

**TEAM 6 – KENNEDY INN OF COURT – MCLE HANDOUT**

**“DAYS INN OF COURT”**

**March 18, 2025**

**I. CJEO Annotated California Code of Judicial Ethics**

- i. Canon 1. A judge shall uphold the integrity and independence of the judiciary.
- ii. Canon 2. A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.
- iii. Canon 3. A judge shall perform the duties of judicial office impartially, competently, and diligently.
- iv. Canon 4. A judge shall so conduct the judge’s quasi-judicial and extrajudicial activities as to minimize the risk of conflict with judicial obligations.
- v. Canon 5. A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary.
- vi. Canon 6. Compliance with the Code of Judicial Ethics.

**II. Canon 3(B)(7) of the California Code of Judicial Ethics**

- (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. This prohibition extends to information available in all media, including electronic. 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:
  - o (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.
    - A judge may consult with court personnel or others authorized by law, as long as the communication relates to that person’s duty to aid the judge in carrying out the judge’s adjudicative responsibilities.

- 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.
    - For purposes of Canon 3B(7)(a), “court personnel” includes bailiffs, court reporters, court externs, research attorneys, courtroom clerks, and other employees of the court, but does not include the lawyers in a proceeding before a judge, persons who are appointed by the court to serve in some capacity in a proceeding, or employees of other governmental entities, such as lawyers, social workers, or representatives of the probation department.
  - (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.

### **III. CJEO Formal Opinion 2022-020**

#### **a. Question**

- i. What types of judicial conversations fall within the canon permitting judges to consult with other judges under the California Code of Judicial Ethics?

#### **b. Summary of Conclusion**

- i. Canon 3B(7)(a) expressly permits judges to consult with other judges subject to limited exceptions. For instance, a judicial officer may not consult with judicial officers who are disqualified from the matter or who may be involved in appellate review of the matter.
- ii. The code does not define consultation; however, courts have interpreted the term broadly. The committee interprets consultation to mean any conversation among judges that assists a judicial officer in carrying out judicial functions, facilitates independent decision making, and does not otherwise violate the code. Permissible consultation need not be phrased as a question or request for advice,

initiated by the deciding judge, or follow a particular format. Consultation may include a discussion of the facts or legal issues in a case; however, a judge should make reasonable efforts to avoid receiving facts that are outside of the record.

- iii. Judicial consultation may necessarily involve a discussion of facts, parties, or witnesses that another judge might potentially encounter in a future proceeding; this is permissible under the code. There is a presumption of honesty and integrity in the judiciary, and judicial officers must be entrusted with the ability to disregard information that would be inadmissible in their own matters.

#### **IV. California Rule of Professional Conduct 3.5 – Contact with Judges, Officials, Employees, and Jurors**

- a. Except as permitted by statute, an applicable code of judicial ethics or code of judicial conduct, or standards governing employees of a tribunal,\* a lawyer shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal. This rule does not prohibit a lawyer from contributing to the campaign fund of a judge or judicial officer running for election or confirmation pursuant to applicable law pertaining to such contributions.
- b. Unless permitted to do so by law, an applicable code of judicial ethics or code of judicial conduct, a rule or ruling of a tribunal,\* or a court order, a lawyer shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before the judge or judicial officer, except:
  - 1. in open court;
  - 2. with the consent of all other counsel and any unrepresented parties in the matter;
  - 3. in the presence of all other counsel and any unrepresented parties in the matter;
  - 4. in writing with a copy thereof furnished to all other counsel and any unrepresented parties in the matter; or
  - 5. in ex parte matters.
- c. As used in this rule, “judge” and “judicial officer” shall also include: (i) administrative law judges; (ii) neutral arbitrators; (iii) State Bar Court judges; (iv) members of an administrative body acting in an adjudicative capacity; and (v) law clerks, research attorneys, or other court personnel who participate in the decision-making process, including referees, special masters, or other persons\* to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court.

#### **V. Ethics Hotliner – What Are “Friends” For?**

- a. Duty of Candor

In an age when lawyers use the Internet to research everyone from clients to prospective jurors to potential witnesses, social networking sites are a tempting vehicle for obtaining private information.

Bar associations have recognized that it is ethical for lawyers to search social networking sites for damaging information they might use against their opponents in lawsuits. (See N.Y. State Bar Ass'n, Comm. on Prof. Ethics, Op. 843 (2010) (available at [www.nysba.org](http://www.nysba.org)).)

b. California Rules

California lawyers must conduct themselves honestly whether they are in the courtroom or not. (See Cal. Bus. & Prof. Code § 6106.) Section 6106 arguably governs a lawyer's activities and statements on social networking sites, as it states that "the commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension." Further, the Business and Professions Code imposes misdemeanor criminal liability on a lawyer who engages in or consents to any deceit or collusion "with intent to deceive the court or any party." (Cal. Bus. & Prof. Code § 6128(a).)

Local California bar associations are beginning to weigh in on the ethics of social networking - with respect to judges, jurors, and adverse parties. The San Diego County Bar Association has observed that friending a represented party violates California Rule of Professional Conduct 2-100. (See San Diego County Bar Ass'n, Legal Ethics Op. 2011-2 (available at [www.sdcba.org](http://www.sdcba.org)).) Its opinion cites the above-mentioned New York and Philadelphia opinions and notes in passing that the context in which a friend request is made, and the attorney's motive in sending it, are relevant to the ethics inquiry. But the conclusion is clear: "[T]he attorney's duty not to deceive prohibits him from making a friend request even of unrepresented witnesses without disclosing the purpose of the request. Represented parties shouldn't have 'friends' like that and no one - represented or not, party or non-party - should be misled into accepting such a friendship." (San Diego Op. 2011-2 at p. 13.)

c. Friending Judges

It may seem impressive for a lawyer's Facebook page to show a number of local judges as "friends." However, a judge must consider serious issues before accepting a counsel's friend request to connect via Facebook. The request can be transmitted easily enough, but any judge who thinks about accepting the invitation must abide by California's Judicial Canons of Ethics.

California is among just a handful of states that have publicly issued ethics opinions on this issue. (See Cal. Judges Ass'n Judicial Ethics Comm., Op. 66 (available at [www.caljudges.org](http://www.caljudges.org)).) The California opinion provides a concise discussion of judges' involvement in online social networking communities. Recognizing the realities of modern online communication, the opinion states that a judge may indeed participate in an online social networking community, and that his or her online social network may include lawyers who might appear before him or her. The opinion states, however, that a judge's online social network may not include lawyers who have cases pending before the judge.

In fact, there is no per se prohibition against judges' online interaction with lawyers who may appear before them. (Cal. Jud. Ethics Comm. Op. 66 at p. 6.) The opinion notes the similarity between online social interaction and the type of in-person social interaction permitted through participation in organizations such as the American Inns of Court, which is designed to promote professionalism and civility, and other social or civic organizations. Online interactions are of course subject to the same

rules that apply to any other interactions, in the sense that they cannot elicit the appearance of bias or undue influence in violation of the Canons of Judicial Ethics. In particular, Canon 2A requires that judges must "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." In addition, Canon 2B prohibits a judge from conveying or permitting anyone else to convey "the impression that any individual is in a special position to influence the judge," and Canon 4B(1) prohibits extrajudicial activities that would "cast reasonable doubt on the judge's capacity to act impartially."

## **VI. Formal Opinion 94-001 – Orange County Bar Association**

### **a. Statement of Facts**

Judges and attorneys often intermingle outside of the courthouse, in both social activities and professional organizations, such as the county bar association. As a result, there are times when judges and attorneys who are presently appearing before them are at a professional or social function together.

### **b. Question Presented**

The Question, therefore, is under what circumstances is judge-attorney contact outside of the courtroom permissible.

### **c. Applicable Rules**

The issue of acceptable contact between attorneys and judges outside of the courtroom is dealt with in both the Rules of Professional Conduct and in the Code of Judicial Conduct.

### **d. Brief Analysis**

#### *i. Conduct of Attorneys*

“[T]he Rules of Professional Conduct contain no language which makes it unethical for an attorney to have social contact with a judge, either alone or in a group setting, regardless of whether or not the attorney is presently appearing before that judge. So long as the attorney is not giving the judge a gift of some sort, or communicating with the judge about the merits of an active case, the Rules of Professional Conduct put no restraints on an attorney’s conduct vis-à-vis a judge outside the courtroom.”

#### *ii. Conduct of Judges*

“A judge is under somewhat greater restraint than is an attorney. It is therefore important for attorneys to be as aware of the rules governing judicial conduct as they are of the rules governing attorney conduct. This knowledge will enable attorneys to avoid putting members of the judiciary in compromising or awkward situations. The Code of Judicial Conduct contains language which, although not condemning social contact between court and counsel, creates the need for caution under certain circumstances.”

iii. *Conclusion*

“The Rules of Professional Conduct permit an attorney to socialize with a judge outside of the work environment without concern as to whether the attorney is presently appearing before that judge, provided that the two parties do not discuss any pending case and that the attorney does not give the judge anything of value (absent a relationship in which the giving of gifts is normal). The Code of Judicial Conduct permits a judge to socialize with an attorney outside of the work environment, without concern as to whether the attorney is presently appearing before that judge, providing that the nature of the conduct does not affect the judge’s ability to be impartial, or the public’s opinion about the judge’s ability to be impartial. Both sets of behavioral rules are concerned only with the effect any such conduct might have on the ability of a litigant to have a fair and impartial trial.”

**I. STATUTES**

a. Code of Civil Procedure Section 170.1

i. (a) A judge shall be disqualified if any one or more of the following are true:

1.

a. (A) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.

b. (B) A judge shall be deemed to have personal knowledge within the meaning of this paragraph if the judge, or the spouse of the judge, or a person within the third degree of relationship to either of them, or the spouse of such a person is to the judge’s knowledge likely to be a material witness in the proceeding.

2. (2)

a. (A) The judge served as a lawyer in the proceeding, or in any other proceeding involving the same issues he or she served as a lawyer for a party in the present proceeding or gave advice to a party in the present proceeding upon a matter involved in the action or proceeding.

b. Code of Civil Procedure Section 170.3

i. (a)

1. (1) If a judge determines himself or herself to be disqualified, the judge shall notify the presiding judge of the court of his or her recusal and shall not further participate in the proceeding, except as provided in Section 170.4, unless his or her disqualification is waived by the parties as provided in subdivision (b).

2. (2) If the judge disqualifying himself or herself is the only judge or the presiding judge of the court, the notification shall be sent to the person having authority to assign another judge to replace the disqualified judge.

ii. (b)

1. (1) A judge who determines himself or herself to be disqualified after disclosing the basis for his or her disqualification on the record may ask the parties and their attorneys whether they wish to waive the disqualification, except where the basis for disqualification is as provided in paragraph (2). A waiver of disqualification shall recite the basis for the disqualification, and is effective only when signed by all parties and their attorneys and filed in the record.
2. (2) There shall be no waiver of disqualification if the basis therefor is either of the following:
  - a. (A) The judge has a personal bias or prejudice concerning a party.
  - b. (B) The judge served as an attorney in the matter in controversy, or the judge has been a material witness concerning that matter.
3. (3) The judge shall not seek to induce a waiver and shall avoid any effort to discover which lawyers or parties favored or opposed a waiver of disqualification.
4. (4) If grounds for disqualification are first learned of or arise after the judge has made one or more rulings in a proceeding, but before the judge has completed judicial action in a proceeding, the judge shall, unless the disqualification be waived, disqualify himself or herself, but in the absence of good cause the rulings he or she has made up to that time shall not be set aside by the judge who replaces the disqualified judge.

iii. (c)

1. (1) If a judge who should disqualify himself or herself refuses or fails to do so, any party may file with the clerk a written verified statement objecting to the hearing or trial before the judge and setting forth the facts constituting the grounds for disqualification of the judge. The statement shall be presented at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification. Copies of the statement shall be served on each party or his or her attorney who has appeared and shall be personally served on the judge alleged to be disqualified, or on his or her clerk, provided that the judge is present in the courthouse or in chambers.

## II. CASES

- *Withrow v. Larkin*, 421 U.S. 35 (1974)
- *People v. Farmer*, 47 Cal.3d 888 (1989)
- *People v. Hernandez*, 160 Cal.App.3d 725 (1984)

## III. SECONDARY SOURCES

- Rothman et al., *California Judicial Conduct Handbook* (4th ed. 2017) sections 5:9 and 5:50

- Alabama Judicial Inquiry Commission Opinion No. 94-523 (1994) Colorado Judicial Ethics Advisory Board Opinion No. 2004-02 (2004) Geyh et al., Judicial Conduct and Ethics (6th ed. 2020) section 1.02

The Anthony M. Kennedy Inn of Court certifies that this activity has been approved for MCLE credit by the State Bar of California.