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CJEO Expedited Opinion¹ 2021-044

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**DISQUALIFICATION FOR CIVICS EDUCATION ACTIVITIES IN MATTERS
INVOLVING SCHOOL DISTRICT MASK AND VACCINE MANDATES**

I. Question

Is a judicial officer who participates in civics education programs, such as the California judiciary's Power of Democracy Steering Committee, disqualified from hearing cases against school districts regarding COVID-19-related mask and vaccine mandates?

¹ The California Supreme Court Committee on Judicial Ethics Opinions (CJEO or committee) issues **Expedited Opinions**, formerly known as **Oral Advice Summaries**, pursuant to California Rules of Court, rule 9.80(i)(1) (eff. Jan. 1, 2021). Expedited Opinions are issued to requesting judicial officers following a discretionary decision by CJEO to address the ethical issues raised in an expedited process that does not include posting draft opinions for public comment, as required for CJEO Formal Opinions. CJEO Expedited Opinions are published in full, without identifying information regarding the requesting judicial officer, to provide information and analysis to the bench and the public regarding judicial ethics.

II. Advice Provided

A judicial officer who participates in civics education programs is not disqualified under mandatory grounds from hearing matters challenging school district mask and vaccine mandates. However, judicial officers must consider whether additional facts require disqualification, such as personal knowledge gained during participation in civics education activities regarding the reasons for a school district's mask or vaccine policies. There may be discretionary grounds for disqualification in such a circumstance if the judicial officer believes he or she cannot be impartial or if, based on certain facts, a reasonable observer would have cause to believe the judicial officer could not be impartial. In the committee's view, a reasonable person would not have reason to doubt a judicial officer's impartiality in cases involving mask or vaccine mandates based on participation in civics education programs alone. The analysis changes if there are other facts warranting disqualification, for example, if someone with whom the judge is closely associated in the civics education program is personally named as a defendant in a case. Judicial officers must balance public perception of impartiality against the duty to hear all cases from which a judicial officer is not disqualified. Even if a trial judge determines that disqualification is not required, the judge must disclose on the record all facts reasonably relevant to the judge's determination.

III. Facts

The California judiciary has created programs that involve partnering with schools to bring civics-based education to young people. For example, Supreme Court Chief Justice Tani Cantil-Sakauye has established the Power of Democracy Steering Committee, which includes stakeholders from the judiciary, the Department of Education, and other civics education leaders and supports educational initiatives to further Californians' understanding of their judiciary. (Judicial Council, Power of Democracy, <<https://www.courts.ca.gov/21763.htm#panel22832>>

[as of October 27, 2021].)² The steering committee carries out its work through various regional committees, and other programs, such as the “Judges in the Classroom” project, which partners volunteer judges with teachers and schools. Members of the judiciary are involved in the statewide committee, regional committees, and other educational programs that involve working closely with local school districts or school board members.

Given these facts, the committee has been asked about disqualification and disclosure obligations related to involvement in civics education programs in matters involving school district mask and vaccine mandates.

IV. Discussion

The disqualification and disclosure rules for judicial officers are laid out in canon 3 of the California Code of Judicial Ethics³ and the Code of Civil Procedure sections 170 through 170.5. While only trial court judges are bound by the Code of Civil Procedure disqualification statute, appellate justices are subject to substantially similar rules as specified in canon 3E(4), (5), and (6). (CJEO Oral Advice Summary 2018-023 (2018), *Disqualification Responsibilities of Appellate Court Justices*, p. 3 [the specific grounds for disqualification of appellate justices in canon 3 largely track the statutory requirements for trial judges]; Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 7:1, p. 388 (Rothman) [because the canons governing disqualification for appellate justices parallel Code Civ. Proc., § 170.1 et seq., appellate justices can look to analysis of the statutory rules for guidance].)

² One of the steering committee’s stated accomplishments was to launch the Task Force on K-12 Civic Learning, which developed recommendations for civics-based curriculum in schools. According to the task force’s 2014 report, the goal of educating children about the judicial system “came about because the courts interact daily with the broad range of Californians that come from our schools. The courts depend on an informed public to understand the importance of a fair and impartial judiciary and to understand their roles when they come to court as jurors, litigants or witnesses.” (Revitalizing K-12 Civic Learning in California: A Blueprint for Action (2014) p. 1.)

³ All further references to the code, terminology, canons, and advisory committee commentary are to the California Code of Judicial Ethics unless otherwise indicated.

When making a disqualification determination, judicial officers should be guided by the dual purposes of the disqualification rules, which are to: (1) “promote trust by precluding judges from presiding in those circumstances where there is a reasonable doubt as to impartiality”; and (2) “further the administration of justice by requiring judges to preside where there is no reasonable doubt as to impartiality.” (CJEO Formal Opinion 2015-007 (2015), *Disqualification for Prior Appearance as a Deputy District Attorney in a Nonsubstantive Matter*, p. 9.) To ensure the efficient administration of justice, judicial officers have a duty to hear all cases from which they are not disqualified. (Canon 3B(1) [judicial officers have a duty to serve unless disqualified]; Code Civ. Proc., § 170 [applying the same rule to trial court judges].) Indeed, “[t]he duty of a judge to sit where not disqualified is equally as strong as the duty not to sit when disqualified.”” (CJEO Formal Opinion 2015-007, *supra*, at p. 5, citing *United Farm Workers of America v. Superior Court* (1985) 170 Cal.App.3d 97, 100.)

As this committee has previously advised, the grounds for disqualification of judicial officers generally fall into two categories: mandatory and discretionary. (CJEO Oral Advice Summary 2020-036 (2020), *Appellate Disqualification for Judicial Council Service in Matters Challenging COVID-19 Emergency Rules and Orders*, p. 4.) All grounds for disqualification, once met, require a judicial officer to disqualify under the code and statute. (Canon 3E(4)-(5) [appellate disqualification is required if any specified grounds are met]; Code Civ. Proc., § 170.1 [trial court disqualification is required if any specified grounds are met].) The terms *mandatory* and *discretionary* are used to distinguish between (a) grounds that require disqualification when a judicial officer identifies mandatory criteria set by the statute or code that has been met in any proceeding (*mandatory grounds*), and (b) grounds that require disqualification when a judicial officer exercises discretion after evaluating whether objective or subjective disqualifying circumstances have been met in any proceeding (*discretionary grounds*). (CJEO Oral Advice Summary 2020-036, *supra*, at p. 4.)

A. Mandatory Disqualification

Most disqualification rules are mandatory; once a judicial officer determines that certain facts are present, he or she must disqualify. Examples of mandatory grounds for disqualification

include cases where a judicial officer previously served as a lawyer, or, in certain situations, was affiliated with lawyers in the case (canon 3E(5)(a)-(c); Code Civ. Proc., § 170.1, subd. (a)(2)); has a financial interest in the outcome of the case (canon 3E(5)(d)); Code Civ. Proc., § 170.1, subd. (a)(3); is closely related to a party or lawyer in the case (canon 3E(5)(e); Code Civ. Proc., § 170.1, subd. (a)(4) & (5)); has personal knowledge of disputed facts in the case (canon 3E(5)(f)(ii)); Code Civ. Proc., § 170.1, subd. (a)(1); or in the case of an appellate justice, presided over the case at an earlier stage (canon 3E(5)(f)(i)).

Participation in civics education programs does not per se give rise to any mandatory grounds for disqualification from cases involving school district mask or vaccine mandates. However, a judicial officer involved in such programs must determine if there are any additional facts requiring disqualification in a particular case. For example, if in the course of serving on a statewide or regional civics education committee, the judicial officer was present during discussions among school district representatives regarding the reasons for mask or vaccine mandates, that judicial officer may have personal knowledge of disputed facts in a case challenging those mandates; this would be a mandatory ground for disqualification. (Canon 3E(5)(f)(ii); Code Civ. Proc., § 170.1, subd. (a)(1).) Another example would be if the judicial officer, while serving on such a committee, made a statement that a person would reasonably believe commits the judicial officer to a particular outcome in a case challenging mask or vaccine mandates. (Canon 3E(3)(a).) While having made the statement is a factual determination and thus a mandatory ground for disqualification, this also has a discretionary component in terms of how the statement is perceived, as discussed further below. There may be other facts, not contemplated here, that constitute mandatory grounds for disqualification in a given case.

B. Discretionary Disqualification

Assuming there are no facts constituting mandatory grounds for disqualification, a judicial officer should consider whether participation in civics education programs triggers any discretionary grounds for disqualification from cases involving masks or vaccine mandates. For instance, a judicial officer may be disqualified from hearing a case if the judicial officer: (a)

believes that the interests of justice require it; (b) substantially doubts his or her capacity to be impartial; or (c) believes that a reasonable person aware of the facts would doubt the judicial officer's ability to be impartial. (Canon 3E(4)(a)–(b); Code Civ. Proc., § 170.1, subd. (a)(6)(A).) The reasonable person test for disqualification requires an objective analysis: “if a fully informed, reasonable member of the public would fairly entertain doubts that the judge is impartial, the judge should be disqualified.” (*Wechsler v. Superior Court* (2014) 224 Cal.App.4th 384, 391; accord, *Jolie v. Superior Court* (2021) 66 Cal.App.5th 1040–1041.) This same standard applies when determining if a person would reasonably believe that a statement made by a judicial officer commits the judicial officer to a particular outcome in a case under canon 3E(3)(a).

In the committee’s view, engagement in civics education programs would not, on its own, cause a reasonable person to doubt a judicial officer’s ability to be impartial in a case involving mask or vaccine mandates because there is not a sufficient nexus between the educational purposes of such programs and legal challenges against COVID-19-related mandates. (CJEO Informal Opinion Summary 2012-003 (2012), *Disqualification and Disclosure: University Representation of a Party in a Matter Before a Justice Employed by the University*, p. 2 [a justice was not disqualified from hearing a case where a party was represented by a law school clinic at the university where the justice taught because the link between the university and the justice was too remote and unrelated to give a reasonable person sufficient doubt as to impartiality].)

However, the committee cautions that the analysis may change depending on particular facts. For instance, if a case against a school district personally named as a defendant someone with whom a judicial officer worked closely, had extensive communications with, or was publicly associated with, this might change a reasonable person’s perception about the judicial officer’s ability to be impartial. When making a determination concerning a reasonable person’s perception of impartiality, a judicial officer should consider whether a case is likely to be subject to heightened public scrutiny. (CJEO Informal Opinion Summary 2018-005 (2018), *Disqualification for Spouse’s Political Campaign Services*, p. 7 (CJEO Informal Opinion Summary 2018-005) [if a case is high profile or likely to garner publicity, a judge’s impartiality

is more likely to be questioned].) This must be balanced against a judge’s duty to hear a case, no matter how controversial, when there is no reasonable doubt as to the judicial officer’s ability to be impartial. (*Id.* at p. 5 [the reasonable person test for disqualification strikes a balance between the parties’ right to a decision based upon an objective evaluation of the facts and the law, and the public’s right to a fair, yet efficient resolution of disputes]; canon 3B(1) [a judge shall hear all cases from which they are not disqualified]; canon 3B(2) [a judge shall be faithful to the law regardless of partisan interests, public clamor, or fear of criticism].)

C. Disclosure

Even if there are no mandatory or discretionary grounds for disqualification, a trial judge must consider whether civics education activities that involve interaction with school districts require disclosure on the record in cases challenging mask or vaccine mandates. The circumstances requiring disclosure are broader than those requiring disqualification. (CJEO Informal Opinion Summary 2018-005, *supra*, at p. 8.) A trial judge must disclose “information that is reasonably relevant to the question of disqualification under Code of Civil Procedure section 170.1, even if the judge believes there is no actual basis for disqualification.” (Canon 3E(2)(a).) Reasonably relevant information includes any information on which the judge relies to make a determination whether to disqualify. (Rothman, *supra*, § 7:75, p. 500 [defining “relevant” to mean that the matter has a tendency in reason to prove or disprove something].) For example, if it were relevant to a trial judge’s disqualification determination, the judge might disclose that he or she participates in civics education programs and interacts with members of the local school board but has never discussed and has no personal knowledge regarding the school district’s mask or vaccine policies. 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].)

V. Conclusion

Judicial involvement in civics education programs does not, on its own, constitute mandatory grounds for disqualification from cases against school districts challenging COVID-19-related mask and vaccine mandates under the California Code of Judicial Ethics or Code of Civil Procedure. However, additional facts may require disqualification, for example, if through participation in civics education activities, the judicial officer gained personal knowledge of a school district's reasons for imposing mask or vaccine mandates. There may be discretionary grounds for disqualification if a judicial officer believes that a reasonable person might doubt the judicial officer's impartiality, for example, if the judicial officer works closely with someone personally named in a case. Judicial officers must balance public perceptions regarding impartiality against the duty to hear all cases from which they are not disqualified, no matter how controversial. Trial judges who determine that disqualification is not required must disclose on the record any information reasonably relevant to their disqualification determination.



This expedited advice opinion is advisory only. (Cal. Rules of Court, rule 9.80(a), (e); Cal. Supreme Ct. Com. Jud. Ethics Opns. (CJEO), Internal Operating Rules & Proc. 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)). 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)).)