



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 2020-015]

Title	Action Requested
Committee on Judicial Ethics Opinions Draft Formal Opinion 2020-015; Supervising Judge’s Duties When Party Complains About Judge In Pending Matter	Review and submit comments by October 13, 2020
Prepared by	Proposed Adoption Date
California Supreme Court Committee on Judicial Ethics Opinions Hon. Ronald B. Robie, Chair	To be determined
	Contact
	John S. Throckmorton Committee Counsel 415-865-7169 phone john.throckmorton@jud.ca.gov

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 2020-015 provides guidance to judges with supervisory duties about their obligations when in receipt of a complaint about a judge under their supervision. The opinion provides advice about when disclosure to the trial judge of ex parte communications relating to the complaint is ethically permissible. Where such disclosure is permitted, the opinion discusses additional steps that supervising judges should take to ensure

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that the trial judge follows proper procedures and any agreed upon or directed plan of corrective action, so that the disclosure does not affect the trial judge's impartiality or the fairness of pending proceedings. Finally, the opinion discusses additional steps a supervising judge may take if the trial judge persistently fails to carry out directives regarding the ex parte communication, including enlisting the presiding judge to instruct and encourage the trial judge to comply and, in appropriate circumstances, informing the Commission on Judicial Performance of the trial judge's failure to fulfill his or her ethical duties.

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comments, the committee will decide whether the draft opinion should be published in its original form, modified, or withdrawn (rule 9.80(j)(2); CJEO rule 7(d)).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 **October 13, 2020**, and may be submitted as described below.

Comments submitted in response to this Invitation to Comment are confidential communications to the committee and precluded from disclosure under the CJEO rules (rule 9.80(h); CJEO rule 5(b)). However, confidentiality may be waived under those rules (rule 9.80(h)(3); CJEO rule 5(b)(1), (e)) and the committee will post on the CJEO website, at the close of the comment period, any comments submitted with a statement of waiver of confidentiality or consent to disclose. The online comment form provided on the committee's website includes a waiver option.

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, 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 when a judge who has the duty to supervise other judicial officers may ethically disclose to a trial judge under their supervision an ex parte communication made in connection with a complaint against the trial judge.

In the attached draft opinion, the committee notes that judges with responsibility for supervision of judicial officers have an obligation to properly fulfill their duty of oversight when in receipt of a complaint about a judge under their supervision. (Canon 3C(4); Cal. Rule of

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Court, rule 10.603(c)(4), (d).) The draft opinion then examines canon 3B((7) of the California Code of Judicial Ethics, which limits the disclosure of ex parte communications relating to matters that are pending before a judge who is the subject of a complaint. The draft opinion advises that before disclosing ex parte communications to the trial judge that is the subject of a complaint, the supervising judge should consider whether it may be possible to investigate and resolve the complaint without making a disclosure. For example, disclosing ex parte communications may not be necessary where the complaint on its face is not reliable, or when the reliability of the complaint can be tested without disclosing the ex parte communication. If disclosure of the communication can be delayed until the case is no longer pending, then the limitations on ex parte communications can be sidestepped. If an ex parte communication is required, the draft opinion advises that the supervising judge disclose only information that is necessary for the investigation and proper resolution of the complaint. Where disclosure of ex parte communications is made, the draft opinion advises that the presiding judge remains responsible to monitor and supervise additional procedures that the trial judge may need to follow to prevent the ex parte communication from undermining the appearance of impartiality or affecting the fundamental fairness of the proceedings before the trial judge. If the trial judge fails to carry out the supervising judge's directives with regard to the ex parte communication, the draft opinion advises that others with judicial oversight duties can be enlisted to encourage the trial judge to comply. If the trial judge persistently refuses to comply with his or her ethical duties, then the draft opinion notes that in appropriate circumstances, the supervising judge may need to inform the Commission on Judicial Performance of the trial judge's conduct.

Invitation to Comment

The committee invites comment on the attached draft opinion by **October 13, 2020**. Comments may be submitted:

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

Mr. John S. Throckmorton, Committee Counsel
The California Supreme Court Committee on Judicial Ethics Opinions
350 McAllister Street
San Francisco, California 94102

The committee will post on the CJEO website, at the close of the comment period, or after October 13, 2020, those comments submitted with a statement waving confidentiality or consenting to CJEO's public disclosure of the comment.

Attachment: CJEO Draft Formal Opinion 2020-015

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

350 McAllister Street, Room 1144A

San Francisco, CA 94102

(855) 854-5366

www.JudicialEthicsOpinions.ca.gov

CJEO Draft Formal Opinion 2020-015

**SUPERVISING JUDGE’S DUTIES WHEN PARTY COMPLAINS ABOUT JUDGE IN
PENDING MATTER**

I. Question Presented

When may a supervising judge¹ ethically disclose to a trial judge an ex parte communication made in connection with a complaint against the trial judge?

II. Summary of Conclusions

Supervising judges may disclose an ex parte communication to a trial judge in the discharge of their duty of oversight, but they should do so only when there is no alternative way to properly investigate and respond to a complaint. It would be preferable not to disclose ex

¹ Presiding judges and other judges who have been delegated responsibility to supervise judicial officers are referred to in this opinion collectively as “supervising judges.” The term “supervising judges” includes judges who have been designated by their presiding judge to supervise a division, district or branch court pursuant to California Rules of Court, rule 10.603(b)(1)(A), as well as judges who have been delegated supervisory responsibilities by their presiding judge pursuant to rule 10.603(d).

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parte communications to the trial judge if the complaint can be properly investigated and resolved without such disclosure, or if the disclosure can be delayed until the case from which the complaint arises is no longer pending, and no further proceedings in the case before the trial judge are anticipated. If the disclosure of the ex parte communication to the trial judge is required, then the supervising judge should only reveal information that is necessary to investigate the allegations of the complaint, remediate any harm relating to the complaint, or improve the trial judge's conduct in the future. If ex parte communications are disclosed, then as part of the continuing duty of oversight, supervising judges should take reasonable measures to ensure that the trial judge follows proper procedures and any agreed upon or directed plan of corrective action so that the disclosure does not affect the trial judge's impartiality or the fairness of pending proceedings. If the trial judge persistently fails to carry out directives regarding the ex parte communication from a supervising judge acting under delegated responsibility for judicial oversight, then the supervising judge should enlist the presiding judge to instruct and encourage the trial judge to comply. In appropriate circumstances the supervising judge should inform the Commission on Judicial Performance of the trial judge's failure to fulfill his or her ethical duties.

III. Authorities

A. Applicable Canons²

Canon 1: "An independent, impartial, and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary is preserved."

Canon 2A: "A judge shall respect and comply with the law and shall act at all times in a manner that promotes confidence in the integrity and impartiality of the judiciary."

Canon 3B(7): "A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the full right to be heard according to law. Unless otherwise authorized by law, a judge shall not independently investigate facts in a proceeding and shall consider only the evidence presented or facts that may be properly judicially noticed. . . . 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:

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

“(a) Except as stated below, a judge may consult with other judges. A judge presiding over a case shall not engage in discussions about that case with a judge who has previously been disqualified from hearing that case; likewise, a judge who knows he or she is or would be disqualified from hearing a case shall not discuss that matter with the judge assigned to the case. A judge also shall not engage in discussions with a judge who may participate in appellate review of the matter, nor shall a judge who may participate in appellate review of a matter engage in discussions with the judge presiding over the case.

“[¶] . . . [¶] In any discussion with judges or court personnel, a judge shall make reasonable efforts to avoid receiving factual information that is not part of the record or an evaluation of that factual information. In such consultations, the judge shall not abrogate the responsibility personally to decide the matter.

“[¶] . . . [¶] (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, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.”

Canon 3C(1): “A judge shall diligently discharge the judge’s administrative responsibilities impartially, on the basis of merit, without bias or prejudice, free of conflict of interest, and in a manner that promotes public confidence in the integrity of the judiciary.”

Canon 3C(3): “A judge shall require staff and court personnel under the judge’s direction and control to observe appropriate standards of conduct and to refrain from (a) manifesting bias, prejudice, or harassment based upon race, sex, gender, gender identity,* gender expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, or (b) sexual harassment in the performance of their official duties.”

Canon 3C(4): “A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to ensure the prompt disposition of matters before them and the proper performance of their other judicial duties.”

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Canon 3D(1): “Whenever a judge has reliable information that another judge has violated any provision of the Code of Judicial Ethics, that judge must take appropriate corrective action, which may include reporting the violation to the appropriate authority.”

ADVISORY COMMITTEE COMMENTARY: Canons 3D(1) . . . “[¶] Appropriate corrective action could include direct communication with the judge . . . who has committed the violation, writing about the misconduct in a judicial decision, or other direct action, such as a confidential referral to a judicial . . . assistance program, or a report of the violation to the presiding judge, appropriate authority, or other agency or body. . . . [¶] ‘Appropriate authority’ means the authority with responsibility for initiation of the disciplinary process with respect to a violation to be reported.”

B. Other Authorities

Code of Civil Procedure, sections 170.3, subdivision (b), 170.4, subdivision (c).

California Rules of Court, rules 10.603(b)(1)(A), (c)(4), (d), 10.703(g).

California Standards of Judicial Administration, standard 10.20(d).

Alameda County Superior Court, Local Rules, rule 2.0.

Contra Costa County Superior Court, Local Rules, rule 2.150.

San Diego County Superior Court, Local Rules, rule 1.2.1.

San Francisco Superior Court, Local Rules, rule 2.6.

Inquiry Concerning Schnider (Aug. 31, 2009) <https://cjp.ca.gov/wp-content/uploads/sites/40/2016/08/Schnider_DO_08-31-09.pdf> (as of Aug. 27, 2020).

Inquiry Concerning Velasquez (2007) 49 Cal.4th CJP Supp. 175.

Inquiry Concerning Ross (2005) 49 Cal.4th CJP Supp. 79.

Inquiry Concerning Platt (2002) 48 Cal.4th CJP Supp. 227.

Rothman et al., California Judicial Conduct Handbook (4th ed. 2017) sections 5:2, 6:2.

Commission on Judicial Performance, Annual Reports for 2011, 2010, 2009, 2002, 2000, 1998, 1995, 1994, 1993, 1992, 1990 and 1988.

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California Judges Association, Judicial Ethics Committee, Opinion No. 64 (2009).

California Judges Association, Judicial Ethics Update (Jan. 2016).

IV. Discussion

Supervising judges are required to exercise proper oversight of the judicial officers they supervise, regardless of the size of their court or the way in which supervisory duties are delegated within the court. (Canon 3C(4); Cal. Rules of Court, rule 10.603(c)(4), (d).) As part of their oversight obligations, supervising judges frequently must handle complaints against trial judges under their supervision from parties, witnesses, court staff or others. (Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 6:2, pp. 339-340 (Rothman).) Supervising judges must respond to such complaints appropriately and in a timely manner, or face discipline for having failed to do so. (*Inquiry Concerning Schnider* (Aug. 31, 2009) pp. 4-5 (*Schnider*) [supervising family law judge disciplined for failing to respond to complaints about commissioner under his supervision from three different litigants and two attorneys]; Com. on Jud. Performance, Ann. Rep. (2011) Private Admonishment 9, p. 24 [presiding judge failed to take appropriate corrective action after receiving reliable information about serious wrongdoing by another judge on the court]; Com. on Jud. Performance, Ann. Rep. (2010) Advisory Letter 22, p. 27 [presiding judge did not properly respond to a complaint about a delay by a commissioner in a family law case]; Com. on Jud. Performance, Ann. Rep. (2009) Advisory Letter 14, p. 19 [judge charged with duty to supervise failed to ensure timely responses to litigants' complaints]; Com. on Jud. Performance, Ann. Rep. (2002) Advisory Letters 1, 15, pp. 23-24 [presiding judge did not respond to a litigant's complaint in a timely manner, or to a letter from the Commission on Judicial Performance inquiring about the status of the matter; another presiding judge failed to process a complaint for nine months]; Com. on Jud. Performance, Ann. Rep. (2000) Advisory Letters 17, 18, p. 22 [presiding judge failed to respond in a timely manner to a complaint; in another case, a presiding judge acted promptly but delayed before notifying complainant about the outcome of investigation]; Com. on Jud. Performance, Ann. Rep. (1998) Advisory Letters 28, 29, p. 28 [supervising judge failed to respond to a complaint against two commissioners and respond timely to a complaint against another commissioner]; Com. on Jud. Performance, Ann. Rep. (1995) Advisory Letters 35, 36, p. 27 [supervising judges delayed response to complaints about commissioners]; Com. on Jud. Performance, Ann. Rep. (1994) Advisory Letters 19, 21, 25, p. 19 [discipline imposed for failures to respond to complaints]; Com. on Jud. Performance, Ann. Rep. (1993) Private Admonishment G, p. 16 [same]; Com. on Jud. Performance, Ann. Rep. (1993) Advisory Letters 14, 19, pp. 18-19 [same]; Com. on Jud. Performance, Ann. Rep. (1992) Advisory Letter 20, p. 15; [same]; Com. on Jud. Performance, Ann. Rep. (1990) Advisory Letter

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29, p. 24 [same]; Com. on Jud. Performance, Ann. Rep. (1988) Advisory Letter 44, p. 16 [same].)³

When responding to a complaint against a trial judge under their supervision, supervising judges should first determine if the court’s local rules require them to follow any specific procedures. (Cal. Stds. Jud. Admin., std. 10.20(d) [a court’s informal complaint procedure “should be memorialized in the applicable local rules of court”]; see, e.g., Super. Ct. Alameda County, Local Rules, rule 2.0 [mandating that violations of the court’s policy against bias be reported to the presiding judge, but reserving for a future time implementation of Standard 10.20]; Super. Ct. Contra Costa County, Local Rules, rule 2.150 [describing procedures presiding judge should follow when in receipt of complaint against a bench officer]; Super. Ct. San Diego County, Local Rules, rule 1.2.1 [describing court’s policy against bias and access to court services]; Super. Ct. San Francisco, Local Rules, rule 2.6 [outlining procedures after a complaint has been filed].) But whether or not a court has adopted a local rule governing complaint procedures, a supervising judge should always take reasonable measures to review, investigate and respond to a complaint in a way that is designed to take appropriate corrective action when the supervising judge has determined that the information is reliable. (*Schnider, supra*, at p. 2 [citing canon 3C(3), which requires judges with supervisory authority to take reasonable measures to ensure the prompt disposition of matters in their courts, and canon 3D(1), which requires judges to take appropriate corrective action when they have reliable information that another judge has violated the code].)

The “reasonable measures” that a supervising judge should take in response to a complaint will depend on the facts and circumstances of each particular complaint. (*Schnider, supra*, at pp. 4-5 [noting that a supervising judge’s knowledge that a commissioner had a history of delay should have prompted the supervising judge to investigate further]; see also Cal. Rules of Court, rule 703(g) [describing alternative actions that a supervising judge may take after reviewing a complaint, depending on whether the allegations merit further investigation].) That is particularly true with regard to the decision whether to contact the trial judge accused of wrongdoing. For example, if it is clear that a party is protesting a legal ruling that the trial judge has made in a case, rather than an alleged breach of ethics, then it would not be necessary for the supervising judge to communicate with the trial judge about the matter. Similarly, if the supervising judge is able to determine that the complaint on its face is not reliable because it utterly lacks credibility, it may be reasonable not to pursue an investigation. Where the complaint seems at first blush to be reliable, a supervising judge may be able to test the complaint’s reliability and resolve the matter by reviewing transcripts, minute orders and other

³ To ensure that there is a clear record if needed, supervising judges should consider documenting in writing all steps taken in response to a complaint against a trial judge.

recordings of trial court proceedings, or by speaking with percipient witnesses. If a supervising judge is not able to fully resolve a complaint this way, he or she may be obligated by the duty of oversight to communicate with the trial judge who is the subject of a complaint, either as part of an investigation into the reliability of the complaint's allegations or, if the supervising judge is convinced of the reliability of the complaint, to confer with the trial judge about appropriate corrective action. (Canon 3D(1); Cal. Judges Assn., Judicial Ethics Update (Jan. 2016) § I.D, p. 4 [a presiding judge who receives a complaint by a litigant in a pending case has a duty to investigate the complaint which may include discussing the matter with the judge].)

In cases where the duty of oversight requires communication with the trial judge about a complaint, the supervising judge should give careful consideration to whether it is necessary to refer to specific facts and circumstances that relate to a proceeding pending before the trial judge. Disclosure of such information by the supervising judge to the trial judge would constitute an ex parte communication, which canon 3B(7) defines as “any communications to or from the judge outside the presence of the parties concerning a pending or impending proceeding.” Generally speaking, such ex parte communications are prohibited. With certain exceptions discussed, below judges must “not initiate, permit, or consider ex parte communications” and must “make reasonable efforts to avoid such communications.” (Canon 3B(7).) For that reason, if discussion of a case currently before the trial judge is required, the supervising judge should consider whether it would be appropriate and practicable to avoid an ex parte communication by delaying the discussion while the case proceeds to conclusion, and then resuming the inquiry with the trial judge when the case is no longer pending and no further proceedings before the trial judge are reasonably anticipated.⁴

It may not be appropriate or practicable in every instance to delay speaking with the trial judge who is the subject of a complaint. For example, if the allegations of a complaint set forth facts that might affect the outcome of a currently pending case, then the supervising judge may conclude that it would be improper to delay discussing the matter with the trial judge. Or, if the complaint alleges sexual misconduct or invidious racism or other bias, then the supervising judge may feel compelled to proceed in order to mitigate any harm should the allegations be established as true. Further, if a complaint arises in the context of a family law case, probate or another kind of matter that may last many years, or in a matter that is likely to be appealed and thereafter remanded to the trial court, then it may not be possible to stay an investigation long enough for the case to finally conclude. In those circumstances, there are exceptions to the

⁴ If a stay of an investigation is appropriate in order to delay a communication with the judge who is the subject of the complaint, then the supervising judge should consider whether to inform the complainant and other parties in the case of the stay as well as the reasons for the stay.

general prohibition on ex parte communications that permit disclosures of case-related information to trial judges when necessary to fulfill the supervising judges' oversight obligations, so long as certain conditions are met, as discussed below. (Cal. Judges Assn., Judicial Ethics Update (Jan. 2016) § I.D, p. 4 [where a presiding judge discloses a complaint to the judge it becomes an ex parte communication which the judge would have to disclose].) For example, Canon 3B(7)(b) allows ex parte communications for administrative purposes (such as judicial oversight) "where circumstances require." (*Inquiry Concerning Ross* (2005) 49 Cal.4th CJP Supp. 79, 104, fn. 6 (*Ross*) [ex parte communication by supervising judge while investigating complaint against trial judge was part of legitimate administrative duties pursuant to canon 3C(3), and for that reason it was not improper]; Rothman, *supra*, § 5.5, p. 268-269 [it is "essential" that the communication be necessary for it to be ethically permissible].) Canon 3B(7)(a) allows ex parte communications between trial judges and "court personnel and others authorized by law" (including a supervising judge) "as long as the communication relates to that person's duty to aid the judge in carrying out the judge's adjudicative responsibilities." A supervising judge's communication with a trial judge to investigate a complaint or correct the trial judge's violation of judicial ethics falls within this carve-out to the general prohibition on ex parte communications.

Even where ex parte communications are allowed in the circumstances described above, supervising judges should exercise caution to avoid unnecessary disclosure of facts or other specific information about a case pending before the trial judge who is the subject of the complaint. A trial judge does not have a right to know case-specific information that is not necessary to evaluate the allegations raised in a complaint against the trial judge or to take appropriate corrective action. (*Inquiry Concerning Velasquez* (2007) 49 Cal.4th CJP Supp. 175, 209 [trial judge disciplined for demanding copies of letters of complaint that had been submitted to his presiding judge].) "In any discussion with judges or court personnel, a judge shall make reasonable efforts to avoid receiving factual information that is not part of the record or an evaluation of that factual information." (Canon 3B(7)(a); accord canon 3B(7)(b) [allowing ex parte communications for administrative purposes only "where circumstances require"].) For that reason, the supervising judge should narrow the focus of any discussion with the trial judge to issues related to the administration of justice, the remediation of a violation of the trial judge's ethical duties, or the improvement of the trial judge's conduct in future matters. No extraneous information about cases pending before the trial judge, or that are impending, should be disclosed. (*Inquiry Concerning Platt*, (2002) 48 Cal.4th CJP Supp. 227, 245, fn. 4 [general inquiry into administrative matters does not become an ex parte communication unless and until it is linked to some specific case].) In addition, the supervising judge should not disclose information to the trial judge that would provide a procedural or tactical advantage to a party appearing before the trial judge in pending litigation. (Canon 3B(7)(b)(ii).) Furthermore, supervising judges should limit their interactions with the trial judge as much as possible to

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written communications, so that there is a clear record of what has been disclosed to the trial judge in case the content or propriety of the communications is ever called into question.

The supervising judge's duty of oversight continues after any disclosure of ex parte communications. That oversight duty includes monitoring and supervising additional procedures that the trial judge may need to follow to prevent the ex parte communication from undermining the appearance of impartiality or affecting the fundamental fairness of the proceedings before the trial judge. For example, the trial judge should notify all other parties of the substance of the ex parte communication, and allow them an opportunity to respond. (Canon 3B(7)(b); see also *Ross, supra*, 49 Cal.4th CJP Supp. at pp. 101-104 [judge removed from office after claiming that he provided prompt notice to parties of ex parte communication when in fact he had not done so]; Rothman, *supra*, § 5:2 at p. 259 [citing *Ross* and noting that the judge did not promptly notify the parties of his ex parte communication as required by canon 3B(7)(b)(ii)].) The supervising judge remains responsible to take reasonable measures to ensure that the trial judge follows proper procedures after the disclosure of an ex parte communications.

If the trial judge fails to carry out the supervising judge's directives with regard to the ex parte communication, then others with judicial oversight duties can be enlisted to encourage the trial judge to comply.⁵ If the trial judge persistently refuses to comply with his or her ethical duties, then in appropriate circumstances, the supervising judge may need to inform the Commission on Judicial Performance of the trial judge's conduct. (Cal. Rules of Court, rule 10.603(c)(4)(A); Cal. Judges Assn., Jud. Ethics Com., Opn. No. 64 (2009) [listing factors to consider when determining if a referral to the commission is appropriate, including (1) the seriousness of the trial judge's ethical violation, (2) the pervasiveness of the trial judge's misconduct, (3) the trial judge's willingness to correct his or her behavior, and his or her ability to do so, (4) the likelihood of repeat violations and difficulty of discerning the likelihood of new violations, and (5) a prior history of discipline].)

⁵ Presiding judges remain responsible for oversight of judicial officers under their supervision even when they have delegated particular tasks to another judge. Rule 10.603(d). For that reason, a supervising judge who has been delegated responsibility for judicial oversight (see, e.g., fn. 1, above) should make sure that their presiding judge is made aware if any judge in their court refuses to follow proper procedures relating to ex parte communications. Similarly, a presiding judge should inform a supervising judge who has delegated responsibility for oversight when a trial judge who falls within the scope of that delegated responsibility fails to follow the presiding judge's instructions about ex parte communications.

V. Conclusion

The proper handling of a complaint may require a supervising judge to disclose an ex parte communication to the trial judge who is the subject of the complaint. Before making such a disclosure, the supervising judge should determine if there are any appropriate alternative ways to proceed with the investigation and resolution of the complaint that would not require disclosure. If disclosure is required, it should be limited to what is necessary, and the supervising judge should monitor the trial judge and take reasonable measures, including instructing the trial judge, to make sure that he or she follows proper procedures after disclosure is made.



This opinion is advisory only (Cal. Rules of Court, rule 9.80(a), (e); Cal. Com. Jud. Ethics Opns., Internal Operating Rules & Proc. (CJEO) rule 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 rule 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)). The conclusions expressed in this summary are those of the committee and do not necessarily reflect the views of the California Supreme Court or any other entity. (Cal. Rules of Court, rule 9.80(b); CJEO rule 1(a).)

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