CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS

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CJEO Draft Formal Opinion 2022-019

DISQUALIFICATION AND DISCLOSURE OBLIGATIONS WHEN COACHING YOUTH SPORTS

Public Comments Submitted

Comments from members of the public submitted in response to an Invitation to Comment on a CJEO Draft Formal Opinion are deemed not to be confidential communications and may be posted on the committee's website for public review at the committee's discretion. (Cal. Rules of Court, rule 9.80(h)(4).)

Comment 1

Submitted by: The Hon. Kelvin D. Filer, Los Angeles County Superior Court
Received: June 17, 2022
Subject: Comment

THIS IS ABSOLUTELY RIDICULOUS TO BE SPENDING TIME DEALING WITH THIS ALLEGED ISSUE !!!!!! So, as a judge, let's just NOT get involved in our children's activities ?

Comment 2

Submitted by: The Hon. Barbara Kronland, San Joaquin County Superior Court
Received: June 23, 2022
Subject: Submission: Public Comments on CJEO Draft Formal Opinions

I agree with CJEO's Draft Formal Opinion 2022-019. However, I don't think the term "discretionary disqualification" should be used, because unless I am missing something, that is not actually a term I could find in any established Ethics authorities. (Canons, Rothman, CJA Opinions). Disqualification (DQ) and Disclosure is confusing enough to most judges, so to add a novel term in discussing this topic only complicates an already complicated area of Ethics.

I think CJEO is trying to use the term "discretionary disqualification" as shorthand, perhaps, for reference to CCP 170.1(a)(6)(A)(iii), ["Person aware of the facts might reasonably entertain a doubt" on the judge's ability to be impartial], but I believe it's not accurate to use "discretionary disqualification" in this fashion. Under this CCP subsection, it's an objective standard, and is more correctly termed a "general" basis for DQ, as opposed to the "specific" bases for DQ found in CCP 170.1(a)(1)-(5), and (7)-(9). [For example, having served as an attorney in the matter, having a financial interest, having a relationship with a party or an attorney in the proceeding, etc.]

It's not a "discretionary" call within the legal meaning of that term of art.

Judge Rothman's 4th Edition Judicial Conduct Handbook, Appendix G, discusses CCP 170.1(a)(6)(A)(iii) in detail for 5 pages, starting at page 917.

Quoting portions of Rothman's Appendix G, page 918: "The reason given for subdivision (a)(6)(A)(iii) of CCP 170.1 was "the difficulty in showing that a judge is biased unless the judge so admits. In addition, public perceptions of justice are not furthered when a judge who is reasonably thought to be biased in a matter hears the case."

Rothman continues that the standard for DQ in this subdivision "is fundamentally an objective one…The issue is not limited to the existence of an actual bias. Rather, if a reasonable man would entertain doubts concerning the judge's impartiality, DQ is mandated. To ensure that the proceedings appear to the public to be impartial and hence worthy of their confidence, the situation must be viewed through the eyes of the objective person. While the objective standard clearly indicates that the decision on DQ not be based on the judge's personal view of his own impartiality, it also suggests that the litigants' necessarily partisan views not provide the applicable frame of reference. Rather, a judge faced with a potential ground for DQ ought to consider how this participation in a given case looks to the average person on the street."

Finally, I think CJEO might consider adding a brief discussion in this Opinion on Waiver of DQ as related to the topic covered in this Draft Opinion. As pointed out in Rothman's Appendix E, pages 898-899, all statutory grounds for DQ under CCP section 170.1 may be waived except for the following 3 specific grounds for DQ in CCP 170.3(b)(2): (1) the judge has a personal bias or prejudice concerning a party (2) the judge served as an

attorney in the matter in controversy, or (3) the judge has been a material witness concerning the matter in controversy.
Thank you for considering my comments herein.

Comment No. 3

Submitted by: Dr. Bryan Borys, Director of Research and Data Management, Los Angeles County Superior Court
On behalf of: Los Angeles County Superior Court
Received: July 27, 2022
Subject: Draft Formal Opinion 2022-019

In this email are comments to the CJEO's Draft Formal Opinion 2022-019

Thank you for the opportunity to comment. We provide the following comments and suggestions for your consideration.

1. The draft opinion uses the terms "mandatory disqualification" and "discretionary disqualification." The references to "discretionary disqualification" are in connection with Code of Civil Procedure section 170.1, subdivision (a)(6)(A). Section 170.1 states, "A judge shall be disqualified if any one or more of the following are true . . . ." This statutory language requires disqualification, even under subdivision (a)(6)(A). We recommend replacing the term "discretionary disqualification" with another term, such as "disqualification under subdivision (a)(6)(A)."

2. The first full paragraph at the top of page 2 states, "If the judge concludes that disclosure is not required, the judge must disclose on the record information that is reasonably relevant to the judge's determination not to disqualify." Similarly, the conclusion on page 12 refers to "information reasonably relevant to the judge's decision not to disqualify." That language does not precisely track the language of Canon 3E(2)(a) as quoted on page 3 of the draft opinion. Canon 3E(2)(a) states, "A judge shall disclose information that is reasonably relevant to the question of disqualification . . . ." The draft opinion at page 10 in the bottom paragraph also refers to "information that is reasonably relevant to the question of disqualification . . ." We recommend revising the language on page 2 and page 12 to track the language of Canon3E(2)(a): "If the judge concludes that disclosure is not required, the judge must disclose on the record information that is reasonably relevant to the question of disqualification."

3. The first full paragraph on page 9 of the draft opinion outlines a series of important factors for a judge to consider when evaluating disclosure and recusal obligations. We suggest that the opinion clarify whether this paragraph is included as (1) an example of facts to be considered and weighed in the careful and highly contextual exercise of a judge's decision-making or (2) guidelines for when a judge is disqualified. If the latter is correct, we

recommend the opinion state this more clearly. If the former is correct, we propose the following edits to that paragraph, with the primary edits in red:

"This conclusion could change if there were other facts demonstrating that the coaching position created a close social relationship between the judge and the attorney that would cause a person to reasonably doubt the judge's impartiality. For instance, among the many different facts that might be present in a particular case, the judge must consider whether the attorney served as the team parent for the sports team; whether the attorney had close and frequent interactions with the judge regarding the team; and whether the families of the team members, including the attorney, regularly met for meals with the judge after team practices. As another example, if the attorney volunteered as an assistant coach for the judge's sports team or provided uniforms or other sports gear as a team sponsor, a person might reasonably believe that the attorney was in a special position to influence the judge. (Canon 2B(1) [a judge shall not convey the impression that any individual is in a special position to influence the judge].) The conclusion similarly could be impacted if the judge's own child or other close family members were current or recent participants on the team and if the attorney's role (e.g., as an assistant coach or donor) could impact the judge's family members. These examples of individualized factual assessments reflect the type of objective analysis that the judge must undertake when determining whether disqualification is required based on the nature and duration of the coaching relationship. These specific examples are offered to illustrate the types of individualized factual assessments a judge should consider. The guiding question for the judge remains whether the specific facts created a "close social relationship" that would cause a person to reasonably doubt the judge's impartiality. This fact- and context-specific inquiry is similar to one a judge must make when involved in other social or professional circles with attorneys. (*See, e.g.*, Cal. Judges Assn., Ethics Opn. No. 45, *supra,* pp 4-5.)"

4. We recommend adding the following edits to the section on security concerns on page 12 of the draft opinion to emphasize that judges should take security seriously and clarify the opinion does not attempt to provide full guidance on security risks. In addition, because judges in small communities may face different risks in disclosing personal information, we propose a statement that a judge in certain situations can make the disclosure confidentially or make a more generalized disclosure. The primary edits are in red:

"Disclosure of general information relating to the judge's coaching position that does not specify identifying facts or locations will ordinarily address potential security risks and fulfill the purposes of the disclosure rules. Any unique security concerns that cannot be eliminated or mitigated by a

disclosure in general terms may be addressed with court administrators to ensure safety as well as to satisfy the disclosure requirement. [FN: If informing the parties of a coaching relationship without specifying the specific sport or location is not sufficient to address security concerns (e.g., if the judge is in a small community or if a case participant has a history of threatening or aggressive behavior), the judge may consider: (i) ordering that the disclosure be part of the confidential court record, or (ii) further generalizing the disclosure, for example by disclosing that the judge holds a leadership role in a youth organization in which an attorney's child participates, without specifying that the organization is a youth athletics team.] Security risks to judges and their families are real and must be taken very seriously. Addressing appropriate security measures generally falls outside the scope of an ethics opinion, and any judge who has a concern about security should discuss the matter with the presiding judge, a supervising judge, other members of court leadership, or any member of the court's security team."

Thank you for considering these comments.