



**CALIFORNIA SUPREME COURT
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CJEO Oral Advice Summary 2018-025

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**DISQUALIFICATION AND DISCLOSURE DUTIES OF A TRIAL JUDGE
ASSIGNED AS AN APPELLATE JUSTICE**

I. Question

Does a trial court judge assigned to hear a matter in an appellate court have disqualification and disclosure obligations as an appellate justice or as a trial court judge?

A trial court judge who has been invited to sit on assignment as a pro tempore justice of an appellate court asks for advice about whether any of the following circumstances raise ethical concerns with accepting assignment: the appellate matter includes parties from whom the trial court judge received campaign contributions during the judge's recent judicial election; the judge also accepted a campaign contribution from a third party entity, or super political action committee (PAC), that accepted contributions from named parties in the appellate matter; and, finally, the judge is an active member of an

organization devoted to the law, the legal system, and the administration of justice, which includes parties to the appellate matters as other members of the organization.

II. Oral Advice Provided

Disqualification and disclosure rules differ for trial court judges and appellate justices, but those rules apply based on the type of proceeding rather than on a judicial officer's formal title or status. (*Mosk v. Superior Court* (1979) 25 Cal.3d 474, 483 [an assigned judge pro tempore generally has the same power and authority as a regular judge of the court to which he or she is assigned].) Here, the trial court judge would have no mandatory duty to disqualify or disclose the reported campaign contributions from parties in the appellate proceeding, which were all under the \$5,000 limit requiring appellate justice disqualification. (Cal. Code Jud. Ethics, canon 3E(5)(j).)¹ Nor would the judge have a duty to disqualify or disclose the third party super PAC contribution. Similarly, the trial court judge would have no mandatory duty to disqualify or disclose the judge's membership in an organization devoted to the law, the legal system, and the administration of justice.

However, as an appellate justice pro tempore, the judge is obligated to make a discretionary decision to disqualify in the assigned matter if the judge believes recusal would further the interests of justice or the circumstances are such that a reasonable person aware of the facts might doubt impartiality. (Canon 3E(4)(a) & (c).) The party contributions below the canon limit for mandatory appellate justice disqualification are circumstances the judge should consider when making a discretionary decision about whether a reasonable person aware of those contributions through the judge's publically available Fair Political Practices Commission (FPPC) filings, or any other circumstances

¹ All further references to canons and to Advisory Committee commentary are to the California Code of Judicial Ethics unless otherwise indicated.

related to the campaign or memberships, would doubt the judge's impartiality in the appellate matter.

III. Analysis

(a). Applicable Rules

The disqualification and disclosure requirements for trial court judges differ from those applicable to appellate court justices. For example, it is mandatory for a trial court judge to disqualify for all campaign contributions over \$1,500 from a party or lawyer in the proceedings. (Code Civ. Proc. § 170., subd. (a)(9)(A) & (B); CJEO Formal Opinion 2013-005, *Disqualification Based on Judicial Campaign Contributions from a Lawyer in the Proceedings*, Cal. Supreme Ct., Com. Jud. Ethics Opns., p. 9.) Appellate Justices, on the other hand, are required to disqualify only for such contributions over \$5,000. (Canon 3E(5)(j).)

The differences in disclosure requirements are more significant. A trial court judge must disclose information that is “reasonably relevant to the question of disqualification . . . , even if the judge believes there is no actual basis for disqualification.” (Canon 3E(2)(a); canon 3E(2)(b)(i) [judge who was a candidate for judicial office in a trial court election must disclose any contribution of \$100 or more from a party, even if the amount would not require disqualification]; Advisory Com. com. foll. canon 3E(2)(b) [additional required campaign contribution disclosures might include those made by a party to a third party in support of a trial court judge's campaign, such as a super PAC contribution made by a party]; Code Civ. Proc. § 170.1, subd. (a)(9)(C) [trial court judges must specifically disclose any campaign contribution by a lawyer or party in the proceeding].)

In contrast, appellate justices have no disclosure duties under either the canons or statute. (CJEO Oral Advice Summary 2018-023, *Disqualification Responsibilities of Appellate Court Justices*, Cal. Supreme Ct., Com. Jud. Ethics Oral Adv. Sum., p. 3;

Rothman et al., Cal. Jud. Conduct Handbook (4th ed. 2017) § 7:90, pp. 501-503 [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. (CJEO Oral Advice Summary 2018-063, *supra*, at p. 3.)

It is clear from these canons and statutes, and other authorities interpreting them, that the differing disqualification and disclosure rules apply based on the type of proceeding rather than on the judicial officer's formal title or status. (Canon 3E(2) [disclosure requirement for information relevant to disqualification expressly applies in trial court proceedings]; *Mosk v. Superior Court*, *supra*, at p. 483 [an assigned judge pro tempore generally has the same power and authority as a regular judge of the court to which he or she is assigned].) Thus, a trial court judge invited to sit on assignment as a pro tempore justice of the Supreme Court would be subject to the disqualification and disclosure obligations applicable to an appellate court justice.

(b). No Mandatory Duty to Disqualify or Disclose

Mandatory grounds for disqualification applicable to appellate court justices are set forth in canon 3E(5), which includes the disqualification requirement for justices who have received a campaign contribution of \$5,000 or more from a party in the matter before the court. (Canon 3E(5)(j).)

In the circumstances here, the requesting trial court judge reports receiving campaign contributions from several parties in the appellate matter, but all of those contributions were in amounts lower than the \$5,000 limit requiring appellate disqualification. The judge also reports receiving a \$7,000 contribution from a super

PAC, which included contributions to the third party super PAC made by parties to the appellate matter. Because this third party contribution was not made by “a party or lawyer” in the appellate matter, the canon 3E(5)(j) limit requiring appellate disqualification does not apply. None of these reported contributions would require the judge to disqualify himself under the mandatory canon applicable to appellate justices.

Because appellate justices have no duty to disclose, the requesting trial court judge would be under no obligation to disclose any of these contributions, which he would have been required to disclose in a trial court proceeding as information reasonably relevant to the question of disqualification. (Canons 3E(2)(a) & 3E(2)(b)(i); Advisory Com. com. foll. canon 3E(2)(b); Code Civ. Proc. § 170.1, subd. (a)(9)(C).)

Similarly, the judge’s active membership in an organization devoted to the law, the legal system, and the administration of justice would not require disqualification under any canon or statute, but disclosure would be required in a trial court proceeding because the organization is primarily made up of parties to the appellate matter, which is reasonably relevant to the question of disqualification. In the appellate court proceeding the judge has been invited to hear on assignment, however, the judge would have no duty to disclose the circumstances of the membership. (CJEO Oral Advice Summary 2014-005, *Disqualification for Membership in an Amicus Curiae*, Cal. Supreme Ct., Com. Jud. Ethics Opns., p. 3 [a reasonable person would not doubt a justice’s ability to be impartial in deciding *the interests of the parties* in circumstances where the justice was a member of an organization that had filed an amicus brief].)

(c). Discretionary Decisions about Disqualification for the Appearance of Impartiality

Discretionary grounds for disqualification applicable to appellate court justices are set forth in canon 3E(4), which requires appellate justices to disqualify themselves when

they believe recusal would further the interests of justice or when the circumstances are such that a reasonable person aware of the facts might doubt impartiality. (Canon 3E(4)(a) & (c); CJEO Oral Advice Summary 2014-005, *supra*, Cal. Supreme Ct., Com. Jud. Ethics Oral Adv. Sum. at p. 2.) In this case, the judge will not have a duty as an appellate justice pro tempore to disclose the non-disqualifying party campaign contributions, but those contributions would still be publically available in the judge's FPPC filings. The judge's discretionary decision about disqualification must take into consideration whether a reasonable person aware of those public records and the campaign contributions from parties to the action, or any other circumstances related to the judge's campaign or memberships, would doubt impartiality.



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)).