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CJEO Oral Advice Summary 2019-029

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**APPELLATE DISQUALIFICATION FOR PRIOR ASSIGNMENT AS
COORDINATED PROCEEDINGS JUDGE**

I. Questions

Must a recent appellate justice disqualify himself from hearing an appeal in Judicial Council coordinated proceedings where the justice was assigned for several months as the coordination judge? While assigned to the justice, the matter on appeal was either (i) the subject of a stay ordered by a previous coordination judge or (ii) on appeal, depriving the court of jurisdiction. The docket shows no action taken in the matter by the justice while he was the coordination judge. Now elevated to the Court of Appeal and serving on a panel hearing all appellate matters from the coordinated proceedings, the justice asks if he must disqualify or may

participate in deciding the matter on appeal. The justice asks for additional guidance on his disqualification obligations when assigned to appeals from other coordinated matters in which the justice did not issue the ruling on appeal as the trial judge.

II. Oral Advice Provided

The Code of Judicial Ethics¹ provides that disqualification of an appellate justice is mandatory when the justice “tried or heard” the case on appeal as a trial judge. (Canon 3E(5)(f)(i) [disqualification required when an appellate justice served as the judge before whom the proceeding was tried or heard in the lower court].) This canon is nearly identical to Code of Civil Procedure section 170.1, subdivision (b) (section 170.1(b)), which provides that a trial court judge before whom a proceeding was “tried or heard” shall be disqualified from participating in any appellate review of that proceeding. While no court or other authority has interpreted what “tried or heard” means in the context of canon 3E(5)(f)(i), the term has been interpreted as used in the similar circumstances of section 170.1(b). (*Housing Authority of Monterey County v. Jones* (2005) 130 Cal.App.4th 1029 (*Jones*) [judge who ruled on contested pretrial motions but did not try or hear the subsequent judgment is not subject to mandatory disqualification under § 170.1(b)].) By analogy, *Jones* compels the conclusion here that mandatory disqualification is not required for the inquiring appellate justice who did not take any action in the proceeding now on appeal before the justice’s panel. (*Jones, supra*, at pp. 1040-1041.)

The *Jones* court went on to rule, however, that the judge was disqualified from the appellate division panel reviewing the judgment because a reasonable person might doubt the judge’s impartiality knowing that the judge had decided contested pretrial motions related to the judgment on appeal. Conversely, *Jones* also suggests that a reasonable person would not doubt the impartiality of the inquiring justice who did not actively participate as a trial judge in any matter related to the merits of the appeal. (*Jones, supra*, 130 Cal.App.4th at pp. 1041-1042.)

¹ All further references to the code or canons are to the California Code of Judicial Ethics unless otherwise indicated.

Finally, basic guidance on appellate disqualification for prior service as a trial or coordination judge can be garnered from *Jones*. (*Id.* at p. 1042.)

(a). Tried or Heard

In *Jones*, the court analyzed whether a trial court judge was disqualified from participating in a superior court appellate division panel review of a case in which the judge had issued pretrial continuance and discovery orders but had not presided over the subsequent judgment on appeal. Interpreting the statutory term “tried or heard” applicable to trial court judges under section 170.1(b), *Jones* acknowledged that while appellate justices are not bound by the statute, the appellate disqualification canon is similar and also contains the term “tried or heard.” (*Jones, supra*, 130 Cal.App.4th at pp. 1040, 1043, fn. 6.)

To interpret the meaning of “tried or heard” in section 170.1(b), *Jones* examined the entire statutory scheme for trial court disqualification and observed that it defined ‘proceeding’ to mean ‘the action, case, cause, motion, or special proceeding to be tried and heard by the judge.’ (*Jones, supra*, 130 Cal.App.4th at p. 1040, quoting Code Civ. Proc., § 170.5, subd. (f).) The court concluded from this definition that a judge who decided contested pretrial continuance and discovery motions heard a different “proceeding” from the ultimate judgment on appeal and so was not disqualified from sitting on the superior court appellate division panel under section 170.1(b). (*Jones, supra*, at p. 1090.) The court reasoned that the judgment the appellate panel was reviewing had not previously been heard by the same judge, even though those motions were related to the judgment. The court found it significant that in her order on the motions, the judge stated that she was not ruling on the case-in-chief or the affirmative defenses, and no claim of error was made on appeal with regard to those motions. (*Id.*, at 1041.) Thus, *Jones* held that mandatory disqualification from the superior court appellate division panel was not required because no part of the judge’s ruling was actually included within the proceeding on appeal. (*Ibid.*)

Although the appellate disqualification canons do not similarly define a “proceeding,” as *Jones* noted, we reach an analogous conclusion under canon 3E(5)(f)(i) because the inquiring

justice made no rulings included within the proceeding on appeal. (*Jones, supra*, 130 Cal.App.4th at p.1043, fn. 6 [unlike the parallel statute governing superior court disqualification, canon 3E does not define proceeding].) Here, the inquiring justice took no action in the coordinated proceedings, which were stayed or on appeal during the assignment, depriving the court of jurisdiction. Defining or distinguishing proceedings is not necessary to conclude that the inquiring justice did not try or hear any part of the matter on appeal and therefore is not disqualified under canon 3E(5)(f)(i).

A disqualification analysis does not end there, however, as *Jones* noted. (*Jones, supra*, 130 Cal.App.4th at p.1041 [a more general disqualification determination about the appearance of impropriety is also required].)

(b). Appearance of Impartiality

Having decided that disqualification was not mandatory under section 170.1(b), the *Jones* court turned its attention to analyzing the provision of the disqualification statute that requires trial court judges to disqualify in all matters if a person aware of the facts might reasonably entertain doubt the judge would be able to be impartial. (*Jones, supra*, 130 Cal.App.4th at p. 1041, citing Code Civ. Proc., § 170.1(a)(6)(C), now subd. (a)(6)(4)(iii).) Canon 3E(4)(c) contains a parallel provision for appellate justices who must disqualify in all matters if a reasonable person aware of the facts would doubt the justice's ability to be impartial. (*Kaufman v. Court of Appeal* (1982) 31 Cal.3d 933, 937-940 [each appellate justice decides whether the facts require recusal, subject only to higher court review for bias or unfairness in the appellate proceedings].)

Jones looked at the contested pretrial motions and concluded that, although technically not the same proceedings as the judgment on appeal, the legal and factual issues were related. (*Jones, supra*, 130 Cal.App.4th at p. 1031, 1041.) For example, the motions limited the scope of discovery and the proceedings, although the motions themselves were not appealable, and the appellant did not argue those rulings were in error on appeal. (*Ibid.*) Nonetheless, the court concluded that a person aware of the degree to which the contested pretrial motions were

implicated by and referenced in the arguments on appeal would reasonably question the judge's impartiality, which in turn compelled the judge's disqualification. (*Id.*, at p. 1042.)

The pretrial rulings in *Jones* are easily distinguished here and the circumstances described by the inquiring justice do not compel disqualification. The justice lacked jurisdiction or the matter was stayed the entire time the justice was assigned as the coordination judge, so he took no action that could possibly suggest the appearance of partiality. As this committee concluded in a similar situation, disqualification is not required when a judge previously appeared in the same case as a deputy district attorney on a nonsubstantive matter, such as a perfunctory continuance, because a person aware of the fact that the judge did not "actively participate" in the prosecution would have no reason to doubt the judge's 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. 3, 14; see also 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., p. 4 [active participation in another proceeding includes, at a minimum, significant personal involvement as a prosecutor in critical decisions regarding the other case].)

Here, the inquiring justice was precluded from taking any action in the coordinated proceedings. A reasonable person aware of these facts could not conclude that he was actively involved or made any decisions as the coordination judge regarding the matter on appeal or other related matter. Therefore the committee advises against discretionary disqualification under canon 3E(4)(c).

(c). Appellate Disqualification Considerations in Other Coordinated Proceedings

The inquiring justice asks for additional guidelines about making disqualification decisions in other matters generally where he served as the coordination judge. With regard to mandatory disqualification under canon 3E(5)(f)(i), it is the committee's advice that a matter is tried or heard below, and disqualification is mandated, when a prior coordination judge was actively involved in a judicial decision being appealed. (Rothman et al., *Cal. Jud. Conduct*

Handbook (4th ed. 2017) § 7:63, pp. 487-486 [citing *Jones* but concluding that the decision against mandatory disqualification would be different in circumstances where the motion is itself on appeal].) Concomitantly, *Jones* instructs that disqualifying actions by a judge in the lower court include issuing rulings or orders actually included in the proceeding on appeal. (*Jones, supra*, 130 Cal.App.4th at pp. 1040-1041.) That is, disqualification is not mandatory under canon 3E(5)(f)(i) unless the issues on appeal were previously decided by the justice.

Jones also provides valuable guidance for making a discretionary decision about disqualification based on whether a person aware of the facts might reasonably doubt impartiality. *Jones* identifies the following facts as likely to raise reasonable doubt as to impartiality: (1) the judge decided issues of law or fact related to the merits of the appeal; (2) the appeal references or is implicated by the lower court ruling; (3) the judge made a ruling in the case in chief or affirmative defenses; (4) the judge made a procedural determination that had a substantial effect on the ultimate outcome; or (5) a claim of error about the judge's lower court rulings is raised in the arguments on appeal. The committee agrees and advises that these are also facts to be considered by an appellate justice under canon 3E(4)(c).

(d). Conclusions

The committee concludes that mandatory disqualification is not required under canon 3E(5)(f)(i) because the inquiring justice did not previously try or hear the appellate matter, which was stayed or on appeal during the time the justice was assigned as the coordinated proceeding judge. The justice took no action and made no decisions in the matter. The committee also advises against discretionary disqualification under canon 3E(4)(c) because a reasonable person aware of the circumstances, including the fact that the justice did not decide a motion or contested issue of law or fact related to the merits of the appeal, would have no reason to doubt the justice's impartiality. Finally, the committee recommends that when determining whether to disqualify in other appeals from coordinated proceedings in which the justice served, the justice consider whether he actively participated in the matter on appeal. It is the committee's view that the following actions as a trial judge below would likely lead a

reasonable person to doubt impartiality: (1) rulings on contested issues of law or fact related to the appeal; (2) a ruling that is referenced or implicated in the appeal; (3) a ruling on the case in chief or affirmative defenses; (4) a procedural determination that had a substantial effect on the ultimate outcome; or (5) any rulings about which a claim of error is raised in the arguments on appeal. A reasonable person would doubt impartiality in these circumstances. (Canon 3E(4)(c).)



This oral advice summary 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 summary 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).)