



## SUPREME COURT COMMITTEE ON JUDICIAL ETHICS OPINIONS

350 McAllister Street, Room 1144A  
San Francisco, CA 94102

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# MEMORANDUM

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Date

January 11, 2012

To

Hon. Tani Cantil-Sakauye, Chief Justice of  
California  
Associate Justices of the California Supreme Court

From

Hon. Ronald B. Robie, Chair, Supreme Court  
Committee on Judicial Ethics Opinions, and  
Members of the Committee

Subject

The Supreme Court Committee on Judicial Ethics  
Opinions' Report to the Supreme Court on the  
Proposed CJEO Internal Operating Rules and  
Procedures and a Request for the Court's Approval  
pursuant to Cal. Rules of Court, rule 9.80(m).

Action Requested

Approve the Supreme Court  
Committee on Judicial Ethics  
Opinions' Proposed CJEO Internal  
Operating Rules and Procedures,  
adopted by the Committee on January  
6, 2012.

Deadline

N/A

Contact

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## Introduction

The Committee on Judicial Ethics Opinions (CJEO)<sup>1</sup> is pleased to submit to the Supreme Court this report on proposed internal operating rules and procedures adopted

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<sup>1</sup> CJEO membership includes: Justice Ronald B. Robie of the Court of Appeal, Third Appellate District (chair; five-year term); Justice Douglas P. Miller of the Court of Appeal, Fourth Appellate District, Division Two (vice-chair; five-year term); Judge Mary Carolyn Morgan (Ret.) of the Superior Court of San Francisco County (five-year term); Justice Maria Rivera of the Court of Appeal, First Appellate District, Division Four (four-year term); Judge John S. Wiley, Jr. of the Superior Court of Los Angeles County (four-year term); Presiding Judge Suzanne N. Kingsbury of the Superior Court of El Dorado County (four-year term); Judge Kenneth K. So of the Superior Court of San Diego County (three-year term); Judge George J. Abdallah, Jr. of the Superior Court of San Joaquin County (three-year term); Commissioner Robert L. Broughton of the Superior Court of Contra Costa County (three-year term); Justice Judith Ashmann-Gerst of the Court of Appeal, Second Appellate District, Division Two (two-year term); Judge

by the committee pursuant to rule 9.80 of the California Rules of Court, and subject to this court's approval. As the court will recall, it created the committee to provide ethics opinions and advice to California judges. Rule 9.80 generally sets forth the structure of the committee, its powers and duties, and the approach that the committee is to take in considering and responding to requests for opinions and guidance.<sup>2</sup> The rule also directs the committee to adopt procedures for implementation, subject to the court's approval. (Rule 9.80(m).) In adopting procedures, CJEO was also guided by the final report of the Implementation Committee for the Supreme Court Committee on Judicial Ethics Opinions submitted on February 17, 2009 (<http://www.courts.ca.gov/memo-finalreport-ethicscomm.pdf>).

This report describes CJEO's process in developing and adopting the proposed rules and procedures, which are attached. The committee invited public comment on the proposed rules, as authorized by the court, and made amendments as explained in the report and set out in the attached public comment chart. The fundamental elements of the proposed rules include procedures for making and responding to requests for opinions and advice, confidentiality requirements and practices, methods for public distribution of the committee's opinions, and coordination with the California Judges Association (CJA).

## **Summary of CJEO Rules and Procedures**

The proposed rules and procedures submitted for approval contain the following core provisions:

1. In providing its opinions and advice, the committee acts independently of the Supreme Court, the Commission on Judicial Performance (CJP), the Judicial Council, the Administrative Office of the Courts, and all other entities.
2. The committee will meet in person at least twice a year. The committee as a whole, an executive committee appointed by the chair, an oral advice subcommittee, and drafting subcommittees will meet by electronic and telephonic means as needed to conduct committee business.

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Joanne B. O'Donnell of the Superior Court of Los Angeles County (two-year term); and Judge Michael Garcia (Ret.) of the Superior Court of Sacramento County (two-year term).

<sup>2</sup> A copy of the Rule of Court is attached for the court's convenience, and all references to rule 9.80 and any subdivision or subpart of rule 9.80 are references to the rules of court. All other references are to the proposed CJEO rules.

3. Committee counsel will provide services to the committee as directed and will staff the CJEO Web site, toll-free phone line, email accounts, and offices.
4. CJEO members and staff will maintain strict confidentiality. All communications to and from the committee will not be disclosed outside the committee, except through opinions issued by the committee. Opinions will not disclose information identifying the judicial officers and candidates who request opinions or whose conduct is the subject of the opinions. Information identifying judges and candidates will be removed by staff upon receipt of requests for opinions or advice and will not be disclosed within the committee. The confidentiality of a request or of an opinion or advice may be waived, but the confidentiality of the committee's deliberations and records may not be waived. All confidential records and information of the committee will be protected by security measures and access restrictions.
5. CJEO will coordinate with CJA as recommended in the implementation committee's final report. CJEO will refer all requests for oral advice to the CJA Judicial Ethics Committee hotline, except as follows: if the request for advice is resolved by a prior or pending CJEO opinion; if the request may be resolved by reference to other authority; or if the requester declines to contact CJA. If an exception applies, a CJEO subcommittee will resolve the request and provide oral advice. Subcommittee members may call for a full committee discussion and vote on any exception or advice. CJEO will work with CJA to develop procedures by which CJA will provide information on its informal responses to requests for oral advice.
6. The committee will review all requests for opinions submitted by judges and candidates and all topics suggested for opinions by individuals and entities before deciding whether to issue an opinion. The committee will not consider matters or issues that are the subject of pending litigation or disciplinary proceedings. Requests and suggestions for topics must be in writing using CJEO forms available through the CJEO Web site and from its members. In its discretion, the committee may issue formal and informal written opinions on subjects that it chooses. Requests for oral advice may be made in any manner by contact with CJEO members or its staff.
7. The committee will vote whether to take action on each request or suggestion. The chair will appoint drafting subcommittees, which will draft formal and informal responses on subjects accepted for consideration by the committee. The entire committee will vote whether to adopt the drafted responses. Adopted drafts of formal opinions will be posted for public comment. Following circulation for

comment and any amendments, the committee will vote to approve publication of the final opinions.

8. The committee's final formal opinions will be distributed to all California judicial officers and interested parties. CJEO formal opinions will be posted on the CJEO Web site and provided to those who request copies. CJEO's informal opinions will be distributed to the requesting party. Summaries of informal opinions and oral advice will be posted periodically on the CJEO Web site.

## **The Committee's Background**

### **A. Establishment**

In August 2007, the Supreme Court established the Committee on Judicial Ethics Opinions to provide judicial ethics advisory opinions and advice to judicial officers and candidates for judicial office ([Supreme Court Announces Creation of Committee on Judicial Ethics Opinions](#)). The committee was created by the court in furtherance of its responsibilities under Article VI, section 18(m) of the California Constitution to adopt the Code of Judicial Ethics and govern the conduct of judges and judicial candidates. The court established the committee to encourage judges and candidates to seek ethics advice, and, through written opinions, to provide them with guidance for complying with the Code's canons. The court's establishment of CJEO was in accordance with the practices of the vast majority of other state court systems.

### **B. The Implementation Committee**

Shortly after establishing CJEO, the court appointed an implementation committee to recommend rules to guide the new committee.<sup>3</sup> The implementation committee submitted a unanimous final report and recommendations, including a draft governing

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<sup>3</sup> The membership of the CJEO implementation committee included seven members of the Supreme Court Advisory Committee on the Code of Judicial Ethics: Justice Richard D. Frybel, Court of Appeal, Fourth Appellate District, Division Three (chair of both committees); Presiding Justice Barbara J. R. Jones, Court of Appeal, First Appellate District, Division Five; Acting Presiding Justice Laurence D. Rubin, Court of Appeal, Second Appellate District, Division Eight; Judge Teresa Estrada-Mullaney, Superior Court of San Luis Obispo County; Judge David Rothman (Ret.), Superior Court of Los Angeles County; Judge Brian Walsh, Superior Court of Santa Clara County; and Beth J. Jay, Principal Attorney to the Chief Justice, as well as the following members from CJP: Judge Frederick P. Horn, Superior Court of Orange County and chair of CJP, and Victoria B. Henley, Director-Chief Counsel of CJP. The members from CJA were Presiding Judge James M. Mize, Superior Court of Sacramento County, former president of CJA, and Judge Ronni B. MacLaren, Superior Court of Alameda County, former chair CJA's Judicial Ethics Committee.

rule, to the court in February 2009. The court unanimously adopted the recommendations and proposed rule, now rule 9.80 of the California Rules of Court, at its administrative conference on February 25, 2009 ([Supreme Court Adopts Rule to Govern New Committee on Judicial Ethics Opinions \(NR #12-09\)](#)).

### **C. Rule 9.80**

Rule 9.80 grants CJEO broad authority to provide advisory opinions and advice to judges and candidates. The rule sets forth requirements for confidentiality and the committee's authority, membership, and conduct (rule 9.80(c), (e), (g), and (h)). The rule directs CJEO to exercise discretion in the adoption of specific rules and procedures relating to meetings, confidentiality practices, and the form of opinion requests and responses (rule 9.80(d), (h), (i), and (j)). Most notably, rule 9.80 (f) directs CJEO to adopt a revocable policy of referring requests for oral advice to CJA, with conditions and exceptions approved by the committee.

Finally, as noted, rule 9.80(m) directs CJEO to adopt internal operating rules and procedures, subject to the approval of the court.

### **The Committee's Adoption of Rules and Procedures**

In March, 2011, the committee began the process of drafting rules and procedures for operations. Members of the rules subcommittee appointed by Justice Ronald B. Robie, Chair of CJEO, reviewed the rules and procedures of judicial ethics advisory committees from other states and from CJA and consulted with members of the implementation committee and its staff, including Chair Justice Richard D. Fybel, Beth Jay, and Mark Jacobson, and with Cynthia Gray, Director of the American Judicature Society Center for Judicial Ethics. The rules subcommittee met several times in-person and conferred by e-mail.

The full committee considered draft rules at its first in-person meeting on May 16, 2011. After discussion and a vote, the committee approved an initial draft of the proposed rules on May 26, 2011. The committee decided to restate the mandatory provisions of rule 9.80 in the proposed rules in order to make all the applicable provision available in one document.

The initial draft of the proposed rules was circulated for public comment, as authorized by the court, and the committee received a total of 15 comments which are

described in the attached public comment chart.<sup>4</sup> The principal commentators were Judge David M. Rubin, President of the California Judges Association; Victoria B. Henley, Director-Chief Counsel, State of California Commission on Judicial Performance; and Presiding Justice Ignazio J. Ruvolo, State of California Court of Appeal, First Appellate District, Division Four.

After discussion and consideration, the committee voted as indicated in the responses set forth in the attached public comment chart and adopted amendments to the proposed rules and procedures, as discussed below. On January 6, 2012, the committee approved this report for submission to the court with the adopted CJEO rules proposed for the court's approval pursuant to rule 9.80((m)).

## **The Proposed CJEO Internal Operating Rules and Procedures**

The following is a detailed discussion of how the proposed CJEO rules implement rule 9.80, follow the recommendations of the implementation committee, and provide procedures for CJEO's operations. Also discussed are significant public comments received and the committee's responses, including amendments adopted by the committee in response to some of the public comments.

### **A. Purpose, Scope, and Authority**

#### *1. a) Rule 1(a); Purpose and Scope*

The proposed CJEO internal operating rules and procedures begin by implementing rule 9.80's grant of broad authority to the committee. Rule 1(a) echoes rule 9.80(a) and (b) and provides that:

- The committee was established by the 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; and
- 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.

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<sup>4</sup> Some comments were received that did not address CJEO or the proposed rules. Those comments are not contained in the public comment chart.

Rule 1(a) further provides that the committee will not issue opinions or advice in matters known by requesters or the committee to be the subject of pending litigation or a pending Commission on Judicial Performance or State Bar disciplinary proceeding. To implement this provision, the rules require disclosure of such information by those requesting opinions and advice (CJEO rule 6(e)(1)-(3)).

*b) Public Comments*

CJA expressed support of the disclosure requirement in the CJEO rules and commended CJEO's intent to avoid inconsistent outcomes.

CJP observed that disciplinary proceedings were not defined in the proposed rules posted for public comment. Ms. Henley suggested that some judges might interpret the term as limited to formal proceedings and fail to disclose confidential staff inquiries or preliminary investigations about which CJEO would have no independent knowledge. The committee agreed and added a definition of the term to clarify that those requesting opinions must disclose formal and informal disciplinary proceedings, including hearings, inquiries, and investigations (CJEO rule 2(o)).

*2. a) Rule 1(b); Authority*

Consistent with rule 9.80, CJEO rule 1(b) authorizes the committee to provide ethics advice to judges and candidates, including formal written opinions, informal written opinions, and oral advice, and to consider topics for opinions suggested by individuals and entities. (Rule 9.80(e) and (i)(1).) Rule 1(b) further provides that the CJEO rules are not intended to prohibit or inhibit individuals from seeking advice from other sources.

Rule 1(b) reiterates rule 9.80(e)(1)-(4) and provides that the committee may:

- 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 of court, and any other authority deemed appropriate by the committee (CJEO rule 1(b)(1));

- Make recommendations to the Supreme Court for amending the Code of Judicial Ethics, the California Rules of Professional Conduct, or rule 9.80 (CJEO rule 1(b)(2));
- Make recommendations regarding appropriate subjects for judicial education programs offered by the Center for Judicial Education and Research, CJA, or other providers (CJEO rule 1(b)(3));
- Make other recommendations to the Supreme Court as deemed appropriate by the committee or as requested by the court (CJEO rule 1(b)(4)); and
- Adopt amendments to the CJEO rules and procedures, subject to approval by the court (CJEO rule 1(b)(5); see rule 9.80(m)).

b) Public Comment

Justice Ruvolo observed that the proposed rules did not specifically authorize CJEO to make recommendations to the court for amending the State Bar's Rules of Professional Conduct. Justice Ruvolo suggested that the work of the committee might reveal an operational inconsistency between the rules of professional conduct and the Code of Judicial Ethics, or a perceived practical defect in a rule of professional conduct that should be resolved or clarified by an amendment.

The committee agreed with this suggestion and amended rule 1(b)(2) to add a specific reference to the California Rules of Professional Conduct. The rules of professional conduct, while formulated by the State Bar, ultimately are approved by the Supreme Court, and this procedure would fall within the committee's broad authority under rule 9.80(e) to make any recommendations to the court that the committee deems appropriate.

## **B. Membership, Definitions, Meetings, and Subcommittees**

### *1. Rule 1(c); Members*

Rule 1(c) restates rule 9.80(c)'s appointment and term requirements for membership: the committee consists of 12 members appointed by the Supreme Court, including at least one justice from a court of appeal and one member who is a subordinate judicial officer employed full-time by a superior court. The remaining members are justices of a court of appeal or judges of a superior court, active or retired. No more than two retired justices or judges may be members of the committee at one time, except if an

active justice or judge retires during his or her term, he or she may complete the term. A retired justice or judge committee member may not be an active member of the State Bar of California and may not be engaged in privately compensated dispute resolution activities.

## 2. Rule 2; Definitions

Rule 2 provides definitions that implement rule 9.80 generally by defining the committee, the chair and vice-chair, committee counsel, judicial officers, judicial candidates, and other terms relevant to the rules. Rules 2(i)-(k) specifically implement rule 9.80(n), which requires the committee to provide access, by referencing the committee's Web site ([www.JudicialEthicsOpinions.ca.gov](http://www.JudicialEthicsOpinions.ca.gov)), toll-free telephone line (1-855-854-5366), and e-mail address ([judicial.ethics@jud.ca.gov](mailto:judicial.ethics@jud.ca.gov)). Rules 2(l)-(n) describe the forms CJEO will use for opinion requests, topic suggestions, and confidentiality waivers.

No comments were received to rule 2, but as noted above, the committee responded to a comment on the disclosure requirements in rules 1(a) and 6(e)(1)-(3) by adding a definition of the term 'disciplinary proceedings' in rule 2(o).

## 3. Rule 3; Meetings and Subcommittees

As directed by rule 9.80(m), rule 3 provides procedures for the committee's operations through meetings and subcommittees. Rule 3(b) provides that the committee will meet in-person at least twice a year and the chair will preside over those meetings. The chair has discretion to appoint subcommittees as needed, including the appointment of an executive committee consisting of the chair, vice-chair, and two additional members (CJEO rules 3(a) and 7(a)). The chair also appoints no fewer than three committee members to serve on an oral advice subcommittee, as discussed below (CJEO rule 4(b)). Rule 3(b) further provides that the vice-chair performs assigned duties and acts as chair in the chair's absence. Finally, rule 3(b) provides that the committee confers by phone or other electronic means as often as needed.

### **C. Oral Advice**

#### 1. a) Rule 4; Referral Policy and Exceptions

Rule 9.80(f) authorizes the committee to adopt a revocable policy of referring requests for oral advice to the CJA Judicial Ethics Committee, with conditions and exceptions approved by CJEO. Rule 4(a) implements this authority by providing for referral of all oral advice requests to the CJA Judicial Ethics Committee, except in the following circumstances:

- If a request is answered by a pending or prior formal or informal CJEO opinion (CJEO rule 4(a)(1));
- If the requester declines to contact the CJA Judicial Ethics Committee (CJEO rule 4(a)(2)); or
- If the request can be resolved by citation to a statute, rule of court, canon, or other source. In this circumstance, CJEO will inform the requester of the particular source that may resolve the issue but will not provide oral advice. If the cited source does not resolve the issue for the requester, CJEO will refer the requester to the CJA Judicial Ethics Committee (CJEO rule 4(a)(3)).

Rule 4(b) provides (1) procedures for determining whether an exception applies and (2) procedures on how oral advice will be given by CJEO. The oral advice subcommittee, whose members serve on a rotating basis, will exercise their discretion to determine whether an exception applies, and if so, the advice to provide. The chair assigns a committee member to provide the oral advice once these determinations are made.

*b) Public Comments*

Justice Ruvolo suggested adding a procedure authorizing a member of the oral advice subcommittee to request a full committee discussion and vote on an oral advice determination. He observed that such a procedure would be similar to CJA's Judicial Ethics Committee's rules and would assure that a broader spectrum of the committee had considered and approved the advice on particularly difficult inquiries.

The committee agreed with the suggestion and amended rule 4(b) to provide that any serving member of the oral advice subcommittee may request full committee discussion and vote on an oral advice determination, to be held at a time and by such means as determined by the chair.

Justice Ruvolo also suggested that another exception to an immediate reference to CJA be added to allow CJEO to provide oral advice in two circumstances: (1) in which a prior CJEO opinion conflicts with a CJA opinion or advice, and (2) in which CJEO disagrees with a CJA opinion or advice when considering a current request to CJEO for oral advice.

The committee declined to follow this suggestion. The first circumstance falls within the exception in rule 4(a)(1) which allows CJEO to give oral advice when a prior or pending CJEO opinion in any form answers the request. The second circumstance falls within the broad authorization allowing CJEO to determine what issues to address using the various options for response provided for in the rules, including oral advice (rule 9.80 (e) and (j); CJEO rules 1(b) and 7(b)). The committee believes that the exercise of this broad authority in the circumstance suggested (where CJEO disagrees with a prior CJA opinion or advice) properly falls within the discretion of the full committee, and should not be a question determined only by the oral advice subcommittee under rule 4. Should these circumstances arise through a request to CJEO for oral advice, the oral advice subcommittee is authorized by rule 4(b) to call for a meeting of the full committee to discuss and vote on the request.

CJA concurred in CJEO's procedure by which it will refer oral advice requests to the CJA Judicial Ethics Committee, and stressed CJA's long history of providing confidential responses to inquiries from anyone (including those who are not members of CJA) whose conduct is governed by the Code of Judicial Ethics. CJA noted that the CJA Judicial Ethics Committee responds to over 400 requests for oral advice a year, often within 24 hours of inquiry.

The committee shares CJA's goal of providing all bench officers with prompt oral advice, and to further that mutual goal, CJEO will remind callers of CJA's history of providing prompt oral advice, often within 24 hours. In those circumstances where CJEO determines that an exception to a CJA referral applies, and if the request is time-sensitive and an expedited response is sought, the committee anticipates it is unlikely to be able to provide a similarly rapid response, and will so notify the caller.

CJA disagreed with the exception authorizing CJEO to provide oral advice when a definitive answer is found in a pending CJEO opinion. CJA suggested that if an opinion is pending it cannot provide a definitive answer and should not be an exception to referral to CJA.

The committee declined to follow this suggestion. The committee anticipates being able to respond to a request for oral advice when a formal or informal CJEO opinion is pending by informing the requester that a definitive answer is imminent. The committee believes this exception generally avoids duplication of efforts on the part of CJA in those circumstances where CJEO is in the process of addressing an issue, and avoids the potential for inconsistent responses.

CJA also disagreed with the exception authorizing CJEO to provide oral advice when the caller declines to contact CJA. CJA suggested that this should not be the basis of an exception for several reasons:

- Membership in CJA is not required for access to the CJA Judicial Ethics Committee hotline and advice is available to all who are bound by the canons;
- A requester may be aware of what the CJA Judicial Ethics Committee has been advising on a particular issue and may be ‘shopping’ for different advice. Seeking inconsistent advice should not be encouraged; and
- In bypassing the CJA Judicial Ethics Committee, CJEO will be providing oral advice without the benefit of the databank resources available to the CJA Judicial Ethics Committee. If all requests for oral advice are directed to CJA, it can continue to maintain a complete, accurate database reflecting all of the issues for which judicial officers are seeking advice. Allowing judicial officers to ‘opt out’ of seeking oral advice through the CJA hotline will diminish the informational value of CJA’s 20-year databank.

The committee declined to follow the suggestion and believes CJA’s informational database will not be affected by the exception authorizing CJEO to provide oral advice when a requester declines to contact CJA. The fact that CJA receives and responds to over 400 requests for oral advice a year supports the continued strength of its database. Rule 8(b) provides for periodic posting of CJEO’s informal written opinions and oral advice, which will allow CJA to maintain a comprehensive database.

Rule 9 also provides for CJA to share its oral advice summaries with CJEO, which will further the implementation committee’s intent that CJEO have a complete record of inquiries to “effectively evaluate the areas and issues of concern so that it can determine whether a formal opinion should be provided...” (Implementation Committee Final Report (Feb. 2009), p. 13).

The committee believes that these proposed rules and procedures for sharing and posting will fully inform both CJA and CJEO of the advice California judges are receiving and will reveal rather than encourage potential advice shopping.

CJA also disagreed with the exception to CJA referral where a request can be answered by reference to authority. While CJA commends the goal of quickly providing citations that may easily answer a requestor’s question, CJA’s experience has been that callers to the CJA hotline sometimes believe the question is easily answered by reference to a source, but underlying ethical issues often arise once the judge receiving the hotline call questions the caller. CJA suggested that it would serve a caller’s interests best to refer all calls, whether they appear easy on the surface or not, to the CJA Judicial Ethics Committee so that the inquiry may be fully addressed.

The committee declined to follow the suggestion to refer requests for oral advice to CJA even if they might be answered by citation to authority. In addition to the exception where a caller declines to contact CJA, the implementation committee identified two broad categories of requests in which CJEO would give oral advice: (1) those which can be resolved by reference to authority, and (2) those which may require greater analysis (Implementation Committee Final Report (Feb. 2009), p. 12.). After much deliberation, including consideration of public comments, the implementation committee concluded that in those instances where authority cited by CJEO did not answer the caller's question, the caller should be referred to CJA's hotline (Implementation Committee Final Report (Feb. 2009), p. 13.). This approach provides the foundation for rule 4(a)(3).

In those circumstances described by CJA where deeper ethical issues underlie a seemingly simple question, the caller will be referred to CJA for analysis and advice. For those questions that can be resolved by citation to authority alone, the committee believes the interests of requesters who choose to call CJEO will be best served by obtaining that authority rather than a referral.

## **D. Confidentiality**

### *1. a) Rule 5; Policies and Procedures*

To promote ethical conduct by judicial officers and candidates for judicial office and to encourage them to seek ethics opinions and advice from CJEO, rule 9.80(h) and CJEO rule 5(b) mandate that all communications to and from the committee are confidential, with the following provisions and exceptions:

- Except for the committee's written opinions and oral advice, all documents, records, communications, and deliberations of the committee are confidential and will not be disclosed. Requests for opinions and advice and the committee's responses are confidential and deemed to be official information within the meaning of the California Evidence Code. All communications and documents forwarded by CJA to CJEO are deemed confidential information (CJEO rule 5(b)(1), (4); CJEO rule 9);
- Any confidential information, including identifying information concerning an individual whose inquiry or conduct is the subject of any communication with the

committee, will not be disclosed outside the committee by its members or its staff (CJEO rule 5(c)); and

- A judicial officer or candidate for judicial office may waive confidentiality in writing. Also, if the judicial officer or candidate asserts reliance on an opinion or advice in a disciplinary proceeding, the request and the CJEO opinion or advice are no longer confidential. However, committee deliberations and records are confidential notwithstanding any waiver (CJEO rule 5(e)).

Rule 5 provides the following procedures and practices to further ensure confidentiality:

- All information electronically gathered by the committee, including on computers and electronic devices, on the CJEO Web site, in the CJEO e-mail accounts, and in the electronic files and e-mail accounts of the committee, will be maintained as confidential using available electronic security applications and other means, including password protections and access restrictions (CJEO rule 5(b)(2));
- The CJEO office, file cabinets, and computers will be maintained using security measures to restrict access and protect confidentiality (CJEO rule 5(b)(3));
- Any identifying information concerning an individual whose inquiry or conduct is the subject of any communication with the committee will not be disclosed within the committee. Staff will remove names and identifying information and assign numbers upon receipt of a request for an opinion or advice. Committee members will deliberate and respond to requests without identification of the requester. Names and identifying information will not be disclosed within the committee by anyone who has direct contact with the requester, unless confidentiality is waived. If the requester is an entity, such as CJA or the Commission on Judicial Performance, the entity will be disclosed within the committee, but if the request includes identifying information concerning an individual, that information will be removed and maintained as confidential (CJEO rule 5(d)(1)-(3)).

b) Public Comments

Victoria Henley found it unclear whether the prohibition on releasing ‘any identifying information’ extends to information about the size or location of the court, which could be pertinent to the committee's consideration of an issue.

In response, the committee clarified that rule 5(d) prohibits disclosure within the committee of only that information which would identify the requester. Under rule 5(d)(1), specific information concerning size or location would only be removed in those rare circumstances where the requester could be identified by such information alone. In those cases, pertinent but non-specific information would not be excluded from the committee’s deliberations. For example, the fact that the circumstances under consideration occurred in a small-sized or rural court would be disclosed within the committee rather than the actual location of the court if to do so would, by process of elimination, identify the requesting judge.

The committee’s purpose is to determine the ethics of conduct, not individuals. The rules for internal confidentiality reflect that purpose and allow for consideration of pertinent information without disclosure of identity. Where size and location, for example, effect the conduct under consideration, that information will be disclosed within the committee to the extent possible without identifying the individual.

Ms. Henley also observed that the proposed rules provided that the opinion or advice was no longer confidential only when a requesting judge waived confidentiality or asserted reliance on committee advice in judicial or attorney discipline proceedings. Ms. Henley commented that for the Commission on Judicial Performance to evaluate a claim of reliance on advice from CJEO or CJA, it is essential that the commission have both the request for advice and the advice given. She suggested amending rule 5(e) to provide that when there is a waiver or asserted reliance on committee advice, both the full text of the request and the advice or opinion are no longer confidential.

The committee agreed with this suggestion. The confidentiality waiver provisions of rule 5(e) restate rule 9.80(h)(3), which provides that “[i]f a judicial officer or candidate making a request for an opinion or advice waives confidentiality or asserts reliance on an opinion or advice in judicial or attorney discipline proceedings, such opinion or advice no longer is confidential under these rules.” This rule is based on the implementation committee’s recommendation that “[a] judge may waive confidentiality as to his or her ethics inquiry and CJEO’s response....” (Implementation Committee Final Report (Feb. 2009), p. 9.) The committee amended rule 5(e) to specify that the request as well as CJEO’s opinion or advice are no longer confidential when waived, in keeping with this recommendation.

CJA suggested adding another specific reference in the confidentiality rules stating that all communications and documents shared by CJA with CJEO under rule 9 are confidential. The committee agrees with CJA that confidentiality is of great importance to inquiring judges and amended rule 5(b) to add subsection (4), which further ensures

that judges know the information shared by CJA will be maintained by CJEO as strictly confidential.

## **E. Opinion Requests**

### *1. Rules 6(a) and (b); Authority*

Rule 6(a) restates rule 9.80(i)(1) and authorizes the committee to issue formal written opinions on any subject it deems appropriate, and to consider topics suggested for formal opinions by individuals or entities. Rule 6(b) restates rule 9.80(i)(2) and provides that the committee will only consider requests for informal written opinions and oral advice from judicial officers and candidates for judicial office.

### *2. a) Rules 6(c)-(f); Procedures*

Rule 6(c) implements rule 9.80(i) by providing that all requests for opinions must be submitted using approved CJEO forms that are available on the CJEO Web site or by request. All such requests must describe the facts and discuss the issues presented, and should include citations to relevant authority.

Rule 6(d) provides that judicial officers and candidates may request oral advice by any means and by contacting any member of the committee or its staff, who will refer the request to the chair.

Rule 6(e) provides that anyone requesting an opinion or advice must disclose whether the issue is the subject of pending litigation or disciplinary proceedings, and must disclose if the issue has been presented to CJA as an inquiry or is the subject of a prior or pending CJA opinion.

Finally, rule 6(f) provides that the committee will inform requesters of these disclosure requirements and of the fact that its opinions and advice will be based on the premise that all relevant information has been disclosed, including whether another inquiry has been made and has been completed or is pending.

### *b) Public Comment*

CJA agreed with the requirement in rule 6(e) that requesters disclose whether an inquiry has also been made to CJA or the matter is pending before CJA. CJA requested that CJEO wait to respond in such circumstances.

The committee is committed to coordinating with CJA and will work with CJA to avoid duplication of efforts and to discourage forum-shopping. The committee anticipates it will defer action on a request under consideration by CJA unless it appears imprudent to do so.

## **F. Consideration of Requests and Procedures for Response**

### *1. Rules 7(a)-(b); Consideration of Requests*

Rule 7(a) provides that the committee must consider all requests for an opinion. Rule 7(b) restates rule 9.80(j) and authorizes the committee to determine (1) whether or not to issue an opinion and (2) the format of its response to any request. Rule 9.80(j) also directs the committee to adopt procedures for handling and determining all requests for opinions and advice.

### *2. a) Rules 7(a)-(e); Procedures*

Rule 7(a) provides that an executive committee will review all requests for opinions, will and prioritize the requests, and will present them to the full committee.

Rule 7(b) provides that the committee will determine whether to respond to a request and the form of the response, selecting from an array of discretionary options. Rule 7(b) also provides that if the committee decides to provide oral advice, the request will be referred to the oral advice subcommittee.

Rule 7(c) provides that upon a vote by eight members to prepare a formal or informal opinion, the chair will appoint a drafting subcommittee of four members, including one appellate justice. The full committee will consider the draft opinions issued by the drafting subcommittees.

Rule 7(d) provides that upon a vote by eight members to adopt a draft as a formal written opinion, the authorized draft will be posted for public comment on the CJEO Web site for 45 days. The committee has discretion to decide not to post or to post for an alternative amount of time. Following public comment, the committee will decide by an eight member vote whether the opinion will be published as drafted, modified, or withdrawn.

Finally, rule 7(e) provides that an eight member vote is also required for a decision to adopt an informal written opinion, which will be distributed to the requester by committee counsel.

*b) Public Comment*

Justice Ruvolo found rules 6 and 7 to be confusing and out of order. He suggested changing the order to put opinion requests (rule 6) and responses (rule 7) ahead of referral to CJA (rule 4) and confidentiality (rule 5), and suggested separate rules and procedures for each type of response.

The committee declined to follow these suggestions. The order of the proposed rules tracks rule 9.80 and reflects the logic and priorities of the court. The types of inquiries CJEO will address are discussed in rule 1(b), which states that the committee is authorized by rule 9.80 to provide ethics advice to judges in the form of formal written opinions, informal written opinions, and oral advice, and to consider topics for opinions suggested by individuals and entities. The referral of oral advice to CJA in rule 4 follows this statement logically as one of the authorized forms of inquiries the committee will consider.

Placement of the oral advice referral policy in rule 4 reflects the high priority the court and CJEO place on coordination with CJA. Confidentiality is also a high priority, as reflected by its placement in rule 5. The procedures for making and responding to requests for formal and informal written opinions are similar and are best addressed together in rules 6 and 7. The procedures for responding to requests for oral advice are unique and are discussed separately in rule 4.

Rules 6 and 7 are organized by how users will make written requests for opinions (rule 6) and how the committee will respond to such requests (rule 7). The rules allow the committee to determine the best response to each request based on all of its discretionary options (rule 9.80(j)(1); CJEO rule 7(b)). The committee declined to follow the suggestion to restructure rules 6 and 7 according to the types of responses (formal opinions and informal opinions), because to do so would require separate procedures for each and would require the committee to decide on the form of the response before a substantive analysis of a written request or topic suggestion has been undertaken.

**G. Distribution**

Rule 8(a) restates rule 9.80(k) and provides for the distribution of the committee's final written opinions to all California judicial officers, the requester, and other interested parties. The rule provides that distribution will take place by posting approved formal written opinions on the CJEO Web site, with copies provided to requesters. Committee counsel will maintain a list of interested persons and entities who request receipt of

distributed CJEO opinions. The committee may withdraw, modify, or supersede an opinion at any time.

Rule 8(b) provides that the committee will periodically post summaries of its informal opinions on its Web site and may, in its discretion, post summaries of its oral advice.

## **H. Coordination with CJA**

### *1. a) Rule 9: Policy and Procedures*

Rule 9 adopts the recommendations of the implementation committee and provides for coordination with CJA to develop procedures that will allow CJEO to obtain information regarding the inquiries CJA receives and the oral advice it provides so that CJEO can effectively evaluate the areas of concern when determining what issues to address in CJEO opinions (Implementation Committee Final Report (Feb. 2009), pp. 3, 7, 13).

Working to implement this recommendation, members of the CJEO executive committee met with members of CJA and its Judicial Ethics Committee to coordinate on procedures for CJA's delivery of its informal responses (IRs) to CJEO. It was agreed that delivery of IR summaries may be a workable solution to meet the needs and concerns of both committees.

Rule 9 reflects those coordination efforts and provides for delivery of IR summaries by CJA to CJEO for a six month period, beginning on the date of approval of the CJEO rules. Rule 9 specifies that the summaries will not include the name of the inquiring judicial officer but will contain: (1) a full description of the inquiry; (2) all of the relevant circumstances; (3) a full description of the answer provided; (4) the reasoning in support of the answer; and (5) any relevant information that would be helpful to CJEO. The rule reiterates that all communications and documents forwarded by CJA will be maintained by CJEO as confidential.

Rule 9 also provides that after six months, CJEO will evaluate the summaries and report to the court on whether the information provided allows it to perform its duties and fulfill its responsibilities, as envisioned by the implementation committee and directed by the court. Based on its evaluation and report, CJEO may recommend any necessary amendments to its rules for the court's approval.

b) *Public Comment*

CJA noted the coordination efforts by CJEO Chair Ronald B. Robie and past CJA Judicial Ethics Committee Chair Judge Robert Trentacosta. CJA expressed its opinion that summaries rather than actual IRs will (1) provide CJEO with the information it needs, (2) maintain confidence in CJA's confidentiality procedures, and (3) ensure consistency in the advice being given by both committees. CJEO agreed provisionally and amended rule 9 to authorize delivery of summaries for a six month period, after which it will evaluate whether the rule 9 procedures are effective and report to the court. The committee also agreed with CJA's suggestion to coordinate on judicial education about CJEO and CJA so that judges are aware of the services provided and the confidentiality protections both committees have developed.

**Request for Court Approval of the Proposed CJEO Internal Operating Rules and Procedures**

The committee respectfully requests that the court approve the proposed internal operating rules and procedures pursuant to Cal. Rules of Court, rule 9.80(m). The committee is available to respond to any questions the court may have about the issues discussed in this report.