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CJEO Oral Advice Summary 2020-036

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**APPELLATE DISQUALIFICATION FOR JUDICIAL COUNCIL SERVICE IN
MATTERS CHALLENGING COVID-19 EMERGENCY RULES AND ORDERS**

I. Questions

An appellate justice inquires whether disqualification is required in cases challenging emergency rules and orders related to COVID-19 where the justice served as a nonvoting member of the Judicial Council, and in that role, participated in discussions that led to the Judicial Council's adoption of COVID-19 emergency rules and approval of related emergency orders issued by Chief Justice Cantil-Sakauye.¹ The Judicial Council is named as a party in

¹ Limited identifying information is included in this oral advice summary because the requesting party has waived confidentiality. (Cal. Rules of Court, rule 9.80(h)(3); Cal. Supreme Ct. Com. Jud. Ethics Opns., Internal Operating Rules & Proc., rule 5(e).)

some of the cases coming before the inquiring justice’s appellate division and is not named as a party in others. The justice also asks whether disqualification is required in matters involving emergency rules that were approved for recommendation to the Judicial Council by its Rules Committee after the justice, who serves as a voting member of that committee, voted on whether to submit some proposed emergency rules for public comment.

II. Oral Advice Provided

First, an appellate justice’s prior service as a nonvoting Judicial Council member and as voting member of the council’s Rules Committee, standing alone, would not require the justice to be disqualified. The justice’s service on the council and the committee does not raise a reasonable belief that the justice’s discussion of emergency COVID-19 rules and orders with the council were statements committing the justice to a particular outcome in matters challenging those rules or orders. Second, in matters naming the Judicial Council as a party in direct challenges to the emergency rules and orders, the justice is disqualified. A person aware of the justice’s membership in a named party would have reason to doubt the justice’s impartiality when that party’s actions are challenged. Finally, in matters where the Judicial Council is not a named party, the justice is not disqualified because law drafting is expressly not a ground for disqualification and because a person aware of the justice’s administrative role and duties would not reasonably doubt the justice’s ability to reconsider the validity of a rule or order as part of his or her judicial function.

III. Discussion

The Judicial Council, as the policymaking body of the California courts, is responsible for ensuring the consistent, independent, impartial, and accessible administration of justice. (Cal. Const, art. VI, § 6; Cal. Rules of Court,² rule 10.1(a)-(b).) The council consists of voting

² All further references to rules are to the California Rules of Court unless otherwise indicated.

members of the judiciary and others, and nonvoting advisory council members determined by the voting members of the council and appointed by the Chief Justice, as specified in the constitution and the rules of court. (Cal. Const., art. VI; rule 10.2(a)(1).) Nonvoting advisory council members may participate in the council’s discussions, but they do not vote, speak, or act for the council unless authorized to do so for specific purposes. (Rules 10.30(a), (b)(4), 10.31(d).)

The council is also assisted in its duties by internal committees, which are comprised of voting council members and nonvoting advisory council members appointed by the Chief Justice. (Rules 10.2(b)(2), 10.10(a)-(c).) One such internal committee is the Rules Committee, which, among other duties, assists the council in making informed decisions about rules of court by reviewing and proposing rules, advising the council about circulating proposals for public comment, recommending council action, and ensuring that proposed rules do not conflict with statutes or other rules. (Rule 10.13.) Nonvoting council members who serve on an internal committee such as the Rules Committee may vote on internal committee matters. (Rules 10.3(b), 10.10(e).)

Since the outbreak of the novel coronavirus, the Judicial Council has adopted a number of emergency rules related to COVID-19 and has approved emergency orders issued by the Chief Justice in response to the pandemic. The justice requesting advice from the Committee on Judicial Ethics Opinions (CJEO) is a nonvoting advisory council member and sits on the Rules Committee. The justice made recommendations to the council and participated in discussions that led to the council’s adoption of these emergency rules, and approval of related orders, but did not vote to adopt or approve them. In at least one instance, however, the inquiring justice was authorized to vote as a Rules Committee member on whether to submit a proposed emergency rule for public comment.

A. Disqualification for Judicial Council Service

Appellate court justices must each decide for themselves whether their disqualification is required in any case assigned to them. *Kaufman v. Court of Appeal* (1982) 31 Cal.3d 933, 940 (*Kaufman*). Canon provisions 3E(1), (3), (4), (5), and (6) of the California Code of Judicial

Ethics³ set forth the grounds for disqualification applicable to appellate court justices. (CJEO Oral Advice Summary 2018-023 (2018), *Disqualification Responsibilities of Appellate Court Justices*, Cal. Supreme Ct. Com. Jud. Ethics Opns., p. 2; Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 7:90, pp. 501-502 (Rothman) [providing a summary of statutory and code changes following *Kaufman*].) These provisions of canon 3 include mandatory and discretionary grounds for disqualification that must be considered in all assigned proceedings.⁴

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

⁴ All grounds for disqualification, once met, require an appellate justice or trial court judge to disqualify under the code and statute. (Canon 3E(4)-(5) [appellate disqualification is required if any specified grounds are met]; Code Civ. Proc., § 170.1-9 [trial court disqualification is required if any specified grounds are met]; Advisory Com. com. foll. canon 3E, (4)-(6) [canon grounds for appellate disqualification are consistent with and substantively similar to the statutory grounds for trial court disqualification]; CJEO Formal Opinion 2013-003 (2013), *Disqualification Based on Judicial Campaign Contributions From a Lawyer in the Proceedings*, p. 10 [canon grounds for appellate disqualification restate the statutory grounds for trial court judges].) 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*).

Most grounds are mandatory and include, for example, prior service as an attorney in the matter, prior representation of a party, ownership of a financial interest in a party, appearance of a family member as a party or witness, personal knowledge of disputed facts, or receipt of campaign contributions from an appearing lawyer above certain amounts. (CJEO Formal Opinion 2013-003, *supra*, pp. 2, 7, 11 [disqualification required for any judicial campaign contribution of more than the mandatory amount of \$1,500 from an individual lawyer appearing in a trial court proceeding]; canon 3E(5)(j) [disqualification required for any judicial campaign contribution of more than the mandatory amount of \$5,000 from a party or lawyer in an appellate matter].)

Discretionary grounds are more limited in number and include circumstances where a judicial officer determines he or she has personal bias, substantially doubts the ability to be impartial, believes justice would be served by disqualification, or concludes that a reasonable person aware of the facts might doubt impartiality. (Canon 3E(4)(a)-(c), (f)(iii); Code. Civ. Proc., § 170.1(a)(6)(A)(i)-(iii); CJEO Formal Opinion 2013-003, *supra*, pp. 2, 7, 11-12 [disqualification required if a judge evaluates all circumstances, including aggregated and law firm contributions, and makes the discretionary determination that a reasonable person would

Here, the facts require a disqualification analysis of two separate circumstances: first, where the Judicial Council is named as a party, and second, where the Judicial Council is not named.

B. Judicial Council as a Party

Two mandatory grounds for disqualification touch on issues related to this justice's inquiries. Canon 3E(5)(e)(i) mandates disqualification when a justice "is a party or an officer, director, or trustee of a party to the proceeding." On its face, however, this mandatory ground does not apply to a justice who was a nonvoting advisory council member of party but was not an officer, director, or trustee of that party.

Another ground for disqualification that is both mandatory and discretionary is canon 3E(3)(a), which requires judicial officers to disqualify when they have made statements, other than in a court proceeding, judicial decision, or opinion, that a person aware of the facts might reasonably believe commits them to reach a particular result or rule in a particular way in a proceeding. (Rothman, *supra*, §§ 7:1, 7:3, 7:56, pp. 388, 391, 474 [appellate justices are also bound by canon 3E(3)].) Although canon 3E(3)(a) describes a statement as a mandatory ground for disqualification, it also requires a discretionary determination about whether an aware person would reasonably believe that the statement commits the justice to a particular legal result or ruling. This discretionary determination is similar to the broader discretionary ground in canon 3E(4)(a)(c), which requires the justice to determine whether a reasonable person aware of the facts would doubt impartiality. Thus, disqualification here will turn on a discretionary determination of what a reasonable person would conclude under the circumstances of a direct challenge to the constitutionality and validity of rules and orders adopted and approved by the Judicial Council as a named party.

doubt the judge's impartiality]; quoted in *Eith v. Ketelhut* (2018) 31 Cal.App.5th 1, 15-16 [mandatory disqualification for individual attorney contributions over the statutory \$1,500 threshold, together with discretionary disqualification for aggregated and law firm contributions that the judge determines would raise reasonable doubt about the judge's impartiality, sufficiently ensures the public trust in the judiciary].)

In those circumstances, a person aware of the facts would know that while the justice did not vote to adopt or approve the rules and orders, the justice's duties as a Rules Committee member included advising whether proposed rules are consistent with statutory law and the constitution, and making recommendations to the council about the adoption of those rules. (Rules 10.1(a)(2) [council seeks advice and recommendations from committees], 10.13(a)(5) [rules committee ensures that proposed rules do not conflict with statutes or other rules]; *In re Richard S.* (1991) 54 Cal.3d 857, 863 [rules established by the Judicial Council are authoritative only to the extent that they are not inconsistent with legislative enactments and constitutional provisions].) While the justice may never have made an explicit commitment to uphold the validity of rules and order, particularly as the justice did not vote to adopt or approve them, a person aware that the judge served as a nonvoting advisory member when the council adopted them might reasonably doubt the justice's impartiality if assigned to determine the validity of the Judicial Council's adoption and approval of them in a lawsuit where the Judicial Council is a named party.

Although disqualification is a matter solely for an appellate justice to determine under *Kaufman, supra*, 31 Cal.3d at p. 940, it is the opinion of this committee that a reasonable person would not believe that a nonvoting Judicial Council member's discussion of emergency rules and orders committed the justice to uphold COVID-19 rules and orders in direct challenges naming the Judicial Council as a party under canon 3E(3)(a). However, the committee also concludes that under canon 3E(4)(a)(c), that same reasonable person might doubt the impartiality of a justice who served as a member of a named party, in either a voting or nonvoting capacity, when the *actions* of that party are directly challenged in a matter before the justice. A person aware of these facts would understand that the justice's relationship as a member of a named party whose actions are challenged would make it difficult for the justice to be impartial when judging those actions. The committee concludes that when the Judicial Council is named as a party, discretionary disqualification would compel the justice to recuse in direct challenges to the council's actions in adopting or approving any rules or orders the justice discussed as a nonvoting advisory council member or as a member of the Rules Committee.

C. Judicial Council Not Named as a Party

In circumstances where the Judicial Council’s actions in adopting or approving emergency COVID-19 related rules and orders are challenged indirectly as applied in a particular matter or to a particular individual without naming the council as a party, the committee reaches the same conclusion that mandatory disqualification is not required for statements as to outcome, but reaches the opposite conclusion regarding the discretionary ground of reasonable doubt as to impartiality where the Judicial Council is not named as a party. In those circumstances, recusal is not required based on past practices, the distinction between administrative and adjudicatory judicial functions, and canon 3E(6)(c), which expressly eliminates law drafting as a ground for disqualification.

There have been several instances in which justices of the California Supreme Court participated in cases challenging rules of court adopted by the Judicial Council when they were members of the council, where the Judicial Council was not named as a party. (*People v. Hall* (1994) 8 Cal.4th 950, 964 [opinion by Chief Justice George determining the invalidity of rule 428, adopted by the Judicial Council while the Chief Justice was the council chair]; *In re W.B.* (2012) 55 Cal.4th 30 [Chief Justice Cantil-Sakauye and Justice Baxter concurred to the determination that rule 5.480 was overbroad, where the rule was adopted by the Judicial Council while the Chief Justice was chair and Justice Baxter was a member].) This precedent follows the reasoning of the court in *Curran v. Mount Diablo Council of the Boy Scouts* (1998) 17 Cal.4th 670, 684 fn.10 (*Curran*).

In *Curran*, the court concluded that the justices’ adoption of nondiscrimination provisions in the Code of Judicial Ethics did not raise a conflict of interest, or the appearance of such a conflict, preventing them from deciding whether similar non-discrimination provisions in the Unruh Civil Rights Act (Civ. Code, § 51) applied to the Boy Scouts. (*Curran, supra*, 17 Cal.4th 670.) Approximately two years before it decided *Curran*, the court adopted a provision in the Code of Judicial Ethics barring a judge from holding membership in any organization that practices invidious discrimination on the basis of “race, sex, religion, national origin, or sexual orientation.” (Canon 2C.) The court, responding to a letter it had received from a nonparty that

questioned whether it could hear the case in such circumstances, concluded that its adoption of the code did not create a conflict of interest or an appearance of such a conflict. The court reasoned, among other findings, that even if its adoption of the code reflected a legal conclusion on an issue relevant to the issues in *Curran*, that did not create a conflict of interest for the court because “[c]ourts routinely are called upon to apply, modify, or reconsider prior legal determinations in subsequent litigation, and a judge’s participation in a prior decision involving a related legal issue has not been viewed as . . . a basis for recusal in later proceedings.” (*Curran, supra*, at p. 684, fn.10.)

In concluding there was no conflict, the *Curran* court distinguished the court’s function of administering the conduct of judges from an individual justice’s adjudicatory duties. This distinction follows more direct authority from other jurisdictions, as noted by a leading commentator on judicial disqualification, Professor Richard Flamm. When a judge has both adjudicative and administrative duties, “courts have held that the dual responsibilities of diligent administration and impartial adjudication do not create a substantial conflict; and . . . , judges have routinely declined to recuse merely because a litigant challenges a court’s administrative directive.” (Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges* (2007) § 10.6, p. 270, citing *N.Y. State Assn. of Crim. Defense Lawyers v. Kaye* (2000) 95 N.Y.2d 556, 559-560 [reasoning that just as a court may reconsider its own rulings, so too may it rule on the validity of its own administrative orders and the judges who comprised the court when it issues the challenged order are not disqualified].)

The leading California commentator, Judge David Rothman, notes that in this state, participation in efforts to draft, pass or defeat laws are expressly not a valid ground for disqualification in circumstances where the meaning, effect, or application of the law is at issue in a matter before the judge, “unless the judge believes that his or her prior involvement was so well known as to raise a reasonable doubt in the public mind as to his or her capacity to be impartial.” (Code Civ. Proc, § 170.2, subd. (c); Rothman, *supra*, § 7:16, pp. 410-412.) For appellate justices, this *nonground* for disqualification is provided in canon 3E(6)(c) [it shall not be a ground for disqualification that a justice has, as a public officer, participated in the drafting of laws when the meaning, effect, or application of those laws is before the justice, unless the

justice believes that his or her prior involvement was so well known that it raises reasonable doubt in the public mind as to impartiality].)

Applied here, this canon supports *Curran*'s distinction between administrative rulemaking and adjudicatory duties and exempts this inquiring justice's involvement in the adoption of emergency rules as a ground for disqualification. The distinction also suggests that a reasonable person would not doubt the justice's impartiality when the Judicial Council is not a named party, unless the inquiring justice's involvement in a particular rule at issue was more specifically well known.⁵ Even if the inquiring justice voted as a Rules Committee member to ensure the consistency of a challenged emergency rule, or made other recommendations, this administrative role would also be known to an aware person as prescribed rulemaking duties under rule 10.13(a) and would not raise a reasonable doubt as to the justice's ability to reconsider the rule as part of his or her judicial function.



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).)

⁵ Nothing suggests the inquiring justice's involvement entailed more than performing the duties known to be required of the justice's memberships with the Judicial Council, such as advising the council as a nonvoting member, voting on rules when called to do so as an internal Rules Committee member, or making recommendations about the public comment process. The committee recommends, however, that the justice consider whether in the course of performing these duties, the justice took a leading public role or gained special notoriety as part of the rule drafting, or if the justice obtained personal knowledge of disputed evidentiary facts that went beyond the legislative history of the rule, which would independently require disqualification under canon 3E(5)(f)(ii).