

MEMORANDUM

TO: All CJA Members

FROM: Stanley S. Bissey
Executive Director & CEO

DATE: January 2013

SUBJECT: **Formal Ethics Opinion No. 67**

The Judicial Ethics Committee of the California Judges Association has issued the following formal opinions:

Opinion No. 67

“Monitoring the Internet for Potential Threats to Judicial Security.”

 **Please place these opinions in the pocket part of your California Judicial Conduct Handbook by David Rothman.**

Judges may direct questions on the Code of Judicial Ethics to the current 2012/13 Ethics Committee by writing or calling the CJA office or any Ethics Committee member. The Ethics Committee, as a matter of policy, does not answer inquiries which are moot or raise issues of law. Nor does the Committee respond to questions that involve matters pending before the Commission on Judicial Performance.

All opinions of the committee are advisory only.

SSB:lmb

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CALIFORNIA JUDGES ASSOCIATION

Judicial Ethics Committee

Opinion No. 67

MONITORING THE INTERNET FOR POTENTIAL THREATS TO JUDICIAL SECURITY

I. Introduction

Judges are regularly required to rule on matters that have profound effects on people's lives. On a daily basis judges make rulings affecting parental rights, custody of children, potential incarceration, even decisions regarding life and death. People adversely affected by these decisions often react angrily and may look for ways to lash out at the judge. As a result, judges are urged to be vigilant about potential threats to their safety and their families' safety. Among the recommendations given by security experts is for judges to monitor the internet for potential threats. Specifically, judges should be concerned with the posting of their personal identifying information and threats or inappropriate communications.¹ This opinion addresses the ethical concerns that arise when a judge monitors the Internet for potential security threats.

II. Applicable Canons and Authorities²

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...

Canon 3B(1): A judge shall hear and decide all matters assigned to the judge except those in which he or she is disqualified.

Canon 3B(4): A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity....

1 See John F. Muffler and James R. Brandlin, Judicial Security: Recommendations for Implementing Sound Protective Intelligence Methodologies, *The Judges' Journal*, Volume 50, Number 1, Winter 2011.

2 Citations to the Canons of the California Code of Judicial Ethics incorporate the amendments effective January 1, 2013.

Canon 3B(7): A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, 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:

(a) ... A judge may consult with court personnel ... so long as the communication relates to that person's duty to aid the judge in carrying out the judge's adjudicative responsibilities.

Canon 3B(7)(d): If a judge receives an unauthorized ex parte communication bearing upon the substance of a matter, 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.

3E(2): In all trial court proceedings, a judge shall disclose on the record as follows:

(a) Information that is reasonably relevant to the question of disqualification. A judge shall disclose information that is reasonably relevant to the question of disqualification under Code of Civil Procedure section 170.1, even if the judge believes there is no actual basis for disqualification.

Cal. Code Civ. Proc. §170.1(a)(6)(A): [A judge shall be disqualified if] [f]or any reason:

(i) The judge believes his or her recusal would further the interests of justice.

(ii) The judge believes there is a substantial doubt as to his or her capacity to be impartial.

(iii) A person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.

III. Discussion

Two aspects of Internet security are addressed in this opinion. The first involves what ethically can be done to monitor the Internet for potential security threats. The second involves the ethical duties that arise when a

judge discovers items posted on the Internet by litigants or others involved in a case before the judge.

A. Monitoring the Internet

The first step in determining whether any potentially threatening information about a judge has been posted on the Internet is to search the Internet for any references to that judge. To do this, a judge simply types his or her name into a search engine. Doing so should enable the judge to discover any sites on the web that currently mention that judge's name. Next, security experts advise judges to set up an alert that will notify the judge any time that judge's name is mentioned on an Internet site.³ Setting up such an alert is easy to do. For example, Google allows a person to simply enter his or her email address and name.⁴ After that, the person will receive a notification at that email address any time his or her name appears on a website. The notification will include a link to that site.

At the outset, the question is whether there is anything in the Code of Judicial Ethics that would prohibit a judge from conducting an Internet search of that judge's name and/or setting up an alert that would notify that judge every time that judge's name is mentioned on any website. The only Canon that could be implicated in either situation is 3B(7), which prohibits *ex parte* communications. However, there is nothing in the language of 3B(7) that would prohibit a judge from either doing an Internet search for any references to that judge or from setting up an alert for any such references.

Canon 3B(7) states in relevant part: "A judge shall not initiate, permit, or consider *ex parte* communications, that is, any communication 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."

By searching for his or her own name, a judge cannot be said to be initiating a communication concerning a pending or impending case. The mere possibility that such a query could result in discovering a post on the Internet regarding a pending case does not mean the judge is initiating a communication regarding that case. The requirement that a judge make reasonable efforts to avoid such communications does not require shunning all activities in which there is a possibility that some information about a pending case may be disclosed. To suggest otherwise would be interpreting

3 Materials provided by Judge James Brandlin, Chair of the Los Angeles Superior Court's Judges Security Committee.

4 www.Google.com/alerts

the language of 3B(7) so broadly that a judge would be prohibited from doing such things as reading the newspaper. Such an interpretation of 3B(7) would not only lead to absurd results, it would greatly hamper a judge's ability to protect his or her personal safety and the safety of his or her family.⁵ What the Canons require are *reasonable* efforts to avoid ex parte communications. Asking judges to refrain from determining whether there is any threatening information posted on the Internet regarding that judge merely because there is a remote possibility the query may divulge information about a pending case is not reasonable.

B. Responding To Internet Posts By Parties Or Litigants

Whether or not any ethical duties arise when a judge discovers material posted by someone who appeared before the judge depends on whether the case is still pending, and if so, the nature of the post. Obviously, the proscriptions of Canon 3B(7) are not implicated if the case is no longer pending. This would also be true for any other Canon that might otherwise apply. On the other hand, if the case is still before the judge or pending appeal, the nature of the post may raise several ethical issues. These issues can be broken down into two categories: ex parte communications and disqualification/disclosure.

1. Ex parte communications.

Not all statements relating to a judge posted on the Internet by parties or litigants constitute an ex parte communication. Many posts from unhappy litigants or their supporters are little more than tirades against the judge. Simply saying "I was before judge X in a family court" and then launching into a personal attack on the judge does not amount to an ex parte communication. A personal attack is not a statement regarding the case. "I was before Judge X and she is an arrogant, obnoxious jerk" is not a statement regarding the case. It is a statement regarding the judge. Therefore, these types of posts do not implicate Canon 3B(7). However, such posts can give rise to a duty to disclose under Canon 3E(2), discussed below.

On the other hand, if the post concerns facts of a pending case, the post is an ex parte communication. Once a post goes beyond simply attacking the judge to complaining about what the judge has done or is doing in a specific

5 The Committee is aware of the public admonition in *In re Friedenthal* (2012) that could be read to suggest that 3B(7) may apply to this situation. However, such a broad reading of the CJP opinion is not supported by the Canons. The reference to 3B(7) must be read within the context of the facts presented in the admonishment. The committee believes this Opinion is consistent with *In re Friedenthal*.

case, it is a communication concerning a pending proceeding. If that is the nature of the post, the judge should read no more of the post than is necessary to make that determination. The judge must then disclose to all parties those portions of the post that were read by the judge.

Usually it is the unhappy litigants or their supporters who author these posts. These are also the people who can present a potential security threat. This situation presents a serious dilemma for judges. Once the judge determines that a post from an unhappy litigant relates to a pending case, he or she is precluded from ensuring that the post doesn't contain any potentially threatening information. To deal with this problem the Judge should refer the post to a third party, possibly to a member of the court staff, to assess whether the balance of the post poses any security issues.⁶

If there are potential security threats within the post, staff may inform the judge of those threats. Such a communication is permitted. As the California Judicial Conduct Handbook points out in discussing communications with staff: "If [the] information involves a threat to the judge or the safety and security of the courtroom and protection of the public, informing the judge is necessary and appropriate in order for the judge to fulfill his or her duty to assure order and decorum in court proceedings." David Rothman, California Judicial Conduct Handbook, 3rd Edition §512 (Handbook). Indeed, the Commentary to Canon 3B(7) expressly states that a bailiff may inform the judge about a threat to the judge.

2. Disqualification and disclosure.

A statement posted on the Internet, whether or not an ex parte communication, may implicate disqualification and disclosure issues. This occurs whenever a post contains attacks on the judge or discloses information that constitutes potential security threats to the judge.

Statements by litigants threatening a judge or attacking the judge's character, professional abilities, fairness and the like rarely result in disqualification of the judge. Normally, disqualification is required only if the judge feels that he or she cannot be fair and impartial. The Committee has consistently advised judges that they are not disqualified simply because a litigant makes a threat

6 The Committee recognizes that, from a security standpoint, this procedure is less than ideal. Veiled threats that appear innocuous without information the judge alone may possess could go undetected. This is a serious flaw with the current rules. The better approach would be to allow the judge to read any post to ensure that the post does not contain potential threats to the judge's safety. However, 3B(7) would have to be amended to allow this approach.

against a judge or files a complaint against the judge.⁷ Indeed, so long as the judge believes he or she can be fair and impartial the judge is obligated to remain on the case under Canon 3B(1).

The argument that a judge should recuse himself or herself under Cal. Code Civ. Proc §170.1(a)(6)(A)(iii) whenever litigants or their supporters post threatening or disparaging remarks about that judge, because a reasonable person would entertain a doubt about the judge's ability to be impartial, is untenable for very important policy reasons. Such an interpretation of 170.1(a)(6)(A)(iii) would allow any litigant who is unhappy with a judge's rulings to get a new judge and start over by simply launching into a tirade against the judge or threatening the judge.⁸ Allowing litigants to force the disqualification in this manner would wreak havoc on the judicial process. As Judge Rothman has observed "when a litigant attacks a judge and the court, more is at stake than the judge's reputation: the administration of justice is in jeopardy when a judge is intimidated into recusal." Handbook, p. 371.

Although disqualification is normally not required, the judge must disclose the statement if the matter is still pending before that judge. Canon 3E(2) requires a judge to disclose any "information reasonably relevant to the question of disqualification." Threats, attacks on the character or competence of the judge and publication of information detrimental to the safety of the judge and his family are all reasonably relevant to the issue of disqualification.

In making the disclosure judges are cautioned to be "patient, courteous and dignified" as required by Canon 3B(4). Every effort should be made to avoid making the disclosure in a manner that would suggest embroilment. Should the judge give the impression that he or she has become embroiled in the controversy, the judge would be in violation of Canon 2A which requires a judge "to act at all times in a manner that promotes the public confidence in the integrity and impartiality of the judiciary." If it appears the judge has become embroiled in the controversy, §170.1(a)(6)(A)(iii) would require disqualification of the judge.

7 Ethics Update Nov. 2010, Conduct Inside Courtroom, Disclosure and Disqualification 6; Ethics Update Apr. Conduct Inside Courtroom, Disclosure and Disqualification.5. *See also* Handbook §7.60.

8 This is not to suggest that disqualification is never required in these situations. For example, if a judge becomes embroiled in the controversy, disqualification would be required under CCP 170.1(a)(6)(A)(ii).

IV. Conclusion

Judges have a difficult job and can rarely please everyone involved in the cases before them. Following the prescription of Canon 3B(4) to be patient, courteous and dignified at the outset may alleviate some of the hostility that may be engendered by an adverse ruling, but it does not always do so. Unfortunately, that hostility can and has manifested itself in violent attacks on judges and their families. Judges have to be able to utilize the tools necessary to ensure their safety and the safety of their families. Monitoring the Internet for potential threats is one of those critically important tools.

Judges may and should be vigilant about information posted about them on the Internet. Nothing in the Canons prevents judges from doing so. If information is posted on the Internet by a litigant in a case pending before that judge, or relating to a case pending before that judge, that information must be disclosed on the record. However, so long as judges believe they can be impartial, even overt threats posted on the Internet normally will not require disqualification.

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