



## California Supreme Court Committee on Judicial Ethics Opinions

350 McAllister Street, San Francisco, California 94102

[www.JudicialEthicsOpinions.ca.gov](http://www.JudicialEthicsOpinions.ca.gov)

---

### INVITATION TO COMMENT [CJEO Draft Formal Opinion 2025-028]

---

**Title**

CJEO Draft Formal Opinion 2025-028:  
*Disqualification and Disclosure  
Requirements Under the Racial Justice  
Act*

**Action Requested**

Review and submit comments by  
**Friday, July 11, 2025**

**Proposed Date of Adoption or Other  
Action**

To be determined

**Prepared by**

The California Supreme Court  
Committee on Judicial Ethics Opinions

**Contact**

Jody Vakili  
Chief Counsel for the California Supreme  
Court Committee on Judicial Ethics  
Opinions (CJEO)  
Phone: 415-865-7169  
Email: [Judicial.Ethics@jud.ca.gov](mailto:Judicial.Ethics@jud.ca.gov)

For information about the Committee and  
its members, visit the [CJEO website](http://www.CJEO.org)

---

### CJEO Invites Public Comment

The California Supreme Court Committee on Judicial Ethics Opinions (CJEO) has adopted a draft formal opinion and approved it for posting and public comment pursuant

*This CJEO Draft Formal Opinion has not been adopted by the Committee in final form and is circulated for comment purposes only.*

to California Rules of Court, rule 9.80(j), and CJEO Internal Operating Rules and Procedures, rule 7(d). ([Rule 9.80](#); [CJEO Rules](#).) The public is invited to comment on the draft opinion before the Committee considers adoption of an opinion in final form, or other action.

In **CJEO Draft Formal Opinion 2025-028**, the committee advises that a judge is not automatically required to recuse themselves solely because, as a former deputy district attorney, they handled cases involving elements that might be subject to discovery under a Racial Justice Act motion or used to demonstrate a violation of the Act in a case now before them.

After receiving and reviewing comments, the Committee will decide whether the draft opinion should be published in its original form, modified, or formally withdrawn. (Rule 9.80(j)(2); CJEO rule 7(d)). Comments are due by **July 11** and may be submitted as described below.

### **How to Submit Comments**

Comments may be submitted: (1) [online](#); (2) by email to [Judicial.Ethics@jud.ca.gov](mailto:Judicial.Ethics@jud.ca.gov); or (3) by regular mail to:

Jody Vakili  
Chief Counsel  
California Supreme Court Committee on Judicial Ethics Opinions  
350 McAllister Street  
San Francisco, California 94102

### **Comments Due by July 11, 2025**

At the close of the comment period, on or after **July 11**, the Committee will post on its [website](#) all comments that are not clearly identified as confidential.

**Attachment:** CJEO Draft Formal Opinion 2025-028: *Disqualification and Disclosure Requirements*

*This CJEO Draft Formal Opinion has not been adopted by the Committee in final form and is circulated for comment purposes only.*



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

350 McAllister Street  
San Francisco, CA 94102  
(855) 854-5366  
[www.JudicialEthicsOpinions.ca.gov](http://www.JudicialEthicsOpinions.ca.gov)

**CJEO *Draft* Formal Opinion 2025-028**

**DISQUALIFICATION AND DISCLOSURE REQUIREMENTS UNDER THE  
RACIAL JUSTICE ACT**

**I. Question**

The California Supreme Court Committee on Judicial Ethics Opinions (CJEO or the Committee) has been asked to address the ethical issues regarding disqualification and disclosure requirements in cases involving Racial Justice Act claims.

**II. Facts**

The requesting judge seeking the Committee’s opinion is presiding over a criminal case where the charges include firearm enhancements under Penal Code section 12022.53, subdivision (d) that carry a potential exposure of an additional and consecutive term of imprisonment for 25 years to life (“the current case”). The defense attorney in this matter filed a motion pursuant to the Racial Justice Act (Penal Code section 745, subdivision (d)) (“Racial Justice Act”) seeking discovery back to the year 2000 from the

*This CJEO Draft Formal Opinion has not been adopted by the Committee in final form and is circulated for comment purposes only.*

county district attorney's office of all cases where the initial charges filed included firearm enhancements that would potentially expose defendants to a life sentence.

Before being appointed to the bench, the requesting judge worked in the county district attorney's office from 1998 to 2010. While working as a prosecutor, the judge personally handled cases involving firearm enhancements in both the gang and homicide units, although never handled any cases involving the defendant in the current case. The judge did not serve in any administrative or management capacity in the district attorney's office that involved policy making or charging decisions. The question is whether the judge is now required to disqualify from the current case, and if not, what must the judge disclose.

## **II. Advice Provided**

A trial judge who worked as a prosecutor prior to taking the bench must be disqualified from a case (1) if the judge actively participated in some substantive aspect of the prosecution of the current case against this defendant; (2) if the judge actively participated in the prosecution of a previous case against this defendant that is alleged as a prior for sentencing purposes in the present case; (3) if the judge believes their recusal would further the interests of justice; (4) if the judge believes there is a substantial doubt as to the judge's capacity to be impartial; or (5) where a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial. (Cal. Code Jud. Ethics, Canon 3E(2); Cal. Code Civ. Proc., § 170.1.)<sup>1</sup>

However, a judge is not automatically required to recuse merely because the judge, while working as a deputy district attorney, handled cases involving elements that may be subject to discovery under a motion pursuant to the Racial Justice Act or that

---

<sup>1</sup> All further references to the Code, Canons, Terminology, and Advisory Committee Commentary are to the California Code of Judicial Ethics unless otherwise indicated. All further references to the statute or the disqualification statute are to the California Code of Civil Procedure unless otherwise indicated.

could be used to establish a violation of the Act in the case before them. Nevertheless, disqualification is required if the judge's prior prosecutorial involvement was such that a reasonable person, aware of the circumstances, could justifiably doubt the judge's ability to remain impartial. Where a judge decides not to disqualify from a case, the judge must disclose on the record any facts reasonably relevant to the determination of disqualification. This includes any facts the judge considered when deciding not to disqualify.

Accordingly, based on the facts presented by the requesting judge, the Committee advises that the judge need not disqualify but should disclose, on the record, any information reasonably relevant to the issue of disqualification under Code of Civil Procedure section 170.1, including all facts the judge considered in deciding against disqualification. (Canon 3E(2)(a)).

### **III. Authorities**

#### **A. Applicable Canons**

Advisory Committee commentary following Canons 2 and 2A: “...*Code of Civil Procedure section 170.2, subdivision (b), provides that, with certain exceptions, a judge is not disqualified on the ground that the judge has, in any capacity, expressed a view on a legal or factual issue presented in the proceeding before the judge....*”

Canon 3B(1): “A judge shall hear and decide all matters assigned to the judge except those in which he or she is disqualified.”

Canon 3E(1): “A judge shall disqualify himself or herself in any proceeding in which disqualification is required by law.”

Advisory Committee commentary following Canon 3E(1): “*The term ‘proceeding’ as used in this canon encompasses prefiling judicial determinations. Thus, if a judge has a disqualifying interest in a matter, the judge is disqualified from taking any action in the matter, even if it predates the actual filing of a case, such as making a probable cause determination, signing a search or arrest warrant, setting bail, or ordering an own recognizance release. Interpreting ‘proceeding’ to include prefiling judicial*

*This CJEO Draft Formal Opinion has not been adopted by the Committee in final form and is circulated for comment purposes only.*

*determinations effectuates the intent of the canon because it assures the parties and the public of the integrity and fairness of the judicial process. ”*

Canon 3E(4): “An appellate justice shall disqualify himself or herself in any proceeding if for any reason:

- (a) the justice believes his or her recusal would further the interests of justice; or
- (b) the justice substantially doubts his or her capacity to be impartial;\* or
- (c) the circumstances are such that a reasonable person aware of the facts would doubt the justice’s ability to be impartial.\*”

Canon 3E(5) provides: “Disqualification of an appellate justice is also required in the following instances:

- (a) The appellate justice has served as a lawyer in the pending\* proceeding, or has served as a lawyer in any other proceeding involving any of the same parties if that other proceeding related to the same contested issues of fact and law as the present proceeding, or has given advice to any party in the present proceeding upon any issue involved in the proceeding.”

Advisory Committee commentary following Canon 3E(5)(a): “*Canon 3E(5)(a) is consistent with Code of Civil Procedure section 170.1, subdivision (a)(2), which addresses disqualification of trial court judges based on prior representation of a party in the proceeding.*”

## **B. Constitutional Provisions, Statutes, and Other Authorities**

Cal. Code Civ. Proc. section 170.

Cal. Code Civ. Proc. section 170.1, subdivision (a)(2)

“(2) (A) The judge served as a lawyer in the proceeding, or in any other proceeding involving the same issues he or she served as a lawyer for a party in the present proceeding or gave advice to a party in the present proceeding upon a matter involved in the action or proceeding.

B) A judge shall be deemed to have served as a lawyer in the proceeding if within the past two years:

- (i) A party to the proceeding, or an officer, director, or trustee of a party, was a client of the judge when the judge was in the private practice of law

*This CJEO Draft Formal Opinion has not been adopted by the Committee in final form and is circulated for comment purposes only.*

or a client of a lawyer with whom the judge was associated in the private practice of law.

(ii) A lawyer in the proceeding was associated in the private practice of law with the judge.

(C) A judge who served as a lawyer for, or officer of, a public agency that is a party to the proceeding shall be deemed to have served as a lawyer in the proceeding if he or she personally advised or in any way represented the public agency concerning the factual or legal issues in the proceeding.”

Cal. Code Civ. Proc. section 170.1, subdivision (6)

“(6) (A) For any reason:

(i) The judge believes his or her recusal would further the interests of justice.

(ii) The judge believes there is a substantial doubt as to his or her capacity to be impartial.

(iii) A person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.

(B) Bias or prejudice toward a lawyer in the proceeding may be grounds for disqualification.”

Cal. Penal Code section 745 (Racial Justice Act).

Cal. Penal Code section 12022.53.

*In re Arthur S.* (1991) 228 Cal.App.3d 814.

*Muller v. Muller* (1965) 235 Cal.App.2d 341.

*People v. Crappa* (1925) 73 Cal.App. 260.

*Sincavage v. Superior Court* (1996) 42 Cal.App.4<sup>th</sup> 224.

*Williams v. Pennsylvania* (2016) 579 U.S. 1.

Cal. Judges Assn., Judicial Ethics Update (2016).

*This CJEO Draft Formal Opinion has not been adopted by the Committee in final form and is circulated for comment purposes only.*

Cal. Judges Assn., Judicial Ethics Update (2012).

Cal. Judges Assn., Formal Ethics Opn. No. 63 (2009).

Cal. Judges Assn., Formal Ethics Opn. No. 56 (2006).

CJEO Oral Advice Summary 2016-017, *Disqualification for Prior Appearance as a Deputy District Attorney in Another Proceeding*, Cal. Supreme Ct., Com. Jud. Ethics Opns.

CJEO Oral Advice Summary 2015-016, *Full Bench Disqualification*, Cal. Supreme Ct., Com. Jud. Ethics Opns.

CJEO Formal Opinion 2015-007, *Disqualification for Prior Appearance as a Deputy District Attorney in a Nonsubstantive Matter*, Cal. Supreme Ct., Com. Jud. Ethics Opns.

Rothman, et al., California Judicial Conduct Handbook (4th ed. 2017) §§ 7.6, 7.37.

#### **IV. Background**

In 2020, California passed the Racial Justice Act which declares “The state shall not seek or obtain a criminal conviction, or seek, obtain, or impose a sentence on the basis of race, ethnicity, or national origin.” (Pen. Code § 745, subd. (a).) A violation is established if the defendant proves, by a preponderance of the evidence, any of the following:

- (1) A listed person (judge, attorney, law enforcement officer, expert witness, or juror) exhibited bias toward the defendant because of the defendant’s race, ethnicity, or national origin;
- (2) A listed person used discriminatory language about the defendant’s race or otherwise exhibited bias or animus toward the defendant based on the defendant’s race, ethnicity, or national origin; does not have to be purposeful;
- (3) Defendant was convicted of a more serious offense than other defendants of other races who are similarly situated; and evidence shows the prosecution

*This CJEO Draft Formal Opinion has not been adopted by the Committee in final form and is circulated for comment purposes only.*



more frequently sought convictions for other people of defendant's race, ethnicity, or national origin in that county;

- (4) (A) Longer or more severe sentences were imposed on the defendant than other similarly situated defendants convicted of the same offense; and longer or more severe sentences are frequently imposed for that offense on people of defendant's race, ethnicity, or national origin than defendants of other races, ethnicities, or national origins in that county;
- (B) Longer or more severe sentences were more frequently imposed for the same offense on defendants in cases with victims of one race, ethnicity, or origin than in cases with victims of other races, ethnicities, or national origins.

(Cal. Penal Code, § 745, subd. (a)(1)-(4).)

Subdivision (d) states that “[a] defendant may file a motion requesting disclosure to the defense of all evidence relevant to a potential violation of subdivision (a) in the possession or control of the state. A motion filed under this section shall describe the type of records or information the defendant seeks. Upon a showing of good cause, the court shall order the records to be released. Upon a showing of good cause, and if the records are not privileged, the court may permit the prosecution to redact information prior to disclosure.” (*Id.* at subd. (d).)

## **V. Discussion**

### **A. Disqualification**

Judges have a duty to hear all cases from which they are not disqualified.<sup>2</sup> (Canon 3B(1) [judicial officers have a duty to serve unless disqualified]; Code Civ. Proc., § 170

---

<sup>2</sup> The disqualification statute applies to trial court judges, but appellate justices are subject to substantially similar rules as specified in canons 3E(4), (5), and (6). (CJEO Oral Advice Summary 2018-023 (2018), *Disqualification Responsibilities of Appellate Court Justices*, Cal. Supreme Ct. Com. Jud. Ethics Opns., p. 3 [the grounds for disqualification of appellate justices in canon 3 largely track the statutory requirements for trial judges]; Rothman et al., Cal. Jud. Conduct Handbook (4th ed. 2017) § 7:1, p. 388 [the canons governing disqualification for appellate justices parallel Code Civ. Proc., § 170.1 et seq., so appellate justices may look to analysis of the statutory rules for guidance].)

*This CJEO Draft Formal Opinion has not been adopted by the Committee in final form and is circulated for comment purposes only.*

[trial court judges have an affirmative obligation to serve unless disqualified].) A judge must disqualify in any proceeding in which disqualification is required by law. (Cal. Code Jud. Ethics, Canon 3E(1).) The grounds for disqualification of trial court judges are provided in Section 170.1 of the California Code of Civil Procedure. A judge is disqualified from hearing a case if the judge previously served as a lawyer in the proceeding or served as a lawyer for a party in the present proceeding in any other proceeding involving the same issues. (Code Civ. Proc. § 170.1, subd. (a)(2)(A).) Whether a judge must recuse when they “served as a lawyer in the proceeding” turns on the nature of the judge’s activity in relation to the matter, as well as the parties, lawyers, and issues therein. (Rothman, Cal. Judicial Conduct Handbook (4th Ed.) § 7.37, p. 447.)

The committee concluded in CJEO Formal Opinion 2015-007 that section 170.1 does *not* require disqualification of a judge who previously served as a deputy district attorney in the same case on a “perfunctory, nonsubstantive hearing,” such as a brief appearance at an uncontested motion or scheduling conference, because a person aware of the fact that the judge did not “actively participate” in the prosecution would not have reason to doubt the judge’s impartiality. (CJEO Formal Opinion 2015-007, pp. 2-3, 12, 14 “[D]isqualifying *service as a lawyer in the proceeding* requires at least a modicum of active participation.” (Emphasis in original)].)

On the other hand, where a judge made a prior appearance on a *substantive* matter in the *same case*, disqualification is required. (CJEO Formal Opinion 2015-007, p. 10, citing *People v. Crappa* (1925) 73 Cal.App. 260, 261 [judge’s revocation of probation and sentencing reversed where the judge previously appeared as a deputy district attorney at the defendant’s arraignment and probation hearings in the same matter].) In *Williams v. Pennsylvania* (2016) 579 U.S. 1 (*Williams*) the United States Supreme Court held “there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case.” (*Williams*, *supra*, 579 U.S. at p. 8 [Disqualification required where former

*This CJEO Draft Formal Opinion has not been adopted by the Committee in final form and is circulated for comment purposes only.*

prosecutor served as an advocate for the state in a case that then came before the judge.]) Here, the judge did not previously serve as a lawyer in any capacity in the present proceeding. (Code Civ. Proc. § 170.1, subd. (a)(2)(A); CJEO Formal Opinion 2015-007; CJEO Oral Advice Summary 2016-017.) Accordingly, the judge would not be disqualified on those grounds.

Subdivision (a)(2)(A) also requires disqualification where, “in any *other* proceeding involving the same issues,” a judge “served as a lawyer for a party in the present proceeding...” (Code Civ. Proc. § 170.1, subd. (a)(2)(A) (emphasis added).) The term “issues” is narrowly interpreted. (Rothman, Cal. Judicial Conduct Handbook (4th Ed.) § 7.37, pp. 448-49.) “[S]ame issue’ has been held to mean ‘the disputed point or question to which the parties to an action have narrowed their several allegations and upon which they are desirous of obtaining either the decision of the court on a question of law or of the court or jury on a question of fact.’” (Rothman, Cal. Judicial Conduct Handbook (4th Ed.) § 7.37, p. 448, citing *Muller v Muller* (1965) 235 Cal.App.2d 341, 343-344; *In re Arthur S.* (1991) 228 Cal.App.3d 814, 820-822.) There must be some “identity of issues between the two proceedings.” (*In re Arthur S.* (1991) 228 Cal. App. 3d 814, 820.)

In Oral Advice Summary 2016-017, the Committee concluded that a “judge who actively participated in the prosecution of a case alleged as a prior for purposes of sentencing is disqualified from hearing any proceeding in the matter in which the prior is alleged.” (CJEO Oral Advice Summary 2016-017, p. 2.) In this case, the judge – a former prosecutor – had no “significant, personal involvement as a prosecutor in a critical decision regarding the defendant’s case.” (*Williams*, *supra*, 579 U.S. at p. 2.) Nor did the judge actively participate in the prosecution of a case alleged as a prior for sentencing purposes. (CJEO Oral Advice Summary 2016-017, p. 2.) As such, the judge would not be disqualified on those grounds.

*This CJEO Draft Formal Opinion has not been adopted by the Committee in final form and is circulated for comment purposes only.*

The next inquiry is whether, “in any other proceeding involving the same issues,” a judge “gave advice to a party in the present proceeding upon a matter involved in the action or proceeding.” (Code Civ. Proc. § 170.1, subd. (a)(2)(A)).) The initial charges in the present proceeding included firearm enhancements under Penal Code 12022.53(d). Firearm enhancements are generally considered a question of fact – namely, whether the defendant, in the commission of a felony, personally and intentionally discharged a firearm and caused great bodily injury or death to someone other than an accomplice. (Pen. Code § 12022.53(d).) During the judge’s time at the district attorneys’ office, the judge (as a lawyer) personally handled a number of cases involving firearm enhancements in the gang and homicide units, which necessarily involved giving advice to a party (the state) upon a matter involved in the present proceeding (firearm enhancement). (Rothman, § 7:37, p. 448 [“Although there appear to be no cases regarding the meaning of ‘a matter involved in the action or proceeding,’ the language reasonably should be read to relate to actual matters ‘involved’ in the case itself.”])

However, the fact that the judge as a former prosecutor previously handled cases with firearm enhancement allegations under Penal Code 12022.53(d), in conjunction with the fact that the current case also involves firearm enhancements, lacks the nexus required to rise to the level of “any other proceeding involving the same issues.” There are no overlapping issues of law or fact between the current and former proceedings solely because they all involve firearm enhancements. To conclude otherwise would mean any judge who prosecuted rape cases as a district attorney would not be permitted to adjudicate cases involving rape charges, any judge who formerly worked on murder cases would not be permitted to adjudicate cases involving murder charges, and so on. This interpretation would hinder the proper administration of justice in cases where there is no valid reason to question impartiality, which runs counter to the intent of the disqualification statutes. Accordingly, the judge here would not be disqualified from the current case based solely on the fact that, as district attorney, they previously handled

*This CJEO Draft Formal Opinion has not been adopted by the Committee in final form and is circulated for comment purposes only.*

cases with gun enhancements. On the other hand, if the judge, as district attorney, had worked on a prior case with gun enhancements against *this* defendant, disqualification would be appropriate.

The question presented here, however, is whether defendant's discovery motion under the Racial Justice Act brings this case within the purview of section 170.1, subdivision (a)(2)(A) on disqualification. In CJEO Oral Advice Summary 2016-017, the committee found a "judge who actively participated in the prosecution of a case alleged as a prior for purposes of sentencing is disqualified from hearing any proceeding in the matter in which the prior is alleged." (*Id.* at p. 2.) Here, the judge actively participated in the prosecution of cases that may evidence violation(s) of Penal Code section 745, subdivision (a) for purposes of the present proceeding against this defendant. If the court finds a violation of subdivision (a) before judgment, the court may declare a mistrial, discharge the jury and empanel a new one, or dismiss enhancements, special circumstances, or special allegations, or reduce one or more charges. (Penal Code § 745, subd. (e)(1).) If after a judgment has been entered, the court finds that a conviction was sought or obtained in violation of subdivision (a), the court must vacate the conviction and sentence, finding it legally invalid, and impose a new sentence. (Penal Code § 745, subd. (e)(2).)

As noted above, a judge is disqualified if, "in any other proceeding involving the same issues," the judge "gave advice to a party in the present proceeding upon a matter involved in the action or proceeding." (Code Civ. Proc. § 170.1, subd. (a)(2)(A)).) After clearing the "active participation" hurdle, the next inquiry is "whether there was any identity of issues between the two proceedings." (*In re Arthur S.* (1991) 228 Cal. App. 3d 814, 820-821 [The referee did not impliedly serve as both attorney and judge in the same proceeding when he acted as the referee for the second petition, following his role as deputy district attorney in the first petition. There is no proof that the referee provided any legal counsel on matters related to the second petition, and the issues between the

*This CJEO Draft Formal Opinion has not been adopted by the Committee in final form and is circulated for comment purposes only.*

two cases were not closely related enough to create a conflict.]; *but see, Sincavage v. Superior Court* (1996) 42 Cal.App.4<sup>th</sup> 224, 230 [judge who actively participated in the prosecution of a case alleged as a prior for sentencing purposes is disqualified from hearing any proceeding in the matter in which the prior is alleged].)

When analyzing the “same issues” requirement, the *Arthur* court stated “[a]lthough we have concluded the two petitions marked what were in fact separate proceedings between the same parties, Code of Civil Procedure section 170.1 still provides mechanisms whereby they may be *treated* as the same proceeding, and therefore may require disqualification.” (*In re Arthur S., supra*, 22 Cal.App.3d at 820 [emphasis in original].) Here, we have the current case before the judge, and previous cases handled by the judge as a prosecutor against different defendants, with nothing in common except for firearm enhancement allegations under Penal Code section 12022.53, subdivision (d). The throughline of these various proceedings is too faint to treat them as “involving the same issues” for the purpose of section 170.1(a)(2)(A). Accordingly, the judge is not required to recuse on these grounds.

It bears noting that there is no applicable time limit to the disqualification requirement where “the judge served as a lawyer in the proceeding;” or where “in any other proceeding involving the same issues [the judge] served as a lawyer for a party in the present proceeding;” or where in any other proceeding involving the same issues the judge “gave advice to a party in the present proceeding upon a matter involved in the action or proceeding.” (Code Civ. Proc., § 170.1, subd. (a)(2)(A).)

Section 170.1, subdivision (a)(2)(B) of the Code of Civil Procedure states that “[a] judge shall be deemed to have served as a lawyer in the proceeding if within the past two years: (i) A party to the proceeding, or an officer, director, or trustee of a party, was a client of the judge when the judge was in the private practice of law or a client of a lawyer with whom the judge was associated in the private practice of law [or] (ii) [a] lawyer in the proceeding was associated in the private practice of law with the judge.”

*This CJEO Draft Formal Opinion has not been adopted by the Committee in final form and is circulated for comment purposes only.*

((Code Civ. Proc., § 170.1, subd. (a)(2)(B)(i)-(ii).) Based on the question presented, this section is not relevant to our analysis.

Section 170.1 goes on to say, “A judge who served as a lawyer for, or officer of, a public agency that is a party to the proceeding shall be deemed to have served as a lawyer in the proceeding if he or she personally advised or in any way represented the public agency concerning the factual or legal issues in the proceeding.” (Code Civ. Proc., § 170.1, subd. (a)(2)(C).) This language has been interpreted to apply to “lawyers who represent and advise public agencies in forums other than court proceedings, such as administrative and agency hearings, and who provide to the agencies legal advice generally.” (CJEO Formal Opinion 2015-007, p. 7, fn. 4 [“As an example, a former deputy county counsel who represented the county in annexation hearings before a local agency formation commission (LAFCO) is disqualified under subdivision (a)(2)(C) from presiding as a judge over a court proceeding challenging some aspect of that LAFCO annexation.”])

In addition to the above specific instances that require disqualification, a judge must also recuse if, for any reason, “(1) [t]he judge believes his or her recusal would further the interests of justice;” “(ii) [t]he judge believes there is a substantial doubt as to his or her capacity to be impartial;” [or] (iii) A person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.” (Code Civ. Proc. § 170.1, subd. (a)(6)(A).) Thus, if in the question presented here, the requesting judge believes recusal would further the interests of justice, or the judge cannot be impartial, disqualification is required.

A judge must also consider whether a person aware of the fact that the judge, as a prosecutor, actively participated in cases involving firearm enhancement allegations might reasonably entertain a doubt that the judge would be able to be impartial in the present proceeding involving a defense request for discovery under the Racial Justice Act

*This CJEO Draft Formal Opinion has not been adopted by the Committee in final form and is circulated for comment purposes only.*

which may include cases handled by the judge as a prosecutor, and which may be used to establish a violation of the Racial Justice Act in the current case.

In considering this question, the only commonality between the current case before the requesting judge and the previous cases handled by the judge as a prosecutor against other defendants that may be subject to discovery under the RJA is that they involve firearm enhancement charges under Penal Code section 12022.53, subdivision (d). The judge's participation as a prosecutor in any such previous cases was no more or less than any other deputy district attorney employed by the county during the relevant time period of the discovery request. If a judge in this scenario was required to disqualify, presumably any judge who formerly served in the county district attorney's office in the past 25 years and worked on any case involving a firearm enhancement would also be required to do the same. This is impractical and, in the committee's view, unnecessary where, as here, any overlap between the current case before the judge and previous cases handled by the judge as a prosecutor is that they involve similar enhancement charges. The risk of bias or the appearance of bias is low, and it is unlikely a person aware of the facts could reasonably entertain a doubt that the judge would be able to remain impartial in the present proceeding. As such, disqualification would not be required.

Note that the result may be different if the requesting judge, as a former prosecutor, participated in developing or directing the district attorney's policy regarding charging firearm enhancements, or was directly involved in making charging decisions, as opposed to following office policy. These facts, not present here, may increase the likelihood that a person aware of the facts could reasonably entertain a doubt as to the



judge's ability to remain impartial. Such a determination will need to be made on a case-by-case basis.<sup>3</sup>

### B. Disclosure

Where a trial court judge<sup>4</sup> concludes that disqualification is not required, the code requires the judge to disclose, on the record, any information reasonably relevant to the issue of disqualification under Code of Civil Procedure section 170.1. (Canon 3E(2)(a)). This includes all facts the judge considered in deciding against disqualification. (Rothman, *supra*, § 7:75, p. 500 [defining “relevant” as an objective measure of whether the information may reasonably support or refute a given matter].) Here, the requesting judge should disclose the fact that the judge was previously employed with the district attorney's office, and during that time handled cases involving gun enhancements.

## **VI. Conclusion**

A judge who formerly worked as a prosecutor must disqualify from the case where the judge actively participated in a substantive aspect of the prosecution of the current case against the current defendant; where the judge actively participated in the prosecution of a previous case against the current defendant that is alleged as a prior for sentencing purposes in the current case; where the judge believes the recusal would

---

<sup>3</sup> Even where disqualification is appropriate, the decision to disqualify must be made the trial judge; a presiding judge cannot declare the entire bench of a court disqualified without polling every judge, and similarly, should not preemptively disqualify all judges who are former prosecutors. (CJEO Oral Advice Summary 2016-015, p. 2, citing *Kaufman v. Court of Appeal* (1982) 31 Cal.3d 933 [each appellate judge, and by extension, trial court judge, must decide for themselves whether disqualification is required].)

<sup>4</sup> Although not bound by the disclosure rules, an appellate justice also has the option of disclosing certain facts on the record within the justice's ability and discretion. (Canon 3E(2) [limiting disclosure rules to trial proceedings]; Rothman, *supra*, § 7:90, p. 502–503 [acknowledging that disclosure for appellate justices is complicated by the fact that a justice may not appear before the parties until after a case has been fully briefed]; CJEO Oral Advice Summary 2017-021 (2017), *Disqualification for Acquaintance with Leaders of an Amicus Curiae*, Cal. Supreme Ct. Com. Jud. Ethics Opns., p. 3 [an appellate justice has discretion to disclose an acquaintance with the leaders of organizations that filed amicus curiae briefs].)

*This CJEO Draft Formal Opinion has not been adopted by the Committee in final form and is circulated for comment purposes only.*

further the interests of justice; where the judge believes there is a substantial doubt as to the judge's capacity to be impartial; or where a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.

A judge is not required to disqualify from the case solely because the judge, as a prosecutor, handled cases with elements that make those previous cases subject to discovery in response to a motion filed by the present defendant pursuant to the Racial Justice Act, or that may be used to establish a violation of the Act in the case before the judge. However, a judge must disqualify from the case if, as a prosecutor, the judge's participation in a case or cases was such that a person aware of the facts could reasonably entertain a doubt as to the judge's ability to remain impartial in the current case. Where a judge decides not to disqualify from a case, the judge must disclose on the record any facts reasonably relevant to the determination of disqualification.



*This opinion 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 rule 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)). The conclusions expressed in this opinion are those of the committee and do not necessarily reflect the views of the California Supreme Court or any other entity. (Cal. Rules of Court, rule 9.80(b); CJEO rule 1(a)).*

*This CJEO Draft Formal Opinion has not been adopted by the Committee in final form and is circulated for comment purposes only.*