



CJEO Draft Formal Opinion No. 2014-007:

**DISQUALIFICATION FOR PRIOR APPEARANCE AS A DEPUTY DISTRICT
ATTORNEY IN A NONSUBSTANTIVE MATTER**

Comments from the Public Submitted with a Waiver of Confidentiality

Comments from members of the public submitted in response to an Invitation to Comment on a CJEO Draft Formal Opinion are confidential communications to the committee that may not be disclosed unless confidentiality is affirmatively waived (Cal. Rules of Court, rule 9.80(h)(3); CJEO Rules, rule 5(b)(1), (e)). The following are the comments received by the committee on CJEO Draft Formal Opinion 2014-007 that were submitted with a statement waiving confidentiality or consenting to disclosure.

Online submission:

Wednesday, November 19, 2014 – 15:46

Draft Formal Opinion: Disqualification for Prior Appearance as a Deputy District Attorney in a Nonsubstantive Matter

Name: Judge Stan Eller

Comment:

Progressive, common sense approach to the issue. I support it.

Waiver of Confidentiality: yes

Online submission:

Friday, November 21, 2014 – 06:45

Draft Formal Opinion: Disqualification for Prior Appearance as a Deputy District Attorney in a Nonsubstantive Matter

Name: Anonymous

Comment:

Yes. An attorney must be sufficiently familiar with the case to make any appearance on a matter. Therefore even in a situation where the attorney, now judge, could not be biased because he/she did not gain substantive knowledge of the case, the mere appearance of bias undermines the credibility of the judiciary and justice system.

Waiver of Confidentiality: yes

Online submission:

Friday, November 21, 2014 – 10:13

Draft Formal Opinion: Disqualification for Prior Appearance as a Deputy District Attorney in a Nonsubstantive Matter

Name: Judge David Gutknecht

Comment:

The Riverside Superior Court agrees with the conclusion in the opinion that a judge should not be disqualified from presiding over a criminal case if the judge appeared in that case as a deputy district attorney, but only for a brief, non-substantive matter, without active participation in the prosecution (active participation not including a brief appearance on a scheduling or uncontested matter where no special knowledge about the case is gained and no opinion or bias about the matter could be formed). Such an appearance would not raise a reasonable doubt as to impartiality and therefore would not require disqualification. Disqualification where there is no perception of impartiality impedes the administration of justice and defeats the purposes of the disqualification statutes.

Waiver of Confidentiality: yes

Online submission:

Tuesday, December 2, 2014 – 17:33

Draft Formal Opinion: Disqualification for Prior Appearance as a Deputy District Attorney in a Nonsubstantive Matter

Name: Brian D. Thiessen

Comment:

The rationale by the Committee is strained to the breaking point.

Even though the DDA may not have actually prosecuted the case, he is bound to have had some discussions with others in the office before making the "non substantive appearance" and received some information about the charges and issues. The public deserves full 100% impartiality and even the 'non substantive appearance' destroys that. The public is expecting the finest, not a justification for an apparent conflict being swept under the judicial rug. Only if the Defense counsel can voir dire the judge involved and determined who s/he has spoken with and what s/he learned about the case should the defendant (not the Judge) be able to waive the apparent conflict.

Or so it seems from the streamside here....

Waiver of Confidentiality: yes

December 7, 2014

RE: CJEO Draft Formal Opinion 2014-007

Dear Ms Black:

These are my comments on the CJEO Draft Formal Opinion 2014-007.

I suggest that the factual situations examined should be slightly expanded. I believe the discussion should include an analysis of additional difficult situations where the judge may have “served as a lawyer in the proceeding.”

According to the draft opinion, when the judge served as a lawyer in a proceeding that resulted in a conviction of the defendant and that conviction is now alleged in a pending criminal action before the judge, that should disqualify the judge from hearing the case. What if the judge served as a supervisor for the attorney who was involved in the conviction that now is alleged as a prior conviction, should that disqualify the judge from hearing the case? If the judge served as the district attorney on a large calendar when, without discussion, the defendant simply pled guilty to a charge that now is alleged as a prior conviction, should that disqualify the judge from hearing the case. It could be argued that the district attorney did not “actively participate” in the case, but simply appeared in court when the defendant entered a plea of guilty.

These situations occur frequently in our criminal courts. If these are disqualifying events, the burden on the judge is significant. The judge as a lawyer may have handled hundreds of cases which later are charged as prior convictions. It may be difficult to determine which cases he or she was involved with.

I believe it would be helpful to the judiciary to address these issues in the Formal Opinion.

Thank you for considering my comments.

Sincerely Yours

Judge Leonard Edwards (ret.)

I certainly wish to waive confidentiality and hereby consent to disclosure to the public.



The Superior Court

III NORTH HILL STREET

LOS ANGELES, CALIFORNIA 90012 CHAMBERS OF

CAROLYN B. KUHL

ASSISTANT PRESIDING JUDGE

December 11, 2014

Ms. Nancy A. Black
Committee Counsel
The California Supreme Court Committee on Judicial Ethics Opinions
350 McAlister Street
San Francisco, CA 94102

Re: Los Angeles Superior Court Ethics Working Group Comments to
CJEO Draft Formal Opinion No. 2014-007

Dear Ms. Black:

The CJEO Draft Formal Opinion No. 2014-007 has been reviewed by the Los Angeles Superior Court Ethics Working Group, which concurs with the analysis. The conclusion appropriately balances the public's interest in the impartiality of judges and the efficient and effective administration of justice by requiring disqualification in only those circumstances where there is a reasonable doubt as to impartiality. The opinion not only provides practical guidance as to the specific question presented but also a useful analysis that can provide broader guidance for other issues.

The Los Angeles Superior Court and its Ethics Working Group appreciate the opportunity to provide this comment, and waives any right of confidentiality as to these comments.

Very truly yours,

CAROLYN B. KUHL
Presiding Judge Elect

CBK:FRBrm

c: Hon. Daniel J. Buckley, Assistant Presiding Judge Elect
Hon. Anthony Mohr, Chair, LASC Ethics Working Group
Hon. James Dabney, LASC Ethics Working Group

Hon. Amy D. Hogue, LASC Ethics Working Group
Hon. Daniel Brenner, LASC Ethics Working Group
Hon. Daniel Brenner, LASC Ethics Working Group
Hon. Holly E. Kendig, LASC Ethics Working Group
Hon. Holly Fujie, LASC Ethics Working Group
Hon. Monica Bachner, LASC Ethics Working Group
Hon. Judge Marc Marnaro, LASC Ethics Working Group
Frederick R. Bennett, Court Counsel

From: Barbara Kronlund
Sent: Thursday, December 18, 2014 1:46 PM
To: Judicial Ethics; Black, Nancy
Subject: Re: Comments on CJEO Draft Formal Opinion 2014-007

Dear CJEO Members:

I have the following comments regarding Draft Formal Op. 2014-007.

First, I agree with the ultimate conclusion. However, I think there is a lot of superfluous background and information within the Opinion, i.e., “TMI”, or too much information. I also think this is a golden opportunity to add more relevant analysis, directly on the topic of when a former DDA now-turned-judge is disqualified, in the area of having participated in the prosecution of a prior conviction. This is mentioned in passing, in a footnote, and not directly addressed, but really should be a major part of this Opinion since it is in this context that the issue frequently arises.

As written, I don’t think the Opinion is particularly useful, but I think with some revision, it definitely could provide valuable guidance to former DDAs.

I would delete the Statutory Construction and Legislative history sections of the draft at pages 4-5 and pages 9-11-- it’s not useful or helpful to the analysis and is simply not needed for this Opinion.

I would restructure the Opinion to address discrete topics within the question posed, such as “Representation as the DDA on a prior conviction”, “Calendar appearance of DDA”, “Serving as the charging deputy”, “Serving as a Supervising Deputy”, etc., etc. In this way, judges reading this Opinion will get some concrete guidance as to how to evaluate their prior role as a DDA to determine if they are now disqualified as a judge. These are the actual questions being asked by judges who were former DDAs.

Although the draft cites to Rothman at section 7.37 of the 2013 Supplement, what it doesn’t cite to is the 2013 Supp. Appendix 5 (Disqualification and Disclosure Guide to the Decision Making Process), Appendix 6 (Disqualification and Disclosure Analysis of CCP Sec. 170.1(a)(2), which specifically references

“Served as a lawyer in the proceedings...” and specifically references a number of cases), and Appendix 7 (Disqualification and Disclosure Analysis of CCP Sec. 170.1(a)(6)(A)). These sections should be reviewed carefully, and then citations to same should be added to the Opinion.

At page 7, footnote #4 is not needed as it’s getting away from the topic of the Opinion.

I would eliminate the discussion about what other jurisdictions do at pages 14-15 as confusing, not helpful to the issue at hand, and simply superfluous.

At page 15, bottom paragraph, the draft explains the Committee’s opinion, but doesn’t go into any detail or explanation as to what it means to “appear on a nonsubstantive matter”, and “to not actively participate in the prosecution”. The point of the Opinion is to offer judges guidance so they can analyze whether they are indeed disqualified or not, so giving some examples and ground rules for the judge to apply to come to a determination would be most useful in practice. And the reorganization of the Opinion is critical, and could easily be structured around the various examples.

Thank you for considering my comments.

Barbara A. Kronlund, Judge
Superior Court, Dept. 11, San Joaquin County



CALIFORNIA JUDGES ASSOCIATION

The Voice of the Judiciary

December 23, 2014

Ms. Nancy A. Black, Committee Counsel
The California Supreme Court Committee on Judicial Ethics Opinions 350 McAllister Street,
Room 1144A
San Francisco, CA 94102

Via email: nancy.black@jud.ca.gov

RE: CJEO Draft Formal Opinion 2014-007; Disqualification for Prior Appearance
as a Deputy District Attorney in a Nonsubstantive Matter

Dear Ms. Black:

On behalf of the California Judges Association ("CJA") I am forwarding the following comments with respect to the Committee on Judicial Ethics Opinions ("CJEO") Draft Formal Opinion 2014-007. The Opinion involves a discussion of disqualification and disclosure issues when a bench officer served as a Deputy District Attorney prior to becoming a bench officer. As the opinion relates to that issue alone, the CJA agrees with the analysis contained in the opinion and believes it will be of great assistance to bench officers who previously were county prosecutors.

While the Opinion, by its terms, is limited to the situation of a bench officer who was a DDA, the CJA believes it would also be helpful for the CJEO to address the additional situations in which bench officers worked as attorneys for other public agencies which regularly appear before the court. These might include Deputy Public Defenders, Deputy County Counsels and other positions in which an attorney might have done minimal work on a case that is now before the court.

The CJA Ethics Committee often addresses inquiries involving issues of past employment and believes the CJEO's guidance will be of significant value to its constituents. Thank you for your work in this regard.

Sincerely,

A handwritten signature in black ink that reads "Joan P. Weber".

Joan P. Weber President