CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS
350 McAllister Street, Room 1144A
San Francisco, CA 94102
(855) 854-5366
www.JudicialEthicsOpinions.ca.gov

CJEO Formal Opinion No. 2017-009

JUDGES MEETING WITH VENDORS

Comments from the Public 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); CJEO Rules, rule 5(b)(1), (e)).

The following are the comments received by the committee on CJEO Draft Formal Opinion 2016-009 that were submitted with a statement waiving confidentiality or consenting to disclosure.

From: McDannel, Luke
Sent: Wednesday, May 25, 2016 7:58 AM
To: Judicial Ethics
Subject: INVITATION TO COMMENT: CJEO DRAFT FORMAL OPINION 2016-009

Dear Sir / Ma'am,

Thank you for providing the opportunity to comment on the above-named item.

Our only comment is to note that the references to the California Judicial Branch Contract Manual ("JBCM") cite an earlier, out-of-date version. The current version of the JBCM's revision date is July 1, 2015. (Also, it is likely to be revised July 1, 2016.)

Sincerely,

Luke J. McDannel

Assistant Deputy Executive Officer - Procurement
Superior Court of California, County of Riverside

SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE

All Bids/RFPs are on the Court Online Procurement Website at www.BidSync.com.

Nancy A. Black, Committee Counsel

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

RE: NCJEO DRAFT FORMAL OPINION 2016-009

Dear Ms. Black:

The Draft Formal Opinion 2016-009 provides an excellent procedure for judges to follow when dealing with private companies providing services to the parties under court order. However, it fails to discuss the unique issues facing a juvenile court judge when dealing with service providers, including placement providers. It also does not refer to a book that has addressed this issue, a book that has been provided to all juvenile and family court judges in California.

As you know, the role of the juvenile court judge differs from that of a civil or criminal judge. An analysis of the special role of the juvenile court judge starts with Standard of Judicial Administration 5.40(e), embodied in Welfare and Institutions Code section 202(d). While several of the sub-sections in section 5.40(e) are relevant to the issues at hand, sub-sections (2), (3), (5) and (9) seem particularly important. "Judges of the juvenile court, in consultation with the presiding judge of the juvenile court and the presiding judge of the superior court, to the extent that it does not interfere with the adjudication process, are encouraged to:"

(2) Investigate and determine the availability of specific prevention, intervention, and treatment services in the community for at-risk children and their families.

(3) Exercise their authority by statute or rule to review, order, and enforce the delivery of specific services and treatment for at-risk children and their families.

(5) Take an active part in the formation of a communitywide network to promote and unify private and public sector efforts to focus attention and resources for at-risk children and their families.

(9) Encourage the development of community services and resources to assist homeless, truant, runaway, and incorrigible children.

The gist of these and other sections is that the role of the juvenile court judge is different from the traditional civil and criminal judge. The juvenile court judge must get off the bench and do work in the community on behalf of the children and families appearing in the juvenile court.[1]

In fulfilling the juvenile court judge's responsibilities he or she will be interacting with a variety of service providers including substance abuse treatment providers, parenting skills providers, placement providers, mental health providers, domestic violence service providers, and many more. I have discussed some of the ethical issues facing judges in their interactions with service providers in

[1] For an in depth discussion of the unique role of the juvenile court judge, see Edwards, L., *The Role of the Juvenile Court Judge: Practice and Ethics*, California judges Association, 2012, at pp. 10-21

my book, *The Role of the Juvenile Court Judge: Practice and Ethics*. In particular, the following sections seem relevant to the draft formal opinion.

1. Working with Placements (parts 1 & 2 - pages 265-270)
2. Working with Service Providers (Parts 1, & 2 - pages 271-275)
3. Developing Services (Parts 1 & 2 - pages 276-279)
4. Domestic Violence Service Providers and the Juvenile Court (pages 299-302)
5. Increasing Juvenile Court Resources (pages 341-3421
6. Collaboration - (Part 3 - pages 315-320)

Discussion of the ethical issues relating to juvenile court judges who are fulfilling their responsibilities regarding developing services and dealing with service providers occur in other sections of the book, but the listed sections seem to be issues most frequently encountered by the juvenile court judge. Of particular concern is the tension between developing services and the profit-seeking service provider's desire to curry favor with the juvenile court judge. Many service providers cannot survive economically without court referrals. Thus the juvenile court judge must be careful about any meetings with those who might profit from court referrals. Several of the sections noted above discuss this issue.

I am aware that some of this material goes beyond the first issue - dealing with a private alcohol services provider, but the material is quite relevant to the second, broader issue - judges who meet with private vendors to discuss services they provide to courts or to parties.

Frankly, I'm not certain I have aided you with this letter. I have simply given you a resource that discusses the issues in much greater detail albeit for just one division of the Superior Court. Perhaps you could simply add a note to the existing text - something like this.

> This opinion does not discuss the unique issues relating to a juvenile court judge working with service providers. Many of those issues are addressed in the book *The Role of the Juvenile Court Judge: Practice and Ethics* by Judge Leonard Edwards. Copies of the book are available from the California Judges Association. They are free to California judicial officers.

I would be glad to discuss my suggestions further. If you need a copy of the book, contact CJA as they will provide a copy free of charge.

Sincerely yours,

Leonard Edwards
Judge Leonard Edwards (ret.)

To: Black, Nancy 6/7/16
Re: CJEO Draft Formal Opin 2016-009
From: Barbara Kronlund, Superior Court Judge, San Joaquin County

Hi Nancy. Here are my comments regarding CJEO Draft Formal Opinion 2016-009. These may be made public and I waive confidentiality.

CJEO's Draft Formal Opin. 2016-009 is tremendously repetitive and long-winded for the advice it seeks to impart, to the point of being distracting to read. There's a very long "Summary of Conclusions" in the beginning and then again, a fairly long "Conclusions" section at the end. The initial summary of conclusions runs on and seems to focus on primarily giving administrative advice, what we call "phone advice" on CJA's Ethics Committee, rather than substantive ethics advice.

I don't believe this was a particularly well-researched Opinion.

The opinion barely mentions use of family or friends as vendors and the ethical issues involved, which one would think would be fully vetted in such an opinion. The opinion cites to out of state Ethics Opinions (Alabama, Arizona, Florida, Utah and Washington), and I truly have no idea why. The opinion references the other states' ethical rules, which are not applicable or in any way relevant to advising judges in California.

This opinion doesn't cite to CJA Opinion 68 about doing Internet research, in which CJA reaches a contrary conclusion to the CJEO Opinion at page 17, para. 2-3. See CJA Opinion 68, hypotheticals 1, 2, and 6; a judge can research issues upon entering a new assignment to "get background information that is not specific to any case or set of cases to which the judge is assigned. Acquiring an understanding of these scientific facts may make the judge more qualified to handle such matters fairly and expeditiously. Learning these hypothetical facts from the Internet is not different from attending judicial education classes…it would not be permissible if the judge performed these activities in order to make a ruling in a specific case".

The opinion assumes judges should remain ignorant "just in case" there's ever a lawsuit (some day in the future), involving new technology or equipment. This makes no sense to me, and I think judicial training is critical, such as ride-alongs for judges handling criminal cases. They need to see what it's really like on the street, and not "Ivory-Tower" the cases they hear. As CJA's Opinion 68 discusses, provided the judge is not researching a particular case that is before the judge, doing this kind of research and obtaining general education can make the judge better prepared to handle their upcoming work. Judges have a duty under the Canons to be competent, and to this end education is critical. See Canon 1 of the California Code of Judicial Ethics.

This Draft opinion is contrary to Judge Len Edwards' explanation involving a juvenile court judge writing a letter in support of a federal grant. The Role of the Juvenile Court Judge: Practice and Ethics, page 329-331. (Juvenile Court Judge may write letter in support of grant for family drug treatment and juvenile drug court). It's also contra to the Hotline advice CJA has repeatedly given judges for many years, which follows Judge Edwards' advice on the subject. But the CJEO Opinion jumps to conclusions that these are improper meetings (pg. 17, top ph.) and cites to an Arizona case about equipment in law enforcement being the subject of litigation (pg. 17, 2nd ph) for the proposition that it is inappropriate for judge or court staff to have received court-only training prior to the lawsuit. This completely conflicts with CJA's Opinion 68, as explained above. The cite in the CJEO Opinion to Canon 4D(1)(b) is inapplicable and irrelevant to the analysis. (Judge shall not engage in financial and business dealings that involve judge in frequent transactions or continuing business relationships with lawyers or others likely to appear before the court on which the judge serves, i.e., "frequent court flyers").

Attached are some CJA Updates which detail some of the advice that CJA has given over the years saying judges CAN write letters in support of grant applications by agencies that provide treatment to defendants, which provide services to the court, to which the judge refers defendants, etc.

Thank you for considering my comments.

JUDICIAL ETHICS UPDATE
March 2003
6. A judge may write a letter to urge continued financial support for a domestic violence program that will benefit the court. Canon 4C(1)

7. A judge may write a letter of recommendation for a grant, based on personal knowledge, for a nonprofit organization that provides classes for parties and their children involved in divorce. Canon 4C(3)(d)(ii)

California Judges Association
JUDICIAL ETHICS UPDATE
March 2004

C. Letters of Recommendation
1. Judge may write letter to Health Department recommending that drug treatment facility, to which Judge refers defendants, receive Prop 36 funding. Canon 4C(3)(d)(ii)

Judge may write letters supporting funding grants for programs which provide services to the courts. (Canon 4C[3][d][ii]) (IR #237)

JUDICIAL ETHICS UPDATE

March 2005

5. A juvenile court judicial officer may write letter to funding agencies in support of an organization developing programs for minors but may not allow use of name or title in lobbying efforts. (Canon 4C[3][b], 4C[3][d][ii] and [iv]) (IR #163)

California Judges Association
JUDICIAL ETHICS UPDATE
March 2006

Judge may write a letter on behalf of a non-profit methadone clinic in support of continued authorization for the clinic to provide service to the community where Judge has visited the clinic and is personally aware of the service it provides to the community and to defendants appearing in court. (Canon 4C(3)(d)(ii))

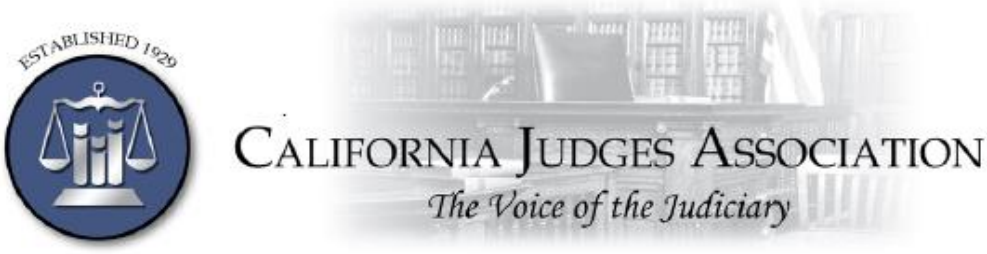
4. Judge who presides in drug court may write a letter of support to the Department of Labor for a drug program to which Judge refers defendants. (Canons 2B(2), 4C(3)(d)(ii))

California Judges Association
JUDICIAL ETHICS UPDATE
June 2007

D. Fundraising
1. Judge may co-sign, with the president of a women lawyers' group, a letter to other judges urging contributions to build a children's waiting room in Judge's courthouse as long as Judge ensures that the letter will not go to subordinate judicial officers. (Canon 4C(3)(d)(i))

California Judges Association
JUDICIAL ETHICS UPDATE
April 2008

2. Judge must immediately direct a rehabilitation group to remove a letter written by Judge from its website and not further reproduce or circulate the letter for any purpose other than in support of the group's original grant application which was the original purpose of the letter. Judge should send copies of the corrective letter to attorneys and judges known to have received the letter. (Canon 4C(3)(d)(ii))



July 8, 2016
Nancy A. Black
Committee Counsel
nancy.black@jud.ca.gov

Re: Invitation to Comment CJEO Draft Formal Opinion 2016-009

Dear Ms. Black:

The California Judges Association (CJA) and the CJA Judicial Ethics Committee wish to submit the following comments for the CJEO Draft Formal Opinion 2016-009:

1. The opinion fails to define the word "vendor." The Committee believes that there are different ethical issues raised depending on the type of "vendor" being discussed. While the opinion alludes to differences in "vendor" category it fails to clearly differentiate these categories. The "vendor" that provides a program that a litigant is ordered to attend is very different than the "vendor" that provides a software program for the judge to use as a research tool or a "vendor" that provides a service to a pro per defendant. Some courts evaluate "vendors" who provide pro per services such as investigators and experts and provide a list of individuals that have been approved by the court and these evaluations are done by judges or committees of judges so as to assure the court that those that provide services to the pro per defendant are competent. The interaction of the judge in this case is necessary and appropriate and does not lend the prestige of the judiciary to these individual investigators or experts but simply provides a basic level of competency by the provider.

2. The opinion gives little space to the issue of a judge's personal relationship to a "vendor" which is a significant issue in the ethical duties of a judge when engaging with a "vendor."

3. The opinion cites many out of state ethics opinions that do not provide good or clear guidelines for California Judges – for instance the opinion cites a Florida case at page 15-16 that suggests that it would be inappropriate for a judge to voice an opinion that one research tool is better than another when the bench is deciding what research tool to use. This citation leaves the reader shaking their head wondering what the current opinion is trying to communicate. Other out of state opinions cited suggest that a judge should never do research on an issue because the subject of the research may come before the judge in a

future lawsuit. This idea of no independent research is also contra to CJA Opinion 68, in which our committee concludes that it is appropriate for a judge to do general research on subjects and to be educated about matters that may in the future come before them in a lawsuit. The opinion fails to mention Opinion 68 or to set out why such research is inappropriate.

4. The opinion fails to cite Judge Edwards' book, The Role of the Juvenile Court Judge: Practice and Ethics, a California authority on ethics which states at pages 329-331, that judges may write letters of recommendation in support of grant applications for drug treatment programs and instead cites a Utah Judicial Opinion that is contra. Even if the Committee disagrees with Judge Edwards, the opinion should set forth a discussion of valid reasons to disagree based on California requirements.

5. The format of the opinion is repetitive.

Sincerely,

Eric C. Taylor
President

California Judges Association

SHERRI R. CARTER
EXECUTIVE OFFICER / CLERK

111 NORTH HILL STREET
LOS ANGELES, CA 90012-3014

Superior Court of California
County of Los Angeles

June 21, 2016

Committee on Judicial Ethics Opinions
c/o Ms. Nancy A. Black, Committee Counsel
The Supreme Court of California
Committee on Judicial Ethics Opinions
350 McAllister Street
San Francisco, California 94102

Re: Draft Formal Opinion 2016-009; Judges Meeting with Vendors

Dear Chair and Members of the Committee on Judicial Ethics Opinions:

Thank you for allowing an opportunity to provide comments on draft formal opinion 2016-009. As currently drafted, this opinion indicates that judges may meet directly with vendors if such a meeting would aid the judge in diligently discharging his or her administrative responsibilities and would not otherwise violate the Code of Judicial Ethics. The opinion recommends that judges consider asking court administrative or purchasing personnel to conduct initial communications and information gathering, particularly where the vendor's products are to be used by parties under court order or if the vendor or vendor's products are subject to litigation in the judges' court. However, the option also indicates that judges, "cannot delegate ultimate decision-making with respect to the engagement of any particular vendor and may need to interface with vendors, if the product at issue is to be used primarily by judges themselves or, if direct investigation by judges is necessary for diligent discharge of administrative responsibilities related to cases or matters before the judges."

I have serious concerns with this draft opinion. I believe it overstates the purchasing power of individual judicial officers and fails to fully impart the importance of involving purchasing and administrative staff at the outset of and throughout vendor contacts. I believe the draft opinion should be modified to reflect that for the superior courts, it is the Presiding Judge and Court Executive Officer who must oversee and approve purchasing and contracts for their individual court and other judges have such authority only if delegated by the Presiding Judge. Additionally, the draft opinion should be modified to strongly advise that judges ask purchasing and/or administrative court staff to handle *all* communications with vendors, including setting up meetings, information gathering, seeking quotes, contract terms negotiations, etc., even when judicial input or decision making is necessary.

Purchasing Authority is Not Automatically Conferred onto All Judicial Officers

The opinion advises that *all* judges may meet with vendors when necessary to perform their administrative duties and may enter into contracts for goods or services, assuming they are cautious to be sure they do not violate the Code of Judicial Ethics. The opinion assumes that a judge's duty to "diligently discharge the judge's administrative responsibilities..." as conferring a duty to procure goods or services. However, it is not clear that all judges have the duty or authority to make purchases or enter into contracts for goods or services.

The superior courts' purchasing authority is vested in the Presiding Judges who are responsible for budget and fiscal management of the court, including by establishing a process for consulting with the judges of the court on budget matters and by approving contracts and procurements. (Cal. Rule of Court 10.603(c)(6).)[1] The Presiding Judge *may* delegate his or her duties to other judges in the court, but if he or she does not, there is no specified duty or apparent authority for other judges to conduct or approve of purchases or contracts (Cal. Rule of Court 10.603(d)). Further, the Rules of Court specifically provide that the Presiding Judge may delegate budgetary, purchasing and contracting duties to the Executive Officer, which is typically done due to his or her administrative (budget, finance, procurement, etc.) experience (Cal. Rule of Court 10.603(6)(D)).

I fully agree that it is imperative that judges be consulted in making budgetary and purchasing decisions, especially if the product at issue is to be used primarily by judges. For example, approximately sixty judicial officers were included in the final decisions regarding the selection and purchase of our court's new case management system as well as the computer hardware used in chambers and courtrooms. However, as discussed below, I believe that administrative and purchasing staff should initiate and facilitate *all* contacts with vendors and purchases in order to ensure public contracting rules are not inadvertently violated and to ensure the judges are not misinterpreted to be creating a conflict of interest or using their position to advance a vendor's interests.

The Opinion Should Advise that Administrative and/or Purchasing Staff Initiate and Facilitate Any Interactions or Meetings with Vendors

Public purchasing requirements in California are complex and numerous. Advising that judges may meet with vendors without guidance by specially trained purchasing and administrative staff may result in several problems, including that the judge could unintentionally violate public purchasing rules or otherwise create a perception that any purchase resulting from the meeting provides a vendor with an unfair advantage; that the judges could be forced to be involved in any

[1] In accordance with California Rule of Court 10.1004 (c)(6), the Court of Appeal Administrative Presiding Justices have sole authority over similar duties and responsibilities.

disputes that arise from any resulting procurements after the vendor meeting; that the vendor could misinterpret a statement from a judge to be an oral agreement binding to the court; that the judge could unintentionally create a conflict of interest in future litigation in which the vendor or the vendor's products are subject; and that the judge could be perceived as providing as lending the prestige of his or her office to a particular vendor.

The many procedural rules and legal requirements associated with a public entity's purchasing, as prescribed by the Public Contracting Code, provide for myriad ways in which a meeting with a vendor or a purchase may expose a court to negative audit findings, solicitation protests, legal disputes and even contract nullification. There are specified and unique rules which apply to several types of purchases or contracts including for IT goods and services, public works or construction-related services, consulting contracts, architectural or engineering services and janitorial services. In several cases, actions must be taken at the outset of communication with vendors or potential contractors, in order to comply with public purchasing rules. For example, when seeking a quote or bid from vendors for public works projects (e.g., painting or carpeting), the courts are required to first provide notice that prevailing wage and fair labor standards laws apply and must verify that the vendor(s) are registered with the Department of Industrial Relations (DIR). (Cal. Labor Code § 1720 *et. seq.*). If such notice is not provided by a judge who is meeting with a vendor and the judge elects to purchase the services, the court could be forced by the DIR to nullify the contract, will be subject to damages in the amount of the contract by the affected vendor, and will have to issue a subsequent solicitation or quote procedure to obtain the services with a registered vendor.

There are also limitations on purchasing which are not prescribed by law and, therefore, may not be readily apparent to judges, but which the courts are bound to follow. For example, the Department of Rehabilitation is allowed first rights to provide services for any cafeteria services or snack bars in courthouses for visually impaired vendors. If a judge were unaware of this agreement, he or she could meet with and contract with other vendors for those services and unintentionally breach the agreement.

In addition to the possibility of violating public purchasing rules or other court obligations of which judges may not be aware, there is a danger of misperception by vendors or the public when judges directly interact with vendors on behalf of the court. Given their authoritative positions, judges may have a greater tendency to be perceived as entering into oral agreements for goods or services. In one instance in our court, a judge had informal discussions with a landscaping vendor regarding work needed at a courthouse to get advice and information as to the options available. When contracts staff later initiated a formal solicitation process and the vendor was not successful, the vendor demanded payment for their previous consulting with the judge, stating that their communications had made clear the judge intended to obligate the court to pay for those services. Although our formal solicitation process makes clear to any interested vendor that they will not be paid for services or work performed in creating a bid or proposal, the discussion prior to the formal process was not witnessed by any other court personnel and there

was no indication such an admonition was made to the vendor. This put the judge in the precarious position of defending himself against the claims of the vendor in the resulting payment dispute.

Conclusion

In summary, I believe the draft opinion 2016-009 should be modified to: 1) make clear that only the Presiding Judges have purchasing and contracting authority, unless that authority is delegated by the Presiding Judge, which is typically done to the Court Executive Officer in accordance with the California Rules of Court and 2) to advise that any judge who wishes to meet with a vendor for informational purposes or in order to make a purchase should always require court administrative or purchasing staff to initiate and facilitate *all* communications to avoid potential violations of public purchasing requirements and laws and to prevent a potential conflict of interest or appearance of bias.

Please feel free to contact me if you have any questions or if I can provide any additional information.

Sincerely,

Sherri R. Carter
Executive Officer/Clerk
Los Angeles Superior Court

COMMENTS ON PROPOSED CHANGES

RESPONDING JUDGES

Los Angeles Superior Court
111 N. Hill Street,
Los Angeles, Ca. 90012

Names: Judge Anthony J. Mohr (civil assignment)
Judge Monica Bachner (criminal assignment)
Commissioner Nichelle Blackwell (juvenile assignment)
Judge Richard Burdge (family law assignment)
Judge Gail Ruderman Feuer (civil assignment)
Judge Victor H. Greenberg (juvenile assignment)
Judge Lisa B. Lench (criminal assignment)
Judge Michael I. Levanas (juvenile assignment)
Judge Valerie Salkin (criminal assignment)
Judge Michael Small (civil assignment)

Tel. No.: 213-830-0776 (Judge Mohr)

___ **Agree** with proposed changes

___ **Do not agree** with proposed changes

_X_ **Agree** with proposed changes only if modified

SUBJECT: CJEO DRAFT FORMAL OPINION 2016 – 009

We support the effort by the California Supreme Court Committee on Judicial Ethics Opinions ("the Committee") in Draft Formal Opinion 2016-009 ("Draft Opinion") to provide guidance to judges on the ethical limits on contact between judges and vendors who provide services to parties under court orders, such as remote alcohol monitoring services, where the vendors contract with the private parties and not the court. We support the Committee addressing the specific question asked: "May a judge meet with a private company providing remote alcohol monitoring services to parties under court order?" However, we believe the Draft Opinion imposes unnecessary restrictions on judges, for example requiring an administrative staff person be present during judicial communications with vendors, in circumstances where the restrictions go beyond what is required by the Judicial Code of Ethics.

We are also very concerned that, by additionally addressing in a single opinion the very separate question of what contact judges may have with private vendors who contract directly with the court, the Draft Opinion suggests that the restrictions on judges in that arena necessarily also

restrict a judge's contact with vendors who contract directly with parties. In our view, judicial contacts with vendors who contract directly with the court present different issues—both legal and ethical—than do judicial contacts with vendors who contract with parties under court orders. Many of these are discussed in the comments that Sherri Carter, our Court Executive Officer, submitted on June 21, 2016.

The Draft Opinion's combined treatment of the ethical restrictions on conduct governing both types of contacts may lead to the imposition of restrictions on judges beyond those required by the California Code of Judicial Ethics. In doing so, the Draft Opinion could unduly constrain the ability of judges to learn the details of programs offered by vendors who contract with and provide services to parties under court order. Judicial efforts to gain such insight should be encouraged, not frustrated, because judges are obligated to educate themselves about subject areas in which they work.

We urge the Committee to modify the Draft Opinion (1) to address only the question of limits on contact between judges and vendors who provide services to parties under court orders, such as remote alcohol monitoring services, where the vendors contract with the private parties and not the court; (2) to clarify that judges should exercise caution when making contact with vendors to parties, but that these contacts are only barred where the judge is contacting a particular vendor from whom the judge intends to order a party to obtain services or where the vendor has another action pending before the judge; and (3) to address in a separate opinion the complicated and more problematic area of a judge's contact with vendors that provide services directly to the court under contract.

We address each of these points below.

Comment 1: The Draft Opinion imposes restrictions on judges beyond what is required by the California Code of Judicial Ethics.

We subscribe to the statement, frequently voiced at the New Judge Orientation and during the qualifying ethics classes, that while the California Code of Judicial Ethics may allow certain activities, judges still must ask themselves if they "should" engage in that particular activity. That said, the Draft Opinion's recommendation that judges enlist the services of nonjudicial administrative staff "when considering meetings with vendors providing goods or services to parties under court order" (see Draft Opinion page 18) exceeds the requirements of the California Code of Judicial Ethics, and should not become a requirement. We are unaware of any opinion construing the California Code of Judicial Ethics that would support this recommendation. Indeed, the recommendation appears to rest largely on ethics opinions from other states in other contexts. Moreover, while judges should exercise caution with respect to contacts with vendors, having nonjudicial administrative staff present creates a burden on administrative staff while failing to address any possible ethical problems with the contacts.

Nor do we believe that the California Code of Judicial Ethics requires judges to determine whether a potential vendor of services to parties under a court order has a matter pending somewhere in the court in which the judge sits before contacting that vendor. While a check of parties may be relatively simple with respect to civil dockets—a quick computer search will reveal the information—the same is not true with respect to criminal, family law, juvenile, and dependency cases, where dockets can be sealed and electronic access is limited. In addition, it is unclear whether the Draft Opinion is instructing judges to ascertain whether a vendor is already being used by, for example, a probationer in a criminal case because the Committee takes the view that this fact would render the use of that vendor a matter pending in the court.

In addition, page 17 of the Draft Opinion says that judges should consider whether equipment or services to be used pursuant to court order *may* "become the subject of litigation." We do not know what this actually means, nor how one determines this possibility. In any event, nothing in the California Code of Judicial Ethics compels this recommendation. We also question whether the Draft Opinion is recommending this scrutiny for literally every provider a court may order, such as psychiatrists or investigators.

Next, the Draft Opinion observes that in highly competitive industries, some vendors "may seek advantage among parties by mentioning meetings with judges." (Draft Opinion, p. 17.) While this might happen, anyone who has a discussion with a judge (whether a vendor or otherwise) may have an incentive to mention that conversation in order to impress friends, potential clients, and potential customers. As discussed above, judges should exercise caution to minimize the possibility of a vendor using a meeting with a judge to its advantage, but this does not mean that judges must refuse to talk to potential vendors. This is not mandated by the Code of Judicial Ethics, and by refusing any contact, judges may deny themselves access to important information necessary to their work.

Moreover, if a vendor is inclined to take advantage of the judiciary's prestige by mentioning a meeting with a judge in conversations with others, this constitutes the vendor's conduct, not the judge's. To minimize this possibility, judges should be cautioned to explicitly advise any vendors with whom they meet that the vendor may not use the fact of the meeting to further the its business purposes. Furthermore, if a vendor is intent upon using the meeting for an improper purpose, having an administrative person present would not stop this type of behavior.

Finally, on page 19, the Draft Opinion admonishes judges to "confirm" that a member of the public "could not reasonably . . . entertain a doubt" that the judge would be impartial if a meeting with potential vendors occurred. How does a judge so confirm? This is one area where we should not draw the boundaries any more tightly than what appears in California Code of Civil Procedure § 170.1(a)(6)(A)(iii). We encourage the Committee to use the language in the Code of Civil Procedure that requires judges to recuse themselves if they determine that "[a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial."

Comment 2: The discussion of limits on judicial contact with vendors that contract with parties directly should be separated from the discussion of limits on judicial contact with vendors that contract with the court.

We urge the Committee to focus the opinion on the question which it was asked to answer: "May a judge meet with a private company providing remote alcohol monitoring services to parties under court order?" We agree that this is an important question with implications in many areas of the law -- in particular, criminal, family, and dependency -- where judges frequently order parties to participate in programs offered by outside vendors.

By combining its discussion with the separate issue of whether judges may ethically meet with private vendors to discuss services the vendors could provide to the court, the Draft Opinion's recommendations appear to apply equally to both subjects, potentially imposing restrictions on judges' contacts with vendors who contract with parties that go beyond those imposed by the California Code of Judicial Ethics.

We begin our discussion with the Draft Opinion's "Summary of Conclusions" and "Conclusions," because that is where the Draft Opinion sets forth its bottom line. Of particular concern is the repeated call for judges to ensure that nonjudicial personnel become involved in judicial contacts with vendors. For example, the Draft Opinion states: "The committee recommends that when approached by a vendor for a meeting, judges should enlist the assistance of court administrative personnel in order to help prevent lending the prestige of judicial office to vendors or conveying impressions of improper influence." (Draft Opinion, at p.3, citing Canon 2B (1)-(2), Cannon 3C (1).) In the same vein, the Draft Opinion recommends that non-judicial personnel "step in and handle all initial communications with vendors, determinate the purposes of proposed meetings in advance," and take other steps to distance the judge from the communication. (*Ibid*.; see also Draft Opinion, at pp. 18-19.) This theme is echoed in the Draft Opinion's "recommend[ation] that if meetings between judicial officers and vendors are ultimately necessary for diligent discharge of administrative responsibilities, judges may request court administrative personnel to attend all such meetings along with judicial officers." (*Id*. at p. 19.)

In our experience, judges typically do not meet alone with vendors regarding services to be directly provided to the court, nor should they. Sherri Carter's letter provides an excellent discussion of this topic. We question, however, the necessity of presence of nonjudicial personnel essentially serving as chaperones when a judge contacts a vendor that provides services to parties in an effort for the judge to educate himself or herself about what services (e.g., remote monitoring services) the vendor provides.

Our view is informed by California Judges Association Formal Opinion Number 68, which states in pertinent part: "It is important for judges to continue to learn about subjects that interest us and that may come before us." (California Judges Association Formal Opinion No. 68.) A

hypothetical from that opinion deals with a judge who is told that a number of cases he or she may hear involve an infectious disease. The opinion concludes that the judge may go on the Internet to become familiar with basic epidemiology. "Acquiring an understanding of these scientific facts may make the judge more qualified to handle such matters fairly and expeditiously. Learning these hypothetical facts from the Internet is not different from attending judicial education classes." (*Id.*) Logic dictates that a judge has an obligation to become familiar with the offerings of potential vendors whom the judge may order parties to patronize and pay.

Canons 2B(1) and (2) and 3C(1), which the Draft Opinion's Summary of Conclusions and Conclusions cite, impose restrictions to ensure that a judge does not "convey or permit others to convey the impression that any individual is in a special position to influence the judge," and provide that "[a] judge shall not lend the prestige of judicial office or use the judicial title in any manner, including any oral or written communication, to advance the pecuniary or personal interests of the judge or others," and shall discharge his or her duties "in a manner that promotes public confidence in the integrity of the judiciary. . . ."

In our view, if managed carefully, a judge's contact with a vendor who may potentially contract with parties under a court order but who neither contracts with the court nor is the subject of a specific proceeding before the judge does not necessarily convey the impression that the vendor is in a special position to influence the judge or otherwise lend the prestige of the judge to that vendor. By managed carefully, we believe that some activities will not pose ethical problems such as reviewing a company's literature and attending educational programs with multiple vendors.

However, judges must exercise caution in other contexts. An example would be visits to facilities to see how various programs function. As one illustration, new judges in Los Angeles will frequently visit the "Hospital and Morgue" program, alcohol programs, and drug programs to learn about how they function and what types of programs are available to parties. We urge the Committee not to state that administrative personnel be present for such contacts, but rather, that judges exercise caution to ensure compliance with the Canons. For example, in meeting with program providers, it would be prudent for judges to meet with and/or observe multiple providers when discussing their programs. We agree that the Canons may restrict a judge from contacting a vendor about services to be provided to a particular party appearing before the judge, but this should be clarified in the opinion. We discuss in more detail this issue below with respect to the dependency and family law contexts.

Also problematic is the Draft Opinion's citation in the "Conclusions" section (page 19) to Canon 4D (1)(a). That provision prohibits a judge from engaging in certain "financial and business dealings." We assume the Draft Opinion's citation to the Canon was intended to speak to judicial contacts with vendors contracting with the court, not judicial contacts for educational purposes with vendors who may contract with parties under court orders. However, the broad restrictions imposed by the "Conclusions" section are not specifically limited to the former.

Turning from the Summary of Conclusions and Conclusions sections to the body of the Draft Opinion, we are concerned that Sections V.A and B improperly group together all types of contacts with "vendors" into the same category while failing to clearly define the term "vendor." For example, at page 7, the Draft Opinion describes private companies that provide "a wide variety of goods and services directly to courts… to effectuate court orders." Such broad language could reasonably encompass anyone who provides a "good" or a "service" under court order to criminal defendants, families, or children. On the same page, the Draft Opinion notes that private companies provide such services as GPS surveillance technology (e.g., defendant monitoring systems), anger management courses, anti-theft courses, domestic violence prevention courses, parenting courses, and ignition interlock devices to prevent drunken driving. However, in the list of services that vendors provide, the Draft Opinion includes in the same sentence services provided directly to the court, such as "case management systems [and] legal research products." (*Ibid*.) Again, these are very different types of services because the former are provided under contracts with parties and the latter are provided under contract with the court, yet they are grouped together in one sentence.

The same problem appears in Section V.B entitled, "Ethical and Administrative Rules Governing Interactions with Vendors." There, the Draft Opinion states: "Judges may be able to delegate meetings with vendors if appropriate court administrators can gather all necessary information for judges to make sound decisions regarding particular products and services." We assume this sentence is intended to apply to contacts with vendors about products for use by the court because it would not make sense for an administrator to gather information for a judge on services available to parties. (E.g., whether a particular type of alcohol treatment program is generally available to parties.)

Later in Section V.B the Draft Opinion refers to a judge "assuring that procurement is done ethically and appropriately." (Draft Opinion at p. 8.) While we agree, this discussion should be separate from the discussion of judges contacting vendors who only provide services directly to parties.

Section V.B also cautions a judicial officer "to be mindful of the possibility that a vendor may use interactions to gain advantage in a competitive market, whether or not that judicial officer intended the vendor to do so." (Draft Opinion at p. 9.) This caution appears directed to all judicial communications with vendors, but should clarify that a properly-handled contact with a vendor to obtain information about the vendor's services to parties should not be classified as unethical. Rather, the judge should exercise caution with any such contacts to ensure that the vendor not believe that it is in a special position to obtain an advantage with the judge. For example, if a particular alcohol monitoring vendor contacts the judge to encourage the judge to refer parties to that vendor instead of to its competitors, we agree that this contact raises ethical problems and should be avoided. A judge could address this, for example, by setting up a meeting with multiple judges and multiple providers of alcohol monitoring services at the same

time. While it may well be that administrative personnel assist in setting up the meeting, the Draft Opinion should not require that administrative personnel be present at all meetings or involved in all discussions. Indeed, if there is an ethical problem with the contact (e.g., the call from the vendor to encourage the judge to refer parties to the vendor), having an administrative staff member sit in on the call or meeting does not solve the ethical problem.

In sum, judges need to know the legal and ethical pitfalls that come from meeting with vendors that may potentially contract with the court to provide services. (Again, see Sherri Carter's comments.) But the ethical considerations governing such meetings should be the subject of a separate Committee opinion. At a minimum, the Draft Opinion should clearly distinguish between judicial contacts with vendors who contract with the court and judicial contacts with vendors who contract with parties under court order. The CJEO should clarify which restrictions apply to which particular type of contact.

Comment 3: The Draft Opinion would unduly limit the ability of judges to educate themselves regarding programs important to their work and to gain information they need in the administration of justice.

We have articulated our serious concerns that the Draft Opinion, unless modified, would have the effect of limiting the ability of a judge, in order to fashion practical orders, to gather information on important services that may be available to parties. We elaborate on those concerns here by addressing the implications of the Draft Opinion for the administration of justice in different areas of the law.

We begin with the specific question raised in the Draft Opinion regarding a judge's meeting with a vendor providing remote alcohol monitoring services to parties. The judge in this setting may have questions about how remote alcohol monitoring services work. A judge may want to know if an alcohol monitoring device can both monitor alcohol levels and provide GPS information on where the party is, e.g., at the library or at a bar. The typical order simply requires a party to obtain remote alcohol monitoring services, and allows the party to choose a vendor.

We have great concerns about the impact of the Draft Opinion on the ability of criminal courts to carry out their responsibilities given that judges will frequently order that a defendant participate in various types of classes such as alcohol programs, drug treatment programs, anger management programs, domestic violence counseling programs, and the like. Typically a judge does not order defendants to a particular program, but rather, to a particular *type* of program, e.g., a 52 week domestic violence counseling program or an "AB 541 first offender alcohol treatment program." Before ordering the defendant to a particular type of program, the judge may want to find out, for example, whether any vendors provide discounted fees for indigent defendants. The Draft Opinion's requirement that the judge involve administrative staff in making these inquiries may be impractical, and is not required by the California Code of Judicial Ethics. However, the judge should exercise caution in obtaining information about programs from vendors, for

example, by convening meetings with multiple vendors of a particular type of program, such as an alcohol program or domestic violence counseling program. While the judge may enlist the services of administrative personnel to set up the meeting, nothing in the Code of Judicial Ethics requires that the nonjudicial personnel be present at the meeting.

Moreover, we have a particular concern about the impact of the Draft Opinion on collaborative courts, i.e., drug courts, domestic violence courts, and veterans' courts. It is unlikely that a court administrator could add to the judicial officer's assessment of whether a particular program fits a particular defendant. Nor is it appropriate for an administrator to make the assessment, either in lieu of or in conjunction with the judicial officer. Rather, a judge making contact with a particular vendor for a party may find it prudent to involve the parties in any discussion with the vendor about potential services or have a representative of the vendor come to a hearing regarding the party at issue.

The same concern applies to contacts between judicial officers and experts whom the court might appoint pursuant to Evidence Code Section 730 and to persons seeking appointments as private investigators. Many courts, including the Los Angeles Superior Court, have committees composed of judicial officers who evaluate such applicants. This determination is necessary before the court can include anyone on lists of qualified experts and investigators whom all judicial officers use to make appointments. The committee evaluations are conducted by judicial officers because they know what minimum qualifications the persons seeking appointments should have in order to satisfy case needs. For example, the expert committee has at times had contact with potential experts to discuss whether the expert has an expertise in a particular area or would work for a lower court-paid fee. We see no ethical prohibition with respect to pre-appointment judicial contacts. To the extent the Draft Opinion suggests otherwise, we believe that it is mistaken.

The Draft Opinion likewise may pose barriers to the effective administration of justice by a judge in a juvenile court assignment. The Standards of Judicial Administration acknowledge the unique role of a juvenile court judge. They encourage juvenile judges to "[p]rovide active leadership within the community in determining the needs of and obtaining and developing resources and services for at-risk children and families," and to "[i]nvestigate and determine the availability of specific prevention, intervention, and treatment services in the community for at-risk children and their families." (Standard 5.40(e)(1), (2). Also see Standard 5.40(e)(5).)

To achieve these goals, it is often necessary for juvenile court judges to meet with and investigate treatment program providers in order to both develop and ascertain the effectiveness of rehabilitative services being provided to at-risk children and their families. To carry out this obligation, this court has facilitated meetings among judges and community service providers in the courthouse focusing on the development of programs, resources, and relationships to ensure that affected youths have access to sufficient and effective resources. Such meetings constitute an example of the court providing the "active leadership" to "develop[] resources and services

for at-risk children and families," an activity encouraged by the Standards. While it is prudent for a judge to meet with multiple vendors at one time, and potentially include counsel for the agencies and minors in the meeting, these contacts are important for judges to carry out their obligations under the Standards of Judicial Administration. The Draft Opinion should clarify that the only circumstance in which the Code of Judicial Ethics may serve as a bar or require special precautions is where a judge communicates with a treatment provider about services for a particular minor or parent in a matter before the court.

As another example, a juvenile judge may need to investigate domestic violence programs to determine the treatment available to address family issues and achieve rehabilitation. It is a duty of the juvenile judge to take responsibility "to ensure that the child's educational needs are met." (Standard 5.40(h)(1).) To effectuate the purpose of Standard 5.40(h), juvenile judges may need to independently interact with vendors who provide educational services to at-risk children, for example, to determine in general the services provided by tutoring service companies. Again, while caution is advised, the Standards of Judicial Administration do not bar such contact or require the involvement of nonjudicial staff.

In family law cases, Sections 5.20(f)(1) and (f)(2) of the Standards of Judicial Administration contemplate that a judge may be asked to appoint child custody evaluators, minor's counsel or supervised visitation monitors. Indeed, various provisions of the Family Code, California Rules of Court, Court and Local Rules address such appointments. (See, e.g., Family Code § 3110 et seq., CRC 5.228-.235 (Child Custody Evaluations); Family Code § 3150 et seq., CRD 5.240-.242 (Minor's Counsel); Standards of Judicial Administration 5.20 (Supervised Visitation Providers).) In most cases the parties will pay for the services, but the court may pay under certain circumstances for indigent litigants. In addition, there are a host of other services ordered by the family law courts, such as, batterer's treatment programs, drug and alcohol testing, DNA testing, counseling for minors and parents, parenting classes and experts like QUADRO counsel, accountants, appraisers, receivers and financial advisors, to name a few. Self-represented litigants often ask the court for suggestions as to these services, as do represented parties. To be able to respond to these questions, a family law judge must educate himself or herself about providers furnishing these services. Contacts with vendors are essential to that educational process. As discussed above, caution is advised to ensure compliance with the Judicial Code of Ethics, for example, by meeting with multiple vendors, but the Draft Opinion should not be read to bar such contacts without administrative personnel present.

We query whether all or some of the above-referenced service providers fit the definition of "vendors" for purposes of the Draft Opinion's recommendations. If they do, the Draft Opinion imposes undue constraints on the ability of family law judges to carry out their responsibilities. For example, in some larger counties, Family Court Services maintains a list of child custody evaluators who have established the appropriate credentials and have asked to be listed. Even so, someone does not have to be on the list to be retained if the statutory requirements are met. For

minor's counsel, there is no similar list. If the CJEO intends to cover such providers, may a judge speak with a family law lawyer about how he or she could become qualified under the statutes and rules to become a minor's counsel? Additionally, many minor's counsel are in court regularly. Is it impermissible under the Draft Opinion for the judge to inquire whether the counsel is in a position to accept new appointments? Also, could a judge ethically encourage a therapist to become a Child Custody Evaluator under the restrictions of the Draft Opinion? We encourage the Committee to clarify that the Draft Opinion is not intended to include these contacts as a contact with a "vendor."

In addition, in family law cases, a number of experts can be appointed pursuant to Evidence Code Section 730. Does the Draft Opinion apply to judicial contacts with these experts? We pose these questions because they are a far cry from the procurement-related contacts that the Draft Opinion also addresses. We encourage the Committee to exclude contacts with potential experts who have not yet been retained in a case from the definition of "vendors."

In conclusion, the Draft Opinion's undifferentiated treatment of all judicial contacts with vendors, appearing to require the involvement of nonjudicial staff in all circumstances, goes beyond what is required under the Code of Judicial Conduct, and may impose undue burdens on the administration of justice. At minimum, such contacts should not be dealt with in the same manner as contacts with entities and individuals who contract directly with the court.