



California Supreme Court Committee on Judicial Ethics Opinions

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

JudicialEthicsOpinions.ca.gov

INVITATION TO COMMENT

[CJEO Draft Formal Opinion 2013-002]

Title

Committee on Judicial Ethics Opinions
Draft Formal Opinion 2013-002;
Judicial Screening of *Ex Parte* Applications
for Emergency Family Law Orders

Action Requested

Review and submit comments by
September 9, 2013

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 adopted a draft formal opinion and approved it for posting and public comment 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 2013-002 addresses the question of whether a judicial officer's screening of a party's request for emergency non-domestic violence family law orders without

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notice to the other party or an explanation by the requesting party as to why such notice should not be required violates the prohibition against considering *ex parte* communications in Canon 3B(7) of the Code of Judicial Ethics. The full text of the draft opinion is attached below.

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comments, the committee will decide whether the draft opinion should be published in its original form, modified, or withdrawn (rule 9.80(j)(2); CJEO rule 7(d)).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 September 9, 2013, and may be submitted as described below.

CJEO 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 the following question:

Is it a violation of the Code of Judicial Ethics if a judicial officer reviews a request for a non-domestic violence emergency order in a family law matter, in order to determine the necessity for an emergency hearing, where the request is made without prior notice to the other party and without a showing that good cause exists not to give notice?

In the attached draft opinion, the committee discusses the [California Code of Judicial Ethics](#) canons, the rules of court governing emergency family law orders (Cal. Rules of Court, rules 5.151-5.170), a local rule authorizing screening of all requests for emergency family law orders, and other authorities applicable to this question and reaches the following conclusion:

A local rule that allows judicial screening of requests for non-domestic violence emergency orders in family law matters without notice to the other party and without a showing that good cause exists not to give notice is not authorized by the rules of court governing emergency family law orders and therefore violates the prohibition against considering *ex parte* communications in Canon 3B(7) of the Code of Judicial Ethics.

CJEO Draft Formal Opinion 2013-002 has been approved by the committee for posting and public comment but has not been adopted by the committee in final form. This draft opinion is circulated for comment purposes only.

Invitation to Comment

The committee invites comment on the attached draft opinion by September 9, 2013. Comments may be submitted:

- online at <http://www.JudicialEthicsOpinion.ca.gov>;
- by email to Judicial.Ethics@jud.ca.gov; or
- by mail to:

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CJEO Draft Formal Opinion 2013-002 appears immediately below.

CJEO Draft Formal Opinion 2013-002 has been approved by the committee for posting and public comment but has not been adopted by the committee in final form. This draft opinion is circulated for comment purposes only.



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

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CJEO Draft Formal Opinion No. 2013-002

**JUDICIAL SCREENING OF *EX PARTE* APPLICATIONS FOR
EMERGENCY FAMILY LAW ORDERS**

I. Issue Presented

The Committee on Judicial Ethics Opinions (CJEO) has been asked to provide an opinion on whether the following activities are permissible:

Is it a violation of the Code of Judicial Ethics if a judicial officer reviews a request for a non-domestic violence emergency order in a family law matter, in order to determine the necessity for an emergency hearing, where the request is made without prior notice to the other party and without a showing that good cause exists not to give notice?

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II. Summary of Conclusions

A judicial officer's screening of a party's request for emergency non-domestic violence family law orders without notice to the other party or an explanation by the requesting party as to why such notice should not be required is not authorized by the rules of court governing family law emergency orders and therefore violates the prohibition against considering *ex parte* communications in Canon 3B(7) of the Code of Judicial Ethics.

III. Relevant Facts

A local rule provides that when a party in a family law proceeding seeks to have a request for an order (i.e., a motion or order to show cause) considered for emergency hearing, the clerk is to forward the request to a judicial officer for review. During that review, the judicial officer screens the papers to determine whether they set forth facts showing the necessity for an emergency hearing.¹ If the judicial officer determines that good cause for an emergency hearing exists, a date and time for the emergency hearing is set, and the party seeking relief is required to give notice of the emergency hearing to the other party.² Under the local rule, no notice to the other party of the application for an emergency hearing

¹ Specifically, the judicial officer is to determine whether an emergency hearing is necessary (1) to avoid immediate danger or irreparable harm to a party or to the children involved in the matter, (2) to help prevent the immediate loss or damage to property subject to disposition in the case, or (3) to make orders concerning any of the matters set forth in rule 5.170 of the California Rules of Court (see *infra*, note 4 and accompanying text).

² The local rule does not specify the procedure that follows a determination that good cause for an emergency hearing does *not* exist, except to say that the request for order must be filed in any event.

is required before the judicial officer screens the application to determine if good cause for an emergency hearing exists, nor does the moving party have to show why notice should not be given before that screening. Instead, as a matter of course, the screening of the request to determine if good cause for an emergency hearing exists occurs without prior notice to the other party.

IV. Authorities

A. Applicable Canons³

Canon 3B(7): “A judge shall accord to every person who has a legal interest in a proceeding, or that person’s lawyer, full right to be heard according to law. . . . 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:

“

“(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 bearing upon the substance of a matter, the judge shall make provision promptly to notify

³ All further references to canons and to Advisory Committee commentary are to the California Code of Judicial Ethics unless otherwise indicated.

the parties of the substance of the communication and provide the parties with an opportunity to respond.”

B. Other Authorities

California Rules of Court, rules 3.1200 *et seq.*, 5.151-5.170

Abramson, *The Judicial Ethics Of Ex Parte And Other Communications*
(2000) 37 Hous. L.Rev. 1343, 1354

V. Discussion

A. Rules of Court Governing Emergency Orders

In family law cases, applications for emergency orders -- also known as ex parte applications -- are governed by rules 5.151 through 5.170 of the California Rules of Court, which are known as the emergency orders rules.⁴ (Rule 5.151(a).) “The purpose of a request for emergency orders is to address matters that cannot be heard on the court’s regular hearing calendar.” (Rule 5.151(b).) More specifically, “[t]he process is used to request that the court:

“(1) Make orders to help prevent an immediate danger or irreparable harm to a party or to the children involved in the matter;

“(2) Make orders to help prevent immediate loss or damage to property subject to disposition in the case; or

“(3) Make orders about procedural matters, including the following:

“(A) Setting a date for a hearing on the matter that is sooner than that of a regular hearing (granting an order shortening time for hearing);

⁴ These rules generally do *not* apply to ex parte applications for domestic violence restraining orders under the Domestic Violence Prevention Act. (See rule 5.151(a).)

“(B) Shortening or extending the time required for the moving party to serve the other party with the notice of the hearing and supporting papers (grant an order shortening time for service); and

“(C) Continuing a hearing or trial.” (Rule 5.151(b).)

The declarations in support of a request for emergency orders “must contain facts within the personal knowledge of the declarant that demonstrate why the matter is appropriately handled as an emergency hearing, as opposed to being on the court’s regular hearing calendar.” (Rule 5.151(d)(2).) Additional requirements apply to requests for emergency orders relating to child custody and visitation. (Rule 5.151(d)(5).) In either case, however, the evidence submitted in support of a request for emergency orders must demonstrate that the issuance of an emergency order is necessary to achieve the purposes of the rule.

When a request for emergency orders is made, “notice to the other party is shorter than in other proceedings.” (Rule 5.151(b).) Generally, “[a] party seeking emergency orders under this chapter must give notice to all parties or their attorneys so that it is received no later than 10:00 a.m. on the court day before the matter is to be considered by the court.” (Rule 5.165(b).) “Notice of appearance at a hearing to request emergency orders may be given by telephone, in writing, or by voicemail message.” (Rule 5.165(a).) When notice of an emergency hearing has been given, the moving party must include with the request for emergency orders a written declaration based on personal knowledge regarding the details of the notice given.⁵ (Rule 5.151(c)(4), (e)(2)(A).) If notice of the emergency hearing was

⁵ Specifically, the declaration must describe “[t]he notice given, including the date, time, manner, and name of the party informed, the relief sought, any response, and whether opposition is expected and that, within the applicable time under rule 5.165, the

given later than 10:00 a.m. the court day before the hearing, that declaration must also include a request that the court approve the shortened notice and must provide facts showing “exceptional circumstances that justify the shorter notice.” (Rule 5.165(b)(1).)

Notice to the other party of the request for emergency orders can be “waived under exceptional and other circumstances as provided in the [emergency orders] rules.” (Rule 5.151(b).) Like shortened notice, waiver of notice requires court approval. To ask the court to waive notice of the request for emergency orders, “the party [seeking the waiver] must file a written declaration signed under penalty of perjury that includes facts showing good cause not to give the notice.” (Rule 5.165(b)(2).) Situations in which the court may find good cause not to give notice of the emergency hearing include the following:

“(A) Giving notice would frustrate the purpose of the order;

“(B) Giving notice would result in immediate and irreparable harm to the applicant or the children who may be affected by the order sought;

“(C) Giving notice would result in immediate and irreparable damage to or loss of property subject to disposition in the case;

“(D) The parties agreed in advance that notice will not be necessary with respect to the matter that is the subject of the request for emergency orders.” (Rule 5.165(b)(2).)

If the party seeking the emergency hearing tried to give notice of the hearing but could not, the declaration regarding notice must state that “the applicant in good faith attempted to inform the opposing party but was unable to do so” and

applicant informed the opposing party where and when the application would be made.” (Rule 5.151(e)(2)(A).)

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must “specify[] the efforts made to inform the opposing party.” (Rule 5.151(e)(2)(B).) In such a case, the court may waive notice for good cause if it finds that “[t]he party made reasonable and good faith efforts to give notice to the other party, and further efforts to give notice would probably be futile or unduly burdensome.” (Rule 5.165(b)(2)(E).)

The emergency orders rules also specify certain situations in which a party may always request an order without notice to the other party.⁶ (See rule 5.170.)

From the foregoing, it is apparent that California law permits a party in a family law proceeding to seek emergency orders from the court without notice to the opposing party only under very limited circumstances. Additionally, before a court may consider a request for emergency orders without notice, the applicant “must make an affirmative factual showing of irreparable harm, immediate danger, or [an]other statutory basis for granting relief without notice.” (Rule 5.151(d)(2).) Absent the requisite showing, notice is required.

With that in mind, we turn to the ethical rules regarding ex parte communications between the parties and the court.

B. Ethical Rules

Canon 3B(7) of the Code of Judicial Ethics codifies the judge’s ethical obligation to protect the right of every party to due process of law. The first sentence of Canon 3B(7) states: “A judge shall accord to every person who has a

⁶ Those situations are as follows: “[a]pplications to restore a former name after judgment”; “[s]tipulations by the parties”; “[a]n order or judgment after a default court hearing”; “[a]n earnings assignment order based on an existing support order”; “[a]n order for service of summons by publication or posting”; “[a]n order or judgment that the other party or opposing counsel approved or agreed not to oppose”; and “[a]pplication for an order waiving filing fees.” (Rule 5.170.)

legal interest in a proceeding, or that person’s lawyer, full right to be heard according to law.” Ex parte communications, defined as “any communications to or from the judge outside the presence of the parties concerning a pending or impending proceeding,” inherently infringe on that right. It is understood, of course, that ex parte communications are sometimes necessary to prevent immediate danger or irreparable harm. Those circumstances are narrowly defined, however, to insure the critical right of every party to be heard.

Because of the important role judges play in protecting the right of every party to be heard, with certain exceptions (discussed below), canon 3B(7) of the Code of Judicial Ethics prohibits judges from initiating, permitting, or considering ex parte communications and also requires judges to make reasonable efforts to avoid ex parte communications. In effect, the canon generally precludes a judge from engaging in a communication about a pending or impending proceeding with a party to that proceeding when the other party is not present and has not received notice of the communication. (See Abramson, *The Judicial Ethics Of Ex Parte And Other Communications* (2000) 37 Hous. L.Rev. 1343, 1354 [“An otherwise proper communication becomes a prohibited ex parte communication when matters relevant to a proceeding circulate among or are discussed with fewer than all the parties who are legally entitled to be present or notified of the communication”].)

Exceptions to the prohibitions against ex parte communications are recognized in the following situations:

(1) “where circumstances require, for scheduling, administrative purposes, or emergencies that do not deal with substantive matters”⁷;

⁷ The application of this exception is subject to the following conditions: “(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a

(2) “when expressly authorized by law to do so or when authorized to do so by stipulation of the parties.” (Canon 3B(7)(b) & (c).)⁸

We now apply these emergency order rules of court and ethical rules to the present facts.

C. Application to the Facts and the Local Rule

Specifically, the question before us is this: If a local rule authorizes a judge to review a request for non-domestic violence emergency orders in a family law matter in order to determine whether the moving papers show the necessity for an emergency hearing, and that review occurs without notice to the other party and without a showing that good cause exists not to give notice, does the rule facilitate or permit *ex parte* communications in violation of the Code of Judicial Ethics? In the committee’s opinion, the answer to that question is “yes.”

The first step in the analysis is to determine whether a judge’s review of the application papers under the procedure specified in the local rules involves an *ex parte* communication. It clearly does because the rule allows a party in a family law matter to present a request for emergency orders to the court for review without first notifying the other side that the request will be presented to the court. It does not matter, for purposes of determining whether an *ex parte* communication

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.” (Canon 3B(7)(b).)

⁸ The exception for *ex parte* communications “expressly authorized by law” permits judges to hear the many *ex parte* applications that come before them seeking emergency relief, such as *ex parte* applications brought pursuant to Rule of Court 3.1200 *et seq.*, which apply in civil cases generally, and those brought pursuant to Rule of Court 5.151, *et seq.*, which apply in family law cases.

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has occurred, that the request is to be reviewed at this stage only to determine whether good cause exists to set an emergency hearing. What matters is that one party is communicating to the judge concerning a pending proceeding without notice to the other party. Such a communication is, by definition, an *ex parte* communication.

Given that an *ex parte* communication is involved, the next step in the analysis is to determine whether that communication implicates the prohibitions in the canons.⁹ It does. It is true that a judge in this situation does not violate the prohibition against *initiating* *ex parte* communications, because the communication -- i.e., the request for emergency orders -- is initiated by the moving party, not the judge. Nonetheless, the canons also prohibit *permitting* and *considering* *ex parte* communications, and both of these prohibitions are implicated by the procedure established by the local rule. A judge who accepts a request for emergency orders for the purpose of reviewing it to determine whether it demonstrates good cause for an emergency hearing *permits* an *ex parte* communication, and by reviewing the request the judge *considers* an *ex parte* communication.

The final step in the analysis is to determine whether the procedure specified in the local rule falls within any of the exceptions found in the canons. It does not. Under the first exception, a judge may permit and/or consider an *ex parte* communication “where circumstances require, for scheduling, administrative purposes, or emergencies that do not deal with substantive matters,” provided certain conditions (set out above) are met. This exception is a narrow one. The phrase, “where circumstances require,” “strongly suggests that this exception must

⁹ At this point, we do not consider whether the communication falls within one of the exceptions provided for in the canons. That analysis follows below.

be considered on a case-by-case basis, without establishing a comprehensive exception to the general rule.” (Abramson, *supra*, at p. 1370.) Here, however, the local rule establishes a procedure to be followed in *every* family law case where a party seeks non-domestic violence emergency orders. In each and every such case, the judge reviews the request without prior notice to the other side, and without regard to whether there is any showing that good cause existed not to give such notice. Circumstances certainly do not “require” this sort of screening in every family law case. Further, non-domestic violence emergency orders are an “emergency” by definition, so the application papers required for requesting such orders deal with substantive matters. Accordingly, this exception does not apply.

Under the second exception, a judge may permit and/or consider an *ex parte* communication “when expressly authorized by law to do so or when authorized to do so by stipulation of the parties.” Just like the first one, this exception does not apply. As for “stipulation of the parties,” nothing in the local rule predicates the judge’s review of a request for emergency orders on whether the parties have stipulated to such review; the review occurs without notice and without any prior stipulation to the lack of notice. As for what is “expressly authorized by law,” our recitation of the emergency orders rules above shows what the law authorizes.

Rule of Court 5.151 *et seq.* generally permit *ex parte* applications for emergency orders in family law cases. Under that rule, “[a] party seeking emergency orders . . . must give notice to all parties or their attorneys so that it is received no later than 10:00 a.m. on the court day before the matter is to be considered by the court.” (Rule 5.165(b).) Nothing in the rules excludes from this concept of “consideration” a judge’s determination of whether an emergency hearing should be held on the request for emergency orders. In making that determination, the judge must review the moving papers to see if they demonstrate

why the matter is appropriately handled as an emergency hearing, as opposed to being heard on the court's regular hearing calendar. (Rule 5.151(d)(2).) Thus, in conducting the review provided for by the local rule, the judge "considers" the matter presented by the request for emergency orders, even if the court does not ultimately resolve the request on its merits at that time.

Under the emergency orders rules, notice may be waived if the declaration regarding notice that must accompany a request for emergency orders contains facts showing good cause not to give the notice. (Rule 5.165(b)(2).) Here, however, no such showing needs to be made; the local rule permits the judge to review the request without notice to the other side and without any showing of good cause not to give the notice. Instead, notice is required under the local rule only *after* the judge determines an emergency hearing is warranted. This practice is inconsistent with the emergency orders rules and therefore is not expressly authorized by law.

VI. Conclusion

Under the emergency orders rules, "[c]ourts may require all parties to appear at a hearing before ruling on a request for emergency orders. Courts may also make emergency orders based on the documents submitted without requiring the parties to appear at a hearing." (Rule 5.169) What the family law rules of court do not authorize, however, is review by a judicial officer of a request for emergency orders -- even for the limited purpose of determining whether an emergency hearing should be held -- without the moving party first providing notice to the other side or showing good cause for waiver of such notice. Such a review, in the committee's opinion, would violate the prohibitions in the Judicial Code of Ethics against permitting and considering *ex parte* communications.

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This opinion is advisory only (Cal. Rules of Court, rules 9.80(a), (e); Cal. Com. Jud. Ethics Opns., Internal Operating Rules & Proc. (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 Opinions in a request for an opinion (Cal. Rules of Court, rule 9.80(i)(3); CJEO rules 2(f), 6(c)), or on subjects deemed appropriate by the committee (Cal. Rules of Court, rule 9.80(i)(1); CJEO rule 6(a)).

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