



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

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CJEO Oral Advice Summary No. 2016-016

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**DISQUALIFICATION OF A PRO TEM APPELLATE JUSTICE UNDER
ACTIVE CONSIDERATION**

I. Question:

Does a superior court judge who is sitting as a pro tem appellate justice while under active consideration¹ by the Governor for appointment to the Court of Appeal have disqualification obligations in a habeas corpus matter in which the Governor's decision to affirm, modify, or reverse the parole board is at issue?

¹ "Active consideration" indicates that either the Commission on Judicial Nominees Evaluation of the State Bar of California is evaluating the superior court judge for appointment to an appellate court at the request of the Governor, or that the Governor or the Governor's staff is engaging in direct conversations with the superior court judge regarding appointment to an appellate court.

II. Oral Advice Provided:

The committee recommends that a superior court judge sitting as a pro tem appellate justice while under active consideration by the Governor for appointment to the Court of Appeal disqualify himself or herself when asked to decide a habeas corpus matter in which the Governor's decision to affirm, modify, or reverse the parole board is at issue.

The Governor makes appointments and nominations to the Court of Appeal pursuant to article VI, section 16(d)(1) and (2) of the California Constitution. In addition, article V, section 8 provides that "[n]o decision of the parole authority of this state with respect to the granting, denial, revocation, or suspension of parole of a person sentenced to an indeterminate term upon conviction of murder shall become effective for a period of 30 days, during which the Governor may review the decision subject to procedures provided by statute." (Cal. Const., art. V, § 8.)

In the California Judicial Conduct Handbook, Judge Rothman observes that "[t]he pressures on judicial independence are significant where political considerations play a part in the appointment, election, or elevation of judges," and that "[t]he need to 'please' the electorate or appointing authority can pervert judicial integrity and courage." (Rothman, Cal. Judicial Conduct Handbook (2013 supp.) § 3.46, p. 143.) Moreover, canon 3E(4) requires a pro tem appellate justice under active consideration by the Governor for appointment to the Court of Appeal to disqualify himself or herself from a habeas corpus matter in which the Governor's decision to affirm, modify, or reverse the parole board is at issue if "his or her recusal would further the interests of justice," or if he or she "substantially doubts his or her capacity to be impartial." (Canon 3E(4)(a), (b).) In addition, disqualification is required if the "circumstances are such that a reasonable person aware of the facts would doubt the justice's ability to be impartial." (Canon 3E(4)(c).)

“The ‘reasonable person’ is not someone who is ‘hypersensitive or unduly suspicious,’ but rather is a ‘well-informed, thoughtful observer.’” (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 389 [internal citations and quotations omitted].) “[L]itigants’ necessarily partisan views [should] not provide the applicable frame of reference.” (*United Farm Workers of America v. Superior Court* (1985) 170 Cal.App.3d 97, 104.) Instead, “a judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street.” (*Ibid.*)

In light of the Governor’s constitutional authority to review personally all decisions of the parole board granting, denying, revoking, or suspending parole, and in light of the substantial interest a judicial officer under active consideration for permanent elevation to an appellate court may have in maintaining the Governor’s favor during service as a pro tem appellate justice, a reasonable person aware of the facts would likely doubt the justice’s ability to be impartial. (See Judicial Conference of U.S., Guide to Judicial Policy, Vol. 2B, Ch. 2, Com. on Codes of Conduct Advisory Opn. No. 97 (June 2009) p. 169 [recognizing that “[a]n incumbent [magistrate judge] seeking reappointment obviously has a substantial interest in receiving a favorable recommendation from [a reappointment] panel,” and advising recusal when a member of the reappointment panel appears before that magistrate judge because “during the period of time that the panel is evaluating the incumbent and considering what recommendation to make concerning reappointment, a perception would be created in reasonable minds that the magistrate judge’s ability to carry out judicial responsibilities with impartiality is impaired.”]).



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)).