



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

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CJEO Oral Advice Summary No. 2016-015

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FULL BENCH DISQUALIFICATION

I. Questions:

Does a presiding judge, under some circumstances, have the authority to disqualify the entire local bench? For example, in circumstances where a criminal case is filed alleging a local judge's family member as a victim or perpetrator, considerable embarrassment could be avoided if the presiding judge is able to disqualify the entire bench without disclosing the identity of the individuals involved and the details of the alleged crime to the other judges in order to poll them about disqualification.

Is there a statutory reason to conclude that a presiding judge does have the authority to disqualify the entire bench under these circumstances? Cal. Code Civ. Proc. §170.1(a)(6)(A)(i) & (ii) state that disqualification is required if "[t]he judge believes ..." certain circumstances exist. In contrast, §170.1(a)(6)(A) (iii) states that disqualification is required if "[f]or any reason: ... [a] person aware of the facts might reasonably

entertain a doubt that the judge would be able to be impartial.” On the face of (iii), may the determination of disqualification be made by another judge, including a presiding judge, who is often in a better position to make the call? When there is a concern that a person aware of the facts might reasonably entertain a doubt as to a judge’s impartiality, can that concern be addressed by the presiding judge?

II. Oral Advice Provided:

In *Kaufman v. Court of Appeal* (1982) 31 Cal.3d 933, the Supreme Court stated the ethical rule that each appellate justice decides for himself or herself whether disqualification is required, and therefore, colleagues of a justice, a judge, or a panel may not assume jurisdiction to decide if another judicial officer should be disqualified. (*Kaufman, supra*, at pp. 937–940.) This ethical rule also applies to trial court judges since the appellate justice disqualification canon contains the same disqualifying language as the superior court judge disqualification statute. (Compare Cal. Code Jud. Ethics, canon 3E(4)(a)-(c) with Cal. Code Civ. Proc. § 170.1(a)(6)(A)(i)-(iii).) California Code of Civil Procedure section 170.1(a)(6)(A) does not provide statutory grounds for circumventing this ethical rule to allow a presiding judge, or any other individuals, to determine whether another judge is disqualified. Although the exact phrase “if the judge believes” is not used in subpart (iii), the reasonable doubt test in that subpart is clearly intended to be decided by the judge to whom the subpart applies, in keeping with the statutory pattern and *Kaufman*.

Given the ethical rule that no judge may decide another judge is disqualified, if a presiding judge believes that all of the local judges could be disqualified, each member of the court must make an individual disqualification determination before the presiding judge may seek assignment of the matter to a judge from another court. (Cal. Code Civ. Pro., § 170.8 [when there is no judge of a court qualified to hear an action or proceeding,

the Chief Justice may assign a judge to hear the matter]; California Judges Association (CJA) Formal Opinion No. 62, p. 3 [the presiding judge must poll the individual judges for their disqualification determinations as a prerequisite to reassignment under § 170.8].)

There are, however, two administrative alternatives that may allow a presiding judge to make an assignment to an outside judge without polling the local judges and without violating the ethical rule. First, a retired judge may be assigned to the court through the Assigned Judges Program (AJP) and the presiding judge may be able to assign such a matter to the AJP judge. (Cal. Const., art. VI, § 6(e) [the Chief Justice has authority to assign a retired judge to any court]; Cal. Rules of Court, rule 10.603(a) [presiding judges have authority to make assignments within their court].) Second, when the presiding judge's court has a reciprocal assignment order issued by the Chief Justice, the presiding judge may be permitted to assign matters to a judge in another court as specified in the order. (Cal. Const., art. VI, § 6(e) [the Chief Justice has authority to assign any judge to another court within the judicial branch]; Cal. Rules of Court, rule 10.630 [a "reciprocal assignment order" issued by the Chief Justice permits judges in courts of different counties to serve in each other's courts]; Gov. Code § 69740(b) [allows presiding judges to agree to hold sessions of court outside of a county while maintaining venue].)



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)).