



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 2013-003]

Title

Committee on Judicial Ethics Opinions Draft
Formal Opinion 2013-003;
Disclosure on the Record When There is No
Court Reporter or Electronic Recording of the
Proceedings

Action Requested

Review and submit comments by
November 15, 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 2013-003 provides guidance on how trial judges can satisfy the ethical requirement to make “on the record” disclosures when there is no court reporter or electronic recording of the proceedings. The opinion discusses what constitutes a record and how to make a disclosure on the record. The full text of the draft opinion is attached.

CJEO Draft Formal Opinion 2012-003 has been approved 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 The attached draft opinion is circulated for comment purposes only.

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comments, the committee will decide whether the draft opinion should be published in its original form, modified, or withdrawn (rule 9.80(j)(2); CJEO rule 7(d)).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 November 15, 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:

What constitutes an “on the record” disclosure by a trial judge pursuant to canon 3E(2)(a) of the Code of Judicial Ethics when there is no court reporter or electronic recording of the proceedings?

In the attached draft opinion, the committee discusses canon 3E(2)(a) of the [California Code of Judicial Ethics](#), which requires that judges in all trial court proceedings make “on the record” disclosures of information that is reasonably relevant to the question of disqualification. The Code of Judicial Ethics does not define “on the record,” so the committee discusses California Supreme Court decisions and other authorities interpreting canon 3E(2)(a) and looks to statutory definitions of court records in other proceedings to reach the following conclusions:

In order to comply with the canon 3E(2)(a) requirement that disclosures be made “on the record,” trial court judges hearing matters that are not reported or electronically recorded must ensure that any disclosures become a part of the written record of proceedings. To accomplish this, disclosures must be made orally and documented in a writing that is entered in the case file as a minute order, official clerk’s minutes, or a formal order. As guidance, the committee provides steps that may be taken in all cases where disclosure is required.

CJEO Draft Formal Opinion 2013-003 has been authorized 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 November 15, 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 2013-003 appears immediately below.

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

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CJEO Draft Formal Opinion No. 2013-003

**DISCLOSURE ON THE RECORD WHEN THERE IS NO COURT REPORTER
OR ELECTRONIC RECORDING OF THE PROCEEDINGS**

I. Question Presented

The Committee on Judicial Ethics Opinions has been asked to provide an opinion on the following question:

What constitutes an “on the record” disclosure by a trial judge pursuant to canon 3E(2)(a) of the Code of Judicial Ethics when there is no court reporter or electronic recording of the proceedings?

II. Summary of Conclusions

The Code of Judicial Ethics requires that all disclosures be made “on the record.” (Cal. Code of Jud. Ethics, canon 3E(2)(a).) Oral and implied disclosures that are not made part of the record do not satisfy the canon. The simplest way for a judge to ensure that a disclosure is part of the record is to state the disclosure in open court when a court reporter is transcribing the proceedings or an electronic recording is being made of the

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proceedings. However, not all proceedings are reported or electronically recorded. In those circumstances, a judge must make the disclosure orally in open court and take steps to ensure that a document describing the nature of any information being disclosed is made part of the case file.

III. Introduction

Canon 3E(2)(a) of the California Code of Judicial Ethics requires judges in all trial court proceedings to disclose "on the record" any information that is reasonably relevant to the question of disqualification under Code of Civil Procedure section 170.1, even if the judge believes there is no actual basis for disqualification. Making disclosures in open court when an official court reporter is transcribing the proceedings, or when the proceedings are being electronically recorded and may be transcribed, is a simple and efficient way to ensure that they are part of the record. However, due to recent court budget cuts, more and more matters are being heard without benefit of a reporter or electronic recording. Because a judicial officer must nonetheless satisfy canon 3E(2)(a) and make "on the record" disclosures of information reasonably relevant to the question of disqualification, the committee has been asked how judges can satisfy this ethical obligation when there is no court reporter and no electronic recording. To provide guidance, this opinion addresses what constitutes a record and how to make a disclosure on the record.¹

¹ Campaign contribution disclosures under canon 3E(2)(b) and Code of Civ. Pro. § 170.1(a)(9)(C) are not encompassed in the question posed to the committee and are beyond the scope of this opinion. The committee may address "on the record" disclosures in these special circumstances in a separate opinion.

IV. Authorities

A. Applicable Canons²

Canon 3E(2)(a): “E. Disqualification and Disclosure. . . . (2) In all trial court proceedings, a judge shall disclose on the record as follows: . . . (a) Information relevant to disqualification. A judge shall disclose information that is reasonably relevant to the question of disqualification under Code of Civil Procedure section 170.1, even if the judge believes there is no actual basis for disqualifications.”

B. Other Authorities

California Code of Civil Procedure, sections 170.1, 170.1(a)(9)(B)-(C), 170.5(f), 269(a)-(b), and 1904.

Government Code, sections 68086, 68151(a)(1), (2), and (3), 68152(j)(14), 69957.

California Rules of Court, rules 2.952, 2.956(c) and (e)(1), 8.120(a), 8.122(b), 8.128(a), 8.320(a)-(b), 8.336(c), 8.388(b), 8.407(a), 8.480(b), 8.610(a), 8.832(a), 8.835, 8.860(a), 8.863, 8.867, 8.868, 8.910(a), 8.914, 8.920, 8.957 and 10.500(c)(1).

California Welfare & Institutions Code, sections 347, 677.

Adams v. Commission on Judicial Performance (1995) 10 Cal.4th 866, 903-906.

Copley Press, Inc. v. Superior Court (1992) 6 Cal.App.4th 106, 113.

Fletcher v. Commission on Judicial Performance (1998) 19 Cal.4th 865, 893-894.

Michael v. Aetna Life & Casualty Ins. Co. (2001) 88 Cal.App.4th 925, 932.

People v. Dubon (2001) 90 Cal.App.4th 944, 954.

California Judges Association, Ethics Committee Advisory Opinions 45, 48, and 56.

² All further references to canons and to Advisory Committee commentary are to the California Code of Judicial Ethics unless otherwise indicated.

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V. Discussion

Canon 3E(2)(a) of the California Code of Judicial Ethics requires judges in all trial court proceedings to make an "on the record" disclosure of information that is reasonably relevant to the question of disqualification under Code of Civil Procedure section 170.1, even if the judge believes there is no actual basis for disqualification.³ While the Code of Judicial Ethics does not define "on the record," California Supreme Court decisions and other authorities interpreting canon 3E(2)(a) make clear that oral and implied disclosures that do not become part of the record are insufficient (*Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 903-906 [general knowledge, affirmative references, and incomplete oral disclosures constitute failure to disclose on the record for purposes of waiver]; *Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 893-894 [no evidence of disclosure on the record where the judge claimed to have advised of *ex parte* contacts at an in chambers sentencing with no record of the proceedings]; Cal. Judges Assoc., Formal Ethics Opinion No. 45 (1997) p. 6 [the record or the clerk's minutes of the proceedings must reflect a disclosure and merely mentioning to counsel is insufficient]; Cal. Judges Assoc., Formal Ethics Opinion No. 48 (1999) p. 6 [implied disclosure does not satisfy the requirement of disclosure on the record]).

These authorities raise the question of what constitutes a record in trial court proceedings and, more specifically, how to accomplish making a disclosure part of the record where there is no record of oral proceedings.

A. What constitutes a record?

Because the canons do not define "on the record" for purposes of judicial disclosures, we look to other sources for guidance. Several statutes define records of

³ The committee has not been asked to provide an opinion on the sufficiency of any particular disclosures under the Code of Judicial Ethics and other statutes.

court proceedings in broad terms. The Code of Civil Procedure defines a judicial record as the “record or official entry of the proceedings in a Court of justice, or of the official act of a judicial officer, in an action or special proceeding” (Code Civ. Proc., § 1904). For purposes of trial court record management, the Government Code provides that a court record consists of “. . . [a]ll filed papers and documents in the case . . . ,” [a]dministrative records filed in an action or proceeding . . . [including] . . . transcripts, and tapes of electronically recorded proceedings filed, lodged, or maintained in connection with the case . . . ,” and other records, including minutes (§§ 68151(a)(1), (2), (3), 68152(j)(14)). For purposes of judicial administration record requests, an adjudicative record is defined as “. . . any writing prepared for or filed or used in a court proceeding” (Cal. Rules of Court, rule 10.500(c)(1).)

The rules of court governing appellate matters are instructive because they narrow the broad scope of trial court records for purposes of review on appeal. Those rules specify that a record of trial court proceedings contains two parts: (1) the record of oral proceedings, and (2) the record of written documents. (*See*, Cal. Rules of Court, rules 8.120(a)-(b) [civil appeals], 8.320(a)-(c) [criminal appeals].)

1. Record of Oral Proceedings

A record of proceedings is required to be made by an official shorthand court reporter in juvenile proceedings (Welf. & Inst. Code, §§ 347, 677) and in felony proceedings when requested by the defendant or prosecution (Code Civ. Proc., § 269, subd. (a)(2)). Except in those matters where a reporter is required, local courts have the discretion to decide, as a matter of court administration, whether an official reporter is made available. (Welf. & Inst. Code, §§ 347, 677; Code Civ. Proc., § 269, subd. (a)(2); Cal. Rules of Court, rule 2.956(e)(1).) In general civil matters where an official court reporter is not made available by the court, the parties may arrange for the presence of a certified shorthand reporter at their expense. (Gov. Code, § 68086; Cal. Rules of Court, rule 2.956(c).) In all proceedings where a shorthand reporter makes a verbatim record, an

official transcript of the proceedings may be requested. (Code Civ. Proc., § 269, subd. (b).) Thus, in those proceedings where a court reporter is present, oral disclosures made in open court will be "on the record" as required by canon 3E(2)(a).

In some proceedings where neither the court nor a party provides an official shorthand reporter, the local court may elect to make electronic recording equipment available. (Gov. Code, § 59957 [electronic recording is permitted by statute in limited civil, misdemeanor, and infraction proceedings only].) Written transcripts of official electronic recordings may be prepared at the request of the court or a party. (Cal. Rules of Court, rule 2.952(g).) In some circumstances, the electronic recording may be used as the record of oral proceedings in lieu of a reporter's transcript prepared from the recording. (Cal. Rules of Court, rule 2.952(i), (j).) Oral disclosures made in open court at proceedings that are electronically recorded will also be "on the record" as required by canon 3E(2)(a).

Although court reporters are statutorily required in juvenile and felony matters and courts are authorized to provide electronic recording equipment in certain proceedings as noted above, as a matter of practical reality and current economic constraints, neither reporters, nor recording equipment, will be available in large numbers of proceedings that come before the courts every day. Where there is no oral record, the record of written documents becomes significant to the question of how a trial judge complies with the obligation to make disclosures "on the record."

2. *Record of Written Documents*

While there is no definition of a record for purposes of judicial disqualification, appellate rules identify what documents are recognized as the record of proceedings for purposes of review. On appeal, the record of written documents is set forth in the clerk's transcript, which generally includes notices, judgments, orders, minute orders, court minutes, the register of actions, and other documents filed or lodged in the case (Cal. Rules of Court, rules 8.120(a)(A), 8.122(b), 8.320(b), 8.336(c), 8.388(b), 8.407(a),

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8.480(b), 8.610(a)(1), 8.832(a), 8.860(a)(1)(A), 8.910(a)(1)(A), 8.920(1)). In some appellate matters, however, the record of written documents may alternatively consist of the court's file, where allowed by local rule (Cal. Rules of Court, rules 8.120(a)(C), 8.128(a), 8.860(a)(1)(B), 8.863, 8.910(a)(1)(B), 8.914, 8.920(1)). In small claims appeals, the record on appeal will always consist of the court file and all related papers (rule 8.957).

For purposes other than judicial disqualification, several courts have evaluated specific court documents and found that minute orders and the court's official minutes suffice as "a record" when entered in the case file (*People v. Dubon* (2001) 90 Cal.App.4th 944, 954 [a minute order qualified as 'a record']; *Copley Press, Inc. v. Superior Court* (1992) 6 Cal.App.4th 106, 113 [official court minutes accurately and officially reflect the work of the court]; *Michael v. Aetna Life & Casualty Ins. Co.* (2001) 88 Cal.App.4th 925, 932 [a court order is a document that is either entered in the court's permanent minutes or signed by the judge and stamped 'filed']).

From these cases and the rules of court, we conclude that all documents filed, entered, or lodged in the case file constitute a trial court's written record of proceedings. Such documents include minute orders, the official clerk's minutes, and formal orders entered in the case file. Thus, when there is no court reporter or electronic recording, and therefore no record of oral proceedings, disclosures must be made part of the written record of proceedings in order to be "on the record" pursuant to canon 3E(2)(a).

B. How To Accomplish Making A Disclosure Part of the Record

Where there is not a reporter's transcript or electronic recording, an oral disclosure may be made part of the written record of proceedings by preparing and entering a disclosure document in the court file. The written disclosure may take many forms. It may be a brief handwritten document that outlines the information disclosed. (See Cal. Judges Assoc., Formal Ethics Opinion No. 56 (2006) p. 5 [information relating to the question of disqualification must be disclosed on the record, but the disclosure need not

be detailed].) It may also take the form of a formal, complete statement, detailing the content of the disclosure.

The written disclosure may also be entered in the case file in the form of a minute order or official court minutes. However, merely having the clerk enter in the minutes that a disclosure has been made would be insufficient. (*Adams v. Commission on Judicial Performance, supra*, 10 Cal.4th 866, 903-906). When this procedure is used, the minutes should reflect both the fact that the disclosure was made and the nature of the information disclosed. Although the task of documenting the disclosure may be delegated to a clerk, ultimately it is the judge's responsibility to confirm that the nature of the disclosure has been accurately documented and made a part of the case file. (See *Adams v. Commission on Judicial Performance, supra*, 10 Cal.4th 866, 906 [failure to disclose on the record in general terms the nature of the disqualifying relationship was improper for purposes of waiver]).

Moreover, because disclosures are intended to provide the parties and lawyers appearing before a judge with the information being disclosed, simply filing a written disclosure document in the court file is not sufficient. To comply with the canons, the judge must make the disclosure orally in open court and, where there is no court reporter or electronic recording, document the disclosure as noted above.

VI. Conclusions

In order to comply with the canon 3E(2)(a) requirement that disclosures be made “on the record,” trial court judges hearing matters that are not reported or electronically recorded must ensure that any disclosures become a part of the written record of proceedings. To accomplish this, disclosures must be made orally and documented in a writing that is entered in the case file as a minute order, official clerk’s minutes, or a formal order.

As guidance, the committee provides the following steps that may be taken in all cases where disclosure is required:

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1. If the proceeding is being reported or electronically recorded, make an oral disclosure in open court, stating in general terms the nature of any information being disclosed.
2. If the proceeding is not being reported or electronically recorded:
 - a) Make an oral disclosure in open court and prepare or have prepared a disclosure document that states in general terms the nature of any information disclosed;
 - b) Enter the disclosure document in the case file as a minute order, official court minutes, or a formal order; and
 - c) Check to confirm that the disclosure document accurately states the information disclosed and that it is entered in the case file.



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)).