



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

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CJEO Expedited Opinion¹ 2022-046

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**DISQUALIFICATION WHEN A JUDGE’S SPOUSE MAY BE A MATERIAL
WITNESS**

I. Question

The Committee on Judicial Ethics Opinions has been asked about the point at which a judge must disqualify from hearing a capital case when defense counsel has expressed an intent to interview the judge’s spouse and possibly call the spouse as a witness during the sentencing phase of the capital case.

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 judge must disqualify from the capital case as soon as, to the judge's knowledge, the judge's spouse is likely to be called as a material witness in the case. If the spouse's documents and testimony are ruled admissible at an evidentiary hearing conducted by a different judicial officer, this is a clear indication that the spouse is likely to be called as a material witness and the judge must immediately disqualify upon such a ruling. A judge may be required to disqualify prior to the evidentiary hearing if, based on the facts of the case, the judge determines earlier that the spouse is likely to be called as a witness. As in any case, a judge must also consider whether disqualification is required because a reasonable person aware of the facts would have cause to doubt the judge's impartiality. A judge's rulings prior to the point of disqualification are valid and need not be set aside unless the grounds for disqualification arose earlier.

III. Facts

A judge is assigned to a capital case for all purposes. The judge's spouse, who is also now a judge but previously worked at the public defender's office, represented the defendant in an earlier unrelated juvenile proceeding. Defense counsel in the capital case has indicated an intent to interview the judge's spouse in relation to the spouse's prior representation of the defendant and may seek to call the spouse as a witness during the sentencing phase of the capital case. An evidentiary hearing has been set to determine whether documents and testimony relating to the spouse's representation of the defendant will be admissible during sentencing. The evidentiary hearing will be conducted by an unrelated judicial officer.

IV. Discussion

The disqualification and disclosure rules for judicial officers are provided in canon 3 of the California Code of Judicial Ethics² and Code of Civil Procedure sections 170 through 170.5

² All further references to the code and canons are to the California Code of Judicial Ethics unless otherwise indicated.

(disqualification statute). When making a disqualification determination, judicial officers must 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*, Cal. Supreme Ct. Com. Jud. Ethics Opns., pp. 9, 10 (CJEO Formal Opinion 2015-007).) 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, quoting *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.³ Mandatory grounds require judicial officers to disqualify when certain facts are present regarding the judge’s

³ See CJEO Expedited Opinion 2022-045 (2022), *Disqualification Obligations for Participants in the California Judicial Mentor Program (CJMP)*, California Supreme Court Committee on Judicial Ethics Opinions, page 4; CJEO Expedited Opinion 2021-044 (2021), *Disqualification for Civics Education Activities in Matters Involving School District Mask and Vaccine Mandates*, California Supreme Court Committee on Judicial Ethics Opinions, page 4; and CJEO Oral Advice Summary 2020-036 (2020), *Appellate Disqualification for Judicial Council Service in Matters Challenging COVID-19 Emergency Rules and Orders*, California Supreme Court Committee on Judicial Ethics Opinions, page 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; see *Eith v. Ketelhut* (2018) 31 Cal.App.5th 1, 15–17).

relationship to the parties, the lawyers, or the issues involved in a case. In addition, a judicial officer must disqualify on discretionary grounds when 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)–(c); Code Civ. Proc., § 170.1, subd. (a)(6)(A).) The reasonable person test for disqualification requires an objective analysis: “[I]f 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 (*Wechsler*); accord, *Jolie v. Superior Court* (2021) 66 Cal.App.5th 1025, 1040–1041.)

One mandatory ground for disqualification, relevant here, is when a judge “has personal knowledge of disputed evidentiary facts concerning the proceeding.” (Code Civ. Proc., § 170.1, subd. (a)(1)(A).) A judge is deemed to have personal knowledge “if the judge, or the spouse of a judge, ... is to the judge's knowledge *likely* to be a material witness in the proceeding.” (Code Civ. Proc., § 170.1, subd. (a)(1)(B) [*italics added*].) This requires a judge to make a subjective determination, “to the judge's knowledge,” as to the likelihood of the judge's spouse being called as a material witness in the case pending before the judge. (*Ibid.*)

In the facts provided, defense counsel has expressed an intent to interview the judge's spouse in connection with the spouse's prior representation of the defendant and may seek to call the spouse as a witness during the sentencing phase of the capital case. There is an evidentiary hearing pending to determine whether documents and testimony related to the spouse's prior representation of the defendant will be admissible. If the spouse's documents and testimony are ultimately ruled admissible, the spouse is almost certain to become a material witness and the judge must immediately disqualify upon such a ruling.

Whether the judge can determine the likelihood of the spouse being called as a material witness prior to the evidentiary hearing is a more difficult and fact-sensitive inquiry. Counsel's intent to call a witness, absent additional facts, may not be sufficient to create the likelihood of the judge's spouse actually appearing as a witness, particularly as the facts of the case suggest only a possibility that the spouse's testimony will be admitted. However, the judge must consider the totality of the circumstances, for example, the threshold for admissibility of

evidence during the sentencing phase of a capital case, defense counsel's level of motivation to compel the spouse's testimony,⁴ and the likelihood of defense counsel's success in admitting the spouse's documents and testimony. If the judge determines that his or her spouse is likely to be a material witness based on specific facts known to the judge prior to an evidentiary hearing, the judge must disqualify and not wait for the outcome of the hearing.

In addition, as in any case, the judge must consider whether to disqualify on discretionary grounds because a reasonable observer aware of the facts would have cause to doubt the judge's impartiality. (Code Civ. Proc., § 170.1, subd. (a)(6)(A).) For example, if the judge's spouse's prior representation of the defendant was particularly high-profile or extensive, a reasonable observer might question the judge's ability to be impartial in the capital case. This is also a fact-specific inquiry that the judge must resolve. (Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 7:17, p. 413 (Rothman) [a judge is required to know the disqualification rules and must make a judicial determination as to disqualification rather than leaving the decision to others, such as the lawyers in the case].)

If the judge determines that disqualification is necessary for any reason, the judge must recuse and not take further action in the case except for certain administrative actions permitted by law. (Code Civ. Proc., § 170.3, subd. (a)(1).) The judge's rulings made prior to the point at which the judge learned of the grounds for disqualification are valid and need not be set aside. (Code Civ. Proc., § 170.3, subd. (b)(4) [absent good cause, rulings made by a judge prior to when the grounds for disqualification are first learned shall not be set aside].) However, if the grounds for disqualification arise earlier and the judge fails to timely disqualify, the judge's rulings made after the point at which disqualification was required are void or voidable and may require rehearing. (Rothman, *supra*, § 7:5, at p. 399 [once disqualified, a judge's prior rulings are void or voidable if the judge knew or should have known grounds for disqualification arose earlier but failed to disqualify in a timely manner]; *Christi v. City of El Centro* (2006) 135

⁴ For example, in this case, the judge's spouse is also now a judge. Therefore, defense counsel may be highly motivated to call the spouse as a witness in hopes that the spouse's testimony will be given significant weight.

Cal.App.4th 767, 776 [disqualification occurs when the facts creating disqualification arise, not when disqualification is established].)

V. Conclusion

A judge must disqualify from a capital case as soon as the judge determines that the judge's spouse is likely to be a material witness in the case. If documents and testimony of the judge's spouse are ruled admissible at an evidentiary hearing, this is a clear indication that the spouse is likely to be called as a material witness. The judge must disqualify immediately upon such a ruling. Depending on the facts of the case, the judge may determine prior to the evidentiary hearing that the judge's spouse is likely to be called as a material witness, at which point the judge must disqualify without waiting for the outcome of the hearing. The judge must also disqualify if a reasonable observer aware of the facts would have cause to doubt the judge's impartiality. The judge's rulings prior to disqualification are valid and will not be set aside unless the grounds for disqualification arose earlier.



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).)