



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

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CJEO Oral Advice Summary 2018-023

[Issued August 1, 2018]

**DISQUALIFICATION RESPONSIBILITIES OF APPELLATE COURT
JUSTICES**

I. Question:

The Committee on Judicial Ethics Opinions was asked for an opinion on whether the disqualification responsibilities of a trial court judge also apply to an appellate court justice. An opinion was also sought on whether, if disqualified, an appellate court justice may request and accept waiver by the parties and attorneys and whether the appellate court justice may revoke his or her disqualification decision if the factors that necessitated disqualification are no longer present.

II. Oral Advice Provided:

A. Grounds for Disqualification of an Appellate Court Justice

There are no statutory grounds for disqualification that are applicable to appellate court justices. In *Kaufman v. Court of Appeal* (1982) 31 Cal.3d 933 (*Kaufman*), the Supreme Court of California held that the procedures for disqualification set out in Code of Civil Procedure section 170¹ do not apply to appellate court justices and an appellate court justice must decide whether to disqualify himself or herself. Following *Kaufman*, in 1984, the Legislature reorganized section 170 by dividing it into sections 170 through 170.5, and excluded appellate court justices from the statutory scheme, including the grounds for disqualification. (§ 170.5, subd. (a) [“judge” under the disqualification statutes means judges of the superior courts, court commissioners, and referees].)

As such, canon 3E(1), (3), (4), (5), and (6) of the California Code of Judicial Ethics sets forth the only grounds for disqualification applicable to appellate court justices. (See Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 7:90, pp. 501-502 (Rothman) [providing a summary of the changes to the Code of Civil Procedure and the Code of Judicial Ethics following *Kaufman*].) Canon 3E is intended to eliminate the appearance of bias and ensure public confidence in the impartiality of legal proceedings. (See canon 2 [promoting public confidence in the impartiality of the judiciary is required in all matters].) Canon 3E(1) requires trial court judges and appellate court justices to disqualify themselves in any proceeding in which disqualification is required by law. Canon 3E(3) requires disqualification if, while a candidate for judicial office, a trial court judge or an appellate court justice makes a statement that would commit the judge or justice to a particular result or to rule in a particular way in a proceeding, or where the judge or justice owns certain corporate or government bonds. Canon 3E(4) sets forth the general grounds for disqualification of an appellate court justice and is nearly identical to general grounds for disqualification of a trial court judge, set out in section

¹ All further references to section or sections are to the Code of Civil Procedure unless otherwise indicated. All references to canon or canons are to the California Code of Judicial Ethics unless otherwise indicated.

170.1, subdivision (6)(A)(i)-(iii). The specific grounds for disqualification of an appellate court justice are set forth in canon 3E(5) and largely track the statutory specific grounds for disqualification applicable to trial court judges, set forth in sections 170 through 170.5. Finally, canon 3E(6) sets forth instances that are not grounds for disqualification that are substantively the same as section 170.2. (Advisory Com. com. canon 3E(6).)

There are also no disclosure obligations for appellate court justices, either within the code or by statute. Canon 3E(2), which requires trial court judges to disclose information relevant to the question of disqualification, specifically excludes appellate court justices. (Rothman, *supra*, § 7:90, pp. 502-503 [disclosure requirement in the appellate context would be more complex than in trial courts because there is no face-to-face contact with the parties until the hearing date, after the briefs are examined and a tentative decision is discussed by the appellate court justices].) An appellate court justice may, but is not required to disclose information relevant to the decision to not disqualify himself or herself. (*Ibid.*)

B. Waiver of Disqualification of an Appellate Court Justice

The statutory scheme applicable to trial court disqualification includes a general waiver provision, which by its terms does not apply to appellate court justices. (§ 170.5, subd. (a); *Kaufman, supra*, 31 Cal.3d 933, 939-940.) Section 170.3, subdivision (b)(1) provides that a trial court judge “who determines himself or herself to be disqualified after disclosing the basis for his or her disqualification on the record may ask the parties and their attorneys whether they wish to waive the disqualification.” The statute provides that waiver is not permitted if the trial court judge disqualifies for either personal bias or prior service as an attorney or material witness in the matter. (§ 170.3, subd. (b)(2)(A) & (B).)

The Supreme Court has not adopted a similar general waiver provision applicable to appellate disqualification. Moreover, no appellate decision has addressed whether waiver is generally available to appellate court justices who determine they are disqualified under the Code of Judicial Ethics. One canon provision specifically permits waiver when a justice is disqualified for judicial campaign contributions over a specified amount (canon 3E(5)(j)), but

this provision was added to mirror a recent amendment to section 170.1, subdivision (a)(9), that expressly permits waiver of disqualification for campaign contributions received by trial court judges, although such a waiver is generally permitted under section 170.3. (§§ 170.1, subd. (a)(9)(D), 170.3, subd. (b)(1).) The narrow waiver provision in canon 3E(5)(j) is not similarly supported by a general waiver provision applicable to appellate disqualification on other grounds.

It is the committee's opinion that appellate disqualification may be waived with party consent because it is not prohibited under the Code of Judicial Ethics. (Rothman, *supra*, § 7.90, p. 502 [the most reasonable approach is to apply the waiver procedures in § 170.3, subd. (b) to waive grounds for disqualifying appellate court justices].) However, it is the committee's opinion that a request for waiver of disqualification should be made only in exceptional circumstances, such as when the appellate court would have difficulty creating a panel without the disqualified justice's participation. Moreover, an appellate court justice should evaluate his or her other obligations under the canons to determine whether he or she should request or accept the parties' waiver of disqualification. (Canons 2A [a judge shall act at all times in a manner that promotes public confidence in the impartiality of the judiciary], 3 [a judge shall perform the duties of judicial office impartially].) The circumstances surrounding the disqualification, request for waiver, and acceptance of waiver should be such that a reasonable person would have no doubt of the appellate court justice's impartiality. The committee further advises that if the appellate court justice requests or accepts a waiver of disqualification, the request and acceptance should be in writing and made a part of the appellate record.

C. Revocability of an Appellate Court Justice's Decision To Disqualify

In the event that an appellate court justice determines that the circumstances necessitating disqualification are no longer present, it is the committee's opinion that an appellate court justice may revoke his or her disqualification. Whether disqualification may be revoked differs for appellate court justices and trial court judges. Section 170.3, subdivision (a)(1) provides that a trial court judge who determines himself or herself to be disqualified shall not further

participate in the proceeding unless disqualification is waived pursuant to section 170.3, subdivision (b), or except as provided in section 170.4, which limits the actions a disqualified trial court judge may take. (§ 170.4, subd. (a)(1)-(6).) Section 170.4, subdivision (d) specifically provides that, other than for the specific purposes provided in section 170.4, a disqualified trial court judge “shall have no power to act in any proceeding after his or her disqualification after the filing of a statement of disqualification until the question of his or her disqualification has been determined.”

These statutory disqualification requirements are notable because of the Supreme Court’s decision in *People v. Freeman* (2007) 47 Cal.4th 993 (*Freeman*). The defendant in *Freeman* forfeited her statutory remedy to challenge the trial court judge’s failure to disqualify himself when the case was reassigned to the judge following his initial disqualification on discretionary grounds that later proved to be unfounded. (*Id.*, at p. 1006.) Deciding only the narrow issue of whether the due process clause of the United States Constitution required disqualification, the Supreme Court held that the defendant was required to show a probability of actual bias, rather than an appearance of bias, and the defendant failed to make such a showing. (*Ibid.*) The Supreme Court rejected the defendant’s claim that the trial court judge’s acceptance of the case after he had once recused himself presented the kind of exceptional facts that demonstrate a due process violation: “At most, [the trial court judge’s] decision to accept reassignment of defendant’s case may have violated the judicial disqualification statutes that limit the actions that may be taken by a disqualified judge. [Citations.] But, without more, this does not constitute the kind of showing that would justify a finding that defendant’s due process rights were violated.” (*Ibid.*)

Relying on this language in *Freeman, supra*, 47 Cal.4th at page 1006, Rothman concludes that a trial court judge may not have the authority to revoke disqualification, even if the facts underlying the initial decision to disqualify turn out to be erroneous. (Rothman, *supra*, § 7:27, pp. 422-423.) The Ethics Committee of the California Judges Association (CJA) also advised that “a judge who has disqualified him/her self from a case and who now believes that the disqualification was done in error may not set aside the disqualification.” (Cal. Judges Assn., Judicial Ethics Update (2016) p. 3, I.B.20, citing canon 2A [requires judges to promote

public confidence], and canon 3E(1) [requires judges to disqualify themselves when required by law].)

While both Rothman and CJA agree that disqualification by a trial court judge may not be revoked, Rothman acknowledges that appellate disqualification differs. In Rothman's discussion of divestment following recusal, there is a citation to the Supreme Court's docket in *Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481 (*Stockton*). (Rothman, *supra*, § 7.27, pp. 423-424, fn. 184.) The Supreme Court's docket shows an order filed in late 2009, which states: "Chief Justice George recused himself from participating in the order granting review in this case, filed on February 13, 2008. Having examined the materials subsequently filed in this court, and having concluded that there is no basis for requiring his further recusal in this matter, Chief Justice George will participate further in all further proceedings in this matter before this court." (*Stockton*, S159690, Supreme Ct. Mins., Nov. 10, 2009.)

The Rothman citation also refers a Daily Journal article, which reports that Chief Justice George recused in *Stockton, supra*, 48 Cal.4th 481 because he owned shares in the real party in interest, but he concluded that there was no further basis for recusal after he divested himself of those shares. (Ernde, *Court Allows 'Unrecusals' For Judges*, S.F. Daily J. (Dec. 7, 2009).) The article also reported on a court policy that allows justices to avoid conflicts and disqualification by selling stock. (*Ibid.*) There are other instances in Supreme Court dockets where justices have revoked disqualification and participated in proceedings following recusal on unspecified grounds. (See *Voices of the Wetlands v. State Water Resources Control Board*, S160211, Supreme Ct. Mins., Jan. 12, 2011 [Justice Corrigan's Mar. 19, 2008, recusal revoked following an examination of the materials filed and her conclusion that there was no basis for further disqualification].)

It is reasonable to conclude that the Supreme Court's policy and practice of revoking disqualification would apply in the event that the circumstances that caused an appellate court justice to disqualify were erroneous or no longer exist, for example, due to a divestment or removal of an improper party. Moreover, the inability of a trial court judge to revoke his or her disqualification, as referenced in *Freeman* and Rothman, is explicitly based on the statutory

provisions that limit the powers of disqualified trial court judges, excluded from the canons, and inapplicable to appellate court justices. (§§ 170.3-170.5; canon 3E(5)(a)-(j).) Therefore, it is the committee's opinion that an appellate court justice may revoke his or her disqualification and participate in subsequent proceedings if the factors that necessitated disqualification are no longer present. As with requesting and accepting waiver of disqualification, the appellate court justice should limit revocation of disqualification to exceptional circumstances. Moreover, the justice should consider the circumstances that caused his or her disqualification, if there may be an appearance of bias if the justice revokes disqualification, and whether the justice's participation in the proceeding could violate other canons. If the appellate court justice revokes his or her disqualification, the committee advises that decision to revoke the disqualification should be in writing and made a part of the appellate record.



This oral advice summary is advisory only (Cal. Rules of Court, rule 9.80(a), (e); Cal. Com. Jud. Ethics Opns., Internal Operating Rules & Proc. (CJEO) rule 1(a), (b)). It is based on facts and issues, or topics of interest, presented to the California Supreme Court Committee on Judicial Ethics Opinions in a request for an opinion (Cal. Rules of Court, rule 9.80(i)(3); CJEO rules 2(f), 6(c)), or on subjects deemed appropriate by the committee (Cal. Rules of Court, rule 9.80(i)(1); CJEO rule 6(a)).