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CJEO Oral Advice Summary 2020-034

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**JUDGES WORKING REMOTELY AFTER COURT REOPENINGS DURING
THE COVID-19 PANDEMIC**

I. Question

During the COVID-19 pandemic, many courts have provided remote technology that allows judges to perform selective judicial functions outside of public courtrooms while courts are closed. The California Supreme Court Committee on Judicial Ethics Opinions (CJEO) has been asked if there are ethical considerations prohibiting trial court judges from continuing to work remotely after courts reopen, out of concerns about their age or preexisting medical

conditions that could place them at greater risk if they were to be physically present in a courtroom and potentially exposed to the coronavirus there.

II. Oral Advice Provided

Judges are not ethically prohibited from working remotely when assigned by their presiding or supervising judge to matters authorized by law or emergency rules enacted in response to the COVID-19 pandemic to be performed remotely from outside of a courtroom.

While judges have an obligation under the Code of Judicial Ethics¹ to hear all matters assigned to them unless they are disqualified, an individual judge's personal health status, safety concerns, and possible disabilities are court management matters determined by presiding judges. Presiding judges rather than individual judges are ultimately responsible for making assignments. The nature of those specific assignments determines whether remote judicial functions are authorized by law or, in the circumstances of the pandemic, authorized under the Judicial Council Emergency Rules Related to COVID-19. (Cal. Rules of Court, appen. 1.) CJEO is without authority to offer advice about legal and court management questions concerning the balance of specific assignments with reasonable accommodations for the health and safety of individual judicial officers.

III. Discussion

In response to the public health threats posed by the COVID-19 pandemic, the judicial branch has enacted emergency rules that have partially or completely closed courts to protect the health and safety of the public, court staff, and judicial officers. (Cal. Rules of Court, appen. I, *Emergency Rules Related to COVID-19* (Emergency Rules);² CJEO Oral Advice Summary 2020-032 (2020), *Judicial Obligations Regarding Witness Face Masks During the COVID-19*

¹ All further references to canons and the code are to the California Code of Judicial Ethics unless otherwise indicated.

² All further citations to Emergency Rules are to appendix 1 of the California Rules of Court.

Pandemic, Cal. Supreme Ct. Com. Jud. Ethics Opns., pp. 2-3 (CJEO Oral Advice Summary 2020-032) [whether a witness may be compelled to remove a mask is resolved as a legal rather than ethical matter in individual cases by balancing witness protections and a litigant’s constitutional rights].) Under the Emergency Rules, many judicial proceedings and court operations have been conducted by employing video, audio, and telephonic means for remote appearances and by using remote interpreting, reporting, and recording to make the official record of actions and proceedings. (Emergency Rule 3(a)(1) [courts may require that judicial proceedings and court operations be conducted remotely for the protection of health and safety].)

As emergency conditions have changed, courts have begun to reopen. In anticipation of being asked to return to court, judges who have been performing judicial functions remotely are considering the risks of returning based on their individual circumstances. These reopenings raise the question for judges who may be especially vulnerable if they contract COVID-19 by reason of age, preexisting health conditions, or other factors, about whether they have ethical obligations to conduct judicial functions in person in a public courtroom.

The code requires judges to hear all matters assigned to them unless they are disqualified. (Canon 3B(1) [duty to serve and trial court disqualification grounds based on the statutory obligations in Code Civ. Proc., §§ 170, 170.1].) While the code requires that judges manage their courtrooms in a manner that provides all litigants the opportunity to have their matters fairly adjudicated in accordance with the law (canon 3B(8)), it does not obligate judges to hear all matters in a public courtroom.

As a general legal matter, judicial functions are to be performed in court unless authorized by statute to be performed outside of open court or in chambers. (*Richmond v. Shipman* (1976) 63 Cal.App.3d 340-343.) In chambers functions are not confined to courthouse spaces and may extend to any place in which a judge is authorized to hear court matters. (*Superior Court v. County of Mendocino* (1996) 13 Cal. 4th 45, 64, fn. 10 [whenever a judge is present at a place designated for the transaction of judicial business, the judge’s acts may be considered as the acts of the court], citing *Von Schmidt v. Widber* (1893) 99 Cal. 511, 514; see *id.* at p. 513 [the term “chambers” may include any out-of-court places where judges may hear applications or make

orders while the court is not in session]; *People v. Valenzuela* (1968) 259 Cal.App.2d 826, 831 [judicial functions performed while court is not in session are done in chambers if performed at the judges residence or elsewhere].)

Several statutes authorize remote judicial functions. For example, Code of Civil Procedure sections 164 and 166 specify judicial actions that may be performed in chambers by appellate justices and trial court judges.³ The Emergency Rules enacted in the wake of the COVID-19 pandemic expand the list of authorized remote judicial actions by broadly authorizing courts to “require that judicial proceedings and court operations be conducted remotely.” (Emergency Rule 3(a)(1) [authority to require remote appearances granted to courts, with exceptions for specified proceedings], (b) [rule effective until COVID-19 state of emergency lifted or until amended or repealed].) Assuming the validity of this broad authority and its extension to court reopenings, these rules do not raise ethical issues for individual judges about their ethical duty to hear assigned matters in which they are not disqualified.

Under the code, a judge’s ethical duty to serve or disqualify in any specific matter is necessarily determined by a judge on a case-by-case basis after the matter has been assigned. But the prerequisite question of assignment is exclusively in the hands of presiding judges who are responsible for ensuring the effective management and administration of the courts, consistent with any rules adopted by the Judicial Council or the courts. (Cal. Rules of Court, rule 10.603(a).) Indeed, presiding judges have the ultimate authority to make judicial assignments while balancing the needs of the public, their court, a particular judge’s interests, the desirability of placing a judge in a particular type of assignment, and other appropriate factors. (*Id.*, rule 10.603(c)(1)(A)(i), (iv), (vi), (viii).) This authority extends to judicial schedules, oversight of judges, and personnel matters. (*Id.*, rule 10.603(c)(2), (4), (5).) As court managers, presiding judges are also responsible for their court’s duty to provide reasonable accommodations under state and federal disability laws to those attending court proceedings (*id.*,

³ Code of Civil Procedure section 166, subdivision (b) further provides that “[a] judge may, out of court, anywhere in the state, exercise all the powers and perform all the functions and duties conferred upon a judge as contradistinguished from the court, or that a judge may exercise or perform in chambers.”

rule 1.100(a)(1)(3)), and have a duty to report absences caused by disability for specified periods of time and failure to perform judicial duties or carry out assignments (*id.*, rule 10.603(c)(4)(A)(i) & (ii)).

It is clear from these rules that an individual judge's personal health status, safety concerns, and possible disabilities, are court management matters determined by presiding judges, who are ultimately responsible for making assignments. Those specific assignments determine whether remote judicial functions are authorized by law or, in the circumstances of the pandemic, authorized under the Emergency Rules. CJEO is without authority to offer advice about legal and court management questions concerning the appropriate balance of specific assignments against reasonable accommodations for the health and safety of individual judicial officers. (CJEO Oral Advice Summary 2020-032, *supra*, p. 2 [what the law accords concerning witness face masks in any particular matter is a legal question rather than a judicial ethics question and CJEO has no authority to offer advice about balancing legal or court management concerns].)



This oral advice summary is advisory only. (Cal. Rules of Court, rule 9.80(a), (e); Cal. Supreme Ct. Com. Jud. Ethics Opns. (CJEO), Internal Operating Rules & Proc. 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)). 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)).