



**IMPLEMENTATION COMMITTEE FOR THE  
SUPREME COURT COMMITTEE ON JUDICIAL ETHICS OPINIONS**

350 McAllister Street  
San Francisco, CA 94102

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**M E M O R A N D U M**

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Date

February 17, 2009

To

Hon. Ronald M. George, Chief Justice of California  
Associate Justices of the California Supreme Court

From

Hon. Richard D. Fybel, Chair, Implementation  
Committee for the Supreme Court Committee on  
Judicial Ethics Opinions, and Members of the  
Committee

Subject

Implementation Committee's Final Report to the  
Supreme Court Concerning the Supreme Court  
Committee on Judicial Ethics Opinions

Action Requested

Approve rule for new Committee on  
Judicial Ethics Opinions and  
publication of this report

Deadline

N/A

Contact

Mark Jacobson, Committee Counsel  
415-865-7898 phone  
415-865-7664 fax  
mark.jacobson@jud.ca.gov

Sei Shimoguchi, Committee Counsel  
415-865-4509 phone  
415-865-7664 fax  
sei.shimoguchi@jud.ca.gov

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Introduction

The Implementation Committee for the Supreme Court's new Committee on Judicial Ethics Opinions is pleased to submit its unanimous final report to the Supreme Court. This report addresses and makes recommendations regarding the form, scope, and type of opinions to be rendered by the new committee, the procedures for making and responding to inquiries, the confidentiality of communications to and from the committee, publication of the committee's formal opinions, and other procedures and practices required to guide the new committee and its staff. The Implementation Committee (committee) has endeavored to make recommendations that are principled, practical, and innovative. Attached to this report is a proposed rule concerning the Committee on Judicial Ethics Opinions (CJEO). We recommend that any press release about CJEO be linked to this report and the rule.

In arriving at recommendations, committee members reviewed the charge from the court, which is to:

draft recommended procedures and rules for the ethics committee for the Supreme Court's consideration, including rules concerning the terms of committee members' appointments, procedures for receiving inquiries, confidentiality for those individuals making inquiries, and judicial and public access to the committee's opinions. . . . The committee, once appointed by the Supreme Court, will rely upon the Code of Judicial Ethics, the decisions of the court and of the Commission [on Judicial Performance], as well as other relevant sources, in its determinations. In all other respects, it will act independently of the court and the Commission in reaching its decisions.

(News Release #47/07, Aug. 28, 2007.)

Based upon the charge, the committee developed recommendations with a view toward creating and maintaining a system under which judges,<sup>1</sup> candidates for judicial office, and, in limited circumstances, other persons and entities, can obtain accurate, thorough, prompt ethics advice and have access to previous opinions to assist them in resolving their issues.

#### Summary of Recommendations

The core recommendations to the court are as follows:

1. The decision making of CJEO must be independent of the court, the Commission on Judicial Performance (CJP), and all other entities, and CJEO will rely on the Code of Judicial Ethics, the decisions of the court and of CJP, and other relevant sources in its opinions.
2. The committee recommends that the court appoint 12 members who are all appellate justices or superior court judges, active or retired, except that one seat should be reserved for a subordinate judicial officer employed full-time by a court. There should be no more than a total of two retired justices or judges appointed to CJEO at one time, but if an active justice or judge retires during his or her term, he or she shall be permitted to complete that term. The appointees should not be current members of the Supreme Court, CJP, or the California Judges Association's Judicial Ethics Committee (CJA Ethics Committee), but it would be beneficial for the court to consider appointing at least one member of the Supreme Court Advisory Committee on the Code of Judicial Ethics. The committee recommends that members serve four-year terms and be eligible for reappointment. The court should appoint a chair from among the members for a two-year term as chair and he or she should be eligible for reappointment to that position.

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<sup>1</sup> The term "judge" is used throughout this memorandum to refer to justices, judges, and subordinate judicial officers, as well as any other judicial officers authorized to request an opinion from CJEO.

3. The committee recommends that the court create CJEO through a new rule adopted by the court in Title 9 of the California Rules of Court. To avoid any concern about the confidentiality of communications to and from CJEO, the rule should include language complying with article I, section 3(b)(2) of the California Constitution (Proposition 59) and section 1040(b)(2) of the California Evidence Code.
4. The committee recommends that the new rule of court vest CJEO with broad authority to provide ethics advice to judges, including formal written opinions, informal written opinions, and oral advice. Although CJEO would retain the authority to render oral advice, it should adopt a revocable policy of referring requests for oral advice, with an exception and a clarification described in full on page 13 of this report, to the CJA Ethics Committee.
5. For over 50 years, CJA, through its Ethics Committee, has provided a valuable service by providing prompt, informal, oral advice to judges posing questions about ethical issues. The Implementation Committee recognizes that it is recommending a unique arrangement calling for a cooperative effort with a private professional association of California judges that offers ethics advice. To our knowledge, no other official body rendering ethics opinions in any state has an existing resource similar to the CJA Ethics Committee and, therefore, no other official body has entered into such a cooperative arrangement.
6. To implement the policy described in paragraph 4 above, while performing the duties entrusted to it by the Supreme Court, CJEO must have full, current, and accurate knowledge of the content of all inquiries made by judges and of the responses to these inquiries. The CJA Ethics Committee maintains a written record of all inquiries from judges and responses thereto. To enable CJEO and CJA to proceed as described in paragraph 4, the CJA Ethics Committee must provide CJEO on a continuing, timely basis (described on pages 13–14) with copies of the questions and answers it provides to inquiring judges, excluding the names of the judges and, to the extent possible, any identifying information.
7. The committee recommends that CJEO be permitted to amend its policies and internal operating procedures, and to recommend to the court amendments to the rules governing CJEO and the Code of Judicial Ethics, based on its experience handling inquiries from judges and its conclusions regarding how best to meet the needs of the California judiciary and the people of the state of California.

If the court agrees with these recommendations, draft rules are attached for the court's consideration in accordance with these recommendations.

## The Process

In August 2007, the court announced that, in accordance with the practice in the vast majority of other state court systems, it would appoint an official committee to provide judicial ethics advisory opinions, to be called the Supreme Court Committee on Judicial Ethics Opinions. Following this announcement, the court in October 2007 appointed the Implementation Committee, whose members have expertise in judicial ethics. Members include the seven members of the Supreme Court Advisory Committee on the Code of Judicial Ethics, two members nominated by CJP, and two members nominated by CJA who are knowledgeable about the CJA Ethics Committee.<sup>2</sup> The court charged the committee with considering and making recommendations to the court regarding the structure and procedures for CJEO, the form, scope, and type of opinions to be rendered by the new body, the procedures for making inquiries, the confidentiality of CJEO activities, publication of the opinions, and all other appropriate procedures and practices for CJEO.

### **A. First Implementation Committee Meeting—January 14, 2008**

The committee first met on January 14, 2008. In preparation for the meeting, the members reviewed extensive background information including the formation of and charge to CJEO, the American Judicature Society's *Judicial Ethics Advisory Committees: Guide and Model Rules* (1996), and a chart describing advisory committees in other states prepared by the American Judicature Society (AJS). At the committee's invitation, Cynthia Gray, Director of the AJS Center for Judicial Ethics, appeared and discussed the practices of ethics advisory committees around the country.

Ms. Gray described practices in other states concerning: (1) who may request an opinion from an ethics advisory committee; (2) the types of issues such a committee may consider; (3) the form of inquiries; (4) formal and informal opinions; (5) the effect of reliance on a committee's opinions in judicial disciplinary proceedings; (6) procedures for review of committee opinions; and (7) other tasks a committee may undertake, if any. Following her presentation, Ms. Gray answered questions from committee members.

Judge Ronni MacLaren, a former chair of the CJA Ethics Committee, then described the policies and procedures of that committee, answered questions from members of the Implementation

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<sup>2</sup> The seven members of the Supreme Court Advisory Committee on the Code of Judicial Ethics are Justice Richard D. Fybel of the Court of Appeal, Fourth Appellate District, Div. 3 (chair); Presiding Justice Barbara J. R. Jones of the Court of Appeal, First Appellate District, Div. 5; Acting Presiding Justice Laurence D. Rubin of the Court of Appeal, Second Appellate District, Div. 8; Judge Teresa Estrada-Mullaney of the Superior Court of San Luis Obispo County; Judge David Rothman (Ret.) of the Superior Court of Los Angeles County; Judge Brian Walsh of the Superior Court of Santa Clara County; and Ms. Beth J. Jay, Principal Attorney to the Chief Justice. The two CJP nominees are Judge Frederick P. Horn of the Superior Court of Orange County and chair of the CJP, and Victoria B. Henley, Director-Chief Counsel of the CJP. The two CJA nominees are Presiding Judge James M. Mize of the Superior Court of Sacramento County, former president of CJA, and Judge Ronni B. MacLaren of the Superior Court of Alameda County, former chair of the CJA Ethics Committee.

Committee, and distributed copies of documents describing procedures and rules of the CJA Ethics Committee.

Following these presentations, the committee discussed the following issues:

- Size and composition of CJEO
- Who may request an opinion
- Scope of opinions
- Form of request for an opinion
- Form of the opinion
- Effect of a judge's reliance on an opinion in judicial discipline proceedings
- Confidentiality of communications between CJEO and those requesting opinions
- Procedure for requesting review/modification/reconsideration of an opinion

The committee reached no decisions at this meeting. A second meeting was scheduled and, in the interim, committee staff researched and prepared a memorandum to committee members on the confidentiality of communications between CJEO and those who request advice. (A copy of the memorandum is attached for the court's consideration and an abbreviated discussion of confidentiality is set forth below on pages 7–9.)

In addition, after the January 14 meeting, the chair submitted a detailed inquiry through AJS to advisory committees in other states asking how they each handle oral requests for informal ethics opinions. Thirteen states responded to the inquiry. These responses were distributed in a memorandum to the committee members prior to the second meeting.

#### **B. Second Implementation Committee Meeting—March 10, 2008**

At the second meeting on March 10, 2008, the committee discussed the following issues:

- Confidentiality, including how to implement confidentiality provisions
- Formal opinions
- Informal opinions
- Reconsideration and modification of opinions
- Staff and budget
- Size and composition of CJEO
- Length of terms of CJEO members

As at the first meeting, members did not vote on any of the issues. The committee asked staff, under the direction of the chair, to draft a report to the Supreme Court before the third meeting reflecting the committee's discussions and containing tentative recommendations.

### **C. Third Implementation Committee Meeting—April 21, 2008**

At its third meeting on April 21, 2008, the committee discussed in detail the draft report and agreed on certain revisions. In addition to further dialogue regarding the issues listed above, the committee discussed at length the different types of ethics opinions and advice CJEO might be called upon to give and how CJEO could work cooperatively with CJA in responding to requests for opinions or advice. The members agreed that CJEO should be given great latitude in deciding whether and how to respond to these requests. Following the meeting, the chair and staff prepared a revised report and draft rules for consideration by the committee at its fourth meeting.

### **D. Fourth Implementation Committee Meeting—July 14, 2008**

At its fourth meeting on July 14, 2008, the committee discussed extensively the revised draft report and draft rules and agreed upon further revisions. The report and rules as revised were subsequently distributed to the committee and additional revisions were made based on the comments received. The committee unanimously approved this final report for submission to the court.

### **E. Invitation to Comment**

On August 27, 2008, the court authorized the committee to invite comments on the proposed rule and report, which was then publicly distributed along with the proposed rule. The committee received a total of 12 comments during the 76-day comment period ending on November 19, 2008. The comments are set forth in the attached comment chart.

### **F. Fifth Implementation Committee Meeting—December 4, 2008**

The committee thoroughly discussed the comments at its meeting on December 4, 2008, and revised the final report and draft rule based on those discussions. Revisions to the proposed rule and further analysis by the committee based on comments received are referred to in this report.<sup>3</sup> The committee has unanimously approved this report and the proposed rule for submission to the court.

### **Recommendations**

The committee carefully considered its charge in developing recommendations for creating a court-sponsored system under which judges and candidates for judicial office can obtain ethics advice. The proposed system would allow judges, judicial candidates, and other interested individuals and entities to suggest topics for formal written opinions from CJEO on matters pertaining to judicial ethics, thus providing guidance on issues of wide interest. To best serve the

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<sup>3</sup> Some comments contained in the comment chart are not specifically mentioned in this report because they are obviously inconsistent with the fundamental independence and role of CJEO, misconstrue or ignore our actual recommendations, or do not pertain to the proposed rule at all.

judiciary and the people of the state of California, the committee recommends that the court broadly authorize CJEO to provide all forms and types of ethics advice to judges and candidates for judicial office, including formal written opinions, informal written opinions, and oral advice.

The committee discussed the historical role of CJA in providing both formal and informal ethics advice and opinions to judges. It concluded that this history warrants working cooperatively with CJA to use its existing system for dispensing oral advice. As discussed below, the committee recommends that CJEO adopt a policy under which requests for oral advice would be referred to CJA, with the exception and the clarification described on page 13. For CJEO to perform its role effectively, however, the CJA Ethics Committee must provide CJEO on a continuing, timely basis with written copies of all the questions asked and the answers given by the ethics committee. This information is crucial to CJEO's ability to meet its responsibility to determine which topics merit formal written opinions and will help ensure the quality and consistency of advice given to judges. Because the committee believes CJEO must have flexibility to revoke or amend its policies and procedures in order to provide the full scope of service the court intends, CJEO may, in its discretion, change this policy to meet those goals.

#### **A. Source of Governing Rules**

The committee considered two methods the court could use to establish rules and procedures for CJEO: (1) amending the Code of Judicial Ethics pursuant to the court's authority under article VI, section 18(m) of the California Constitution; or (2) adopting a new rule in Title 9 (Rules on Law Practice, Attorneys, and Judges) of the California Rules of Court. Article VI, section 18(m) grants authority to the Supreme Court to "make rules for the conduct of judges." The contemplated provisions relating to CJEO primarily address procedure rather than the "conduct of judges" per se, although the very purpose of the committee places it squarely under the constitutional grant of authority. In any event, Title 9, which is part of the California Rules of Court, seems most appropriate for these rules. The title contains procedural rules adopted by the Supreme Court relating to the practice of law and to disciplinary proceedings affecting judges. The use of a rule of court also is consistent with the approach in most other jurisdictions. Therefore, the committee recommends that provisions governing CJEO be set forth in a new rule adopted by the Supreme Court and included in Title 9.

#### **B. Confidentiality**

As noted above, staff prepared a memorandum to committee members on the confidentiality of communications between CJEO and those requesting advice or opinions. The memorandum also covers the confidentiality of CJEO documents, records, files, and proceedings. A copy of the memorandum is attached for the court's review but will not be linked for public distribution. We provide a brief analysis of relevant confidentiality issues in this report.

The court must be able to assure judges that their inquiries to CJEO and its responses will remain confidential. Only then will judges be willing to contact CJEO and provide complete information when requesting an opinion. If judges are reluctant to ask for advice because of concerns over confidentiality, CJEO's effectiveness will be hindered and its benefit to the public

reduced. Ethical conduct by judges promotes the fair administration of justice, and it is therefore important that judges be encouraged to seek ethics advice.

Generally, it is unclear the extent to which the various statutes and provisions governing confidentiality of government communications apply to the judicial branch and its committees and agencies. There is strong support, however, for the conclusion that the “official information” privilege established in Evidence Code section 1040(b)(2) would in any event provide protection. That section states that a public entity has a qualified privilege to refuse to disclose “official information” when disclosure “is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice.” The substantial benefits to the public and the administration of justice achieved by encouraging judges to seek and follow ethics advice in order to conduct themselves in accordance with the Code of Judicial Ethics outweigh the necessity for disclosure. The committee recommends that the court expressly cite this conclusion in the rule in order to demonstrate how the public interest would best be served by confidentiality.

Article I, section 3(b)(2) of the California Constitution (which was amended by Proposition 59 in 2004) provides that “[a] statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access [to government information] shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.” Although this provision’s application to judicial branch actions has not yet been determined, the committee suggests the court expressly state in the rule the importance of promoting ethical conduct by judges as a basis for its adoption. Such a declaration should be sufficient to satisfy the constitutional requirement, if applicable.

The committee also discussed whether canon 3D(1) of the Code of Judicial Ethics should be amended to protect confidentiality. Canon 3D(1) states that a judge with reliable information that another judge has violated any provision of the Code of Judicial Ethics must “take or initiate appropriate corrective action, which may include reporting the violation to the appropriate authority.” Because most, if not all, of CJEO’s members will be active judges, canon 3D(1) arguably could put the judge members in the position of having to report ethics violations they learn about through inquiries from judges seeking ethics opinions. This obligation would compromise CJEO’s confidentiality and dissuade judges from seeking ethics advice. The committee believes that a judge member of CJEO satisfies his or her obligation to take “appropriate corrective action” by advising an inquiring judge how to handle an ethics issue. There is therefore no need to amend canon 3D(1) to create an exception for judges on CJEO who become aware of judicial misconduct through a recognized request for ethics advice. If the court agrees with this analysis, it may wish to refer the matter to the Advisory Committee on the Code of Judicial Ethics to consider whether commentary should be added following canon 3D(1) that addresses this issue.

Finally, the committee discussed the issue of access to confidential CJEO records by Supreme Court justices and court staff, by CJP, or anyone else. Except for those opinions and advice that are published or available on the CJEO Web site (discussed on page 14), all CJEO records

should be accessible only by CJEO members and its staff. A judge may waive confidentiality as to his or her ethics inquiry and CJEO's response; he or she may not waive the confidentiality of CJEO proceedings.

### **C. Functions of CJEO**

The committee recommends that the Supreme Court vest CJEO with the authority to issue formal written opinions, informal written opinions, and oral advice; in short, CJEO should have the authority to employ any method it finds useful and appropriate to provide guidance to judges and judicial candidates. Members agreed that CJEO opinions should generally be limited to prospective conduct, but there should be an exception for past conduct that has future consequences. This exception would allow CJEO to issue opinions to judges seeking advice on curative measures that may be taken concerning past conduct, and on self-reporting requirements.

The committee concluded that requests for opinions or advice must contain the name and court (if applicable) of the inquiring judge or judicial candidate, a complete description of the issue, including the relevant facts and circumstances, whether the inquiry involves past or future conduct, and relevant dates, including the date by which an opinion is needed. In addition, CJEO should ask the judge or judicial candidate whether he or she is aware of any pending litigation or CJP or State Bar disciplinary proceeding involving the subject matter of the inquiry to avoid a situation in which a CJEO opinion conflicts with a subsequent formal disciplinary finding or court ruling in the same matter.

In response to the invitation to comment, one commentator suggested that CJEO ask the inquiring judge whether he or she has sought the advice of counsel or an opinion from the CJA Ethics Hotline. The committee agreed that the judge must disclose all relevant information to CJEO, including whether the CJA Ethics Committee has given advice on the issue.

CJEO should develop a form designed to elicit information that will enable it to determine the appropriate form of response. The information not only should clearly set forth the inquiry, but also should be sufficient to assist CJEO in determining whether a formal written opinion, an informal written opinion, oral advice, or a combination thereof may be appropriate.

#### **1. Formal written opinions**

To provide broad guidance, which is one of the Supreme Court's stated goals, CJEO's formal written opinions should be made available to judges and the public. After discussing which factors CJEO should consider in determining whether to issue a formal written opinion, who may request an opinion, the form of a request for an opinion, the number of committee member votes needed to issue an opinion, and requests for reconsideration or modification of an opinion, the committee agreed that CJEO generally should have broad authority to decide under what circumstances a formal written opinion should be issued. All such opinions issued by CJEO should be published on its Web site in searchable form.

a. Criteria

The committee first considered the criteria for issuing a formal written opinion. It is anticipated that most of these opinions will address recurring topics, such as disqualification, disclosure, contempt, campaign conduct, and ex parte communications. Nevertheless, limiting formal written opinions to frequent or recurring issues seems unnecessarily restrictive. CJEO should also have discretion to issue these opinions on new or unusual issues that are of importance or interest to the judiciary, as well as situations involving interpretation of the Code of Judicial Ethics or other governing provisions. The opinions should be written without providing identifying information as to any individual. The committee recommends that CJEO be authorized to issue a formal written opinion whenever it deems it appropriate.

b. Who may suggest topics for formal written opinions

The committee agreed that anyone, including judges, attorneys, court employees, entities such as CJA and CJP, and members of the general public, should be permitted to suggest topics for formal written opinions. CJEO should have discretion to issue such opinions when it deems it appropriate, regardless of who brings the issue to CJEO's attention. Entertaining suggestions from a wide variety of sources also will help inform CJEO about which ethics issues need to be addressed. The rule should authorize CJEO to issue such opinions on its own initiative and to decline to issue an opinion.

Two commentators suggested that CJP not be permitted to propose topics for formal written opinions. One commentator opined that CJP's constitutional mandate is limited to enforcing rules of conduct; it does not include formulating rules of conduct. Allowing CJP to suggest topics for formal written opinions would "inject them into the rule-making process." Another commentator reasoned that this might allow CJP to "seek an opinion to bolster its disciplinary position in a pending case against a judge." This commentator stated that prohibiting suggestions from CJP would increase judges' confidence in the independence of CJEO and would further the goal of encouraging judges to seek ethics advice. The committee does not agree with either proponent; CJP is in an excellent position to propose topics based on its knowledge of areas that may benefit from clarification and explanation.

c. Form of request

The committee recommends that all suggestions of topics for formal written opinions be submitted in writing, which includes electronic mail.

d. Number of votes

The committee agreed that two-thirds of CJEO members should be required to approve a formal written opinion, regardless of the size of CJEO. As discussed below, the committee recommends that the court appoint 12 members, so 8 votes of those 12 members would be needed to issue such an opinion. To ensure that CJEO's formal written opinions are accorded the appropriate

amount of deference, the committee recommends that CJEO require approval by a two-thirds vote even if some members are unable to cast votes, either because of unavailability or disqualification. The committee also recommends that these opinions specify how many CJEO members voted in favor of and against the opinion.

*e. Withdrawal, modification or superseding of opinion*

To ensure a formal written opinion is adequately vetted before it is adopted, the committee concluded that draft opinions should be made available for public comment for a specified period of time. This could be accomplished by posting the draft opinion on CJEO's Web site (discussed below) and inviting comment for at least 45 days after posting.

The 30-day period in our original report has been changed to 45 days after the committee considered the comment by CJP that 30 days is too short because CJP meets every seven or eight weeks. In addition to changing the time period, the committee added provisos in the rule that CJEO may in its discretion decide not to provide a comment period, or it may shorten or lengthen the period. These provisos would be exceptions to the general 45-day comment period. Based on the comments in response to distribution of a draft opinion, CJEO would determine whether the draft opinion should be made final, modified, or withdrawn. CJEO, however, may at any time decide whether an opinion should be withdrawn, modified or superseded.

One commentator suggested that use of the term "reconsideration" may result in confusion because a judge may rely on an opinion that is later revised. Based on this comment, the committee concluded the proposed rule should be revised to refer to "withdrawal, modification or superseding" of an opinion instead of "reconsideration."

**2. Informal written opinions**

In addition to formal written opinions, the committee recommends that CJEO issue informal written opinions responding to requests arising from facts that may be unique to the inquirer. There would be two major differences between formal and informal written opinions. First, CJEO would provide informal written opinions in a substantially shorter period of time using a simplified procedure. Second, the opinions would not be published, but rather would be provided to the inquiring judge confidentially. As recommended below, however, CJEO would publish a summary of the advice provided in certain informal opinions. CJEO would have discretion to determine which opinions to summarize. Other distinctions are discussed below.

*a. Timing*

CJEO should determine the time frame for rendering an informal written opinion, taking into consideration the time necessary to define and frame the issue, prepare a draft response with analysis and citations, and circulate the draft to committee members. This could be determined on a case-by-case basis or by establishing a specific time period within which CJEO plans to provide opinions. CJEO may adjust the time period if necessary.

b. Who may request

The committee recommends that all state Supreme Court and appellate justices, superior court judges, subordinate judicial officers, judges in the Assigned Judges Program, State Bar Court judges, and candidates for judicial office be permitted to request an informal written opinion. The committee concluded that, ultimately, CJEO should have discretion to decide the nature of its responses, including declining to provide a substantive response if appropriate.

c. Form of request

The committee recommends that all requests for informal written opinions be submitted in writing, which includes electronic mail.

d. Number of votes

Although the committee concluded that CJEO should set its own rules regarding the number of votes needed to issue an informal written opinion, committee members recommend that such opinions be adopted by a simple majority vote. CJEO may decide to form subcommittees to respond to requests for informal written opinions. In that case, a majority vote should suffice to issue an opinion. The committee rejected a supermajority requirement for these opinions because of the risk that if there are not enough members to form a supermajority, CJEO would not be able to offer an opinion. A judge or candidate for judicial office who seeks an ethics opinion should have a reasonable expectation that he or she can obtain an opinion from CJEO. As with formal written opinions, the committee recommends that CJEO disclose in its informal written opinions the number of members who voted for and against the advice given.

**3. Oral advice**

The committee identified two broad categories of inquiries in which oral advice may be appropriate. The first is when a caller has a question that can be answered by referral to a canon, statute, rule of court, section in Judge David Rothman's *California Judicial Conduct Handbook*, existing formal written opinion, or other authority. The second is when a question cannot be answered by such a referral, but rather may require greater analysis before a response can be provided, and time is of the essence.

CJA has been providing ethics advice, primarily oral, to the California judiciary for approximately 50 years. The CJA Ethics Committee receives, through its telephone hotline, over 400 inquiries per year. Acknowledging the important role that CJA has played in this area for several decades, the committee nevertheless concluded that CJEO must have authority to issue all forms and types of ethics advice, including oral advice. If CJEO determines that it must exercise all available options in order to provide the highest quality of advice, it must be free to do so.

In light of CJA's past service, however, the committee sought to develop a model that would incorporate into the process CJA's experience and existing hotline service giving oral advice

provided by its Ethics Committee, while still affording CJEO the necessary information to fulfill its function effectively. Committee members appreciate the value of CJEO working cooperatively with CJA while avoiding any arrangement that might impair CJEO's ability to do its job.

Accordingly, the committee recommends that the court grant CJEO the authority to give advice of any type and in any form, but that CJEO refrain from giving oral advice and instead permit CJA to fill that role, with one clarification and one exception. In the committee's original report, we recommended an exception under which CJEO would provide oral advice to a judge if a question can be answered by referral to a canon, statute, rule of court, section in the *California Judicial Conduct Handbook* by David Rothman, previous opinion, or other authority. In response to comments by CJA and individual judges, we wish to clarify that CJEO would inform the judge or judicial candidate about a particular source that may address the issue, but would not provide oral advice as referred to in proposed rule 9.80(e)(1). In these instances, CJEO would explain that if the cited source does not answer the caller's questions, the caller should contact CJA. Because CJEO would not be offering "advice" under these circumstances and would be referring the caller to CJA, the exception for limited oral advice by CJEO referred to in our initial report has been eliminated.

The second exception in the initial report provided that if a caller needs oral advice and is referred to the CJA Ethics Committee, but nevertheless asks to obtain advice from CJEO rather than CJA, CJEO should answer the question. No change is recommended. The committee did not agree with comments suggesting all callers simply be referred to CJA. Instead, this exception to the policy applies when the caller chooses to request advice from CJEO, not CJA.

CJEO should in any event inform those making inquiries about its authority to issue formal and informal written opinions.

The committee received a comment from CJA and from an individual judge urging it to include a more specific and prominent reference to this policy in the proposed rule. The committee agreed with this suggestion and subsection (f) of the proposed rule has been added accordingly.

The committee unanimously concluded that having complete information about the questions and answers exchanged during the process of oral inquiries and responses is essential for CJEO to fulfill its role. Only with a complete record of the inquiries being made can CJEO effectively evaluate the areas and issues of concern so that it can determine whether a formal written opinion should be provided, or whether other avenues, such as a request for action by the Advisory Committee on the Code of Judicial Ethics, should be pursued. Under the model the committee recommends, CJA would provide to CJEO on a continuing, timely basis copies of all CJA "informal responses." These informal responses are written records maintained by the CJA Ethics Committee that contain a recitation of the oral inquiry and the response, but do not include the name of the inquiring judge. CJA would provide copies of informal responses periodically, coinciding with CJA Ethics Committee meetings, unless CJEO determines that the meetings are not held on a sufficiently frequent or timely basis. CJEO would not seek from CJA

records of such informal responses predating the formation of CJEO. Communications from CJA to CJEO would be confidential under statute and court rule, as provided in the proposed rule.

We anticipate that this approach will provide a comprehensive and consistent array of informed services to California's judges and judicial candidates. In the event that these procedures do not allow CJEO to fulfill its mission to provide reliable and accurate judicial ethics advice, CJEO must be able to decide at any time, and for any reason, to change the policy of relying on CJA and instead offer comprehensive oral advice. Thus, for example, and not by way of limitation, if CJA does not provide the informal responses or if the responses contain insufficient information, or if CJEO determines it needs the ongoing interaction with judges to best serve the judiciary and the public, it may revoke or amend the policy. CJEO's action would not, of course, limit CJA's ability to offer ethics advice in any form. As noted, the committee recommends that the Supreme Court provide CJEO with the independent authority to take such steps if it finds them necessary.

Regarding who may request oral advice, the committee recommends that the categories be the same as those who may request informal written opinions, i.e., all state Supreme Court and appellate justices, superior court judges, subordinate judicial officers, judges in the Assigned Judges Program, State Bar Court judges, and candidates for judicial office.

#### **D. Staff and Budget**

The committee concluded that to operate effectively, CJEO will need two staff attorneys initially. If it becomes clear additional staff is needed, CJEO may inform the court. In addition to staff, CJEO will need an e-mail address, a Web site (which could be linked to the judicial branch site), and a toll-free telephone number. To underscore CJEO's independence, its e-mail address, Web site, and offices should be maintained separately from those of the Supreme Court, CJP, and the Judicial Council, except to the extent that common technological or other administrative assistance is needed.

#### **E. Composition and Size**

An adequate number of members is needed to ensure that CJEO is representative and will handle effectively the requests for opinions it receives. The committee recommends that the court establish a committee of 12 members, to be appointed by the court, although this number might change depending on whether CJEO decides regularly to issue oral advice and the number of requests and suggestions for opinions it receives. As noted above, we recommend that a formal written opinion require the votes of 8 of the 12 members, or two-thirds of the number of authorized members if CJEO consists of fewer or more than 12 members. As for informal written opinions or oral advice, the committee believes the court should authorize CJEO to adopt its own rules as to how many votes are needed before it issues an opinion or advice. The committee recommends, however, that CJEO adopt informal written opinions by majority vote to avoid a situation in which CJEO is unable to offer an opinion because there is no supermajority.

Regarding composition, the committee concluded that all members should be judges, either active or retired. Two comments suggested lay and attorney members be included on the committee. The committee still concludes that, although attorney and lay members may add perspective to CJEO deliberations, CJEO opinions would garner greater respect and deference among the judiciary if its members were all active or former judges. There should be no more than a total of<sup>4</sup> two retired judges appointed to CJEO at any time, but if an active judge member retires while serving a term, that judge should be allowed to complete his or her term provided he or she does not become an active member of the State Bar or enter into privately compensated dispute resolution activities.

In appointing judge members, the court should seek to select members from appellate and trial courts and from urban and rural courts. Members should have a wide range of judicial experience, and judicial ethics experience would be beneficial.<sup>5</sup> The committee also recommends that the court appoint one subordinate judicial officer employed full-time by a court. The California Court Commissioners Association requested that we make this recommendation and persuasively argued that such an appointment would be appropriate because commissioners typically deal with traffic, small claims, and domestic relations matters that often give rise to complaints and questions about judicial conduct. Moreover, there are differences between certain ethical rules applicable to subordinate judicial officers and judges, including, among others, rules related to gifts and the law of contempt.

The committee recommends terms of four years. However, to stagger the terms so membership changes incrementally, the committee recommends the initial terms be five, four, three, and two years. Under this proposal, three members would be appointed to five-year terms, three members would receive four-year terms, three members would be appointed for three years, and three members would have two-year terms. Members would be eligible for reappointment to one additional four-year term. If, however, a new member is appointed to fill the remainder of a former member's term, the new member should be eligible to serve two full terms in addition to the remainder of the former member's term. The committee rejected the alternative of appointing members to four-, three-, two-, and one-year terms to avoid having any members serving initial one-year terms.

The court should appoint the chair. Committee members agreed that the term of the chair (as chair) should be two years, but he or she should be eligible for reappointment as chair. The chair would serve the remainder, if any, of his or her term as a member of CJEO.

The committee recommends that justices of the California Supreme Court be excluded from membership because the court may ultimately have to decide an issue that may come before CJEO or rule on the correctness of an opinion rendered by CJEO. To preserve the independence

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<sup>4</sup> Adding the words "a total of" clarifies our initial report.

<sup>5</sup> Both CJA and an individual judge commented that CJEO members should have a background in judicial ethics, either from teaching judicial ethics, membership on the CJA Ethics Committee, or having published in the area of judicial ethics.

of CJEO, the committee also recommends that no active members of CJP or the CJA Ethics Committee be appointed. Concurrent service on CJEO and these other entities does not seem desirable because of the potential for overlapping or conflicting responsibilities. Both CJA and an individual judge suggested in response to the invitation to comment that CJEO should include a liaison who is a member of the CJA Ethics Committee. The committee rejected this suggestion for the same reasons. The concern about independence does not extend to *former* members of these entities, and it may be advantageous to appoint such knowledgeable individuals to the new committee.

The committee also believes it would be beneficial for the court to consider appointing to CJEO at least one member of the Supreme Court Advisory Committee on the Code of Judicial Ethics. Such a person could use his or her perspective from the two entities to enrich the discussions and actions of each.

#### **F. Effect of reliance on opinion**

The effect to be given to an advisory opinion in judicial disciplinary proceedings is a critical issue because it may influence whether a judge decides to seek advice and the form of advice sought. CJP, of course, has authority to determine the weight to be accorded an opinion by CJEO. The Supreme Court may also do so in the context of its constitutional discretionary review of CJP decisions. The committee understands that CJP intends to formally consider the issue of deference to opinions and advice by CJEO once CJEO's structure and procedures are established, as some of the details may influence CJP's deference determination.

The most common approach in other jurisdictions regarding the effect of ethics opinions rendered by an official entity is that compliance with an official opinion serves as evidence of good faith on the part of the judge. A few states view compliance with an official opinion as a complete defense to a charge of misconduct; other states have declared only that evidence that a judge has sought and complied with an advisory opinion is admissible in disciplinary proceedings.

In its original report, the committee recommended that CJP view compliance with advice or opinions from CJEO as evidence of good faith by the judicial officer who sought and relied on the opinion. Several commentators stated that CJP should accord the same weight to CJA advice as it does to CJEO advice. The committee recommends that CJP consider viewing compliance with advice or opinions from CJEO and CJA as evidence of good faith by the judicial officer who sought and relied on the advice or opinion. This revision is also consistent with the recommended policy of referring requests for oral advice to CJA.

#### **G. Publication**

Wide dissemination of advisory opinions should provide guidance to all members of the judiciary. The committee recommends that all formal written opinions and summaries of certain informal written opinions and oral advice be posted on CJEO's Web site. CJEO should have

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discretion to determine which summaries of informal written opinions and oral advice should be published. CJEO should also consider the creation of a booklet or a binder containing all opinions to be distributed periodically in hard copy or electronically to all judges and updated when new opinions are issued.

The committee is available to respond to any questions the court may have about the issues covered in this report.

RF/MJ/SS  
Attachments