

Title	Committee on Judicial Ethics Opinions (create new Division 6 in Title 9 and adopt rule 9.80)
Summary	This proposed rule would create a Supreme Court Committee on Judicial Ethics Opinions and establish policies and procedures for the effective operation of the committee.
Source	Implementation Committee for the Supreme Court Committee on Judicial Ethics Opinions
Staff	Mark Jacobson, 415-865-7898, mark.jacobson@jud.ca.gov
Discussion	<p>In 2007, the Supreme Court announced the creation of a new Supreme Court Committee on Judicial Ethics Opinions to provide ethics opinions and advice to judicial officers in California. The court appointed an Implementation Committee to draft recommended procedures and rules for the new committee. The Implementation Committee's recommendations are set forth in the attached report and proposed rule.</p> <p>The report contains recommendations on the form, scope, and type of opinions to be offered by the committee, the procedures for making and responding to requests for advice, the confidentiality of communications to and by the committee, publication of the committee's formal opinions, and other procedures and practices required to guide the new committee and its staff. The proposed Supreme Court rule describing the procedures that would govern the Committee on Judicial Ethics Opinions would be in Title 9 of the California Rules of Court.</p> <p>The Implementation Committee invites comment on the proposed rule and the procedures and policies discussed in the attached report.</p>
	Attachments



**IMPLEMENTATION COMMITTEE FOR THE
SUPREME COURT COMMITTEE ON JUDICIAL ETHICS OPINIONS**

350 McAllister Street
San Francisco, CA 94102

M E M O R A N D U M

Date

August 18, 2008

To

Hon. Ronald M. George, Chief Justice of California
Associate Justices of the California Supreme Court

From

Hon. Richard D. Fybel, Chair, Implementation
Committee for the Supreme Court Committee on
Judicial Ethics Opinions
Mark Jacobson, Committee Counsel
Sei Shimoguchi, Committee Counsel

Subject

Implementation Committee's Report and
Recommendations to the Supreme Court Concerning
the Supreme Court Committee on Judicial Ethics
Opinions

Action Requested

Approve draft rule for new Committee
on Judicial Ethics Opinions or
circulate the rule and report for public
comment

Deadline

N/A

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Introduction

The Implementation Committee for the Supreme Court's new Committee on Judicial Ethics Opinions is pleased to submit its unanimous report to the Supreme Court. This report addresses and makes recommendations regarding the form, scope, and type of opinions to be rendered by the new committee, the procedures for making and responding to inquiries, the confidentiality of communications to and by the committee, publication of the committee's formal opinions, and other procedures and practices required to guide the new committee and its staff. The Implementation Committee (committee) has endeavored to make recommendations that are principled, practical, and innovative. Attached to this report are draft rules for the Committee on Judicial Ethics Opinions (CJEO).

In arriving at recommendations, committee members reviewed the charge from the court, which is to

draft recommended procedures and rules for the ethics committee for the Supreme Court's consideration, including rules concerning the terms of committee members' appointments, procedures for receiving inquiries, confidentiality for those individuals making inquiries, and judicial and public access to the committee's opinions. . . . The committee, once appointed by the Supreme Court, will rely upon the Code of Judicial Ethics, the decisions of the court and of the Commission [on Judicial Performance], as well as other relevant sources, in its determinations. In all other respects, it will act independently of the court and the Commission in reaching its decisions.

(News Release #47/07, Aug. 28, 2007.)

Based on the charge, the committee developed recommendations with a view toward creating and maintaining a system under which judges,¹ candidates for judicial office, and, in limited circumstances, other persons and entities, can obtain accurate, thorough, prompt ethics advice and have access to opinions rendered previously to answer their questions.

Summary of Conclusions

The committee's core conclusions are as follows:

1. The decision making of CJEO must be independent of the court, the Commission on Judicial Performance (CJP), and all other entities, except CJEO will of course rely on the Code of Judicial Ethics, the decisions of the court and of CJP, and other relevant sources in its opinions.
2. CJEO should consist of 12 members appointed by the Supreme Court who are all appellate justices or superior court judges, active or retired, except that one seat should be reserved for a subordinate judicial officer employed full-time by a court. There should be no more than two retired justices or judges appointed to CJEO at one time, except that if an active justice or judge retires during his or her term, he or she shall be permitted to complete that term. The appointees should not be current members of either the Supreme Court, CJP, or the California Judges Association's Judicial Ethics Committee (CJA Ethics Committee). The members should serve four-year terms and should be eligible for reappointment. The court should appoint a chair for a two-year term as chair and he or she should be eligible for reappointment.

¹ The term "judge" is used throughout this memorandum to refer to justices, judges, and subordinate judicial officers, as well as any other judicial officers authorized to request an opinion from CJEO.

3. CJEO should be created by virtue of a new rule adopted by the Supreme Court in Title 9 of the California Rules of Court. To avoid any concern about the confidentiality of communications to and from CJEO, the rule would include language complying with article I, section 3(b)(2), of the California Constitution (Proposition 59) and section 1040(b)(2) of the California Evidence Code.
4. The new rule of court would vest CJEO with broad authority to provide ethics advice to judges, including formal published opinions, informal written opinions, and oral advice. Although CJEO would retain the authority to render oral advice, it should adopt a revocable policy of referring requests for oral advice, with exceptions described in this report, to the CJA Ethics Committee.
5. For over 50 years, CJA, through its Ethics Committee, has provided a valuable service by providing prompt, informal, oral opinions to judges posing questions about ethical issues. The Implementation Committee recognizes that it is recommending a unique arrangement calling for a cooperative effort with the private professional association of California judges that offers ethics advice. To our knowledge, no other official body rendering ethics opinions in any state has an existing resource similar to the CJA Ethics Committee and, therefore, no other official body has such an innovative, cooperative arrangement.
6. To maintain the policy described in paragraph 4 above, and to perform the duties entrusted to it by the Supreme Court in light of the policy, CJEO must have full, current, and accurate knowledge of the content of all inquiries made by judges and of the responses to these inquiries. The CJA Ethics Committee maintains a written record of all inquiries from judges and responses thereto (excluding the name of the inquiring judge). In order to enable CJEO to function under the policy described in paragraph 4, and to provide opinions or advice that take into account all judicial ethics resources, the CJA Ethics Committee should provide CJEO on a continuing, timely basis (described below) with copies of the questions and answers it provides to inquiring judges.
7. CJEO should be permitted to amend its policies and internal operating procedures, and to recommend to the court amendments to the rules governing CJEO, based on its experience handling inquiries from judges and its conclusions regarding the needs of the California judiciary and the people of the state of California.

If the court agrees with these recommendations, attached are draft rules in accordance with the recommendations for the court's consideration. The court may circulate the proposed rules for public comment itself, request that the committee do so and return to the court with its responses to the comments, approve the rules outright, or refer them back to this committee with further directions. If the court decides to send the proposal out for public comment or asks the

committee to do so, the committee recommends that this report be published and linked to the invitation to comment and any press release about the invitation to comment.

The Process

In August 2007, the court announced that, in accordance with the practice in the vast majority of other state court systems, it would appoint an official committee to provide judicial ethics advisory opinions, to be called the Supreme Court Committee on Judicial Ethics Opinions. Following this announcement, the court in October 2007 appointed the Implementation Committee, whose members have expertise in judicial ethics. Members include the seven members of the Supreme Court Advisory Committee on the Code of Judicial Ethics, two members nominated by CJP, and two members nominated by CJA who are knowledgeable about the CJA Ethics Committee.² The court charged the committee with considering and making recommendations to the court regarding the structure and procedures for CJEO, the form, scope, and type of opinions to be rendered by the new body, the procedures for making inquiries, the confidentiality of CJEO activities, publication of the opinions, and all other appropriate procedures and practices for CJEO.

A. First Implementation Committee Meeting—January 14, 2008

The initial meeting of the committee took place on January 14, 2008. In preparation for the meeting, the members reviewed extensive background information including the formation of and charge to CJEO, the American Judicature Society's *Judicial Ethics Advisory Committees: Guide and Model Rules* (1996), and a chart describing advisory committees in other states prepared by the American Judicature Society (AJS). At the committee's invitation, Cynthia Gray, Director of the AJS Center for Judicial Ethics, discussed the practices of ethics advisory committees around the country.

Ms. Gray described practices in other states concerning: (1) who may request an opinion from an ethics advisory committee; (2) the types of issues such a committee should consider; (3) the form of inquiries; (4) formal and informal opinions; (5) the effect of reliance on a committee's opinions in judicial disciplinary proceedings; (6) procedures for review of committee opinions; and (7) other tasks the committee may undertake, if any. Following her presentation, Ms. Gray answered questions from committee members.

² The seven members of the Supreme Court Advisory Committee on the Code of Judicial Ethics are Justice Richard D. Fybel of the Court of Appeal, Fourth Appellate District (chair); Presiding Justice Barbara J. R. Jones of the Court of Appeal, First Appellate District; Justice Laurence D. Rubin of the Court of Appeal, Second Appellate District; Judge Teresa Estrada-Mullaney of the Superior Court of San Luis Obispo County; Judge David Rothman (Ret.) of the Superior Court of Los Angeles County; Judge Brian Walsh of the Superior Court of Santa Clara County; and Ms. Beth J. Jay, Principal Attorney to the Chief Justice. The CJP nominees are Judge Frederick P. Horn of the Superior Court of Orange County and chair of the CJP, and Victoria B. Henley, Director-Chief Counsel of the CJP. The CJA nominees are Presiding Judge James M. Mize of the Superior Court of Sacramento County and Judge Ronni B. MacLaren of the Superior Court of Alameda County.

Judge Ronni MacLaren, a former chair of the CJA Ethics Committee, then described the policies and procedures of that committee, answered questions from members of the Implementation Committee, and distributed copies of documents describing procedures and rules of the CJA Ethics Committee.

Following these presentations, the committee discussed the following issues:

- Size and composition of CJEO
- Who may request an opinion
- Scope of opinions
- Form of request for an opinion
- Form of the opinion
- Effect of a judge's reliance on an opinion in judicial discipline proceedings
- Confidentiality of communications between CJEO and those requesting opinions
- Procedure for requesting review/modification/reconsideration of an opinion

The committee did not reach any decisions at its initial meeting. A second meeting was scheduled and, in the interim, committee staff researched and prepared a memorandum to committee members on the confidentiality of communications between CJEO and those who request advice. (A copy of the memorandum is attached for the court's consideration and an abbreviated discussion of confidentiality is set forth below on pages 7–8.)

In addition, after the January 14 meeting, the chair submitted a detailed inquiry through AJS to advisory committees in other states asking how they each handle oral requests for informal ethics opinions. Thirteen states responded to the inquiry. These responses were distributed in a memorandum to the committee members prior to the second meeting.

B. Second Implementation Committee Meeting—March 10, 2008

At the second meeting on March 10, 2008, the committee discussed the following issues:

- Confidentiality, including how to implement confidentiality provisions
- Formal opinions
- Informal opinions
- Reconsideration and modification of opinions
- Staff and budget
- Size and composition of CJEO
- Length of terms of CJEO members

As with the first meeting, members did not vote on any of the issues. The committee asked staff, under the direction of the chair, to draft a report to the Supreme Court before the third meeting reflecting the committee's discussions and containing tentative recommendations.

C. Third Implementation Committee Meeting—April 21, 2008

At its third meeting on April 21, 2008, the committee discussed in detail the draft report and agreed on certain revisions. In addition to further dialogue regarding the issues listed above, the committee discussed at length the different types of ethics opinions and advice CJEO may be called upon to give and how CJEO could work cooperatively with CJA in responding to requests for opinions or advice. The members agreed that CJEO should be given great latitude in deciding whether and how to respond to these requests. Following the meeting, the chair and staff prepared a revised report and draft rules for consideration by the committee at its fourth meeting.

D. Fourth Implementation Committee Meeting—July 14, 2008

At its fourth meeting on July 14, 2008, the committee discussed extensively the revised draft report and draft rules and agreed upon further revisions. The report and rules as revised were subsequently distributed to the committee and additional revisions were made based on the comments received. The committee unanimously approved this final report for submission to the court.

Recommendations

The committee carefully considered its charge in developing recommendations on creating a court-sponsored system under which judges and candidates for judicial office can obtain ethics advice. The system would allow judges, judicial candidates, and other interested individuals and entities to suggest topics for formal written opinions from CJEO on matters pertaining to judicial ethics. To best serve the judiciary and the people of the state of California, the committee recommends that the court broadly authorize CJEO to provide all forms and types of ethics advice to judges and candidates for judicial office, including formal published opinions, informal written opinions, and oral advice.

The committee acknowledged the historical role of CJA in providing both formal and informal ethics advice and opinions to judges. It concluded that this history provides a reasonable basis to work cooperatively with CJA to continue dispensing oral advice. As discussed below in the section on informal opinions, the committee recommends that CJEO adopt a policy under which requests for oral opinions would be referred to CJA, with the exceptions described on page 12. For CJEO to perform effectively under the policy, however, the CJA Ethics Committee would need to provide CJEO on a continuing, timely basis with written copies of all the questions asked and the answers given by the ethics committee. This information will assist CJEO in determining which topics merit formal opinions and will ensure the quality and consistency of advice given to judges. Because the committee believes CJEO must have the flexibility to revoke or amend its policies and procedures in order to provide the service the court envisions, CJEO may change this policy in its discretion.

A. Placement of Governing Rules

The committee considered two methods the court could use to establish rules and procedures for CJEO: (1) amending the Code of Judicial Ethics pursuant to the court's authority under article VI, section 18(m) of the California Constitution; or (2) adopting a new rule in Title 9 (Rules on Law Practice, Attorneys, and Judges) of the California Rules of Court. Article VI, section 18(m) grants authority to the Supreme Court to "make rules for the conduct of judges." The contemplated provisions relating to CJEO primarily address procedure rather than the "conduct of judges" per se, although one could argue that the very purpose of the committee places it squarely under the constitutional grant of authority. In any event, Title 9, which is part of the California Rules of Court, seems most appropriate. It contains procedural rules adopted by the Supreme Court relating to the practice of law and to disciplinary proceedings affecting judges. The use of a rule of court also is consistent with the approach in most other jurisdictions. Therefore, the committee recommends that provisions governing CJEO be set forth in a new rule adopted by the Supreme Court and included in Title 9. A draft of the proposed rule is attached.

B. Confidentiality

As noted above, staff prepared a memorandum to committee members on the confidentiality of communications between CJEO and those requesting advice or opinions. The memorandum also covers the confidentiality of CJEO documents, records, files, and proceedings. A copy of the memorandum is attached for the court's review but will not be linked for public distribution. We provide a brief analysis of relevant confidentiality issues in this report.

The court must be able to assure judges that their inquiries to CJEO and its responses will remain confidential. Only then will judges be willing to contact CJEO and provide complete information when requesting an opinion. If judges are reluctant to ask for advice because of concerns over confidentiality, CJEO's effectiveness will be hindered and its benefit to the public reduced. Ethical conduct by judges promotes the fair administration of justice, and it is therefore important that judges be encouraged to seek ethics advice.

Generally, it is unclear the extent to which the various statutes and provisions governing confidentiality of government communications apply to the judicial branch and its committees and agencies. There is strong support, however, for the conclusion that the "official information" privilege established in Evidence Code section 1040(b)(2) would provide protection. That section states that a public entity has a qualified privilege to refuse to disclose "official information" when disclosure "is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice." The substantial benefits to the public and the administration of justice achieved by encouraging judges to seek and follow ethics advice in order to conduct themselves in accordance with the Code of Judicial Ethics outweigh the necessity for disclosure. The court should expressly cite this conclusion in the rule in order to demonstrate how the public interest would best be served by confidentiality.

Article I, section 3(b)(2) of the California Constitution (which was amended by Proposition 59 in 2004) provides that “[a] statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access [to government information] shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.” Although this provision’s application to judicial branch actions has not yet been determined, the committee suggests the court expressly state in the rule the importance of promoting ethical conduct by judges as a basis for its adoption. Such a declaration also should be sufficient to satisfy the constitutional requirement.

The committee also discussed whether canon 3D(1) of the Code of Judicial Ethics should be amended to protect confidentiality. Canon 3D(1) states that a judge with reliable information that another judge has violated any provision of the Code of Judicial Ethics must “take or initiate appropriate corrective action, which may include reporting the violation to the appropriate authority.” Because most, if not all, of CJEO’s members will be active judges, canon 3D(1) arguably could put the judge members in the position of having to report ethics violations they learn about through inquiries from judges seeking ethics opinions. This obligation would compromise CJEO’s confidentiality and dissuade judges from seeking ethics advice. The committee believes that a judge member of CJEO satisfies his or her obligation to take “appropriate corrective action” by advising an inquiring judge how to handle an ethics issue. There is therefore no need to amend canon 3D(1) to create an exception for judges on CJEO who become aware of judicial misconduct through a recognized request for ethics advice. If the court agrees with this analysis, it may wish to refer the matter to the Advisory Committee on the Code of Judicial Ethics to consider whether commentary should be added following canon 3D(1) that addresses this issue.

Finally, the committee discussed the issue of access to confidential CJEO records by Supreme Court justices and court staff, by CJP, or anyone else. Except for those opinions and advice that are published or available on the CJEO Web site (discussed on page 12), all CJEO records should be accessible only by CJEO members and its staff. A judge may waive confidentiality as to his or her ethics inquiry and CJEO’s response; he or she may not waive the confidentiality of CJEO proceedings.

C. Functions of CJEO

The committee recommends that the Supreme Court vest CJEO with the authority to issue formal written opinions, informal written opinions, and oral advice—in short, CJEO should have the authority to use any method it finds useful and appropriate to provide guidance to members of the judiciary and judicial candidates. Members agreed that CJEO opinions should generally be limited to prospective conduct, but there should be an exception for past conduct that has future consequences. This exception would allow CJEO to issue opinions to judges seeking advice on curative measures that may be taken concerning past conduct and on self-reporting requirements.

The committee concluded that requests for opinions or advice must contain the inquiring judge’s name and court, a complete description of the issue and the relevant facts and circumstances,

whether the inquiry involves past or future conduct, and relevant dates, including the date by which an opinion is needed. In addition, CJEO should ask the judge whether he or she is aware of any pending litigation or CJP disciplinary proceeding involving the subject matter of the inquiry. Issuing an opinion when there is such a pending proceeding could create a situation in which a CJEO opinion proves inconsistent with a subsequent CJP disciplinary finding or court ruling in the same matter.

CJEO should develop a form designed to elicit information that will enable it to determine the appropriate form of response. The information not only should clearly set forth the inquiry, but also should be sufficient to assist CJEO in determining whether a formal written opinion, an informal written opinion, oral advice, or a combination thereof may be appropriate.

1. Formal written opinions

To provide broad guidance, which is one of the Supreme Court's stated goals, CJEO should issue formal written opinions that will be made available to judges and the public. After discussing which factors CJEO should consider in determining whether to issue a formal opinion, who may request an opinion, the form of a request for an opinion, the number of committee member votes needed to issue an opinion, and requests for reconsideration or modification of an opinion, the committee agreed that CJEO generally should have broad authority to decide under what circumstances a formal opinion should be issued. All formal written opinions issued by CJEO should be published on its Web site.

a. Criteria

The committee first considered the criteria for issuing a formal opinion. It is anticipated that most of these opinions will address recurring topics, such as disqualification, disclosure, contempt, campaign conduct, and ex parte communications. Nevertheless, limiting formal opinions to frequent or recurring issues seems unnecessarily restrictive. CJEO should have discretion to issue formal opinions on, among other things, new or unusual issues that are of importance or interest to the judiciary, as well as situations requiring interpretation of the Code of Judicial Ethics. The opinions should be written without providing identifying information as to any individual. The committee recommends that CJEO be authorized to issue a formal opinion whenever it deems it appropriate.

b. Who may suggest topics for formal opinions

The committee agreed that anyone, including judicial officers, attorneys, court employees, entities such as CJA and CJP, and members of the general public, should be permitted to suggest topics for formal written opinions. CJEO should have discretion to issue formal opinions when it perceives a need for an opinion on a particular issue regardless of who brings the issue to CJEO's attention. Entertaining suggestions from a wide variety of sources will help inform CJEO about which ethics issues need to be addressed. CJEO should also have the authority to issue opinions on its own initiative.

c. Form of request

In addition to formal opinions that CJEO decides of its own accord to issue, CJEO would consider all suggestions for topics for formal opinions submitted in writing.

d. Number of votes

The committee agreed that two-thirds of CJEO members should be required to approve a formal written opinion. As discussed below, the committee believes CJEO should have 12 members, so 8 votes would be needed to issue a formal opinion. To ensure that CJEO's formal opinions are accorded the appropriate amount of deference, CJEO should require 8 votes even if some members are unable to cast votes, either because of unavailability or disqualification. The committee also recommends that the formal opinions specify how many CJEO members voted in favor of and against the opinion.

e. Request for reconsideration/modification of opinion

To ensure an opinion is adequately vetted before it is adopted, the committee concluded draft opinions should be made available for public comment for a specified period of time. This could be accomplished by posting the draft opinion on CJEO's Web site (discussed below) and inviting comment for at least 30 days after posting. Based on the comments, CJEO would determine whether the draft opinion should be made final, modified, or withdrawn. CJEO, however, may at any time decide whether an opinion should be withdrawn or amended.

2. Informal written opinions

In addition to formal written opinions, the committee recommends that CJEO issue informal written opinions responding to requests arising from facts that may be unique to the inquirer. There would be two major differences between formal and informal written opinions. First, CJEO would provide informal opinions in a substantially shorter period of time using a simplified procedure. Second, the opinions would not be published, but rather would be provided to the inquiring judge confidentially. As recommended below, however, CJEO would publish a summary of the advice provided in certain informal opinions. CJEO would have discretion to determine which opinions to summarize. Other distinctions are discussed below.

a. Timing

CJEO should determine the length of time it would take to render an informal written opinion, taking into consideration the time necessary to define and frame the issue, prepare a draft response with analysis and citations, and circulate the draft to committee members. This could be done on a case-by-case basis or by a specific time period in which CJEO expects to be able to provide an opinion. CJEO may adjust the time period if necessary.

b. Who may request

The committee recommends that all state Supreme Court and appellate justices, superior court judges, subordinate judicial officers, judges in the Assigned Judges Program, and candidates for judicial office be permitted to request an informal opinion. The committee concluded that, ultimately, CJEO should have discretion to decide the nature of its responses, including declining to provide a substantive response if appropriate.

c. Form of request

The committee recommends that all requests for informal written opinions be in writing.

d. Number of votes

Although the committee concluded that CJEO should set its own rules regarding the number of votes needed to issue an informal written opinion, committee members recommend that informal opinions be adopted by majority vote. CJEO may decide to form subcommittees to respond to requests for informal written opinions. In that case, a simple majority should suffice to issue an opinion. The committee rejected a supermajority requirement for informal opinions because of the risk that if there are not enough members to form a supermajority, CJEO would not be able to offer an opinion. A judge or candidate for judicial office who seeks an ethics opinion should have a reasonable expectation that he or she can obtain an opinion from CJEO. As with formal opinions, the committee recommends that CJEO disclose in its informal written opinions the number of members who voted for and against the advice given.

3. Oral advice

The committee identified two broad categories of inquiries in which oral advice may be appropriate. The first is when a caller has a question that can be answered by referral to a canon, statute, rule of court, section in Judge David Rothman's *California Judicial Conduct Handbook*, existing formal opinion, or other authority. The second is when a question cannot be answered by such a referral, but rather may require greater analysis before a response can be provided, and time is of the essence.

CJA has been providing ethics advice, primarily oral, to the California judiciary for approximately 50 years. The CJA Ethics Committee receives, through its telephone hotline, over 400 inquiries per year. Acknowledging the important role that CJA has played in this area for several decades, the committee nevertheless concluded that CJEO must have authority to issue all forms and types of ethics advice, including oral advice. If CJEO determines that it must exercise all available options in order to provide the highest quality of advice, it must be free to do so.

In light of CJA's past service, however, the committee sought to develop a model that would incorporate into the process CJA's experience and existing hotline service giving oral advice provided by its Ethics Committee, while still affording CJEO the necessary information to fulfill

its function effectively. Committee members appreciate the value of CJEO working cooperatively with CJA while avoiding any arrangement that might impair CJEO's ability to do its job. Accordingly, the committee recommends that CJEO have the authority to give advice of any type and in any form, but that CJEO refrain from giving oral advice and rely instead on CJA to provide oral advice, with two exceptions. First, CJEO would provide oral advice to a judge if a question can be answered by referral to a canon, statute, rule of court, section in Judge Rothman's book, previous opinion, or other authority. Second, in a situation in which a caller who needs oral advice is referred to the CJA Ethics Committee but nevertheless asks to obtain advice from CJEO rather than CJA, CJEO should answer the question.

The committee agreed that having complete information about the questions and answers exchanged during the process of oral inquiries and responses is essential for CJEO to fulfill its role. Only with a complete record of the inquiries being made can CJEO effectively evaluate the areas and issues of concern so that it can determine whether a formal opinion should be provided, or whether other avenues, such as a request for action by the Advisory Committee on the Code of Judicial Ethics, should be pursued. Under the model the committee recommends, CJA would provide to CJEO on a continuing, timely basis, coinciding with the CJA Ethics Committee's meetings, copies of all CJA "informal responses." These informal responses are written records maintained by the CJA Ethics Committee that contain a recitation of the oral inquiry and the response, but do not include the name of the inquiring judge. CJA would provide copies of all informal responses. CJEO would not seek from CJA records of such informal responses predating the formation of CJEO. These communications from CJA to CJEO would be confidential under statute and court rule, as provided in the attached proposed rule.

We anticipate that this approach will provide a comprehensive and consistent array of informed services to California's judges. In the event that this approach does not meet CJEO's mission to provide reliable and accurate judicial ethics advice, CJEO must be able to decide at any time, and for any reason, to change the policy of relying on CJA and instead offer comprehensive oral advice. Thus, for example, and not by way of limitation, if CJA does not provide the informal responses or if the responses contain insufficient information, or if CJEO determines it needs the ongoing interaction with judges to best serve the judiciary and the public, it may revoke or amend the policy. As noted, the Supreme Court should provide CJEO with the independent authority to take such steps if it finds them necessary.

C. Staff and Budget

The committee concluded that to operate effectively, CJEO will need two staff attorneys initially. If it becomes clear additional staff is needed, CJEO may inform the court. In addition to staff, CJEO will need a Web site (which could be linked to the judicial branch site) and a toll-free telephone number. To underscore CJEO's independence, its Web site and offices should be maintained separately from those of the Supreme Court, CJP, and the Judicial Council, except to the extent that common technological assistance is needed.

D. Composition and Size

An adequate number of members is needed to ensure that CJEO is representative and that it will be able to handle effectively the requests for opinions it receives. The committee recommends appointing 12 members, although this number could change depending on whether CJEO decides regularly to issue oral advice and the number of requests and suggestions for opinions it receives. As noted above, a formal opinion would require the votes of 8 of the 12 members, or two-thirds of the number of authorized members if CJEO consists of more than 12 members. As for informal written opinions or oral advice, the committee believes CJEO should adopt its own rules as to how many votes are needed before it issues an opinion. The committee recommends, however, that CJEO adopt informal written opinions by majority vote to avoid a situation in which CJEO is unable to offer an opinion because there is no supermajority.

Regarding composition, the committee agreed all members should be judges, either active or retired. Although attorney and lay members may add perspective to CJEO deliberations, the committee concluded that CJEO opinions would garner greater respect and deference if its members were all active or former judges. There should be no more than two retired judges appointed to CJEO at any time, but if an active judge member retires while serving a term, that judge should be allowed to complete his or her term.

In appointing judge members, the court should ensure members come from appellate and trial courts as well as urban and rural courts, and that members have a wide range of judicial experience. The committee also recommends that one subordinate judicial officer employed full-time by a court be appointed. The California Court Commissioners Association has requested that we make this recommendation and has persuasively argued that this is appropriate because commissioners typically deal with traffic, small claims, and domestic relations matters that often give rise to complaints and questions about judicial conduct. Moreover, there are differences between certain ethical rules applicable to subordinate judicial officers and judges, including, among others, rules related to gifts and the law of contempt.

The committee recommends terms of four years. However, to stagger the terms so membership changes incrementally, the committee recommends the initial terms be five, four, three, and two years. Under this proposal, three members would be appointed to five-year terms, three members would receive four-year terms, three members would be appointed for three years, and three members would have two-year terms. Members would be eligible for reappointment to one additional four-year term. The committee rejected the alternative of appointing members to four-, three-, two-, and one-year terms to avoid having any members serving initial one-year terms. As proposed, no member would serve more than two consecutive terms.

The court should appoint a chair. Committee members agreed that the term of the chair (as chair) should be two years, but the chair should be eligible for reappointment. The chair would serve the remainder of his or her term as a member of CJEO.

The committee concluded that justices of the California Supreme Court should be excluded from membership because the court may ultimately have to decide an issue that may come before CJEO or rule on the correctness of an opinion rendered by CJEO. To preserve the independence of CJEO, the committee also recommends that no active members of CJP or the CJA Ethics Committee be appointed. The concern about independence does not extend to *former* members of these entities, and it may be advantageous to appoint such knowledgeable individuals to the new committee. Concurrent service on CJEO and these other entities does not seem desirable because of the potential for overlapping or conflicting responsibilities. By contrast, the committee believes it would be beneficial for the court to consider appointing to CJEO at least one member of the Supreme Court Advisory Committee on the Code of Judicial Ethics. Such a person could use his or her perspective from the two entities to enrich the discussions and actions of each.

E. Effect of reliance on opinion

The effect to be given to an advisory opinion in judicial disciplinary proceedings is a critical issue because it may influence whether a judge decides to seek advice and the form of advice sought. CJP, of course, has authority to determine the weight to be accorded an opinion by CJEO. The Supreme Court may also do so in the context of its constitutional discretionary review of CJP decisions. The committee understands that CJP intends to formally consider the issue of deference to opinions and advice by CJEO once CJEO's structure and procedures are established, as some of these details may influence CJP's deference determination.

The most common approach in other jurisdictions regarding the effect of ethics opinions rendered by an official entity is that compliance with an official opinion serves as evidence of good faith on the part of the judge. A few states view compliance with an official opinion as a complete defense to a charge of misconduct; other states have declared only that evidence that a judge has sought and complied with an advisory opinion is admissible in disciplinary proceedings. The committee recommends that CJP view compliance with an opinion from CJEO as evidence of good faith by the judicial officer who sought and relied on the opinion.

F. Publication

Wide dissemination of advisory opinions should provide guidance to all members of the judiciary. The committee recommends that all formal opinions and summaries of certain informal opinions be posted on CJEO's Web site. CJEO should have discretion to determine which summaries of informal opinions should be published. CJEO should also consider the creation of a booklet or a binder containing all opinions to be distributed periodically in hard copy or electronically to all judicial officers and updated when new opinions are issued.

Hon. Ronald M. George
Associate Justices of the California Supreme Court
August 18, 2008
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The committee is available to respond to any questions the court may have about the issues covered in this report.

RF/MJ/SS
Attachments

1 Division 6

2
3 Rule 9.80. Committee on Judicial Ethics Opinions

4
5 (a) Purpose

6
7 The Supreme Court establishes the Committee on Judicial Ethics Opinions to
8 provide judicial ethics advisory opinions and advice to judicial officers and
9 candidates for judicial office.

10
11 (b) Committee determinations

12
13 The committee will rely on the California Code of Judicial Ethics, the
14 decisions of the Supreme Court and of the Commission on Judicial
15 Performance, and other relevant sources in its determinations. The
16 committee will conduct its proceedings in confidence and will reach its
17 decisions independently.

18
19 (c) Membership

20 The committee consists of twelve members appointed by the Supreme Court,
21 including at least one justice from a Court of Appeal and one member who is
22 a subordinate judicial officer employed full-time by a Superior Court. The
23 remaining members must be justices of a Court of Appeal or judges of a
24 Superior Court, active or retired. There must be no more than two retired
25 justices or judges on the committee at one time, except that if an active
26 justice or judge retires during his or her term, he or she will be permitted to
27 fulfill his or her term.

28
29 (d) Terms

30
31 (1) Except as provided in (2), all full terms are for four years. Members
32 may not serve more than two consecutive terms. Members will
33 continue to serve until a successor is appointed, and appointments to
34 fill a vacancy will be for the balance of the term vacated.

35
36 (2) To create staggered terms among the members of the committee, the
37 Supreme Court will appoint initial members of the committee as
38 follows:

39
40 (A) Three members each to serve a term of five years commencing on
41 June 1, 2009. The Court may reappoint these members to one full
42 term.

1 (B) Three members each to serve a term of four years commencing on
2 June 1, 2009. The Court may reappoint these members to one full
3 term.

4
5 (C) Three members each to serve a term of three years commencing
6 on June 1, 2009. The Court may reappoint these members to one
7 full term.

8
9 (D) Three members each to serve a term of two years commencing on
10 June 1, 2009. The Court may reappoint these members to one full
11 term.

12
13 (3) Committee members may not simultaneously serve as members of the
14 Commission on Judicial Performance or the California Judges
15 Association’s Judicial Ethics Committee. If a member of the committee
16 accepts appointment to serve on one of these entities, that member will
17 be deemed to have resigned from the committee and the Supreme Court
18 will appoint a replacement.

19
20 **(e) Powers and duties**

21
22 The committee is authorized to:

23
24 (1) Render formal written advisory opinions, informal written advisory
25 opinions, and oral advice on proper judicial conduct under the
26 California Code of Judicial Ethics, the California Constitution, statutes,
27 and any other authority deemed appropriate by the committee.

28
29 (2) Make recommendations to the Supreme Court for amendment of the
30 Code of Judicial Ethics or these rules;

31
32 (3) Make recommendations regarding appropriate subjects for judicial
33 education programs; and

34
35 (4) Make other recommendations to the Supreme Court as deemed
36 appropriate by the committee or as requested by the Court.

37
38 **(f) Chair and vice-chair**

39
40 The Supreme Court will appoint a chair, who will serve a term of two years.
41 The Supreme Court may reappoint the chair. The chair may not serve more
42 than two terms as chair. The Supreme Court will also appoint a vice-chair

1 from the members of the committee. The chair is authorized to call meetings
2 as needed, and to otherwise coordinate the work of the committee.

3
4 **(g) Confidentiality**

5
6 Encouraging judicial officers and candidates for judicial office to seek ethics
7 opinions and advice from the committee will promote ethical conduct and
8 the fair administration of justice. Establishing the confidentiality of
9 committee proceedings and communications to and from the committee is
10 critical to encourage judicial officers and candidates for judicial office to
11 seek ethics opinions and advice from the committee. The necessity for
12 preserving the confidentiality of these proceedings and communications to
13 and from the committee outweighs the necessity for disclosure in the interest
14 of justice. Therefore, to promote ethical conduct by judicial officers and
15 candidates for judicial office and to encourage them to seek ethics opinions
16 and advice from the committee, the following confidentiality requirements,
17 and exceptions, apply to proceedings and other matters under this rule:

18
19 (1) Notwithstanding any other provision of law, and with the exception of
20 formal written advisory opinions, all opinions, inquiries, replies,
21 circulated drafts, records, documents, files, communications with staff,
22 and proceedings of the committee are confidential. All
23 communications, written or verbal, from or to the person or entity
24 requesting an opinion or advice are deemed to be official information
25 within the meaning of the California Evidence Code. In addition, all
26 communications and documents forwarded by the California Judges
27 Association to the committee are deemed to be confidential
28 information.

29
30 (2) A judicial officer or candidate for judicial office may waive
31 confidentiality; any such waiver must be in writing. If the judicial
32 officer or candidate making the request waives confidentiality or asserts
33 reliance on an opinion or advice in judicial discipline proceedings, such
34 opinion or advice is no longer confidential under these rules.
35 Notwithstanding any waiver, committee deliberations and records are
36 confidential.

37
38 (3) Members of the committee or its staff may not publicly disclose any
39 identifying information obtained by the committee concerning an
40 individual whose inquiry or conduct was the subject of a written
41 advisory opinion, formal or informal, or oral advice.
42

1 **(h) Opinion requests**

- 2
- 3 (1) Any person or entity may suggest to the committee, in writing, topics to
4 be addressed in a formal written advisory opinion. In addition, the
5 committee may select topics about which to issue formal written
6 advisory opinions. Only judicial officers and candidates for judicial
7 office may request informal written advisory opinions and oral advice.
8
- 9 (2) A judicial officer or candidate for judicial office requesting a written
10 advisory opinion must submit the request in writing. The request must
11 be in a form approved by the committee and must describe the facts and
12 discuss the issues presented in the request. The identity, organizational
13 affiliation, and geographic location of persons requesting opinions are
14 confidential.
15
- 16 (3) A judicial officer or candidate for judicial office requesting oral advice
17 may communicate in person, in writing, or by telephone to committee
18 staff or any member of the committee.
19
- 20 (4) A judicial officer or candidate for judicial office requesting an opinion
21 or advice must disclose to the committee whether the issue that is the
22 subject of the inquiry is also the subject of pending litigation involving
23 the inquiring judge or a pending Commission on Judicial Performance
24 disciplinary proceeding involving the inquiring judge.
25

26 **(i) Consideration of requests**

- 27 (1) The committee will determine whether a written request for an opinion
28 should be resolved with a formal written advisory opinion, an informal
29 written advisory opinion, oral advice, or any combination thereof.
30
- 31 (2) Formal written advisory opinions will be decided by vote of the
32 committee members. The affirmative vote of eight members is required
33 to adopt a formal written advisory opinion. After the committee
34 authorizes a formal written advisory opinion and before it becomes
35 final, it will be posted in draft form on the committee Web site and
36 made available for public comment for at least 30 days. After the public
37 comment period has expired, the committee will decide whether the
38 opinion should be published in its original form, amended, or
39 withdrawn.
40
- 41 (3) Informal written advisory opinions and oral advice will be decided by
42 vote of the committee members. The committee must adopt procedures

1 concerning the number of votes required to issue an informal written
2 advisory opinion or oral advice.

3
4 (4) The committee must adopt procedures concerning the handling and
5 determination of requests for opinions or advice.

6
7 (5) The committee will confer in person, in writing, by telephone, or by
8 videoconference as often as needed to conduct committee business and
9 resolve pending requests.

10
11 **(j) Opinion distribution**

12
13 (1) The committee will, upon final approval of a formal written advisory
14 opinion, ensure distribution of the opinion, including to the person or
15 entity who requested the opinion and to all California judicial officers.

16
17 (2) The committee's informal written advisory opinions and written
18 confirmation of oral advice will, upon approval by the committee, be
19 given to the inquiring judicial officer.

20
21 (3) The committee will post formal written advisory opinions on the
22 committee's Web site. The committee may post summaries of its
23 informal written advisory opinions and written confirmation of oral
24 advice on the committee's Web site.

25
26 (4) The committee will maintain records of committee determinations and
27 opinions at the committee's office.

28
29 **(k) Reconsideration**

30
31 If warranted, the committee may reconsider an opinion at any time. The
32 committee will distribute revised opinions in the same manner as original
33 opinions.

34
35 **(l) Internal operating rules**

36
37 The committee will adopt procedures, subject to approval by the Supreme
38 Court, to implement this rule.

39
40 **(m) Web site and toll-free telephone number**

41
42 The committee will maintain a Web site and toll-free telephone number.
43

Item SP08-07 Response Form

Title: Committee on Judicial Ethics Opinions (create new Division 6 in Title 9 and adopt rule 9.80)

- Agree** with proposed changes
- Agree** with proposed changes **if modified**
- Do not agree** with proposed changes

Comments: _____

Name: _____ **Title:** _____

Organization: _____

- Commenting on behalf of an organization**

Address: _____

City, State, Zip: _____

To Submit Comments

Comments may be written on this form, prepared in a letter format, or submitted online. If you are *not* commenting directly on this form, please include the information requested above and the proposal number for identification purposes. Please submit your comments online or email, mail, or fax comments.

Internet: www.courtinfo.ca.gov/courts/supreme/

Email: invitations@jud.ca.gov

Mail: Ms. Camilla Kieliger
Judicial Council, 455 Golden Gate Avenue
San Francisco, CA 94102

Fax: (415) 865-7664, Attn: Camilla Kieliger

DEADLINE FOR COMMENT: 5:00 p.m., Wednesday, November 19, 2008

*Circulation for comment does not imply endorsement by the California Supreme Court.
All comments will become part of the public record of the council's action.*