



California Supreme Court Committee on Judicial Ethics Opinions

350 McAllister Street, Room 1144A, San Francisco, California 94102-3688

<http://www.courts.ca.gov/2963.htm>

INVITATION TO COMMENT [CJEO Draft Formal Opinion 2012-001]

Title

Committee on Judicial Ethics Opinions Draft
Formal Opinion 2012-001;
Requesting Assistance from Attorneys in
Pursuit of the Improvement of the
Administration of Justice

Action Requested

Review and submit comments by
December 19, 2012

Proposed Adoption Date

To be determined

Prepared by

California Supreme Court Committee on
Judicial Ethics Opinions
Hon. Ronald B. Robie, Chair

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Summary

The California Supreme Court Committee on Judicial Ethics Opinions (CJEO) has authorized a draft formal opinion pursuant to California Rules of Court, rule 9.80(j)(2) and CJEO Internal Operating Rules and Procedures, rule 7(d). ([Rule 9.80](#); [CJEO Rules](#).) The public is invited to comment on the draft opinion before the committee considers adoption of an opinion in final form.

CJEO Draft Formal Opinion 2012-001 has been authorized by the committee for posting and public comment but has not been adopted by the committee in final form. The attached draft opinion is circulated for comment purposes only.

CJEO Draft Formal Opinion 2012-001 addresses the topic of judicial officers requesting assistance from attorneys in pursuit of the improvement of the administration of justice. The full text of the draft opinion is attached.

After receiving and reviewing comments, the committee will decide whether the draft opinion should be published in its original form, modified, or withdrawn (rule 9.80(j)(2); CJEO rule 7(d)). Comments are due by December 19, 2012, and may be submitted as described below.

Background

The Committee on Judicial Ethics Opinions was established by the California Supreme Court to provide judicial ethics advisory opinions on topics of interest to the judiciary, judicial officers, candidates for judicial office, and members of the public (rule 9.80(a); CJEO rule 1(a)). In providing its opinions and advice, the committee acts independently of the Supreme Court, the Commission on Judicial Performance, the Judicial Council, the Administrative Office of the Courts, and all other entities (rule 9.80(b); CJEO rule 1(a)). The committee is authorized to issue formal written opinions, informal written opinions, and oral advice on proper judicial conduct under the California Code of Judicial Ethics, the California Constitution, statutes, rules, the decisions of the Supreme Court and the Commission on Judicial Performance, and other relevant sources (rule 9.80(e)(1); CJEO rule 1(b)(1)).

The Draft Opinion

The committee has been asked to provide an opinion on whether the following activities in the pursuit of “the improvement of the law, legal system and the administration of justice” are permissible:

1. May a judge invite partners of law firms in the county to attend a meeting at which the judge makes a presentation concerning potential budget cuts and asks that the attorneys to help the court in whatever way they believe is appropriate?
2. May a judge at the same meeting ask attorneys to write or meet with legislators in Sacramento on the court’s behalf?

In the attached draft opinion, the committee discusses the [California Code of Judicial Ethics](#) canons and other authorities applicable to these questions and reaches the following conclusions:

1. Judges may invite attorneys from the county to attend a meeting where the judge makes a presentation concerning potential budget cuts and asks that the attorneys to

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help the court, but the invitations should not be restricted to a select few and the judge may not ask attorneys to help in “whatever way they believe is appropriate.” The judge must communicate in a way that is not coercive to ensure that any actions taken by the attorneys would be entirely voluntary. The judge must not convey the impression that any of the attorneys providing assistance could thereby be in a special position to influence the judge, as a result of the attorneys’ participation.

2. Judges may ask attorneys to write letters or meet with legislators. The judge must ensure, however, that the attorneys’ actions are voluntary and the judge may not convey the impression that the attorneys could be in a special position to influence the judge, as a result of the attorneys’ participation.

Invitation to Comment

The committee invites comment on the attached draft opinion by December 19, 2012. Comments may be submitted online at <http://www.courts.ca.gov/policyadmin-invitationstocomment.htm>; by email to Judicial.Ethics@jud.ca.gov; or by mail to:

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Attachment: CJEO Draft Formal Opinion 2012-001

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**CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS**

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CJEO Draft Formal Opinion No. 2012-001

**REQUESTING ASSISTANCE FROM ATTORNEYS IN PURSUIT OF THE
IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE**

I. Questions Presented

The Committee on Judicial Ethics Opinions (CJEO) has been asked to provide an opinion on whether the following activities in the pursuit of “the improvement of the law, legal system and the administration of justice” are permissible:

3. May a judge invite partners of law firms in the county to attend a meeting at which the judge makes a presentation concerning potential budget cuts and asks that the attorneys to help the court in whatever way they believe is appropriate?

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4. May a judge at the same meeting ask attorneys to write or meet with legislators in Sacramento on the court's behalf?

II. Summary

3. Judges may invite attorneys from the county to attend a meeting where the judge makes a presentation concerning potential budget cuts and asks that the attorneys to help the court, but the invitations should not be restricted to a select few and the judge may not ask attorneys to help in "whatever way they believe is appropriate." The judge must communicate in a way that is not coercive to ensure that any actions taken by the attorneys would be entirely voluntary. The judge must not convey the impression that any of the attorneys providing assistance could thereby be in a special position to influence the judge, as a result of the attorneys' participation.
4. Judges may ask attorneys to write letters or meet with legislators. The judge must ensure, however, that the attorneys' actions are voluntary and the judge may not convey the impression that the attorneys could be in a special position to influence the judge, as a result of the attorneys' participation.

III. Statement of Facts

A judge invites partners of law firms in the county to attend a meeting at which a presentation of potential budget cuts is discussed and asks attorneys to help the court in whatever way they believe is appropriate. The judge asks the attorneys to write or meet with legislators in Sacramento on the court's behalf.

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IV. Applicable Canons¹

Canon 2: “A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.”

Canon 2A: “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.”

Canon 2B(1): “A judge shall not allow family, social, political, or other relationships to influence the judge’s judicial conduct or judgment, nor shall a judge convey or permit others to convey the impression that any individual is in a special position to influence the judge.”

Canon 4B: “A judge may speak, write, lecture, teach, and participate in activities concerning legal and nonlegal subject matters, subject to the requirements of this Code.”

Canon 4C(1): “A judge shall not appear at a public hearing or officially consult with an executive or legislative body or public official except on matters concerning the law, the legal system, or the administration of justice or in matters involving the judge's private economic or personal interests.”

Canon 5D: “Except as otherwise permitted in this Code, judges shall not engage in any political activity, other than in relation to measures concerning the improvement of the law, the legal system, or the administration of justice.”

V. Other Authorities

Cal. Gov. Code, § 68106.2.

¹ All further code or canon references are to the California Code of Judicial Ethics unless otherwise indicated.

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California Rules of Court, rules 10.601(b)(4)-(5), 10.603(c)(6) & (8), 10.1004(c)(6), and standard 10.5.
Cal. Judges Assoc., Ethics Com. Advisory Opns. 33, 41, and 42
Rothman, Cal. Jud. Conduct Handbook (3d ed. 2007) §§10.30, 11.03.
Lockyer-Isenberg Trial Court Funding Act of 1997, Stats. 1997, ch. 850.
Trial Court Facilities Act of 2002, Stats. 2002, ch. 1082.
Budget Act of August 16, 2004, Stats. 2004, ch. 227.
AOC, The Trial Court Budgeting Process (2012).
AOC, Trial Court Financial Policies and Procedures Manual (7th ed. 2010).

VI. Discussion

A. Judges and the Budgeting Process

Judges are encouraged to “promote public understanding of and confidence in the administration of justice.” (Cal. Rules of Court, rule 10.603(c)8, standard 10.5.) The administration of justice is dependent on proper administration of the court system. Several factors influence a court’s efficacy and the level of access it may afford to the public, such as funding to operate courtrooms and programs, the number and quality of staff resources, the adequacy of facilities, and the level of fees to the public. Budget cuts clearly affect access to justice, and judges are encouraged to promote understanding of this problem by the public and by other branches of government.

Budgeting within the judicial branch is complex and involves all three branches of government. Trial courts, both independently and through the Trial Court Budget Working Group, provide information and recommendations to the Judicial Council.²

² The Judicial Council is the policy making body of the California courts and is responsible for ensuring the consistent, independent, impartial, and accessible

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(Cal. Rules of Court, rule 10.601(b)(4)-(5); AOC, The Trial Court Budgeting Process (2012) p. 1.) Following detailed analysis and review, the Trial Court Budget Working Group makes recommendations for major budget proposals that are transmitted to the Judicial Council through its Executive and Planning Committee. The Judicial Council presents a budget proposal to the Governor for review and negotiation before the Governor's Budget is submitted to the Legislature, which ultimately is charged with passing the annual Budget Act. (AOC, The Trial Court Budgeting Process, *supra.*) The Budget Act appropriates funds to the judicial branch, which the Judicial Council administers as the judicial branch's budget. (*Ibid.*) Presiding judges, or officers or administrators designated by the presiding judge, in turn administer the budgets for their respective courts. (Cal. Rules of Court, rules 10.603(c)(6) & 10.1004(c)(6); AOC, Trial Court Financial Policies and Procedures Manual (7th ed. 2010) FIN 4.01, 6.5(1).)

Various laws, policies, and procedures govern this process. The Budget Act and other "trailer" statutes mandate funding sources and amounts that make up the legislative appropriation, and also set out procedures for the courts. (See, e.g., Stats. 1997, ch. 850; Stats. 2004, ch. 227; Stats. 2002, ch. 1082.) The Judicial Council promulgates further policies and procedures for development and implementation of budgets. (See, e.g., AOC, Trial Court Financial Policies and Procedures Manual (2010).)

Because of the complexity of the budget process, when budget cuts are under consideration there are many avenues that might be pursued to prevent, reduce, or mitigate the impact of potential cuts. Some solutions might take place in the court or community on a local level, some solutions may involve advocacy at the administrative level or directed at the executive branch, and others may involve pursuing legislation.

administration of justice. (Cal. Const., art. VI, § 6.) The Administrative Office of the Courts (AOC) implements the council's policies.

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The range of activities a motivated group of attorneys might attempt to help a court facing budget cuts is broad and the committee has been asked to provide guiding standards and a few examples. The committee has not been asked to opine on the subject of a judge's own activities vis-à-vis the public or members of the executive and legislative branches on issues of potential budget cuts to the court system

B. Requesting Assistance for Potential Budget Cuts

Subject to other requirements of the Code, canon 4B provides that a judge may “speak, write, lecture, teach, and participate in activities concerning legal and nonlegal subject matters.” The Advisory Committee Commentary to canon 4B encourages judges, independently or through specified organizations, to do so because they are “in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice.” Canon 4C(1) allows a judge to “appear at a public hearing or officially consult with an executive or legislative body or public official . . . on matters concerning the law, the legal system, or the administration of justice,” and canon 5D further allows judges to engage in political activity “in relation to measures concerning the improvement of law, the legal system, or the administration of justice.”

The facts presented focus not on what a judge may do in relation to the other branches, however, but on a judge's interaction with attorneys in the local community. This opinion addresses the manner in which a judge may ask attorneys for assistance in advocacy to avoid the impact of potential budget cuts to the court, given the audience of the request.

It is permissible and appropriate for a judge to invite lawyers to a meeting to provide information about the budget cuts and their potential impact on the administration of justice. (Cal. Rules of Court, rule 10.603(c)(8), standard 10.5.) Any member of the public, in fact, has a statutory right to obtain a court's budget information.

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(Cal. Gov. Code, § 68106.2.) Similarly, a letter or presentation describing the anticipated impact of budget cuts on civil litigation practice in the court would be permissible.

It is the committee's view that the Code of Judicial Ethics does not generally prohibit judges from asking attorneys to "help the court," but under canon 2, the manner and audience of the request are important to "avoid impropriety and the appearance of impropriety." Because most attorneys appear in court, any solicitation for help directed to attorneys is fraught with the possibility that the attorneys will believe (1) they will be disadvantaged if they do not provide assistance or (2) they will gain special favor or influence by providing assistance or (3) both. Even the appearance of coercion or favor must be avoided. Judges must therefore exercise thoughtful and careful judgment before requesting help from lawyers.

Canon 2A provides that "[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's integrity and impartiality must not be doubted; the Advisory Committee Commentary to canon 2A provides that "[t]he test for the appearance of impropriety is whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity, impartiality, and competence." A judge that appears to act in a manner so as to coerce attorneys undermines public confidence in the integrity and impartiality of the judiciary. It is crucial that any attorney's participation and action be—and appear to be—voluntary. In presenting information and requesting assistance, a judge may not hint of retribution or bias against an attorney or firm for not complying with the request, or otherwise pressure an attorney to comply. The distinction between an "ask" and a "lean" may be subtle and highly fact-dependent. For example, it might be preferable for the judge to present the budget information and then allow the attorneys to discuss the information or ask them to brainstorm suggestions for ways to mitigate the impact of budget cuts. Answering

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questions and providing information rather than directing discussion or making specific requests helps to avoid the potential for actual or perceived coercion. And, to state the obvious, there cannot be any actual pressure, intimidation, retribution, or abuse of power.

Asking for help in “whatever way they believe is appropriate,” as presented in the facts, may be too broad, may imply or invite too much, and potentially crosses the line of what is permissible. Assuming the request is not coercive, however, it would be permissible to ask attorneys to write an op-ed piece, or do outreach and community education on the impact of the budget cuts on their clients and on the community.

In the opinion of the committee, a judge cannot ask the attorneys to undertake a lobbying campaign or to pay a lobbyist. Though the judge under these facts would be asking for funds to benefit the court or judicial branch rather than to benefit the judge, a charitable or civic organization, or some other governmental entity (see canons 2B(2), 4C(3) & 4D; Cal. Judges Assoc., Ethics Com. Advisory Opns. 33, 41, and 42), the committee believes that direct fund-raising on behalf of the court in this manner violates canons 2, 2A, and 2B(1). Soliciting funds from attorneys under these circumstances would be improper, undermine public confidence in the impartiality of the judiciary, and conveys the impression that the donors would be in a position to influence the judge and possibly the bench in that county. A judge requesting help should promote the voluntary use of a lawyer’s leadership, organizing skills, and free speech rights to support the court or judicial branch, rather than enlist and deputize lawyers as an extended arm and purse of the court itself.

At the same time, the judge must not appear to be favoring the attorneys who are participating, even if they do so voluntarily when the judge requests assistance. Canon 2B(1) provides that “[a] judge shall not allow family, social, political, or other relationships to influence the judge’s judicial conduct or judgment, nor shall a judge convey or permit others to convey the impression that any individual is in a special

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position to influence the judge.” There must not be an appearance of an attorney’s special influence over a judge that results in favorable rulings or trial assignments. One way a judge might avoid the appearance of favoritism is by prefacing the request with the caveat that help is sought from anyone willing to volunteer, but without any expectations or benefits attached. A person hearing this caveat would be less likely to infer that special benefits in the courtroom were being offered.

The scope of the invitation or audience is also problematic in creating an appearance of invited attorneys being in a special position to influence the judge. Under the facts of the inquiry, the judge invites partners from firms in the county to the meeting. Questions the judge must ask himself or herself include: Are all of the firms in the county invited, or just a select few? Are only partners with certain connections or relationships invited? Does the size of the firm or their client list play a factor in the decision? Are only plaintiff or defense firms being asked to attend? It is difficult for the committee to provide an opinion without more facts, but it is clear that judges must proceed with caution in this regard. A judge may only meet with so many people given limited time and resources, but the narrower the list of invitees, the more likely the appearance that those attending are in a special position to influence the judge. One way to avoid this appearance is to meet with officers of local bar associations rather than partners of only a handful of the law firms in the county.

The circumstances of invitees in relation to the court are also important in terms of creating an appearance of impropriety or being in a special position to influence the judge. Since familiarity and preexisting relationships may further perceptions of favoritism, it may be relevant in creating a reasonable doubt as to the judge’s impartiality if all of the invited attorneys are friends of the judge, rather than all strangers or a mixed group. This presents a special challenge in smaller counties where judges and attorneys tend to have closer relationships. Similarly, if the judge in a small county who is

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convening the meeting also handles trial assignments or other legal proceedings, the judge should consider excluding attorneys with cases pending or those who are on or about to be on the trial calendar. In these scenarios, the danger of actual or perceived coercion exists in addition to the danger of a participating attorney appearing to be in a special position to influence the judge. In these circumstances, it may be advisable not to have a meeting or to have a different judge call the meeting.

C. Specifically Requesting that Attorneys Write or Meet with Legislators

It is the committee's opinion that asking attorneys to write or meet with legislators on the court's behalf is not prohibited by the Code of Judicial Ethics, so long as the manner and audience for the "ask" is not coercive, does not place a lawyer in a special position of influence, and does not create the appearance of either situation if a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity, impartiality, and competence. (See canons 2A & 2B(1); discussion, *supra*, at VI.B.) Thus, for example, to reduce or avoid the appearance of coercion, or of placing a participating attorney in a special position to influence, the judge should not seek to approve or receive copies of letters written by participating attorneys. This is in keeping with the principle that judges should merely be asking lawyers to exercise their own free speech rights if they voluntarily choose to do so, rather than coercing or inducing the lawyers to act as an arm of the court. For the same reasons, judges should not provide pre-written form letters for attorneys that agree to participate.

A question considered by the committee was whether the request to write or meet with legislators is akin to fund-raising because it is asking lawyers to donate their time or services to the court instead of their money. The committee concluded that such activities are distinguishable and not prohibited. Fund-raising traditionally involves solicitation of donations, such as gifts or contributions. Writing or meeting with an

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elected representative is not a donation of money or time to the court; it is an individual's participation in the political process, which is not done in the court's stead nor does it preclude a judge's own participation in the political process. Due to the involvement of the executive and legislative branches, the budgeting process for the judicial branch is inherently political and there are few, if any, nonpolitical means to influence that process (See discussion, *supra*, at VI.A.) Attorneys' advocacy may potentially benefit the court or judicial branch financially, but the Legislature remains the source of the funds rather than any individual donor.

Although asking lawyers to write or meet with legislators is not fund-raising, it may be political activity. Canon 5D provides that "[e]xcept as otherwise permitted in this Code, judges shall not engage in any political activity, other than in relation to measures concerning the improvement of the law, the legal system, or the administration of justice." The annual Budget Act is a measure concerning the improvement of the legal system and the administration of justice because a court's budget directly affects the administration of justice. (See discussion, *supra*, at VI.I.) A judge asking lawyers to write to their own legislators on behalf of the court is not impermissible political activity to the extent that a judge asks lawyers to address the budget of a court or the judicial branch as a whole.

The committee cautions that judges should be wary of inviting lawyers to seek particular results that benefit the judge's court to the detriment of other courts. For example, a judge should avoid requesting that an attorney ask a legislator to move courthouse construction funds to general trial court operations. Such a request could place some attorneys in a dilemma if they practice in different counties that have competing interests. Judges should therefore avoid asking the attorneys to support a funding solution for a specific court that might be detrimental to other courts. One way

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to avoid placing attorneys in these situations would be to invite them to advocate on behalf of the entire judicial branch.

VII. Summary

In reaching the views expressed above, the committee is guided by the leading treatise on judicial ethics in California, which states:

“Although judges are permitted to be involved in community affairs, they should ‘avoid political activity that may create the appearance of political bias or impropriety.’ Definitions of the word “political” encompass so much that it is often difficult to determine what sorts of activities would transgress. . . . The difficulty comes when trying to separate those sorts of activities that fall into the arena of ‘public affairs of state’ from those that create the appearance of political bias or impropriety.’ [¶] The judiciary is very much a part of the government of the state and the Code of Judicial Ethics permits involvement by a judge in public affairs related to the improvement of the law, the legal system or the administration of justice.” (Rothman, Cal. Jud. Conduct Handbook (3d ed. 2007) § 10.30, p. 540-541, fns. omitted.)

Any court’s budget, and the budget of the judicial branch as a whole, impacts the administration of justice and access to the courts. The political activities essential to affecting those budgets and appropriations fall into “public affairs of state” rather than political bias or impropriety. It is the committee’s opinion that by asking others to advocate for a court budget that is not drastically reduced, a judge does not create an appearance of political bias, but one of working to preserve access to courts and a stable, independent judiciary.

The committee, however, also urges caution and restraint. As Judge Rothman recognizes, problems may arise when judges advocate positions before the legislative and

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executive branches on issues related to the law, the legal system, and administration of justice. (Rothman, *supra*, § 11.03, p.570.) He advises that judges should greatly limit advocacy before the legislative and executive branches to only the clearest and most urgent of circumstances. “Where judges frequently engage in such advocacy, they may be perceived as encroaching on legislative and executive prerogatives. When judges do so they should not be surprised if the legislative and executive branches feel comfortable in doing the same in the judicial arena. . . . Separation of powers and preservation of the independence of the judiciary require judges to ration their advocacy.” (Rothman, *supra*, § 11.03, p.570.) The committee believes that the current budget crisis is one of those “clearest and most urgent of circumstances,” but nevertheless cautions against advocacy that exceeds the scope of the exigency.



This opinion is advisory only (Cal. Rules of Court, rules 9.80(a), (e); CJEO rules 1(a), (b)). It is based on facts and issues, or topics of interest, presented to the California Supreme Court Committee on Judicial Ethics in a request for an opinion (rule 9.80(i)(3); CJEO rules 2(f), 6(c)), or on subjects deemed appropriate by the committee (rule 9.80(i)(1); CJEO rule 6(a)).

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