From: Tina Rasnow [tina@rasnowpeak.com]
Sent: Friday, November 02, 2012 8:34 AM
Subject: CJEO Draft Formal Opinion 2012-001

Dear Ms. Black,

I wanted to express some concern about the draft formal opinion regarding judges meeting with attorneys to solicit financial support for the courts and encourage lobbying the legislature for adequate court funding. My concern is that large and wealthy law firms, which are in a better position to raise money, will have a form of access to the judges that will not be available to small firms or sole practitioners, legal services providers, etc. It may give the appearance of inequality even if the judges don't allow the fundraising efforts to affect their decision making. I don't see a problem with the second prong, namely the request for lobbying, so long as that request is made to all attorneys, in all sectors of the law. In fact, lobbying is most effective when the legislators can see broad based support for an issue, and not just representatives of one segment of the business or larger community.

I am a retired attorney who used to work for the Ventura County Superior Court, coordinating its Self-Help Legal Access Center and Homeless Court programs, for which I continue to be involved as a volunteer. From my experience working for the court I am aware that not all judges see access to justice issues for self-represented litigants the same. I fear that having partners in wealthier firms representing powerful clients be given an opportunity to meet privately with judges regarding court fundraising may influence the focus of how funds are spent, perhaps by making it easier for large civil cases to get to trial at the expense of the types of matters normally relegated to self-representation (i.e. small claims, family law, etc.). I am not adverse to having judges request financial support for the courts, but the outreach should include all segments of the legal community and it should combine requests for pro bono representation, support for limited scope representation, and as inclusive a platform as possible to facilitate participation by all.

Thank you for considering my comments.

Respectfully,

Tina Rasnow
1000 So. Ventu Park Rd.
Newbury Park, CA 91320
cell: 805-236-0266

From: Ruvolo, Ignazio
Sent: Monday, November 05, 2012 7:36 AM
Subject: CJEO Invitation To Comment; Draft Formal Opinion 2012-001

Nice job. I agree with the analysis and conclusions.

IJRuvolo

Presiding Justice Ignazio J. Ruvolo
State of California Court of Appeal
First Appellate District, Division Four
350 McAllister Street
San Francisco, California 94102

From: Dukes, Robert
Sent: Tuesday, November 06, 2012
Subject: Comment: CJEO Draft Formal Opinion 2012-001

I comment on behalf of myself and not on behalf of my court or any organization.

I am concerned about the following language quoted from the opinion suggesting a court cannot advocate to attorneys and seek help if such is not consistent with the views of other courts or the Branch.

> *"The committee cautions that judges should be wary of inviting lawyers to seek particular results that benefit the judge's court to the detriment of other courts. For example, a judge should avoid requesting that an attorney ask a legislator to move courthouse construction funds to general trial court operations."*

In my opinion, such is an overreaching interpretation of the cited Canons and would appear to be an attempt to make actionable through CJP discipline actions of a court taken by its elected PJ which are not consistent with policy decisions promoted by the Judicial Council and the AOC, as well as those potentially inconsistent with any other court in the state. It would expose those who chose to not "speak with one voice" about such policies and decisions of the AOC and the Judicial Council but which are affecting that judge's court to the chilling effect of potential CJP action. The seeking of assistance through our constituent Bar groups is fundamental to each court's ability to address its own concerns in the legislature, a right each court thus far still has. Further, taken to its logical conclusion, it would also apply to the CJ or any judicial member of the Judicial Council or the Bench/Bar coalition when they ask attorneys to advocate on their behalf if the action would be to the detriment of an individual trial court. Interestingly, it would not prevent the attorney members of the Council from seeking such advocacy on behalf of the Council or the AOC – only the Judicial members.

Finally, I join with others who are concerned the opinion as written is potentially volatile of constitution free speech and association principles as articulated in Republican Party of *Minnesota v White* (2002) 536 US 765 as well as the concerns that its guidance is so vague and ambiguous that it fails to give notice of just what is prohibited. In the example given by the committee, it is arguable that simply because one court wants a court house constructed and the other wants the funds used for operations statewide, the judge advocating for the latter is not really advocating a position which is detrimental to the former court. It is equally appropriate to argue the former is simply misguided and will ultimately suffer grater detriment if the funds are not diverted.

Judge Robert A. Dukes
Los Angeles Superior Court
400 Civic Center Plaza, Dept. R
Pomona, Ca. 91766

From: Judge Geoffrey Glass, Orange County Superior Court
Subject: Comment: CJEO Draft Formal Opinion 2012-001

The draft opinion gives judges very little guidance and cites no authorities. I would not rely on it. Further, I am not confident that it is acceptable to "soft pedal" the request for assistance. I think a better position is that judges can express concerns about judicial branch issues anywhere, anytime to anybody, but cannot request any assistance. See what CJA Hotline says.

From: Melissa Johnson, Judicial Staff Attorney
Subject: Comment: CJEO Draft Formal Opinion 2012-001

I question the wisdom of this paragraph:

"The committee cautions that judges should be wary of inviting lawyers to seek particular results that benefit the judge's court to the detriment of other courts. For example, a judge should avoid requesting that an attorney ask a legislator to move courthouse construction funds to general trial court operations. Such a request could place some attorneys in a dilemma if they practice in different counties that have competing interests. Judges should therefore avoid asking the attorneys to support a funding solution for a specific court that might be detrimental to other courts. One way to avoid placing attorneys in these situations would be to invite them to advocate on behalf of the entire judicial branch." (draft opinion at pp. 14-15.)

If the request is not in any way coercive, how could it place attorneys "in a dilemma"? Attorneys who practice in different counties may have a view, based on their experience, of where funds would best be spent, and are free to express their views to legislators. There is nothing wrong with a judge providing information that could affect an attorney's views on the subject or encourage him or her to express those views to legislators. Every request should be made in such a way that the attorney would feel free to reject it on any grounds — including the attorney's view that money would better be spent on a different court, on statewide judicial branch concerns, or on a different branch of government.

From: Judge Runston G. Maino, San Diego Superior Court
Subject: Comment: CJEO Draft Formal Opinion 2012-001

I believe that the opinion approves of an unrealistic scenario in which a judge convenes a meeting of attorneys, gives a budget report (which today is always bad), and then watches the lawyers all decide to write or contact their legislators or the governor asking that the courts receive more money. I believe this is called lobbying and it does not become something else because the judge believes it is not coercive. In my opinion when a judge suggests to an attorney that he/she do or not do something this is a coercive act.

From: Hon. Marie Weiner, San Mateo Superior Court
Subject: Comment: CJEO Draft Formal Opinion 2012-001

Looks good! Thank you for addressing this issue.

From: Hon. Julie Conger (retired, Alameda County Superior Court)
Sent: Friday, November 30, 2012
Subject: Comment on CJEO Draft Formal Opinion 2012-001

I wish to express three concerns about the proposed Formal Opinion as it has been presented:

1) Although the question phrased by the inquirer specifies "May a judge invite partners of law firms in the county…?" I believe that judges should be cautioned that restricting the invitation in that manner invites an appearance of favoritism and bias. ALL attorneys in the County should be invited to such a meeting so that it does not appear that these partners have special access to the judge. To that end, a citation should be added to the Opinion directing attention to Canon 4A(1) which mandates that "A judge shall conduct all of the judge's extrajudicial activities so that they do not cast reasonable doubt on the judge's capacity to act impartially." While page 12 of the Opinion addresses this concern, I think the caution should be expanded and given more prominence.
2) I concur with other comments which have expressed reservations about the language on pages 14-15 of the draft Opinion which frowns upon a judge "inviting lawyers to see particular results that benefit the judge's court to the detriment of other courts." If a judge is permitted to convene such a gathering to address and provide information concerning budget issues concerning the local court, that judge cannot be charged with knowledge of the impact of budget issues on other courts and should not be restricted to encouraging advocacy "for the entire judicial branch."
3) In my opinion, the Formal Opinion is internally inconsistent and contradictory. The Committee posits that asking attorneys to "write and meet with legislators on the court's behalf is not prohibited by the Code of Judicial Ethics" (page 13 of the Opinion). Is that not lobbying? How does this comport with the admonition on page 11 that "In the opinion of the committee, a judge cannot ask the attorneys to undertake a lobbying campaign or to pay a lobbyist"?

Respectfully submitted,
Hon. Julie Conger (retired)
Alameda County Superior Court

From: Hon. James W. Luther, Mendocino Superior Court (Retired)
Sent: Saturday, December 1, 2012
Subject: Comment on CJEO Draft Formal Opinion 2012-001

To: Hon. Ronald B. Robie, Chair, and Members
Supreme Court Committee on Judicial Ethics Opinions

Night before last, our County's presiding judge and six of his judicial colleagues drove 60 miles through heavy rain and dangerous winds over treacherous mountain roads to meet with more than 300 of those of us who live here on the coast, and exhorted us all to work with "Save Our Coast Court," a group of coast lawyers, to help them find ways to save our Coast Branch Court. (And we all responded that we would.)

Your draft formal opinion 2012-0001 would call what they did unethical.

Please withdraw it.

Please stop hurting and start helping.

Respectfully,

James W. Luther
Mendocino Superior (Retired)

From: Trial Court Presiding Judges Advisory Committee of the Judicial Council
Subject: TCPJAC Comment on Draft Formal Opinion

Dear Justice Robie:

On behalf of the Trial Court Presiding Judges Advisory Committee, (TCPJAC) thank you for the opportunity to comment on the CJEO draft Formal Opinion No. 2012-001, Requesting Assistance from Attorneys in Pursuit of the Improvement of the Administration of Justice. Having reviewed and considered the draft Formal Opinion we urge the committee to withdraw the draft opinion or significantly narrow its scope to respond only to the factual circumstances presented. As discussed below, we believe that the draft Formal Opinion raises questions beyond the facts presented and suggests impropriety where none is evident.

Over the past three years Presiding Judges throughout California have been required to develop plans for administering their courts with dramatically shrinking revenue. Presiding Judges have shouldered the major responsibility for communicating the effects of their plans to their employees, the attorneys who appear before them and the community at large. Respecting our obligation to provide access to justice, Presiding Judges have also spent significant time with local legislators to educate them about the role of the courts in our society and to urge restoration of funds to operate the courts. Judges have also enlisted the help of attorneys and community members who could assist the courts by carrying their own message to the Governor and Legislature explaining the impact of the drastic revenue reductions on their clients and the community.

While the draft Formal Opinion offers helpful affirmation of some of the specific activity identified in the questions posed, in our view it goes far beyond those situations and touches on a number of other circumstances that are not fully defined or evaluated. Examples of our concerns are as follows:

1. In the opening paragraph of the draft Formal Opinion, the committee explains that it has been "asked to provide an opinion on whether the following activities...are permissible." The committee goes on to state the precise factual scenario presented for review. At page 9 of the draft Formal Opinion, the committee diverges from the previously articulated questions and explains its task as having been asked to "provide guiding standards and a few examples." The Presiding Judges urge the committee to limit the scope of the opinion to the clearly articulated factual circumstance presented and to refrain from expansive admonitions not rooted in issues presented for review by the committee. We feel that, if finalized as presented in the draft, this opinion will serve to

chill legitimate judicial activity in what your committee has acknowledged is the "clearest and most urgent of circumstances."

2. The committee's advisement that judges may not ask attorneys "to help the court in whatever way they believe is appropriate" appears to conflict with the committee's directive that judges should not direct the content of attorneys' communications with legislators. Additionally, the prohibition seems to conflict with the committee's statement that judges should "merely be asking lawyers to exercise their own free speech rights if they voluntarily choose to do so." (See, Section C., p. 13). We request that the committee reconsider this admonition in light of the seemingly contradictory guidance set forth in the discussion.

3. At page 11, the committee states that "a judge cannot ask the attorneys to undertake a lobbying campaign or to pay a lobbyist." Insofar as the draft Formal Opinion does not define "lobbying campaign" we are unable to differentiate between the prohibited request to engage in a "lobbying campaign" and the approved activity of requesting attorneys to write or meet with their legislators on the court's behalf.

4. Further, we are confused by the committee's opinion prohibiting judges from seeking to "enlist and deputize lawyers as an extended arm and purse of the court itself" stated at page 11 as compared to the approved activity of "asking attorneys to write or meet with legislators on the court's behalf" which the committee states is not prohibited by the Code of Judicial Ethics. (Page 13) We do not understand where the concept of "deputizing" anyone to act for the court has come from. Nothing in the stated questions presented suggest a request for an opinion as to whether judges may ask attorneys to speak as surrogates for the court. Further, we cannot discern any distinction between "deputizing" and "asking attorneys to write and meet with legislators on the court's behalf."

5. We disagree with the committee's caution against judges seeking particular results that benefit the judge's court to the detriment of other courts. (Page 14) First, due to the extraordinary complexity of the budget process described by the committee, it is impossible for any judge to know whether any particular result will cause detriment to other courts. Second, as locally elected officials, judges meet with our locally elected legislators to discuss the impact of budget cuts on our local courts and our shared constituency. It seems inimical to the responsibility of superior court judges to be restricted in our ability to protect our courts and our communities and to prohibit us from asking attorneys to speak to our legislators about matters of local concern. It also seems illogical that judges may, on the one hand, ask lawyers to seek results that benefit the

Judicial Branch at the expense of child care, education, and mental health services, but, on the other hand, not be allowed to ask lawyers to support local projects that may be to the detriment of a sister court.

In regard to the committee's specific example regarding courthouse construction projects, we firmly disagree with the committee's conclusion that judges may not ask attorneys to support funding for a local project (Page 14). As the committee states throughout the draft Formal Opinion, judges may only seek voluntary, non-coercive actions by attorneys. To the extent that an attorney feels that support for one court's construction project will cause a dilemma due to the attorney's law practice in other counties, that attorney will know that he or she may voluntarily choose to sit on the sidelines of that debate or participate in whatever way he or she deems best. We believe that the committee's reminder to judges that we may not coerce or reward attorneys for their actions is sufficient to ensure proper ethical guidance for judges. We believe that the prohibition suggested in the draft Formal Opinion is far afield of the questions presented and should not be included in this opinion.

The Presiding Judges appreciate the work of the committee in reviewing the important questions presented and offering guidance to judges regarding conduct that is consistent with the Canons of Judicial Ethics. We certainly agree with the opinion in regard to the restatement of a judge's obligation to refrain from any actions that are coercive or rewarding to attorneys. We also agree with the reminder that judges may not solicit funds for any purpose.

Our primary concern is that the opinion goes far beyond the questions presented and sets out a series of guidelines that are over-broad, ill-defined and internally inconsistent. We respectfully ask that the committee withdraw the draft opinion or narrow its scope to respond only to the specific questions presented.

Sincerely,

Hon. Laurie M. Earl

Chair, Trial Court Presiding Judges Advisory Committee

From: Sacramento Superior Court
Subject: Comment CJEO Draft Formal Opinion 2012-01

Dear Justice Robie,

Thank you for the opportunity to comment on the Committee on Judicial Ethics Opinions (CJEO) Draft Formal Opinion 2012-001. I submit the following response on behalf of the Sacramento Superior Court.

Question(s)

The committee states it has been asked to provide an opinion on whether judges may engage in the following activities:

1. May a judge invite partners of law firms in the county to attend a meeting at which the judge makes a presentation concerning potential budget cuts and asks that the attorneys help the court "in whatever way they believe is appropriate?

2. May a judge at the same meeting ask attorneys to write or meet with legislators in Sacramento on the court's behalf?

Overview of Comments

1. The draft opinion concludes that although judges may invite partners of law firms in the county to attend a meeting at which the judge makes a presentation concerning potential budget cuts and may ask the attorneys to help the court, judges may not ask the attorneys to help in "whatever way they believe is appropriate." We believe this conclusion is incorrect and that allowing attorneys to proceed in the manner and to the degree they see fit, without making specific suggestions, is what the canons call for.

2. The draft opinion concludes that although a judge at the same meeting may ask attorneys to write or meet with legislators in Sacramento on the court's behalf, a judge who handles trial assignments or other legal proceedings should not convene such a meeting with attorneys with cases pending or those who are on or about to be on the trial calendar. We believe this conclusion is incorrect and unsupported by any ethical canons.

3. In attempting to provide guidance the draft opinion provides conflicting advice and generates confusion.

4. The draft opinion includes content that is extraneous to the call of the question(s) and as a result, is distracting.

5. The draft opinion strays from a discussion of the ethical rules and canons that should govern the action of judges, to the much debated topic of statewide versus local management of courts which, we submit, is not appropriate to address in the proposed ethical opinion.

Discussion

"Judges and the Budgeting Process"

The draft opinion begins with a discussion entitled "Judges and the Budgeting Process," the first paragraph correctly explains how budgeting decisions can and do affect the administration of justice. However, the second and third paragraphs provide a summary of the budgeting process within the judicial branch that is unnecessary and distracting. The summary includes more than once, an emphasis on the complexity of the budget process; "Budgeting within the judicial branch is *complex* [emphasis added] and involves all three branches of government." (p.7), "Because of the *complexity* of the budgeting process ..."(p.8)

We are concerned that the manner of presentation of this information and the reference to Article VI, section 6 of the California Constitution in footnote 2, may be interpreted to suggest that judges should not be offering information or entertaining discussions with attorneys or the executive or legislative branches that fall outside the stated goals, purview, or position of the Judicial Council. There is nothing stated in the canons or rules that would constrain a judge to discuss only an approved branch wide approach to the crisis the courts now face, both individually and as a whole, so long as it is done properly. Furthermore, the *complexity* of the budget process has nothing to do with *advocacy* in connection with budget decisions. We suggest that the draft opinion strays too far with the inclusion of this information, not only because it is irrelevant to the ethical analysis, but also because it reads perhaps as an admonition against *any* advocacy by judges on the budget process.

In this vein, it should be noted that the topic of branch or statewide versus local management of courts is a heavily debated subject within the branch. Citing Article VI, section 6 of the California Constitution, footnote 2 of the draft opinion states that "The Judicial Council is the policy making body of the California Courts, and is responsible for ensuring the consistent, independent, impartial and accessible administration of justice." While many of California's bench officers agree with this formulation, the recent debate regarding judicial governance in California makes clear that many do not. Many judges in California believe that the Constitution envisions a more limited advisory role for the Judicial Council.

We believe that the subject footnote adds nothing of substance to the draft opinion itself and ought to be deleted. Alternatively, if the committee determines that footnote 2 is necessary, we suggest that it be reworded simply to track the Constitutional language set forth in Article VI, section 6 of the California Constitution as follows:

"Article VI, section 6 of the California Constitution states as follows: 'To improve the administration of justice the [Judicial] council shall survey judicial business and make recommendations to the courts, make recommendations annually to the Governor and Legislature, adopt rules for court administration, practice and procedure, and perform other functions prescribed by statute. The rules adopted shall not be inconsistent with statute.'"

<u>The Draft Opinion Provides Conflicting Advice and Generates Confusion</u>

The draft opinion points out that it is permissible and appropriate for a judge to invite lawyers to a meeting to provide information about the budget cuts and their potential impact on the administration of justice, as long as this is done in a manner that does not result in the appearance of coercion or favoritism. Where the draft opinion appears to get into trouble is when it attempts to parse the specific words that should or should not be used in such a meeting, and when they should be used.

For example, while suggesting that a judge present the information and then ask attorneys to "brainstorm" suggestions for mitigation, it continues: "Answering questions and providing information rather than directing discussion or making specific requests helps to avoid the potential for actual or perceived coercion." If a judge were to follow this suggestion, and attorneys were to ask the judge for suggestions on how they might help, the opinion would prohibit a judge from responding that they "should

help in whatever way they believe is appropriate." The reason given to avoid this phrase is that it may be too broad, or may imply or invite too much. Yet the very same paragraph then goes to say that "assuming the request is not coercive...it would be permissible to ask attorneys to write an op-ed piece, or do outreach and community education on the impact of the budget cuts on their clients and on the community." The two appear inconsistent and the later runs afoul of appearing to direct a course or path for attorneys to engage in.

We submit that what are additionally offered as appropriate alternatives are far more coercive in scope than that which is arguably prohibited as too broad. Suggesting an op-ed piece for example, and the failure to follow through, or the substance of the piece which would be available for all to view and see with the attorney's name on it, carries much more coercive effect and provides greater avenues for others to argue that as a result of a particular piece a particular attorney gained favor. Further, requesting volunteers, as discussed and suggested on page 12, puts attorneys in a difficult if not uncomfortable position should they wish to decline, regardless of the statement that it is "without any expectations or benefits attached."

Likewise the draft opinion goes on to advise that "a judge cannot ask the attorneys to undertake a lobbying campaign..." (p.11), yet requesting attorneys to write or meet with legislators on the court's behalf is sanctioned in the draft opinion, so long as the request is not coercive or conveys the appearance of garnering a special position of influence. (p.l4) We see little, if any, distinction between an attorney writing or meeting with legislators on the court's behalf and an attorney "lobbying" for the court. Additionally, the language used by the draft opinion, i.e., "This is in keeping with the principle that judges should merely be asking lawyers to exercise their own free speech rights if they voluntarily choose to do so, rather than coercing or inducing the lawyers to act as an arm of the court" (p.13), seems no more problematic than telling attorneys to help the court in "whatever way they believe is appropriate."

We submit that allowing attorneys to proceed in the manner and to the degree they see fit, without making specific suggestions, is what the canons call for. In fact, the final sentence of the second full paragraph on page 11, which reads: "A judge requesting help should promote the voluntary use of a lawyer's leadership, organizing skills, and free speech rights to support the court or judicial branch, rather than enlistd deputize lawyers as an extended arm and purse of the court itself," is in keeping with an open

ended expression from a judge regarding the assistance of attorneys, public or private. Such a statement is entirely consistent with asking attorneys to help the court "in whatever way they believe appropriate."

The Draft Opinion Reaches Conclusions Unsupported by Ethical Canons

The suggestion that those judges who handle trial assignments or "other legal proceedings" - which we submit is every judge on our court - should not convene a meeting with attorneys with "cases pending or those who are on or about to be on the trial calendar" (p.l3) is simply unworkable and unsupported by the ethical canons. This prohibition would essentially extend to any attorney who may appear in court, with the result not being limited to small counties. As the leading treatise on judicial ethics points out, "The judiciary is very much a part of the government of the state and the Code of Judicial Ethics permits involvement by a judge in public affairs related to the improvement of the law, the legal system or the administration of justice." (Rothman, Cal. Jud. Conduct Handbook 3d ed. 2007) section 10.30, p. 540-541, fns. omitted)

Although the call of the question presented speaks in terms of "a judge," the opinion appears directed to the Presiding or Assistant Presiding Judges of local county courts, or their designees, who often meet with and speak to private attorneys and by virtue of their position, advocate on behalf of their court. The draft opinion would effectively exclude Presiding Judges, Assistant Presiding Judges and Supervising Judges of every division of a local court from meeting with attorneys about potential budget cuts. This provides no workable rule. Rather, as it has been in all other ethical opinions, the emphasis should be on providing the judge with the canons and asking him or her to navigate the shoals, which in fact is what judges do every day. We urge the deletion of such language from the draft opinion.

We also wish to draw the committee's attention to the entire last paragraph commencing on page 14 and continuing to page 15, immediately preceding the section entitled "VII. Summary." As discussed more fully below, this paragraph abruptly departs from the themes set forth in the rest of the draft opinion, and announces a content-based proscription that is sweeping in its scope. The conclusions set forth thus do not appear to be based in any ethical proscription, and do not advance any recognized ethical core value. Accordingly, we urge the committee to delete the entirety of this paragraph from the draft opinion

The paragraph at issues states, *inter alia* that ". . . a judge should avoid requesting that an attorney ask a legislator to move courthouse construction funds to general trial court operations." Observing merely that "Such a request could place some attorneys in a dilemma if they practice in different counties that have competing interests," the draft opinion concludes that "Judges should therefore avoid asking the attorneys to support a funding solution for a specific court that might be detrimental to other courts."

Up to this point, the draft opinion is correctly concerned with the question of *how* judicial requests for political assistance may be made without the suggestion of resulting favoritism and/or coercion. In the words of the draft opinion, the entirety of the text preceding the paragraph at issue focuses on proper *methodologies* to insure that an "ask" does not become a "lean." The paragraph under discussion differs markedly, because it abruptly deviates from the question of *how* assistance is properly sought, and posits that the *substance* of the communication is somehow improper. That is not to say that an ethical opinion cannot address the content or substance of conduct, but that is not the focus of the question(s) the committee was asked to provide guidance on.

As noted above, the draft opinion supports this result only with speculation that a given attorney may experience a "dilemma" if different courts in which he or she practices have competing financial interests. That analysis cannot withstand scrutiny.

We have identified no ethical rule or precedent supporting the proposition that a judge's ability to engage in political activity on matters affecting the administration of justice may be constrained on the basis that an attorney who hears such advocacy may be put in the everyday political "dilemma" of determining whether he or she is moved to act in support of that advocacy. Such a prohibition is sourced not in the risk of coercion or suggested favoritism that informs the rest of the draft opinion, but in the premise that some attorneys may not be comfortable in supporting the request.

Carried to its logical extreme, such an approach could prohibit *all* political advocacy by judges no matter *how* strong the connection between the subject matter and the administration of justice, because every request for support in this arena could pose a hypothetical "dilemma" for any attorney who is asked to support the request. This is the intrinsic nature of the political process; to our knowledge it has never before been suggested that a judge must screen those who hear political advocacy to insure that recipients of the intended message do not feel conflicted by opposing viewpoints.

The draft opinion suggests that one way to avoid this is to "invite [attorneys] to advocate on behalf of the entire judicial branch." As the draft points out, "[I]t is permissible and appropriate for a judge to invite lawyers to a meeting to provide information about the budget cuts and their potential impact on the administration of justice." (pg. 9) Also, letters and presentations on the anticipated impact of the cuts are permissible. (pg. 9) This presumably involves local impacts, which are likely to be the most important to the attorneys at the meeting. To date, nowhere in Rothman's book does he limit a judge's involvement to *statewide issues* of judicial administration, as opposed to *local issues.* While we do not take issue with the suggestion that persons, if they are so inclined, should advocate on behalf of the entire judicial branch, for reasons stated above the "dilemma" cannot be corrected by inviting attorneys to "advocate on behalf of the entire judicial branch." No one can dispute that a given attorney may disagree with branch wide approaches to court funding; he or she may oppose the construction of new courthouses while courts eliminate day to day services statewide. One need not agree with that view to recognize that such an attorney would be put in the same sort of dilemma identified in the draft opinion when asked to take that approach.

In the final analysis, the core problem with the paragraph relating to funding transfers is that it would prohibit advocacy relating to the administration of justice based upon the *content* of the advocacy rather than on the *manner* in which the advocacy is delivered. In doing so it departs from the central theme of the draft opinion, and incorrectly posits that advocacy is prohibited whenever other judges may hold a competing view such that attorneys might be required to decide what course of political action to follow. This result attends all speech and if the "dilemma" analysis holds sway, all speech on all sides of a given issue is logically prohibited no matter how strong the connection to the administration of justice.

This same portion also presumes that attorneys are incapable of exercising individual discretion in determining whether to advocate on matters related to the administration of justice. Trial court judges should not be dissuaded from educating their local attorneys on how particular funding strategies or trial court funding may impact positively or negatively a particular court, nor should they be dissuaded, upon fear of being brought up before the Commission on Judicial Performance, from telling attorneys to convey that which they believe is appropriate. Because this portion of the draft opinion is not based on any ethical rule or core value, and would incorrectly

prohibit speech whenever the recipient might be called upon to resolve conflicting viewpoints, it should be deleted in its entirety.

The Draft Opinion Strays Beyond it's Scope

Although the call of the question in the draft opinion is narrow, in its concluding paragraph, the draft opinion strays from its scope. In two separate portions the Draft Opinion, points out what the committee has *not* been asked to analyze: *"The committee has not been asked to opine on the subject of a judge's own activities vis-a-vis the public or members of the executive and legislative branches on issues of potential budget cuts to the court system.* " (p.9 - first paragraph). *"The facts presented focus not on what a judge may do in relation to the other branches, however, but on a judge 's interaction with attorneys in the local community.* " (p. 9 -third paragraph) Yet the language in the very last paragraph of the draft opinion addresses exactly what the committee says it is not focused on and was not asked to opine on:

"The committee, however, also urges caution and restraint. As Judge Rothman recognizes, problems may arise when judges advocate positions before the legislative and executive branches on issues related to the law, the legal system, and administration of justice. (Rothman, *supra,* section 11.03, p.570). He advises that judges should greatly limit advocacy before the legislative and executive branches to only the clearest and most urgent of circumstances. 'Where judges frequently engage in such advocacy, they may be perceived as encroaching on legislative and executive prerogatives. When judges do so they should not be surprised if the legislative and executive branches feel comfortable in doing the same in the judicial arena... . Separation of powers and preservation of the independence of the judiciary require judges to ration their advocacy.' (Rothman, *supra,* section 11.03, p.570.) The committee believes that the current budget crisis is one of those 'clearest and most urgent of circumstances,' but nevertheless cautions against advocacy that exceeds the scope of the exigency."

Because it is not responsive to any issue raised in the questions presented, and because its inclusion could be interpreted as gratuitous, we believe the paragraph should be deleted.

Recommendations for Changes to the Draft Opinion

The draft opinion should be revised as follows:

(1) The response to the question of whether a judge may invite partners of law firms in the county to attend a meeting at which the judge makes a presentation concerning potential budget cuts and asks that the attorneys help the court in whatever way they believe is appropriate, should be revised to answer "Yes". The opinion should include advisory language that reflects that so long as a judge communicates in a way that is not coercive to ensure that any actions would be entirely voluntary and that the judge does not convey the impression that any of the attorneys providing assistance could thereby be in a special position to influence the judge.

(2) Eliminate the second and third paragraph and corresponding footnote and any reference to the "complexity" of the budget process from *"Section VI Discussion A. Judges and the Budgeting Process."* In the alternative, reword the footnote to simply track the Constitutional language as follows:

" Article VI, section 6 of the California Constitution provides that: 'To improve the administration of justice the [Judicial] council shall survey judicial business and make recommendations to the courts, make recommendations annually to the Governor and Legislature, adopt rules for court administration, practice and procedure, and perform other functions prescribed by statute. The rules adopted shall not be inconsistent with statute."'

(3) The first full paragraph on page 11 of the draft opinion should be deleted.

(4) The language on page 11 that reads "to undertake a lobbying campaign" should be deleted.

(5) The suggestion that those judges who handle trial assignments or "other legal proceedings", beginning with the last sentence on page 12 and continuing through the end of the first paragraph on page 13, should be deleted.

(5) The entire last paragraph commencing on page 14 and continuing to page 15, immediately preceding the section entitled "VII. Summary", should be deleted.

(6) The concluding paragraph which begins at the bottom of page 15 and continues to the end of the draft opinion should be deleted.

Attached is a copy of the draft opinion with our proposed amendments.

Sincerely

Laurie M Earl

Presiding Judge

Sacramento Superior Court

From: Carter Sears, Attorney at Law
Subject: Comment on CJEO Draft Formal Opinion 2012-001

This has been an ongoing problem has it?

If judges are prohibited from "requesting assistance from attorneys in pursuit of the improvement of the administration of justice" such a rule will surely rein in any wildcatting and ensure that the task of lobbying remains firmly in the control of the AOC.

It will ensure that judges outside of LA County will not speak a critical word of the Long Beach courthouse PPP construction project and other AOC boondoggles. They will, however, be free to praise them. An excellent manipulation.

This proposal certainly appears to be an attempt to silence judges who express disapproval of big box-store courthouses because they come at the expense of the under-served and poorer residents in the remoter areas of California's vast counties, and at the expense of the environment.

The Judicial Council makes a mistake in supposing that it's the judges who maintain superior knowledge of the excesses of the AOC contributing to the trial court funding crisis and the diminished credibility of the judicial branch within the legislature. However, the word is out and it is spreading. It is now too late for the AOC to close the door.

Rather than wasting energy drafting unnecessary rules to silence judges, please devote attention to cleaning your own house. Although AB 1208 will likely die quietly in the Senate, if the AOC continues to try to stifle, rather than listen to, the voices of dissent another such bill is inevitable.

It's so incredibly cynical to assume, that in these times of diminished availability of court services for those already disenfranchised, that lawyers working to improve the trial court funding crisis are selfishly seeking to curry favor from judges. Once again, the Judicial Council is not just on a wrong page, it's still carrying around the wrong book.

Please put it down, listen carefully to those you seek to silence, and then return to the legislature with 3 Rs: Remorse, Responsibility, and Reliability. Real people suffer while you entertain fantasies.

Thank you.

From: Carter Sears, Attorney at Law
Subject: Comment on CJEO Draft Formal Opinion 2012-001

Dear Gentle-people:

This is my second posted comment. My first was deleted -- I suspect the reason for that was my mention of the Long Beach courthouse. Clearly, a policy, and then a direct action to silence dissent (the deletion of my post) causes you less embarrassment than a project which will cost taxpayers millions of dollars and cripple the operations of California trial courts possibly for decades to come.

I agree with Retired Judge James Luther's comments. Please stop doing harm and start helping. Every closure of a self-help program or family law facilitator's office while money continues to fund the Judicial Council's wasteful projects causes real harm to those least able to understand and absorb the causes of the reductions in trial court funding. The actions of the Judicial Council deny access to justice while claiming to promote it.

Now that SB 1407 funds will be used to pay for the Long Beach courthouse, there's really no containing this story. Word is out, and the proposed ethical canon comes too late to be of any benefit. And perhaps just in time. The 24 or so counties who may now lose construction funds will have many vocal judges speaking out against the excesses of the Long Beach courthouse before the rule has time for adoption. Once it is adopted (a certainty as long as you continue to handpick comments) the rule itself will be picked up by the media who will want to know more about why the Judicial Council is seeking to violate judicial officers' 1st Amendment rights. Implicit in this argument is the obvious sense that such a rule is unnecessary. As others have pointed out, the judges' ethics are not likely to be compromised by speaking out in a manner the rule seeks to silence. The only compromised ethics are of those who drafted, and push for the imposition of, this rule, which is little more than a violation of the rights of others to speak their consciences. I believe my first post better expressed my feelings but I failed to save a copy. I'll retain one this time.

If you won't work to ensure access to justice for all Californians, then please get out of the way of those who are.

Respectfully,

P.S. Will a CRC Court Records Request produce other comments you've deleted?

From: Carter Sears, Attorney at Law
Subject: Comment on CJEO Draft Formal Opinion 2012-001

I have twice commented to express my opposition to the proposed rule. And again, the Judicial Council seems to misunderstand the purpose of public comments. That you retain the power to choose among the comments to include only those with which you feel comfortable is extremely problematic and defeats the entire purpose for seeking comments.

My previous comments contained no profanities, aggressive or distasteful language. They merely stated opinions which you may have found to be somewhat embarrassing. If the truth hurts, you are not in a position to receive comments. Period. Someone open to the public and to transparency should have your job.

It's clear that you and the AOC need a reminder so I attach the SEC link. Please spend some quality time with this document and give serious consideration to the recommendations, particularly those relating to transparency. If you are deliberately deleting all comments which contain a reference to the Long Beach debacle, it's little wonder that you have only 9 posted (read: "acceptable") comments to date.

http://www.courts.ca.gov/documents/SEC_Final_Report_May_2012_withcoverletter.pdf

It is not at all true that the suppression of free speech is an issue which is of little interest to the public. Little matters more, especially during a period of supposed reorganization of the AOC. How ironic that you cannot accept some well-deserved criticism and that you are unwilling to allow comments which focus attention on the real reason behind your proposed change to canons of judicial ethics.

Thank goodness the Alliance of California Judges organization exists and is actively performing oversight of this bloated agency which has brought the California trial courts to virtual ruin. Unfortunately,, this agency continues to violate the law by refusing to comply with its own rules requiring disclosure of Court Administrative Records upon request. And the ACJ has been hampered in conducting needed and healthy oversight on numerous occasions because of the AOC's refusal to comply with their requests. This must stop.

Having available now the money spent on CCMS alone would significantly lessen the impact on trial court funding, if not relieve it entirely.

Get it together. Because the decisions you've made to censor my comments will one day result in a loss of work for you. No one needs to have PUBLIC COMMENTS reduced to a very few found acceptable.

If you print this comment, please print the others you have deemed unacceptable. I can't imagine anyone would offer language which is offensive. And just to remind you, criticism itself is NOT offensive. Censorship of such criticism is.

Thank you again for considering my comment.

From: Los Angeles Superior Court
Subject: Invitation to Comment, CJEO Draft Formal Opinion 2012-001

Dear Judge Robie:

On behalf of the Los Angeles Superior Court thank you for the opportunity to comment on the CJEO draft Formal Opinion No. 20 12-00 1.

We formed a Working Group to draft comments of the Los Angeles Superior Court, and we have adopted those comments, which are transmitted herewith, as the comments of the Los Angeles Superior Court.

Sincerely.

Lee Smalley Edmon	David S. Wesley	Carolyn B. Kuhl
Presiding Judge	Presiding Judge-Elect	Assistant Presiding Judge-Elect

LOS ANGELES SUPERIOR COURT
COMMENTS REGARDING CJEO DRAFT FORMAL OPINION NO. 2012-001

Summary

The Committee is correct when it concludes that it is permissible and appropriate for a judge to invite lawyers to a meeting to provide information about budget cuts and their potential impact on the administration of justice. In addition, the Code of Judicial Ethics does not generally prohibit judges from asking attorneys to "help the court." The Committee is also right to say that in discussing ways that attorneys can assist a court in obtaining necessary funding, judges must be careful not to be coercive or convey the impression that any attorneys providing assistance are in a special position to influence the judge. The Committee also appropriately cautions judges to minimize the impression that they are directing requests only to certain attorneys, and that this may be avoided "by prefacing the request with the caveat that help is sought from anyone willing to volunteer, but without any expectations or benefits attached."

However, the Draft Opinion's guidelines are vague and overly broad. They do not provide judges with sufficient explanation or direction. They will lead to unintended consequences in connection with judges' official community outreach functions as articulated in the Code of Judicial Ethics, the California Rules of Court and the Standards of Judicial Administration. In addition, some of the discussion included in the Draft Opinion could create confusion with respect to the duties of a judge to recuse himself or herself in a particular case.

The Draft Opinion also includes proposed content-based restrictions on judicial speech insofar as it states that judges should avoid supporting a funding solution that helps their court in

a manner that may disadvantage other courts. We respectfully suggest that there is no basis in the canons of judicial ethics for such a limitation and that the restriction should be eliminated to avoid potential First Amendment issues. Further, the summary of the role of trial courts in the budgeting process should be amended to avoid the implication that judges cannot express their views about what they believe to be in the best interests of the court system.

We provide at the end of these comments proposed changes to the Draft Opinion that would clarify judges' appropriate roles while insuring compliance with the canons of judicial ethics in a way that is consistent with statute and avoids infringing on First Amendment rights.

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I. Prohibiting judges from asking lawyers to help with budget cuts "in whatever way they believe is appropriate" is too broad and is inconsistent with other analysis within the Draft Opinion.

The Draft Opinion appropriately concludes that it is permissible and appropriate for a judge to invite lawyers to "a meeting to provide information about the budget cuts and their potential impact on the administration of justice." Similarly, the Draft Opinion correctly observes that the Code of Judicial Ethics does not generally prohibit judges from asking attorneys to "help the court." The Committee also correctly cautions judges to minimize the impression that there is an implied benefit to those attorneys who assist the court with respect to budget issues or that there is an implied disadvantage for those attorneys who do not. The Draft Opinion constructively suggests that the implication of benefit or disadvantage may be minimized "by prefacing the request with the caveat that help is sought from anyone willing to volunteer, but without any expectations or benefits attached." (Draft Opinion, p. 12.)[1]

Nevertheless, the Draft Opinion concludes that a "judge may not ask attorneys to help in 'whatever way they believe is appropriate.'" (Draft Opinion, p. 5.) This conclusion that an open-ended request is inappropriate is not supported by the Code of Judicial Ethics and is logically inconsistent with other statements in the Draft Opinion.

The focus of the Committee's analysis is canon 2A, which requires a judge to "respect and comply with the law and [to] act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." "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." (Advisory Committee Commentary to canon 2A.)

Applying this test, the Draft Opinion correctly concludes that it is obvious "there cannot be any actual pressure, intimidation, retribution, or abuse of power" in asking for assistance from members of the Bar. (Draft Opinion, p. 11.) However, the Draft Opinion's line-drawing with respect to circumstances short of pressure, intimidation and abuse of power is unpersuasive.

The Committee suggests that "[a]nswering questions and providing information rather than directing discussion or making specific requests helps to avoid the potential for actual or perceived coercion." (Draft Opinion, pp. 10-11.) During such legitimate discussions, it is reasonable and even likely that lawyers might ask what they can do to help. To conclude that a judge may not answer such questions is unrealistic. So is the conclusion that it is inappropriate for a judge to respond by stating that lawyers should act or help in "whatever way they believe is

[1] Citations are to the form of the Draft Opinion included with the "Invitation to Comment." In that document, the Draft Opinion itself begins at page 4.

appropriate." In fact, saying that attorneys may or should take whatever action they deem appropriate may constitute the most neutral response under the circumstances.

The Draft Opinion states that judges may ask attorneys "to write or meet with legislators" (Draft Opinion, p. 13), may promote voluntary use "of a lawyer's leadership, organizing skills, and free speech rights" (Draft Opinion, p. 11), may "ask attorneys to write an op-ed piece" (Draft Opinion, p. 11), or may ask an attorney to do outreach on the impact of budget cuts on their clients (Draft Opinion, p. 11). Nevertheless, the Draft Opinion concludes that judges may not ask attorneys to help in "whatever way they believe is appropriate". (Draft Opinion, p. 11.) Without citation, the Committee concludes that such a request "may be too broad, [and] may imply or invite too much . . . ." (Draft Opinion, p. 11.) Implies or invites too much compared to what? Too broad compared to what? The Draft Opinion fails to explain why such a request is over the ethical line. Nor does the Committee explain why a request for lawyers to write letters to legislators over which the judge exercises no editorial control is ethically preferable. Indeed, following the Committee's suggestion that judges instead ask that attorneys take a specific action might carry a greater risk that the request will be seen as coercive or likely to appear to curry judicial favor.

The Committee should withdraw its preliminary conclusion that a judge may not ask members of the Bar to help the court with respect to potential budget cuts "in whatever way they believe is appropriate." That preliminary conclusion does not flow from the requirements of the canons of judicial ethics and is incongruous with the Committee's conclusion that it is proper to ask lawyers to take specific action to help the courts secure adequate funding.

The Committee should recognize that an attorney may perform acts that benefit a court without creating any appearance of impropriety. While standing alone that fact may certainly be viewed as influential by the public, the legal test of appearance of impropriety is different and specific: "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." (Advisory Committee Commentary to canon 2A.) Applying a similar test, an appellate court concluded that a judge was not disqualified from presiding over a matter involving a prominent attorney active in the local bar association who played a part in obtaining bar association endorsements for the county judiciary. (*In re Marriage of Fenton* (1982) 134 Cal.App.3d 451, 456-457 ("While wife was understandably apprehensive, we must assume that the judges who passed upon her motions conscientiously believed that they, and other local judges, could determine the matter objectively and in conformity with their oaths of office. No precedent or authority of which we are aware would justify us in holding that the prominence of husband, or his role in the local bar, established disqualification of all Monterey County judges as a matter of law."))

II. The Draft Opinion is both vague and overbroad in attempting to regulate judges' interactions with lawyers concerning court budget needs and the administration of justice.

Judicial outreach is specifically sanctioned by canon 4B, which provides that "[a] judge may speak, write, lecture, teach, and participate in activities concerning legal and non-legal

subject matters, subject to the requirements of this Code." Moreover, judicial outreach is recognized as an official judicial function and an essential part of the court's responsibility to the community under the California Rules of Court. Rule 10.603(c)(8)(C) states that a presiding judge shall "[s]upport and encourage the judges to actively engage in community outreach to increase public understanding of and involvement with the justice system and to obtain appropriate community input regarding the administration of justice, consistent with the California Code of Judicial Ethics and standard 10.5 of the Standards of Judicial Administration." In turn, the Standards of Judicial Administration encourage all trial court judges, as an important "judicial function," to [p]rovide active leadership within the community in identifying and resolving issues of access to justice within the court system." (Standard 10.5(b)(1).)

While the Draft Opinion recognizes the importance of judicial outreach, particularly on the important issues presented by reduction of court funding and threats to access to justice, it suggests the need for unreasonable restrictions on the type of forums in which such outreach may occur, restrictions that are (1) vague, (2) inconsistent with current widespread practices within the judicial branch and (3) beyond the scope of what is required by the Code of Judicial Ethics.

The Draft Opinion expresses concern that meetings with small groups of lawyers to discuss budget issues present ethical difficulties. "A judge may only meet with so many people given limited time and resources, but the narrower the list of invitees, the more likely the appearance that those attending are in a special position to influence the judge." (Draft Opinion, p. 12.) The Draft Opinion is vague as to how to apply this standard. The Draft Opinion also appears to question whether it is appropriate to invite only lawyers with "certain connections or relationships" to a meeting discussing how to counter potential budget cuts. (Draft Opinion, p. 12.) As a solution, the Draft Opinion suggests meeting with "officers of local bar associations." (Draft Opinion, p. 12.)

At the statewide level, the interactions of the courts with the Bar do not comport with the limitations suggested by the Draft Opinion. The Bench-Bar Coalition, first organized under the leadership of Chief Justice Ronald George, is a group of lawyers, only some of whom are current Bar association officers, chosen for their credibility and contacts with state legislators. The work of this Coalition includes consultation between the lawyer members and judges who similarly hold leadership positions on the court or have knowledge of and contacts with state legislators. At least one day per legislative session, judges and lawyers who are members of the Coalition organize to visit state legislators, in groups that include specific lawyers and specific judges.

The organization of the statewide Bench-Bar Coalition is contrary to the ethical limitations suggested by the Draft Opinion. Its membership is a narrow group, and not all of the members are current officers of Bar associations. Moreover, judges are designated to work with very small subsets of the overall Coalition, only a handful of lawyers, for direct meetings with legislators or legislative staff. This structure would appear to run afoul of the apparent prohibition on meetings with a narrow list of invitees suggested by the Draft Opinion.

Indeed, under the reasoning of the Draft Opinion, one might question whether Judicial Council Advisory Committees with lawyer members raise ethical issues. For example, the Chief

Justice appoints prominent attorneys to be members of the Civil and Small Claims Advisory Committee and the Criminal Law Advisory Committee. Does the selection of these lawyers, and the exclusion of others who also might have an interest in working on the development of rules in these subject areas, suggest favoritism toward these attorneys in such a way as to constitute a violation of the canons of judicial ethics?

Further, local courts have long considered it appropriate to consult with a limited number of attorneys on issues such as access to justice. For example, courts in larger metropolitan areas such as Los Angeles have created committees to discuss local issues during regularly scheduled meetings with lawyers who practice in family law, complex litigation, civil litigation and criminal law. Judges also attend meetings of lawyer groups such as Inns of Court, the Association of Business Trial Lawyers, and organized groups limited to attorneys who primarily represent either plaintiffs or defendants. Such groups provide valuable feedback to the trial courts on how various case management practices and other matters of judicial administration affect the Bar and the public. They also provide important forums for conveying information about current changes in court rules or practices and the significance of impending cuts to the budget of the judicial branch. Yet judicial presentations to such committees may be called into question by the "narrow invitee" rule suggested by the Draft Opinion.

The Draft Opinion's concerns about a narrow group of invitees are not rooted in the Code of Judicial Ethics. The Committee should clearly ground its reasoning in the requirements of canon 2A that a judge "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary" and avoid the "appearance of impropriety." Moreover, it is appropriate that the Committee take into account canon 4B, which recognizes that a judge may speak, write, lecture, teach and participate in activities concerning legal and nonlegal subject matters. The Advisory Committee Commentary to canon 4B states that "a judge may do so, either independently or through a bar or judicial association or other group dedicated to the improvement of the law."

The Draft Opinion also is vague in requiring a judge to "ensure" that attorneys' actions assisting the court are voluntary. The Draft Opinion requires that a judge communicate with attorneys in such a way as to "ensure that any actions taken by the attorneys would be entirely voluntary." (Draft Opinion, p. 5.) The Draft Opinion does not explain how it is possible for a judge to ensure another person's motives, or that another person's actions are voluntary.

It is appropriate for the Draft Opinion to stress that a judge must not appear to favor only one segment of the Bar with a particular interest before the courts; for example, that a judge should not limit outreach to members of the Bar who represent plaintiffs to the exclusion of Bar leaders who represent defendants. In addition, the Draft Opinion properly cautions judges to minimize the impression that they are directing requests only to certain attorneys, and offers sound advice that this may be avoided "by prefacing the request with the caveat that help is sought from anyone willing to volunteer, but without any expectations or benefits attached." (Draft Opinion, p. 12.) This guidance, presented within the context of the ethical canons cited above, provides sufficient guidelines to judges without imposing restrictions that would unreasonably and unnecessarily restrict interactions between the judiciary and members of the Bar.

III. The Draft Opinion is inconsistent as to whom it applies, and unnecessarily creates confusion with respect to the duties of a judge to recuse himself or herself in a particular case.

The Draft Opinion is inconsistent and confusing as to whom it applies – judges of courts collectively, judges in leadership or administrative positions, judges acting in an official capacity on behalf of a court, or to all individual judges. (Compare Draft Opinion pp. 4, 5, 9, 14.) (distinguishing between when a judge is acting on a court's behalf or as an individual).)

The first question presented is: "May ***a judge*** invite partners of law firms in the county to attend a meeting at which the judge makes a presentation concerning potential budget cuts and asks that the attorneys help the court in whatever way they believe is appropriate?" (Draft Opinion, p. 4 (emphasis added).) However, the summary of the response to this first question begins: "***Judges*** may . . . ." (Draft Opinion, p. 5 (emphasis added).) The Discussion states: "The committee has not been asked to opine on the subject of ***a judge's own activities*** . . . ." (Draft Opinion, p. 9 (emphasis added).) It goes on to distinguish between a judge acting in the court's stead "and a judge acting as an individual." (Draft Opinion, p. 14.) As a result, the Draft Opinion makes it unclear what activities by what judge in what capacity are supposed to be improper.

The Code of Judicial Ethics permits a judge to consult with, and presumably lobby, a public official on matters concerning the law, the legal system or the administration of justice. (Canon 4(C)(1).) To prohibit such activities would be inconsistent with the Code.

Judges who do not hear cases – or hear only certain types of cases – may meet with individual attorneys and request help in settings that would not affect their appearance of impartiality. For example, a judge assigned only to criminal law cases could meet freely with lawyers who only practice civil litigation without a concern that the meeting would create an appearance of impartiality. The converse would, of course, also be true.

Similarly, when a presiding judge in a larger court with primarily administrative responsibilities meets with specific attorneys and asks them to advocate in the legislature for more court funding, this does not affect the appearance of the judge's impartiality, and is consistent with the provision of canon 5D, which allows judges to engage in political activity "in relation to measures concerning the improvement of the law, the legal system, or the administrative of justice." Moreover, because under canon 4C(1) a judge may consult with an executive, legislative body or public official "concerning the law, the legal system, or the administration of justice," this canon would, on its face, allow the judge to request assistance by attorneys to lobby the same executive, legislative body or public official, as long as there is no appearance of lack of integrity or impartiality.

There may be circumstances in which a judge, particularly a presiding judge performing administrative responsibilities, may be required to take action that might require recusal, at least for some period of time, in order to carry out responsibilities under the Rules of Court for

"establishing policies, and allocating resources in a manner that promotes access to justice for all members of the public, provides a forum for the fair and expeditious resolution of disputes, maximizes the use of judicial and other resources, increases efficiency in court operations, and enhances service to the public." (California Rule of Court 10.603(a).) Carrying out such duties can and has required a presiding judge to engage counsel or even a lobbyist to represent the court in furtherance of such responsibilities. (*See* California Rule of Court 10.810(d), Function 10 (legal services for allowable court operations, including contractual services).)

This Opinion, however, should stay within bounds of the questions presented, and should not take up issues concerning when recusal is required. Whether a judge is required to make a disclosure or recuse ordinarily is a question that should be decided in the specific context of a particular litigated matter. Moreover, analysis of recusal questions requires consideration of a well-developed and extensive body of law interpreting Code of Civil Procedure sections 170.1 and 170.3. (*See, e.g., In re Marriage of Fenton* (1982) 134 Cal.App.3d 451, 457 (summarized, *supra*, at p. 2); *see also Develop-Amatic Engineering v. Republic Mortgage Co.* (1970) 12 Cal.App.3d 143, 150.)

The Draft Opinion also strays beyond the questions presented in its concluding "Summary." Earlier in the Draft Opinion, the Committee acknowledges that it has not been asked to opine on the subject of a judge's own activities in conveying messages to the public or to the executive and legislative branches on issues pertaining to the court budget. Yet, in the final "Summary" section, the Draft Opinion in fact does take up the issue of a judge's advocacy before the legislature and with the executive branch. The quotations from the Rothman treatise deal with a judge's own advocacy and are not responsive to any issue raised by the questions presented. We strongly suggest that these paragraphs be omitted, as they take the Draft Opinion in a direction that is not supported by the discussion and analysis of the earlier portions of the Draft Opinion.

IV. The Draft Opinion purports to impose content-based restrictions on judicial speech. These portions of the Draft Opinion are inappropriate and should be deleted.

A. The statement that trial court judges should avoid supporting a funding solution that helps their court is not founded in the Code of Judicial Ethics and is based on a faulty premise.

The final paragraph of section VI.C of the Draft Opinion states that "[j]udges should . . . avoid asking the attorneys to support a funding solution for a specific court that might be detrimental to other courts." (Draft Opinion, p. 14.) The Draft Opinion provides, as an example, that "a judge should avoid requesting that an attorney ask a legislator to move courthouse construction funds to general trial court operations." (Draft Opinion, p. 14.) The Committee purportedly is concerned that asking attorneys to support a particular court's funding needs "could place some attorneys in a dilemma if they practice in different counties that have competing interests."

Any request by a judge to a lawyer to support court funding of any sort places an attorney in "a dilemma" if the attorney does not agree with the content of the request by the judge. For

example, an individual lawyer might believe that health care or education is more worthy of support in a particular budget crisis than the judiciary. Any lawyer who disagrees for whatever reason with the judge's stated position on court funding is placed in "a dilemma" by a request for advocacy on behalf of the court. This is why, as discussed above and in the Draft Opinion, it is important that a judge make clear in advocacy to the Bar that there should be no expectation of support or benefit to be obtained by supporting the court's or the judge's position.

There is no special "dilemma" posed for attorneys if a particular trial court advocates for its own perceived needs and interests, even if it might be the case that another court program could be diminished by meeting that trial court's needs. As there is only one "pie" of funds allocated to the judicial branch, any request by a judge for funds for her own court will automatically reduce another court's slice of the "pie" and will "be detrimental to other courts." The last paragraph of section VI.C in effect amounts to a prohibition against judges asking attorneys for support for any particular funding solution unless it is a completely vague statement that the court system as a whole deserves more money.

The Committee provides no analysis as to the propriety of such a vast, content-based restriction. The implicit threat of action by the Commission on Judicial Performance against a judge for "offensive" speech, by which an individual judge expresses his sincere views as to what funding best preserves access to justice, is chilling.

B. The section of the Draft Opinion entitled "Judges and the Budgeting Process" includes a discussion which implies that judges may advocate only positions that have been approved as the position of the Judicial Council. This discussion is unnecessary and should be deleted.

The opening section of the Discussion section of the Draft Opinion begins, in the first paragraph, with a correct statement that individual judges are encouraged by the California Rules of Court to promote public understanding of and confidence in the administration of justice. The second and third paragraphs of this section, however, adopt a view of centralized control of the judicial branch which may be interpreted to suggest that individual judges are limited to advocating positions about the judicial branch budget that have been approved by the Judicial Council. We believe that those paragraphs are unnecessary to the substance of the questions presented and may be read by judges as an admonition to refrain from sincere advocacy for what a judge may believe to be the best interests of the court system.

Contrary to what is implied by footnote 2 of the Draft Opinion, the judicial power of the state is vested equally in the Supreme Court, courts of appeal and superior courts, not in the Judicial Council. (California Constitution, article VI, section 1.) Superior courts are the only courts with general jurisdiction. (California Constitution, article VI, section 10.) As discussed below, superior courts are also charged with the responsibility for "independent local court financial management." (Trial Court Funding Act of 1997, Art. 3; Government Code section 77001.) Finally appellate courts have encouraged superior court presiding judges to take a

leadership role with regard to assisting the local justice community in resolving local issues concerning the courts. (*See Gates v. Municipal Court* (1992) 9 Cal.App.4th 45, 59.)

Prior to 1997, trial courts negotiated directly with their counties for necessary funding. The Lockyer-Isenberg Trial Court Funding Act of 1997 shifted much, but not all, of the responsibility for trial court funding to the state, and did not change the independent role of trial courts with regard to financial management. Uncodified section 3 of the trial Court Funding Act, provides in pertinent part (emphasis added):

> "SEC. 3. The Legislature declares its intent to do each of the following: ****
> (1) ***Acknowledge the need for strong and independent local court financial management, including encouraging the adoption by the Judicial Council of a Trial Courts Bill of Financial Management Rights,*** to be approved no later than January 1, 1998. **This bill of management rights shall minimize the rules and regulations in the area of financial affairs to those sufficient to guarantee efficiency, but shall give strong preference to the need for local flexibility in the management of court financial affairs."**

Consistent with this, Government Code section 77001, which sets forth the principles for implementing the Trial Court Funding Act, calls for a decentralized system of trial court management. That section limits, rather than expands, the policy making role of the Judicial Council by providing that "[t]he Judicial Council shall adopt rules which establish ***a decentralized system of trial court management.***" (Emphasis added.)

This issue has been the subject of ongoing debate within the Judicial Branch. As stated in the Summary of the Report of the Strategic Evaluation Committee (May, 2012), under the caption "Overarching Issues and Themes" the SEC Committee concluded that historical over-reaching by the AOC had led to "tension between centralized control or authority exercised by the AOC and the autonomy retained by local courts, which are presided over by judges who are constitutional officers." (SEC Report, p. 4.)

The incorrect discussion of the role of the Judicial Council and the independent role of trial courts in the Draft Opinion lead to the unwarranted conclusion that trial courts may not advocate positions for funding that may disadvantage other trial courts or the AOC. It is by assuming there is centralized authority for financial management that the Draft Opinion concludes: "Judges should . . . avoid asking the attorneys to support a funding solution for a specific court that might be detrimental to other courts." (Draft Opinion, p. 14.)

While the Judicial Council has the constitutional authority "to make recommendations . . . to improve the administration of justice," and to "adopt rules for court administration practice and procedure, and perform other functions prescribed by statute," such rules "shall not be inconsistent with statute." (California Constitution, art. VI, sec. 6(d).) Government Code section 77001, and uncodified section 3 of the Lockyer-Isenberg Trial Court Funding Act of 1997, direct independent local financial management. The Judicial Council has adopted general rules establishing a system of trial court management that: (1) promotes equal access to the courts; (2) establishes decentralized management of trial court resources; and (3) enables the trial

courts to operate in an efficient, effective, and accountable manner in serving the people of California." (California Rule of Court 10.601(a).) The Judicial Council also has provided that local presiding judges shall exercise that independent local financial management by "establishing policies, and allocating resources in a manner that promotes access to justice for all members of the public, provides a forum for the fair and expeditious resolution of disputes, maximizes the use of judicial and other resources, increases efficiency in court operations, and enhances service to the public." (California Rule of Court 10.603(a).)

These responsibilities imposed on presiding judges may require taking positions contrary to other trial courts or contrary to the AOC, especially if statewide resources have been applied in a way that implicates access to justice for all members of the public. For example, the judicial members of the SEC Committee were required to exercise and express their independent judgment in order to carry out the mandate of the Chief Justice to the SEC Committee.

For these reasons, we submit that the second and third paragraphs of the "Judges and the Budgeting Process" section of the Draft Opinion chills appropriate advocacy by judges and presiding judges and should be deleted.

C. Judicial speech is protected by the First Amendment, and the content-based restrictions included in the Draft Opinion cannot survive strict scrutiny.

Judges, like legislators and other public officials and employees, have the same First Amendment rights as private citizens under federal and California law.[2] In *Republican Party of Minnesota v. White* (2002) 536 U.S. 765, the United States Supreme Court determined that a prohibition against a candidate for judicial office "announcing" her position on matters of public interest, contained in canon 5A of Minnesota's Code of Judicial Conduct, violated the First Amendment speech and assembly rights of judicial candidates, whether they were sitting judges or attorneys running for office. The Supreme Court held that the constitutional validity of judicial canons of ethics that restrict speech is determined by applying strict scrutiny.

Under the strict scrutiny test, the entity proposing restrictions in a state's canons has the burden of proving that the regulation "is (1) narrowly tailored, to serve (2) a compelling state interest. In order for respondents to show that the [restriction] is narrowly tailored, they must demonstrate that it does not unnecessarily circumscribe protected expression." (*Id.* at 775 (citations and internal quotation marks omitted.))

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[2] *See Bond v. Floyd* (1966) 385 U.S. 116, 135-137 (holding Georgia's argument that a state legislator was entitled to less First Amendment protection than a private citizen was erroneous); *Beiluch v. Sullivan* (2nd Cir. 1993) 999 F.2d 666, 670-671 (municipality that transfers police officer in retaliation for speaking out against its tax expenditures, budgets and school construction violates his First Amendment right to petition; where employee's speech contributes to debate on public issues, a perceived potential threat to effective government operations is not sufficient to justify retaliation).

As discussed above, there is no support in law or logic for restricting judges' ability to advocate for funding for their own local courts, even if that advocacy could affect the funding of other local courts or programs (either directly or by implication). The Draft Opinion's statement that judges may not ask attorneys to support a funding solution that might be detrimental to other courts, and its implication that judges must refrain from advocacy that is not centrally approved, are neither narrowly tailored nor do they serve a compelling state interest. The proposed restrictions on judicial speech do not have a persuasive rational basis, and certainly cannot survive strict scrutiny. The Committee should avoid the constitutional issue and should strike the content-based restrictions discussed above from the Draft Opinion.

V. Conclusion.

For the reasons set forth in these comments, we urge the Committee to modify the Draft Opinion to make clear what conduct is allowed by judges consistent with the Code of Judicial Ethics, while insuring that any restrictions do not infringe on judges' First Amendment rights. We have attached as an Appendix, a redline/strikeout version of the Draft Opinion incorporating our proposed changes.

Los Angeles Superior Court Working Group Re:
CJEO Draft Formal Opinion No. 2012-001

Hon. Anthony J. Mohr, Chair,
Hon. Monica Bachner
Hon. Gail Ruderman Feuer
Hon. Holly Fujie
Hon. Amy D. Hogue
Hon. Holly E. Kendig
Hon. Lisa B. Lench
Hon. Louis M. Meisinger
Hon. Rita Miller
Hon. Elia Weinbach
Frederick R. Bennett, Court Counsel

From: Judge Rolf M. Treu, Los Angeles Superior Court
Subject: Comment on CJEO Draft Formal Opinion 2012-001

I fully concur and join in the comments set forth by the Los Angeles Superior Court.

ROLF M. TREU

Judge of the Superior Court
State of California
County of Los Angeles

From: Lance H. Olson, Attorney at Law
Subject: Supreme Court Ethics Opinion Comments

Ms. Black: I have no view point on the outcome of the opinion, but I would suggest you examine the case of Miller v. Miller (1978) 87 Cal.App.3d 762. I have always understood this case to prohibit the expenditure of public funds for the purpose of grass roots lobbying. The proposed ethics question would appear to suggest public funds (judges) would be used to urge voters (attorneys) to lobby the Legislature in support of the Courts. In Miller the 3rd DCA found this to violate the State Constitution with respect to a state agency that lacked legislative authorization for grass roots lobbying. The relevant discussion may be found at page 768-69. While Miller was subsequently superseded by statute, I believe it remains good law.

I would note further that assuming Miller I applies, the judiciary could avoid its application by simply avoiding use of public resources to engage in grass roots lobbying. For example, the judges could volunteer their own time for this effort and not involve court personnel or court resources. It is also possible (I have not researched this) that there is existing statutory authority for grass roots lobbying by the courts. Good luck with your opinion.

Lance H. Olson, Attorney at Law

From: James R. Lewis, Attorney at Law
Subject: CJEO draft ethics opinion 2012-001

Committee:

I agree with the draft opinion. Unfortunately, despite the judge's best intentions, the invitation to a "few" (and efforts of the few in return) will give the impression to the "many" that some favorites are being played and favors traded. While an invitation to a broader group of attorneys (say the entire local bar association) could make the judge's meeting impractical in terms of size, it would avoid ethically negative perceptions and could perhaps garner more ideas for furthering the cause.

Avoidance of impropriety or the appearance of impropriety is one the hallmark responsibilities of a member of the bench.

My two cents.

Regards,

JAMES R. LEWIS | Attorney at Law

From: James W. Rushford, Attorney at Law
Subject: Supreme Court Ethics Ruling Comments

Ms. Nancy Black:

I have reviewed the draft opinion 2012-001 and the commentary. I disagree with the proposed opinion.

In a nutshell, judges should not be soliciting favors or assistance from attorneys regarding political decisions by the legislature relating budget cuts or additions. It simply looks bad, no matter how carefully the judge or judges to try to candy coat it. While budget issues for the judiciary certainly relate to the improvement and administration of justice they also relate to the judge's workload, how much he or she continues to enjoy their job, his or her staff's income and benefits, and perhaps even the judge's income and benefits. There is the nagging concern that the judge hopes to personally benefit from the "assistance." Necessarily, certain attorneys will be called in for "the meeting" wherein the judge asks for assistance; be they friends of the judge, politically powerful attorneys, or leaders in the local legal community, or the various sub associations of local bar associations. Those not included will naturally wonder whether they will receive a fair shake in a case involving the attorney who provided assistance, heard by the judge who asked for the assistance. It would be more appropriate for the Judicial Counsel or Judges Association or, whoever represents the judiciary as a whole, to contact the State Bar, advising of the budget issues and suggesting that it is in the interest of justice for the Bar and its members to address court budget issues with the Legislature. Individual judges should never ask attorneys who practice in their courts (or attorneys from firms that practice in their courts) for such favors. Frankly, all litigators are painfully aware of the impact of budget cuts. I would leave it to them or their numerous associations to initiate efforts to address with the Legislature the problems caused by budget cuts and potential solutions.

The same is true with regard to a judge asking attorneys to write letters or meet with legislators on their behalf. It simply and unnecessarily invites questions of propriety that would not be raised if Judges' associations dealt with The State Bar rather than individual members.

Thank you for this opportunity to comment.

James W. Rushford

From: John S. Gilmore, Attorney at Law
Subject: Lawyers Advocacy re Budget Cuts For Courts

I have reviewed the draft opinion, though do not have time for a thorough reading/research. What follows, therefore, are curbstone comments:

Why "partners of law firms." That doesn't make sense and cuts out solo attorneys and experienced, battle seasoned associates. It has an indirect emphasis on the larger firms. What it should address are attorneys with connections to advocacy professionals, such as the Consumer Attorneys or Association of Defense Counsel. Also, contacts with American Board of Trial Advocates and American College of Trial Counsel through local members. All four have stated interests in keeping the courts open for all cases especially civil matters. Local bar associations have liaison committees with the Superior Courts. Are they being utilized?

The above is not to state that I am negative on the idea. On a first read, however, it needs tweaking.

John S. Gilmore

From: Borden D. Webb, Attorney at Law
Subject: CJEO Draft Formal Opinion 2012-001

Dear Committee,

In this firm, we fully support the position taken by the Superior Court of California, County of Sacramento, in its December 11, 2012, letter to the Chair of the Committee.

Borden D. Webb
Attorney at Law
Webb & Tapella Law Corporation

From: Lawrence C. Tistaert, Attorney at Law
Subject: Comment on CJEO Draft Formal Opinion 2012-001

I have been admitted to practice, and practicing, in California since 1967 (SBN 041149). I interact with judges in legal, professional and social settings. In fact, judges have myriad and varied interactions with attorneys in many contexts, some of which are in relation to or affect the courts and/or their administration. In all these contexts, judges are constrained from engaging in conduct that creates an appearance of impropriety, lack of integrity or impartiality. There is no reason to create a sub-set of rules for budgetary interactions and every reason not to create sub-sets of rules for each and every conceivable category of interactions between judges and attorneys. I trust judges to abide by the Canons. A judge who abides by them in one context will abide by them in all contexts. I'm not in favor of proposed Opinion 2012-001, or the restraint upon speech inherent therein, or the underlying and unspoken lack of confidence in our judges and their integrity.

From: The California Judges Association
Subject: CJA Judicial Ethics Committee Comments re CJEO Draft Formal Opinion No. 2012-001

Committee Members:

After consultations with its Judicial Ethics Committee The California Judges Association submits the following comments regarding Draft Formal Opinion No. 2012-001 of the California Supreme Court Committee on Judicial Ethics Opinions.

At the outset, the CJA Ethics Committee agrees with the core conclusions expressed in the Opinion. However, the opinion contains language that goes beyond what is necessary to answer the question presented and which could be interpreted as restricting the conduct of judges advocating for their courts beyond what is warranted by the Canons. As the Opinion recognizes, Canon 5D expressly permits political activity related to the improvement of the law, the legal system, or the administration of justice. Canon 4B and the commentary to 4B not only permit judges to speak about matters related to the improvement of the law, the legal system, or the administration of justice, they are encouraged to do so. At the same time, these activities must conform with the requirements of Canon 2A and Canon 2B(1). These are the principles at the heart of the Opinion and the Committee is in complete agreement with the Opinion in this regard.

At points the opinion does not delineate these competing principles with sufficient clarity. Also, the Opinion contains language that does not pertain to the question presented and that takes away from the focus of the discussion. The Committee has endeavored to go through the Opinion and tried to identify those portions that we believe need clarification and those that we believe should be changed or deleted.

Before discussing specific recommendations, we make one more general observation. We assume the Questions Presented section states the facts of a particular situation raised in an inquiry to CJEO. However, it would be helpful to readers of the Opinion to discuss factual scenarios to which the rules can be applied. Such discussion would provide more guidance to judges confronted with the competing interests presented when advocating for their court. See, for example, CJA Formal Opinion Nos. 61 and 63 where a variety of examples or hypotheticals are discussed.

The following comments pertain to the specific language in the Opinion. First, section IV and V of the Opinion include authorities that do not apply to the question presented. We believe these authorities and the ensuing discussion pertaining to them should be deleted. For example, Canon 4C(1) relating to a judge appearing at a public hearing or consulting

with an executive or legislative body or public official has nothing to do with the question presented. Indeed, the last sentence in part VI of the Opinion expressly states that the CJEO was not asked to opine on this subject. Similarly, CJA Ethics Advisory Opinion No. 33 does not appear to apply to the discussion and should be deleted.

Part VI A of the opinion contains a lengthy discussion on the budget process. The second and third paragraph of that discussion adds nothing to the analysis of the question presented and should be deleted. Understanding the role of the Judicial Council and the AOC in the budget process has little or nothing to do with an individual judge approaching lawyers to discuss the potential budget cuts and to enlist their aid with the legislature. It is off point and not helpful. The authorities cited in part V which relate to this discussion should also be deleted.

The reference to Canon 4C(1) in Part VI B should be deleted for the reasons stated above. Also, the first sentence of the second paragraph of Part VI B should also be deleted for the same reasons.

On page 6, in the fourth paragraph of Part VI B, the Opinion states that "most" attorneys appear in court. There is no support for this assertion in the opinion, and as a great number of attorneys handle transactional or in-house work and never enter the courtroom, the opposite is probably true. It would be correct to state that "many" attorneys appear in court. This distinction is important because it affects the analysis. If one assumes that any lawyers who are approached are likely to appear in court, the risks identified in the opinion are more germane than would be the case if most of the lawyers approached never appeared in court. We suggest that the sentence in the fourth paragraph beginning with "Because most attorneys…" be changed to: "Because many attorneys appear in court, any solicitation for help directed at attorneys must be made in a manner that avoids leading attorneys to believe…."

In the sixth paragraph of Part VI B the Opinion suggests that asking for help in "whatever way [the attorneys] believe to be appropriate," may be too broad. The Opinion should make a clearer distinction between proper suggestions as to ways attorneys may help (i.e., making personal contact with legislators) versus improper suggestions (payment of a lobbyist to lobby on behalf of court interests). In the first sentence of the seventh paragraph, the Opinion states, "In the opinion of the committee, a judge cannot ask the attorneys to undertake a lobbying campaign or to pay a lobbyist." However, on pages 9 and 10, the committee opines that judges may request that attorneys write to or meet with legislators. These statements appear to be in conflict as writing to or meeting with legislators may reasonably be understood to be part of a lobbying campaign. Yet, in light

of other discussion in the Opinion, that type of lobbying would be permissible. This confusion should be eliminated. Indeed, stating that a judge can ask attorneys to undertake a lobbying campaign, but cannot ask to pay a lobbyist, seems more consistent with the analysis presented in the opinion.

While we agree with the analysis in paragraph five, we have some concern regarding the discussion of a judge's obligation to "ensure" that attorneys are acting voluntarily and not under a feeling of compulsion or expectation of favoritism. In the second paragraph of the summary, Part II of the Opinion, it states, "Judges may ask attorneys to write letters or meet with legislators. The judge must ensure, however, that the attorneys' actions are voluntary and the judge may not convey the impression that the attorneys could be in a special position to influence the judge, as a result of the attorneys' participation." In paragraph five, the Opinion discusses the importance of any attorney's participation being voluntary and page 8 discusses the importance of not conveying the impression that an attorney will be in a special position to influence the judge. While these principles are important there is no guidance as to how a judge is to ensure that an attorney's actions are voluntary or that an attorney is not placing himself or herself in a position to influence the judge. Presumably, CJEO does not want to create new duties on judges to follow up on attorneys' outside activities. The Opinion should take care to make clear that judges do not have any obligation to monitor the activities of lawyers outside the courtroom context. Perhaps replacing the word "ensure" with different phrasing would eliminate this concern.

To avoid some of the risks mentioned in the Summary, paragraph 8 suggests a "caveat" that could preface any request for assistance. It would be helpful if the Opinion went further here. Simply including the caveat does not resolve other ethical concerns that can arise in this situation. For example, what, if anything, should a judge do if an attorney copies the judge on letters he or she has sent to legislators, or updates the judge at a bar function about the attorney's efforts on the court's behalf? What further action is required when an attorney present at the meeting has a case pending before the judge? These situations would appear to require some discussion regarding disclosure and disqualification rules.

In paragraph nine the committee discusses the "scope" of the invitation. The questions raised are legitimate. More questions come to mind – what of lawyers who are not partners or who are government attorneys? To whom should the invitations be sent in order to pass ethical muster? While care should be taken that the scope is not too exclusive so as to avoid creating the impression that those who are invited are an elite few, it also is not practical in larger counties to invite the entire bar .

In paragraph three of Part VI , the draft cautions judges to "be wary" of inviting lawyers to "seek particular results that benefit the judge's court to the detriment of other courts." This statement seems to mean that judges should not urge lawyers to seek funding for a facility or program at the judge's court, as opposed to all courts. There is nothing in the Canons that suggest that judges can only take positions that inure to the benefit of all the courts in the State. The Opinion offers no authority to support this assertion and we are not aware of any such authority. So long as the judge is not asking lawyers to act "on behalf of" the court, but is merely providing facts or information from which the attorney may draw his or her own conclusion, there does not appear to be an ethical problem. Moreover, if the local court is in need of facility improvements (due, for example, to seismic problems) a judge should not be constrained from sharing the information with the local bar. Nor is it clear how doing so might be "detrimental to other courts," except in the very general sense that there is only so much money to go around.

The analysis offered in support of the position taken in paragraph four of Part VI C is very weak. There is nothing wrong with a judge in County B asking the attorney to support the transfer of construction funds to general trial court operations so long the request complies with the other concerns addressed in the Opinion. If an attorney feels that it is more important that County A get a new courthouse, than County B closing courtrooms, that attorney is free to advocate for that position, instead. The ethical issue is how the request is made, not the specifics of the request. To suggest that any judge who advocated for the use of court construction funds to maintain court operations was violating the rules of ethics, and as such would be subject to discipline, is very disturbing. We strongly urge that this paragraph be deleted.

In the last paragraph of Part VII, the Opinion concludes with a brief discussion of problems that may arise when judges advocate positions before the legislative and executive branch. However, this important topic is not the subject of the Opinion. As noted at the outset on page 5, "The committee has not been asked to opine on the subject of a judge's own activities vis-à-vis the public or members of the executive and legislative branches on issues of potential budget cuts to the court system." It would be helpful to judges in a future opinion to discuss the concerns noted by Judge Rothman regarding advocacy before the other branches of government. But the entire paragraph should be deleted in favor of a conclusion that addresses the issues in this Opinion. For example, many of the problems identified in the Opinion can be avoided by the judge addressing lawyers in a neutral non-exclusive setting such as meetings of bar associations or their governing boards. This suggestion would be more germane to the issues presented than a discussion related to conduct not addressed in the Opinion.

Thank you for the opportunity to present these comments.

Very truly yours,

Allan D. Hardcastle

President

From: Judge Michele E. Flurer, Los Angeles Superior Court
Subject: Comment on CJEO Draft Formal Opinion 2012-001

Comment:

Given the state of court funding and its prospects in the foreseeable future, I appreciate the consideration of this topic by the committee. I believe limiting the discussion to a simplified review of the specific questions posed and application of Cannons 2, 2A, 2B(1), 4B, 4C(1),Canon 5D would reduce a significant amount of the objections raised to the draft opinion. I am encouraged by the Committee's recognition of the realities in which we now must conduct ourselves and ask the Committee to consider modifying the Draft to limit the broad discussion points and provided clearer examples of permissible conduct under the Code of Judicial Ethics. I concur with the opinions and suggestions of the LASC and CJA.

Judge Michele E. Flurer
San Pedro Court

From: Edith Matthai, Attorney at Law
Subject: Comment on CJEO Draft Formal Opinion 2012-001

I submit this comment as an attorney who has attended countless meetings with numerous judges on budget issues. I do not speak for any organization or anyone other than myself in making this comment.

There have been many prior comments regarding the language in the proposed opinion at the bottom of page 14. My concern is that the admonition against asking for support of a funding solution "for a specific court that might be detrimental to other courts" creates significant practical problems. Should judges in counties with a dilapidated court house be prohibited from asking (not leaning on) counsel to convey to the legislature the difficulties they face in practicing there ? Are judges prohibited from participating in meetings with counsel concerning the need for electronic filing systems with the expectation that attorneys will explain to the legislature of the need for same, knowing that funds will not go to all courts at the same time?

Different counties have different priorities and neither the judges nor the counsel who may choose to advocate for a particular project can know all the ways that another county may see the project as detrimental to them. In these budgetary times any money going to one court can be seen as detrimental to another.

As attorneys we should be free to advocate as we choose and it would be too easy for someone who disagrees with the position taken to assert that it resulted from improper judicial influence.

If discipline were sought against a judge on the basis that meetings with counsel resulted in advocacy lawyers that aided a particular court, it would be viewed by many as a political use of the disciplinary system; that perception is detrimental to all.

Thank you for the opportunity to comment.

From: The Alliance of California Judges
Subject: ACJ Comments on Draft Ethics Opinion

Hon. Ronald B. Robie, Chair
California Supreme Court Committee
On Judicial Ethics
350 McAllister Street, Room 1144A
San Francisco, CA 94102

This comment is submitted on behalf of the Alliance of California Judges in response to a draft formal ethics opinion published for comment by the California Supreme Court Committee on Judicial Ethics Opinions (CJEO). The Alliance appreciates the opportunity to comment on this opinion before its adoption. The draft opinion proposes rules restricting the behavior of judges seeking the assistance of attorneys in opposing budget cuts negatively affecting their court. The Alliance believes that the draft opinion is (1) overly broad, going beyond the questions presented; (2) confusing and contradictory in the guidance given to judges about what actions are and are not ethically permissible; and (3) unduly restrictive, preventing judges from acting in ways that are entirely ethical and in the best interest of their respective courts.

Questions Presented

The questions presented, and which the draft opinion seeks to answer, are:

1. May a judge invite partners of law firms in the county to a meeting at which the judge makes a presentation regarding potential budget cuts and asks the attorneys to help the court in whatever way they believe is appropriate?

2. May a judge at the same meeting ask attorneys to write or meet with legislators in Sacramento on the court's behalf?

The draft opinion answers the first question with a yes and a no; yes, judges may invite

attorneys to attend such a meeting but the invitations "should not be restricted to a select few," and no, judges may not ask attorneys to help in "whatever way they believe is appropriate." The opinion cautions that judges must communicate about the subject in a way that is not coercive and must not convey the impression that helping could result in a position of special influence for the attorney. The second question is answered with a yes, that a judge may ask attorneys to write to or meet with legislators, subject to the same caveats set forth in the answer to Question 1.

Scope of the Draft Opinion

It is understandable that issues such as these arise in fiscally difficult times like the present. Judges need guidance on how they may ethically carry out their responsibilities in dealing with the budgetary process. However, the draft opinion is too broad, because it goes far beyond the questions presented. To the extent that the draft opinion gives advice far beyond the scope of the questions presented, it appears to be a solution in search of a problem. By addressing issues not raised and giving what is in some respects confusing advice, the draft opinion would inappropriately chill or discourage judges from commenting or acting to educate the bar in their respective communities about the potentially damaging impact of budget cuts for the judiciary. These crucial budgetary measures unquestionably concern the improvement of the law, the legal system, or the administration of justice. For judges to speak out about the impact of these cuts, especially to those most affected by them (including attorneys) is entirely consistent with the principles regarding public advocacy by judges set forth in Canons 4B, 4C(1) and 5D.

A rule or opinion on this issue really needs to state little more than that a judge may, without pressure or the appearance of favoritism, request that an attorney take any

step that would be permissible for a judge to take directly. This rule, even in paraphrased form, is a far simpler and a clearer guide to ethical action than that proposed by the CJEO.

Problems with the Opinion

The second major concern the Alliance has with the draft opinion is that it is confusing and contradictory in the advice it gives to judges. Unquestionably judges are permitted under the Canons to engage in "political activity" related to "measures concerning the improvement of the law, the legal system, or the administration of justice." (Canon 5D) The draft opinion properly recognizes this in affirming that a judge may organize and speak at a meeting of attorneys of the type described, and in encouraging attorneys to communicate with members of the Legislature.

The second major opinion first cautions that the invitations to a meeting "should not be restricted to a select few." This recommendation is not problematic if it is clear what is meant by "a select few," but it is not. Certainly the invitations to such a presentation should not be limited in a way that suggests favoritism, but it is unclear what this would mean in practice. For example, civil and family law practitioners are often disproportionately impacted by budget cuts; criminal lawyers, whose matters have priority by law, are often much less affected. It thus might well be the case that the civil and family law bar in a given community would be more motivated to support the court in its efforts to avoid budget cuts crippling their practice. Would an invitation directed to civil and family law practitioners be "limited to a select few" in an improper way, or would such an invitation be ethical? The answer is not clear.

An even more significant problem lies in the answer to the second half of the first question. The draft opinion concludes that it is improper for a judge to ask an attorney

to help “in whatever way they think is appropriate,” but that it is permissible for a judge to ask attorneys to write to or speak with members of the Legislature. The argument set forth in the opinion is that asking for help “in whatever way they think is appropriate” is too broad. The opinion concludes that this makes it more coercive than a specific request to communicate with the Legislature. This distinction does not make sense. There is nothing inherently coercive about asking attorneys to help in a way they feel comfortable with; this is in fact less coercive than a request to take specific action. It is not the action requested, but the way in which the request is made (plus any associated implications) that make it coercive and thus improper. There is no basis stated in the Canons for the distinction drawn between the general request in the first question and the specific one set forth in the second.

The draft opinion also draws an untenable distinction between asking attorneys to “undertake a lobbying campaign,” which is determined not to be permissible, and asking attorneys to contact members of the Legislature, which is permissible. The Alliance agrees that soliciting funds from attorneys to pay a lobbyist would be improper, making judges seem beholden to the contributing attorneys. Absent this action, however, “undertaking a lobbying campaign” is indistinguishable from communicating with legislators in an effort to persuade them. That is in fact the essence of lobbying. Absent more specific definitional language, it is difficult for a judge to determine what activity would be permitted and what would not. It is far simpler and clearer to inform judges that they may ask an attorney to take any step they could take directly, as long as there is no implied favoritism and no coercion associated with the request.

The draft opinion goes beyond the scope of the questions presented and errs by

stating that it is improper for a judge to seek to protect the funding of their court in a way that may disadvantage other courts. To begin with, it is very difficult for a judge to determine in advance whether that would be the case, given the complexity of the budget process in the legislative and executive branches. Legislators and executive branch decision makers work with limited resources and competing priorities. Often the budgetary choices they are presented with change as the process goes on. They will often be presented with, and must consider, choices more complicated than simply funding or not funding the judiciary as a whole. It is inconsistent with the duty of a judge familiar with the problems of his or her local court, and with the impact of budget cuts on the administration of justice in that community, to refrain from supporting continued or increased funding for essential local needs. This is precisely where the knowledge and input of judges and attorneys is most beneficial to the legislative and executive decision-making process. It is not appropriate to chill judges either from providing that input or from asking attorneys to help. Since any request for assistance from attorneys must be made in a noncoercive manner, and their decision to help must be entirely voluntary, there is no reason to conclude that somehow they will feel coerced to choose between the competing needs of multiple courts in which they appear.

Finally, the Alliance believes that the draft opinion once again strays beyond the bounds of the questions presented, and gives erroneous directions, by suggesting that a judge handling a calendar in a small county should consider excluding from the invitation attorneys who have cases on that judge's calendar, or who are "about to be on the trial calendar." This completely ignores the reality of a judge's responsibility in a small county with few judges and lawyers; in such a community, it is often the case

that each judge has a daily calendar and most of the attorneys either have cases on those calendars or are about to. This direction is tantamount to suggesting that, in practice, judges in small counties may not seek assistance from their local bar in opposing funding cuts for their court. Once again, it is the nature of the request made to attorneys, and the way in which it is made, that creates either a real or apparent impropriety, not the size of the court or community in question

Conclusion

The Alliance of California Judges appreciates the efforts of the CJEO to provide ethical guidance regarding the issues presented when judges are faced with the need to participate in the budgeting process because of difficult fiscal circumstances. However, as described, the draft opinion is too broad in scope because it strays beyond answering the specific questions presented, and in several instances gives impractical and erroneous directions about what does and does not constitute permissible action. For those reasons, we believe that the draft opinion should be withdrawn, its scope narrowed to answer only the questions presented, and the problems set forth herein corrected.

Sincerely,

Directors of the Alliance of California Judges

From: Judge Elizabeth Allen White, Los Angeles Superior Court
Subject: Comment on CJEO Draft Formal Opinion 2012-001

The opinion is overly broad and confusing. There are many references to "they" which are not properly attributed leading to potential problems of interpretation. I agree with the comments of the Los Angeles Superior Court and the CJA.

From: Judge Ramona G. See, Los Angeles Superior Court
Subject: Comment on CJEO Draft Formal Opinion 2012-001

I agree with the remarks provided by the Los Angeles Superior Court.

From: Judge Dan Healy, Solano County Superior Court
Subject: Comment on CJEO Draft Formal Opinion 2012-001

I share with many others deep concern, and some sadness, over this opinion, for several reasons.

As others have noted, the logic of the opinion is flawed. When reduced to its simplest form, the reasoning of this opinion suggests that the act by a judge of applauding anything good in life, from positive community involvement to a solid performance by a kid in a football game to a nice public singing performance can be an act of judicial impropriety if someone, somewhere might someday think that the recipient of the complement might one day appear in that judge's court. Ultimately under this analysis we judges must one day be sealed in a vault when not working so as to prevent any risk whatsoever of the appearance of favoritism.

According to these authors this is true even when the nature of this public speech - pertaining to the survival of the courts - is expressly approved by the rules of ethics. We are told that we are free to publicly advocate and educate about the importance of the courts, but we shouldn't.... publicly advocate and educate about the importance of the courts???? This makes no sense.

The ethics committee seeks to offer nuance by suggesting that, while seeking public support for the judiciary from attorneys may be proper, in this case it was asking for help "in whatever way they believe is appropriate" is improperly "asking too much". This also makes no sense - how can making a generalized plea be worse than a specific plea? Are you saying that if the judge had instead made a specific request for action (i.e. given lawyers a list of legislator's home phone numbers and asked for a specific itemized list of responses) that this would have been better?

It seems obvious that. if you are concerned about these interactions between judges and lawyers, you want less specific, not more specific, requests from the judge. "Anything you can do" would thus seem to be a more appropriate call to action than "call and complain", or "go find us some money".

I would like to offer two more practical, and admittedly darker, observations.

First, I am a judicial officer in my hometown of Vallejo, a community ravaged by overwhelming conditions that keep our community on the brink of collapse. Struggle as we might, our court and other community resources cannot come close to meeting the minumum needs of our community. I was elected (expressly campaigning on the need for

people to support the courts) by the people of this community, and it is to them, and to the Constitution and the laws of this State, to which I owe my allegiance. If forced to choose between those commitments - which mandate me to fight for more resources for our community - and a morally and intellectually flawed judicial ethics bureaucracy, I choose the former.

Second, in offering this opinion the Commission on Ethics ultimately undermines its own existence. As I suggest above, anyone who actually cares about their community is going to minimize, or ignore, the opinion. If the Commission then takes no action, it demonstrates its weakness. If it takes action - attempting to sanction a judge for advocating for support for the judiciary - that judge will be either a hero or a martyr, and the Commission will drive public support for the judiciary below that of Congress.

We judges, and the public, deserve better.

The committee ultimately urges "caution and restraint". Our judiciary is not in peril right now due to a lack of caution or restraint. It is in peril as a result of many things, including poor political and administrative management and, importantly, a failure to actively engage the public and legislature in fully understanding and supporting our mission. To that end, with opinions like this, our ethics bureaucracy appears to be part of the problem, rather than part of the solution.

From: Patricia L. Glaser, Attorney at Law
Subject: Comment on CJEO Draft Formal Opinion 2012-001

For what it is worth, I agree with the Presiding Judges' Association, the Los Angeles Superior Court and the California Judges Association. Thank you for your consideration. Patricia L. Glaser

Patricia L. Glaser | Glaser Weil Fink Jacobs Howard Avchen & Shapiro LLP

From: Judge Rita Miller, Los Angeles Superior Court
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The opinion oversteps the legal bounds of State administrative bodies to direct the actions of individual Superior Courts. Moreover, it violates the First Amendment rights of judicial officers, recognized in United States Supreme Court authorities as protected and, indeed crucial, to the administration of justice.

From: Judge Susan Lopez-Giss, Los Angeles Superior Court
Subject: Comment on CJEO Draft Formal Opinion 2012-001

I agree with the comments provided by the Los Angeles Superior Court, the California Judges Association and the Alliance of California Judges, all which raised concerns about free speech asserting that the Draft Opinion is: 1) overly broad, and goes beyond the questions presented; (2) confusing and contradictory in the guidance given to judges about what actions are and are not ethically permissible; and (3) unduly restrictive, preventing judges from acting in ways that are entirely ethical and in the best interest of their respective courts.

From: Presiding Judge Michael Bush, Kern County Superior Court
Subject: Comment on CJEO Draft Formal Opinion 2012-001

I have read all of the comments posted to date (December 19, 2012 at 3:03pm) and, in the interest of being brief, will simply state I agree with the concerns expressed by various individuals and organizations about the proposed opinion and ask that the California Supreme Court Committee on Judicial Ethics Opinions reconsider adopting it as drafted.

From: Judge Tia Fisher, Los Angeles Superior Court
Subject: Comment on CJEO Draft Formal Opinion 2012-001

At the August, 2011 Annual American Bar Association Meeting, in Toronto, retired Supreme Court Associate Justice Sandra Day O'Conner addressed a packed room of lawyers and judges. "We need lawyers in every state to get busy and start advocating for adequate funding of the courts. We need lawyers to get busy and say 'I'm willing to tackle this in my state'…We need you." She further suggested that that ABA host hearings in communities, states and in the legislature. "Make sure the press gets there," she admonished. "Assemble facts, figures and stories that will make your point. Encourage bar associations to get busy and do that. And do it soon."

During the same meeting, Mary McQueen, president of the National Center for State Courts, agreed with O'Connor about forging alliances with the legislature. "If we don't come as true partners, we just sound like we're whining," McQueen said.

McQueen added that though public hearings are a good avenue, the real issue is political. She suggested putting together a political action committee to talk one on one with legislators. She said it worked in Missouri. She said it's "hand-to-hand combat" and encouraged being blunt. "We will not support you in your next campaign if you don't ensure sufficient funding for courts."

Months later at the 2012, ABA midyear meeting in New Orleans during a meeting of the Task Force on the Preservation of the Justice System, according to an online report in the ABA Journal, Mr. Curtis Childs stated "We need to be throwing elbows in the legislature, but our judicial officers aren't good at that…That's why collaboration is important. We need to enlist support to help us throw elbows."

I set forth the above comments as reported in the media as background for my response to the proposed ethics revision. Retired Justice Sandra Day O'Conner addressed the fiscal challenges eloquently and assuredly well within the ethical boundaries that apply had she still been active. She asked attorneys to step up to the plate on behalf of the courts.

By comparison, Ms. McQueen's approach and that articulated by Mr. Childs as set forth above, demonstrate that leaving the "politics" of court funding to court administrators or consultants is risky business. It would be irresponsible to silence judicial voices, already bound by ethical constraints set forth in existing Canons. "Throwing elbows" as

suggested by Mr. Childs, then Director of the Office of Governmental Affairs for the AOC and now a top administrator in the same agency or the “hand-to-hand combat” referenced by Ms. McQueen, may be the unfortunate outcome of the proposed rule if court administrators are left to control the message and tactics.

Accordingly, I join others in opposition to the Draft Opinion.