

## MEMORANDUM

TO: All CJA Members

FROM: Stanley S. Bissey  
Executive Director & CEO

DATE: May 2015

SUBJECT: **Formal Ethics Opinion No. 69**

The Judicial Ethics Committee of the California Judges Association has issued the following formal opinions:

### **Opinion No. 69**

*“Disqualification Issues When Judge Served as a Lawyer in a Prior Case That is Now Alleged as a Prior Conviction”*

 **Please place these opinions in the pocket part of your California Judicial Conduct Handbook by David Rothman.**

Judges may direct questions on the Code of Judicial Ethics to the current 2014/15 Ethics Committee by writing or calling the CJA office or any Ethics Committee member. The Ethics Committee, as a matter of policy, does not answer inquiries which are moot or raise issues of law. Nor does the Committee respond to questions that involve matters pending before the Commission on Judicial Performance.

All opinions of the committee are advisory only.

SSB:jmg

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# CALIFORNIA JUDGES ASSOCIATION

## Judicial Ethics Committee

### Opinion No. 69

#### DISQUALIFICATION ISSUES WHEN JUDGE SERVED AS A LAWYER IN A PRIOR CASE THAT IS NOW ALLEGED AS A PRIOR CONVICTION

##### I. Introduction

This opinion seeks to assist judges who were prosecutors or criminal defense attorneys before taking the bench. A criminal case may come before the judge that contains allegations of one or more prior convictions. If the judge served as a lawyer in a prior case that is alleged as a prior conviction in the new case now pending before the judge, is the judge disqualified from the new case?

##### II. Applicable Authority

Canon 2A: “A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary . . .”

Canon 3B(1): “A judge shall hear and decide all matters assigned to the judge except those in which he or she is disqualified.”

Canon 3E(1): “A judge shall disqualify himself or herself in any proceeding in which disqualification is required by law.”

Code of Civil Procedure section 170: “A judge has a duty to decide any proceeding in which he or she is not disqualified.”

Code of Civil Procedure section 170.1(a): “A judge shall be disqualified if any one or more of the following are true:

(1)(A) “The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.

(B) “A judge shall be deemed to have personal knowledge within the meaning of this paragraph if the judge, . . . is to the judge’s knowledge likely to be a material witness in the proceeding.

(2)(A) “The judge served as a lawyer in the proceeding, or in any other proceeding involving the same issues he or she served as a lawyer for a party in the present proceeding or gave advice to a party in the present proceeding upon a matter involved in the action or proceeding.

(B) “A judge shall be deemed to have served as a lawyer in the proceeding if within the past two years:

(i) “A party to the proceeding, . . . , was a client of the judge when the judge was in the private practice of law or a client of a lawyer with whom the judge was associated in the private practice of law.

(ii) “A lawyer in the proceeding was associated in the private practice of law with the judge.

(C) “A judge who served as a lawyer for, or officer of, a public agency that is a party to the proceeding shall be deemed to have served as a lawyer in the proceeding if he or she personally advised or in any way represented the public agency concerning the factual or legal issues in the proceeding.”

...

...

(i) “The judge believes his or her recusal would further the interests of justice.

(ii) “The judge believes there is a substantial doubt as to his or her capacity to be impartial.

(iii) “A person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.”

Code of Civil Procedure section 170.3(b)(2): “There shall be no waiver of disqualification if the basis therefor is either of the following:

(A) “The judge has a personal bias or prejudice concerning a party.

(B) “The judge served as an attorney in the matter in controversy, or the judge has been a material witness concerning that matter.”

David M. Rothman, *California Judicial Conduct Handbook* (1999) §§ 7.17, 7.37; 2013 Supplement, App. 6

*Sincavage v. Superior Court* (1996) 42 Cal.App.4<sup>th</sup> 224

*In re Arthur S.* (1991) 228 Cal.App.3<sup>rd</sup> 814

*People v. Perez* (1971) 14 Cal.App.3d 368

CJEO Formal Opinion 2014-007

### III. Discussion

#### A. Initial Observations

Judges have a duty to hear all matters coming before them unless they are disqualified. The dual purposes of the disqualification statutes are: one, to promote trust by precluding judges from presiding over cases where there is a “reasonable doubt as to impartiality,” and two, to further the administration of justice by requiring judges to preside where there is “no reasonable doubt as to

impartiality.”<sup>1</sup> (CJEO Formal Op. 2015-007, pp. 9-10.)

Many judges came to the bench by way of criminal practice, either as a prosecutor or a defense attorney. When those judges sit in a criminal court, they may be presented with cases containing allegations of prior convictions that have impact on the case. For example, there may be an allegation of a prior conviction for driving under the influence of alcohol that could increase punishment on a new misdemeanor DUI charge. (Veh. Code § 23540.) There may be an allegation of a prior conviction for drug sales that adds an additional three-year term to a new drug charge. (Health & Saf. Code § 11370.2.) Or there may be allegations of one or more prior convictions for serious or violent felonies that can make a defendant ineligible for probation and greatly increase punishment. (Pen. Code § 667(b)-(i).) In some instances, the judge may have served as a lawyer in the underlying prior case. When the judge becomes aware that he or she did serve as a lawyer in the prior case, is the judge disqualified from hearing the new case?

The following discussion assumes the automatic two-year period of disqualification has passed for any judge from private practice who previously represented a defendant who is now before the court, or was associated with an attorney who represented the defendant. (Code Civ. Proc. § 170.1(a)(2)(B).) It also assumes the judge does not personally believe recusal would further the interests of justice or that there is a substantial doubt as to his or her capacity to be impartial. (Code Civ. Proc. § 170.1(a)(6)(A)(i) and (ii).) In other words, the judge believes he or she can be fair. The issue is whether the disqualification statutes lead to the conclusion there is a reasonable doubt as to impartiality. A judge is disqualified from hearing a case when the judge previously served as a lawyer in another proceeding involving the same issues or gave advice to a party in the present proceeding upon a matter involved in the proceeding. (Code Civ. Proc. § 170.1(a)(2).)

In performing this analysis, it is important to recognize the various ways in which a judge who was a prosecutor or criminal defense attorney may have served as a lawyer in a prior case. The judge may have made a standard offer at arraignment for a misdemeanor DUI, or counseled a defendant at arraignment as to whether to take the offer. If the defendant pled guilty at that stage, and the case was one of 30 matters on calendar, the likelihood that the judge would even remember the case is very slight. The judge may have prosecuted or defended at a 30-minute preliminary hearing regarding a drug sale, following which the defendant decided to enter a guilty plea. Depending on the passage of time, the judge’s knowledge of the details might now be minimal to none. By contrast, the judge may have fully investigated a hotly contested serious case as a prosecutor or defense attorney and taken it through trial. In that situation,

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1 “Reasonable doubt” is not being used in this context as a term of art for the criminal law burden of proof, but rather as a short-hand summary to convey the purposes of the disqualification statutes.

the judge's current recollection of his or her role and the details of the case would likely be much higher.

It is also important to take into account the nature of the alleged prior, its impact on the current case, whether it is contested and whether the judge's role in serving as a lawyer on the prior case will come into play in the current proceeding. For example, whether a one-year prison prior (Pen. Code § 667.5(b)) should be admitted, or whether the judge will exercise discretion in striking punishment for that prior conviction (Pen. Code § 1385(a)), does not require an analysis of the nature of the underlying offense or the facts of the case, but only whether the defendant served a prison term for the conviction within the qualifying time frame. By contrast, the analysis required for a judge to decide whether to exercise discretion in striking a prior serious conviction under the Three Strikes Law (*People v. Superior Court (Romero)* (1996) 13 Cal.4<sup>th</sup> 497; *People v. Williams* (1998) 17 Cal.4<sup>th</sup> 148, 162-163.) will involve consideration of multiple facts and circumstances, including those surrounding the prior conviction.

## **B. Application to Various Situations**

*All scenarios apply whether the judge served as a prosecutor or defense attorney. They assume that the judge knows he or she served as a lawyer in the prior case, either because the judge remembers the case, or has been alerted to his or her role by one of the attorneys, or otherwise learns of this fact. They also assume, unless otherwise stated, that the judge served as a lawyer in the prior case in a substantive hearing (e.g., arraignment, preliminary hearing, taking of plea, trial or sentencing) and not merely in a perfunctory one (e.g., seeking continuance).*

**Judge sits in arraignment court.** One of the cases on calendar contains allegations of a prior conviction for which the judge served as a lawyer. May Judge handle the arraignment?

Yes. The prior proceeding does not involve the “same issues” as the arraignment before Judge. No findings will be made at arraignment regarding the truth of the allegations. No person aware of these facts would reasonably entertain a doubt that Judge cannot fairly hear the arraignment.

**Judge presides over a felony disposition calendar.** One of the cases contains allegations of prior convictions that could increase punishment. The parties negotiate a stipulated plea agreement which includes admission of one of the priors and a stipulated sentence, which Judge approves. Judge served as a lawyer in the prior case that is being admitted. May Judge take the plea and later handle the sentencing?

Yes. The prior is not being contested and the sentencing will not involve the “same issues” as the prior proceeding.

**Judge presides over a felony disposition calendar, but a strike prior is at issue.**

Judge prosecuted or defended the serious and violent felony strike prior at trial ten years before. The defendant wishes to plead guilty to all charges and allegations and submit to Judge’s sentencing discretion, which may include striking the strike prior pursuant to Penal Code section 1385(a). May Judge take the plea and later handle the sentencing?

No. As a trial attorney for the underlying case, Judge was actively involved in prosecuting or defending the case. As a prosecutor, Judge likely had contact with the victim and was aware of all of the investigatory material, even that which did not come into evidence. As a defense attorney, Judge was aware of all discovery, explored all avenues of defense, including possible character evidence and would have had a thorough understanding of the details of the case. Although defendant has admitted the prior conviction, and therefore it does not involve the “same issues” that will be before Judge for sentencing, a person aware of the facts might reasonably entertain doubt that Judge would be able to be impartial in determining whether to exercise discretion in striking the prior strike conviction.

**Judge presides over a preliminary hearing for vehicle theft.** The case includes allegations of one prior vehicle theft conviction, which could increase the sentencing triad on the current charge. (Veh. Code § 10851(a); Pen. Code § 666.5(a).) Judge served as a lawyer on the prior case, eight years ago. May Judge preside over the preliminary hearing?

Yes. The prior conviction will not be at issue during the preliminary hearing. This analysis would be different in the unlikely event the prosecutor at the preliminary hearing seeks to admit evidence regarding the prior vehicle taking during the hearing in order to prove an evidentiary issue.

**Judge presides over a trial where prior is not contested.** In a trial involving charges of narcotics sales, there are also allegations of multiple prior convictions for similar sales. At the pre-trial conference, defense counsel informs Judge the defendant will not be contesting the validity of the priors. Judge previously served as a lawyer in one of the prior sales cases, which was resolved by a change of plea before trial, five years ago. May Judge preside over the trial?

Yes. The prior conviction will not be disputed at trial and will not involve the same issues as the prior case. This analysis would be different if the facts of the underlying case become relevant at trial due to an evidentiary issue.

**Judge presides over a trial where prior is contested.** The trial is a residential burglary case with allegations of two prior residential burglary strike convictions. The defense informs Judge at the outset that a bifurcated trial is sought and the defendant will not be admitting the priors. Judge prosecuted or defended the preliminary hearing on one of the prior burglary cases, and later

served as a lawyer on the case when defendant entered a guilty plea and was sentenced. May Judge preside over the trial?

No. Because the validity of the strike prior will be contested, the issues from the prior case do overlap with issues in the new case. In addition, if the prior convictions are proven, Judge will likely be in the position of determining whether to exercise discretion in striking one or more of the strikes. A person aware of Judge's role in one of the prior burglary cases might reasonably entertain a doubt that the judge would be able to be impartial.

### **C. Factors to Consider In a Case Involving Allegations of Priors**

The examples above are only some of the wide variety of situations that may arise. As different scenarios are presented, a judge will need to consider many factors before presiding over a criminal case involving allegations of prior convictions. This list is not exhaustive.

- What is the nature of the hearing?
- What impact does the alleged prior conviction have at the hearing?
- Is the alleged prior being contested?
- Will the judge be asked to exercise discretion in striking the prior conviction?
- Did the judge sign the charging document?
- What was the judge's role in serving as a lawyer in the prior case?
- Does the judge remember anything about the prior case?
- How many years have passed since the judge served as a lawyer in the prior case?

Finally, when a judge determines that he or she is disqualified because of service as a lawyer in a prior case that is now alleged as a prior, a waiver of disqualification may be permissible, depending on the basis for the disqualification. (See Code Civ. Proc, § 170.3(b)(2)(A) and (B).)

### **IV. Conclusion**

A judge is not automatically disqualified from presiding over a criminal case simply because the judge served as a lawyer in a prior case that is alleged as a prior conviction. There are many situations in which a judge has a duty to preside over such a case because there will be no reasonable doubt as to the judge's impartiality. In analyzing whether the judge is disqualified, multiple factors must be considered. Only if those factors give rise to a reasonable doubt as to the judge's impartiality, is the judge disqualified.



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