

## MEMORANDUM

TO: All CJA Members

FROM: Nicole Virga Bautista  
Executive Director & CEO

DATE: April 2019

SUBJECT: **Formal Ethics Opinion No. 77**

The Judicial Ethics Committee of the California Judges Association has issued the following formal opinions:

### **Opinion No. 77**

*ETHICAL ISSUES WHEN COURT INVESTIGATORS AND SUPPORT STAFF GIVE THE COURT INFORMATION CONCERNING PENDING LITIGATION – CANON 3B(7)*

Judges may direct questions on the Code of Judicial Ethics to the current 018/19 Ethics Committee by writing or calling the CJA office or any Ethics Committee member. The Ethics Committee, as a matter of policy, does not answer inquiries which are moot or raise issues of law. Nor does the Committee respond to questions that involve matters pending before the Commission on Judicial Performance.

All opinions of the committee are advisory only.

Special thanks to Ethics Committee member Judge Leonard Edwards, Santa Clara Superior Court, Retired, for preparing this Opinion.

NVB:jmg

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# CALIFORNIA JUDGES ASSOCIATION

## Judicial Ethics Committee

### Opinion No. 77

#### **ETHICAL ISSUES WHEN COURT INVESTIGATORS AND SUPPORT STAFF GIVE THE COURT INFORMATION CONCERNING PENDING LITIGATION – CANON 3B(7)**

Several professionals and volunteers work with the courts in a variety of roles to provide information to the court. These include District Attorney Investigators in child abduction cases, probation officers, probate investigators, social workers, CASA volunteers, and CASA staff. They do not represent either party in a pending case; instead they provide the court with important information about pending litigation. Usually the information they provide the court is offered in written reports. However, on occasion one of these persons may want to talk with the judge to explain issues that were not covered in the written report.

In some situations, the investigator may believe that the law permits verbal exchanges with the judge. For example, in one publication from the Child Abduction division of the Los Angeles District Attorney's Office, the office encourages the judge to contact the investigator about the progress regarding any case. The report continues "...these kinds of inquiries do not constitute ex parte communication." The report's suggestions to the investigators include contacting the judge in three types of situations: (1) to clarify a court order; (2) To seek additional orders based on the investigation, including special consideration when the child is out-of-state or out-of-country; (3) To inform the court of a serious fact relevant to the enforcement of the court's order.

This opinion will discuss the ethical considerations when one of these investigators/staff contacts the judge and whether the judge should contact the investigator.

#### **THE LAW**

#### **CANON 2A: A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL OF THE JUDGE'S ACTIVITIES**

A. Promoting Public Confidence - A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. A judge shall not make statements, whether public or nonpublic, that commit the judge with respect to cases, controversies, or issues that are likely to come before the courts or that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

### **CANON 3: A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY, COMPETENTLY, AND DILIGENTLY**

(1) A judge shall hear and decide all matters assigned to the judge except those in which he or she is disqualified.

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the full right to be heard according to law.

(8) A judge shall dispose of all judicial matters fairly, promptly, and efficiently. A judge shall manage the courtroom in a manner that provides all litigants the opportunity to have their matters fairly adjudicated in accordance with the law.

**ADVISORY COMMITTEE COMMENTARY:** Canon 3B(8) The obligation of a judge to dispose of matters promptly and efficiently must not take precedence over the judge's obligation to dispose of the matters fairly and with patience. For example, when a litigant is self-represented, a judge has the discretion to take reasonable steps, appropriate under the circumstances and consistent with the law and the canons to enable the litigant to be heard. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs.

#### **CANON 3B(7)**

A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the full right to be heard according to law. Unless otherwise authorized by law, a judge shall not independently investigate facts in a proceeding and shall consider only the evidence presented or facts that may be properly judicially noticed. This prohibition extends to information available in all media, including electronic. A judge shall not initiate, permit, or consider ex parte communications, that is, any communications to or from the judge outside the presence of the parties concerning a pending or impending proceeding, and shall make reasonable efforts to avoid such communications, except as follows:

(a) Except as stated below, a judge may consult with other judges. A judge presiding over a case shall not engage in discussions about that case with a judge who has previously been disqualified from hearing that case; likewise, a judge who knows he or she is or would be disqualified from hearing a case shall not discuss that matter with the judge assigned to the case. A judge also shall not engage in discussions with a judge who may participate in appellate review of the matter, nor shall a judge who may participate in appellate review of a matter engage in discussions with the judge presiding over the case.

A judge may consult with court personnel or others authorized by law, as long as the communication relates to that person's duty to aid the

judge in carrying out the judge's adjudicative responsibilities.

In any discussion with judges or court personnel, a judge shall make reasonable efforts to avoid receiving factual information that is not part of the record or an evaluation of that factual information. In such consultations, the judge shall not abrogate the responsibility personally to decide the matter.

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

#### **ADVISORY COMMITTEE COMMENTARY: Canon 3B(7)(a)**

Regarding communications between a judge presiding over a matter and a judge of a court with appellate jurisdiction over that matter, see Government Code section 7 68070.5. Though a judge may have ex parte discussions with appropriate court personnel, a judge may do so only on matters that are within the proper performance of that person's duties. For example, a bailiff may inform the judge of a threat to the judge or to the safety and security of the courtroom, but may not tell the judge ex parte that a defendant was overheard making an incriminating statement during a court recess. A clerk may point out to the judge a technical defect in a proposed sentence, but may not suggest to the judge that a defendant deserves a certain sentence. A sentencing judge may not consult ex parte with a representative of the probation department about a matter pending before the sentencing judge. This canon prohibits a judge who is presiding over a case from discussing that case with another judge who has already been disqualified from hearing that case. A judge also must be careful not to talk to a judge whom the judge knows would be disqualified from hearing the matter.

(b) A judge may initiate, permit, or consider ex parte communications, where circumstances require, for scheduling, administrative purposes, or emergencies that do not deal with substantive matters provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(c) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so or when authorized to do so by stipulation of the parties.

(d) If a judge receives an unauthorized ex parte communication, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.

**ADVISORY COMMITTEE COMMENTARY:** Canon 3B(7) An exception allowing a judge, under certain circumstances, to obtain the advice of a disinterested expert on the law has been eliminated from Canon 3B(7) because consulting with legal experts outside the presence of the parties is inconsistent with the core tenets of the adversarial system. Therefore, a judge shall not consult with legal experts outside the presence of the parties. Evidence Code section 730 provides for the appointment of an expert if a judge determines that expert testimony is necessary. A court may also invite the filing of amicus curiae briefs.

An exception allowing a judge to confer with the parties separately in an effort to settle the matter before the judge has been moved from this canon to Canon 3B(12).

This canon does not prohibit court personnel from communicating scheduling information or carrying out similar administrative functions. A judge is statutorily authorized to investigate and consult witnesses informally in small claims cases. Code of Civil Procedure section 116.520, subdivision (c).

*Family Code §§ 3131, 3133.*

*Welfare and Institutions Code §§ 103-104.*

*California Rules of Court, Rule 5.235 and Rule 5.655.*

*California Judges Association Ethics Opinion Number 37*

*Rothman, D., et.al. California Judicial Conduct Handbook 4th ed. §§5:1, 5:3, 5:11, 5:13, 5:17, 5:19.*

*Edwards, L., The Role of the Juvenile Court Judge: Practice and Ethics, pp. 166-170, 208-210, 214-217, 289-291, 297-299; Standards of Judicial Administration, Standards 5.40 and 10.5.*

## **HYPOTHETICAL SITUATIONS:**

1. *An investigator from the district attorney's office is appointed by the family court to find a child who has been abducted by a parent in a contested custody case. Pursuant to the statutes, Family Code sections 3131 and 3132, the district attorney believes direct contact with the judge is legal as he is acting "on behalf of the court and shall not represent any party to the custody proceedings." The investigator calls the judge to give the judge an update on the search for the missing child.*

*Should the judge receive the call?*

No. The conversation would be an improper ex parte communication. The investigator could inform the judge of the update in writing.

2. *A deputy probation officer brings a report to the judge in chambers and says that he/she would like to explain certain portions of the report.*

*Should the judge permit the probation officer to give the explanation?*

No. The judge should ask that any explanations must take place with all the parties or their attorneys present or in a supplemental written report.

3. *You are having lunch with a family court mediator who is also a friend. She says she has a very difficult case and she wants to ask your advice about some aspects of the case.*

*Should you engage in that conversation?*

No. This would be an improper ex parte communication. In addition, mediation in family court is confidential.

4. *A Court Appointed Special Advocate (CASA) volunteer meets the judge at a conference. The volunteer wants to tell the judge about a problem that has arisen in the case involving the child she is advocating for. The volunteer says it is very important.*

*Should the judge hear what the volunteer has to say?*

No. The judge should decline as this would be an improper ex parte communication.

The judge could refer her to the social worker or the attorneys involved in the case.

5. *Police officers come to the duty judge's house with an affidavit in support of a search warrant as well as a search warrant. They ask the judge to read the affidavit and sign the warrant. The judge reads the affidavit with the officers in the room and as the judge is thinking about the warrant, the officers orally offer additional information about the case.*

*Should the judge accept this additional information about the case?*

No. First, the best practice is for the judge to read the affidavit alone so that the officers cannot add to the facts or explain them. Second, the affidavit as written is the only information the judge can consider in the judge's determination whether to sign the search warrant.

6. *A mediator tells the judge that a restraining order is necessary to prevent an imminent risk to the physical safety of the child who is involved in a custody dispute.*

*Should the judge permit this conversation to take place?*

Yes. This ex parte communication is permitted by Family Code Section 216(c) (3) & California Rules of Court, Rule 5.235(e)(5).

7. *The Director of the local CASA program wishes to discuss with the judge administrative issues such as the quality of CASA reports and the role of the advocates in court.*

*Should the judge participate in this meeting?*

Yes, so long as the conversation is confined to administrative issues. These meetings are similar to administrative meetings the judge may hold with the director of children's services, the chief probation officer, and the heads of attorney offices. The judge must be careful not to discuss individual cases in any of these meetings.

## **CONCLUSION:**

The professionals and volunteers who work with the court have a special relationship to the court. They provide information or perform a service that either provides the court with information or provides a service to the clients. When one of these professionals/volunteers has a special need to talk with the court, except in specified circumstances, the communication would be an improper ex parte communication. Usually a written report is the proper method to communicate with the court. Any report must be shared with all of the parties in the case.

However, if the communication involves only calendaring or other administrative issues, the communication is not improper. Therefore, a judge should carefully determine what the purpose and nature of the communication is before participating in the conversation.

## 2018/19 JUDICIAL ETHICS COMMITTEE

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