



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

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CJEO Oral Advice Summary 2020-035

[Issued June 2, 2020]

**APPELLATE DISQUALIFICATION FOR PRIOR PEREMPTORY
CHALLENGE AS A TRIAL JUDGE IN THE MATTER**

I. Question:

An appellate justice requests advice about disqualification obligations in a matter in which the justice had been the subject of a peremptory challenge as a trial court judge. Is a peremptory challenge below a ground to disqualify an appellate justice from hearing the matter on appeal?

II. Oral Advice Provided:

Yes, a peremptory challenge that removed a judge below is a ground for disqualification, when that judge becomes an appellate justice and the matter is assigned to the appellate justice for review.

Applying canon 3E(4)(c) of the California Code of Judicial Ethics,¹ the committee advises that a justice who was disqualified as a trial judge by peremptory challenge should reach the determination that a reasonable person would doubt impartiality and disqualify from the panel hearing the matter. A peremptory challenge is meant to end a judge's involvement in a case. Public confidence in the judiciary's impartiality comes, in part, by giving great weight to a litigant's stated belief of bias made under oath. While the peremptory challenge did not, and does not, disqualify an appellate justice, a justice's obligation to consider the objective appearance of impartiality should.

III. Discussion:

Disqualification for trial court judges is set by statutes. (Code Civ. Proc., §§ 170 et. seq., 170.1, 170.6.) A peremptory challenge does not disqualify an appellate justice. (§ 170.6, subd. (a); Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 7:10, p. 404 (Rothman) [statutory language specifying application to superior court judges precludes application to appellate justices].)

Disqualification for appellate justices is a decision made by each justice alone, under grounds set by canon. (Canon 3E(1), (3), (4) & (5); *Kaufman v. Court of Appeal* (1982) 31 Cal.3d 933, 935, 938-940 [statutory grounds for trial court disqualification are not applicable to appellate justices].) Canon 3E(4)(c) requires disqualification when circumstances are “such that a reasonable person aware of the facts would doubt the justice’s ability to be impartial.”

The application of the reasonable doubt standard uses an objective test; the perspective is of the “average person on the street.” (*United Farm Workers v. Superior Court* (1985) 170 Cal.App.3d 97, 105 [the reasonable person standard does not require

¹ All further references to canons are to the Code of Judicial Ethics. All further references to statutes are to the Code of Civil Procedure unless otherwise indicated.

proof of actual bias, the objective test ensures that proceedings appear to the public to be impartial, and hence worthy of public confidence[.]) ““The “reasonable person” is not someone who is “hypersensitive or unduly suspicious,” but rather is a “well-informed, thoughtful observer.””” (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 389.)

Although section 170.6 does not apply to appellate justices, several characteristics of peremptory challenges should inform the justice’s decision about whether the lower court disqualification would suggest to a reasonable person that the justice might not be impartial.

Section 170.6 ““guaranteed to litigants an extraordinary right to disqualify a judge.”” (*Solberg v. Superior Court of San Francisco* (1977) 19 Cal.3d 182, 193.) A party’s sworn affidavit of a belief of bias filed under section 170.6 does not create a presumption of prejudice; rather, it provides disqualification on a separate ground, because “actual prejudice is not a prerequisite to invoking the statute.” (*Ibid.*) The statute was specifically enacted to ensure “confidence in the judiciary and avoid the suspicion” of unfairness that occurs when a party believes a judge to be biased. (*Johnson v. Superior Court* (1958) 50 Cal.2d 693, 697.) As the Supreme Court observed in *Maas v. Superior Court* (2016) 1 Cal.5th 962, 973, section 170.6 should be liberally construed in favor of peremptory challenges. Like all disqualification grounds applicable to a trial court, a peremptory challenge is irrevocable, and its effect may outlast the challenging party’s own interest in the case. (*Louisiana-Pacific Corp v. Philo Lumber Co.* (1985) 163 Cal.App.3d 1212, 1219, 1217.)

In addition to these strong policy considerations, canon 3B(7)(a) prohibits a judge from discussing a matter with any judge “who has previously been disqualified from hearing that case,” and prohibits a judge who knows “he or she is or would be disqualified” from discussing the matter with another judge assigned to the case. The ban on discussions between a judge on a case and a disqualified judge is also aimed at promoting the “public confidence in the integrity and impartiality of the judiciary.”

(Rothman, *supra*, § 7:5, at p. 399 [that judge’s discussion with disqualified judge was inadvertent was irrelevant because violation of canon 3B(7)(a) undermines public confidence in the judiciary].)

Considering all applicable circumstances objectively, it is unlikely that an average person would think it fair that a judge who had irrevocably lost power in a matter could reclaim that same power by accepting a new judicial position. Likewise, a judge removed by a party's subjective belief of bias, who is the same individual later assigned to sit in review on the same case and who fails to disqualify, may cause an average person to doubt that judicial officer’s ability to be impartial.



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)).