CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS
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CJEO Draft Formal Opinion 2024-025

RESPONDING TO ATTORNEY MISCONDUCT

Public Comments Submitted with a Waiver of Confidentiality

Comments from members of the public submitted in response to an Invitation to Comment on a CJEO Draft Formal Opinion are confidential communications to the committee that may not be disclosed unless confidentiality is affirmatively waived (Cal. Rules of Court, rule 9.80(h)(3); Cal. Com. Jud. Ethics Opns., rule 5(b)(1), (e)).

The following comments received by the committee on CJEO Draft Formal Opinion 2024-025 were submitted with a statement waiving confidentiality or consenting to disclosure.

Comment No. 1
Submitted by: Anonymous
Received on: December 11, 2023
Confidentiality Waived

Why would Judges do anything for attorneys misconduct? In my experience, Judges don't even follow statutory rules/laws, nor do they state policies and or government regulations. They don't seem to care that they are not being ethical, judicial, they don't read or allow actual evidence to be considered if it contradicts with whatever decision(s) they want to make. They just don't care about reality it seems. So why would they do the ethical, professional, judicial behavior of enforcing attorney conduct. While they should; it just isn't happening. They are almost as bad as criminals.

Comment No. 2
Submitted by: Kira L. Klatchko
Received on: January 5, 2024
Confidentiality Waived

Thank you to the Committee for its work. This proposed guidance is helpful but could be more extensive. I would suggest adding additional hypotheticals of misconduct warranting corrective action. Particularly examples relating to conduct among counsel. New rules from the Bar governing professional and civil behavior among attorneys should be addressed. It would be helpful to have guidance about what if any types of corrective action are appropriate to deal with, for example, abusive behavior by counsel e.g., screaming and yelling during depositions, meet and confer, abusive comments in writing, ad hominem attacks, etc. Many judges take the position that if this behavior occurs outside their presence that they have no obligation to take any corrective action. The obligation to take corrective action, if any, relative to that behavior could be clearer.

Comment No. 3
Submitted by: Bryan Borys, Director of Research and Data Management on behalf of the Los Angeles Superior Court
Received: January 8, 2024
Confidentiality Waived

Proposed Comments to Draft Formal Opinion 2023-025

Thank you for the opportunity to comment on this important matter. The draft formal opinion provides helpful guidance. We suggest some points of clarification:

1. Comments on Section B.1

In section B.1 on page 12 entitled "Deciding Which Course of Corrective Action is Appropriate," the draft formal opinion includes as a possible corrective action a "public or private admonition of the attorney." This raises questions about what constitutes a private, as opposed to, public admonition, particularly in light of the additional consideration listed in section B.3 on page 14 that corrective action "should be carried out in open court and not ex parte." An off-the-record conversation with only the offending attorney could constitute an ex parte communication. Does the CJEO intend by "a private admonition" a comment on the record in court with all parties present but outside the presence of the jury and public?

Section B.1 also lists "reporting misconduct to the attorney's superior or employer" as a possible corrective action. As discussed below, this option also raises concerns about ex parte communications. And we note the interplay of this draft formal opinion with Formal Opinion 2021-018 recommending that judicial officers refrain from giving feedback on attorney performance until all proceedings before them are resolved due to the restriction on ex parte communications, as well as refrain from any public or nonpublic comments on a case that may interfere with a fair trial or hearing. Formal Opinion 2021-018 may counsel modification of the draft formal opinion in favor of additional guidance on the timing of a public or private admonition of an attorney and the reporting of misconduct to the attorney's superior or employer.

Section B.1 suggests that possible corrective action could include referring an attorney to the State Bar's Lawyer Assistance Program (LAP) and Alternative Discipline Program (ADP). Does the CJEO intend that such a referral would be made directly to the

program, or is the referral suggested to the attorney? As some judges may not be familiar with these options, we suggest footnotes with cites to a website or publication in which a judge could obtain more information about these programs and the circumstances when a referral would be appropriate.

To clarify these matters, we propose the language of section B.1 on page 12 be revised as follows:

> "Corrective action in response to attorney misconduct may include (1) public ~~or private~~ admonition of the attorney; (2) *private admonition to the attorney or the attorney's superior or employer if done after the conclusion of the case*; (3) ~~reporting misconduct to the attorney's superior or employer;~~ instruction to the attorney and/or the jury; (4) addressing the misconduct in a judicial decision; (5) referring the attorney to the Lawyer Assistance Program (LAP) [insert footnote with cite for additional information]; or (6) referring the attorney to the State Bar's Alternative Discipline Program (ADP) *[insert footnote with cite for additional information]*. . . ."

2. <u>Comments on Section B.2</u>

With respect to section B.2 on page 13 entitled "Factors to Consider," we suggest more details in the fourth factor about whether the attorney misconduct was isolated or part of an ongoing problem. It might be helpful to add an example, such as when a governmental attorney repeatedly shows up late for criminal proceedings or engages in inappropriate conduct, and to provide more guidance on when a judge should consider a communication to the attorney's supervisor and whether that communication be on the record in court.

We propose the language of section B.2 on page 13 be revised to insert at the end of the fourth factor the following additional language:

> "*On the other hand, when the conduct is part of an ongoing pattern, such as a governmental attorney repeatedly appearing late or engaging in improper conduct, and a public comment directly to the attorney on the record has not resolved the problem, it may be appropriate to raise the issue with that attorney's supervisor if it can be done without commenting on a pending case in a manner that would interfere with a fair trial or hearing and without engaging in an ex parte communication*."

3. Comments on Section B.3

In section B.3. on page 14 entitled "Additional Considerations After Determining Appropriate Corrective Action," the draft formal opinion recommends that corrective action should be carried out in open court and not ex parte. However, there will likely be times when corrective action cannot be carried out in open court. For example, when a judge makes a non-mandatory report to the State Bar, the corrective action involves either a phone call or an email to the State Bar and typically does not take place on the record in court. Further, it may not be possible to put on the record the judge's intention to contact the State Bar if, for example, the case has ended.

As discussed above, the list of corrective actions on page 12 includes a private admonition to the attorney and reporting the misconduct to the attorney's superior or employer. In the former case, depending on how "private admonition" is defined, that communication could be considered ex parte and would not be private if done in open court. In the latter case, communicating with, for example, the supervisor of an assistant public defender or assistant district attorney could be considered an ex parte communication, since the entire office represents the party in question.

To resolve these issues, we propose the language of section B.2 on page 14 be revised to insert as an additional factor the language:

"~~And eighth,~~ *Eighth, a judge should consider the timing of the appropriate corrective action to avoid commenting on a pending proceeding or engaging in conduct that may be considered an ex parte communication or that might substantially interfere with a fair trial or hearing [with a citation to Formal Opinion No. 2021-018]. And ninth, in determining . . . .*"

We also propose the language of section B.3 on page 14, be revised as follows:
"Second, the corrective action should be carried out in open court whenever possible, and not ex parte *except after a case has concluded*."

Thank you for considering these comments.

Comment No. 4
Submitted by: Candice Garcia-Rodrigo
Received: January 9, 2024
Confidentiality Waived

This opinion appears to put the burden or onus on the court to investigate attorney misconduct and provide for multiple avenues of requiring attorneys' compliance with rules of professional conduct or court orders, before reporting the attorney to the State Bar. I believe that the purpose of the State Bar is to ensure compliance with the rules and investigate any alleged violation then issue appropriate discipline, if any. It seems if a bench officer is required to avoid engaging in ex parte communications, embroilment, and interference with an attorney-client relationship, then most of the suggested corrective actions should not be taken (e.g., speaking to a supervisor, admonishing attorney in open court, or commencing sanctions/contempt proceedings against attorney). Rather, it would appear the least drastic action is a report to the State Bar for the investigation to occur and allowing the attorney to present his/her side and evidence outside of a court setting or presence of his/her client(s).

Comment No. 5
Submitted by: Rod Sorenson
Received on: January 16, 2024
Confidentiality Waived

To the California Supreme Court Committee on Judicial Ethics Opinions:

I am writing to comment on the CJEO's Draft Formal Opinion 2023-25.

Attached is a copy of a December 14, 2023 complaint made pursuant to California Rule of Professional Conduct 8.3 to the San Mateo County Superior Court regarding, among other things, the unauthorized practice of law by attorneys regularly appearing before that court. In addition, the complaint details the involvement of the San Mateo County Superior Court in that unauthorized practice of law.

By way of background, San Mateo County does not have a Public Defender Office, nor does it have public defenders. Instead, San Mateo County and the San Mateo County Superior Court pay approximately $21,000,000 annually to fully outsource all

responsibilities of a Public Defender Office to the San Mateo County Bar Association ("SMCBA"), an incorporated trade association.

As detailed in the attached complaint, indigent defense lawyers appearing in San Mateo County Superior Court are engaged in the unauthorized practice of law. The agreements for indigent defense services between the SMCBA and San Mateo County contemplate the exact type of legal representation the California Supreme Court has determined to be illegal. For over a century, the law in California has been clear – an incorporated trade association like the SMCBA can neither practice law nor hire lawyers to represent third parties (i.e., indigent criminal defendants and children) in legal matters. *People v. Merchants Protective Corp*., 189 Cal. 531 (1922).

As explained by the California Supreme Court in *Frye v. Tenderloin Housing Clinic, Inc*., 38 Cal.4th 23, 37 (2006), in *Merchants Protective Corp*. "the Attorney General challenged the authority to practice law of an incorporated trade association that employed attorneys to represent its members. We held that the corporation was engaged in the unauthorized practice of law and that a [trade association] corporation could neither practice law nor employ lawyers to represent third parties."

More recently, in *Capital Associated Indus., Inc. v. Stein*, 922 F.3d 198 (4th Cir. 2019), the U.S. Court of Appeals for the Fourth Circuit rejected a trade association's federal Constitutional challenge to a North Carolina rule that, like California, barred trade associations from practicing law. The court ruled that states do not violate the U.S. Constitution by banning trade associations from providing legal services because states have a legitimate interest in regulating the types of corporate entities that can and cannot practice law. *Id*. at 209.

In the Court's January 12, 2024 response, attached, Sarah Lind (a member of the Court's administrative staff) set forth the Court's response to the Rule 8.3 Complaint: "the Superior Court does not believe that there are any circumstances warranting its response . . . and defers to the County or Bar Association to respond, as appropriate."

You also will see the Court's January 12, 2024 response references earlier correspondence I exchanged with the Court. On November 15, 2023, prior to sending the Rule 8.3 Complaint, I submitted a Public Records Act request to the Court seeking copies of all independent contractor agreements relating to the Court's indigent defense contract with the SMCBA. Pursuant to that contract, the Court was required to approve all independent contractor agreements, which would include the SMCBA's independent contractor agreements with the attorneys who represented indigent defendants. Attached

is my November 15, 2023 correspondence to the Court regarding this issue. In its December 13, 2023 response to that correspondence, attached, the Court explained that it possessed no such contractor agreements because, in its view, it was not required to approve them notwithstanding the plain language of the indigent defense contract. That earlier correspondence in no way involved a complaint relating to the unauthorized practice of law, nor was it a complaint made pursuant to Rule 8.3.

I respectfully request that all members of the Committee on Judicial Ethics Opinions evaluate whether Draft Formal Opinion 2023-25 should be modified after carefully reviewing the attached Rule 8.3 Complaint and the Court's response. For example, the CJEO may find it appropriate to provide guidance on whether a tribunal in receipt of a Rule 8.3 Complaint may delegate the responsibility of a response to court administrative staff, as opposed to a response by a judicial office. In addition, Draft Formal Opinion 2023-25 does not address circumstances where the tribunal participates in, or is otherwise involved with, the conduct at issue. Nor does it specify what actions, if any, a lawyer should take when a tribunal ignores a Rule 8.3 Complaint.

Finally, a rhetorical question. To what extent, if any, do members of CJEO and the attorneys who work for it have an obligation to act following their review of the attached complaint, including the relevant facts and law set forth therein, which remains unaddressed by the San Mateo County Superior Court?

Thank you for your consideration of this comment. Please do not hesitate to contact me if you would like any additional information.

I would appreciate confirmation that the CJEO received this email.

Best,

Rod Sorensen

Comment No. 6
Submitted by: George S. Cardona, Chief Trial Counsel, State Bar of California
Received on: January 19, 2024
Confidentiality Waived

(1) Bus. & Prof. Code section 6086.7, subd. (b) requires that the court notify the attorney involved that the matter has been referred to the State Bar whenever a notification is made under any of the five provisions in subdivision (a). As currently drafted, the opinion and accompanying Appendix A reference this requirement only in connection with certain of the required notifications under subdivision (a). For example, on page 10, the paragraph beginning "Third" and discussing the obligation to report certain judicial sanctions does not reference the required notification to the attorney, while earlier paragraphs discussing other obligations do reference the required notification. Similarly, in Appendix A, the discussions of reporting requirements under subdivisions (a)(2), (a)(3), (a)(4), and (a)(5) specifically reference the required notice to the attorney, but the discussion under subdivision (a)(1) does not. While the discussion of section 6086.7 generally includes a reference to the required notification to the attorney, we are concerned that there may remain confusion and would ask that the opinion and Appendix A be modified to make more clear that notification to the attorney is required for a report to the State Bar under any of the provisions in subdivision (a).

(2) In Appendix A, we would ask that the description of "attorney misconduct" falling under subdivision (a)(3) be modified to track the statutory language by revising it to read: "Judicial sanctions against an attorney (except sanctions for failure to make discovery or monetary sanctions in an amount less than $1,000)."

(3) In Appendix A, we would ask that the description of "attorney misconduct" under Cal. Rules of Prof. Conduct, Rule 8.4, subd. (a) be modified to track the rule language by revising it to read: "(a) violating the Rules of Professional Conduct or the State Bar Act (Bus. & Prof. Code sections 6000, et seq.)."

(4) With the modification above, Appendix A will correctly make clear that judges may use their discretion to report any violation of the Rules of Professional Conduct or the State Bar Act. Pages 12-14 of the opinion set out factors for judges to consider in determining whether such a discretionary report is an appropriate corrective action where reporting is not mandated. The introduction to the discretionary reporting section on page 11, however, could be read to suggest that discretionary reporting is "appropriate" only for the more limited set of Rule violations listed.

We would ask that this language be modified to make clear that discretionary reporting may be appropriate for any violation of the Rules or the State Bar Act depending on the particular circumstances, and that the specified violations are provided only as examples of conduct for which discretionary reporting may be particularly appropriate.