



California Supreme Court Committee on Judicial Ethics Opinions

350 McAllister Street, San Francisco, California 94102-3688

www.JudicialEthicsOpinions.ca.gov

INVITATION TO COMMENT

[CJEO Draft Formal Opinion 2021-018]

Title

Committee on Judicial Ethics Opinions
Draft Formal Opinion 2021-018;
Providing Feedback on Attorney Courtroom
Performance

Action Requested

Review and submit comments by
November 17, 2021

Proposed Date of Adoption or Other Action

To be determined

Prepared by

California Supreme Court Committee on
Judicial Ethics Opinions
Hon. Ronald B. Robie, Chair

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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) 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, or other action.

CJEO Draft Formal Opinion 2021-018 provides guidance on whether a judicial officer may provide feedback about an attorney's courtroom performance when requested by the attorney or the attorney's supervisor.

CJEO Draft Formal Opinion 2021-018 has been approved by the committee for posting and public comment but has not been adopted by the committee in final form. The attached draft opinion is circulated for comment purposes only

After receiving and reviewing comments, the committee will decide whether the draft opinion should be published in its original form, modified, or formally withdrawn. (Rule 9.80(j)(2); CJEO rule 7(d)). Comments are due by **November 17, 2021**, and may be submitted as described below.

All comments submitted to the committee are deemed not to be confidential communications and may be posted on the CJEO website for public review at the committee's discretion. (Rule 9.80(h)(1) & (4).) All comments the committee receives will be carefully considered by the CJEO members when taking final action on an opinion, which may include approving the opinion as drafted, approving a revised opinion for publication, or formally withdrawing the draft opinion. (Rule 9.80(l).)

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 expedited 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 about whether it is ethically permissible for a judicial officer to provide feedback on an attorney's courtroom performance when requested by the attorney or the attorney's supervisor.

In the attached draft opinion, the committee concludes that the Code of Judicial Ethics does not prohibit judicial officers from providing feedback on courtroom performance to appearing attorneys or their supervisors; however, judicial officers must carefully consider several canon restrictions and exercise caution before doing so. When providing feedback on courtroom performance, a judicial officer may not:

- engage in prohibited ex parte communications (canon 3B(7));
- make a public comment on a pending proceeding or nonpublic comment that may interfere with a fair trial or hearing (canon 3B(9));

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- create an appearance of favor or bias (canons 1, 2, and 2A);
- suggest that anyone is in a special position to influence the judicial officer (canon 2B(1)); or
- engage in coaching by advising on tactics or strategies that give one side an advantage in litigation or by providing legal advice.

The opinion advises that judicial officers who choose to provide feedback on courtroom performance must avoid discussing their own assigned matters until final resolution and must also refrain from discussing matters pending before other judges or courts. In addition, judicial officers who choose to provide feedback must ensure that the substantive nature and tone of any feedback is neutral and must be equally available to attorneys representing various interests or viewpoints. When choosing to provide feedback, judicial officers must also ensure that their conduct does not suggest a special relationship with any attorney or law office and should avoid acting as evaluators of attorney job performance. Finally, judicial officers must ensure that any feedback does not provide any attorney or party with an inside advantage.

Invitation to Comment

The committee invites comment on the attached draft opinion by **November 17, 2021**. Comments may be submitted:

- through [CJEO's online comment form](#);
- by email to Judicial.Ethics@jud.ca.gov; or
- by mail to:
CJEO
The Supreme Court of California 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 **November 17, 2021**, those comments submitted during the comment period. Comments submitted that are intended for review by the committee members only must be clearly identified as confidential and will not be posted for public review following the close of the comment period.

Attachment: CJEO Draft Formal Opinion 2021-018

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

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CJEO Formal Opinion 2021-018

**PROVIDING FEEDBACK ON ATTORNEY COURTROOM
PERFORMANCE**

I. Question

The Committee on Judicial Ethics Opinions (CJEO) has been asked whether it is ethically permissible for a judicial officer to provide feedback on an attorney's courtroom performance when requested by the attorney or the attorney's supervisor.

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II. Summary of Conclusions

The Code of Judicial Ethics¹ does not prohibit judicial officers from providing feedback on courtroom performance to appearing attorneys or their supervisors; however, judicial officers must carefully consider several canon restrictions and exercise caution before doing so. When providing feedback on courtroom performance, a judicial officer may not: (1) engage in prohibited ex parte communications (canon 3B(7)); (2) make a public comment on a pending proceeding or nonpublic comment that may interfere with a fair trial or hearing (canon 3B(9)); (3) create an appearance of favor or bias (canons 1, 2, and 2A); (4) suggest that anyone is in a special position to influence the judicial officer (canon 2B(1)); or (5) engage in coaching by advising on tactics or strategies that give one side an advantage in litigation or by providing legal advice.

In practice, this means that judicial officers choosing to provide feedback on attorneys' courtroom performance must avoid discussing their own assigned matters until final resolution and must also refrain from discussing matters pending before other judges or courts. In addition, judicial officers who choose to provide feedback must ensure that the substantive nature and tone of any feedback is neutral and must be equally available to attorneys representing various interests or viewpoints. When choosing to provide feedback, judicial officers must also ensure that their conduct does not suggest a special relationship with any attorney or law office and should avoid acting as evaluators of attorney job performance. Finally, judicial officers must ensure that any feedback does not provide any attorney or party with an inside advantage.

¹ All further references to the code, canons, terminology, and advisory committee commentary are to the California Code of Judicial Ethics unless otherwise indicated.

III. Authorities

A. Applicable Canons

Terminology: “‘Pending proceeding’ is a proceeding or matter that has commenced. A proceeding continues to be pending through any period during which an appeal may be filed and any appellate process until final disposition. The words “proceeding” and “matter” are used interchangeably, and are intended to have the same meaning...”

Canon 1: “A judge shall uphold the integrity and independence of the judiciary.”

Canon 2: “A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.

Canon 2A: “A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. A judge shall not make statements, whether public or nonpublic, that commit the judge with respect to cases, controversies, or issues that are likely to come before the courts or that are inconsistent with the impartial performance of the adjudicative duties of judicial office.”

Advisory Committee commentary following canon 2 and 2A: *“The test for the appearance of impropriety is whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity, impartiality, and competence.”*

Canon 2B(1): “A judge shall not allow family, social, political, or other relationships to influence the judge’s judicial conduct or judgment, nor shall a judge convey or permit others to convey the impression that any individual is in a special position to influence the judge.”

Canon 2B(2)(d): “A judge may respond to judicial selection inquiries, provide recommendations (including a general character reference relating to the evaluation of persons being considered for a judgeship), and otherwise participate in the process of judicial selection.”

Canon 2B(2)(e): “A judge may serve as a reference or provide a letter of recommendation only if based on the judge’s personal knowledge of the individual.

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These written communications may include the judge’s title and may be written on stationery that uses the judicial title.”

Canon 3B(7): “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...”

Canon 3B(9): “A judge shall not make any public comment about a pending or impending proceeding in any court, and shall not make any nonpublic comment that might substantially interfere with a fair trial or hearing.”

Canon 4B: “A judge may speak, write, lecture, teach, and participate in activities concerning legal and nonlegal subject matters, subject to the requirements of this code.”

Advisory Committee commentary following canon 4B: “*As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that time permits, a judge may do so, either independently or through a bar or judicial association or other group dedicated to the improvement of the law. It may be necessary to promote legal education programs and materials by identifying authors and speakers by judicial title. This is permissible, provided such use of the judicial title does not contravene Canons 2A and 2B.*”

Canon 4G: “A judge shall not practice law.”

B. Constitutional Provisions, Statutes, and Other Authorities

Code of Civil Procedure, section 170.1, subdivisions (a)(2)(B) and (a)(2)(C)

Adams v. Commission on Judicial Performance (1995) 10 Cal. 4th 866

Inquiry Concerning Mills (2018) 6 Cal. 5th CJP Supp. 1

Commission on Judicial Performance, *Public Admonishment of Judge Ronald Maciel* (1997)

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Commission on Judicial Performance, *Public Admonishment of Judge Stuart Scott* (2016)

CJEO Formal Opinion 2018-012 (2018), *Providing Educational Presentations at Specialty Bar Events*, California Supreme Court Committee on Judicial Ethics Opinions

CJEO Oral Advice Summary 2018-024 (2018), *Reporting Misconduct by a Superior Court Research Attorney in a Pending Matter*, California Supreme Court Committee on Judicial Ethics Opinions

Rothman et al., California Judicial Conduct Handbook (4th ed. 2017) sections 2:24, 5:8, 10:16

California Judges Association, Judicial Ethics Updates (April 2000), (February 2002), (March 2004), (June 2007), and (January 2017)

Geyh et al., Judicial Conduct and Ethics (6th ed. 2020) section 8.02

IV. Discussion

It is not uncommon for judicial officers to be asked to provide feedback on attorney courtroom performance in a variety of contexts. For example, an attorney who has appeared in a judge's courtroom may ask the judge for a letter of recommendation or reference in the context of a judicial application or application for another position or honor. The code expressly contemplates this scenario and permits judicial officers to provide such feedback. (Canon 2B(2)(d) [a judge may respond to judicial selection inquiries, provide recommendations and general character references, and otherwise participate in the process of judicial selection]; canon 2B(2)(e) [a judge may serve as a reference or provide a letter of recommendation if based on the judge's personal knowledge].)

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It is also commonplace and permissible for judicial officers to provide feedback on attorney performance in educational settings, such as moot court programs, Inns of Court, or bar association panels. (Canon 4B [judges may speak, write, lecture, teach, and participate in other activities concerning legal and nonlegal subject matters, subject to other requirements of the code]; Advisory Com. com. foll. canon 2B [as a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice, and may do so to the extent time permits, either independently or through a bar or judicial association or other group dedicated to the improvement of the law]; CJEO Formal Opinion 2018-012 (2012), *Providing Educational Presentations at Specialty Bar Events*, Cal. Supreme Ct. Com. Jud. Ethics Opns., pp. 2, 7-8 (CJEO Formal Opinion 2018-012) [judges may participate in legal educational activities so long as participation does not suggest bias in favor of or against a particular group]; Geyh et al., *Judicial Conduct and Ethics* (6th ed. 2020) § 8.02, p. 8-2 [judicial engagement in lecturing and scholarship is a time-honored tradition].)

Sometimes, supervisors at a public law agency may ask a judicial officer for feedback on an attorney or class of attorneys who regularly appear before the judicial officer in order to address any administrative issues that may be interfering with court operations. Judicial officers are not prohibited from providing this type of feedback in order to improve the administration of justice and the efficient resolution of cases, provided the feedback does not constitute an ex parte communication in the judicial officer's assigned matters, impermissibly comment on matters pending before other judges or courts, create an appearance of partiality or influence, or provide anyone with an advantage.

The rules and cautions that judicial officers must consider when determining whether to provide requested feedback about attorney courtroom performance are discussed more fully below.

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A. Ex Parte Communications

Judicial officers may not provide feedback about attorney courtroom performance if doing so would result in an ex parte communication. The code defines ex parte communications as “*any* communications to or from a judge outside the presence of the parties concerning a pending or impending proceeding.” (Canon 3B(7) [emphasis added] [prohibiting ex parte communications with few exceptions, none of which are directly relevant here].) A “pending proceeding” is a proceeding or matter that has commenced through any period during which an appeal may be filed and any appellate process until final disposition. (Terminology, Pending proceeding; CJEO Oral Advice Summary 2018-024 (2018), *Reporting Misconduct by a Superior Court Research Attorney in a Pending Matter*, Cal. Supreme Ct. Com. Jud. Ethics Opns., pp. 3-4 [a matter remains pending if there is still sufficient time for a party to petition for review].)

However well-intentioned, commenting on an appearing attorney’s courtroom performance runs the risk of discussing the facts, merits, or status of a particular case or matter. Even a seemingly innocuous comment may interfere, intentionally or unintentionally, with one party’s decision-making process or strategy on appeal. For this reason, judicial officers should exercise extreme caution when asked to provide feedback at the close of a trial or hearing and may not comment on attorney performance relating to that trial or hearing prior to final resolution of all possible appeals. (Canon 3B(7); Rothman et al., *California Judicial Conduct Handbook* (4th ed. 2017) § 2:24, p. 92 (Rothman) [unless a case is absolutely final on appeal, providing attorney feedback creates the potential for an improper ex parte communication]; Cal. Judges Assn., *Judicial Ethics Update* (April 2000), p. 2 (CJA Update) [when asked by a trial attorney to critique the attorney’s performance after trial, a judge may do so only after the matter is

finally resolved so as to avoid any appearance of impropriety].) This prohibition extends to providing feedback to an appearing attorney’s supervisor.²

B. Public and Nonpublic Comment on Pending Proceedings

In addition to refraining from engaging in ex parte communications, judicial officers may not provide feedback on attorney performance that violates canon 3B(9). Canon 3B(9) prohibits judges from making public comments about a pending or impending proceeding and from making nonpublic comments that may substantially interfere with a fair trial or hearing, including those pending before other judges or courts, with limited exceptions. For instance, a judicial officer may discuss a case pending on appeal “in legal education programs and materials,” but not if the judge had any personal involvement in the case at any stage or if the discussion would interfere with the fair hearing of a case. (Canon 3B(9).)

Even when a judicial officer comments on a pending proceeding in a nonpublic setting, such as a private conversation in chambers or by electronic means, there is a risk that any discussion of case specifics may interfere with a fair trial or hearing. (Advisory

² The California Commission on Judicial Performance (CJP) has disciplined judges for commenting on attorney performance prior to the close of all pending proceedings. (Com. on Jud. Performance, *Public Admonishment of Judge Stuart Scott* (2016), pp. 2-5 [judge disciplined for pulling aside a deputy district attorney at the end of trial but prior to sentencing, despite her protestations, to comment on her trial performance and that of the public defender, which violated the prohibition against ex parte communications and undermined public confidence in the impartiality of the judiciary in violation of canon 2A]); (*Inquiry Concerning Mills* (2018) 6 Cal. 5th CJP Supp. 1, 18-19 [judge disciplined for, at the close of trial and while the jury was deliberating, advising a prosecutor how the judge would have countered the defense’s expert based on techniques used in the past; while the judge attempted to defend his conduct by characterizing it as “sharing war stories,” CJP found that “[t]here is no ‘war story’ exception to the prohibition against ex parte communications”].)

Com. com. foll canon 3B(9) [explaining the risk of nonpublic comments being misheard, misinterpreted, or repeated, which can negatively impact a pending case].) Therefore, when providing feedback about attorney performance, judicial officers must ensure that their comments do not involve pending proceedings in their own or any other court.

C. Appearance of Favor or Bias

Judicial officers are also prohibited from providing attorney feedback that exhibits favoritism or otherwise undermines the judicial officer's impartiality. (Canons 1, 2, and 2A [judges must preserve the integrity and impartiality of the judiciary in all activities]. To minimize ethical risks, judicial officers choosing to provide feedback must ensure that the substantive nature and tone of the feedback would not suggest to an objective observer that the judicial officer has a particular affinity or dislike for certain attorneys or parties. (Advisory Com. com. foll. canon 2 and 2A [the test for impropriety is whether a person aware of the facts would reasonably doubt a judge's impartiality].) For instance, the content of feedback should be neutral and not disparage any other attorneys or parties. As a precaution, the feedback should be equally applicable to and appropriate to say in the presence of attorneys on opposing sides of the same case. (CJEO Formal Opinion 2018-012, *supra*, at pp. 7-9 [educational content is permissibly neutral if the identical presentation could be given to bar associations representing competing interests].)

Judicial officers must also avoid the suggestion of favoritism or bias in terms of who has access to the judicial officer's feedback. For example, it would be improper for a judicial officer to only provide feedback to a law office with which the judicial officer was previously affiliated, or to repeatedly provide feedback to one side of the criminal bar to the exclusion of the other. In most cases, attorneys requesting feedback on courtroom performance are doing so in a private setting, as opposed to an educational setting or public environment. If a judge provides feedback at the request of one party,

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the opposing party may not be aware that the judge is either providing or available to provide this feedback. For this reason, the committee recommends that judicial officers choosing to provide feedback make it clear that they are equally available to provide such feedback to all parties upon request.

In order to preserve the impartiality of the judiciary, judicial officers choosing to provide feedback must do so in a manner that does not favor or exclude, or appear to favor or exclude, any particular attorney or group of attorneys, and be equally available to attorneys representing various interests or viewpoints. (CJEO Formal Opinion 2018-012, *supra*, at pp. 2, 7-8 [judges may give educational presentations to specialty bar associations, provided they are equally available to bar associations having opposing interests or viewpoints, and must ensure neutrality when speaking to judges from a prior practice area]; CJA Update (June 2007), p. 3 [a judge may speak with newly hired district attorneys about trial practice provided the judge is available to give similar talks to the public defender's office].)

D. Appearance of Special Position of Influence

When providing individualized feedback to attorneys, judicial officers must also ensure that their conduct does not suggest that the requesting attorneys have a special relationship with the judicial officer in violation of canon 2B(1) [judges must not convey or permit others to convey the impression that any individual is in a special position to influence the judge]. As discussed above, only providing feedback to a particular group of attorneys may suggest bias or imply that those attorneys are in a special position to influence the judicial officer. In addition, providing feedback regarding an appearing attorney's performance, particularly when it is requested by the attorney's supervisor, may put the judicial officer in a position of evaluating the attorney from the perspective

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of a supervisor-supervisee relationship. Providing such feedback may suggest that the judicial officer favors or has a special relationship with a particular law office or has a special interest in the development of its employees.

For this reason, providing feedback in the context of an employment evaluation raises additional concerns. As Judge Rothman suggests in his treatise: “there are far more reasons against engaging in this practice than favoring it.” (Rothman, *supra*, § 5:8, p. 274, discussing CJA Update (March 2004), p. 2.) In addition to identifying the ethical concerns discussed above, Judge Rothman notes that there are other ways for supervisors to obtain information about how their employees are performing, and for new attorneys to learn, such as attending courtroom proceedings to observe. (Rothman, *supra*, § 5:8, pp. 273-274.) The committee agrees that the better practice is for judges to avoid acting as evaluators of attorney job performance, as there are ethical pitfalls to doing so and more effective ways for supervisors to evaluate employees for promotion or discipline. The committee also notes that, because judicial officers are prohibited from commenting on an attorney’s performance in the judicial officer’s assigned matters prior to the close of all proceedings, the time delay in providing any feedback for employment evaluation purposes would likely diminish its value.³

E. Coaching

When providing feedback about attorney performance, judicial officers must also be cautious to avoid coaching. Although judicial officers are permitted to teach attorneys by providing neutral instruction on substance, procedure, or technique, they are

³ Another concern with providing feedback in the context of an employment evaluation is that it may put the judicial officer in the position of becoming a percipient witness in the event of an employment dispute.

prohibited from suggesting strategies or tactics that would provide an advantage before a particular judge or court. Coaching is impermissible because it suggests that a judicial officer may be biased in favor of, or have a special relationship with, the attorneys being coached in violation of canons 2, 2A and 2B(1). The suggestion of bias may be heightened when a judge appears to coach attorneys that repeatedly appear before that judge. (Rothman, *supra*, § 2:24, p. 92.)

Coaching is not defined in the code. In a previous opinion, this committee has advised that judicial officers may discuss procedures, trial or appellate techniques, black letter law, best practices, tips to avoid common errors, and proper courtroom protocol. (CJEO Formal Opinion 2018-012, *supra*, at pp. 8-9.) For instance, a judge may speak at a statewide conference of district attorneys or teach courses on evidence to a criminal defense association, as long as the judge provides impartial instruction and refrains from advocating for certain positions. (Rothman, *supra*, § 10:16, p. 685, citing CJA Update (February 2002), p. 2; CJA Update (January 2017), p. 10.) However, it would be impermissible for a judicial officer to advise on topics or strategies that favor a particular side in litigation, such as how to select a pro-plaintiff or pro-defense jury or the ideal demeanor for a police witness in a criminal case. (CJEO Formal Opinion 2018-012, *supra*, at p. 9; Rothman, *supra*, § 10:16, p. 685.)

Depending on the factual scenario, coaching may also suggest that a judicial officer is providing legal advice to an attorney in violation of canon 4G, which prohibits judges from practicing law. For example, in *Adams v. Commission on Judicial Performance*, (1995) 10 Cal. 4th 866, 906-908, a judge was disciplined for, among other things, assisting attorneys in cases pending before other judges by suggesting particular motions, commenting on rulings in related cases, and reviewing and proposing edits to pleadings. The court found that the judge had provided “legal advice” to the attorneys and found that the judge’s actions “amounted to egregious misconduct, demonstrating a

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disregard for the integrity of the bench, and constituted prejudicial conduct.” (*Id.* at 907-908.) In addition, the court found that the judge’s conduct could be construed as sharing information “known or peculiarly available to members of the [judge’s] bench” with some attorneys to the exclusion of others, which cast doubt on the integrity and impartiality of the judiciary. (*Id.* at 908.) In essence, this improperly gave the assisted attorneys an inside advantage. (See also Com. on Jud. Performance, *Public Admonishment of Judge Ronald Maciel* (1997), pp. 1-2 [judge admonished for privately advising a prosecutor on the time period for filing a peremptory challenge].)

V. Conclusion

Judicial officers choosing to provide feedback on attorney courtroom performance must bear in mind certain canon restrictions and ethical considerations. It is not permissible for judicial officers to provide feedback in matters assigned to them until all proceedings are finally resolved due to the restriction on ex parte communications. Judicial officers must also refrain from making public comments on proceedings pending before any other judge or court, or nonpublic comments that may interfere with a fair trial or hearing. Judicial officers may only provide feedback in a manner that avoids the suggestion of favoritism, bias, or a special relationship with the requesting attorneys and should avoid acting as evaluators of attorney job performance. Finally, judicial officers must ensure that their feedback does not cross the line into coaching by suggesting tactics or strategies that favor a particular side in litigation or by providing legal advice.



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

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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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