Judicial Conduct Handbook by Judge David Rothman, et al, covers this in some detail, stressing all of the pitfalls involved in providing feedback to attorneys. My concern is that judges will get the impression that it's "fine" to do these critiques, and only after it's too late and they've violated numerous ethical Canons, will they realize they have a problem on their hands.

I base my analysis on my extensive experience in judicial ethics. I was on the CJA Judicial Ethics Committee for 11 years, including service as Chair and Vice-Chair. During my tenure, I personally handled over 300 Ethics Hotline calls myself, reviewed approximately 3,500-4,000 calls as a committee member, and I personally was primary author of a number of Formal CJA Opinions. I've taught New Judge Orientation (NJO) for over 15 years and have been an instructor of the QE Mandatory Ethics Program for the past 3 cycles, including serving on the past two curriculum committees.

As written, I believe this Opinion is unworkable in practice. The result is an absurd and impossible set of directives, a slippery-slope, which I predict if it is published, will result in more discipline cases for judges engaging in attorney feedback sessions.

There are plenty of ways for judges to participate in education of the Bar, other than providing feedback directly to attorneys. MCLE programs, judging mock trials, and courses through the Bar Associations and specialty Attorney Associations are all viable and permissible options, without posing the associated risks of providing attorneys direct feedback on their performance.

Attorneys, likewise, aren't going to be deprived of evaluations of their performance. Their supervisors, if they work for a public agency, should be providing this service. That's the proper role for a public agency supervisor; to sit in on trials and hearings, and to debrief their subordinates and offer appropriate feedback. In private firms or solo offices, there's staff or other attorneys, both in the same or different firms, who can watch and evaluate. Even better, lay persons, who better simulate jurors, can be called upon as

well by attorneys desiring feedback. Their friends, their family members, their colleagues from the Bar, etc. As a trial judge, I routinely invite jurors to remain after they are discharged to meet with the lawyers since this is a great way for lawyers to see how jurors view their performance. Of course, I am no where around when this exchange goes on, and the lawyers really appreciate the opportunity.

There are many mentoring programs for lawyers who seek feedback as well. American Inns of Court in many areas offers great mentoring programs. Bar Associations frequently have excellent mentoring programs as well. These alternatives do not carry the numerous risks which accompanies judges providing feedback on performance after a trial or hearing before the judge.

In looking at the Opinion, I think it's premised on some questionable assumptions such as: judges generally have good judgment when it comes to spontaneous interactions with attorneys; judges have common sense in most situations; and judges have a good command of the Judicial Code of Ethics. But most problematic is what Judge Rothman points out in both the Conduct Handbook and in the NJO Faculty materials- judges frequently have big egos, and this is the driving force behind judges engaging in, and wanting to engage in this feedback on attorneys' performance.

The NJO curriculum discusses how meeting with lawyers about their performance brings up a number of ethical issues: ex parte communications, possible appellate issues or new trial motion issues; coaching; disqualification in the event of a new trial; appearance of bias and favoritism and having special access to the judge. NJO directs new judges to focus on the judicial task at hand which is NOT evaluating attorneys. In fact, no judicial function is involved in evaluating lawyers, and there are better ways for attorneys to learn their craft, namely taking education and training courses, watching other lawyers in court, and watching judges who they will appear before to see what that judge expects and how that judge rules and handles their courtroom.

From my experience on the CJA Ethics Hotline, I have seen so many judges cause "self-inflicted ethical wounds" to themselves. They don't stay in their own lane, or they are trying to be helpful or just plain want to show off a bit to others who look up to them and really are interested in their stories. I can't stress enough how dangerous spontaneous, "private" off-the-record evaluations of attorneys can be for the unknowing judge. To be honest, the Opinion reads like the new drug commercials I see early in the morning which sound great, until the long laundry list of potential side effects, almost always ending in "death", follows at the end of the clip.

I'm unsure how a judge can avoid the suggestion of favoritism or bias in terms of who has access to the judicial officer's feedback. In fact, just by nature of an attorney getting such feedback seems to me to imply such favoritism. The Opinion also indicates that judicial officers are to make it clear that they are equally available to provide such

feedback to all parties upon request. How? And I suppose some judges who actually follow this advice will be providing such feedback daily, diverting attention from their real work because they must be available to “all parties” upon request? This is not practical and may create more ethical issues for the judge who is doing this.

I agree with the Opinion’s statement that “Providing such feedback may suggest that the judicial officer favors or has a special relationship with a particular law office or has a special interest in the development of its employees.” Having served as a supervisor in the District Attorney’s Office, I know that there are ample training opportunities within DA’s Offices, and the supervisor should be watching the attorneys they supervise and providing all the feedback the attorney needs to grow and thrive as an attorney.

The Opinion cites to Judge Rothman who states, “there are far more reasons against engaging in this practice than favoring it.” [Opinion cites to the Conduct Handbook and CJA Update, citations omitted here].

The biggest pitfall of this practice in my view is the potential for coaching. I think it’s unavoidable, in the setting of “feedback after trial or hearing”, that a judge will necessarily be coaching the attorney as to what would be a more successful approach or tact, or how to get around objections or get certain evidence admitted, etc. The Opinion cautions against coaching, but doesn’t say how to avoid it. And if a judge does provide feedback on attorney performance as part of an employment evaluation, the Opinion warns that the judge may be getting into the position of becoming a percipient witness in the event of an employment dispute. This alone should be enough of a “down-side” to this practice to steer clear of promoting it in any way.

The Opinion cites to a couple of CJP discipline cases where judges have been disciplined for this very conduct of evaluating lawyers or providing feedback on their performance. An additional CJP discipline case I don’t think was cited in the Opinion is the 2003 opinion, “Inquiry concerning Judge Bruce Van Voorhis.” CJP removed this judge from office in part, for providing “an assessment of the DDA’s performance.” Why then, would the Committee want to suggest, even a little bit, that this practice is a good idea? Where the numerous exceptions literally swallow up the rule, it seems obvious that the rule is flawed at base.

Thank you for considering my comments.

Judge Barbara A Kronlund, Superior Court, San Joaquin County