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CJEO Expedited Opinion[1] 2023-050

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JUDICIAL OBLIGATIONS FOR PRIOR SERVICE BY AN APPELLATE STAFF ATTORNEY IN A PENDING MATTER

I. Question

The Supreme Court Committee on Judicial Ethics Opinions (CJEO) has been asked about an appellate justice's ethical obligations where the justice has been assigned criminal appeals

[1] The California Supreme Court Committee on Judicial Ethics Opinions (CJEO) 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. The CJEO Expedited Opinions are published in full, without identifying information regarding the requesting judicial officer, to provide information and analysis to the bench and public regarding judicial ethics.

involving defendants who may be, or may have been, *unnamed* class members in one or more certified civil class actions challenging conditions of criminal confinement in which the justice's current staff attorney previously represented the class while employed in private practice as class counsel.

As a matter of practice, and to comply with the ethics requirements for judicial impartiality, the justice does not assign the staff attorney to work on any matter involving a *named* class member, or any matter involving an *unnamed* class member with whom the staff attorney interacted, and the staff attorney also does not work on any appeal involving the subject matters at issue in the civil class actions. The justice asks whether there are broader disqualification requirements or obligations beyond these regular practices.

II. Facts

While in private practice, the staff attorney was counsel of record in several related civil class actions representing various certified classes of correctional inmates challenging various conditions of confinement. In private practice, the staff attorney also had interactions and involvement with at least two other civil class actions challenging correctional conditions, but not as counsel of record. For all of these class actions, the class membership changed as individuals moved in and out of the correctional system and they became or ceased to be subject to a condition that could qualify them for membership in the class.

The justice asks whether the staff attorney is precluded from working on any criminal matters that might involve unnamed class members, and relatedly, how to identify those unnamed class members and the time period from the staff attorney's private practice for which any preclusion applies.

III. Advice Provided

A judicial officer's ethical obligations do not require disqualification of a staff attorney for prior representation in private practice of *unnamed* class members who appear in matters before the justice within two years of the judicial assignment, so long as those class members remained

unnamed during the two-year period of prior representation. It would not be reasonable for a person aware of the facts to doubt the staff attorney's impartiality towards unnamed class members the staff attorney does not know or could not have known the identity of during the two-year period of representation.

However, if any unnamed class member became a named class member during the two-year period of prior representation, the justice's ethical obligation would be to preclude the staff attorney from working on the assigned appellate matter of that named class member. Similarly, the committee advises that the same would be required for any *named* client of an attorney with whom the staff attorney was associated in private practice during the two-year period, including any *unnamed* class members who became known and *named* within two years of the justice's assignment of a matter in which the class member is a party. (Canon 3E(5)(b).)

The justice's regular practice of not assigning the staff attorney to work on any appeal involving the subject matter that was at issue in the civil class actions fulfills any of the justice's obligations under canon 3E(5)(a) because it would necessarily include representation in another related proceeding or giving advice on any issue in the present proceeding. The justice's regular practice of not assigning the staff attorney to work on any matter involving a *named* or *unnamed* class member with whom the staff attorney interacted fulfills the justice's remaining obligations under canon 3E(5)(b) because it would necessarily include representation of a private practice client of the staff attorney within the two years prior to judicial assignment of the criminal appeal. When a staff attorney is disqualified from an appeal, the justice is required to take reasonable steps to effectively eliminate the staff attorney's active and substantive involvement in the appeal.

It is the committee's opinion that the justice has no further obligations regarding *unnamed* class members during the two-year period specified in provision 3E(5)(b). An analytical discussion of these conclusions follows.

IV. Discussion

Canon 3C(3) of the California Code of Judicial Ethics[2] places a duty on judicial officers to "require staff and court personnel under the [justice]'s direction and control to observe appropriate standards of conduct and refrain from … manifesting bias or prejudice ... in the performance of their duties." For appellate staff attorneys, appropriate standards of conduct are specified in Code of Ethics for the Court Employees of California [Revised Oct. 2009], as adopted in the California Court of Appeal Judicial Attorney Manual (manual), which provides guidelines and model standards for individual appellate districts to adopt or modify [Third Ed., Revised 2013]. The manual directly addresses conflicts of interest for prior representation of an appellate party by an appellate staff attorney:

> "As is the rule for justices, disqualification is necessary if the attorney 'has appeared or otherwise served as a lawyer in [a] pending proceeding, or has appeared or 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.' (See Cal. Code Jud. Ethics, canon 3E(5)(a); Code Civ. Proc. § 170.1, subd. (a)(2).) In addition, a judicial attorney should withdraw from a case if, within the last two years preceding employment at the court, a party in the case was a client or the attorney practiced law with a lawyer in the case. (See Cal. Code Jud. Ethics, canon 3E(5)(b).)" (Manual, *supra*, §11.11, p. 147.)

Accordingly, the standards applicable to appellate staff attorneys arise from and correspond to the justice's disqualification and other obligations under the Code of Judicial Ethics. A judicial officer's canon 3C(3) obligation to ensure that these standards are upheld necessarily requires an examination of the justice's own disqualification requirements. The question of whether an appellate staff attorney's prior service as a lawyer may impact the justice's broader ethical obligations must be answered by examining the judicial disqualification rules for a justice's prior service as a "lawyer in the proceeding." (Canon 3E(5).)

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[2] All further references to the code, canons, and advisory committee commentary are to the California Code of Judicial Ethics unless otherwise indicated. All further references to the statutes are to the Code of Civil Procedure unless otherwise indicated.

For appellate justices, those specific rules are contained in provisions (a)-(c)[3] of canon 3E(5). Provision (a) requires disqualification if the justice (i) served as a lawyer in the same proceeding, (ii) served as a lawyer in another proceeding involving a present appellate party and involving the same contested issues of fact and law as the present proceeding, or (iii) has given advice to any party in the present proceeding on any issue involved in the present proceeding. Provision (b) requires disqualification if, within the last two years, a party was (i) a client of the justice, (ii) a client of a lawyer with whom the justice was associated in the practice of law, or (iii) a lawyer in the proceeding was associated with the justice in the private practice of law.

In several advisory opinions, this committee has interpreted the statutory provisions applicable to disqualification of trial court judges for prior service as an attorney. (CCP 170.1(a) (2)(A)-(C); CJEO Formal Opn. 2015-007 (2015), *Disqualification for Prior Appearance as a Deputy District Attorney in a Nonsubstantive Matter*, Cal. Supreme Ct. Com. Jud. Ethics Opns.; CJEO Oral Advice Summary 2016-017 (2016), *Disqualification for Prior Appearance as a Deputy District Attorney in Another Proceeding*, Cal. Supreme Ct. Com. Jud. Ethics Opns.) The statutory grounds for superior court disqualification examined in those opinions are substantially similar to those contained in canon 3E(5), which are described above as applicable to appellate justices. (Compare Code Civ. Proc. § 170.1, subd. (a)(2)(A)-(C) with canon 3E(5)(a)-(c); see also Advisory Com. commentary foll. canon 3E(5)(a) [appellate disqualification grounds based on prior representation of a party by the justice in canon 3E(5)(a) are consistent with the statutory grounds applicable to trial judges].)[4]

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[3] Provision (c), which applies to prior governmental service, is not relevant under the circumstances described where the staff attorney was previously in the private practice of law as class counsel of record for several civil actions challenging correctional institution conditions.

[4] For purposes of this discussion, further references will be to the provision letters that are identical in both the statute applicable to trial judges and the canon applicable to appellate justices, by interchangeably referring to those provision letters distinguished only by capitalization. For example, references to provisions "(A)" or "(a)" refer correspondingly to both the grounds applicable to trial court judges in CCP 170.1(a)(2)(A), discussed in prior CJEO opinions, and also to the similar and consistent grounds in canon 3E(6)(a) applicable to appellate justices, unless otherwise noted in the discussion.

In these advisory opinions, the committee concludes that statutory provision (A) applies to any prior active and substantive involvement as an attorney in the *same matter* now before the judicial officer and to any prior active and substantive service in *another matter* involving the same issues of fact and law as in a *present* matter before the judicial officer. (CJEO Formal Opn. 2015-007, *supra*, pp. 3, 14; CJEO Oral Advice Opn. 2016-017, *supra*, p. 2, 5; accord, *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016) [195 L.Ed.2d 132, 141] [federal due process sets a 'significant, personal involvement' standard requiring disqualification of a judge who 'actively participated' as a lawyer in the case now before the judge].) As concluded, while provision (A) broadly applies to prior service by *any* attorney, provisions (B) and (C) apply to specific *types* of attorneys or law practice. Specifically, provision (B) applies to attorneys in private practice when a former client appears in a case now before the judicial officer, and provision (C) applies to attorneys in governmental practice representing and advising public officials, officers, or entities. The statutory and canon progression of these broad to specific provision grounds provide the analytical framework for determining whether prior service as a lawyer by an appellate staff attorney requires any actions or obligations on the part of the justice with whom the staff attorney is now employed.

In practical terms, an appellate justice's obligations would require steps be taken equivalent to disqualifying a staff attorney from working on an appellate matter in which the staff attorney's prior service as a "lawyer in the proceeding" (canon 3E(5)) would have been disqualifying for the justice had the justice served in such a capacity. Meeting those obligations may take several forms, such as not assigning or otherwise preventing substantive or active involvement in the appellate matter.

Based on the facts provided about the staff attorney's prior class action representations and involvement while in private practice, canon provision (a), which would be broadly applicable to any attorney, must be analyzed, necessarily followed by an analysis of provision (b), which is more narrowly applicable to attorneys in private practice. An analysis of these provisions and facts must also include discussion of the justice's current practices, followed by the committee's conclusions regarding any additional measures that may be advisable under the circumstances described and the specific inquiry.

A. Prior service in the same or another proceeding

Canon 3E(5)(a) requires appellate justices to disqualify if they have "served as a lawyer in the pending proceeding, or [have] 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 [have] given advice to any party in the present proceeding upon any issues involved in the proceeding." Applied to an appellate staff attorney's prior service as a lawyer, this would obligate a justice if the staff attorney had appeared as an attorney of record and been actively involved *in the same* criminal matter now before the justice. It would further obligate the justice if any criminal defendant in an appeal assigned to the justice had been represented on the record by the justice's staff attorney *in another* matter related to the same facts and law in the criminal appeal. Finally, it would broadly apply if the staff attorney previously gave advice *in another* matter to any criminal defendant on any issue in that defendant's criminal appeal.

Here, the justice has established procedures that fully comply with provision (a). The staff attorney has not appeared as counsel of record for a criminal defendant in any criminal matter that would be assigned as a direct appeal to the justice,[5] and the justice precludes the staff attorney from working on any appeal involving the same contested issues of fact and law involved in a matter assigned to the justice.[6]

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[5] Although the justice does not specifically ask about ethical obligations where a staff attorney appeared in the *same matter* as assigned to the justice on appeal, if that were to occur, the justice would generally be obligated to preclude the staff attorney from doing any work on the appeal. In this committee's opinion, however, a staff attorney would be able to work on an appeal in which the staff attorney had previously appeared on the record if the justice determined that the staff attorney's prior involvement was nonsubstantive and did not include active participation in the appeal before the justice. (CJEO Formal Opn. 2015-007, *supra*, pp. 2, 14 [prior service in a perfunctory, nonsubstantive role does not require disqualification unless the judge actively participated as an attorney in the current action before the judge].)

[6] However, the committee's opinion discussed above for prior nonsubstantive representation *in another matter* would allow the staff attorney to work on appeals were the justice to determine that the staff attorney had not been actively involved in the substance of the other matter. (CJEO Oral Advice Opn. 2016-017, *supra*, p. 2, 5 [prior service at a

Broadly stated, the justice's current practice of not assigning the staff attorney to work on any appeal involving the subject matter at issue in the civil class actions, which would necessarily include representation in another related proceeding or giving advice on any issue in the present proceeding, fulfills any of the justice's obligations under provision (a).

B. Prior service in private practice

Canon 3E(5)(b) requires an appellate justice to disqualify if "within the last two years, … a party in the [present appeal] either was a client of the justice when … in private practice … or was a client of a lawyer with whom the justice was associated in … private practice …." This provision applies specifically to prior private practice service but sets a two-year limit not provided for in provision (a). Further, provision (b) is not limited to related proceedings or to the same contested issues of fact and law and instead broadly requires disqualification when any prior client of either the justice or a private practice associate of the justice appears before the justice. Applied to the inquiring justice's staff attorney, that attorney would be precluded from working on any appeal before the justice in which the staff attorney had, within the two years prior to the justice's assignment, represented a *named* class member as a client while in private practice, or, also within the two years prior to the justice's assignment, the staff attorney had been associated in private practice with a lawyer who had represented a *named* class member as a client.

As a practical matter, the application of this provision requires identification of prior clients of the staff attorney, or of the staff attorney's associates, to determine if a criminal defendant in an appeal before the justice falls within either category of a disqualifying private practice client. In this case again, the inquiring justice's current practices fulfill part of the justice's obligations regarding *named* class members, who would be identifiable from the record of the class proceedings as former clients of the staff attorney or associates.

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nonsubstantive hearing in any other proceeding involving the same parties and contested issues of fact and law as in the current action does not require disqualification].)

The committee notes that because provision (b) contains a two-year limit, the staff attorney would be able to work on any matters in which the attorney-client relationship with either the staff attorney or the attorney's associates ended as a matter of record more than two years before the justice is assigned the former client's criminal appeal. The committee further notes that if the staff attorney has been out of private practice for more than two years, no further disqualification duties would be required of the justice before assigning the staff attorney to criminal appeals.

The justice asks, however, about *unnamed* class members, and the facts provided indicate that the justice's staff attorney also had interactions and involvement with at least two other civil class actions challenging correctional conditions but not as attorney of record. The facts also indicate that for all of the class actions, the named class membership changed as individuals moved in and out of the correctional system and when class criteria changed. Thus, the distinction between *named* and *unnamed* former clients becomes analytically significant, and more precisely, when they became *named* class members is determinative.

C. Other unnamed class members

To the extent that the staff attorney had interactions with class members but was not attorney of record, the justice's current practices again partially fulfill disqualification obligations by precluding the staff attorney from working on an appeal involving any *named* or *unnamed* class member with whom the staff attorney knows the attorney has interacted. This leaves only the question of the justice's remaining obligations regarding *unnamed* class members who, within the two-year period before assignment, may have become *named* class members and publicly identifiable clients of either the staff attorney or an associate of the staff attorney, but who were unknown to the staff attorney.[7]

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[7] Any *unnamed* class members who were not *named* within the past two years would not give rise to disqualification obligations. (CJEO Formal Opinion 2015-007, supra, at pp. 9-10 [the legislative history of the disqualification statutes identifies the two purposes of promoting trust by precluding judges from presiding where there is a reasonable doubt as to impartiality, and furthering the administration of justice by requiring judges to preside where there is no

To answer this question, identification of the clients of the staff attorney and the clients of the staff attorney's associates during the past two years is necessary, and those individuals will be identifiable to the justice, the staff attorney, and to the public through court records. Thus, as individuals moved in and out of the correctional system, and class membership changed, a reasonable person would not be aware of any potential for impartiality towards a former class member until that individual is named publicly as a class member and client. Given the requirements and time limit set in canon 3E(5)(b), that identification process would need to be done only for the immediate two years before any criminal defendant's appeal is assigned to the justice. However, it would also need to include identification of any class members who became named within the past two years as clients of the staff attorney's private practice associates in any matter.

With this time limit, and the committee's advice that only *unnamed* class members who became *named* clients of the staff attorney or their law associates during that time period would require additional disqualification steps, the inquiring justice will be able to fulfill any additional disqualification obligations while still hearing assigned matters with suitable appellate staff attorney participation.

V. Conclusions

Appellate justices have an obligation under the California Code of Judicial Ethics and the Code of Ethics for the Court Employees of California to take steps equivalent to disqualifying a staff attorney employed by the justice from working on any part of an appellate matter in which

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reasonable doubt as to impartiality].) In this context, it is the committee's opinion that it would not be reasonable for a person aware of the facts to doubt the impartiality of a staff attorney who did not and could not have known the identity of a class member who was *unnamed* during the time of the staff attorney's representation of the class and its named members, or during the same class representation by the staff attorney's associates of a class member who remained *unnamed* during the past two years. That is, a person or outside observer would be unaware from the record of *unnamed* class members, and therefore could not reasonably entertain doubt as to impartiality by the staff attorney towards any parties who remained *unnamed* during the staff attorney's class representation.

the staff attorney's prior service as a "lawyer in the proceeding" would have been disqualifying for the justice had the justice served in such a capacity. (Canon 3E(5).)

Under canon provision 3E(5)(a), a justice's staff attorney would be precluded from working on any criminal defendant's appeal assigned to the justice, if, at any time:

1. The staff attorney represented the criminal defendant in the criminal appeal now before the justice;
2. The staff attorney represented the criminal defendant in another matter related to the same contested facts and law as that defendant's criminal appeal; or
3. The staff attorney gave advice to the criminal defendant on any issue in the criminal appeal.

Under canon provision 3E(5)(b), the justice would have the same duty to preclude the staff attorney from working on any criminal defendant's appeal if, *within the two years prior to the justice's assignment of the criminal appeal*:

1. The criminal defendant was a named class member and client of the staff attorney while in private practice;
2. The criminal defendant was a named class member and client of an associate of the staff attorney while in private practice; or
3. A private practice associate of the staff attorney appears in the matter assigned to the justice.

In the committee's opinion, a justice would have no duty to identify and effectively disqualify the staff attorney for any *unnamed* class members who remained unnamed as clients or class members of either the staff attorney or the attorney's associates during the two years prior to the justice's assignment of a criminal appeal.

This expedited 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)(2); 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 expedited 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).)