



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

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CJEO Oral Advice Summary 2018-024

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**REPORTING MISCONDUCT BY A SUPERIOR COURT RESEARCH
ATTORNEY IN A PENDING MATTER**

I. Questions Presented:

The Committee on Judicial Ethics Opinions was asked for an opinion on the following question:

Does an Administrative Presiding Justice or Presiding Justice (APJ) of a Court of Appeal have an ethical obligation to report a superior court research attorney to the State Bar or the research attorney's presiding judge when the APJ determines that the research attorney engaged in misconduct related to a particular appellate matter?

A petition for review in the matter was denied by the California Supreme Court; however, at the time of the request for this opinion, there was sufficient time to petition the United States Supreme Court seeking review.

II. Oral Advice Provided:

A. Communication Between Courts on a Pending Matter

Canon 3B(7) of the Code of Judicial Ethics¹ prohibits a judge from initiating, permitting, or considering ex parte communications, which include any communications from the judge outside the presence of the parties concerning a pending matter, absent certain exceptions. One exception is that, in certain instances, a judge may consult with other judges. (*People v. Hernandez* (1984) 160 Cal.App.3d 725, 739 [“History and logic recognize the value of certain types of discussion between judges and, in our present society, the demands of the judicial function require it.”].) The canon explicitly states, however, that a communication between a judge who may participate in appellate review of a matter and judge presiding over the case is an improper ex parte communication. (Canon 3B(7)(a).) Communication between members of the trial and appellate courts is similarly prohibited by Government Code section 68070.5, subdivision (a), which states “[w]hen a case is appealed, there shall be no communication direct or indirect, between the judge or judicial officer who heard the case and *any* judge of the reviewing court concerning the facts or merits of the case” unless it is a written communication and all the parties are sent a copy at the time of the communication. (*Italics added.*)

The prohibition against ex parte communications endures while the matter is pending. The terminology section of the Code of Judicial Ethics states that a matter “continues to be pending through any period during which an appeal may be filed and any appellate process until final disposition.” (Terminology, “Pending proceeding,” *Roberts v. Commission on Judicial Performance* (1983) 33 Cal.3d 739, 746-748 [trial court judge censured for telephoning the presiding justice who participated in a writ proceeding before the rehearing time had expired in violation of canon 3B(7) and Government Code section 68070.5.]; Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 5:60, p. 320 (Rothman) [“When an appellate panel reverses a trial judge’s decision and remands the case for a new trial, and the matter is pending in the trial court, the appellate justices on the panel and trial judge may not discuss the reasons for reversal

¹ All further references to canon or canons and to the Advisory Committee commentary are to the California Code of Judicial Ethics unless otherwise indicated.

even though the appellate matter is final.”].) Here, the matter was recently denied by the California Supreme Court; however, a party may petition for a writ of certiorari to the United States Supreme Court within 90 days after entry of the order denying discretionary review by the California Supreme Court. (U.S. Supreme Ct. Rules, rule 13.) Therefore, it is still a pending matter even if the matter is final as it relates to the California courts.

The committee advises that until the matter is no longer pending within the meaning of the Code of Judicial Ethics, the APJ may not contact the presiding judge. Such contact would be an impermissible ex parte communication regarding a pending matter. (Canon 3B(7)(a).)

B. Reporting Attorney Misconduct

Canon 3D(2) states that a judge shall take appropriate corrective action whenever a judge has personal knowledge that an attorney has committed misconduct or has violated any provision of the Rules of Professional Conduct.² Personal knowledge is defined within the terminology section of the Code of Judicial Ethics to “mean actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.” (Terminology, “Knowledge;” Cal. Judges Assn., Jud. Ethics Com., Opn. No. 74 (2018) p. 5 [advising that a judge has personal knowledge of attorney misconduct where the judge would be able to testify to the misconduct as a percipient witness].) The Advisory Committee commentary following canons 3D(1) and (2) explains that appropriate corrective action may include direct communication with the attorney who has committed the violation or other direct action, including reporting the violation to the presiding judge, appropriate authority, or other agency or body. The appropriate authority is “the authority with responsibility for initiation of the disciplinary process with respect to a violation to be reported.” (Advisory Com. com. foll. canons 3D(1), 3D(2).)

If the APJ has personal knowledge of facts that he or she concludes constitute misconduct, then the APJ has an affirmative obligation to take appropriate corrective action.

² Business and Professions Code sections 6086.7 and 6086.8, subdivision (a), Penal Code section 1424.5, and California Rules of Court, rules 10.609 and 10.1017 impose additional mandatory reporting requirements to the State Bar for specific types of attorney misconduct.

(Canon 3D(2).) In this instance, the committee advises that the APJ could report the misconduct to the State Bar, which is the authority with responsibility for initiation of an attorney disciplinary proceeding. During the time that a party may file a writ of certiorari with the United States Supreme Court in the matter, direct communication with the superior court research attorney or the presiding judge constitutes impermissible ex parte communication. (Canon 3B(7)(a).)



This oral advice summary 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 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)).