**CALIFORNIA SUPREME COURT**
**COMMITTEE ON JUDICIAL ETHICS OPINIONS**
350 McAllister Street, Room 1144A
San Francisco, CA 94102
(855) 854-5366
*www.JudicialEthicsOpinions.ca.gov*

**CJEO Oral Advice Summary No. 2014-005**

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# DISQUALIFICATION FOR MEMBERSHIP IN AN AMICUS CURIAE

## I. Question:

Does an appellate justice have disqualification obligations when the justice is a member of a regional, environmental, non-profit organization that has filed an amicus curiae brief in a matter being heard by the justice?

The question was asked by an appellate justice hearing an appeal in which an amicus curiae brief had been filed on behalf of a regional, environmental, non-profit organization. The justice has been a member of the amicus organization for approximately 20 years. The justice's participation in the organization has been limited to payment of annual membership dues of approximately $120.00.

## II. Oral Advice Provided:

The justice has discretion to decline to disqualify. Canon 4A requires judges to conduct their extrajudicial activities so that they do not cast doubt on the judge's capacity to act impartially or lead to frequent disqualification. (Cal. Code of Jud. Ethics, canon 4A(1) and (4).) Canon 3E(4) obligates appellate justice to make a discretionary decision to disqualify if the justice substantially doubts his or her capacity to be impartial, or if the circumstances are such that a reasonable person aware of the facts would doubt the justice's ability to be impartial. (Canon 3E(4)(b) and (c).)

Judicial membership in non-profit community organizations that do not practice invidious discrimination is not prohibited by the canons. (Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007), §§ 10.02-10.06, pp. 525-527.) Instead, community activities are expected of judges and encouraged. (Canon 4A, Advisory Committee commentary foll. canon 4A; Standards of Judicial Administration, std. 10.5.)

Two sources provide guidance on disqualification issues posed by judicial involvement in non-profit organizations (Rothman, *supra*, § 7.57, pp. 367-368, append. L [Guide to Involvement in Community Activities and Outreach], and Cal. Judges Assoc., Formal Ethics Opinion No. 53 (2003), pp. 1-4). Both provide factors to be considered by judges when determining their disqualification obligations where the judge has made contributions to an appearing non-profit organization (*id*.). The applicable factors are:

1) The nature of the organization;
2) The levels of involvement;
3) The size of the contribution; and
4) Whether the contribution is a voluntary donation.

Factors 2-4 clearly indicate against disqualification in this case. The justice's level of involvement is limited to annual payment of dues. The size of the justice's $120 membership dues are small in relation to the organization's total dues from over 35,000 members. The justice renews membership annually and does not participate in a fundraising event.

Only the first factor requires analysis, but the resulting conclusions also indicate against disqualification. Judge Rothman explains the disqualification concerns related to the nature of the organization as follows: "Where the non-profit organization represents a side in litigation before the courts (*e.g.*, a contribution to Legal Aid suggests support of access to justice for the poor, whereas a contribution to a tenant's advocacy group suggests sympathy for a side in landlord/tenant cases) … membership in the organization could raise a question of the judge's capacity to maintain impartiality." (Rothman, *supra*, § 7.57, pp. 367-368.) Here, the non-profit organization is like Legal Aid in that it supports conservation of regional rivers. The non-profit organization is not in the nature of an advocacy group and it is not regularly involved in litigation, such as may be the case with the Sierra Club. (See, *e.g.*, In re U.S., 666 F.2d 690, 695 (1st Cir. 1981) [pre-judicial appointment participation in the Sierra Club, which regularly engages in adversarial court proceedings, does not require disqualification]; Flamm, *Judicial Disqualification* (2d ed., 2007), §10.5, p. 269 [disqualification in federal proceedings involving the Sierra Club may sometimes be appropriate for post-appointment membership].)

The most significant fact here, however, is that the non-profit organization filed an amicus brief and is not a party in the matter the justice is deciding. A reasonable person aware of this fact would have no reason to doubt the justice's ability to be impartial in deciding *the interests of the parties*. The California Supreme Court's practices support this conclusion.

In Supreme Court matters in which one or more justices hold a financial interest in an organization that has filed an amicus brief, the court may decide to issue what is titled a *Notice Concerning Necessity to Recuse* (copy attached below). In that *Notice*, the court concludes that a justice is not required to recuse when a non-party files an amicus brief and the justice has a financial interest in the amicus curiae. The *Notice* provides notice to the parties that after considering all of the applicable rules, canons, statutes, and principles, the justices who hold financial interests in amicus curiaes have declined to recuse themselves and will continue to participate in the proceedings.

Here, as the court concludes in its *Notice Concerning Necessity to Recuse*, the justice has the discretion to decline to disqualify. The justice also has the discretion to decide whether or not to disclose the membership and the decision not to disqualify (Rothman, *supra*, § 7.72, p. 382, § 7.90, p. 389).

## III. Attachment

*NOTICE CONCERNING NECESSITY TO RECUSE*

A justice is required to recuse him or herself when he or she has specified financial or other interests in a party appearing before the court. The court has been asked whether the same recusal requirement applies when a justice has a similar interest in an amicus curiae, but not a party.

No statute, Canon of Ethics, or rule requires recusal under such facts. Recusal is required if a judicial officer or a specified member of the justice's household has a financial interest in the matter, defined as an "ownership or more than 1 percent legal or equitable interest *in a party*, or a legal or equitable interest *in a party* of a fair market value exceeding one thousand five hundred dollars." (Code of Judicial Ethics, canon 3E(5)(d), italics added.) There may, of course, be some circumstances in which recusal based on a non-party interest would be appropriate pursuant to canon 3E(4)(c) of the

Code of Judicial Ethics, requiring disqualification if "the circumstances are such that a reasonable person aware of the facts would doubt the justice's ability to be impartial." Nevertheless, it is clear that the applicable laws and regulations do not automatically require disqualification based upon a financial interest in a non-party to the action.

Each justice has a duty to hear the matters assigned to him or her in the absence of a ground for disqualification. (Canon 3B(1).) Moreover, it is important to the administration of justice to avoid the potential for "justice- shopping" that might occur if non-parties were to file amicus curiae briefs or letters in order to disqualify an otherwise qualified jurist in an individual case.

After considering all the applicable rules, canons, statutes, and principles, the justices who hold a financial interest in parties that have participated in the filing of amicus curiae briefs have declined to recuse themselves and will continue to participate in the proceedings in the above entitled matter.



*This oral advice summary is advisory only (Cal. Rules of Court, rules 9.80(a), (e); Cal. Com. Jud. Ethics Opns., Internal Operating Rules & Proc. (CJEO) rules 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)).*