

MEMORANDUM

TO: All CJA Members

FROM: Stanley S. Bissey
Executive Director & CEO

DATE: April 2013

SUBJECT: **Formal Ethics Opinion No. 68**

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

Opinion No. 68

“Ethics of Internet Research of Facts by Trial Judges”

☞ 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. 68

ETHICS OF INTERNET RESEARCH OF FACTS BY TRIAL JUDGES

I. Scope of Opinion and Introduction

The Internet has simplified the ability to perform factual research and investigation. From one's desk in chambers or at home, a judge can type words and phrases into a search engine and learn an astounding amount of information pertaining to a pending case, including background material about the parties to that action. We use "judge" to include all bench officers within the meaning of Canon 6.

It is important for judges to continue to learn about subjects that interest us and that may come before us. Nevertheless, the Ethics Committee is concerned that after being assigned a particular case or cases, and without advising counsel and/or the parties, judges may use Internet search engines to acquire background information about a party or the subject matter of a case that has been assigned to them. Using the Internet for this purpose, without informing counsel or the parties and not disclosing the manner in which such investigation is conducted, may impact the appearance of "fairness" to litigants appearing before the judge. Potential ethical issues include the following possible problems: impermissibly engaging in ex parte communications; the information gleaned from the Internet is inaccurate, biased, or even fraudulent; the judge is only acquiring one perspective on the issue; and the Internet search engine filter may present only limited perspectives on the issue.

This opinion clarifies certain of the issues presented when a trial judge contemplates performing a search on the Internet.

II. Authority¹

A. Canons

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(7) “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.² A judge shall not initiate, permit, or consider ex parte communication 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: ...

(c) A judge may initiate or consider any ex parte communication when expressly authorized by law to do so.³

B. Statutes

Evidence Code § 140 “Evidence” means testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact.

Evidence Code §§450-460 Judicial Notice

1 The California Code of Judicial Ethics as amended effective January 1, 2013

2 This provision is new as of January 1, 2013. Prior to January 1, 2013, this admonition was not contained in the rule but was contained in the Advisory Committee Commentary to Canon 3B(7) as follows:

“...A judge must not independently investigate facts in a case and must consider only the evidence presented, unless otherwise authorized by law. For example, a judge is statutorily authorized to investigate and consult witnesses informally in small claims cases.”

3 The provision that governed prior to January 1, 2013 provided that: “A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except as follows:[exceptions (a)-(d)].”

C. California Rules of Court

3.1306(a) and (c) Judicial notice

D. Rothman, David M., *California Judicial Conduct Handbook (3rd Edition 2007)*

§ 5.16 – Gathering Evidence Outside the Record

Viewing the scene. Except in small claims cases ... it is improper for a judge to view a scene without the consent of the parties.

Special rules in small claims cases. Since hearings in small claims cases are supposed to be informal, with the object being “to dispense justice promptly, fairly, and inexpensively,” small claims judges “may consult witnesses informally and otherwise investigate the controversy with or without notice to the parties.” Although there is little authority on the subject of this statute, concepts of fairness would seem to argue in favor of informing parties that such informal actions took place.

E. Other Sources

Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 *Virginia Law Review* 1255-1312 (2012) [Larsen, p.1264.]

III. Discussion

A. Some initial observations

First, the proscription on independent investigation of facts by judges in all media, including electronic, is now not only included prominently in Canon 3B(7), and is no longer confined to a part of an Advisory Commentary, it precedes the general proscription on initiating, permitting, considering, and avoiding ex parte communications except in limited circumstances.

Second, although the Terminology section of the Canons has been updated as of January 1, 2013, to include several definitions where there were none (e.g. gift; impartial, impartiality, and impartially; impending proceeding; impropriety; independence; integrity; knowingly, knowledge, known, and knows; law, the legal system or the administration of justice; pending proceeding; service organization; and third degree of relationship) the following terms are not defined although they are all included in Canon 3B(7): “ex parte communications”; “information”;

“facts”; and “substance of the matter.” Of these, “facts” has had a long and perhaps tortured history (e.g. ultimate facts, adjudicative facts, legislative facts etc.).

For purposes of this Opinion we consider the term “fact” to include a “descriptive statement that can (at least theoretically) be falsified.” This feature of a fact “distinguishes it from statements of value or policy preferences” and for these purposes we refer to what have been described as adjudicative facts; that is, those that “relate specifically to the activities or characteristics of the litigants and are facts that would typically go to the jury in a jury trial.” Larsen, p. 1264.

Third, two of the limited exceptions do not require disclosing the communication to counsel and/or providing an opportunity to be heard. These are: (1) exception 3B(7)(a) which allows speaking with other judges (as long as they have not been previously disqualified, would be disqualified if assigned, would participate in appellate review of the case) and discussing with court personnel or others authorized by law to aid the judge in carrying out the judge’s adjudicative responsibilities and (2) exception 3B(7)(c) which allows judges to initiate, permit, or consider any *ex parte* communications when expressly authorized by law or when authorized by stipulation of the parties.

Fourth, two of the limited exceptions, however, do require disclosing the communication to counsel and/or providing an opportunity to be heard. These are: (1) exception 3B(7)(b) which allows *ex parte* communications required for scheduling, administrative purposes, or emergencies that do not deal with substantive matters and (2) exception 3B(7)(d) which applies when a judge *receives* unauthorized communications bearing upon the substance of a matter.⁴

Fifth, the term *ex parte* communications, for the purpose of this Opinion includes “independent investigation of facts” and is not limited to the types of communications identified in the Canon 3B(7) exceptions. It is clear that *ex parte* communications are not allowed in order to ensure that counsel learn together, and at the same time, and within the rules of evidence, what the judge learns from the litigation and trial process. Judges generally acquire information either in their courtroom in the presence of counsel or by reading papers (e.g. declarations and exhibits) prepared by counsel and served on all other parties who have appeared in a case.

4 Prior to January 1, 2013, there was another such exception [former 3B(7)(a)] for obtaining the advice of disinterested experts provided notice to the parties and an opportunity to respond was given. That is no longer an exception.

The Committee does not believe that the ease of an Internet search justifies changing ethical provisions in this regard. Nevertheless, it is appropriate to distinguish the type of information a judge may gather on his or her own as opposed to facts that a judge may not.

B. Application to specific factual situations

1. **Facts:** A judge receives a new assignment to hear complex civil cases and is told that a number of these cases involve medical issues with respect to infectious diseases. In anticipation, the judge goes on the Internet to become familiar with basic principles of epidemiology including the difference between viruses and bacteria.

Analysis: This is permissible provided that the background information is not specific to any case or sets of cases to which the judge is assigned. Acquiring an understanding of these scientific facts may make the judge more qualified to handle such matters fairly and expeditiously. Learning these hypothetical facts from the Internet is not different from attending judicial education classes.

2. **Facts:** A judge is assigned a case that will involve issues regarding epidemiology. Before the judge learns any of the details of this case, the judge researches on the Internet basic principles of epidemiology.

Analysis: Again, this is permissible because the judge is still acquiring basic background information that is not specific to a case. And again, learning these facts from the Internet is no different from a judge attending judicial education classes.

3. **Facts:** A judge is presiding over a toxic tort trial. After experts for the plaintiff and the defendants testify about whether a chemical at issue could have caused plaintiff's disease, the judge performs research about the properties of that particular chemical.

Analysis: This is an improper ex parte communication. The chemical's properties are germane to the case before the judge. The judge is learning about relevant facts outside the presence of the parties. This is the equivalent to consulting an expert without notifying the parties that the judge is doing so. If the judge needs more information before making a decision, the judge should request further evidence from the parties or consider appointing a court expert whom the court and the parties may examine.

4. **Facts:** A judge hears a court trial in which Corporation X is a party. After the parties rest and complete their final arguments, the judge starts

to write a statement of decision. To flesh out the introduction, the judge goes on Corporation X's web site for the sole purpose of acquiring basic background information that is not in dispute in the case and for that reason did not come out during the trial. (e.g., Corporation X's principal place of business, the exact phraseology with which Corporation X describes the nature of its business, whether Corporation X is publicly held, the number of people it employs, the number of outlets it has in, e.g., San Francisco)

Analysis: This is an improper ex parte communication. Even if the information is unimportant to the case, the judge is learning details about a party without either side receiving notice of that activity and in doing such research, may learn information that may be relevant. The Statement of Decision should be confined to the facts presented.

5. **Facts:** A judge hears a court trial in which one of the issues involves when India changed the name of Bombay to Mumbai. Experts have given conflicting testimony. The judge looks at an official web site maintained by the Indian government for the answer.

Analysis: This is an improper ex parte communication. If the judge needs more information before making a decision, the judge should request further evidence from the parties or consider appointing a court expert (in a manner consistent with the Advisory Committee Commentary to Canon 3B(7)) who could be examined by the court and the parties.

6. **Facts:** A judge has a family law assignment and frequently hears cases involving parental alienation. During these hearings, the judge listens to arguments regarding the different developmental stages of children. These were among the topics in the Family Law overview course the judge took. May the judge continue to read books and articles on this subject? May the judge enter search term "parental alienation" into a site like Google or Wikipedia to get a better understanding and references for further reading? (see http://en.wikipedia.org/wiki/Parental_alienation)

Analysis: Yes. The judge may continue to read books and articles on this subject and may search the Internet for more information as long as the judge is acquiring background knowledge in the area. It would not be permissible if the judge performed these activities in order to make a ruling in a specific case.

7. **Facts:** A judge is hearing a case in which one of the issues is whether construction management is an established job classification distinct

from other professionals involved in the construction trade. Without notifying counsel, the judge conducts a simple Google search of “construction management degree” and learns that UCLA Extension and UC Berkeley Extension each offer a certificate program in construction management; a number of undergraduate institutions award bachelor degrees with a major in construction management; and Georgetown University awards a post baccalaureate degree, master of professional studies in real estate, with a focus on construction management.

Analysis: This is an improper ex parte communication, because the judge has performed independent factual research without notifying the parties. The fact that the judge performed this research via a simple Google search does not change the result. The judge should ask the parties for evidence on this issue or consider appointing a court expert who could be examined by the court and the parties.

8. **Facts:** A judge is writing a ruling in connection with a motion. The papers contain differing spellings of a witness’s name. The judge does a quick Internet search and finds a reference to the witness with a specific spelling of the witness’s name.

Analysis: This is an improper ex parte communication whereby the judge is performing independent factual research beyond what is contained in the case file and what was disclosed during any hearings that may have occurred. In *Guz v Bechtel National, Inc.* (2000) 24 Cal.4th 317, our Supreme Court faced this situation and simply adopted one of the spellings: “Throughout the record and briefs, the last name of this individual sometimes is spelled “Sheaffer” and at other times is spelled “Shaeffer.” We use the latter spelling.” *Id.*, footnote 3.

9. **Facts:** A judge wants to use Google Earth in order to view a scene.

Analysis: This is an improper ex parte communication. It is the equivalent of driving to the scene in order to view it.

10. **Facts:** A judge is hearing a personal injury case in which the plaintiff claims he has had symptoms of carpal tunnel syndrome for the past two years. The judge logs onto the Mayo Clinic web site to learn how long symptoms of carpal tunnel persist.

Analysis: This is an improper ex parte communication. The judge should ask the parties to provide additional evidence on this issue, or the judge could appoint a court expert who would be subject to examination by the parties.

11. **Facts:** A judge is hearing a class action involving the efficacy of a medication to treat carpal tunnel syndrome. The duration of symptoms of carpal tunnel is not an issue in the case. Nevertheless, the judge is curious about learning this fact and wishes to log onto the Mayo Clinic web site to get the answer.

Analysis: The judge should not do so. Although now, unlike the hypothetical facts in number 10, the duration of carpal tunnel syndrome is not an adjudicative fact, the appearance of fairness is still being compromised. Again, the judge should ask the parties for evidence on this issue or at least tell them she is considering performing this research for her own information, which will not have any impact on the case. Better yet, the judge should wait until the trial is over.

12. **Facts:** A judge is assigned to a matter and must decide whether a father is still married to a mother. Neither party has addressed the issue. The judge resolves the matter by one-click access on the public records of the court.

Analysis: This is an improper ex parte communication. The judge should ask the parties to provide additional evidence on this issue, or the judge should give notice to the parties that, pursuant to Evidence Code § 452(d) or 452(h), the court plans to take judicial notice of these facts and give counsel an opportunity to respond.

13. **Facts:** A judge suspects that a potential juror, who claims he is a lawyer, is not telling the truth during voir dire. May the judge check the State Bar site to determine whether the potential juror is a lawyer?

Analysis: No. The judge is researching potentially disputed facts. The judge should not engage in this ex parte communication but should instead raise the concerns with counsel and ask them to engage in follow-up factual research with respect to this potential juror.

C. Factors to Consider Before Conducting an Internet Search of Facts

Before a judge determines to use the internet to research facts, the judge should use common sense and ask several basic questions, among them: why am I doing this? Is it because I am curious, or is it because I am embroiled, or something in between? Are the facts to be researched matters that the attorneys may not want their trial judge to know?

There are several factors a judge should consider before deciding to perform factual research on the Internet. This list is not exhaustive.

1. Availability of information
 - A. Easily accessible?
 - B. Accessible to both litigants?
2. Actual vs. Potential case. Has a case actually been assigned to the judge?
3. Is it reasonably likely that the type of case or cases will be assigned to the judge?
4. Is the information the type of information that would/could be the subject of a request for judicial notice?
5. Is the information akin to the definition of a word in a dictionary?
6. Is the information sought “background knowledge” of a type
 - A. Necessary to understand issues at trial?
 - B. Helpful to understand issues at trial?
 - C. Not reasonably likely to be evidentiary matters?
7. Are disclosure to the parties and the opportunity to be heard sufficient remedies?

IV. Conclusion

The availability of Internet technology and the resultant ease with which one can investigate facts does not change the prohibitions against ex- parte communications that are in the California Code of Judicial Ethics. If anything, it makes it essential that judges understand what constitutes improper ex parte communications and avoid the temptation to engage in them, even with respect to simple factual questions. Judges may educate themselves on general topics that they may confront in their assignments. Judges also may verify facts about which one may take judicial notice, but they must comply with the Evidence Code concerning notice to and opportunity to be heard by the parties. Beyond that, however, the Committee believes that if judges wish to engage in independent research relating to facts that pertain to issues in specific cases before them, they must notify the parties and invite their input and participation before proceeding any further.

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